INTERSTATE COMMERCE ACTS ANNOTATED

1974 SUPPLEMENT

VOLUME 21

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TITLE 49—TRANSPORTATION

INTERSTATE COMMERCE ACT

[See Table of Cases for history of cases indicated by asterick (*)]

Short title.—This act may be cited as the Interstate Commerce Act. (Sept. 18, 1940, c. 722, § 1, 54 Stat. 899.)

National transportation policy.—[Unchanged. See vol. 11, p. 8954.]

Historical note, see vol. 11, p. 8954.

Historical Note

In furtherance of the National Transportation Policy, the commission recommends that consideration be given to amending the Interstate Commerce Act and related statutes so as to provide for greater flexibility in transportation of mail by authorizing more efficient use of motor common carriers and the new Interstate Highway System.—Annual Report, 1964, p. 61-2.

Notes of Decisions

Volume 11—p. 8954; Volume 12—p. 10109; Volume 13—p. 10861; Volume 14—p. 11341; Volume 15—p. 11887; Volume 16—p. 12513; Volume 17—p. 13129; Volume 18—p. 13919; Volume 19—p. 14925.

2. The Commerce Clause.—[Vols. 16-19].—While a State's immunity from suit by a citizen without its consent has been said to be rooted in "the inherent nature of sovereignty," the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce; they thereby necessarily surrendered any portion of their sovereignty which would stand in the way of such regulation. Since defendant, a State owned and operated railway, is a common carrier by railroad within the Federal Employers' Liability Act, application of that statute to the railroad cannot be precluded by sovereign immunity. The State of Alabama, when it began operation of an interstate railroad 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by that act; thus, having waived its immunity, the State may be sued without its consent under that statute.—Parden v. Terminal Ry., 377 U.S. 184 (185, 191-2, 196)*.

Amended Chicago ordinance, which requires licensing of taxi cabs and other vehicles used in transportation of passengers, cannot be validly applied to transfer company engaged by the railroads to transport passengers and baggage between rail terminals in Chicago. As the court held in 357 US 77, service provided by the transfer company is an integral part of interstate railroad transportation authorized and subject to regulation under the Interstate Commerce Act; the federal statute gives railroads, not the city, discretion to determine who may transfer passengers and baggage between rail terminals and, furthermore, various provisions thereof completely preclude the city from exercising any veto power over such transfer service.—Railroad Transfer Service, Inc. v. Chicago, 386 U.S. 351 (358-9)*.

The court finds no indication that the "affected with a public interest" test, used in connection with validity of legislation under the Due Process Clause of the Fifth

Amendment, has ever been applied to determine validity of federal legislation enacted under authority of the Commerce Clause. Although exercise of the commerce power is subject to the Due Process Clause, requirements of due process are satisfied if the statute enacted under the Commerce Clause has a reasonable relation to a legitimate legislative purpose and is not arbitrary, capricious, or discriminatory. If the means chosen are appropriate to the permissible end, there is little scope for the operation of the Due Process Clause.—Boylan v. United States, 310 F. 2d 493 (498).

Clause in exclusive franchise granted defendant by Government of the Virgin Islands for transportation of persons from St. Croix airport, insofar as it precluded such transportation by plaintiff in connection with "package" or "all-expense" tour services it had contracted to provide, constitutes an unreasonable burden on interstate commerce and is invalid for that reason. There is no single concept of interstate commerce which can be applied to every issue; each case must be viewed on its own peculiar facts. Interstate commerce is an intensely practical concept drawn from normal course of business, and interstate journeys are to be measured by commonly accepted sense of the transportation concept. Passengers traveling in considered tours were in the stream of commerce from time they left their homes until they returned there; their transportation by plaintiff from St. Croix airport to their hotels was an integral part of their interstate journey.—Southerland v. St. Croix Taxicab Ass'n, 315 F. 2d 364 (368-9).

City's maintenance of signs, with or without mandatory words "By Order Police Department," on sidewalks adjacent to interstate bus and railroad terminals, for purpose of assisting and encouraging white and colored passengers in voluntary separation of the races, constitutes discriminatory action by the State in violation of the Commerce Clause, the Fourteenth Amendment, and the Interstate Commerce Act. Moreover, since what is forbidden is state action in which color (i.e., race) is the determinant, it is immaterial whether such signs are in the terminal or on the sidewalk. [Citing 287 F. 2d 750.] A terminal is not an island, entire of itself; adjacent sidewalks are necessary to passengers' use thereof. The sovereign power of the United States over interstate commerce is not confined within walls of bus and railroad terminals.—United States v. City of Jackson, Miss., 318 F. 2d 1 (7-8)*.

Congress may employ its authority under the Constitution to control, in the national interest, activities which may appear at first blush to be purely intrastate and as such without the domain of federal power.—Berkman v. Trans World Airlines, Inc., 209 F. Supp. 851 (852).

Commerce Clause of the Constitution precludes California commission from requiring that motor carriers who contract with nonprofit shippers' associations for delivery of their goods from break-bulk points to destinations, both within the State, assess charges in accordance with its minimum rate tariffs for services performed wholly within commercial zones. Federal regulation has preempted the field but, even in absence of pre-emption, scheme of rate regulation which the State seeks to impose violates the commerce clause when record shows that such State action would result in substantial burden on, and interference with the free flow of, commerce. The law is clear that, absent compelling circumstances, a State may not impose a direct economic burden on commerce through establishing rates; and the commerce clause protects interstate commerce from any State actions which unreasonably disrupt the free flow of commerce; thus, imposition of minimum rates established by the California commission amounts to an unreasonable and unconstitutional burden on commerce. Enforcement of the tariffs upon plaintiffs permanently enjoined.—Baltimore Shippers & Receivers Ass'n v. Public Utilities Com'n of California, 268 F. Supp. 836 (844-7)*.

It is beyond the constitutional power of a State to permit or prohibit interstate carriage on grounds of public convenience and necessity. [35 F. Supp. 136.]—Daniels v. United States, 210 F. Supp. 942 (948)*.

Louisiana statutes requiring separation of passengers according to race in common carrier terminal facilities, and posting of

signs therein designating those facilities for such separate use, impose an undue burden on interstate commerce in violation of the Commerce Clause and violate the equal protection clause of the Fourteenth Amendment to the Constitution; are unconstitutional and null and void.—United States v. Lassiter, 203 F. Supp. 20 (25).

Enforcement by defendant city and its police department of racial segregation in bus terminal used by interstate motor carriers of passengers imposes an undue burden upon interstate commerce in violation of the Commerce Clause.—United States v. City of Shreveport, La., 210 F. Supp. 708 (710-11).

The commerce power is not confined to regulation of commerce among the States: it extends to those intrastate activities which so affect interstate commerce, or the exercise of the power of Congress over it, as to make regulation thereof an appropriate means to effective execution of the power to regulate interstate commerce. The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution; it follows that no form of State activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. [315 US 110.]—State of Illinois v. United States, 213 F. Supp. 83 (91)*; however, in matters admitting of diversity of treatment according to special requirements of local conditions, the States may act within their jurisdictions until Congress sees fit to act, but when Congress does act the exercise of its authority overrides all conflicting State legislation. [230 US 352.]—Sludden v. United States, 211 F. Supp. 150 (154)*.

Because the constitution puts the ultimate power to regulate commerce in Congress, the degree of State legislation's interference with commerce may be weighed by federal courts to determine whether the burden makes the statute unconstitutional; but the courts could not invalidate federal legislation for that reason, because Congress, within limits of the Fifth Amendment, has authority to burden commerce if that seems to it a desirable means of accomplishing a permitted end. [328 US 373.] And there can be no question that Congress is empowered to legislate concerning operation or discontinuance of trains engaged in interstate commerce.—Id., p. 155.

See also State Corporation Commission v. Bartlett & Co., Grain, § 202(b), n. 5.

The free flow of interstate commerce and its freedom from local restraints are interests safeguarded by the commerce clause of the Constitution. When grain shipments are inspected for grading at North Dakota origin by a federally licensed inspector, and the only interested parties are the consignor in that State and the consignee in New York, subsequent reinspection for grading purposes at Duluth, Minn., under Minnesota statute, while en route to New York is an unreasonable burden on interstate commerce.—Guy v. Rolvaag, 233 F. Supp. 301 (304).

Not only is there a complete lack of evidence to support water carrier's contention that approval of reduced transcontinental rail rate on canned goods from Pacific coast territory is an exercise of power to regulate commerce by diverting traffic from Oregon and Washington ports to ports of other States in violation of clause 6, section 9, of Article I of the Constitution, but the commission's exercise of powers under Interstate Commerce Act was delegated to it by Congress under the commerce clause of the Constitution; as an agency of Congress, the commission must assume that in laying such statutory powers upon it Congress has not transcended its powers.—Canned Goods from Pacific Coast to Eastern Points, 315 I.C.C. 769 (771).

5. National transportation policy, in general.—[Vols. 11-19].—Since common factors may emerge in adjudication by the commission of questions arising under Interstate Commerce Act and by National Labor Relations Board of matters under Labor Management Relations Act, each agency must be careful not to trench on the other's jurisdiction and through lack of expert competence contravene either the national transportation policy or the national labor relations policy; and fact that §8(e) of LMRA now exposes the carrier employer as well as the union to injunctive processes of the Labor Board underlines necessity for careful analysis to fashion a remedy to terminate unlaw-

ful action by delinquent carriers, such as refusal to handle traffic under "hot cargo" clauses. Policies of ICA and LMRA must be accommodated, one to the other.—Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (172, 173, 174)*.

The expressed transportation policy must serve as a guide to the commission in all its decisions; however, the commission cannot and should not be required to discuss each consideration expressed in the national policy in every decision it renders. Findings essential to validity of a given order will vary with the statutory authority invoked and content of the situation presented; thus, specific reference to the policy is unnecessary, and it is only necessary that the essential basis of the commission's order appear in the report so that a court can satisfy itself that the commission has performed its functions.—Roadway Exp., Inc. v. United States, 213 F. Supp. 868 (877-8)*.

Development of the trilevel rail car, enabling railroads to transport enough motor vehicles in one carload to materially reduce costs per unit and improve service, is the sort of technological improvement which the national transportation policy was designed to encourage. So long as rates and rules based on such improvements are consistent with provisions of the act and the stated policy, they represent a lawful effort to compete which should not be arbitrarily thwarted.—Motor Vehicles—Wayne & Wixom, Mich., to Milwaukee, Wis., 323 I.C.C. 266 (276).

Under the national policy the commission is charged with positive duties to effect the aims declared therein; all provisions, including those of § 5, must be considered in order to achieve those aims. Thus, the commission is concerned not only with good transportation service, but also with obedience to and respect for the law, and to that end may counsel and encourage an attitude of faithful compliance with the law. This would not be encouraged by approval of purchase of operating rights by vendee which has been utilizing them under an unlawful leasing arrangement although, as a carrier for over 40 years and no stranger to § 5 proceedings, it should have been aware that its lease arrangement and purported interline with vendor was a mere fiction and a clear violation of the leasing rules.—American Red Ball Transit Co., Inc.—Purchase—Fallon, 90 M.C.C. 515 (521)*.

In extending economic regulation of interstate transportation to motor carriers by the act of 1935, the principle of limited competition among such carriers was made a central part of the regulatory scheme; findings required by §§ 207 and 209 for grants of operating authority are intended to aid in avoidance of unnecessary duplication of transportation facilities and resulting waste and inefficiency, and thus, by requiring shippers to make the best use of existing facilities to extent they provide satisfactory service, to maintain sound economic conditions in the industry.—Motor Common Carriers of Property—Routes and Service, 88 M.C.C. 415 (425).

Proposals which would allow common carriers of property to operate over direct routes between any of their authorized service points, without adhering to their authorized regular routes or observing gateway requirements, thus enabling them to provide totally new services without any showing of convenience and necessity therefor, would negate to a large extent the commission's attempt, through administration of the certificate and permit requirements of the act, to provide for fair and impartial regulation and to foster sound economic conditions in transportation, as required by the national transportation policy; their adoption is not warranted.—Id., p. 425.

Adequate transportation system: [Vols. 17, 19].—Fact that Congress expressed intention that the act be administered to the end of developing an adequate, efficient, and economical transportation system does not give the commission unlimited authority to proceed in any manner which it believes will accomplish those objectives; the commission must proceed within limits of its statutory authority.—J.B. Montgomery, Inc. v. United States, 206 F. Supp. 455 (461)*.

In connection with directive of the national policy to promote safe, adequate, and efficient service and foster sound economic conditions among the several carriers, effect which a unification of operations might have on financial stability of protestants and other

carriers competing with the vendor, and ability of such carriers to continue providing adequate service to the public in competition with that proposed by the vendee, are vital questions. That vendee may reap some benefit from the transaction, or that protestants, particularly the long-distance operators, are large motor carriers with substantial resources and facilities, does not lessen the commission's responsibility in this regard.—T.I.M.E. Freight, Inc.—Purchase—M.C. Slater, Inc., 90 M.C.C. 702 (708).

Proposed control of Baltimore & Ohio by Chesapeake & Ohio will promote the public interest in helping to preserve and maintain an adequate transportation system; as result of the affiliation B & O will eventually become a stronger railroad and its ability to meet the needs of commerce and national defense will be enhanced—a matter of particular significance when the large industrial and population centere it serves are considered. Such needs are of paramount importance to the country and are vitally affected by condition of B & O's physical properties, which under C & O control will be restored to essential standards, and by efficacy of other services which it can provide on short notice in case of national emergency. Proposed control will enable B & O to make improvements necessary to provide adequately the service reasonably to be expected of it.—Chesapeake & O. Ry. Co. Control—Baltimore & O. R. Co., 317 I.C.C. 261 (285, 291)*.

While an important phase of the national transportation policy, which the commission is required to administer in a manner consistent with the congressional mandate, is maintenance of sound economic conditions among regulated carriers, and the commission is aware of problems confronting those carriers when restraints of competition are lifted (as by partial restoration of the commercial zone exemption to embrace movement of traffic between petitioner's Kearney, N.J., TOFC terminal and original New York City zone), its overall responsibility to develope, coordinate, and preserve a national transportation system by highway, water, and rail requires that it balance conflicting interests.—New York, N.Y., Commercial Zone, 88 M.C.C. 336 (340)*.

And though a single carrier's private interests are not always consistent with the broader public interest, there is nevertheless a broad area where private interests coalesce with the public interest; petitioner Pennsylvania R. is an important segment of rail transportation between eastern port cities and the Midwest, and its continued strength and vigor is of legitimate interest to the commission.—Id., p. 339.

The traditional reliance by shippers on express service to meet certain of their needs, and on general freight operations to meet others, has always provided a natural line of demarcation between the two types of service, and a well-balanced national transportation system includes both. While motor movement of express by Railway Exp. Agency presents no real threat of undue competition to independent motor carriers generally, diminution of passenger-train service and of expedited railroad operations in which express traffic has historically moved threatens continued existence of the nationwide express service on which the country has relied and whose disappearance would clearly be contrary to public interest. Guidelines drawn for REA's conduct of motor operations should prove helpful in coordinating and preserving a strong national transportation system.—Railway Exp. Agency, Inc., Extension, 91 M.C.C. 311 (340-1)*.

Applications, operating authority: [Vols. 17, 19].—Under the national transportation policy as contrued by the Supreme Court, the issuance of a certificate of public convenience and necessity requires determination by the commission of the prejudice, if any, which will result therefrom to existing properly authorized carriers; thus, adequacy of existing service is a proper item for consideration in such a proceeding.—Robbins v. United States, 204 F. Supp. 78 (82)*.

Even apart from the numerous cases holding that in issuing a certificate the commission need not specifically find existing service to be inadequate, it appears to be the more reasonable view that the narrower conceptual element of inadequacy of present service was not intended to be imposed as a straitjacket on the process of determining the broader interests of public convenience

and necessity in effectuation of the national transportation policy. See 326 US 60 and 355 US 83.—Nashua Motor Exp., Inc. v. United States, 230 F. Supp. 646 (653)*.

See also R-C Motor Lines, Inc. v. United States, § 207(a), n. 25.

In denying plaintiffs' extension applications, the commission did not make its decision without reference to the national transportation policy; its position is apparent in its statement respecting its power to grant new operating rights, which more than met the statutory requirements of the declared policy. While its sometimes implicit balancing of factors to be observed and weighed under the national policy, and its failure to make more explicit each consideration that influenced it, have not provided as total a record as might be desired, the record is sufficient; the commission has given consideration to all factors enumerated in 355 US 83, and the court would not have benefited substantially had it directly verbalized what it clearly implied. The commission's orders sustained.—Roadway Exp., Inc. v. United States, 213 F. Supp. 868 (878-9)*.

The national transportation policy is intended to promote economical and efficient service and foster wholesome and basically sound economical conditions in transportation among the carriers. A healthy and efficient motor carrier operation is extremely important to the public interest; and one of the basic ingredients in determination of public necessity is the inadequacy of existing service. Although the commission's report is without record support of any idea that there were inadequacies in existing service, its finding is to the contrary. Report and order granting operating authority in issue, vacated and annulled; proceeding remanded.—Dixie Highway Exp., Inc. v. United States, 242 F. Supp. 1016 (1021)*.

Although Congress has entrusted to the commission delineation of the area which a carrier may serve, the commission's discretion must be exercised in conformity with the policies of Congress, and the courts should evaluate the evidence to determine if the commission's ruling accords with the public interest. Movement of frozen fruits, berries, and vegetables is predominantly seasonal, and destination points constantly change under influence of various factors; in applications for "grandfather" authority under Transportation Act of 1958, the unpredictable nature and special characteristics of that traffic require consideration of shipments handled prior to the 1957 seasonal movement in determining whether Statewide destination authority should be granted.—Winter Garden Co. v. United States, 211 F. Supp. 280 (285, 286, 288)*.

Under the commission's conception of its duties under the national transportation policy, it cannot grant authority to provide a new service simply because applicant and a shipper find that expedient and satisfactory arrangements can be made between them to utilize shipper's equipment more advantageously.—Moran Towing & Transp. Co., Inc., Extension, 315 I.C.C. 591 (596)*.

In passing on contract carrier applications, it is proper for the commission to consider factors in addition to those specified in § 209(b) when required by a consistent administration of the national policy, such as questions of public interest involved in an applicant's dual operations or in unusual carrier-shipper relations. [See 364 US 1.]—J-T Transport Co., Inc., Extension, 91 M.C.C. 507 (511, Note)*.

While decision in 86 MCC 447 that, regardless of form of authority applied for, only common-carrier authority should be granted applicants seeking to participate in movement of cement traffic which has recently become available to the motor-carrier industry, was concerned solely with transportation needs of the cement industry in a number if eastern States, the same considerations apply in considered Mississippi Valley and southwestern areas.—Ruan Transport Corp. of Kansas, 88 M.C.C. 65 (67)*; Ruan Transport Corp. Extension, 88 M.C.C. 123 (125)..

In determining whether operations by 5 new companies controlled by parties already controlling 12 carriers would be consistent with public interest, the number of carriers which would then be controlled by the same interest may not be disregarded; under the national transportation policy, in furtherance of which all provisions of the act must be administered and enforced, the com-

mission is charged with the duty of developing, coordinating, and preserving an adequate national system of transportation by all media, and to approve common control among motor carriers without regard to the total number which would thereby be controlled and managed in a common interest would ignore the practicalities of economic regulation and would invite a plethora of similar applications.—Best Transport, Inc., 88 M.C.C. 147 (154)*.

Extension application by motor carrier which controls a forwarder and is apparently managed in common therewith, and which also conducts a storage and warehousing business, must be denied when by reason of those dual capacities its motor operations would be conducted to advantage of its storage business, and its control of certain shippers' routing to advantage of its carrier operations, and, since all operations are conducted and controlled by same personnel, to probable detriment of competing carriers in the area and the public who depend on them.—M.G.M. Transport Corp. Extension, 89 M.C.C. 699 (701).

Combination, strong railroads: [Vols. 15, 19].—Nothing in § 5 of the act expressly or by implication prohibits merger of financially strong railroads; no distinction is drawn between the strong and the weak, or between competitive and noncompetitive railroads, and there is no requirement in either the statute or judicial precedent limiting the commission to approval only of mergers involving carriers that are insolvent or on the brink of bankruptcy. The primary test is whether proposed merger will be consistent with the public interest under standards prescribed by § 5(2)(c), and whether it is otherwise just and reasonable.—Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122 (129-30)*.

Notwithstanding the relative prosperity of both Seaboard Air Line and Atlantic Coast Line in recent years, net income of both has gradually declined since 1955, and Coast Line is now operating its lines at only 25 percent of capacity. Railroads throughout the nation are faced with vigorous and constantly increasing competition from other modes of transport, as well as increasing operating costs within the railroad industry itself. Because of both those trends, strengthening of applicants is necessary to enable them effectively to combat the vigorous competition with which they are now confronted, which can best be accomplished by merging their assets and resources in a way that will enable the merged company to eliminate duplicative services and facilities, reduce costs, and increase the overall efficiency of its operations. Merger approved.—Id., pp. 210-11. [But see dissent.]

Although carriers participating in a § 5(2) transaction are specifically relieved from operation of antitrust laws by § 5(11), the commission is required to consider effect of the control on the competitive situation in the industry in light of the national policy; scope of resulting curtailment of competition must be estimated and its effects appraised as against advantages of improved service, safer operation, lower costs, etc. Since lines of Chesapeake & Ohio and Baltimore & Ohio are generally complementary, there will be no material lessening of competition between them; all factors considered, C&O's proposed control of B & O will assist in effectuating the transportation policy.—Chesapeake & O. Ry. Co.—Control—Baltimore & O. R. Co., 317 I.C.C. 261 (292)*.

Affiliation of C & O and B & O will not so adversely affect New York Central as to lessen latter's ability adequately to serve New York metropolitan area, including the port of New York. Although C & O and B & O intend to improve the port of Baltimore, New York is the largest and best equipped north Atlantic port for handling of general commodities, whereas traffic through Baltimore and Newport News is largely bulk traffic; any effect the C & O-B & O affiliation may have on the port of New York is thus conjectural and unlikely to be such as to warrant prevention of improvement of the port of Baltimore to detriment of the shipping public and the national defense.—Id., p. 283.

Commercial zones: [Vols. 61, 19].—The commission adheres to its statement in 53 MCC 451 (wherein, in redefining the New York commercial zone, it removed the § 203(b8) exemption within the enlarged zone except as to transportation wholly within the originally defined zone or transportation

of waterborne traffic between that zone and a defined pier area) that removal—or restoration—of the exemption is dependent on a showing that the national transportation policy warrants the action sought. Petitioner seeking restoration of the exemption for transportation of traffic between its Kearny, N.J., TOFC terminal and the original zone therefore has burden of proving that the situation has changed and that the NTP now requires that the exempt zone be extended to include Kearny.—New York, N.Y., Commercial Zone, 88 M.C.C. 336 (338, 340)*.

Petitioner has met its burden by showing that it is the only major railroad serving the New York area whose TOFC terminal is outside the exempt zone; that shippers using its plan III service must employ a certificated carrier to move their trailers to and from its terminal, whereas those using similar service of its competitors can use unregulated carriers at lower contract charges; and that, since it owns land within the exempt zone accessible from Kearny by a bridge which it owns, denial of its request will force it as a matter of economic survival to extend its Kearny terminal into the exempt zone, subjecting it to additional expense and leaving regulated motor carriers in no better position trafficwise than if its petition were denied.—Id., pp. 339, 340. [But see dissent.]

See also *Exemption*, below.

Competition and ratemaking: [Vols. 11-19].—See also §15a(3).

Innovations by carriers designed to improve their competitive position are desirable so long as they are consistent with provisions of the act and the national policy. Lawfulness of such innovations in ratemaking must be determined on the controlling circumstances and conditions, including material economic as well as physical facts of record, in particular situations, and approval of a novel theory of ratemaking based on unusual facts and circumstances does not constitute a precedent for indiscriminate use of that form of ratemaking.—Vol. Rates on Processed Meal—Midwest to Ports, 322 I.C.C. 456 (478); Freight, All Kinds—Expedited Service—Chicago-Atlanta, 314 I.C.C. 663 (666).

Though Southern Ry.'s proposed use of jumbo hopper cars for multiple-car shipments of grain is a technological innovation, proposed reduced rates are designed to meet unregulated truck competition which has already upset the rail grain rate structure and distorted relationships among markets, commodities, and shippers; Southern's effort to obtain revenue which has bypassed it over the years, to enable it to provide adequate service at the lowest cost consistent with furnishing thereof, is in accord with §15a(2) and the national policy. The proposed rates entail investment of millions of dollars in the new jumbo cars and development of more efficient operating facilities; such technological efficiencies and managerial initiative are elements to be promoted under the national policy.—Grain in Multiple-Car Shipments—River Crossings to So., 318 I.C.C. 641 (687, 690)*.

While all modes of transportation—rail, water, and motor—have been transporting a progressively larger volume of grain into the Southeast in recent years, increase in absolute rail tonnage does not warrant inference that respondents' fears of diversion were groundless; on the contrary, decline in their relative share of the total traffic, as compared with increased percentage transported by water and still greater increase in percentage handled by unregulated truckers, could reasonably be considered an ominous trend in view of the greatly increased volume available. Respondents were fully justified in striving, by publication of reduced rates on multiple-car shipments, to increase their share of the traffic or at least arrest the diversionary trend; Southern's investment in jumbo hopper cars should enable it to transport a larger volume at greater profit and at rates lower than would otherwise be prudent or lawful.—Id., 321 I.C.C. 582 (586-7)*.

Carriers of general commodities should be accorded every reasonable opportunity to price their services in light of the different transportation demand characteristics of the numerous articles they are authorized to carry, provided such pricing does not run counter to any of the basic standards of lawfulness in the act. Differential pricing should not be inhibited by any obsession about fully distributed costs or by any fear of casting a burden on other traffic, where unregulated transportation is the dominant

competitive mode. Continued reliance on carrier management to maximize profits by differential pricing, coupled with reasonable restraint, will result in more efficient use of transportation resources than either unbridled competition or controls that are excessively mechanistic or idealistic in charater.—Id., pp. 603-4.

The public is entitled to benefits resulting from competition if the carriers' rates are not unlawful. History of rate relations between motor and rail carriers competing for movement of frozen meats from north Atlantic ports to destinations in official and w.t.l. territories reveals that defendant railroads were seeking a level that would satisfactorily increase their participation in the traffic, and there is no showing that assailed import rates on alternative minima from 45,000 to 90,000 pounds are in that context unduly low. The assailed rates, which were necessitated by competition or established to induce heavier loading by shippers, are generally compensatory and not shown to be unreasonable or otherwise unlawful.—Midwest Emery Freight System, Inc. v. Baltimore & O.R., 321 I.C.C. 637 (642).

In carrier competitive situations a particular carrier or mode of carriage should not be required to forgo traffic by observing classification principles that are ignored by its competitors, when the rate situation otherwise conforms to statutory ratemaking standards. The present statutory standards, particularly § 15a(3), are flexible enough to enable all regulated carriers and modes to maintain competitive rate adjustments, including the special situations resulting from proprietary and exempt carriage, provided such adjustments do not run counter to any of the basic standards of lawfulness in the act.—All Commodities, New England to Chicago and St. Louis, 315 I.C.C. 419 (424, 425)*.

Evidence establishes that proposed reduced rail rates on alcoholic liquors, minima 40,000 and 60,000 pounds, are compensatory, the 60,000-pound rates yielding substantially more than fully distributed costs, and is convincing that on latter shipments respondents are the low-cost carriers. Respondents have obtained little of the available traffic, and there is no probative evidence that the proposed rates constitute a destructive competitive practice, or for requiring them to be differentially higher than Sea-Land's rates on basis of cost, service, national defense, or other public need.—Alcoholic Liquors from Md., N.J., N.Y., and Pa. to Fla., 319 I.C.C. 323 (328).

Proposed reduced all-rail rates on automobiles in trilevel cars from Wixom and Dearborn, Mich., to Milwaukee involve hard competition, not destructive; and though intervening shipper pointed out several service disadvantages of the all-rail routes as compared with truck-boat movement as basis for its contention that the rail rates must be lower than those of other modes to compete successfully for the traffic, level of the proposed rates appears necessary to meet the competition. Rail respondents have shown that they possess the cost advantage on the traffic and that the proposed rates are reasonably compenstory and not detrimental to their own revenue requirements; in the circumstances there is no basis for finding that they violate § 15a(3) or contravene the national policy.—Motor Vehicles—Wayne & Wixom, Mich., to Milwaukee, Wis., 323 I.C.C. 266 (276, 278).

Since the mill nearest point of consumption ordinarily sets the delivered price of bulk cement in a given area, to be competitive the rail rate structure must reflect service advantages of motor carriers for the shorter hauls, while enabling more distant mills to absorb freight charges to meet price quotations of the mill closest to the consumer. Though protestant motor carriers insist that they cannot lower their rates and meet their minimum revenue requirements, motor service is so far superior to rail that the traffic will continue to move freely, especially to off-rail jobsites, at differentially higher truck rates. Moreover, motor service, even of common carriers, is closesly coordinated with producers' shipping schedules and is tailored to meet the distinct needs of one or a few shippers. It is therefore improbable that proposed reduced rail rates differentially under the motor rates will divert so much cement traffic that protestants will be unable to continue in business; and though they have invested large sums in equipment and facilities, they had no reason to believe that the commission would protect them against

consequences of vigorous competition.—Cement within Southern Terr. & from Hagerstown to So., 319 I.C.C. 465 (471-2, 475).

Despite the constantly growing market in California and Arizona for fresh meats and packinghouse products, rail shipments from midwestern origins have decreased considerably in past 2 years without corresponding increase in traffic of authorized motor carriers, and one respondent is handling almost 50 percent less of such traffic than it did in 1947; State check of inbound truck shipments to California shows that less than half of the motor movement is by regulated carriers, and increase in volume of meats trucked from midwestern packing plants is apparently largely due to unregulated transportation. Regulated carriers must be allowed considerable leeway in meeting unregulated competition; proposed rail TOFC rates on same level as motor common-carrier rates, for single-trailer loads, and 50 cents lower for two-trailer loads, are compensatory and otherwise lawful.—Meats, Fruits, Vegetables—TOFC—Transcontinental, 316 I.C.C. 585 (586, 590, 591, 593).

Although it is probable that the proposed TOFC rates will adversely affect protestant motor common carriers' revenues, their prediction of a 25- to 50-percent traffic diversion appears exaggerated in view of two superiorities of motor service: first, protestants provide third-morning delivery from considered origins to San Francisco, Los Angeles, and intermediate points, whereas even with improved TOFC service rail transit time will generally be 1 day longer; second, the rail 66,000-pound rates do not permit stoppage in transit for partial loading or unloading, whereas motor tariffs allow as many as four stopoffs at a charge of $10 per stop.—Id., pp. 591-2.

Containers.—[Vols. 16, 19].—In reviewing the commission's denial of plaintiffs' applications for authority to transport bulk commodities in premounted C & S containers, it is not for the court to issue a mandate to the commission to state with Einsteinian exactness how much of a contribution the new rubber containers make to the transportation field; neither should it be required to measure in dollars and cents the damage that might be done to tank truckers if general carriers are granted free rein to utilize the new technological device at this time. The commission's decision was palpably a compromise—an attempt to ensure that both general and tank carriers should continue in healthy competition; the broad view taken by the commission is convincing, and while its decision may suggest debate, it is not reversible as a matter of either fact or law.—Roadway Exp., Inc. v. United States, 213 F. Supp. 868 (879)*.

See also Eastern Central Motor Carriers Ass'n v. U.S., §216(g), n. 66.

Fully distributed cost is the general criterion for determining the low-cost transportation mode where the primary competition respondents seek to meet is regulated barge or truck-barge and not private or other carriage not subject to commission regulation; but where the predominant competitive force is unregulated truck or barge movement, determination may be based on out-of-pocket costs.—Grain from Idaho, Oreg. & Wash. to Ports in Oreg. & Wash. 319 I.C.C. 534 (560)*.

Notwithstanding advantages of an inflexible application of commission's cost formulas, where cancellation of reduced rates would mean loss of important large-volume traffic that can be handled in existing trains the commission should exercise discretion in order to arrive at a sound and logical conclusion consistent with the national policy. In light of directive of § 15a(3) to consider facts and circumstances attending movement of the traffic by proponent of a rate, reduced rates in issue may be approved as compensatory even though they fail to produce the return on investment in road and equipment normally considered in computation of out-of-pocket costs.—Coal from Southern Mines to Tampa and Sutton, Fla., 318 I.C.C. 371 (389, 390).

See also Grain in Multiple-Car Shipments, *Inherent advantages*, below.

Contract carriers.—[Vol. 19].—Grant of contract carrier permit to an applicant whose majority stockholder is an employee of the sole supporting shipper is not in contravention of the national transportation policy.—Deioma Trucking Co. v. United States, 233 F. Supp. 782 (784)*.

Destructive competition.—[Vols. 11, 19].—Principal purpose of the reference to the

national transportation policy in § 15a(3) was to prevent a carrier from setting a rate which would impair or destroy inherent advantages of a competing carrier, for example by setting a rate, below its own fully distributed costs, which would force a competitor with a cost advantage on particular transportation to establish an unprofitable rate in order to attract traffic; § 15a(3) made it clear that something more than even hard competition must be shown before a particular rate can be deemed unfair or destructive. The commission's findings as to proposed TOFC rates are not supported by substantial evidence; decision of the district court vacated, and cause remanded to the commission for further proceedings consistent with the Court's opinion.—I.C.C. v. New York, N. H. & H. R. Co., 372 U.S. 744 (759, 764)*.

Although the commission found, in granting § 4 relief in connection with reduced rail proportional rate, that establishment of proposed rates was not a competitively destructive practice, it should have specifically considered and passed on applicants' claim that the rate structure violated the national transportation policy. Proportional rate in issue did not cover out-of-pocket cost, and there was no economic analysis, no expert testimony, and no supporting data; nevertheless, the commission found the through rates compensative and no lower than necessary to meet the competition. That finding does not answer the question of whether effect of the below-cost proportional violated the national policy; the combination rate appears to have diverted appreciable traffic from appellant barge lines without profit to the railroad; under the circumstances, applicants' claim of violation, insisted on throughout the proceedings, must be specifically considered. Reversed and remanded.—Mechling Barge Lines v. United States, 376 U.S. 375 (381-2, 386-8)*.

In accordance with the court's interpretation of "destructive competition" in 199 F. Supp. 635, competition is destructive and unlawful only when (1) rates are so low as to harm proponents thereof, or (2) so low as to deprive a competitor of its advantage of being the low cost transportation mode. Reduced ratings and rates in issue will not be harmful to proponent railroads, the commission having found them to be compensatory; evidence did not permit the commission to determine on the record the low cost mode on considered traffic; the commission should not have required cancellation of the rates as being "destructive" or as precipitating a destructive rate war.—Missouri Pac. R. Co. v. United States, 203 F. Supp. 629 (634-5)*.

Although TOFC plans III and IV have enabled railroads to stem somewhat the flow of traffic away from the rails, rates thereunder are shown in all cases to exceed out-of-pocket costs and in some instances fully distributed costs; thus, under the oft-repeated test enunciated in 259 ICC 475, they are compensatory and cannot be considered destructive merely because lower than the vast majority of plan II and boxcar rates. The commission's finding that the assailed rates were not destructive of either individual motor carriers or the motor carrier industry as a whole was justified by substantial evidence, and its conclusion that they are not unreasonably low or competitively destructive either in law or in fact must be sustained.—Cooper-Jarrett, Inc. v. United States, 226 F. Supp. 318 (325-6)*.

Since the commission found that reduced rates which rail and motor carriers proposed to establish on cigars were compensatory, record affords no support for a conclusion of "unfair or destructive competitive practices," as such.—St. Louis-S.F. Ry. Co. v. United States, 207 F. Supp. 293 (295, 298)*.

The commission's finding that plaintiffs' all-commodity boxcar rates on manufactured articles in mixed or straight shipments constitute a destructive competitive practice under § 15a(3) is not supported by any finding based on evidence that they would destory the inherent advantages of other modes of transportation. That term was meant to be applied only in context of competition between different modes and not for purpose of supporting the classification provisions of the act, and the differential prohibition of § 15a(3) was intended to be qualified only when factors other than normal incidents of fair competition intervene; issues of the case should never have been framed under § 1(6) nor the meaning of the national policy,

as referred to in § 15a(3), been distorted to supplement it. Rather than being destructive of competition, it would appear that the considered rates, which are admittedly compensatory, would enable the railroads to respond to competition by asserting whatever advantages of cost and service they possess. The Commission's order set aside.—New York, N.H. & H. R. Co. v. United States, 221 F. Supp. 370 (376)*.

While neither the national transportation policy nor the act itself defines "destructive competitive practices," the Supreme Court in 372 US 744 held that something more than even hard competition must be shown before a particular rate can be deemed unfair or destructive; that it is not enough to rely on possible effects of other rate reductions not in issue—a situation which the commission has ample power to deal with if occasion arises; that proposed reduced rates are not unlawful merely because they threaten to divert traffic; and that disapproval of such rates could be just as destructive as approval. The commission and the courts have held that where a reduced rate is compensatory there is no basis for finding that it contravenes the national policy; and though respondent's proposed multiple-car rates on iron ore may fail of their purpose of enhancing its share in the traffic if competing rail carriers counter with corresponding reductions, they do not constitute a destructive practice in view of the physical limitations on the amount of ore it can handle.—Iron Ore from Cleveland, Ohio, to Ohio and Pennsylvania, 323 I.C.C. 746 (753-4)*.

See also Pennsylvania R. Co. v. United States, § 15a(3), n. 2.

Under the interpretation in 372 US 744 of unfair or destructive competition within meaning of § 15a(3), a protestant of another mode, to come under the protective cover of the act, must first establish that it possesses a cost advantage. As proposed intercoastal water rates are reasonably compensatory in light of proponent's revenue requirements, protestant motor carriers and forwarders must bear the consequences of their failure to make such a showing; without that information the commission has no basis for concluding that proposed rates would destory, or even impair, any inherent advantages of protestants. Proposed rates found not unlawful.—Intercoastal Any-Quantity Class and Commodity Rates, 319 I.C.C. 357 (361).

Considered all-rail rates on automobiles in trilevel cars from Michigan origins to Milwaukee and Minneapolis, and joint rail-motor rates to destinations beyond Minneapolis, are not unlawful when measured by criteria in 372 US 744; nor has it been shown that they would threaten continued existence of a transportation service uniquely capable of filling a transcendent national defense or other public need, or that they would foster unsound economic conditions in transportation or among the several carriers. The all-rail and rail-motor routes have the overall inherent cost advantage as compared with truck-boat and truck-boat-rail routes, and all rates in issue are shown to be reasonably compensatory; they therefore do not constitute a destructive competitive practice.—Motor Vehicles (Trilevel-Truck-away) from Flint, Mich., 323 I.C.C. 215 (225-6); Motor Vehicles—Wayne & Wixom, Mich., to Milwaukee, Wis., 323 I.C.C. 266 (277-8); Wisconsin & Michigan S.S. Co. v. Grand Trunk W. R. Co., 323 I.C.C. 298 (309-12)*.

See also Chicago, B. & Q. R. v. Chicago & E.I.R., § 15a(2), n. 3.

In considering the issue of destructive competition, evaluation of respondents' motive is important. And an important related criterion is whether respondents would be better off with their present rates than with those proposed; the fact that they would be worse off with the proposed rates would be strongly indicative of destructive competition. In addition, the commission is obliged to weigh the relative inherent advantages, especially relative cost advantages, of the competing modes; generally, where reduced rates are designed primarily to attract traffic of a competing for-hire mode, the inherent cost advantage of the low-cost mode is entitled to protection.—Reduced Transcontinental Lumber Rates, 1961, 318 I.C.C. 815 (842, 843, 844).

Respondents' motive in publishing proposed reduced eastbound transcontinental rates on lumber is clearly not predatory:

(1) they would be substantially better off with those rates than without them, even though no traffic is diverted from competitors; (2) proposed increased minimum weights, while improving carrier's net revenues, will result in some inconvenience to shippers in programming shipments and loading cars, and shippers naturally demand a quid pro quo in form of reduced rates; (3) the reduction is not restricted to limited Atlantic coast area where respondents compete with intercoastal water carriers, and it applies also to plywood, on which there is no intercoastal competition; and (4) declining volume of waterborne lumber in recent years appears due primarily to competition of waterborne shipments from Canada. Thus, proposed rail rates cannot be found to be an initial step in an overall program of reductions which threatens the continued existence of intercoastal water carriage.—Id., p. 843.

Even assuming that canned goods traffic from Pacific coast points to transcontinental group A moved by rail only to the ports and contiguous areas, showing as to increase in rail portion of the total tonnage (following 1954 rail-rate reduction) does not establish that further reduction of 20 cents in the rail rate and substantial increase in minimum weight was calculated to destroy competing water lines. Where the new rate applies to group A points to which canned goods moved by intercoastal lines prior to its establishment, respondents, in publishing it as an incentive rate, merely exercised their right to compete effectively; nothing in the act requires that their competitors must be shielded from competition under the circumstances shown.—Canned Goods from Pacific Coast to Eastern Points, 315 I.C.C. 769 (792).

Viewing protestant's claim in light of all pertinent facts and circumstances disclosed, no reasonable inference can be drawn that factors other than normal incidents of fair competition motivated establishment of the new rail rate, or that respondents intended thereby to destroy protestant as a competitor; even assuming (which has not been established) that protestant is the low-cost carrier on considered traffic, and accepting its claim as to "fully allocated" cost of handling unpalletized shipments, it is important that the new rate exceeds that cost by 24.5 cents and applies on a minimum weight nearly 4 times as great as the water minimum; the new rail rate thus cannot be found to constitute an unfair or destructive competitive practice.—Id., p. 795.

Assailed unit train rates on coal, based on annual volume, do not constitute a predatory or unfair competitive practice, as alleged, by monopolizing rail coal traffic to electric generating plant at Hammond, Ind., or by destroying part of complainant's market for natural gas. Complainant does not claim that it is a low-cost mode whose inherent advantages are entitled to protection, but that the unit train tariff will eliminate carriage by other railroads. However, it is not established that other coal carriers consider themselves harmed by any adverse effects of assailed tariff, and present-day competitive conditions warrant the commission's according a certain degree of deference to managerial discretion absent a demonstrated injury to competing carriers or other unlawfulness.—Natural Gas Pipeline Co. of America v. N.Y.C. R. Co., 323 I.C.C. 75 (81-2).

Although complainant, a producer and transporter of natural gas, contends that the competition is between carriers, gas remaining competitive with coal for fuel needs in excess of annual volume requirements of the unit train tariff, such competition between complainant and defendant is the indirect result of carriage of different commodities. Essentially, the competition involved is between different fuels, not between the parties as carriers. Moreover, other coal carriers or other fuels are free to compete for consignee's remaining fuel requirements, which are substantial, the tariff minimum volume being only about 10 percent of its annual fuel requirements. Complainant has not established that the assailed rates constitute a destructive competitive practice or otherwise violate the national transportaton policy, due consideration being given to the antitrust policies as construed by the Supreme Court.—Id., pp. 82, 83.

Though bargeline protestants insist that reduced rates proposed by Southern Ry. on multiple-car shipments of grain in jumbo cars

from Ohio and Mississippi River crossings to the Southeast are designed to destroy water competition, actual purpose thereof is to meet unregulated truck competition which is shown to exist even though bargelines claim they have not felt it. Southern's initiativeness and resourcefulness in coping with substantial unregulated truck competition does not constitute a destructive competitive practice, such as is prohibited by the act, merely because a third mode, claiming it does not suffer from that competition, may lose some traffic.—Grain in Multiple-Car Shipments—River Crossings to So., 318 I.C.C. 641 (686)*.

In determining whether a proposed rate reduction constitutes destructive competition, the commission endeavors to ascertain, in light of all relevant circumstances, whether respondents' dominant motive is predatory; and while the commission obviously cannot probe respondents' subjective intent, the basic purpose of a challenged may be indicated by considering whether it would be a rational economic decision in absence of competition by the complaining mode. Since unregulated trucking is found to be the dominant competitive force in movement of grain to the Southeast, conclusion is warranted that in establishing reduced multiple-car rates from Ohio and Mississippi River crossings respondent Southern was motivated primarily by desire to meet that competition and not to close the Tennessee River to barge transportation of grain.—Id., 321 I.C.C. 582 (605)*.

Proposed l.c.l. rates of Railway Exp. Agency on all commodities, with certain exceptions, in containers loaded to not over 3,000 pounds, between principal U.S. cities, generally reflecting approximate equivalent of motor carrier charges for transportation of a class 55 shipment weighing 2,300 pounds, do not constitute a destructive competitive practice merely because they threaten to divert traffic from protesting motor carriers or forwarders; see 372 US 744. The proposed rates will enhance REA's revenue position and are compensatory; and protestants have not made the showing of their costs which is necessary to support their claim that the proposed rates are competitively destructive.—Freight, All Kinds, L.C.L. Container Charges—U.S.A., 323 I.C.C. 468 (475)*.

Assailed joint rail-water rates on coal from Illinois-Indiana mines to upper lake ports for transshipment beyond are not shown to constitute a destructive competitive practice. Complaining railroads' claim that coal traffic which they have lost is now handled by defendants at the assailed rates is not supported by evidence; though complainant Illinois Central has lost substantial tonnage, complainants moving eastern coal to Wisconsin (the principal destination State for coal moving at assailed rates) have enjoyed a substantial increase in tonnage, as have river and ex-river routes. Illinois Central's loss of coal traffic may therefore be attributable to the great increase in use of natural gas, as well as diversion to bargelines and other complainants handling eastern coal.—Chicago, B. & Q. R. Co. v. Chicago & E.I. R. Co., 322 I.C.C. 138 (146)*.

Decline in rail volume contemporary with increases in truck and pipeline volume does not, without further evidence, establish that a competing mode with compensatory rates is practicing unfair or destructive competition.—Pipeline Rates on Propane from Southwest to Midwest, 318 I.C.C. 615 (623).

Although issue of destructive competition in respect of reduced all-rail rates on iron or steel articles from origins in middle Atlantic States to destinations in Louisiana and Texas is properly before the commission on remand from district court which set aside fourth-section orders granting relief therefor, no evidence of cost of water transportation by protestant Seatrain was presented for comparison with costs shown for rail service. In absence of evidence from which the low-cost mode for that traffic could be determined, there is no basis for finding that the rates in issue, which are shown to be reasonably compensatory, constitute a destructive competitive practice.—Iron or Steel Articles from the East to the Southwest, 321 I.C.C. 419 (423, 425)*.

Party alleging destructive competition has burden of showing its own costs so that the low-cost mode of transportation may be determined; in absence of such showing, allegation of destructive competition in re-

duced all-rail rates on fine coal published to meet rail-barge and rail-barge-truck competition is not sustained. Respondents have suffered an almost total diversion of the traffic to the bargelines, and fact that one major coal user maintains a private dock and another stockpiles its coal appears to offset any service disadvantages of the barge routes.—Bituminous Coal from Ill., Ind., & Ky. to Red Wing, Minn., 318 I.C.C. 17 (22); similarly, because of protestant water carrier's failure to furnish adequate data respecting its operations, there is no sound basis for finding that proposed rail rate would constitute a destructive practice.—Wool, Norfolk and Newport News, Va., to Charleston, S. C., 316 I.C.C. 109 (112).

In absence of any evidence of cost of intercoastal water transportation of canned goods, or of total cost to shipper of using water service compared with rail service, and therefore of any showing as to which is the low-cost mode for that traffic, compensatory reduced all-rail rate from transcontinental group A to mountain-Pacific States cannot be found to constitute a destructive competitive practice.—Canned Goods from Eastern Points to Pacific Coast, 315 I.C.C. 757 (761).

Where in an intermodal competitive adjustment the evidence does not permit determination of the low-cost mode of transportation owing to protestant's failure to furnish adequate cost data for its operations, it may not be presumed that a proposed, clearly compensatory rate would be competitively destructive.—Garden Hose & Electric Cable from N.J. or R.I. to Tex., 319 I.C.C. 227 (229)*; accordingly, since protestant Sea-Land did not attempt to establish a cost advantage on considered traffic by submitting its own costs, it cannot be found that proposed reduced rail rates impair any inherent advantage of Sea-Land or constitute a destructive competitive practice.—Alcoholic Liquors from N.H. and N.Y. to Tex. and La., 319 I.C.C. 396 (398)*.

Though complainant motor carrier states that it will be forced to reduce its rates on frozen meats from north Atlantic ports if assailed rail rates remain in effect, its loss of traffic does not establish that defendants' rate levels constitute a destructive competitive practice. Setting of a rate at a particular level is not necessarily unfair or destructive simply because that rate would divert some or all traffic from a competing mode. Complainant's costs are not shown, nor has it demonstrated that it possesses inherent advantages that are threatened with impairment by defendants' rates. In such circumstances a finding of destructive competition may not be made.—Midwest Emery Freight System, Inc. v. Baltimore & O. R., 321 I.C.C. 637 (642-3).

Since reduced all-rail rates on sugar from New Orleans, west side Louisiana origins, and other gulf, south Florida, and south Atlantic ports to Indiana points, Ohio River crossings, and intermediate southern territory points, also corresponding barge rates from gulf ports to Ohio River destinations, all exceed fully distributed costs, the rail rates cannot be found to constitute an unfair and destructive competitive practice. Disapproval of fully renumerative rates, in absence of evidence that they are unlawful in some other respect, would contravene provisions of §15a(2) and (3) and would not be in public interest.—Sugar, South to Indiana, Ohio River, Intermediate Points, 319 I.C.C. 782 (785)*.

Where rail service under TOFC plans III and V is the low-cost mode for transportation of automobiles, and both considered plan III rates and rail portions of the plan V rates not only cover out-of-pocket costs but largely exceed fully distributed costs, neither the fact nor the possibility that certain motor carriers may lose some or even a substantial part of their long-haul traffic in itself supports a finding that the railroads are engaged in a practice constituting unfair or destructive competition in contravention of the national policy.—Motor Vehicles from Kansas City to Ark., La., and Tex., 318 I.C.C. 301 (320).

Although proposed reduced westbound transcontinental rail rate on wines, in packages, can be expected to divert a large percentage of present water-carrier traffic, it cannot be found to constitute a destructive competitive practice when it would yield

substantially more than fully distributed costs and, since no costs were presented for the intercoastal water service, low-cost mode for the traffic cannot be determined.—Wine and Champagne—Westbound Transcontinental, 318 I.C.C. 53 (56); also, proposed incentive rate on weight of shipments in excess of 40,000 pounds does not constitute a destructive competitive practice when, even on cost evidence most unfavorable to respondent, revenues thereform would exceed fully distributed costs.—Razors and Related Articles, Boston, Mass., to Houston, 318 I.C.C. 97 (101).

Multiple-car rates that are compensatory and no lower than necessary to meet the all-barge competition for which they are designed do not constitute destructive competition.—Grain—K.C., Omaha & Related Origins to Lawrenceburg, 315 I.C.C. 83 (87); similarly, when no evidence of competing motor carriers' cost was presented, and proposed multiple-car rail rate on cement is shown to be compensatory, there is no basis for finding that it constitutes a destructive competitive practice in contravention of the national policy.—Cement from Pennsylvania to New Jersey, 318 I.C.C. 217 (220).

Proposed reduced assembling rates on textiles are no lower than necessary to retain the traffic to common carriage, are compensatory, and do not constitute a destructive competitive practice when shippers association plans to move its terminal to another city if they are not approved, and other consolidators are threatening to use other modes of transportation.—Assembling Rates at Charlotte and Greensboro, N. C., 318 I.C.C. 429 (439).

Protestant forwarders' showing of potential diversion of traffic, as result of reductions in charges on higher-rated articles under motor carriers' proposed scales of constant charges on small shipments, is wholly speculative in view of probability that any such diversion would be offset by diversion to them of lower-rated traffic (on which the constant charges would represent substantial increases), and does not justify a finding of destructive competition. Moreover, while forwarders are entitled to protection against unfair or destructive competitive practices in appropriate cases, the otherwise lawful rate structures of carriers who provide the physical transportation need not be tailored for forwarders' benefit.—General Increases—Eastern Central Territory, 316 I.C.C. 467 (479-80, 486).

Assailed rate which exceeds restated out-of-pocket costs may not be condemned as competitively destructive merely because it may divert traffic from another mode. Complainant motor carrier has offered no substantial evidence from which extent of any diversion of its traffic can be determined, and defendant railroad has established that assailed rate is necessary for it to participate in the traffic involved.—Prue Motor Transp., Inc. v. Boston & M. R., 316 I.C.C. 299 (302).

Evidence of traffic and revenue losses of rate bureau members on certain commodities moving between a few points is insufficient in and of itself to support a finding that rates in defendant's commodity tariff constitute a destructive competitive practice, and there is no indication that the complaining motor carriers' economic conditions are unsound, and no evidence concerning their recent operating ratios or other data on which to judge their present financial condition; thus there is no basis for a finding of destructive competition.—Middlewest Motor Freight Bureau v. Beaver Transport, 325 I.C.C. 175 (181).

That respondent's proposed initial rates on meats from Wisconsin points to Chicago are lower than those of protestant rate bureau, which apply as factors of through combinations, particularly to points east of Chicago, is not shown to amount to destructive competition; the bureau does not show the volume of traffic involved or extent to which its members participate therein; moreover, proposed rates are local in application, whereas protestant's members appear to be interested primarily in movements beyond the destinations concerned.—Meats & Related Articles, Wis. to Chicago & Twin Cities, 315 I.C.C. 588 (590).

When some 30 percent of present beer traffic between considered points is moving in contract or private carriage and practically none is moving in motor common carriage, reduction of rail rate to meet threat of increased use of private carriage does not constitute a destructive competitive practice.—Beer, in Containers, St. Louis to

Arlington Heights, Ill., 316 I.C.C. 812 (819-20); within reasonable limits the public is entitled to reduced rates brought about by competition. Proposed rates do not constitute a destructive competitive practice when they are well within the zone of reasonableness, respondent railroads are not handling any of the traffic, and a subsntial part is moving in private carriage; disapproved on other grounds.—Fresh Meats, Ill., Ind., Ky., & Mo. to Points in Fla., 318 I.C.C. 5 (10).

Proposed reduced rail rates on bulk cement in southern territory, ranging from 2 to 21.5 cents lower than corresponding motor rates for distances from 20 to 200 miles, are compensatory and not competitively destructive; while they will make it more difficult for motor protestants to obtain as much cement traffic as they originally anticipated, in view of service advantages of motor carriage, particularly in deliveries to off-rail locations and for the shorter hauls, protestants should have no undue difficulty in obtaining a substantial share, and it is highly improbable that so much traffic will be diverted to the rails as to cause discontinuance of truck service on any significant or alarming scale.—Cement within Southern Terr. & from Hagerstown to So., 319 I.C.C. 465 (474, 475, 480).

Proposed rate on liquefied petroleum gas in jumbo tank cars, over direct route from Oklahoma City to Memphis area, is not shown not to constitute a destructive competitive practice when present allegedly depressed rate, which is the lowest into the Memphis market on that commodity, is under investigation in another proceeding, and proposed reduction thereof is not shown, other than by general declarations, to be necessary to meet existing competition; moreover, proposed rate would barely cover out-of-pocket costs and might seriously disturb the reduced rate level under investigation; not approved.—Liquefied Petroleum Gas, Oklahoma City to Memphis Area, 316 I.C.C. 189 (192). [But see dissent.]

Reduced rail rates on citrus fruits and juices from Florida do not constitute a destructive competitive practice when they were published to meet then-existing Sea-Land rates, and that characteristic was not changed merely because the railroads later failed to follow Sea-Land's action in increasing its rates. Disapproved on other grounds.—Frozen Juice and Fruit from Florida to the North, 319 I.C.C. 577 (596).

Although evidence indicates that protestant Sea-Land is the low-cost mode for transportation of 40,000-pound shipments of magazines from Miami to Derby, Conn., in absence of any showing of its costs for 60,000-pound shipments it must be assumed not to be the low-cost mode therefor. Since rail movement requires drayage to railhead at Miami, and shipper intends to continue using Sea-Land service when expedited handling is not required, protestant should be able to compete effectively for shipments subject to the 40,000-pound minimum without a differenial under rail rate which, with cost of drayage, blocking, and bracing added, equals its own rate for that minimum; and though 60,000 pounds can be loaded in a boxcar but not in protestant's trailer equipment, increased loading in same vehicle promotes efficiency and should be encouraged. Considering also that proposed reduced rail rates exceed fully distributed costs and do not threaten existence of another service essential to national defense or other public need, they cannot be found competitively destructive.—Magazines or Periodicals, Miami, Fla., to Derby-Shelton, 319 I.C.C. 340.

Although Seatrains' rail-water-rail boxcar service is more economical for transportation of plastics from Texas to New York-New Jersey points, parity of Sea-Land's motor-water-motor rates does not constitute a destructive competitive practice when they are compensatory and the competitive Seatrain rates exceed its fully distributed costs.—Plastics, Texas to New Jersey, New York, & Pennsylvania, 321 I.C.C. 115 (118).

Sea-Land's reduced incentive rates on drugs and related articles do not constitute a destructive competitive practice when they are designed merely to meet Seatrain's rate level; services of both water carriers appear to be of substantially equal value to shippers of that traffic, and rate parity is necessary to enable both to compete effectively.—Drugs and Related Articles from N.Y. and N.J. to Tex., 318 I.C.C. 67 (77).

Although protestants' unrebutted cost evidence shows water carriers to be the low-cost carriers in movement of considered

traffic, it also shows proposed reduced rail rate to be amply compensatory. As the longer transit time over the water-rail and water-motor routes is not determinative, and proposed rail rate is not shown to threaten continued existence of water carriage, it does not constitute a destructive competitive practice.—Candy and Confectionery from N.J., N.Y., & Pa. to Tex., 321 I.C.C. 154 (158-9). [But see dissent.]

Since water routes are the low-cost mode on a fully distributed basis for movement of plastics from Texas to New York-New Jersey area and New England, and rail-water-rail rates are substantially above fully distributed costs, proposed reduction of all-rail rates does not involve forcing a competitor with a cost advantage to establish an unprofitable rate in order to attract traffic. Since the proposed rates exceed out-of-pocket costs by substantial margins, they will not be detrimental to respondents' revenue position, nor will they impair the cost advantage of the low-cost mode; thus they are not competitively destructive.—Plastics from Texas to the East, 319 I.C.C. 379 (381)*; for similar reasons, there is no basis for finding proposed reduced TOFC rates would constitute a destructive competitive practice.—Cereal, Coffee, Tea, Drug, Related Art. N.J. & Pa. to Tex., 319 I.C.C. 424 (426)*.

Although Seatrain Lines is the low-cost mode for tank-car transportation of insecticides from New Jersey to Texas, proposed reduced all-rail rate on parity with present rail-water-rail rate exceeds respondents' fully distributed costs by a small amount and Seatrain's by a substantial amount. In the circumstances there is no question of Seatrain's having to establish an unprofitable rate in order to compete effectively, nor is there any evidence indicating its survival is endangered; therefore, under doctrice of 372 US 744, the proposed rate cannot be found competitively destructive.—Agricultural Insecticides—Heyden, N.J., to Houston, Tex., 319 I.C.C. 493 (495)*; for like reasons, there is no basis for finding proposed reduced rail rates to be competitively destructive when they exceed respondents' fully distributed costs on proposed 50,000-pound minimum and are substantially above out-of-pocket costs for proposed 40,000-pound minimum.—Electric Cable & Wire, Worchester, Mass., to Houston, Tex., 319 I.C.C. 390 (392)*.

Rail-water-rail routes are the low-cost mode for movement both of aluminum articles from Texas to Pennsylvania and New York and of DDT from Pennsylvania to Texas. Considering that the initial rate cuts were made over those routes and the competing truck-water-truck routes with active cooperation of railroads serving the ports, that the greater part of Seatrain's rate deterioration antedated the first all-rail reduction, that Seatrain is handling virtually all the aluminum traffic at rates 4 cents under all-rail, and that the all-rail mode has been unable at that differential to win back any significant amount of the traffic that once was all its own, the all-rail rates, which are fully compensatory, cannot be considered destructive. Nor, since the reduced all-rail rate on DDT is designed to meet private-carrier competition from California, none of involved traffic has ever moved by rail or Seatrain, and it does not appear that Seatrain could participate therein at a reasonable differential under the all-rail rate, can that rate, which also exceeds full costs, be found competitively destructive.—Aluminum Articles from Sandow, Tex., to Pa. and N.Y., 319 I.C.C. 431 (438)*.

And reduced all-rail rate on soda ash from Baton Rouge to Port Wentworth and Savannah, Ga., is not competitively destructive merely because certain ex parte increases removed therefrom were not removed from interstate rate from Baton Rouge to New Orleans which is used as a factor of the rail-water rate to Georgia. Before a protesting carrier raises the issue of destructive competition it must present evidence to show that it is the low-cost mode and therefore entitled to protection of the national policy; this Seatrain has failed to do, and in absence of such cost evidence it may not be presumed that the all-rail rate would be a destructive competitive practice.—Id., pp. 442, 444.

See also New York Central R. Co. v. United States, §15(1), n. 35.

Since competition implies action and change, disapproval of proposed reduced rates could be just as destructive of com-

petition as approval; a policy of ratemaking based primarily on maintenance of the status quo would be the antithesis of competition, and the commission has long recognized that a rail rate is not unlawful merely because it may divert a substantial amount of traffic from competing motor carriers. The problem is to develop reasonably definite criteria for determining whether competition which inflicts injury as a matter of fact is destructive as a matter of law; thus, the commission has recognized that regulated carriers must be allowed considerable leeway in meeting competition of unregulated carriers, and has held, where lawfulness of a rate relation between competing modes is in issue and the protesting mode relies mainly on the prohibition of unfair or destructive competition, that it is incumbent on the protestant to adduce competent evidence of its own costs of transporting the traffic, on both out-of-pocket and fully distributed bases.—Meats, Fruits, Vegetables—TOFC—Transcontinental, 316 I.C.C. 585 (592, 593).

Proposed reduced motor rates cannot be found to constitute a destructive competitive practice when there is little prospect that rail protestants can attract a sizeable portion of considered traffic if the reduced rates are disapproved, since shipper confirms that regardless of level of the rail rates substantially all of it will move by truck.—Rubber, Sarnia, Ontario, to Conn., Mass., Mo., and R. I., 315 I.C.C. 707 (708, 709)*.

Maintenance of different rate levels between same points, and different rules and practices in connection therewith, by three commonly controlled forwarders is not shown to be a destructive competitive practice; complainant forwarder did not support its claim of loss of business by specific proof, did not identify any customers or accounts lost to defendants, and did not show a single rate reduction compelled on account of defendants' tariff publications. Complainant does not appear to be at any greater disadvantage than if it were attempting to compete with three independent competitors, one of which consistently maintained the lowest rates, and no other forwarder has complained of inability to meet defendants' competition.—Clipper Carloading Co., Inc. v. ABC Freight Forwarding, 318 I.C.C. 157 (160, 161).

Although defendants' furnishing of helper service for loading and unloading of shipments moving between areas described in complaint, without tariff authority or charge, violates §§ 216 and 217, the evidence does not support a finding that such practice constitutes a destructive competitive practice.—Middle Atlantic Conference v. A.A.A. Trucking Corp., 321 I.C.C. 406 (411)*.

Proposed reduced rail rates per bilevel and trilevel flatcar on motor vehicles from Chicago to Des Moines and Omaha-Council Bluffs, which would require motor hauls to and from the rail terminals, are not competitively destructive when no traffic has moved from shipper's plant in Chicago district to those points and if proposed rates are disapproved it will continue to ship from its St. Paul plant, in which event not only would respondent fail to obtain any of the traffic, but there would be no motor participation therein.—Motor Vehicles on Bilevel and Trilevel Cars, 316 I.C.C. 777 (781).

Competitive effects on protestant bargelines of reduced flat and proportional rail rates on coarse grains from Kansas City and Omaha to Gulf ports for export should not be measured by the proportionals alone; entire adjustment must be considered, since the proportionals have no indenpendent application. The Kansas City proportionals exceed combined barge rates and shipper costs by about 4 cents, and, though those from Omaha are about 1 cent less than such combined costs, the flat rates, which are uniformly 21 cents higher than the proportionals, apply as minima on through movements from country origins; thus the bargelines have a substantial differential on movements through Kansas City and a minimum differential of 21 cents on grain trucked in to Omaha, on which the proportionals do not apply; and insofar as the reduced rates apply on combination movements via Omaha from origins beyond the 21-cent "pad" territory, they do not result in destructive competition; the bargelines can and do effectively compete for the involved traffic.—Export Grain and Grain Prod.—WTL to Gulf-Lake Ports, 319 I.C.C. 729 (742-3)*.

Proposed reduced rate, contingent on shipper's contracting to ship at least 90 percent of its traffic to considered destinations over respondent's lines during effective period of the rate, constitutes a destructive competitive practice when it would lead to establishment of similar rates on the same or other commodities, and competition could be expected to force spread of such rates to most of the traffic moved by for-hire carriers, with end result of destruction in large measure of what is in general a reasonable and lawful rate structure necessary to maintenance of an adequate national transportation system.—Guaranteed Rates, Sault Ste. Marie, Ontario, to Chicago, 316 I.C.C. 311 (312, 323).

In upholding the commission's disapproval of a similar rate, the court in 194 F. Supp. 947 interpreted "unfair and destructive competitive practices" as embracing the type of competition specified in §3 of the Clayton Act, where the effect would be to substantially lessen competition, and noted that in case of services effect of such a contract is to place an unfair handicap on the competitor, contrary to the national transportation policy. Therefore, in absence of a statutory amendment, contract rates and agreed charges are deemed unlawful per se. —Id., pp. 322-3. [But see dissent.]

One objective of the national transportation policy is to encourage establishment and maintenance of reasonable charges for transportation service without unfair or destructive competitive practices; another is to foster sound economic conditions in transportation and among the several carriers. Among factors to be considered in determining reasonableness of proposed rate is effect thereof on movement of traffic over respondent's line and the net revenue effect which might be expected. Although compensatory, proposed reduced rates would result in unnecessary dissipation of carrier revenues both for respondent and competing carriers; not approved.—Vinyl-Coated Iron or Steel Sheet, Chicago to Kalamazoo, 315 I.C.C. 660 (661, 662).

Proposed reduced rail rates are not shown to be competitively necessary and would constitute a destructive competitive practice when there is no showing that present rates of either rail or intercoastal water carriers on considered traffic exceed the maximum of reasonableness; evidence controverts any likelihood that respondents' revenues would increase if the reductions were approved; and, rather than indicating that the present flow of the traffic would be materially changed, the evidence is convincing that there would be a needless dissipation of revenues by both the rail and the water carriers.—Brandy—West Coast to Eastern Points—Bulk & Packaged, 315 I.C.C. 21 (25).

As protestant water carrier has the inherent advantage of low cost in movement of pig iron from Erie, Buffalo, and Niagara Falls area to Chicago area, any reduction in water rates compelled by proposed reduced rail rates would necessarily be to a level below fully distributed cost. The reduced rail rates must therefore be disapproved as competitively destructive, since they are below the railroads' fully distributed costs and will force protestant to establish unprofitable rates in order to remain competitive, which in turn would impair or destroy its inherent cost advantage.—Pig Iron, Buffalo, N.Y., to Chicago, Ill., and Gary, Ind., 321 I.C.C. 121 (129-30)*.

Respondent motor carrier's present use of substituted rail service between St. Louis and New Orleans under rail TOFC plan III, and its proposed substitution of rail service between New Orleans and Chicago, St. Louis, and Little Rock under TOFC plan I, constitute a destructive competitive practice and are unlawful. By use of rail service respondent would be and is giving protestant severe competition for traffic which it cannot handle economically over its highly circuitous highway routes via Houston, Tex., and the new competitive operations proposed would constitute a serious and uncontrolled invasion of protestant's regulated service territories. Approval of its proposals and its present method of operating would sanction operations which competitively are wholly unlike and unrelated to those authorized by its certificates.—Gordons Transports, Inc. v. Strickland Transp. Co., 318 I.C.C. 392 (401)*.

Considered l.t.l. commodity rates on cigarettes and manufactured tobacco, under which shipments are moving in truckload quantities, are out of harmony with ad-

justment prescribed in 293 ICC 133 to effect a reasonable relation between motor and rail rates from Virginia and North Carolina to official territory, which was continued by findings on a comprehensive record in 309 ICC 347; level of rates under investigation is not shown to be necessary to place respondents on competitive basis with rail carriers, and their approval would encourage establishment of similar "less-than-truckload" rates to other destinations, thus undermining a lawful adjustment now in effect. Considered rates therefore constitute a destructive competitive practice; cancellation required.—Cigarettes and Tobacco between North Carolina and Pa., 315 I.C.C. 297 (299-300).

Since applicant's forwarder subsidiary routes substantial volume of traffic to its storage warehouse and terminal, applicant through its control of routing of 'certain shippers' traffic would be assured of substantial volume without solicitation or overhead expenses and would also share management expense with its subsidiary; these economic advantages would enable it to compete on such preferential terms that proposed extension operation in transportation of new furniture might seriously affect interest of the public who depend on existing motor carriers in the area; this situation offers opportunities for unjust discrimination and unfair competitive practices against the public, shippers, and retail furniture dealers, as well as competing motor carriers.—M.G.M. Transport Corp. Extension, 89 M.C.C. 699 (701).

Effect of §22, see Tennessee Products & Chem. Corp. case, §22(1), n. 2.

Differences in rates: [Vol. 11].—Congress has entrusted the issue of reasonableness of rates charged solely to the commission, and there can be no doubt that the commission must rest its decisions on transportation policy. Though in stating considerations that moved its judgment that domestic-rate charges applicable on certain war-blocked export shipments of Government freight were unjust and unreasonable the commission did not not expressly find that the lower export rate was reasonable, the considerations stated appear to be in support *** of the national policy. What the Commission did was to provide for just and reasonable charges on the shipments concerned, and the issue of reasonableness is not open to the court.—Pennsylvania R. Co. v. United States, 315 F. 2d 460 (465)*

Employees:[Vols. 14, 15].—That control of Central of Georgia by Southern Ry. will result in substantial hardship to many employees and their families does not warrant denial of application; while number of jobs will be reduced at least temporarily, those remaining will be more secure, since the affiliation will strengthen Central's ability to render adequate and efficient service and continue its operations on a sound financial basis. And though future technological improvements may cause further displacements of employees, it would not be in public interest or compatible with the national policy to deny control authority in order to prevent modernization of Central's facilities and possible incidental loss of jobs; a freeze on progress would not solve problems of the railroad industry or its employees.—Southern Ry. Co.—Control—Central of Georgia Ry. Co., 317 I.C.C. 557 (562)*.

See also Chesapeake & O. Ry. Co. control case, §5(2), n. 70.

While some railroad employees could be adversely affected as result elimination of 33 key-point restrictions on subsidiary motor carrier's service and authorization of substituted freight service within 12 zones defined around retained key points, it is not shown whether such employees would be displaced or absorbed elsewhere in the railroad's system; any detriment to individual employees is outweighed by the positive public benefits to be derived from more efficient and economic handling of merchandise freight, which benefits will enure to the railroad's employees generally.—New York Central Transport Co.—Modifications, 89 M.C.C. 389 (413).

Exemptions:[Vols. 12-14-, 16, 18].—The modus operandi of air carriers is sufficiently different from that of land carriers to justify special consideration regarding terminal area limits (which may or may not be larger than those of land carriers) within which incidental-to-air motor carriage is partially exempt from regulation; each transportation mode has its inherent advantages, and various economic or geographic factors sometimes prompt use of one mode over others;

also, in 54 MCC 21, other reasons were noted why terminal areas of nonland carriers vary from those of regulated motor carriers and forwarders. As an interpretation of §203(b7a) so as to permit exempt motor operations in specified areas around airports would be in direct conflict with §§ 206 and 209, and with requirements of the national policy that advantages of each transportation mode be protected, no maximum mileage limitation for that exemption will be fixed; but such exempt operations must be within terminal area established by line-haul air carrier tariffs filed with the CAB.—Motor Transp. of Property Incidental to Air, 95 M.C.C. 71 (76-7, 83, 86-7)*.

While enlargement of Philadelphia commercial zone to include a large part of Fort Washington Industrial Park will increase the number of carriers who may serve the industrial park and thus compete with protestants now authorized to serve it, protestants' motion that the statutory exemption of §203(b8) be removed as to traffic moving between points in the present zone and the area to be included must be denied. Such action requires a positive showing that it is required by the public interest and the national transportation policy, but the opposing carriers have not shown what traffic they are transporting to or from the industrial park, the revenue derived from that and other traffic, the profitableness or unprofitableness of serving the park in any fashion, or what effect, if any, its inclusion in the commercial zone would have. Without such information, or even allegations that specific results would flow from the enlargement, even a partial removal of the exemption would not be warranted.—Philadelphia, Pa., Commercial Zone, 94 M.C.C. 172 (178)*.

While enlargement of Chicago commercial zone to include the whole of Bridgeview and Hickory Hills, Ill., will enlarge area which may be served by carriers authorized to serve Chicago, removal of commercial zone exemption as to interstate transportation between those points and Chicago is now warranted; record affords no basis for evaluation of effect of the zone enlargement on carriers seeking partial removal of the exemption. Removal sought would defeat purpose of enlarging the zone, since concomitant enlargement of terminal areas is achieved only to extent that local operations may still be carried on under the examption; such action should not be taken without more positive showing that it is required by the national transportation policy. Considered situation is not parallel to that at Port Newark, N.J., where the New York commercial zone exemption was partially removed.—Chicago, Ill., Commercial Zone, 86 M.C.C. 735 (740)*.

Incentive Rates:[Vols. 17, 18].—Incentive class rates proposed between southern and official territories to meet private and contract-carrier motor competition, 75 percent of class rates otherwise applicable, to apply on that portion of a c.l. shipment rated class 35 or higher in uniform classification which exceeds 22,000 pounds or a lower published minimum weight, are compensatory and otherwise lawful provided they are extended to joint rail-water class rates prescribed in 286 ICC 5. While effect on respondents' net revenues cannot be determined because additional volume which might be attracted is unkown, it must be assumed that railroad management expects to gain overall revenue; moreover, the commission does not pass on wisdom of carrier rate proposals, but on their lawfulness in terms of the regulatory statute. Proposed rates are not shown to be competitively destructive or unduly disruptive of existing rate structures and will not contravene the national policy.—Incentive Class Rates—Between Official & Southern Ter., 319 I.C.C. 448 (455).

Inherent advantages: [Vols. 13, 14, 16-19].—Principal reason for reference to the national transportation policy in § 15a(3) was to emphasize the power of the commission to prevent railroads from destroying or impairing the inherent advantages of other transportation modes; however, in view of the legislative history of § 15a(3), there can be no doubt that purpose of that statute was to permit railroads to respond to competition by asserting whatever inherent advantages of cost and service they possessed.

In light of the findings and conclusions underlying the commission's decision, particularly its putting aside the question of inherent advantages, its insistence that proposed TOFC rates, although compensatory, be held up to a particular level to protect traffic of coastwise water carriers cannot be justified on basis of objectives of the national policy; remanded to the commission.—I.C.C. v. New York, N. H. & H. R. Co., 372 U.S. 744 (757-8)*.

There can be no question of preserving inherent advantage of a particular mode of transportation in the commission's report and order establishing rail and motor rates on cigars, the rail rate 24 cents under the motor rate, when, although "low-cost factor" is one of the inherent advantages within the national transportation policy, the commission found that railroads were the low cost mode in the circumstances under investigation.—St. Louis-S.F. Ry. Co. v. United States, 207 F. Supp. 293 (297)*.

The commission's grant of extension authority to Railway Exp. Agency for motor operation in lieu of discontinued passenger-train service, without imposition of a rail-haul condition, is not incompatible with the congressional desire to recognize and preserve the inherent advantages of each mode of transportation. The commission has long recognized the historical cleavage between express service and ordinary freight service and that they are competitive to only a limited extent. Moreover, it has expressly stated its willingness to look anew at any situation where common carriers show willingness to compete with REA in transportation of express traffic, to determine whether REA's motor operations work to undue detriment of common carriers of general freight, and restriction imposed gives it continuing jurisdiction to ensure that the certificate issued does not operate to defeat the national policy.—Auclair Transp., Inc. v. United States, 221 F. Supp. 328 (335)*.

There was substantial evidence of record in proceeding on water carrier's extension application to support the commission's conclusion that, because of advantages inherent therein, shipping public is entitled to the benefits of transportation by water, including advantage of low rates if such be the case, even though rail and motor transportation services are available; sustained.—Atlantic Coast Line R. Co. v. United States, 202 F. Supp. 456 (458-60)*.

While the value-of-service principle of ratemaking was useful in early years of the act, when the railroads were powerful monopolies, its continuing application at a time when trucks have skimmed off most of the higher-rated traffic is contrary to the letter and spirit of the national policy, which, as its legislative history makes clear, was intended to permit the railroads, no longer effective monopolies, to respond to competition by asserting whatever inherent advantages of cost and service they possess.—New York, N.H. & H. R. Co. v. United States, 221 F. Supp. 370 (373, 375-6)*.

All relevant factors of the national transportation policy, including preservation of inherent advantages of each transportation mode, must be considered by the commission in proceedings involving reasonableness of rail rates. Ability of one mode to operate with a lower rate than a competing one is precisely the sort of "inherent advantage" the national policy requires the commission to recognize. [Citing 355 US 83.] In the demonstrated absence of any destructive competition, there are no grounds for precluding the railroads' assertion of their inherent advantage of being able to haul increasingly heavy loads at reduced rates. Cancellation of proposed reduced rail rates would destory, not preserve, that inherent advantage; the commission's order set aside and its enforcement enjoined.—Missouri Pac. R. Co. v. United States, 203 F. Supp. 629 (635, 636)*.

See also Pennsylvania R. Co. v. United States, § 15a(3), n. 2.

"Public costs," such as those incurred by governmental agencies in making and keeping navigable the inland waterways, are irrelevant in any commission determination of the inherent cost advantage of any carrier or group of carriers. The commission's function in rate proceedings is adjudicatory and does not embrace expression of any opinion respecting imposition of charges on users of the inland waterways. Such proceedings must be determined in accordance with the act and the national policy as written, not as they might have been written, and if there are inequities in other

legislation which sap the strength of fully regulated carriers the commission is not the proper forum in which to seek their correction.—Grain in Multiple-Car Shipments—River Crossings to So., 321 I.C.C. 582 (589-90)*.

Long before the term "inherent advantages" appeared in the national policy, Congress regularly appropriated large sums for improvement of rivers and harbors, and those expenditures have since increased substantially. Assignment of "public costs" to bargelines' cost structure for determination of their inherent advantages assumes—contrary to long established policy of Congress—that such carriers ought to pay user charges reflecting their share of total cost of waterway development and maintenance. Were the commission to consider "public costs" in evaluating inherent advantages asserted by bargelines, it would be exercising an unwarranted veto power over congressional programs designed to encourage barge transportation, and would make barge traffic more susceptible to diversion by other modes. Also, consideration of "public costs" in determining inherent advantages would be contrary to history, congressional intent, and sound accounting principles, and would be inimical to efficient administration of the act; and to accept respondents' arguments on the issue would emasculate §15a(3) and repeal the inherent advantages clause of the policy.—Id., pp. 590, 592-3.

Although the fully distributed cost standard requires an apportionment of constant costs (which are inherently unallocable) to particular traffic, that standard is generally the most appropriate yardstick for measuring inherent cost advantages in intermodal competitive rate controversies. And though, in apparent recognition of the accounting and regulatory problems involved, the Supreme Court in 372 US 744 left open the precise manner in which inherent cost advantages should be measured and protected, it nevertheless made clear that, whatever cost standard is employed, the commission must determine the inherent advantages of cost and service asserted.—Id., pp. 597-8.

In considering reductions proposed to meet unregulated competition, where a protestant regulated mode possesses the inherent advantage of low cost on both fully distributed and out-of-pocket bases, the proponent regulated mode should not necessarily be permitted, in absence of any loss of traffic, to meet the dominant competition of an unregulated mode without regard to effect thereof on the low-cost mode. But where the preponderance of the traffic is moving by an unregulated mode and is readily susceptible to competition by a regulated mode, the inherent advantages of competing regulated modes should be evaluated in light of a cost standard that will encourage increased movement by a regulated mode. In instant proceeding, where unregulated truckers are the dominant competitive force in movement of grain into the Southeast, comparison of out-of-pocket costs is the most appropriate method of determining whether rail respondents or protestant bargelines have the inherent competitive advantage; however, such departure from the fully-distributed cost standard should not be considered a rejection thereof in cases not involving the special competitive circumstances shown.—Id., p. 599.

Though "public costs" are not pertinent in determing the low-cost carrier, and when such costs are disregarded protestant bargelines are the low-cost mode for movement of coarse grains from Kansas City and Omaha to gulf ports for export, the reduced rail rates in issue do not impair any cost advantage of the bargelines by compelling them to establish unprofitable rates, and they can and do compete effectively for that traffic. Prior finding that the reduced rail rates are not unlawful, affirmed.—Export Grain and Grain Prod.—WTL to Gulf-Lake Ports, 321 I.C.C. 88 (89)*.

Accepting protestants' own figures for truck-boat-rail costs of transporting automobiles from Michigan origins to Milwaukee and Minneapolis, railroads' trilevel car operations are shown to be the low-cost mode on both out-of-pocket and fully-distributed bases. Though protestants claim a service advantage for their truck-boat operations which must be protected, no such advantage is established within the Supreme Court's construction of the national transportation policy in 372 US 744. The railroads' cost advantage is balanced against any service

advantage of the motor-water carriers, and whichever outweighs the other is for the shipper to determine; for the commission to decide otherwise would amount to depriving the rails of the competitive means which they possess—their advantage of lower cost. Considered rates are reasonably compensatory and do not violate the national policy.—Motor Vehicles (Trilevel-Truckaway) from Flint, Mich., 323 I.C.C. 215 (225-6); Motor Vehicles—Wayne & Wixom, Mich., to Milwaukee, Wis., 323 I.C.C. 266 (276, 278).

All-motor service for transportation of motor vehicles to points other than rail terminals has inherent advantage in that shipper tenders the traffic on one bill of lading to one carrier, which moves it to specified destination, whereas to use proposed rail rates per bilevel or trilevel flatcar shipper must make arrangements with three transportation agencies, coordinate the individual movements, make separate bills of lading, and inspect for any damage and determine responsibility therefor. Because of flexibility of all-motor service and faster delivery time, boxcar transportation of such traffic has virtually disappeared and those disadvantages will still exist under the proposed rates, especially to points other than the named rail destinations.—Motor Vehicles on Bilevel and Trilevel Cars, 316 I.C.C. 777 (779).

Inherent-advantages clause of national policy comprehends both operating cost and service; to determine the inherent cost advantage as between competing modes, comparison must be between operating costs over their entire routes, not between costs over all-rail routes and those of water carriers plus published rates of connecting carriers. Based on fully distributed cost, rail-water-rail service is the low-cost medium on considered traffic to some destinations and the high-cost medium to others; thus inherent advantages as between all-rail and rail-water-rail routes do not differ materially.—Phosphate Rock, Florida to S. W. and W.T.L. Territories, 316 I.C.C. 207 (210); and finding in 298 ICC 353 that service advantages over the rail-water-rail routes from same origins to three points in same destination territory were at least equal to those of the all-rail routes is equally applicable to the destination area as a whole.—Id., pp. 211, 212.

Although Seatrain's rail-water-rail route is the low-cost mode for transportation of plastics from Texas origins to New York City rate group, relative advantages and disadvantages of that service and Sea-Land's motor-water-motor service otherwise are not such as to warrant a rate differential between them.—Plastics, Texas to New Jersey, New York, & Pennsylvania, 321 I.C.C. 115 (117-8).

The fully-distributed cost standard is the most appropriate yardstick for measuring inherent cost advantages in intermodal competitive rate controversies, except in special circumstances, as where rates are established primarily to meet competition from unregulated carriage. On the fully distributed basis, rail respondents are the low-cost mode for transportation of pig iron from Cleveland and Toledo, Ohio, to Chicago and Gary, Ind., whereas water carriers are the low-cost mode from Erie, Pa., Buffalo, and related Niagara Falls area.—Pig Iron, Buffalo, N. Y., to Chicago, Ill., and Gary, Ind., 321 I.C.C. 121 (126, 128)*.

In determining where the inherent advantage of low cost lies, as between competing all-rail and barge or barge-rail routes, the total costs accrued while the property is in transit must be compared. Since costs, as distinguished from charges, for services ancillary to considered barge movements of sugar are not of record, the fully distributed costs for the complete transportation service over routes including barge hauls cannot be determined. However, appropriate comparison requires consideration of such added expense, and in absence of more exact data the charges shown for the accessorial services are assumed to approximate the costs. As rail carriers group the involved origins for ratemaking purposes, and New Orleans is representative of the group, averaging of barge costs from the various origins permits proper comparison and evaluation of costs via the respective routes. On that basis, the rail routes provide the low-cost service and there is no ground for requiring the rail rates to be differentially higher than costs of using the barge routes.—Sugar, South to Indiana, Ohio River, Intermediate Points, 319 I.C.C. 782 (784-5)*.

Since protestant automobile haulers association admits that it would not be economically feasible for motor carriers to reduce their rates to level of considered plan III and plan V TOFC rates, and the plan III rates and rail portions of the plan V rates are shown not only to cover out-of-pocket costs but for the most part to exceed fully distributed costs, the railroads, in absence of contrary evidence, must be found to be the low-cost mode, and their endeavor, in exercise of their managerial discretion, to increase their volume of automobile traffic and obtain a substantial contribution towards their overhead burden cannot be found unlawful as to reasonableness of level of the rates. Although service differences are minimal, the railroads and their shippers are entitled to the inherent cost advantage of the TOFC service.—Motor Vehicles from Kansas City to Ark., La., and Tex., and Tex., 318 I.C.C. 301 (320).

Although the truck-water-truck route is shown to be the low-cost mode on considered traffic, protestant Sea-Land's costs are so far below proposed rail TOFC rates that it is hardly conceivable that the proposed rates would unduly impair Sea-Land's cost advantage; proposed rates approved.—Automobile Lamps, Alcoholic Liquors—Pa. to Tex. and La., 319 I.C.C. 335 (338).

Since the barge route from Calhoun, Tenn., to Baton Rouge is more than twice as long as the longest rail route, it may not be assumed, in absence of barge cost data to the contrary, that bargelines are the low-cost route; some barge movements of newsprint paper result in less damage to shipments than by rail, storage facilities at destination are ample, and the twice-a-year renewal of the supply of newsprint apparently offsets the irregularity of barge service; the only disability to which protestants could assign a monetary value is slower transit time, and in view of shipper's investment in barge loading and unloading facilities, the slight differential in favor of bargelines following reduction of the all-rail rate should suffice to offset any service disadvantage of the barge route.—Newsprint Paper from Tenn. and Ala. to Baton Rouge, La., 315 I.C.C. 117 (121, 122, 123)*.

Part of iron and steel traffic is captive to the railroads, and some to motor carriers; while heavy loading is an inherent advantage of railroads, some articles will not load to proposed 100,000-pound minimum, whereas steel longer than 40 feet or wider than 8 feet cannot move by truck; not all receivers have rail facilities, and some are not equipped to receive all their tonnage by truck; motor carriers have certain advantages over railroads, such as lower minimum weights, expeditious door-to-door service, and loading and unloading assistance; rails offer free unloading time, but receivers incur cost of shrouding, if necessary, on their rail shipments.—Iron and Steel from Ill., Ind., Kans., and Mo. to Iowa, 315 I.C.C. 403 (407).

Although water-carrier protestant is the low-cost mode for transportation of eastbound lumber on basis of fully distributed costs, and record indicates that total charges for rail movement at proposed reduced transcontinental rates exceed total water charges by lesser differentials than those found necessary and proper in some rail-water competitive rate cases, the proposed rates are not designed primarily to meet intercoastal competition, and requirement of a greater differential would hobble respondents' ability to transport the existing rail volume at lower rates while increasing their net revenues. In the circumstances, inter coastal protestants' inherent cost advantage should not be protected to extent of any greater differential.—Reduced Transcontinental Lumber Rates, 1961, 318 I.C.C. 815 (844).

Ability of one mode of transportation to operate with a lower rate than competing types is the sort of inherent advantage that congressional policy requires the commission to recognize.—United Parcel Service, Inc., Extension, 89 M.C.C. 709 (739)*.

The commission is directed by the national transportation policy to "preserve" the inherent advantages of the several modes, not to approve arrangements which would prevent their effective assertion. Inevitable result of a substantially exclusive patronage arrangement, such as guaranteed rates based on a percentage of shipper's traffic during their effective period, would be to eliminate competition during that period, as, especially during the final months, shipper's vested interest in the reduced rate would discourage acceptance of an offer of superior

transportation service at an equivalent or lower rate, thus nullifying any inherent advantage of other transportation agencies as a competitive factor.—Guaranteed Rates, Sault Ste. Marie, Ontario, to Chicago, 315 I.C.C. 311 (322).

Ability of a particular mode of transportation to operate with a lower rate is an inherent advantage which must be considered, and shippers should be afforded opportunity to use water transportation and gain whatever benefits may accrue therefrom. Mere availability of common carriers should not bar institution of freight forwarder service of a character not presently offered; grant of authority to applicant for forwarder service between points in 11 northern or central States and points in Louisiana and Texas, utilizing barge service between consolidation and distribution points, is warranted when supporting shippers desire rate advantages of water service but do not individually ship in sufficient quantities to meet bargeload minima, and no similar service is presently available.—Corpus Christi Distributing Service, Inc., Extension, 316 I.C.C. 542 (545).

Contractors' selection of the mode of transportation for bulk cement is determined by both cost and service factors. Motor rates usually include delivery into consignee's storage or mixing bin by use of a blower furnished by carrier, whereas consignee must provide an under-the-track receiving hopper for rail shipments and a conveyor to move the cement to a bucket or elevator for dumping into the storage silo; also, rail delivery involves minimum lots of about 140,000 pounds, while tank-truck delivery is available in 18- to 24-ton lots, is more expeditious, and enables consignees to maintain smaller inventories. Motor service is thus so superior to rail that traffic will move freely at differentially higher truck rates.—Cement within Southern Terr. & from Hagerstown to So., 319 I.C.C. 465 (471).

As protesting motor carriers failed to show their costs for transporting bulk cement, relative inherent cost advantages of the competing modes cannot be determined. Rail respondents do not have burden of proving that they have any such advantage: if carriers show a proposed rate to be just and reasonable from standpoint of their own revenue requirements, protesting carriers who rely on a claim of inherent cost advantage must bear the burden of persuading the commission of existence of that advantage.—Id., pp. 479-80.

Although in absence of any evidence of railroad costs it cannot be determined which is the low-cost mode for transportation of ore concentrates between considered points, motor carriage has definite advantages in use of specialized equipment such as pot-like steel containers hauled on flat-bed trailers, which eliminates cost of hauling from mines to railheads, eliminates loss from seepage, permits shipment of smaller quantities, affords more expeditious movement to smelters, and requires less working capital.—Lead or Zinc Concentrates—British Columbia to Idaho, 318 I.C.C. 85 (86).

Irregular-route carriers: [Vol. 14].—Although irregular-route carriers are freer territorially than regular-route, they are restricted as to character of service which they may render; this is imperative if, consistent with the national policy, regular-route operators between points between which ample regular-route [service] is already being furnished are to be protected from destructive competition.—United Parcel Service, Inc., Extension, 89 M.C.C. 709 (744)*.

See also Motor Common Carriers of Property—Routes and Service, § 204(b), n. 1, 6.

National defense: [Vols. 12, 15-19].—While reference to the national transportation policy in § 15a(3) was to confirm the commission's power to protect inherent advantages of all carriers from destructive competition, that was not the only reason. Reference in the policy to such vital considerations as "national defense" and "commerce" are not mere window dressing, without practical significance in terms of the commission's function. However, the Court does not imply that those broad policy factors may be applied so freely as to nullify more particularized mandates of the policy or the clear congressional design embodied in § 15a (3); only under extraordinary circumstances may the commission permit the more specific considerations to be outweighed. To justify such result, it must be shown that proposed TOFC rates in themselves threaten continued existence of a transportation service which is

uniquely capable of filling a transcendent national defense or other public need; against this standard, the commission's conclusions cannot be sustained; remanded to the commission.—I. C. C. v. New York, N.H. & H. R. Co., 372 U.S. 744 (761-2, 764)*.

Inbound flow of materials necessary for production of war materials is essential to needs of national defense; blockage of any of involved ports or substantial diminution of imports or use of facilities at those ports would seriously impair their efficiency and adequacy in event of future emergency. Evidence as to strikes preventing use of one port but not another is convincing of need of ore consumers for at least two ports providing equal through rates, not only in times of emergency but also in peacetime. Parity of rates on imported iron ore from Baltimore and Philadelphia to 17 points in West Virginia, Ohio, and western Pennsylvania and from New York to 9 of those points, found justified.—Iron Ore from Eastern Ports to C.F.A. Points, 321 I.C.C. 473 (488, 489)*.

There is no evidence that proposed reduced all-rail tank-car rate on insecticides from New Jersey to Texas, on parity with rail-water-rail rate via Seatrain Lines, endangers Seatrain's survival or that the proposed rate itself genuinely threatens continued existence of a transportation service uniquely capable of filling a transcendent national defense or other public need. Approved.—Agricultural Insecticides—Heyden, N. J., to Houston, Tex., 319 I.C.C. 493 (495)*.

See also Chesapeake & O. Ry. Co. control case, under *Adequate transportation system*, above.

Policy of Congress: [Vols. 13, 15, 16, 19].—The policy declared in the Motor Carrier Act of 1935 was adapted and made applicable to all modes of transportation by the Transportation Act of 1940 as the national transportation policy, and the commission has been directed by Congress to make that policy the touchstone of all its actions.—Ralph A. Veon, Inc., 92 M.C.C. 248 (251)*.

Private carriers: [Vol. 17].—One of the inherent disadvantages of private carriage in many instances is inability to develop a well-balanced traffic movement in both directions; but if such a carrier is able to overcome this disadvantage by operating as a for-hire carrier in one direction, it may then be in position by reason of interdependence of the private and for-hire operations to compete on better than even terms with carriers who engage exclusively in for-hire operations; accordingly the commission has frequently held, in absence of extenuating circumstances, that mixing of private and for-hire operations in such manner would be inconsistent with public interest.—Ralph A. Veon, Inc., 88 M.C.C. 279 (280)*; and even though the service proposed would be common rather than contract carriage, there is no important difference in principle except that effect of a grant on for-hire carriers might be more pronounced in case of mixed private and common-carrier operations.—Id., p. 280.

The commission has no duty to foster the growth of private carriage and thus in effect preside over the liquidation of carriers subject to its regulation. Policy of the Geraci case, 7 MCC 369, against authorization of for-hire carriage by an applicant also operating as a private carrier, is sound and should not be defeated by ad hoc determinations based on absence of protest or on records in which the long-range interests of carriers and the shipping community necessarily are not fully developed; such a grant, although it might have no immediate or major ill effect, would probably prevent a regulated carrier from ever handling the traffic involved, and effect on the national transportation system of granting hundreds of similar applications would be materially adverse. This is not to say that authority should never be granted to a private carrier whose primary business is not transportation, but such exceptions to the general policy established by the Geraci case should be rare indeed.—Id., 92 M.C.C. 248 (252)*.

Grant of authority to applicant, engaged in business of fabricating steel joists and trusses which it sells and delivers to customers in its own vehicles, and in the sale and distribution of salt from its warehouse, which sought authority to transport salt to provide a backhaul in connection with the private carriage of its steel products, would be inconsistent with the public interest and

the national transportation policy as it would have the effect of encouraging continuance of private motor carriage to the detriment of the for-hire transportation industry. The commission has no duty to foster growth of private carriage and thus, in effect, preside over liquidation of carriers subject to its jurisdiction. (citing 92 MCC 248) Denied.—Argo Trucking Co., Inc., Extension, 96 M.C.C. 434 (436-8).

Public aid. [Vol. 14].—Since increasing highway traffic is the controlling element in accident exposure at grade crossings, cost of upgrading crossings and installing additional protection should be borne by public funds. Federal Government, with matching State funds, is now paying a good share of crossing-elimination costs on Federal-aid highways; this seems a satisfactory solution and a practical way to meet the problem at all crossings. As most benefits of any stepped-up program for improvement of safety at crossings will accrue to motor vehicle drivers, it would be unfair to expect railroads to assume that heavy financial burden. However, in view of the notable relation between costs of improving grade crossings and benefits derived therefrom, determination of how financial responsibility can be shared equitably by direct users of crossings is a matter for legislative action. The commission recommends that Congress consider legislation to provide public funds for installation and maintenance of necessary protective devices, under some equitable arrangement.—Prevention of Rail-Highway Grade-Crossing Accidents, 322 I.C.C. 1 (81-3, 89)*.

Public interest: [Vols. 12, 14, 19].—The commission did not jeopardize the public interest by refusing to consolidate Chesapeake & Ohio's application to control Baltimore & Ohio with pending merger applications of other eastern railroads for disposition in one decision. Evidence shows that B & O, one of the great railroad systems of the country, is in critical condition, and it would be a disservice to the national policy to hazard exposing it to continuing crises by postponing the help available to it under C & O's proposal, especially as it cannot be predicted how many months or years would be consumed in trying to find a better solution of the problems of eastern railroads, large and small. The commission is satisfied that approval of the C & O-B & O affiliation will be a definite step toward solution of this great national problem, and therefore consistent with public interest, and it is not the court's function to substitute its judgment for that of the commission.—Broth. of Maint. of Way Employees v. United States, 221 F. Supp. 19 (29, 30)*.

See also Florida East Coast Ry. Co. v. United States, § 5(2), n. 2, *Antitrust.*

While the commission recognizes that the city and port of Galveston, Tex., form an effective link between rail and water transportation in interstate and foreign commerce, that Gulf, C. & S.F. Ry. is an integral part of rail service into and out of Galveston, and that preservation of a strong transportation system in the Galveston area is necessary to meet the needs of commerce and the national defense, proposed merger of Gulf Ry. into its parent Santa Fe presents no threat to the quality or quantity of existing rail transportation, and any disadvantages to the city from removal of Gulf's headquarters are outweighed by substantial public benefits otherwise accruing from the merger, which is therefore consistent with public interest.—Atchison, T. & S.F. Ry. Co. Merger, 324 I.C.C. 254 (258-9).

Under the transportation policy enunciated in the act, the commission bears the responsibility of tailoring its actions to best carry out the remedial legislation it is called on to administer; its overriding concern must therefore be protection of the public interest. Hence, though under § 5(7) it is charged with the duty of paying heed to effect of its choice of remedy for a § 5(4) violation on the private parties involved, in considering evidence bearing on such choice any doubts regarding conflict with private interests must be resolved in favor of the general welfare.—Kaplan Trucking Co.—Investigation of Control, 93 M.C.C. 167 (169, 171)*.

A motor carrier has a duty to uphold the public interest as expressed by Congress, which is to supply an adequate, economic, and efficient motor service to the public without undue preference, unjust discrimination, or destructive competitive practices. Motor carrier which controls a forwarder and is apparently managed in common therewith, and which also conducts a storage

and warehousing business and controls certain shippers' routing to exclusion of other motor carriers in the area, has affirmative burden to establish that proposed extension operations, in light of those circumstances, meet the standards required by the national policy and the public interest.—M.G.M. Transport Corp. Extension, 89 M.C.C. 699 (701).

Rate structure: [Vols. 14, 17].—See Tennessee Products & Chem. Corp. case, § 22 (1), n. 2.

Rule of ratemaking: [Vols. 13, 18, 19].—See also § 15a(3).

The basic standards of lawfulness in the act are those designed to protect the public interest in ratemaking, especially those which since inception of economic regulation have required freight rates that are fair, just, and reasonable for both carriers and shippers, and equality of treatment for people, commodities, and places, under substantially similar circumstances and conditions. The present statutory standards are flexible enough to permit all regulated carriers and modes to maintain competitive rate adjustments, provided they do not run counter to any of those basic standards.—All Commodities, New England to Chicago and St. Louis, 315 I.C.C. 419 (424-5)*.

See also Atlantic Coast Line R. Co. v. United States, § 15a(2), n. 1.

Safety: Tremendous increase in highway traffic has amplified danger of grade-crossing accidents, particularly in expanding residential or industrial areas where rural roads or suburban streets carry heavy volumes across major rail lines. Effectiveness of present warning devices is limited, since many drivers fail to heed them, and cost of grade separation at all crossings would be prohibitive. To aid in solving the problem, railroads should take prompt action to improve maintenance of rights-of-way at crossings and to provide safer passage for motor traffic, and remove obstructions to afford better sight distance to drivers of approaching vehicles; highway and traffic authorities should apply latest standards for uniform traffic control and warning signs; and motor-carrier management should intensify efforts, particularly where dangerous commodities are involved, to select capable drivers and enforce compliance by them with safety laws and regulations.—Prevention of Rail-Highway Grade-Crossing Accidents, 322 I.C.C. 1 (9-10, 15, 87, 98)*.

Adequacy of time warning of trains approaching a crossing is a matter entirely within province of the railroads, over which the commission has no jurisdiction. There is no uniformity in distance of whistle posts from the crossings, or, consequently, in length of warning time, and review of accident reports raises doubt that sufficient time is afforded. A uniform minimum warning time of at least 20 seconds in essential for safety and would aid materially in preventing accidents; since railroads and local authorities are in position to require that sufficient warning time be afforded at grade crossings, they should give the matter serious consideration, rather than have the commission seek legislative authority.—Id., pp. 78-9, 89.

Adoption of requirements as to physical and mental qualifications of engineers and other railroad employees operating power equipment, similar to those prescribed for motor-carrier drivers, would not aid materially in prevention of grade-crossing accidents because of differences in the two modes of transportation; there is no evidence that physical or mental condition of railroad employees has contributed in any way to such accidents. Moreover, each railroad has in effect and enforces rigid physical requirements for engineers and other employees, and they are required to participate in a continuing educational program concerning their duties and responsibilities.—Id., pp. 79-80.

Though prescription of maximum speed limits for trains approaching grade crossings is suggested, the commission has no authority to regulate train speeds as such, and train and motor vehicle speeds apparently have not been significant factors in grade-crossing accidents. Imposition of any such requirement is unlikely to aid materially in reducing number of accidents, would interfere with railroads' operating rules over which the commission has no jurisdiction, would impede the flow of interstate commerce, and would prevent trains from

operating economically; resulting disadvantage to railroads would not be in harmony with or conform to the national policy.—Id., pp. 18, 75-6; and requirement of reflectors or reflectorized markings on sides of all railroad cars is not recommended, since it is doubtful if such marking would be of enough aid to safety to justify the cost of installation.—Id., pp. 69-70.

Provision, wherever possible, of a "pull out" lane in advance of every rail crossing where vehicular traffic is heavy, to permit vehicles required to stop to do so outside the normal lane of traffic flow, would not materially aid reduction of grade-crossing accidents; value of such deceleration lanes is doubtful because of increased danger created when the vehicle endeavors to return to the normal traffic flow.—Id., pp. 51, 68.

See also Seaboard Air Line R. Co. v. City of West Palm Beach, Fla., n. 15, below.

Seatrain Lines: [Vols. 17, 19].—Though Seatrain is the low-cost mode for transporting insecticides in tank cars from New Jersey to Texas, record leaves no doubt that it would not attract any consequential volume of that traffic at a through rate the same as the all-rail rate. Time in transit is about twice as long as by rail and sailings are only twice weekly; storage in tank cars at Houston is limited to all-rail traffic; tank cars, which are leased by shippers on a time basis, are subject to bunching when moved over the rail-water route; shippers wishing to use Seatrain service must first obtain permits so that origin railroads may release cars to synchronize rail-water transportation; perils and delays of the sea and maritime strikes are other disabilities.—Agricultural Insecticides—Heyden, N. J., to Houston, Tex., 315 I.C.C. 623 (624)*.

Although protestant Seatrain appears to be under a slight operational disadvantage in using boxcars as compared with truck-body containers employed by respondent Sea-Land, that difference is insufficient to warrant prescription of a rate differential, especially where the proposed rates are above respondent's fully distributed costs and do not go below the level of protestant's rail-water-rail rates or the fully distributed cost of latter's service.—Electric Wire, Cable, from New York and New Brunswick, 316 I.C.C. 75 (79).

Water carriers: [Vols. 11, 14-16, 18, 19].—In action to enjoin railroads from making proposed rates effective, the statutory suspension period having expired, there is no decisive evidence supporting petitioners' argument that when the rail rates go into effect the barge line will inevitably and immediately be driven out of business, contrary to the paramount concern of the national transportation policy for protection of water carriers threatened by rail competition. Furthermore, nothing in the national policy, enacted many years after the revision of § 15(7) which vested rate suspension power in the commission, indicates that Congress intended to revive judicial power to grant injunctive relief which was extinguished by that revision. Indeed, mandate therein to achieve a balance between competing forms of transportation is directed to the commission and not to the courts.—Arrow Transp. Co. v. Southern Ry. Co., 372 U.S. 658 (672-3)*.

Maintenance of a stable and adequate system of common and contract carriers by water is a stated objective of the national transportation policy; insofar as immediate effect of requirement that vessel-furnishers obtain a permit may be advantageous to such established carriers, such effect is warranted as a means of attaining that objective.—Boylan v. United States, 310 F. 2d 493 (499).

Fair evaluation of the evidence indicates that proposed reduced rate on newsprint paper from Tennessee Valley origins to Baton Rouge, La., is not so low as to threaten extinction of barge competition and can be expected to attract a substantial share of the traffic to the railroads, which have suffered almost total diversion to bargelines under present rates; as shipper has spent a considerable sum on modern facilities for loading and unloading barges, the slight rate edge in favor of the bargelines which will result under the proposal should offset any service disadvantage of the barge route; under proposed adjustment a substantial portion of the traffic may be expected to move over each of the competing routes.—Newsprint Paper from Tenn. and Ala. to

Baton Rouge, La., 315 I.C.C. 117 (122)*.

10. **Coordinated service.**—[Vols. 11-19].—The commission must take cognizance of the national transportation policy and apply the act as a whole; underlying policy of § 5(2)(b), against railroads' control of motor carriers unless it will not unduly restrain competition, must not be divorced from proceedings for new certificates under § 207. See 355 US 41. Neither promotion of sound economic conditions in transportation nor preservation of each mode would be served by enabling motor subsidiaries to serve points on unaffiliated railroads; such an inroad would open the way to establishment of lengthy and complex all-motor networks paralleling the nation's rail lines. Therefore, an applicant seeking such authority must establish special circumstances requiring it and must further show that grant of such authority will not upset the existing competitive balance.—Pacific Motor Trucking Co. Extension, 89 M.C.C. 645 (648-9).

Applicant's proposed truckaway of automobiles from origins on line of its parent, Southern Pac. R., to destinations on two unaffiliated short-line railroads is in nature of unrestricted motor service. While Southern Pac. participates in joint rates with the short lines and would continue to make divisions with them, whereupon they would settle with applicant if they elected to have their service substituted for, grant of authority sought would, in effect, confer on Southern Pac. authority which it does not now have, and service it could provide to short-line destinations would be as much a new service as extension to points not served by rail at all. No special circumstances are shown and, considering protestants' authority and willingness to serve those points, it is unlikely such a showing could be made; denied as to those destinations.—Id., pp. 647-8, 649.

Grant of unrestricted authority for transportation of cement to rail-owned applicants simply because rail parents have enjoyed that traffic almost exclusively at some time in the past would remove many safeguards designed to prevent railroad domination of trucking and would transform railroads into general transportation companies contrary to public interest and the national transportation policy. While the commission is not unmindful of economic plight of eastern railroads, grant would not be consistent with the policy and must be denied when special circumstances have not been shown. Whether rail carriers for reasons of financial need should be allowed to engaged in independent trucking operations is for Congress to decide.—Pennsylvania Truck Lines, Inc., Extension, 91 M.C.C. 167 (173)*.

Existence of advantages of proposed coordinated rail-motor service is not per se a sufficient basis for granting authority sought for motor transportation of certain commodities between Alabama railheads and jobsites in connection with prior or subsequent rail movement. Applicants still have burden of proving significance of those advantages in a factual context, and a present or foreseeable future need for such service. While their underlying premise that the public convenience and necessity concept should be interpreted to achieve the broad aims of the national policy to develop a coordinated transportation service is accurate, their argument that instant applications are not to be judged by the usual criteria governing applications under Part II is untenable.—Osborne Trucking Line, Inc., Extension, 94 M.C.C. 414 (417-8).

While ability of larger Alaska motor carriers who have established Stateside contacts to make arrangements for through movements with the principal water carriers and Alaska R. has resulted in a competitive force amounting to virtual monopoly of motor transportation in that State, it should be recognized that "through" carriers of all modes have performed a noteworthy service in the public's interest generally, and Alaska's particularly, in pioneering coordinated handling of containerized freight; and it is hoped such cooperative working arrangements will in time include all responsible motor carriers wishing to participate.—Al Renk & Sons, Inc.—Alaska "Grandfather" Application, 89 M.C.C. 91 (94-5, 103, 105).

Express matter:[Vols. 13, 14].—Congress made express companies common carriers under the act to conduct the nation's express business, and though their growth is bottomed largely on the railroads' duty to transport express traffic, they cannot be viewed as operational instrumentalities exclusively of the railroads. That Railway Exp. Agency's

motor service is auxiliary and supplemental to its express-company service, not to rail service, is emphasized by lack of a rail-station restriction in its certificates, nor is it restricted to preferential use of rail service in discharging its duties as an express carrier. But though REA's only relation to railroads is financial control, it is a person controlled by or affiliated with railroads within § 5(2)(b), and it is that relation which, giving effect to the national policy and applying the act as a whole, is recognized by imposition in REA's motor operating authorities of only those restrictions necessary to safeguard against the railroads' misuse of their control, while permitting REA to operate to the fullest extent possible as an express carrier.—Railway Exp. Agency, Inc., Extension, 91 M.C.C. 311 (329-30)*.

And though REA's operations under Part II, when authority is sought upon discontinuance or curtailment of passenger-train service, are very close to a substituted motor-for-rail service, so to designate them is inaccurate, since what REA actually performs is a line-haul motor operation on its own behalf to replace train service which it, as an express company, formerly utilized.—Id., p. 333.

Railway Exp. Agency was created by the railroads to handle small package shipments, often of considerable value and generally at premium rates. It is an integral part of the national transportation system and offers a unique service whereby a small package may be shipped under single responsibility of one carrier with assurance that it will be delivered promptly. However, with diminution of passenger-train service, it has been forced to rely more upon motor carrier service; thus, use of various transportation modes and carriers is now a quality intrinsic to REA operations.—Railway Exp. Agency, Inc., Extension, 91 M.C.C. 473 (479).

Key-point condition: [Vols. 12-19].—Key-point restrictions were designed to be less onerous than rail-haul restrictions, while achieving the same purpose of ensuring that the motor service authorized to be performed by a railroad subsidiary retains the character of service auxiliary or supplemental to rail service and does not become an independent service competitive with non-railroad-affiliated motor carriers in the area. However, there is no basis for argument that both types of restriction cannot apply at the same time and place, if necessary to ensure rendition of rail-auxiliary service; and since both have the same objective, the principles guiding removal or modification should be the same, whichever type of restriction is involved.—Northern Pacific Transport Co.—Removal of Restriction, 91 M.C.C. 757 (761, 762).

And adequacy or inadequacy of existing motor carrier service is not a controlling factor when removal of a key-point restriction is sought; it is enough if it can be shown that removal would accomplish economies and needed improvements in the rail service, without such an alteration in the existing competitive situation as would seriously endagner operations of independent motor carriers.—Id., p. 761.

Elimination of York and Lancaster, Pa., from key-point restrictions on petitioner's authority, and provision of substituted freight service to and from Harrisburg, Pa., in lieu thereof, subject to standard rail-haul and rail-station restrictions, is justified by decline in parent railroad's l.c.l. traffic; authorized classification cars now move to and from those three key points loaded to substantially less than full utilizable capacity, and handling of all such traffic in the daily Harrisburg car will permit economies and improved service.—Pennsylvania Truck Lines, Inc.—Key Points Restriction, 88 M.C.C. 505 (511-2).

Truckee, Calif., is shown to be no longer an appropriate key point for transportation of express shipments by applicant and its parent railroad between California points and Nevada points east of and including Reno; however, applicant's performance of an all-motor service between Sacramento and Reno would be a new service strictly competitive with, rather than auxiliary to, the rail operations; Sacramento and Reno are therefore designated key points for service over route granted between Truckee and Reno.—Pacific Motor Trucking Co. Extension, 89 M.C.C. 81 (83-4, 86).

The key-point condition was developed to allow a railroad or affiliate to handle shipments to, from, or between way stations intermediate to important junction, break-bulk, and concentration points on the rail

system without necessity of prior or subsequent rail haul. Though under present key-point restrictions petitioner's trucks and railroad's merchandise cars are operating between same termini at only a fraction of capacity, which is wasteful and undesirable, and modification of its certificate allowing use of trucks alone would permit substantial operating economies, proposed wholesale removal of 33 of 45 present key points would enable it to institute overnight or second-morning service between 12 major shipping points on the rail system, thus seriously endangering operations of existing independent motor carriers.—New York Central Transport Co.—Modification, 89 M.C.C. 389 (407).

Examiner's proposal would broaden flexibility of petitioner's service by establishing a defined zone around each of the 12 retained key points and permitting all-highway service over authorized routes within each zone, but not between zones, except to or from break points common to adjacent zones. That concept differs from the key-point concept only in authorizing operations in a territory extending in all directions from a key-point hub and reducing to the break points any overlapping of areas now served out of different key points. Operational flexibility under either concept is controlled by adjustable geographical factors such as spacing of key points or size of zones; thus the zone plan is a suitable alternative to key-point or rail-haul conditions where it provides the most appropriate method of combining more flexible operations with adequate protection of existing carriers. Petitioner's authority modified accordingly.—Id., pp. 396, 407, 408.

However, petitioner's request for a 150-mile highway exception to continue transportation of certain interzone traffic permissible under its present authority but barred under the zone plan should not be granted; the broader and more flexible operations authorized under the zone plan far outweigh any detriment from loss of such rights; and retention of those rights, even though inherent under present key-point system, would so enlarge scope of petitioner's operations that the zone plan would fall of its own weight.—Id., p. 412.

Designation of El Paso, Tex., and Tucumcari, N. Mex., as key points in connection with railroad subsidiary's proposed substituted motor-for-rail service over a 331-mile route between those termini would be inappropriate and ineffective to subordinate applicant's operations to those of the railroad when a significant portion of the traffic moves either from or to El Paso, and would not protect protestant motor carriers when a large part of their traffic moves between the same termini.—Pacific Motor Trucking Co. Extension, 92 M.C.C. 573 (579).

Key-point restrictions are customarily imposed only where they would have a less restrictive effect than the conventional rail-haul restriction; and imposition of burdensome operating restrictions of that character is ordinarily not required in a motor-carrier application by Railway Exp. Agency, once those circumstances are found to be present which would normally justify omission of a rail-haul restriction.—Railway Exp. Agency, Inc., Extension, 94 M.C.C. 62 (75).

Since Railway Exp. Agency already has all-motor routes radiating from Mobile, Ala., grant of motor-carrier authority between Mobile and Pensacola, Fla., limited only to service auxiliary or supplemental to its express service, would not allay fears of opposing independent motor carriers; on the other hand, a restriction to shipments having a prior or subsequent movement by rail would prevent REA from handling local interstate shipments. In the circumstances, imposition of a key-point condition which would permit improved express service at named Alabama points, while preventing institution of a long-haul motor service, affords the best solution; Mobile and Pensacola designated at key points.—Id., 94 M.C.C. 180 (184).

In light of prevailing traffic pattern and existing carriers, a keypoint restriction on extension authority granted Railway Exp. Agency is appropriate. This condition was developed to allow railroads or their motor affiliates to handle shipments in all-highway service to, from, or between way stations intermediate to important junction, break-bulk, and concentration points on the rail system, without necessity of prior or sub-

sequent rail haul, while prohibiting substitution of motor service where economical and efficient through train service is maintained. Designation of Chicago and Green Bay, Wis., as key points will restrict REA's motor operations to those shown to be required, will eliminate necessity for costly train service from and to all intermediate points between them, and will enable REA to increase efficiency of its operations.—Railway Exp. Agency, Inc., Extension, 91 M.C.C. 473 (481).

Restrictions, auxiliary, supplemental service: [Vols. 12-19].—See also *Keypoint condition,* above.

The rail-auxiliary, rail-station, rail-haul or key-point, and rail-billing restrictions imposed on rail-controlled motor operations are designed to assure that the motor service will be used to public advantage in the rail operations by precluding operations which (1) compete with the railroad itself, (2) unduly restrict competition by established motor carriers, and (3) invade to a substantial degree the territory already served by other rail or motor carriers.—Reading Transp. Co.—Control and Merger, 93 M.C.C. 11 (19).

Holding of proposed substituted motor-for-rail service between El Paso, Tex., and Tucumcari, N. Mex., to motor-carrier rates on traffic originating at El Paso would not negative fact that the daily service proposed instead of weekly or sporadic service now provided by applicant's parent railroad would be newly competitive with existing motor carriers and would subject their present traffic to diversion. Further, such an unorthodox restriction would be similar to those rejected as administratively undesirable in 89 MCC 389.—Pacific Motor Trucking Co. Extension, 92 M.C.C. 573 (579-80).

By its very nature, operation by a railroad or its subsidiary under authority restricted to rail-auxiliary service is limited to handling of rail traffic and usually does not materially alter existing competitive situation. For that reason authority granted applicant railroad for substituted motor-for-rail service is restricted to service auxiliary to or supplemental of related rail service; and alternate-route authority granted is subject to the same restrictions as operations over service routes.—Erie-Lackawanna R. Co. Extension, 91 M.C.C. 21 (30, 32); for the same reason, and to insure that proposed service remain auxiliary to and supplemental to applicant's rail service, imposition of key-point restriction at Waukesha, Wis., and its commercial zone (in addition to recommended key-point restrictions at Chicago and Fon du Lac, Wis., and commercial zones thereof), is necessary in order to preserve the inherent advantages of independent motor-carrier service and maintain competitive status of rail and motor carriers in the area.—Soo Line R. Co., Extension, 94 M.C.C. 302 (303, 304).

Although most, if not all, of ore and concentrates would be moved in service auxiliary and supplemental to rail service, congressional policy against railroad invasion of the trucking field is so clear that probabilities respecting the flow of traffic can not be treated as a substitute for specific safeguards. Authority granted limited to operations which are auxiliary to and supplemental of train service of applicant's parent railroad company.—Rio Grande Motor Way, Inc., Extension, 89 M.C.C. 199 (202, 203).

The commission has generally endeavored to give effect to requirements of § 5(2)(b) concerning undue restraint of competition and to carry out provisions of the national transportation policy for preservation of inherent advantages of the different transportation modes by requiring that authority granted to a motor carrier affiliate of a railroad be restricted to service auxiliary or supplemental to rail service; and this policy has been relaxed only where special circumstances require unrestricted motor service by a rail-affiliated carrier.—New York Central Transport Co. Extension, 92 M.C.C. 173 (177)*; such "special circumstances" may include need for service, primarily at small intermediate points, which independent motor carriers cannot or will not supply.—New England Transp. Co. Extension, 88 M.C.C. 703 (707); similarly, "special circumstances" requirement is satisfied by showing that a grant to rail-subsidiary applicant with the usual restrictions would not

permit it to provide the services for which a need has been shown.—Burlington Truck Line, Inc., Extension, 94 M.C.C. 195 (197).

In determining whether a proposed contract carrier operation by a wholly owned subsidiary of a railroad will be consistent with public interest and the national policy, due consideration must be given principles underlying § 5(2)(b); as construed in 364 US 1, that section requires that any such operation be auxiliary to or supplemental of parent railroad's service unless special circumstances justify grant of unrestricted authority. Proposed all-motor operations involving points not served by railroad, therefore, can be authorized only if special circumstances prevail.—Pacific Motor Trucking Co. Extension, 91 M.C.C. 61 (64).

There is no obstacle to application of both rail-haul and key-point restrictions at the same time and place; the commission has power to impose any conditions that may be necessary singly or in combination to assure rendition of service that is auxiliary or supplemental to rail, and it will impose whatever conditions are shown to be most appropriate in each case to promote public interest and carry out the national policy. Considering the highly competitive situation among motor carriers in Portland, Oreg., area, imposition of dual restrictions on applicant's operations at that point was and is sound; the rail-haul condition was imposed to prevent wholesale diversion of traffic from independent carriers to a rail subsidiary offering identical service at rail rates, and applicant is not precluded from engaging in bona fide assembly and distribution service for its rail parent at Portland.—Northern Pacific Transport Co.—Removal of Restriction, 91 M.C.C. 757 (762).

Since both rail-haul and key-point restrictions have the same objective, principles guiding removal or modification of either should be the same; the commission's concern in each case is to determine whether the proposal will accomplish a change in nature of the service afforded. Public convenience and necessity will require removal of any restriction not essential to preserve the character of the service, when removal will also redound to benefit of the shipping public through more economical operations. Neither element can be disregarded; in considering whether the rail-haul restriction on applicant's operations at Portland should be removed, its evidence of costs of l.c.l. service between Portland and Centralia, Wash., is relevant, perhaps determinative, and should be evaluated together with facts pertaining to the existing competitive situation among motor carriers and between the two modes of transportation.—Id., p. 761.

As applicant's certificate reserves the right to impose any further specific restrictions that may be found necessary, the commission could, in proper circumstances, impose a more appropriate restriction for that now in force at Portland if the latter were found to be no longer required. However, economies sought through operation as proposed could be achieved only by alteration of applicant's service from rail-auxiliary to direct and active all-motor competition with protestants serving the area. And though imposition of another Washington key point in lieu of the rail-haul restriction might help to ensure that applicant's service retain its present rail-auxiliary character, it would not aid in accomplishing the desired economies. All things considered, the present restrictions are the most appropriate and should be retained; removal of rail-haul condition denied.—Id., p. 762.

Though rail-station restriction, in addition to usual rail-auxiliary restriction, is imposed on authority granted railroad subsidiary for transportation of express shipments between Truckee, Calif., and Reno, Nev., rail-haul restriction and key-point restriction on Truckee urged by protestants are not imposed when they would preclude applicant's rendition of service to involved intermediate points comparable to that formerly rendered by the railroad, including through movements from or to Sacramento or Reno, in connection with Truckee or points now served by applicant between Sacramento and Truckee.—Pacific Motor Trucking Co. Extension, 89 M.C.C. 81 (82, 87).

Provisions of § 5(2)(b) have effect of requiring that an application by a rail-owned or affiliated motor carrier must be denied unless it is shown that authorization of the proposed operation will enable the railroad to use the motor service to public advant-

age in its operations and will not unduly restrain competition; restrictions in certificates thus issued are designed properly to relate the motor operations authorized to those of the rail or rail-controlled carrier on whose behalf they are conducted; such restrictions may not be relaxed, and the motor operations disassociated from those of the parent, without a showing of special circumstances. Activities to which motor operations of Railway Exp. Agency must relate are those of the express company, and it is appropriate to impose an auxiliary and supplemental, a lading, and most importantly, a future-limitation restriction.—Railway Exp. Agency, Inc., Extension, 91 M.C.C. 311 (339)*.

The commission's object is to permit REA to operate to the fullest extent possible as an express company, and to impose in its motor-carrier certificates only those restrictions necessary to safeguard against the owner railroads' misuse of their control; thus, the basic restriction limits its motor service to that which is auxiliary or supplemental to its express service, and the lading restriction limits it to transportation of its express traffic at express rates and on express bills of lading. Use of "air" and "railway" in the auxiliary and future-limitation restrictions is of no significant effect, being merely an evidentiary reflection of the way in which express traffic usually moves, and though those words have become entrenched in REA restrictions they are not intrinsically necessary to effectuate the purpose thereof.—Id., pp. 330-1.

A rail-haul restriction in REA certificates simply reflects the type of need shown for the service: if need is shown for movement of interstate traffic between points wholly local to route involved, or if the service is not to be dependent on connections with other underlying transportation, rail-haul restriction (or language connecting proposed service with underlying transportation) should be omitted; but where proposed service is to be used in connection with other underlying transportation, authority granted can be related thereto by appropriate restriction. Thus, a rail-haul restriction in REA certificates must be interpreted in context that, in obtaining the authority, REA showed that the express service would be performed as an integrated rail-motor movement, no all-motor movement being contemplated. And since usual rail-haul restriction contains no prohibition against tacking, certificate containing such restriction may be joined with others so long as no all-motor movement is provided.—Id., pp. 332-3.

Moreover, since motor operations conducted by REA in lieu of passenger-train service (since discontinued) which it formerly utilized are completely in conformity with the concept of express service, the rail-haul restriction should not be interpreted as requiring literally a complete prior or subsequent movement over steel rails. Under such interpretation REA will still not be able to transport express wholly by motor vehicle, and the public will continue to have available the express service upon which it has relied and which it might lose under a more restrictive, unrealistic interpretation of that restriction.—Id., p. 333; therefore, restriction of authority granted in 84 MCC 435 between Boston and Portland, Maine, to require prior or subsequent rail haul on traffic moving beyond the termini, is not necessary.—Id., p. 343; but since only need shown for local movement of express on certain routes sought is between points in same State, and other traffic will move in connection with REA's other motor operations, authority for those routes is restricted to traffic moving on through bills of lading or express receipts covering prior or subsequent movement in REA's express service,—Id., pp. 342, 344.

Though Railway Exp. Agency is a person controlled by or affiliated with rail carriers, it is a carrier responsible for carriage having "express" characteristics, and uses services of other common carriers; and has been permitted to operate to the fullest extent as an express company and restrictions have been imposed only as necessary to prevent railroads' misuse of their control of the express company. Since REA's motor vehicle operations must relate primarily to those of an express company, authority granted is restricted to service auxiliary or supplemental to express service.—Railway Exp. Agency, Inc., 91 M.C.C. 473 (480-1); for similar

reasons, and since a rail-haul restriction would lessen the flexibility and expedition of proposed express service, the type of express-auxiliary restriction employed in 91 MCC 311 is imposed in lieu of a rail-haul one.—Id., 91 MCC 887 (891-2)*; also, grant without rail-haul restriction will not in itself authorize REA to conduct through all-motor movements to other points. Real and prospective need for local interstate service is shown; express-auxiliary and express-billing restrictions imposed.—Id., 91 M.C.C. 711 (715).

As held in 91 MCC 311, special circumstances must exist for Railway Exp. Agency to obtain a certificate for motor operations wholly disassociated from rail (i.e., a certificate without a rail-haul or other restriction requiring that operations be conducted with rail operations); and special circumstances do exist where other motor carriers do not render regularly an express service. Also, considering rapid diminution of rail passenger service in recent years, continuance thereof should not be relied on as a matter of practice in REA application proceedings. Existing motor carriers of freight or passengers do not, and cannot, regularly provide express service of the scope offered by REA; imposition of a rail-haul or key-point restriction is not justified. Authority granted is therefore limited only to service which is auxiliary to or supplemental of REA's express service and to traffic moving on through express billing.—Id., 94 M.C.C. 62 (74, 75-8); Id., 94 M.C.C. 731 (733, 736-7); 98 M.C.C. 92 (94, 98-9).

As in case of conventional key-point restrictions, the more flexible all-highway operations permitted petitioner under the key-point zone plan will be kept subordinate to rail service by facts that the traffic must still move on rail billing at rail rates, will be solicited by the railroad, and will move to or from points on the railroad's lines over routes almost completely parallel to those lines; in addition, the modified authority is subject to the usual conditions requiring all contractual arrangements between petitioner and the railroad to be reported to the commission, and reserving to the commission the right to impose any future modifications or restrictions that may prove necessary or desirable.—New York Central Transport Co.—Modification, 89 M.C.C. 389 (407-8).

Rail-auxiliary restrictions are designed to preserve and protect the inherent advantages of each mode of transportation, rail and motor, and in absence of special or unusual circumstances a grant of unrestricted motor carrier authority to a railroad or its affiliate cannot be justified.—Northern Pacific Transport Co.—Purchase—Stark, 90 M.C.C. 206 (209).

Unrestricted motor operation by rail-subsidiary vendee between Gardiner, Mont., and points in Yellowstone National Park is needed when the park administration finds it essential that only one truck be operated between Gardiner, the only gateway open during the winter, and Mammoth Hot Springs, where park supplies are stored, and vendor, the only other motor carrier serving Gardiner, has been utilized for that purpose for years; to limit number of trucks on park roads during the tourist season, the park administration could then insist on interchange between motor carriers at the Hot Springs. In order for protestant to interchange with vendee at a point just inside the park at Gardiner, and serve the park from that point on a year-round basis, it would have to station an agent there, which would be economically impractical, whereas vendee has equipment available at Gardiner 5 or 6 days a week.—Id., pp. 209-10.

There is nothing in the statute precluding the commission, in the proper exercise of its discretion, from approving the acquisition by a rail-affiliated motor carrier of operations of an independent motor carrier either with or without restrictions, depending on the particular circumstances involved; see the Pirnie case, 85 MCC 363. Survivor and liquidating carrier presently handle overhead traffic between Denver, Colorado Springs, and Pueblo, on one hand, and Provo and Salt Lake City, on the other, and there is no valid reason why the shipping public should be compelled to accept a less efficient service as result of an approval under § 5. Motor carriers and shippers support unrestricted approval of proposed merger, and the record is devoid of details as to nature and scope of existing carriers' services, or extent to which they could absorb and ef-

ficiently transport the traffic applicants have been handling between those points.—Rio Grande Motor Way, Inc.—Control and Merger, 90 M.C.C. 643 (648, 649)*.

No justification appears for impairing the quality and quantity of the two-line service applicants have been rendering by imposing restrictions on the unified service on basis of implied harm to competing carriers when there is no evidence or contention by such carriers or assurance that they could supply the resulting service deficiencies, whereas the considered operations, which are at best marginal, would be adversely affected to a marked degree by a restriction against the overhead service involved. Under the circumstances, imposition of a rail-auxiliary or rail-haul restriction on service between the points named is not warranted; restriction imposed in prior report deleted.—Id., pp. 649, 650.

In approving purchase by one railroad subsidiary of an affiliate's property-carrying rights, latter's unrestricted authority should not be subjected to rail-auxiliary restrictions when evidence shows a substantial amount of tonnage moving on motor billing, especially between the principal termini of San Bernardino, Calif., and Los Angeles commercial zone, as well as to and from a number of lesser points.—Santa Fe Trail Transp. Co.—Purchase—Santa Fe Transp. Co., 90 M.C.C. 123 (128).

Substituted freight service: [Vols. 12-15, 17-19].—The standards of proof laid down by the commission for authorization of substituted motor-for-rail service, (1) that more efficient and economical service will result, (2) that in absence of special circumstances the service will be confined to that auxiliary and supplemental to rail service, and (3) that it will not appreciably alter the competitive situation or endanger operations of existing motor carriers, were established to provide motor service where it might not be otherwise available, or to allow railroads to regain traffic formerly moving, or retain that now moving, in rail service. Economies and efficiencies redounding to public interest in a sound transportation system justify such action; however, the commission remains bound by the congressional mandate to promote and preserve the inherent advantages of both rail and motor transportation, and such authority is not granted as a matter of course; where an applicant fails to meet that burden of proof, its application must be denied.—Pacific Motor Trucking Co. Extension, 92 M.C.C. 573 (578).

Applicant failed to show with reasonable accruacy what economies could be expected from proposed substituted motor service over 331-mile route paralleling parent railroad between El Paso, Tex., and Tucumcari, N. Mex.; at best, some possible improvement in rail scheduling and use of cars is indicated. Territory involved is very lightly populated and, since the railroad provides only once-a-week service (with additional unscheduled service to a few points), applicant's proposed 6-days-a-week service to all points is a new competitive service that could significantly harm existing motor carriers' operations. As the restrictive conditions applicant is willing to accept are impractical or otherwise objectionable, application is denied.—Id., pp. 577, 578-9.

To prevent railroads from acquiring motor operations and using them to unduly restrain competition of independent motor carriers, authority for substituted motor service is restricted to points located on the railroad's line; proposed interchange at a point on line of another railroad constitutes transportation service at that point and would be as much a new service as an extension to points not served by rail at all. Therefore, in absence of a showing of special justifying circumstances, application is denied.—Green Bay & W. R. Co., Extension, 91 M.C.C. 363 (365-6).

Motor common or contract carriers using rail plan I TOFC service retain full responsibility to shipper for the shipment and the transportation service rendered, under their own tariffs or their contracts with shipper, and take advantage only of voluntary rail participation; and the motor carrier must hold appropriate authority to perform the motor service substituted for. When an automobile hauler uses plan I service for initial movements there is no delivery to a connecting carrier or interchange with the rail carrier in sense of a motor-to-motor interchange, but merely a substitution of rail service for a portion of the initial movement

the motor carrier is already authorized to perform; such use of plan I is a true substituted rail-for-motor service, and a motor carrier holding initial authority from A to D can substitute intermediate plan I rail service between B and C without destroying initial character of the movement as defined by Administrative Ruling No. 75.—National Auto. Transporters Assn.—Declaratory Order, 91 M.C.C. 395 (409-10).

Nor is the initial nature of a movement destroyed by an intervening rail movement in multilevel cars. Recent technological changes and the nature of automobile haulers' service require a realistic interpretation of "initial" authority; it was never intended to halt any development in operating methods of those highly specialized carriers, or to preclude them from coordinating their services with rail service in the methods perfected since that authority was originally granted. Administrative Ruling No. 75 does not have such an effect and should not be so construed.—Id., pp. 411-12.

The commission's encouragement of such substituted service, which it has long permitted or condoned, conforms with the congressional mandate to foster a sound basis for intermodal transportation cooperation. Motor carriers' use of TOFC substitution permits each mode to best utilize its inherent qualities to provide shippers and the public generally with an efficient and economical service, and there is no reason to question legality under § 216(c) of a method long used by the industry and recognized by the commission's decisions and regulations. Nor does it appear that initial carriers' solicitation as TOFC or MLRC traffic of business they formerly handled in all-motor movements will result in economic chaos; any undesirable practices which may result from the multiplicity of carrier services available are matters of enforcement.—Id., p. 411.

However, those conclusions apply only to motor-rail-motor movements such as are contemplated by TOFC plans I and III; and question of the proper relation between services offered under those plans is reserved for determination in pending general investigation in Ex Parte No. 230. As plan V involves an interchange service under joint rates, a motor common carrier holding initial authority may participate in plan V movements only to extent that it is authorized to serve the rail loading point; at the unloading point it may not, under its initial authority, pick up traffic originated by the railroad or by a different motor carrier, but must possess appropriate secondary authority from that point to the ultimate destination. But motor carriers using substituted service for part of an initial movement may continue the movement from the rail unloading point if they originated the traffic.—Id., pp. 412-3.

Moreover, parity between a motor carrier's all-motor route and its substituted rail service is necessary to promote economical and efficient service and foster sound competitive conditions among carriers of all types. Where an irregular-route carrier must observe a gateway or is restricted against tacking at certain points, unlimited substitution would enable it to totally avoid its certificate limitations and thus provide a service not contemplated, or even one specifically prohibited, by its original grant of initial-movement authority.—Id., p. 410.

Though contract carriers may not utilize TOFC plan V service, because they cannot participate in joint-line service with common carriers, they may lawfully participate in plan I service since the substituted rail movement thereunder remains for all legal purposes the operation of the motor carrier. A contract carrier may also act as shipper's agent in plan III service if it is employed as agent, separately from the contract of carriage, for the purpose of delivering shipper's traffic to, or receiving it from, the railroad, or both; in such case the bill of lading for the rail movement must be issued in shipper's name, and, where TOFC rather than multilevel-car service is rendered, the trailers moving on the rail car must be owned or leased by the shipper.—Id., pp. 413-4.

Substituted rail-for-motor service should bear some reasonable relation to the motor carrier's authorized highway service, and competitive effect on other carriers in the territory is a factor to be considered. Approval of respondent's proposed substitu-

tion of rail service between New Orleans and Chicago, Little Rock, and St. Louis under rail TOFC plan I and its present use of TOFC plan III service between St. Louis and New Orleans would be contrary to the concept of substituted service and would sanction operations which competitively are wholly unlike and unrelated to those authorized by its certificates, when there is no indication that it has transported, or could transport economically, a substantial volume of traffic over its highly circuitous single-line routes via Houston, Tex., whereas it is transporting a large volume in the substituted plan III service. [The Red Ball Transfer case, 52 MCC 75, 303 ICC 421, distinguished].—Gordons Transports, Inc. v. Strickland Transp. Co., 318 I.C.C. 395 (401)*.

The substituted service operation enables respondent to give protestants severe competition which it cannot do by operating over its circuitous highway routes; and proposed substituted plan I operation, which would shorten its transit time between Chicago and New Orleans by 8 or 10 hours, would constitute a serious and uncontrolled invasion of protestants' regulated service territories. Respondent's present and proposed use of TOFC service is a destructive competitive practice and is unlawful; cease-and-desist order entered. However, such findings do not prejudge any issues as to legality or propriety of motor common carriers' use of TOFC service that are before the commission in Ex Parte No. 230.—Id., pp. 399, 401.

Since respondent's authorized over-the-road service is presently competitive, proposed substitute rail service (TOFC plan I) between Jackson, Miss., and New Orleans will not result in indirect invasion of the territory by a new competitor; also, proposed service will obviate over-the-road hazards, relieve congestion, improve respondent's service, enable it to effect operating economies, and provide additional revenue for the underlying railroad; similar advantages have justified other substitute rail services.—Substituted Rail Service between Jackson and New Orleans, 318 I.C.C. 629 (634); however, respondent's highway routes from St. Louis to Jackson and New Orleans are considerably more circuitous than those of its motor carrier competitors and, also, more circuitous that railroad routes proposed to be used. Approval of substituted service between those points would enable applicant to compete for traffic which it cannot now handle as economically as its competitors; such service would not bear a reasonable relation to authorized motor service for which it is substituted and would be unlawful; proposed schedules ordered canceled as to that service.—Id., p. 634.

Trailer-on-flatcar service, generally: [Vol. 18].—Transportation of automobiles in TOFC service, in conjunction with motor operations for direct delivery to dealers, is substantially equal to all-motor door-to-door service, has improved utilization of rail equipment, and has overcome disabilities of boxcar service as compared with motor carriage. Both considered plan III rates (under which shipper provides trailer, delivers it to rail ramp at origin, and arranges for its movement from the ramp at destination) and plan V rates (joint rates covering a through rail-motor service), both modes performing line hauls in all instances, contemplate a coordinated through movement which leaves to each mode that portion of the service it can perform most efficiently and economically, which is one objective of the national policy.—Motor Vehicles from Kansas City to Ark., La., and Tex., 318 I.C.C. 301 (305, 319, 320, 322).

Water carriers: [Vols. 18, 19].—While the national transportation policy imposes a duty on the commission to preserve inherent advantages of each mode of transportation, this does not mean that it shall override the clear intent of Congress (as expressed in the proviso of § 5(2)(b)), in passing on water carrier's application to purchase motor-carrier operating rights, and require a water carrier, not affiliated with a railroad, to show that it will be able to use the motor carrier rights to public advantage in its own operations; nor are provisions of the anti-trust laws to be considered, except to the extent that they are matters for consideration in determining whether proposed transaction would be consistent with the public interest.—TTC Corp.—Purchase—Terminal

Transport Co., Inc., 97 M.C.C. 380 (399-401, 403)*.

When proposed acquisition by two railroads of control of a competing bargeline whose operations parallel their rail lines would not only reduce competition between it and the railroads but would so enhance its competitive strength in comparison with independent water carriers as to jeopardize latter's operations on the waterways involved, imposition of condition restricting its operations to those auxiliary or supplemental to rail service, which would prevent it from transporting port-to-port traffic moving solely by water and not as part of a rail movement, would be unrealistic and impractical and would not permit the findings requisite to approval under § 5(16).—Illinois Central R. Co.—Control—John I. Hay Co., 317 I.C.C. 39 (55).

15. State regulations; police power; cooperation generally.—[Vols. 13-19].—While the city has authority to insist that transfer company, employed by railroads to transfer passengers and baggage between rail terminals in Chicago, obey city safety regulations such as traffic signals and speed limits, many provisions of Chicago ordinance requiring licensing of vehicles bear no resemblance to general safety regulations. Transfer company's service, an intergral part of interstate rail transportation, is subject to provisions of Interstate Commerce Act under which the railroads, not the city, may determine who shall provide such service; and, as held in 357 US 77, various provisions of that act preclude the city from exercising any veto power over such service. Other provisions of the ordinance (which might be justified as safety regulations if standing alone and enforced by means other than the licensing program involved) are an integral part of comprehensive licensing scheme which the city would impose as a whole on the transfer company by denial of license for noncompliance and then criminal sanctions for operating without a license; that is "veto power" which the city may not exercise. Considered ordinance cannot be validly applied to the transfer company.—Railroad Transfer Service, Inc. v. Chicago, 368 U.S. 351 (358-60)*.

When a State, not by sporadic act against an individual but by a law or pattern of conduct, takes action motivated by a policy which collides with national policy as embodied in the Constitution, interest of the United States "to promote the interest of all" gives it standing to challenge the State in the courts. Under the Commerce Clause, the Government has authority to sue without specific congressional authorization; and when State action violative of the Fourteenth Amendment conflicts with the Commerce Clause, the United States has a duty to protect the interests of all. Defendant city violates the Constitution and federal statutes when it posts signs on sidewalks adjacent to interstate bus and railroad terminals commanding or even encouraging racial segregation of passengers in the terminal. The Government's sovereign power over interstate commerce is not confined within walls of terminals, it extends over entire State. Injunction sought should be issued against both carrier and noncarrier defendants.—United States v. City of Jackson, Miss., 318 F. 2d 1 (8, 14, 17)*.

City ordinance requiring railroad to install safety gates at rail crossings on two streets in the city was not invalid as a deprivation of property without due process of law or as an unreasonable burden on interstate commerce when, notwithstanding any feeling that cost burden of railroads in installing safety devices must be shared, the lower court was justified in concluding that the city's judgment regarding use of its streets and the safety of its citizens was not made arbitrarily or capriciously. Trial court could consider traffic counts which, though prepared subsequent to adoption of the ordinance, were relevant as bearing on reasonableness thereof at time of its challenge; and the court did not err in rejecting proffered evidence concerning appellant's costs should other cities on its line enact similar ordinances, since such information is not relevant to reasonableness of the municipal action involved. Lower court's denial of injunctive relief, affirmed.—Seaboard Air Line R. Co. v. City of West Palm Beach, Fla., 373 F. 2d 328 (329).

The whole of the evidence strongly supports the commission's finding that plaintiffs have abused their interstate certificates by operating in intrastate commerce between Pennsylvania points over tacked-on inter-

state routes partly through New Jersey, as a subterfuge to evade State regulation, and issuance of its cease-and-desist orders was appropriate action in accordance with mandate of the national transportation policy to "cooperate with the several States and the duly authorized officials thereof."—Hudson Transp. Co. v. United States, 219 F. Supp. 43 (49-50)*.

California commission has no jurisdiction to require motor carriers who contract with nonprofit shippers' associations for delivery of their goods from break-bulk points to final destinations, both within that State, to assess charges in accordance with California minimum rate tariffs for service performed wholly within commercial zones, since provisions of relevant sections of the Interstate Commerce Act (§§ 203(b8), 402(c), and 408) disclose federal pre-emption in the field of motor carriage within a commercial zone of interstate shipments handled by such associations. While pre-emption will not be lightly inferred unless nature of the subject permits no other conclusion or Congress has unmistakenly so ordained, comprehensive regulatory scheme of the federal statute, including the Motor Carrier and Freight Forwarder acts, and nature of the subject matter which the State seeks to regulate require a finding that the field has been preempted by federal regulation.—Baltimore Shippers & Receivers Ass'n v. Public Utilities Com'n of California, 268 F. Supp. 836 (842-4)*.

The State commission has jurisdiction to directly impose reasonable safety regulations, but it is not free to accomplish its asserted goal (assuring that carriers make sufficient profit to allow maintenance of their equipment in a safe manner and to protect their economic welfare) indirectly through such a method as rate regulation. Defendants' claim that the regulation is justified as a protection against destructive competition is without merit since, even had they shown actual harm of that nature, such a State interest is one of economic protection and does not come within the health, safety and welfare, or police interests which have long been recognized to have validity. Moreover, while safety interest is high on the scale of state interests, there is and can be no safety interest directly allied to fixing of the instant minimum rates; and any indirect safety benefit that may accrue to the State from imposition of the higher tariffs will not suffice to support the measure as a safety measure. Enforcement permanently enjoined.—Id., pp. 843, 846, 847.

Cooperation between the Federal Government and the several States is woven by necessary implication into the very fabric of the Motor Carrier Act and is expressly required by the national transportation policy; that requirement is sufficiently definite and essential to support a complaint filed on behalf of a State against motor carriers' conduct of inherently intrastate operations under color of interstate certificates as a subterfuge to evade State regulation, together with issuance of an appropriate compliance order.—Pennsylvania Public Utility Comm. v. Hudson Transp. Co., 88 M.C.C. 745 (750)*.

Though railroad operation through an urban area naturally causes some inconvenience and danger to citizens of the community, if the community desires advantages of rail service some inconvenience must be expected. It is within province of complainant municipality to impose restrictions on carrier's operation (such as speed limits already imposed) in order to provide for safety of its citizens, so long as the restrictions do not constitute an undue burden on interstate commerce.—City of Hialeah, Fla. v. Florida East Coast Ry. Co., 317 I.C.C. 34 (37).

Authority over public safety at rail-highway grade-crossings has been ruled by the Supreme Court as peculiarly within the police power of the States. And, since Congress has not given the commission any safety jurisdiction over railroads with respect to rail-highway grade-crossings, jurisdiction to establish safety regulations with respect to such grade-crossing matters resides exclusively in the States.—American Trucking Associations, Inc. v. United States, 242 F. Supp. 597 (599, 601)*.

The great bulk of grade-crossing accidents are caused by human failure to comply with commission or State safety requirements, and the number of such accidents can be lessened only by systematic enforcement of

existing safety laws and regulations through cooperation of Federal and local governments. By far the greatest number of accidents involve private automobiles, but the commission has no power to prescribe or enforce regulations for passenger automobiles or for buses and trucks operating solely in intrastate commerce, and it lacks both adequate personnel and power of arrest to enforce its requirement of compliance with local laws, ordinances, and regulations; thus the important area of regulation is left to the States, and as a practical matter they have the responsibility for enforcing such safety regulations as stopping of vehicles at crossings. Enactment of State laws prohibiting use of State highways except in compliance with the commission's safety regulations would be very helpful, particularly if matching Federal funds were made available to the States for enforcement.—Prevention of Rail-Highway Grade-Crossing Accidents, 322 I.C.C. 1 (73-4)*.

A statutory penalty does not serve as a deterrent unless enforced, and Federal, State, and local enforcement of laws and regulations governing operation of motor vehicles at railway grade crossings has been woefully weak. Strict enforcemrnt of existing safety requirements is essential to a solution of the grade-crossing accident problem, and there is urgent need therefor in view of the tendency of motor vehicle operators to ignore those requirements, as well as failing to heed warning devices at crossings. And because of severity of accidents involving vehicles hauling flammable or explosive materials, Federal, State, and local authorities should make special efforts to enforce all pertinent laws and regulations, to divert such vehicles away from grade crossings where possible, and to accelerate installation of crossing protective devices. Accordingly, the commission, in cooperation with State and local authorities, will make an intensified effort immediately to enforce all laws and regulations in effect at grade crossings, with particular attention to those applicable to vehicles with dangerous cargoes.—Id., pp. 32, 40, 49, 86, 90.

The commission recommends creation, by congressional resolution or executive order, of an organization composed of a high-ranking Government official and representatives of the States, labor, industry, and others directly interested in improved grade-crossing protection, with object of formulating uniform standards, to be referred to appropriate State officials, for determining at what rail crossings installation of positive protection should be mandatory, or, as alternative, which should be restricted against operation of heavily loaded vehicles, particularly those with dangerous cargoes. Such an organization, if thoroughly representative and vested with proper authority, could materially aid in solving the grade-crossing problem by bringing together other organizations already engaged in effort to reduce the number and severity of railway corssing accidents, for conferences, discussions, and guidance respecting standards, uniform rules, and other preventive measures; and there should be a concerted, cooperative effort to obtain uniform broad acceptance of realistic requirements and enforcement thereof.—Id., pp. 67, 86, 88, 89.

Taxation:[Vols. 15, 19].—A railroad or other taxpayer owning rolling stock cannot avoid imposition of its domicile State's property tax on full value of its assets merely by proving that some determinable fraction of its property was absent from the State for some part of the tax year. The State of domicile retains jurisdiction to tax tangible property which has not acquired an actual situs elsewhere; it is only multiple taxation of interstate operations that offends the Commerce Clause. Taxable property for which no tax situs has been established elsewhere may be taxed to its full value since, under such circumstances, the domicile is the only State affording the "opportunities, benefits, or protection" which due process demands as a prerequisite for taxation. Domicile State could constitutionally tax, at full value, all of appellant's freight cars not shown to have tax situs elsewhere. —Central R. Co. v. Pennsylvania, 370 U.S. 607 (611-3, 614-7).

A railroad right of way is subject to general taxation; and the general rule, sustained by the weight of authority, is that a right of way (whether owned in fee or held in easement) is real estate, property, or ground which may be subjected to assess-

ment for cost of such local improvements as street paving. Validity of special assessment liens against railroad property was upheld by the Supreme Court in 256 US 531. Railroad's contention that city's enforcement of its paving lien against railroad property, through seizure and sale thereof, would in effect constitute an "abandonment" of line within § 1(18) is clearly unsound. It is up to the railroad to prevent any interruption of operations or severance of a segment of line by prompt payment of valid assessments.—City of Alexandria, La. v. Chicago, R.I. & P. R. Co., 311 F. 2d 7 (11)*.

CONSULT THE TABLE OF CASES WHENEVER A CITATION IS FOLLOWED BY AN ASTERISK

PART I

INTERSTATE COMMERCE ACT; RAILROADS

Chapter 1, Title 49, U.S. Code

[See Table of Cases for history, parallel citation, of cases indicated by asterick (*)]

Section 1. Regulation in general; car service; alteration of line.—(1) Carriers subject to regulation.—[Unchanged. See vol. 9, p. 6969.]

Amendments, see footnotes, vol. 1, pp. 157-158, vol. 6, p. 4537; historical notes, vol. 1, p. 158, vol. 9, p. 6969.

Cross Reference

By provision of Executive Order 11340, dated March 30, 1967 (32 FR 5453, April 1, 1967), the date on which the Department of Transportation Act takes effect is April 1, 1967.

Historical Note

By Executive Order 11107, Administration of Alaska Railroads, dated April 25, 1963, the Interstate Commerce Commission is given jurisdiction "to fix, change, or modify rates for the transportation of passengers and property" under the authority set forth in the Alaska Railroad Act, 38 Stat. 305, which jurisdiction had been given to the Secretary of the Interior by Executive Order No. 3861 of June 8, 1923; latter order susperseded. (28 FR 4225, April 30, 1963)

Executive Order 11107 codified as Title 49, Chapter II, Part 1200 — Administration of Alaska Railroads (49 CFR §§ 1200.1 - 1200.4), 28 FR 12278, Nov. 20, 1963.

Notes of Decisions

Volume 1—p. 159; Volume 6—p. 4538; Volume 9—p. 6970; Volume 11—p. 8960; Volume 12—p. 10116; Volume 13—p. 10867; Volume 14—p. 11346; Volume 15—p. 11893; Volume 16—p. 12519; Volume 17—p. 13148; Volume 18—p. 13929; Volume 19—p. 14950.

I. Interstate Commerce, and Application of Act Thereto

7. Nature of movement; between points in same State as part of through movement.—[Vols. 1, 6, 9, 14, 17, 19].—Congress may employ its authority under the Constitution to control, in the national interest, activities which at first blush appear to be purely intrastate. Destination intended by a passenger when he begins his journey and known to the carrier, determines character of the commerce. [Citing 346 US 128.] Plaintiff's substituted flight from St. Louis to Kansas City, Mo., was clearly a part of his interstate air journey under through ticket giving passage from New York City to Portland, Oreg., via those points, and his rights as a passenger thereon, with respect to both his person and his baggage, are determined by appropriate provisions of the federal statute and defendant's tariff filed thereunder.—Berkman v. Trans World Airlines, Inc., 209 F. Supp. 851 (852-3). [Not arising hereunder.]

17. Continuity of movement.—[Vols. 1, 6, 9, 17, 19].—Unloading into elevator at

Duluth, Minn., of shipments of barley originating in North Dakota, prior to transfer to lake vessel for movement to Buffalo, N.Y., was a good faith interruption in the interstate journey from North Dakota to New York, and the transfer from rail to water did not constitute a break in the continuity of movement, nor did the temporary delay necessitate thereby cause the barley to lose its interstate character.—Guy v. Rolvaag, 233 F. Supp. 301 (303-4).

Foreign Commerce

52. Transportation to or from a foreign country.—[Vols. 1, 6, 9, 12, 13, 15-19].—Where railroads performing transportation within the United States enter into a joint through international rate covering transportation from United States origins to Canadian destinations, the commission has jurisdiction to determine reasonableness of such joint through rate and to order the domestic railroads to pay reparations in the amount by which that rate is unreasonable.—Canda Packers, Ltd. v. Atchison, T. & S.F. Ry. Co., 385 U.S. 182 (183-4)*.

53. —"Only insofar as such transportation takes place within the United States."—[Vols. 1, 6, 9, 12, 13, 15-19].—Since the commission's jurisdiction under §1 extends to transportation from points in United States to foreign destinations only insofar as it takes place within the United States, domestic railroads have a clear alternative respecting their participation in rates on international traffic: they may participate in joint through international rates and be jointly and severally liable for any unlawfulness therein, or they may establish lawful rates applicable only to and from the border, in which case they are responsible only for those rates.—Board of Directors for Utilities v. Canadian Natl. Rys., 315 I.C.C. 471 (473-4), and where through rates assailed are combinations of rates to and from border points, the commission has no jurisdiction over Canadian factors thereof or increases made therein.—Id., p. 474.

Common Carriers, and Application of Act Thereto

66. Common carriers defined.—[Vols. 1, 6, 9, 11, 14, 18, 19].—Upon purchase, pursuant to legislative enactment, of an abandoned line for lease to and operation by a new railway corporation, the State of Vermont will own certain trackage and other railroad facilities; however, although the State would clearly fall within the definition of a "railroad" under §1(3)(a), it is not a common carrier by railroad within the statute or under common law merely by reason of its ownership of railroad property, for the following reasons: (1) it is a sovereign State which has never performed or held itself out to perform transportation services in interstate or foreign commerce; (2) it is prohibited by its own law from operating the railroad or granting any subsidy for its operation; and (3) it did not acquire a common carrier by railroad but merely acquired the abandoned line of a corporation that had ceased to be a common carrier. The State is not a necessary party applicant; application, to extent it involves the State, dismissed.—State of Vt. and Vermont Ry., Inc., Acquisition and Op., 320 I.C.C. 609 (609, 611-16)*.

75. Services performed principally for owner.—[Vols. 1, 9].—See Newark Farmers Grain Co. case, §1(18), n. 15.

92. Assumption of status—filing tariffs.—[Vols. 1, 6, 16].—See Republic Carloading & Distrib. Co. v. Missouri Pac. R. Co., §20(11), n. 8.

101. Carriers subject to the act; generally.—[Vols. 1, 19].—The Port of New York Authority is not a carrier subject to the act, and acquisition and operation by its wholly owned subsidiary of line of former Hudson & Manhattan will not make it such.—Port Authority Trans-Hudson Corp. Acquisition and Operation, 317 I.C.C. 357 (362).

Although Nueces County Navigation District No. 1 is a political subdivision created by the State of Texas to operate the port of Corpus Christi, line of railroad to be con-

structed by it will be utilized directly in interstate commerce by applicant railroad jointly with terminal association controlled by the District and railroads serving Corpus Christi, as extension of a line now used in that capacity; therefore, following decision on similar facts in 290 ICC 83, the District is a carrier subject to the act.—Texas & N.O. R. Co. Abandonment, 317 I.C.C. 245 (246-7, 250).

113.—Cab and transfer companies.—[Vols. 1, 6, 18].—Business of transfer company, pursuant to contracts with railroads to provide transfer of passengers and baggage between rail terminals in Chicago, may not be regulated under city ordinance requiring licensing of taxi cabs and other vehicles used in transportation of passengers; transfer company's service is an integral part of interstate rail transportation authorized and subject to regulation under the federal statute, and that statute gives the railroads, not the city, discretion to determine who may provide such interterminal service. Furthermore, as held in 357 US 77, various provisions of the IC Act completely preclude the city from exercising any veto power over such transfer service; and, since comprehensive licensing scheme which the city would impose as a whole on the transfer company constitutes such a "veto power," the challenged ordinance is invalid insofar as it applies to petitioner transfer company.—Railroad Transfer Service, Inc. v. Chicago, 386 U.S. 351 (358-60)*.

Construction of Terms

125. "Common control, management, or arrangement for a continuous carriage."—[Vols. 1, 6, 9, 11, 12, 19].—In the past no joint rates on rail-barge movement of considered coal traffic have been maintained as between the rail and water carriers; thus, under §§1(1)(a) and 303(b), the commission has had no jurisdiction over charges made for the water portion of the movement or the terminal charges in connection therewith.—Barge-Rail Coal, Huntington, W. Va., to Chicago District, 315 I.C.C. 129 (130).

127. "Arrangement."—[Vol. 1]—Since water carrier's filed general-commodity rates (applicable on packaged grain) provide for issuance by it of a separate bill of lading for the port-to-port movement, there have been and are no through combination rail-water rates subject to the act on such grain; as two separate and independent contracts of carriage must be executed, there is no common arrangement within meaning of §1(1)(a).—Rail-Water, Grain in Bulk, Mo., Ill., and Ind. to Buffalo, 321 I.C.C. 564 (565)*.

Section 1. (2) Transportation subject to regulation.—[Unchanged. See vol. 9, p. 6980, amendment, vol. 19, p. 14953.]

Amendments, see footnotes, vol. 1, p. 222, vol. 6, p. 4559; historical note, vol. 1, p. 158.

Notes of Decisions

Volume 1—p. 222; Volume 6—p. 4559; Volume 9—p. 6980; Volume 14—p. 11348; Volume 19—p. 14953.

Section 1. (3)(a) Definitions.—[Unchanged. See vol. 9, p. 6982, amendment, vol. 11, p. 8963.] [54 Stat. 899.]

Amendments, see footnotes, vol. 1, p. 229, vol. 6, p. 4562; historical notes, vol. 1, p. 230, vol. 9, p. 6982.

Notes of Decisions

Volume 1—p. 230; Volume 6—p. 4562; Volume 9—p. 6983; Volume 11—p. 8963; Volume 12—p. 10118; Volume 13—p. 10869; Volume 14—p. 11348; Volume 15—p. 11895; Volume 16—p. 12521; Volume 17—p. 13150; Volume 18—p. 13932; Volume 19—p. 14954.

Agencies Included as Common Carriers

1. Lessors and lessees.—[Vols. 1, 9, 13].—Although Hudson & Manhattan's reorganization plan contemplates separation of its railroad operations from its real estate holdings, including sale of its line to a new operating subsidiary, the successor corporation created for real estate purposes will retain ownership of certain trackage and terminal facilities below Hudson Terminal buildings, which it will lease to the subsidiary, and thus will remain a carrier by railroad as defined in §1(3)(a).—Hudson & M.R. Co. Trustee Abandonment, 312 I.C.C. 701 (704)*.

Carriers by and Over Railroads

3. Express.—[Vols. 1, 9, 11, 15].—Railway Exp. Agency, as an express company, is a carrier which assumes responsibility for carriage having certain distinct characteristics, in which it very largely utilizes services of other common carriers; it is not a "carrier by railroad" for the same reasons for which its predecessor was held not to be, in 265 US 425.—Railway Exp. Agency, Inc., Extension, 91 M.C.C. 311 (330)*.

Terminal Carriers

11. Wharfage and terminal companies.—[Vols. 1, 6, 9, 11, 14, 15, 18, 19].—Although defendant Terminal Railway is wholly owned and operated by the State of Alabama through its State Docks Department, it is indisputably a common carrier by railroad engaging in interstate commerce within the Federal Employers' Liability Act; it conducts substantial operations in interstate commerce, has union contracts with various railroad brotherhoods in accordance with the Railway Labor Act, maintains its equipment in accordance with the Safety Appliance Acts, and complies with reporting and bookkeeping requirements of the commission.Parden v. Terminal Ry., 377 U.S. 184 (185)*. [Not arising hereunder.]

Other Agencies

28. Cab, baggage, and transfer companies.—[Vols. 1, 6, 17, 19].—See Railroad Transfer Service, Inc. v. Chicago, §1(1), n. 113.

Railroad, Construed

30. "Railroad" and "railway."—[Vols. 1, 9, 19].—See State of Vt. and Vermont Ry., Inc., Acquisition and Op., case, §1(1), n. 66.

Transportation, Construed

50. In general.—[Vols. 1, 6, 9, 15, 19].—Definition of "transportation" in §1(3)(a) is broader than the pure transportation service of which common carriage consists; it includes services, such as icing of cars, weighing, storage, and loading and unloading, which may occur before or after actual carriage. Purpose of having the commission supervise these extra-carriage services was to prevent overcharges and discriminations made under pretext of performing such additional services, by including them in the single term "transportation" and thereby subjecting them to provisions of the act respecting publication and reasonableness of charges, etc.—Republic Carloading & Distrib. Co. v. Missouri Pac. R. Co., 302 F. 2d 381 (388)*.

56. Delivery.—[Vols. 1, 6, 9, 11-17].—Just as transportation subject to regulation actually begins when the mer-

chandise is placed in carrier's possession, to constitute valid delivery it is essential that the car be surrendered physically or constructively to consignee at destination at a proper time and place—at industry's siding, public team track, or other place at destination agreed to between shipper or consignee and carrier.—Plaswood Corp. v. Atton & S.R., 321 I.C.C. 434 (437).

68. Loading and unloading.—[Vols. 1, 6, 9, 11, 12, 15, 18].—Although defendant is a railroad subject to Part I and loading and unloading are covered by definition of transportation in §1(3)(a), it does not follow that, in unloading truckloads or carloads of forwarder freight consigned to plaintiff forwarder (lessee of a portion of defendant's freight depot), after inbound line-haul movement by a motor common carrier or a connecting railroad, defendant performed such service as a common carrier and thereby became liable for loss of shipments which occurred after unloading and before they were to have been loaded into trucks for local delivery or further line-haul movement.—Republic Carloading & Distrib. Co. v. Missouri Pac. R. Co., 302 F. 2d 381 (387-8)*.

82. Container service.—[Vol. 6].—Trailers, when used in plan III TOFC service, are containers rather than instrumentalities of transportation.—Cooper-Jarrett, Inc. v. United States, 226 F. Supp. 318 (322)*.

Section 1. (3)(b) Control construed.—[Unchanged. See vol. 11, p. 8967.]

Cross Reference

For construction of §1(3)(b), see §5(2), n. 45, 46, in volumes 12, 13, 14, 15; §20b, n. 50, Boston & M. case, v. 17.

Section 1. (4) Duty to furnish transportation and establish through routes; division of joint rates.—[Unchanged. See vol. 11, p. 8967.]

Amendments, see footnotes, vol. 1, p. 253, vol. 11, p. 8967; historical note, vol. 1, p. 253.

Historical Note

Rates and fares of railroads within the Alaska Railroad Act, jurisdiction of the commission, see Historical Note concerning Executive Order 11107 following § 1(1).

Notes of Decisions

Volume 1—p. 255; Volume 6—p. 4577; Volume 9—p. 6995; Volume 11—p. 8968; Volume 12—p. 10120; Volume 13—p. 10871; Volume 14—p. 11351; Volume 15—p. 11838; Volume 16—p. 12523; Volume 17—p. 13152; Volume 18—p. 13932; Volume 19—p. 14955.

What Embraced in Transportation to be Furnished

25. In general.—[Vols. 1, 6, 14, 19].—The commission properly held that railroads' obligations to furnish transportation are limited by extent of what they hold out to the shipping public in their tariffs, and that under TOFC plans III and IV the furnishing of services under the tariffs and as required by the act does not occur until the flatcars or trailers are placed in possession of the railroad for the purpose of being transported. See 298 US 170 and 144 F. 2d

130.—Cooper-Jarrett, Inc. v. United States, 226 F. Supp. 318 (322)*; and where plan II service is coextensive with that under plans III and IV, the fact that under the latter a partial service is offered at a lower rate does not impugn the fact that a complete service is offered under the former. Contention that in such circumstances the railroads are not holding out to furnish all instrumentalities of transportation is groundless.—Id., p. 323.

25a. Pickup and delivery.—[Vols. 12, 17, 19].—A carrier is not required to furnish facilities to pick up and deliver freight unless it holds out to do so, and when it does it may make a reasonable charge therefor; such additional service for the additional charge then becomes available to all who request it and are willing to pay for it. Moreover, if carrier wishes to initiate a lesser service for a lower price, it may do so; there is no violation of the law if it publishes a lower rate for carrying freight that is brought to it by the shipper, since that is not the rendering of any service under the act connected with the transportation so far as the carrier is concerned.—Cooper-Jarrett, Inc. v. United States, 226 F. Supp. 318 (324)*.

Reasonable Request

43. In general.—[Vols. 1, 6, 9, 14, 16, 17].—Part II, §216 (b), n. 550.

In proceeding on union's motion to suspend preliminary injunction restraining work stop-page at lake transshiping pier being picketed by Canandian unions, it is not certain what claims may be made on plaintiff lake terminal facility, and on railroads who depend on its services, should they be unable to deliver tonnage which they are required as a common carrier to deliver "upon reasonable request therefor"; work stoppages have been held not to excuse a common carrier's failure to make such deliveries. While the court cannot adequately appraise the claims that might be asserted against carriers for failure to fulfill their duties, it is sufficient to note that inability to complete deliveries to vessels taking on cargo of coal for transshipment to Canadian consignee could result in substantial and irreparable injury to plaintiff; preliminary injunction not suspended.—Lakefront D. & R. T. Co. v. International Longshoremen's Ass'n, 333 F. 2d 549 (552).

Railroads' statutory obligation to furnish the instrumentalities and services of transportation is subject to the internal qualification that they must do so "upon reasonable request." In providing service under TOFC plan III in which shipper furnishes the trailer, and plan IV in which it also furnishes the flatcar, there is no indication that the rails have not furnished all services reasonably requested by the shippers, who, rather than protesting the plans, have intervened on their behalf. Contention that under those plans the railroads are not fulfilling their statutory obligation is groundless.—Cooper-Jarrett, Inc. v. United States, 226 F. Supp. 318 (323)*.

It is railroads' duty under §1(4) to provide transportation upon "reasonable request" therefor, and definition of "transportation" in §1(3)(a) includes all instrumentalities and facilities for shipment or carriage, which includes team tracks and pier facilities. Thus, duty of terminal carriers serving New York City was, not to furnish team track facilities for all who might possibly use them, but to furnish team track facilities to meet the reasonable demand therefor; and in finding that team track delivery was a valid option to pier delivery of shipments of fresh vegetables, the commission was not required to find that team track facilities were available to all.—William N. Feinstein & Co. v. United States, 209 F. Supp. 613 (623)*.

Exceptions to Duty to Furnish Transportation

56. Embargoes; unsafe and unsuitable articles.—[Vol. 1].—Defendant pipeline's refusal to accept Kewanee crude oil for transmission in its "asphalt sour stream" was and is fully justified when such oil is

paraffinic in nature, is not regarded as an asphalt-base crude or acceptable by asphalt refiners, and is incompatible with the asphalt stream; moreover, it has been and is being accepted for movement in defendant's general sour stream.—Denver Oil Co. v. Platte Pipe Line Co., 316 I.C.C. 599 (603, 604)*.

Through Routes

61. In general.—[Vols. 1, 6, 9, 12, 13, 15, 17, 18].—In absence of resulting undue preference or prejudice, a carrier is under no duty, in course of its terminal operations, to switch cars from or to connecting line-haul carriers to or from points on its team tracks or other tracks in its terminal area on its right-of-way which are owned and maintained by it as part of its terminal facilities.—Switching at Richmond, Va., on Richmond, F. & P. R. Co., 316 I.C.C. 786 (794).

63. Common-law and statutory duties compared; subsequent to Hepburn amendment.—[Vols. 1, 6].—See Southern Ry. Co. v. Flournoy, §3(4), n. 3.

71. What constitutes through route; generally.—[Vols. 1, 6, 9, 11, 15-19].—Through routes exist in relation to commodities rather than the type of car employed, and TOFC service does not require new routes merely because it utilizes a new type and form of equipment; there is no substantial difference in handling of TOFC and other freight cars at interchange points.—Rates, TOFC, between Midwest & South—Louisville & N.R., 318 I.C.C. 40 (43).

See also Atlantic Coast Line R. Co. v. United States, §15(3), n. 20.

Through Rates, Fares, and Charges

101. In general.—[Vols. 1, 6, 9, 13, 18, 19].—See Atlantic Coast Line R. Co. v. Southern Ry. Co., §1(5), n. 236; Rates, TOFC, between Midwest & South—Louisville & N. R., §1(5), n. 663; and Southern Ry. Co. v. United States, §15(3), n. 36.

Divisions

112. Construction; in general.—[Vols. 1, 6, 9, 12].—Original proposals of transcontinental and midwestern carriers for division of joint rates between those territories were in form of distance scales and included no provisions for grouping or equalization of competing routes and gateways, and the commission stated that the parties were free to establish by agreement percentages other than those prescribed, for that purpose. As all the western carriers have hitherto maintained that questions of equalization should be reserved for their mutual consideration after the commission's decision, and competitive conditions among the interested carriers are closely involved, they should endeavor to solve the problem themselves before invoking a regulatory remedy.—Akron, C. & Y. R. Co. v. Atchison, T., & S.F. Ry. Co., 322 I.C.C. 491 (514-5)*; and though the Milwaukee and the Illinois Central participate in traffic between transcontinental territory and points on their lines in Indiana substantially as eastern carriers, the commission's power to prescribe divisions thereon on the eastern territorial basis is questionable under issues of the complaints; it is reasonable to assume that revision of eastern divisions would include those lines by voluntary action of the carriers involved.—Id., pp. 516-7.

123. Reasonableness; in general.—[Vols. 1, 6, 9, 14-19].—The question of divisions involves the making of practical judgments and cannot be solved like a mathematical problem; a just share is the amount properly apportioned out of the joint rate, to be determined, not by agreement of the parties or by mileage, but by what the commission finds to be just, reasonable, and equitable; there is no single test by which just, reasonable, or equitable divisions may be ascertained, and no fact or group of facts may be used generally as a measure for determining what division will conform to those standards; and error as to the weight to be given financial needs, operating costs, or other material facts is not a misconstruc-

tion of the act.—Boston & M. R. v. United States, 208 F. Supp. 661 (675)*.

There is no single test by which just, reasonable, or equitable divisions may be ascertained; no fact or group of facts may be used generally as a measure for determining what divisions will conform to standards of §15(6), since considerations that reasonably guide to decision in one case may have little or no bearing in others. [298 US 349 and 208 F. Supp. 661.]—Akron, C. & Y. R. Co. v. Atchison, T. & S.F. Ry. Co., 316 I.C.C. 351 (360)*.

That Louisville & Nashville's ton-mile earnings from assailed divisions of rates on coal from Kentucky and Tennessee mines on its lines to the Carolinas, interchanged with Southern Ry. at Knoxville, compare favorably with those of certain Pocahontas region lines on like traffic handled in same general territory under similar physical conditions does not prove that L&N obtains the proportionate division to which it is entitled on a cost and performance basis. Nor does a fair division of the joint rates depend on relative importance of the Knoxville coal traffic to the systemwide movement of all L&N freight. Evidence clearly demonstrates that assailed divisions do not meet the minimal requirement that L&N receive at least enough revenue to reimburse it for its reasonable out-of-pocket costs.—Louisville & N.R. Co. v. Southern Ry. Co., 319 I.C.C. 639 (647, 648, 659-60)*.

Retention of present group basis of primary divisions of joint rates between official territory and defined transcontinental territory is desirable in light of competitive conditions affecting routing of such traffic. Therefore, in readjustment to accord increased percentages to eastern lines shown to be justified by cost and revenue needs, specific primary divisions are prescribed for application east and west of the principal interchange points, between defined groups in those territories. As the findings provide for three groups instead of the present single group in transcontinental territory, percentage increases in eastern divisions are greater on traffic to and from interior western groups than to Pacific coast ports. Grouping provided follows the general plan approved in mountain-Pacific class rate adjustment of parity between groups east of the Mississippi and north and south Pacific coast terminals, with lower rates to and from the Spokane-Reno-Las Vegas group, which from a cost-of-service standpoint is preferable to present blanketing of transcontinental territory.—Akron, C. & Y. R. Co. v. Atchison, T. & S.F. Ry. Co., 321 I.C.C. 17 (73-4)*.

Existing eastern groups are generally observed in the prescribed adjustment; proposed separation of New England from present New England-seaboard group would be inconsistent with the transcontinental class rates and is not justified by the evidence. But transfer of Richmond and Norfolk, Va., from the interior eastern to the seaboard group is desirable and should be accomplished by voluntary negotiation; also, no good reason appears for continuing the small Bessemer, Pa., group separately from Pittsburgh. A defined group of Illinois and Indiana border points is also provided, with a uniform minimum division of 15 percent to terminal lines serving that group; it has been common practice in both prescribed and voluntary adjustments to accord minimum divisions to carriers having relatively short hauls, and increasingly burdensome terminal costs in recent years justify a 15-percent minimum.—Id., pp. 74-5.

Since the preponderance of traffic to and from the East moves through Chicago, Peoria, or St. Louis, those cities should be the principal dividing points; and Mackinaw City, Mich., and Kewaunee, Wis., are proper division points for cross-lake traffic. As no dissatisfaction is expressed with present grouping of interior Illinois interchange points with Chicago, Peoria, or St. Louis, that grouping may properly be observed in applying divisions over the three major dividing points; also, East Hannibal, Cairo, and Thebes, Ill., Mississippi River crossings north and south of St. Louis, may properly be on the St. Louis

basis. On shipments through both Chicago (or Peoria) and St. Louis, latter should be the primary dividing point; and on shipments through both Chicago and Peoria, Peoria should be the division point.—Id., p. 75; and since rates over the cross-lake routes apply to and from all points in transcontinental territory and are equalized with those via Chicago, a common basis of primary divisions should apply.—Id., 322 I.C.C. 491 (515-6)*.

Divisions to complainant midwestern lines out of rates between defined midwestern and transcontinental territories, which are also used in subdividing western shares of official-transcontinental divisions, are shown by the cost evidence to be too low on the whole, partiularly on traffic to and from Chicago, St. Louis, Memphis, and New Orleans. As groups on which present divisions are based are in some instances improperly related to distance, divisional scales provide a more appropriate basis; and in view of prescription of a higher level of class rates within mountain-Pacific territory than east of Rocky Mountains, it is logical and consistent to provide a higher scale of divisional factors for transcontinental territory, including Montana. However, a difference greater than 10 percent would not be justified on the record; scales prescribed reflect that difference and will produce moderate increases in the most important midwestern divisions.—Id., 321 I.C.C. pp. 29, 72, 76-7, 78.

There is no sinlgle yardstick or criterion for determining fair divisions; question of what constitutes just and reasonable divisions involves making of practical judgments and cannot be solved like a mathematical problem. No existing divisional scale, nor any cost scale or other method suggested could be used as an exclusive guide for prescription of official-transcontinental divisions; in the equities of the situation as disclosed by the evidence, the commission necessarily had to exercise its judgment. Rate levels are not controlling in prescription of just and equitable divisions, since the objective is to prescribe fair proportions of revenue whether the rates be on a high or a low level; and in fixing such proportions the relative contribution of the parties, in terms of costs, furnishes the initial indication of what is just and equitable among the carriers. From standpoint of cost and revenue needs the divisions prescribed do not exceed a fair and reasonable level; they would return to eastern roads slightly less than their share in proportion to out-of-pocket costs of the traffic, and are necessary to maintain all essential parts of the transportation system in effective working condition.—Id., 322 I.C.C., pp. 499, 506-8.

In criticizing the scales of divisional factors prescribed for service in western territory, defendants incorrectly assume that construction of a divisional scale is primarily a matter of cost and mathematics. Costs do not control contours of rate scales, and in divisions it is equally true that costs must be used with discretion and flexibility of judgment, particularly in determining contours of divisional scales involving relation of terminal and line-haul cost elements; and due consideration of the respective situations of long-haul and short-haul carriers requires that the solution be based on judgment rather than formula. It is reasonable to divide the rates to some extent in accordance with the way they are made; the divisional scales prescribed generally reflect the Docket 29886 scale, and the 10-percent higher factors for mountain-Pacific territory, with other adjustments, give fair recognition to evidence as to costs and revenue needs.—Id., pp. 508-9.

Exclusion of New Mexico east of described line from definition of mountain-Pacific territory was not improper; that line was the boundary originally fixed in 1920, and the railroads have consistently applied the 28300 class rates to and from eastern New Mexico in accordance with wish of the State commission; moreover, mountain-Pacific class-rate investigation recognized eastern New Mexico as being in 28300 territory.—Id., p. 509; and there is no reason for excluding from the prescribed divisions those affecting competitive routes between Missouri River and Utah gateways when

defendants argued at hearings that such matters were extraneous to the issues and could be considered in subsequent negotiations.—Id., pp. 509-10; other requested modifications considered and certain changes made in divisional groupings and in specific divisions to eliminate inconsistencies, as shown in restatement of prescribed transcontinental-eastern divisions in appendix B-1 and of scale of western divisional factors in appendix C-1.—Id., pp. 516-9.

126. Elements considered affecting reasonableness.—[Vols. 1, 6, 9, 11, 14-17, 19].—That prescription of Docket 28277 divisional scale, already in effect as between official territory carriers and midwestern lines, for divisions of joint interterritorial rates between the eastern lines and plaintiff transcontinental western lines would promote uniformity of official-w.t.l. divisions is not significant enough to be basis for the commission's order, since that factor was relied on, not as a reason for prescribing that scale, but for denial of the eastern roads' request for prescription of an entirely different divisions schedule. The report is clear that the commission did not intend uniformity to be one of circumstances it was considering, in compliance with §15(6), in determining that the 28277 scale would be just and reasonable for transcontinental-eastern divisions. Had uniformity been intended as an important consideration, basic requirements of proper administrative procedure would have required the commission to discuss affirmative virtues of having uniform divisions apply throughout w.t.l. territory.—Atchison, T. & S.F. Ry. Co. v. United States, 225 F. Supp. 584 (603-4)*.

A validly established and currently applied basis of divisions of revenue derived from similar traffic moving in the same or adjacent territory under similar circumstances may properly be considered a criterion, though not necessarily a controlling one, of reasonableness of prescribing the same basis of divisions of the revenue in issue. It was proper for the commission to compare the record in the case under review, involving divisions of rates between southern border points and official territory, with that in Docket No. 29885, in which divisions of rates between those border points and southern territory were prescribed; all parties before the commission in the case under review were also parties in that proceeding, and the two records differ little in respect of border-point traffic.—Boston & M. R. v. United States, 208 F. Supp. 661 (676, 677)*; and the commission's finding that the involved Coast Line stations in Virginia in official territory are border points was supported by substantial evidence.—Id., p. 678.

See also Atchison, T. & S.F. Ry. Co. v. United States, §15(6), n. 7.

127. —Public interest.—[Vols. 1, 6, 9, 11].—There are no differences in importance to the public attributable to the contending groups of mountain-Pacific, midwestern, or eastern lines. As estimated by defendants, average hauls on transcontinental traffic are over 1,200 miles in mountain-Pacific territory, about 1,000 miles in the Midwest, and 630 miles in official territory; therefore, since about 58 percent of the total service measured by miles is rendered in the last two territories, railroads performing that part of the service have an important part in transcontinental transportation.—Akron, C. & Y. R. Co. v. Atchison, T. & S.F. Ry. Co., 321 I.C.C. 17 (70)*.

Public interest does not warrant increase in mountain-Pacific railroads' divisions of transcontinental rates to provide investment funds claimed to be required for enlarged facilities commensurate with industrial development of that region. Railroads throughout the country have increasing need of funds for improvements and new equipment, and there is no apparent difference in degree of urgency as between territorial groups. Considering changes in economic and transportation conditions since the present transcontinental divisional structure first took shape, evidence is convincing that, under requirement of the public interest that so far as possible all essential parts of the transportation system

be maintained in effective working condition, there should be increases in eastern lines' divisions reflecting revenue needs as well as cost.—Id., p. 71.

128.—Efficiency and economy of carrier.—[Vols. 1, 6, 9, 11, 15, 16].—While the commission is required to give "due consideration" to efficiency with which the carriers concerned are operated, in the nature of things it is very difficult to assign a definite weight to that element in appraising either relative costs of service or revenue needs; and evidence of criticism of past managements of complainants New York Central and Chicago & North Western by their successors is discounted as proof of inefficiency.—Akron, C. & Y. R. Co. v. Atchison, T. & S.F. Ry. Co., 321 I.C.C. 17 (58-9, 68)*.

Carrier efficiency cannot be appraised solely by statistical comparisons, as too many varying conditions and circumstances enter into the equation for it to be said with mathematical certainty that one carrier is more efficiently operated than another. Southern Ry's statistical comparisons do not bear out its claims of inefficient operation by Louisville & Nashville or support its contention that the efficiency factors used reflect greater productivity on its part; nor does the evidence concerning efficiency warrant finding that L&N is in any way mismanaged. On the contrary, there is ample evidence that L&N has for some 10 years past taken concrete steps and made a concerted effort to improve its overall service. Both carriers are generally being operated efficiently and neither should be considered the more efficient with respect to the coal traffic involved.—Louisville & N.R. Co. v. Southern Ry. Co., 319 I.C.C. 639 (649-51, 657)*.

Though Southern alleges inefficiency in L&N's failure to use the short-line route from considered Kentucky and Tennessee mines to Middlesboro, Ky., for interchange with it there instead of at Knoxville, no through route has been operated via Middlesboro for over 30 years, terrain and grades in that area are adverse, facilities for interchange in volume at that point are inadequate, and extensive investment would be required, largely duplicating facilities now available at the gathering points of Corbin and Loyall, Ky. Also, segregation of loaded cars at latter points for movement via Middlesboro would entail added mileages, burdensome backhauls, disruptions of service, and addition of new trains, thus increasing expenses incurred over the present Knoxville route. Use of the Middlesboro route would be unpractical and would not enhance efficiency.—Id., p. 651.

129.—Originating, intermediate, or delivering carriers.—[Vols. 1, 6, 9, 11, 12, 14-16].—Southern Ry's contention that Louisville & Nashville's division of their joint coal rates from Kentucky and Tennessee mines should be determined solely by the 40-mile distance from the Windrock, Tenn., base group to the Knoxville interchange, with differentials added for traffic from other groups, on theory that the originating carrier has complete control over size of the groups and measure of the differentials, overlooks fact that in some instances such matters have been prescribed. While coal rates are generally made on a group-and-differential basis, and the constant proportions allocated to the terminating carrier under that divisional method may be appropriate in other circumstances, as applied to considered rates that method operates to L&N's disadvantage by producing divisions disproportionate to amount and cost of service performed by it. Relative services performed by both carriers, plus fact that L&N as initial carrier supplies all cars used to move the traffic and must from time to time extend its branches to new coal areas, are duly reflected in prescribed divisional scale.—Louisville & N.R. Co. v. Southern Ry. Co., 319 I.C.C. 639 (644-5, 658-9, 661)*.

131.—Financial needs of carriers.—[Vols. 1, 6, 9, 11, 12, 15-19].—The commission's finding that increase of some $3 million annually in revenue of eastern railroads as results of prescription of Docket 28277 scale for dividing joint official-w.t.l. rates

between eastern lines and plaintiff transcontinental western lines would be consistent with revenue requirements of the respective groups, without indicating what evidence or which respective groups' requirements were considered, shows that it considered impact of that scale entirely from standpoint of the eastern lines, ignoring its possible shortcomings and impact on plaintiffs. It does not appear that the commission considered substantial evidence of revenue needs of all parties, either as groups or as individual lines, since consideration is shown only of revenue needs of the eastern lines, and not all their needs were shown on individual basis. As the 28277 scale principally affects lines with shorter hauls in official territory, it would not be unreasonable to require the commission to show some evidence of revenue needs of those lines and some indication that it considered the principal effect of that scale on particular transcontinental lines.—Atchison, T. & S.F. Ry. Co. v. United States, 225 F. Supp. 584 (605-6)*.

Shifts in population and economic changes since 1922, when present divisions of official-transcontinental rates were agreed on, have had marked effect on fortunes of the railroads. Comparisons of 1923-30 with 1946-58 show increase in western lines' share and decline in official-territory lines' share both of total traffic volume and of total railway operating income. Comparisons of freight net operating income of defendant mountain-Pacific lines and complainant eastern lines, and of differences in their passenger deficits (which have important bearing thereon), also comparisons of rates of return on either recorded investment or on elements of value, show that defendants' financial position as freight carriers in the postwar period as a whole has been better than that of either the eastern lines or other western-district railroads, while complainants' position has been the least advantageous. Even more significant is the postwar declining trend of the eastern lines' freight traffic, and there are no developments pointing to a reversal of that trend.—Akron, C. & Y. R. Co. v. Atchison, T. & S.F. Ry. Co., 321 I.C.C. 17 (53-5, 61-5)*.

The comparatively stable freight income of the midwestern lines, together with lesser increases in their passenger deficit than in that of the transcontinental lines, reflects fact that they were less affected by adverse influences which reduced income of the eastern lines after 1952, or by conditions which increased freight earnings of the transcontinental lines in same period; and they also shared in the postwar expansion of railroad freight traffic in the western district. Consideration of all evidence relating to revenue need warrants conclusion that the midwestern lines rank below the transcontinental roads in earning power as judged by statistics for the postwar period, and that their propsects for sustained or increased freight income are less promising; at same time, as a group they are shown to be in considerably more favorable condition than the eastern railroads.—Id., pp. 66-7.

Increase of 10 percent sought by the transcontinental lines in their divisions, on basis of claimed revenue need, would require eastern and midwestern roads to absorb the greater part of reductions approved in 1955 in interterritorial class rates to and from mountain-Pacific territory, principally on basis of improved economic and transportation conditions in that territory. Though for geographical reasons mountain-Pacific lines must look to transcontinental traffic for a greater share of their total freight revenue than midwestern or eastern lines, it is apparent that all railroads, and particularly the eastern lines, both now and in future must depend on long-haul freight to a greater degree than in the past. Conditions are far different than they were 75 years ago when present transcontinental divisional structure was taking shape, and evidence is convincing that there should be increases in eastern lines' divisions reflecting revenue needs as well as cost.—Id., p. 70-1.

Contention that in fixing divisions on basis of "revenue need" the commission must find (1) the amount of revenue which

its order would transfer, (2) that such transfer is necessary to accord complainant carriers their fair proportion of revenue from the traffic involved, and (3) that the transfer will not unduly impair defendants' ability to meet their own revenue needs, is grounded on erroneous assumptions of fact and law. Prescription of just and reasonable divisions is in no sense a "transfer" of money: where carriers cannot agree on divisions, prescription thereof for the future is not a mere partition of property but is one aspect of the general rate policy which Congress has directed the commission to establish and administer. There is no rule, statutory or otherwise, requiring that, as a condition on exercise of the commission's authority under §15(6), it must find in terms of dollars the difference between the revenue produced by lawful divisions and that produced by unlawful; nor is there any authority for contention that evidence as to revenue need can be considered only when it is possible to make the three suggested findings.—Id., 322 I.C.C. 491 (499, 500)*.

The commission's authority under §15(6) to consider carriers' revenue needs, among other things, is not limited in concept or scope; it may take into account and give due weight to revenues from all transportation service, operating expenses and taxes chargeable thereto, and amounts available as compensation for use of all carrier property, as well as the revenues, taxes, and returns attributable to the divisions at issue. In every divisions case it is customary to receive evidence relating to revenue needs, and the commission is free to give such evidence the weight which the particular circumstances justify. In fixing transcontinental divisions the commission has considered evidence relating not only to revenue need but to all factors concerning the public interest in maintaining all essential parts of the transportation system in effective working condition, including both beneficial and alleged detrimental effects of the divisions prescribed. There is no substantial evidence to support a finding that transcontinental defendants are entitled to increased divisions because of greater costs and revenue needs, or that present divisions are fair and should be maintained; the record evidence is substantially to the contrary.—Id., pp. 499-500.

Consideration of "passenger deficits" in the prior report was not improper; significance of that term is well known and such deficits have generally been regarded as having important bearing on financial condition of the railroads, as was recognized in report on investigation of them in 306 ICC 417. In numerous divisions cases the commission has given weight to unequal passenger operating ratios as bearing on respective revenue needs of the contesting groups, and making allowances for such differences in comparing net railway operating income from all services cannot be interpreted as implying need for wholesale discontinuance of passenger service. They are important in connection with transcontinental defendants' claimed revenue needs, and refute the contention that controlling weight should be given comparisons of net railway operating income from all services in 1955-57 when disparity in passenger operating ratios of the eastern and western railroad groups reached its maximum.—Id., pp. 502-5.

133.—Value of property used.—[Vols. 1, 9, 11].—Until about 16 years ago the usual method of computing rate of return was to divide net railway operating income by carriers' recorded investment in railway property, and that method must still be used to compare current rates of return with those for years before 1945, though comparisons of more recent years are based on elements of value determined by use of commission's valuation data. Resulting differences in instant case are due principally to discrepancy between recorded investment and valuation data for the transcontinental lines; and evidence offered to support argument that reproduction cost of certain "pioneer' western lines, as found by Bureau of Valuation, assumed use of facilities nonexistent at time of original construction, fails to disclose infirmities in the valuation process or to show that

defendants' book figures are unimpeachable. As the Bureau considered all elements of value required by the act, controlling weight should be given the showing based on elements of value, consistently with view expressed in other divisions cases.Akron, C. & Y. R. Co. v. Atchison, T. & S.F. Ry. Co., 321 I.C.C. 17 (56-8)*.

Defendants' contention that consideration of acquisition adjustment (chiefly the amount of difference between recorded value of assets acquired and par or stated value of securities issued or assumed, in reorganization or merger) is necessary to reflect road and equipment investment of the parties argues in substance that the value of railway property to be considered as basis of a fair return is net investment therein as shown in the carriers' accounts determined by deduction of the acquisition adjustment in case or reorganized carriers. That contention is not supported by 247 ICC 193, which explained reasons for that adjustment, and it need not be given controlling consideration in connection with evidence pertaining to the "fair return" mentioned in §15(6).—Id., pp. 59-60.

134.—Cost of service.—[Vols. 1, 6, 9, 11, 12, 14-17, 19].—Though cost of service is one of the elements to be considered in fixing divisions, the statute does not establish cost as the primary criterion, and both the commission and the courts have consistently rejected any thought that costs should be the controlling factor; evaluation in a given case of importance of the various factors enumerated in §15(6), including costs, is peculiarly the function of the commission. Abudance of evidence relating to costs was introduced at hearings on complaint assailing divisions of rates between southern border points and official territory, and the commission's report shows that it gave careful consideration to that evidence.—Boston & M. R. v. United States, 208 F. Supp. 661 (675)*.

Cost of service is one of factors to be considered by the commission in its determination of just and fair divisions. After giving careful consideration to all the statutory factors and others within the catch-all provision of §15(6), except relative costs, and concluding that they were of equal weight as among the parties, the commission gave primary weight to the relative costs of the carriers; it then carefully considered all the evidence relating to costs, determined the fully distributed costs of each carrier, and adjusted the division of rates accordingly. While cost accounting is not an exact science, and appraisal of cost figures is a task for experts, there is no indication that the commission's appraisal was inexpertly done; the ultimate facts found are supported by substantial evidence, and the court may not substitute its fact appraisal for that of the commission. The commission's order sustained.—Carolina & N.W. Ry. Co. v. United States, 234 F. Supp. 112 (113-4)*.

Though complainants contend that fully distributed costs, including apportionment of constant costs, are a proper measure of relative costs of service, while defendants rely on out-of-pocket costs, constant costs are incurred as result of transportation as a whole, without regard to amount of service performed, and their assignment to separate service units by an averaging process is necessarily arbitrary, which affects the weight to be given cost studies so constructed. This is not to say that constant costs should be disregarded or that out-of-pocket costs should be the sole basis for judging divisions. Separate showings of both classes of costs are desirable: out-of-pocket costs may be useful in determining amount of revenues required for each contending group to avoid confiscation, while constant costs are significant in consideration of revenue needs. However, §15(6), in requiring due consideration of amount of revenue required to pay the carriers' respective operating expenses, taxes, and a fair return on transportation property, does not require any particular treatment of constant costs.—Akron, C. & Y.R. Co. v. Atchison, T. & S.F. Ry. Co., 321 I.C.C. 17 (50-1)*.

Cost evidence shows that defendant mountain-Pacific lines received as divisions on official-transcontinental traffic between 4.6 and 5.8 percentage points more than

their share of cost of furnishing the service, while midwestern lines received 0.3 to 0.9 percentage points, and complainant eastern lines 4.3 to 4.9 percentage points, less than their proportions of such cost. That evidence is convincing that assailed divisions with the eastern lines favor defendants to an extent not justified by ascertainable cost differences, and that the primary midwestern divisions as a whole are likewise too low. However, that evidence alone does not provide an acceptable pattern for readjusting the existing divisions, which must reflect certain broader aspects of revenue needs. Reasonable divisional bases prescribed as between defendants and both eastern and midwestern lines.—Id., pp. 50, 70, 72.

Since both Louisville & Nashville and Southern Ry. are efficiently operated, there are no substantial differences in importance of their services to the public, and neither is a weak line or in financial distress, any change in existing divisions of joint rates on coal from Kentucky and Tennessee mines on L&N's lines to the Carolinas, interchanged with Southern at Knoxville, must be based primarily on cost-of-service considerations. L&N's restatement of costs, which the commission accepts, accords weight to practically all services provided by the respective carriers, includes allowances for return on property, and gives due effect to L&N's role as originating carrier in supplying all cars used and to any construction of new lines involving investments in road property or additional operating expenses; similarly, all operating conditions encountered by Southern are reflected in its own costs. Such data are adequate and may properly serve as a guide for determination of equitable divisions.—Louisville & N. R. Co. v. Southern Ry. Co., 319 I.C.C. 639 (657-8)*.

The evidence clearly demonstrates that the assailed method of divisions does not afford L&N enough revenues to cover its out-of-pocket costs, whereas those accruing to Southern exceed such costs by almost 30 percent; thus, the present divisions do no meet the minimal requirement that each carrier receive at least enough to reimburse it for its reasonable out-of-pocket costs. But while the percentage relation between the carriers on a fully distributed cost basis differs from that on out-of-pocket basis by only about 0.6 percent, fully distributed costs should be used in determining a fair basis of divisions between them, since constant costs, unrelated to amount of service performed or to service units, are unavoidably incurred and must be recovered; they are therefore significant in determining divisions that will contribute a fair and proportionate share of the overall burden of each of the two carriers.—Id., pp. 659-60.

Accordingly, the unit costs shown for line-haul and terminal services in appendix A are used to construct a mileage scale of divisional factors (appendix B) which reflects the carriers' fully distributed costs on involved traffic, gives due weight to all material factors for any prospective hauls on either line, and will provide divisions of some 47 percent to L&N and 53 percent to Southern, affording each sufficient revenue to cover all its out-of-pocket costs and about 95 percent of fully distributed costs. Though that scale will be just, reasonable, and equitable for the future, the carriers should be permitted to negotiate and agree on any other modified scale devised on same basis; but in event they fail to do so before effective date of the order, the appendix B scale is prescribed to apply thereafter.—Id., pp. 660-1.

141.—Contracts of carriers.—[Vols. 1, 6, 15, 18, 19].—Mere fact that the Docket 28277 scale for divisions of joint official-w.t.l. rates had applied on some eastern-midwestern interterritorial traffic for 13 years, and that its application was broadened by 1955 agreement between eastern carriers and 36 midwestern lines, cannot be significant enough for prescription of that scale for divisions of joint interterritorial rates as between eastern lines and plaintiff transcontinental western lines. While the commission relied to a considerable extent on the 1955 agreement, the lawfulness of divisions thereunder, and sub-

sequent satisfaction of the parties thereto, in determining that the 28277 scale was suitable, the midwestern lines' adoption of that scale was not "conduct of other lines in like situations"; situation of midwestern signatories to that agreement was just the opposite of plaintiffs'. As no similarity of circumstances was demonstrated, grouping of plaintiffs with the midwestern lines was invalid; and, as the evidence tends more to show unlike than like circumstances, the commission erred in finding that the 1955 agreement was "significant and important."—Atchison, T. & S.F. Ry. Co. v. United States, 225 F. Supp. 584 (601, 602, 603)*.

143.—Confiscatory divisions.—[Vols. 1, 9, 12, 16, 17, 19].—It is a minimal requirement of fair divisions that each participant in the joint rate should receive at least enough revenue to reimburse it for its reasonable out-of-pocket costs in order to avoid confiscation.—Louisville & N. R. Co. v. Southern Ry. Co., 319 I.C.C. 639 (659)*.

Section 1. (5) Just and reasonable charges.—[Unchanged. See vol. 11, p. 8973, vol. 15, p. 11901].

Amendments, see footnotes, vol. 1, p. 307, vol. 6, p. 4596, vol. 11, p. 8973; historical note, vol. 1, p. 307.

Historical Note

Rates and fares of railroads within the Alaska Railroad Act, jurisdiction of the commission, see Historical Note concerning Executive Order 11107 following §1(1).

Notes of Decisions

Volume 1—p. 313; Volume 6—p. 4596; Volume 9—p. 7008; Volume 11—p. 8973; Volume 12—p. 10122; Volume 13—p. 10872; Volume 14—p. 11354; Volume 15—p. 11901; Volume 16—p. 12528; Volume 17—p. 13156; Volume 18—p. 13936; Volume 19—p. 14959.

1. Charges required to be just and reasonable.—[Vols. 1, 6, 9, 11, 14].—See Guaranteed Rates, Sault Ste. Marie, Ontario, to Chicago, n. 566a, below.

2. Carrier's right to initiate rates.—[Vols. 1, 6, 9, 11-19].—See also §15(7), n. 7. Carriers may, within the zone of reasonableness, voluntarily publish rates to meet competition, and the issue to be decided in such case is whether proposed rates are lawful. Matters pertinent to a proceeding in which carriers may be required to change their rates are irrelevant in proceeding involving a voluntary rate adjustment.—Boston & M. R. v. United States, 202 F. Supp. 830 (837)*.

When rates are not above the reasonable maximum or below the reasonable minimum, a carrier is at liberty to adjust them within that range, although it cannot be required to do so by the commission. Protestants have stipulated that proposed multiple-car rates on iron ore meet the proper cost standard; they are within the zone of reasonableness, and the carrier may adopt such policy of ratemaking as it deems best, absent a violation of some provision of the act. The commission does not sit in judgment on the wisdom of carriers' proposals, but only on whether or not they would be lawful in terms of the regulatory statute.—Iron Ore from Cleveland, Ohio, to Ohio and Pennsylvania, 323 I.C.C. 746 (742-3)*.

8. "Just" and "just and reasonable" defined.—[Vols. 1, 6, 9, 12, 15, 17, 19].—While respondents' prima facie showing that proposed increased transcontinental rate on furfural residue further processed than screened is within the zone of reasonableness and therefore not violative of §1(5) is accepted, there remains the question whether resulting distinction between residue further processed and not

further processed than screened is a just and reasonable classification of property under §1(6).—Transit of Furfural Residue at Various Points, 322 I.C.C. 794 (804).

13.—Maximum rates.—[Vols. 1, 6, 9, 11-18].—Under §1 railroads are entitled to publish and charge reasonable maximum rates; so long as they do not go below the minimum limit of reasonableness, they may voluntarily public rates which do not attain the maximum, but the commission cannot, under §1 alone, require them to do this.—Lynchburg Traffic Bureau v. Chesapeake & O. Ry. Co., 319 I.C.C. 74 (80)*.

Although certain of the rates proposed on fresh vegetables from California and the Southwest to official, w.t.l., and southern territories exceed those prescribed as reasonable maxima from Texas in 279 ICC 671, 284 ICC 206, substantially changed transportation conditions since that proceeding have affected the rate structure on that traffic, and the outstanding order therein, which tended to constrict the carriers' ratemaking judgment, has served its purpose. Therefore, insofar as it requires continued maintenance and observance of maximum bases, that order is vacated, thus restoring respondents' full discretion in establishment of lawful rates on those commodities.—Fresh Vegetables from Tex., Calif., Ariz., and N. Mex., 319 I.C.C. 141 (159).

Provision that charges on incentive class-rate basis approved for application between points in southern and official territories, under which rates 75 percent of the otherwise applicable class rates apply on that portion of a c.l. shipment rated class 35 or higher in uniform classification which exceeds 22,000 pounds or a lower published minimum weight, shall apply as maximum on any shipment rated lower than class 35 and on all shipments subject to exceptions or commodity rates, found just and reasonable.—Incentive Class Rates—Between Official & Southern Ter., 319 I.C.C. 448 (449, 456).

See also United States v. Oklahoma City-Ada-Atoka Ry. Co., n. 260, below.

Prescription of a lower maximum level of rates on coarse grains and products within, to, and from the South than on wheat and flour is not warranted by heavier truck and barge movement of the former. No sound basis appears for modifying conclusion in prior proceedings that maximum reasonable rates should apply on all grains and products thereof and that a lower level of rates on particular grains and products could be justified by circumstances and conditions attending particular movements. Instant proceeding is concerned primarily with maximum reasonable rates, and circumstances relating to movement of grain and products generally are sufficiently the same to warrant no differentiation in level of maximum rates thereon, especially in view of the many processes they undergo in transit. Moreover, in some areas competitive factors affecting movement of wheat might possibly warrant lower rates thereon than on coarse grains.—Southeastern Assn. of R. & Util. Commrs. v. A., T. & S.F. Ry., 321 I.C.C. 519 (543)*.

In a proceeding involving the issue of maximum reasonableness the commission's concern must be directed to whether the rates are too high for the service rendered; this determination must be made apart from the relation of the considered rates to other rates.—Id., p. 545.

Although carriers may establish rates that are less than reasonable maxima, the commission cannot require them to do so. Assailed rates on export rice from Arkansas origins to Mobile are below the maximum level prescribed on domestic clean rice in 219 ICC 5, as adjusted for general increases, and also below fully distributed costs; in absence of special circumstances, a rate less than full cost of the service is less than a maximum reasonable rate. Moreover, compared rates are depressed to meet competition and therefore provide no standard for determining maximum reasonableness; assailed rates are not shown to be unjust and unreasonable.—Alabama State Docks Dept. v. Alabama, T. & N. R. Co., 321 I.C.C. 347 (353)*.

The mere fact that defendants are able to realize profits from considered movements of bentonite clay at assailed rates does not warrant finding that those rates exceed a reasonable maximum level when revenue-cost relation thereunder is similar to that under rates on other products of mines.—American Colloid Co. v. Akron, C. & Y. R. Co., 321 I.C.C. 91 (109, 113).

In passing on issue of whether assailed rates are above a reasonable maximum level, consideration must be given to the transportation circumstances. Assailed 21,000-pound rates on fresh meats cannot be found unjust or unreasonable when evidence regarding distances, costs of service, earnings, and comparisons of those rates with motor-compelled adjustments of rates on higher minima is appraised.—Louisville Chamber of Commerce v. Ahnapee & W. Ry. Co., 318 I.C.C. 749 (754).

That rates exceed out-of-pocket or even fully distributed costs does not establish that they exceed a reasonable maximum level.—Zonolite Co. v. Great Northern Ry. Co., 315 I.C.C. 303 (307)*.

14.—Minimum rates.—[Vols. 1, 6, 9, 11-19].—See also §15(1), n. 72.

One of the criteria of a reasonable minimum rate is whether the carrier would be better off from a net revenue standpoint with it than without it. Establishment of lower rates without any indication of prospective net gain results only in needless dissipation of carrier revenues.—Tractors—T.L. & W.T.L. Territories to S.W. & W.T.L. Terr., 319 I.C.C. 758 (765).

See also City of Wilmington case, n. 58, below.

To say that a reasonably compensatory competitive rate should not only cover out-of-pocket costs, including the variable portion of a reasonable return after Federal income taxes, but also make a contribution to the transportation burden is not inconsistent with the general rule that out-of-pocket costs establish the rate floor, and the commission has often found, in light of particular facts, that a minimum reasonable rate is one that contributes something more than carrier's bare out-of-pocket costs. Moreover, the commission is not precluded from finding that a rate which merely covers out-of-pocket costs is a reasonable minimum, or, in exceptional circumstances, that a minimum reasonable rate may be less than out-of-pocket cost as determined under Rail Form A formula.—Baltimore & O. R. Co. v. Chicago & E.I. R. Co., 318 I.C.C. 771 (783)*.

See also New York Central R. Co. v. United States, §15(1), n. 35.

Where unregulated competition or unlawful trucking operations are clearly dominant in moving the traffic involved, the minimum reasonable level of rates must be determined in light of necessity to meet the competition of carriers who bear none of the burdens of regulation and are in no position to claim its benefits.—Grain in Multiple-Car Shipments—River Crossings to So., 321 I.C.C. 582 (604)*.

Although competition between railroads and Sea-Land for Florida citrus traffic has resulted in a series of reductions depressing their rates to a level inconsistent with economic wellbeing of either, and, as Sea-Land has recently increased its rates, all concerned would profit by a return of the rail rates to higher levels, issuance of a minimum-rate order to achieve that end would not be justified when the record is inadequate for determination of the inherent cost or service advantages of the respective modes, and not all their rates are in issue.—Frozen Juice and Fruit from Florida to the North, 319 I.C.C. 577 (595).

Effect of §22, see Tennessee Products & Chem. Corp. case, §22(1), n. 2.

20. Reasonableness question of fact.—[Vols. 1, 6, 9].—The question of reasonableness is one of fact, and Congress has entrusted the issue of reasonableness of rates charged solely to the commission. There can be no doubt that the commission must rest its decisions on transportation policy, and though in stating considerations that moved its judgment that domestic-rate charges applicable on certain war-blocked export shipments of Government freight were unjust and unreasonable the commis-

sion did not expressly find that the lower export rate was reasonable, or state any succinct test, the considerations stated support the national transportation policy. The commission properly weighed all pertinent factors, and provided for just and reasonable charges on the shipments concerned. Issue of reasonableness of the rates is not open to the court in carrier's action to recover deductions by the Government in amount of difference between the export and domestic rates; district court's order in injunction proceeding, reversing the commission, reversed and case remanded with direction to dismiss the petition for want of equity.—Pennsylvania R. Co. v. United States, 315 F. 2d 460 (465)*.

Whether or not assailed fine-coal rates to Lynchburg, Va., are unreasonable is a question of fact to be determined by the commission and not one of law to be decided by the court. The commission found no unreasonableness, and the lack of evidence indicating unreasonableness fully justified that finding; in this situation the court cannot interfere with the commission's decision; sustained.—Lynchburg Traffic Bureau v. United States, 225 F. Supp. 874 (876)*.

21.—Facts changing from time to time.—[Vols. 1, 6, 9, 11-18].—While there have been significant changes throughout the West in conditions which prevailed at time of original prescription of rate scales in Western Cement and related cases, specifically in population growth and increased use of cement, average length of haul—a very significant factor from a transportation standpoint—has remained comparatively unchanged, due to establishment of additional mills over the years. As present rates appear generally to serve needs of the cement industry and are not shown to be excessive, defendants, which have been alert to changing conditions and diligent in making rate adjustments where warranted by competition, should not be required to reduce previously prescribed rates where intermodal competition is not influential. Complaint dismissed.—United States v. Oklahoma City-Ada-Atoka Ry. Co., 319 I.C.C. 182 (186)*.

22. Flexible limits of judgment in determining reasonableness.—[Vols. 1, 6, 9, 11, 12, 14, 15].—"Just and reasonable" are not fixed, unalterable mathematical terms; there must be range for the flexible limits of judgment which belong to the power to fix rates, and there could be no flexible limits if all rates were to be measured by their relation to cost or by a predetermined rule. Thus, notwithstanding any advantages that might result from an inflexible application of commission's cost formulas, where reduced rates fail by only a small margin to meet long-term out-of-pocket costs as determined by formula and their cancellation would mean loss of large-volume traffic that can be handled in existing trains, the commission should exercise its discretion to arrive at a sound and logical conclusion; that such cases reasonableness of rates should not be determined solely by accounting and statistical computations.—Coal from Southern Mines to Tampa and Sutton, Fla., 318 I.C.C. 371 (389, 391).

Tests of Reasonableness

23. In general.—[Vols. 1, 6, 9, 11, 12, 15-19].—The commission's determination that the level of Southern Ry's proposed multiple-car rates on grain from Ohio and Mississippi River crossings to southern destinations is violative of §1(5) rests in large measure on its prior erroneous conclusion that the proposed 240-cent minimum for movements under 346 miles violates §3(1); the commission determined that when Southern cured that unlawful discrimination its annual car utilization would decline, its costs would increase, and the proposed rates (without the unlawful discrimination) would not be adequately compensatory. The conclusion as to violation of §1(5) is invalid and must be set aside because it is based on the invalid premise that §3(1) has been violated, and on findings as to car utilization and costing procedures which are not supported by substantial evidence in the record.—Cincinnati, N.O. & T.P. Ry. Co. v. United States, 229 F. Supp. 572 (579-80)*.

The fixing of railroad freight rates is a complex and intricate undertaking requiring expert knowledge and skills; is different from determination of rates to be charged by public utilities of other types. Since rates must be established on hundreds of different commodities, the question becomes, in part, whether the entire rate structure will result in a fair return to the carrier; and no one rate may be considered individually. Numerous factors must all be considered in determining reasonableness of a rate; the task comprehends much more than mathematical computations. As the outcome depends on sound judgment and keen discernment based on an appraisal of various considerations and their interrelation, strong reliance must be placed on expertise of the regulating agency.—United States v. I.C.C., 221 F. Supp. 584 (586-7)*.

The best test for determining reasonableness and justness of rates is by a comparison with those applicable to the same or similar commodities.—General Motors Corp. v. United States, 207 F. Supp. 641 (648)*.

24. Determination not matter of formulas or rules.—[Vols. 1, 6, 9, 11, 16, 17].—Freight traffic managers' straight and modified formulas for constructing export-import rates and fixing port relations on traffic between points in interior southern territory and Virginia, South Atlantic, and gulf ports, discussed, pp. 715-717. Though carriers have voluntarily used those formulas as a guide in relating rates, they have disregarded them in particular situations, and record does not warrant freezing of relationships between those ports in export-import rates on commodities generally on any specific basis.—City of Wilmington v. Alabama G.S. R. Co., 316 I.C.C. 709 (723-4)*.

25.—Method or basis of construction.—[Vols. 1, 6, 9, 11-19].—That unit train rates on steam coal, subject to annual volume minima and a minimum weight per trainload shipment, contingent on furnishing of cars by shipper or consignee at no expense to carrier, and with free time for loading and unloading restricted to 4 hours from time of placement of cars, do not reflect traditional concepts of ratemaking in itself affords no basis for disapproval.—Natural Gas Pipeline Co. of America v. N.Y.C. R. Co., 323 I.C.C. 75 (76, 85).

From the practical viewpoint of inducing investment in grain storage and milling facilities there is little logic in use of McGraham formula (47 ICC 409) to develop proposed rates on grain and products from Pittsburgh to trunkline and New England territories; in order to remove existing substantial and competitively disabling rate discrimination in favor of Buffalo, respondents could easily have developed a more practical and consistent pattern of rates from Pittsburgh properly related to distance and to present rates from Buffalo. However, the reduced rates proposed are based on the proper McGraham percentage of 60, as modified for constructing grain rates, and are as closely aligned with those from other origins as is possible under that formula while retaining some competitive relation to Buffalo. Considered rates are reasonably compensatory and otherwise lawful and may properly be approved.—Grain from Pittsburgh, Pa., to Eastern Base Points, 322 I.C.C. 218 (222-4, 226)*.

Present record does not support a finding of unlawfulness of existing rate-break structure on grain from western district to the South. None of the complaining parties seriously press claim that that structure is inherently unlawful, and the majority oppose any change in the ratebreak system; lawfulness of the absolute rate-break rule is before the commission, and will be decided, in another proceeding. Through western grain interests urge prescription of single-factor rates via the river crossings to southern destinations in lieu of present proportionals from the crossings, which apply on ex-barge as well as ex-rail grain, establishment of single-factor rates lower than assailed combinations, without corresponding adjustment for barge-rail traffic, would result in higher charges on ex-barge traffic beyond the crossings than

on ex-rail, and court decisions in recent years leave no doubt that provision would have to be made for application on ex-barge grain of equivalent of the rail divisions from the river crossings.—Southeastern Assn. of R. & Util. Commrs. v. A., T. & S.F. Ry., 321 I.C.C. 519 (541-3)*.

26.—All relevant facts to be considered.—[Vols. 1, 6, 9, 11, 18].—In determining reasonableness of reduced southbound rates on coal to Tampa area, fact that respondents' use of covered hopper cars that would otherwise move empty in connection with northbound movement of phosphate rock has improved their revenue position, considered; also fact that, since unregulated water carriage with which the reduced rates are designed to compete is set up for movement of phosphate rock northbound and coal southbound, cancellation of the reduced coal rates would not only compel respondents to forgo that traffic but would also pose a serious threat to their northbound phosphate rock movement.—Coal from Southern Mines to Tampa and Sutton, Fla., 318 I.C.C. 371 (375, 377, 384, 385).

27. Reasonableness per se.—[Vols. 1, 9, 19].—Rates on fruits and vegetables from the Southeast and Southwest to New York City stations made differentially higher than those to New Jersey points in New York rate group because of extraordinary delivery services provided thereunder are not unreasonable per se when with few exceptions they fail to cover the total line-haul out-of-pocket rail costs, and revenue derived therefrom plus revenue from separate unloading charges at Manhattan pier stations fails to meet out-of-pocket costs of carriers delivering perishables at those stations.—Port of New York Authority v. Aberdeen & R.R. Co., 318 I.C.C. 469 (474, 475)*; but although the assailed rates and charges are not too high in an absolute sense, it does not follow that they are just and reasonable within §1(5).—Id., 321 I.C.C. 738 (742-3, 746)*.

Failure to show defendants' costs of holding cars of grain for inspection at certain rate-break markets, where no charge therefor is assessed, is not material to reasonableness per se of assailed charge for holding cars for inspection and disposition orders at Grand Forks and Jamestown, N. Dak. As assailed charge is generally below cost of holding cars at those points, free holds at other inspection points are not persuasive that it is unreasonable or that its assessment is an unreasonable practice.—Grand Forks Cham. of Com. v. Great Northern Ry. Co., 321 I.C.C. 356 (361-2).

That assailed rates on fresh meats, minimum 21,000 pounds, from Louisville, Ky., and Columbus and Madison, Ind., to trunkline and New England territories are maintained on percentages of Chicago-New York rates prescribed in 47 ICC 409 (McGraham formula), which differ from percentages prescribed as maxima for motor-competitive rates on higher minima from those origins in 313 ICC 345, does not make the assailed rates unreasonable per se, since rates depressed to meet competition are not a proper measure of maximum reasonableness of other rates.—Louisville Chamber of Commerce v. Ahnapee & W. Ry. Co., 318 I.C.C. 749 (750, 753).

Proposed reduced rates on fresh meats are compensatory and clearly within the zone of reasonableness when they produce minimum revenues greater than existing rates on lower minimum and substantially exceed fully distributed costs. Disapproved on other grounds.—Fresh Meats, Ill., Ind., Ky., Ohio & Mo. to Points in Fla., 318 I.C.C. 5 (9).

See also Institute of Scrap Iron & Steel case, n. 574, below.

28. Reasonableness relatively.—[Vols. 1, 6, 9, 11-19].—While a doctrine of "relative unreasonableness," unless carefully defined and applied, would tend to confuse unnecessarily the purposes of §§1(5) and 3(1), intent of §1(5) is not limited to prohibition of assessment of rates and charges that are too high in an absolute sense. The commission is authorized by §1(5) to determine what is a reasonable relation of rates within a general rate structure, regardless of de-

pressed level of rates under attack, and in considering justness and reasonableness of rates it frequently resorts to rate comparisons to determine reasonableness from a "relative" point of view. See 345 US 146.—Port of New York Authority v. Aberdeen & R.R. Co., 321 I.C.C. 738 (746)*. [But see dissent.]

"Relative unreasonableness" may not be considered under §1; questions of rate relations must be decided under §2 or §3.—Southeastern Assn. of R. & Util. Commrs. v. A., T. & S.F. Ry., 321 I.C.C. 519 (545)*.

Prescription of rates on scrap iron or steel within official territory on maximum basis 150 percent of iron-ore rates is not warranted; unlike that of scrap, movement of iron ore is highly concentrated and largely over single-line direct routes; average per-carload weight of ore and scrap differs widely; ore does not require the expensive terminal services characteristics of single-carload movements such as scrap. Moreover, iron-ore rates have never been related to scrap rates, but were designed to meet needs of the traffic within eastern territory in light of competition between lake-front or seaboard mills and interior furnaces.—Institute of Scrap Iron & Steel, Inc. v. Akron, C. & Y. R., 316 I.C.C. 55 (56, 62-3).

Prescription on scrap of a maximum basis 70 percent of prevailing rates on pig iron is likewise unwarranted; pig iron moves from relatively few origins and chiefly to foundries and steel furnaces not integrated with blast furnaces, while scrap moves to almost all steelmaking locations; average carloading of pig iron is about 10 tons heavier and it generally moves for longer distances and with considerable regularity between same points over same routes; moreover, prevailing scrap rates on basis 87 percent of manufactured iron and steel rates are mostly lower than pig iron rates, some of which are reduced to meet water competition.—Id., pp. 56, 63, 67.

Rates on scrap and other raw materials of the steel industry have always been made to reflect circumstances and conditions peculiar to each transportation service; transportation characteristics of iron ore, pig iron, and manufactured iron and steel articles and those of scrap differ widely, and there is no justification from a transportation standpoint for requiring a rigid relation between rates on scrap and any of those commodities. Assailed rates on scrap are not shown to be unjust or unreasonable.—Id., p. 67.

Assailed westbound rates on meats and packinghouse products from the Midwest, which were published to meet motor competition and were approved in 309 ICC 529, established relations the same as those in competitive motor carrier rates concurrently approved in 309 ICC 551, and are not shown to be unlawful. Westbound rates of motor and rail carriers were in a state of turmoil, and present relative stability should not lightly be disturbed. Complainant's dissatisfaction is due to substantial difference in comparative spreads, Missouri River versus Mississippi River points, on eastbound and westbound movements, but the record affords no basis for requiring equalization of such spreads.—Cudahy Packing Co. v. Akron, C. & Y. R. Co., 318 I.C.C. 229 (244)*.

Rates charged on Government shipments of crude rubber from port of New York to Pauline, Kans., were unreasonable to extent they exceeded corresponding rates to Topeka when they had originally been reduced to parity with Topeka at the Government's request; Pauline is about 7 miles distant from Topeka in same rate base area and transportation conditions to both are substantially the same; during the reparation period the reduced Topeka basis sought applied from North Atlantic ports to other points in official and western territories, and Pauline had parity with Topeka in rates from certain Gulf ports and western origins; and delay of nearly 14 months in reestablishing parity of assailed rates with Topeka is not satisfactorily explained.—United States v. Atchison, T. & S.F. Ry. Co., 315 I.C.C. 259 (263).

Even if delay in establishing reduced rates on naphtha from Texas to South Bend,

Ind., to maintain prescribed relation with rates to Illinois could be considered an unreasonable practice, the mere fact that rates to Illinois were reduced and those to Indiana were not is inadequate support for finding assailed South Bend rate to exceed the maximum of reasonableness.—Phillips Petroleum Co. v. Panhandle & S.F. Ry. Co., 315 I.C.C. 378 (379).

31. Reasonableness tested by length of haul.—[Vols. 1, 6, 9, 11-16, 18, 19].—While distance is seldom the sole factor to be considered in fixing reasonable rates, it is a matter entitled to weight, particularly where other circumstances appear substantially similar.—Van Waters & Rodgers, Inc. v. Western Pac. R. Co., 315 I.C.C. 743 (746).

See also Agsco Chemicals case, n. 224, below.

Average length of haul of cement between points in western district, which is a very significant factor from a transportation standpoint, has remained comparatively unchanged in the 200-mile range since original prescription of rate scales in Western cement and related cases, notwithstanding significant changes in other conditions. In absence of special considerations, consumers naturally resort to the supply nearest to point of use, and competitive reductions in rates for the relatively shorter distances have enabled railroads to retain a substantial share in the traffic, but to extend the reductions to the longer hauls would result merely in reduced, rather than improved or protected, revenues. As present rates appear generally to serve needs of the cement industry and are not excessive even on complainant's showing, they are not shown to exceed reasonable maxima. Complaint dismissed.—United States v. Oklahoma City-Ada-Atoka Ry. Co., 319 I.C.C. 182 (186)*.

34. Volume; sporadic or steady movement.—[Vols. 1, 6, 9, 13-19].—Inasmuch as the movements involved were sporadic or occasional in nature, and class rates are designed for such traffic, commodity rate on "machine parts" found applicable on petitioner's rotary kiln parts, including shell sections thereof, is not shown to have been unjust or unreasonable when it is lower than the class rate which otherwise would have applied when considered shipments moved.—Forms or Unfinished Shapes, Fabricated—Classification, 316 I.C.C. 679 (681-3).

46. Disturbance of adjustment.—[Vols. 1, 6, 9, 11-19].—Every change in rates is a disruption pro tanto of a previous structure and may not be condemned by reason of that bare fact alone.—Iron Ore from Cleveland, Ohio, to Ohio and Pennsylvania, 323 I.C.C. 746 (754)*.

Comparison of present adjustment of barge-rail and barge-lake-rail rates on grain and products via Buffalo to trunkline and New England territories with barge-rail rates via Pittsburgh, after effectiveness of reductions from Pittsburgh proposed to make it competitive with Buffalo, indicates that the proposed rates will not cause unlawful disruption of the grain rate structure or lead to its instability. Proposed rates approved as reasonable and otherwise lawful.—Grain from Pittsburgh, Pa., to Eastern Base Points, 322 I.C.C. 218 (230-1)*.

While alternative multiple-transit grain rates from considered origin States, except Montana, to coastal terminals are compensatory and pose no threat to continued barge or barge-truck competition, to the extent that parity in rates to Astoria, Oreg., (prescribed in 38 ICC 16) is destroyed, respondents must establish multiple-transit rates which restore such parity. As grain rates from central and western Montana origins (including those considered) have been reduced since institution of the investigation without protest, suspension, or investigation, a chaotic situation would be created if considered Montana rates were found unlawful; and, since rates on same level from other Montana origins would be unaffected, rate relations essential to proper functioning of a grain-rate adjustment would be destroyed. Also, Montana rates to coastal terminals do not affect barge or barge-truck services via Columbia River ports; are not opposed; and

they meet needs of respondents and the shipping public, are compensatory, reasonable, and otherwise lawful; for like reasons the rates from Montana to California are lawful and necessary.—Grain from Idaho, Oreg. & Wash. to Ports in Oreg. & Wash., 319 I.C.C. 534 (563-4)*; Id., 326 I.C.C. 358 (362, 369)*.

Carrier-initiated rates which are compensatory and required by local competition may not be disapproved merely because they depart from an overall structure the perpetuation of which would be harmful to the proponent carriers.—Corn and Corn Products from Ill. and Ind. to the East, 319 I.C.C. 568 (573).

Proposed establishment, in lieu of present single-factor rates, of combinations of local and proportional rates to and from Danville, Ill., on corn and products from certain Illinois and Indiana origins to the East on same level as rates via Chicago under rate-break adjustment, to restore former parity of Danville with Chicago and Kankakee on direct movements to the East, will not unlawfully disrupt the grain-rate structure and is a reasonable exercise of managerial discretion. While historically Chicago has been the sole ratemaking point on grain from Illinois to the East, the present structure developed as result of various competitive circumstances, and numerous interior Illinois points are accorded general equality with Chicago. Combinations of separate factors provide more flexibility to meet competition in origin areas than single-factor rates which require concurrence of all participating carriers; proposed rates are compensatory and otherwise lawful; approved.—Corn and Corn Products from Ill. and Ind. to the East, 319 I.C.C. 605 (611, 614, 615, 617).

Key-port limitation requested by petitioners on prescription of nonprejudicial export-import rates between interior southern points and Wilmington, N.C., based on differences in distance as between Wilmington and Morehead City, N.C., is not necessary to avert disruption of the southern territory import-export rate structure generally. That finding was not intended to provide a basis for other port relations, but merely to stabilize rates at the source from which disruption threatened to spread.—City of Wilmington v. Alabama G.S.R. Co., 319 I.C.C. 620 (623, 625).

47. Rules affecting rates.—[Vols. 1, 6, 9].—Common carriers should be permitted to establish round-trip rates to meet competition by use of reasonable return-load rules, provided total charges for the round trip are reasonably compensatory.—Motor Vehicles on Trilevel Flatcars—Chicago, 318 I.C.C. 89 (92).

While the general rule that no distinction should be made in charges for transportation, depending on whether shipments are prepaid or collect, ordinarily would apply with equal force to a consolidation rule, that is not to say that equality establishes the lawfulness *ipso facto* of such a rule.—Aggregate Rates on Wearing Apparel—Ry. Exp. Agency, 318 I.C.C. 737 (744, 746)*.

Profit to the Carrier

51. Consideration given value of property. [Vols. 1, 6, 9, 11].—Although considered reduced rates on coal to Florida points fail to produce the return on investment in road property and equipment normally considered in computing long-term out-of-pocket costs, rigid adherence to doctrine that each commodity transported should make a substantial return on such investment would divert a large volume of the traffic to private water carriage and would probably result in loss of a portion of northbound phosphate rock movement. Since the coal traffic can be economically handled in existing trains without significant addition of train-miles, and since taxes and investment in road and equipment will be incurred whether that traffic moves or not, reasonableness of the reduced rates should not be determined solely by accounting and statistical computations. Cost evidence shows that considered rates are reasonably compensatory.—Coal from

Southern Mines to Tampa and Sutton, Fla., 318 I.C.C. 371 (377, 390).

Reduced rates proposed by Southern Ry. on grain in multiple-car shipments in jumbo hopper cars, minimum 450 tons, would in all instances exceed out-of-pocket costs and in some instances fully distributed costs if return on investment were eliminated as was done in 318 ICC 371. However, while proposed reductions resemble those considered in that case in being designed to meet unregulated competition, a return on Southern's large investment in the new jumbo-type cars appears appropriate; even with such a return included the proposed rates appear compensatory on an overall basis.—Grain in Multiple-Car Shipments—River Crossings to So., 318 I.C.C. 641 (685)*.

52. Right of carrier to fair profit, generally.—[Vols. 1, 6, 9, 15, 17].—Cost and revenue data show that revenues under assailed rates on bentonite clay from Belle Fourche, Wyo., to w.t.l. and official territory destinations exceed costs of service by amounts which compare favorably with revenue-cost relations on other products of mines. Therefore, while level of assailed rates is generally higher than level of rates on other products of mines, and revenues under those rates more than cover territorial average fully distributed costs, the revenue-cost relation under the assailed rates is not shown to result in unreasonably high profits to defendants.—American Colloid Co. v. Akron, C. & Y. R. Co., 321 I.C.C. 91 (109).

54. —Upon each service.—[Vols. 1, 6, 9, 12-19].—Although the commission, in condemning as too low Southern Ry's proposed multiple-car rates on grain in jumbo hopper cars, found that there was no reliable evidence to support Southern's claimed utilization figure of 40,000 car-miles annually, and therefore computed the return on basis of annual utilization figure of 20,852 for conventional hopper cars, Southern entered an exhibit indicating that in actual experience the utilization figure for the "Big John" cars was 60,212 under multiple-car rates and 39,079 under single-car rates. Advantages of the new cars in making possible a much higher ratio of payload to deadweight, coupled with elimination of delays, render unsound the commission's use of a utilization figure identical with that for conventional equipment.—Cincinnati, N.O. & T.P. Ry. Co. v. United States, 229 F. Supp. 572 (576, 579)*.

56. —Returns from schedule as a whole.—[Vols. 1, 6, 9].—So long as rates as a whole afford railroads just compensation for their overall services to the public, the commission is not barred from fixing or approving noncompensatory rates for the carriage of some commodities when the public interest is served thereby.—Grain from Pittsburgh, Pa., to Eastern Base Points, 322 I.C.C. 218 (233)*.

Although proposed rates on grain and products from Pittsburgh, Pa., to Boston, Mass., and Rockland, Maine, are part of a territorial group adjustment, and in several recent proceedings involving group adjustments the commission has declined to condemn isolated rates that appeared to be noncompensatory, compensativeness of proposed rates to other considered destinations is not of material importance in determining reasonableness of the rates to Boston and Rockland, which are admittedly noncompensatory (except on flour in airslide cars), especially since the destinations are basing points and proposed rates to those points would have widespread application throughout New England. On reconsideration, proposed reduced rates to Boston and Rockland found not shown to be just and reasonable.—Id., 325 I.C.C. 669 (676-7, 681)*.

57. —Capital stock; and dividends.—[Vols. 1, 6, 9]. Dividend payments cannot be relied on as a sound basis for determining financial condition of railroads.—United States v. Oklahoma City-Ada-Atoka Ry. Co., 316 I.C.C. 731 (750)*.

58. —Earnings.—[Vols. 1, 6, 9, 11-13, 17, 19].— Prescription of minimum earnings, based on computations derived from cost finding section's public statement No. 5-59, as a basis of reasonable import-export rates between interior southern territory points

and Virginia, South Atlantic, and gulf ports might defeat its purpose by encouraging carriers to reduce their rates to the prescribed minimum level, with resulting needless dissipation of revenues. Moreover, aside from difficulties resulting from use of proposed minimum earnings table, cost alone is an inadequate basis for determining issues involving rate relations between the various ports.—City of Wilmington v. Alabama G.S. R. Co., 316 I.C.C. 709 (723)*.

Reduced unit train rates on steam coal, based on annual volume minima, with cars to be supplied by consignor or consignee at no expense to carrier, do not entail an unwarranted sacrifice of railroad revenue when they exceed estimated out-of-pocket costs to a greater extent than do conventional coal rates. The greater net revenue per ton on increased tonnage in the unit train operations would increase, rather than dissipate, defendant's net revenues.—Natural Gas Pipeline Co. of America v. N.Y.C. R. Co., 323 I.C.C. 75 (84).

Although, based solely on mathematical computations, respondents as a group have not demonstrated that reduced multiple-car rates on soybean cake and meal from midwestern origins to southern and eastern ports for export will result in increased revenues, a reasonable expectation thereof is clearly apparent. While considered rates have not been in effect for an entire crop-year and have not been fully exploited by processors and exporters, they have stimulated exportation of soybean cake and meal and consequently will increase respondents' revenues; respondents have thus met the standard enunciated in 313 ICC 495; the multiple-car rates approved.—Vol. Rates on Processed Meal—Midwest to Ports, 322 I.C.C. 456 (468).

Respondents' managerial opinion that reduced rates on grain and products from Pittsburgh to trunkline and New England territories would increase net revenue contribution of that traffic is based on fact that none is moving at present rates and any movement under the proposed rates would be an improvement. While establishment of a new flour mill at Pittsburgh would deprive respondents of participation in present rail movement of flour into Pittsburgh area from other mills of same shipper, which traffic would not be replaced by inbound grain movement because 75 percent of wheat to the new mill would move by barge, the minimum inbound rail movement of wheat is estimated to be far in excess of the present flour movement. Protestants' argument that flour milled at Pittsburgh would replace rail movements of flour to that area from mills at other points is not buttressed by any facts, and they have not shown that the proposed rates would decrease respondents' net revenues; on the contrary, the weight of evidence supports respondents' opinion as to their beneficial revenue effect.—Grain from Pittsburgh, Pa., to Eastern Base Points, 322 I.C.C. 218 (227-8)*.

In a territorial group adjustment such as that proposed, cost studies raising mere doubts as to compensatory nature of a few rates do not justify condemnation of the entire adjustment, especially when comparison of existing rates from other milling points reveals similar exceptions. Comparison of the proposed rates from Pittsburgh with those in effect from other origins warrants finding them reasonably compensatory and thus just and reasonable in conformity with provisions of §1.—Id., pp. 232-3.

Rate per carload on automobiles in trilevel cars from Flint, Mich., to Minneapolis is reasonable compensatory when revenue per automobile exceeds restated out-of-pocket costs by $4.07 for standard cars (12 per trilevel car) and $3.13 for compacts (15 per car).—Motor Vehicles (Trilevel Truckaway) from Flint, Mich., 323 I.C.C. 215 (225); and per-carload rates from Wixom and Dearborn, Mich., to Milwaukee are likewise compensatory when on standard cars from Wixom revenue per automobile exceeds out-of-pocket costs by $1.50 and on compacts from Dearborn by $1.53.—Motor Vehicles—Wayne & Wixom, Mich., to Milwaukee, Wis., 323 I.C.C. 266 (276).

Though defendants' revenue needs do not justify maintenance of higher rates and

charges on fruits and vegetables to New York City stations than to New Jersey stations in New York rate group, requirement of rate equalization to all points in the group need not contravene such needs. Rates and charges to New Jersey stations can be increased to the New York City station level, or rates to the former can be raised and those to latter reduced. Also, costs of extraordinary accessorial services at New York pier stations can be covered by separately stated accessorial charges.—Port of New York Authority v. Aberdeen & R.R. Co., 321 I.C.C. 738 (750)*.

Proposed rates on bulk cement, including unloading or allowance of 35 cents a net ton to consignee in lieu thereof, are compensatory when they will yield $1.90 per car-mile for average haul of 94.6 miles even after deduction of the unloading allowance.—Allowance, Unloading Cement, Covered Hopper Cars—East, 319 I.C.C. 711 (715)*.

Cost of Service

71. Applied generally.—[Vols. 1, 6, 9, 11-13, 15, 16, 18].—Neither the commission nor the court has held that lesser cost of service is a finding without which the commission may not fix a charge, division of rate, or differential; both have consistently rejected any thought that costs should be the controlling factor in ratemaking.—Boston & M. R. v. United States, 208 F. Supp. 661 (675)*.

Costs alone are not determinative of the maximum limits of rates. As a general rule, however, rates that do not cover full costs cannot be bound to exceed maximum reasonable rates in absence of other cogent cost evidence; even an excess of revenue over full cost does not require conclusion that such rates are unjust and unreasonable.—Southeastern Assn. of R. & Util. Commrs. v. A., T. & S.F. Ry., 321 I.C.C. 519 (545)*.

There is no absolutely equitable and practical method of apportioning increased costs over all the traffic carried on the rails, especially on a commodity like coal which is produced at numerous locations historically related ratewise by differential amounts per ton and competing for sales in the same markets.—Increased Rates on Coal and Petroleum Coke, 316 I.C.C. 159 (175).

72. Applied specifically.—[Vols. 1, 6, 9, 11, 12, 14-16, 18, 19].—Rate reduced to meet private-carrier competition is compensatory when it will equal or slightly exceed out-of-pocket costs, including return on investment.—Beer, in Containers, St. Louis to Arlington Heights, Ill., 316 I.C.C. 812 (817, 819).

73. Margin of profit implied.—[Vols. 1, 6, 12, 15, 19].—See New York Central R. Co. v. United States, §15(1), n. 35.

76. Water-lines costs.—[Vol. 1, 9, 11, 12, 15, 18, 19].—Put-through charge paid by shipper for handling grain from a truck through a river elevator to a barge is a nonterminal expense which shipper considers when selecting a mode of carriage for grain and should be included in barge and truck-barge costs for purpose of intermodal cost comparisons.—Grain from Idaho, Oreg. & Wash. to Ports in Oreg. & Wash, 319 I.C.C. 534 (557)*.

Although no reliable information was developed to show actual weight of all lumber transported by the principal water-carrier protestant, and cost of port-to-port movement therefore cannot be determined precisely in cents per 100 pounds, the standard weight of 3,300 pounds per thousand board feet can be taken as a reasonable estimate of average weight of dimension lumber, which comprises some 80 percent of protestant's total traffic and is the most susceptible to rail diversion at reduced rates; on that basis, the record indicate that protestant's fully distributed costs are approximately equal to rail out-of-pocket costs; thus, protestant must be considered the low-cost mode for that traffic.—Reduced Transcontinental Lumber Rates, 1961, 318 I.C.C. 815 (837, 844).

As water-carrier protestant's cost study does not show actual cost of moving pig iron from origin plants to docks at Lake

Erie ports, use of average eastern-district intraterminal switching cost appears to be a fair measure of such cost; and approximate cost shown at Cleveland for spotting cars on dock and dock cleaning, which does not include other dock expense such as depreciation, maintenance, or taxes, may be used for all four origin ports. But charge for movement of the pig iron to rear of dock at Chicago, which is incurred only when conditions require it, and postseason costs, should not be included in computing a representative cost for the rail-water-rail movement; also no wharfage charge should be included for use of the private docks concerned.—Pig Iron, Buffalo, N.Y., to Chicago, Ill., and Gary, Ind., 315 I.C.C. 601 (610-1)*.

Protestant Sea-Land's costs for movement of ammunition from New Haven to Dallas and Fort Worth in 1957 are not shown to be representative of its costs of transporting garden hose from Paterson, N.J., to those destinations; the 1957 costs relied on are not necessarily indicative of present costs, nor is there any firm indication that costs of transporting ammunition, a heavy, high-density commodity, are representative of those for garden hose, a comparatively light and bulky commodity. In absence of other cost data for handling of considered traffic, Sea-Land cannot be found the low-cost mode.—Garden Hose & Electric Cable from N.J. or R.I. to Tex., 319 I.C.C. 227 (228)*.

Although Seatrain contends that 95 car units should be used as a divisor against 1960 expenses, since that is the normal working standard of its vessels and will be an understatement when 25-percent increase in capacity of two vessels is accomplished, use of an anticipated load factor is not warranted merely because rates for the future are in issue. The 78.6 units per vessel to one destination port and 69.5 to the other, which reflect Seatrain's actual experience in 1960, are a mere valid measure for estimating costs, since it has not achieved a sustained average loading of 95 cars since 1955. Also, costs of record for all-rail movements are based on actual experience, and water costs should be similarly based to provide a meaningful comparison.—Wrought Pipe to the Southwest, 319 I.C.C. 310 (316)*.

Respondents challenge protestant water carrier's allocation of vessel expense equally between eastbound and westbound intercoastal voyages, considering that preponderance of involved canned goods tonnage moved eastbound and that extra vessels were used to accommodate it; they also question propriety of allocating and expense on basis of average vessel time of 32.8 days when scheduled turnaround time, exclusive of additional time accasioned by adverse weather or other unavoidable circumstances, is 70 days; as 5 days' voyage time elapses between start of a voyage at Portland, Oreg., and time when vessel clears Los Angeles, substantial veriations in vessel costs occur from and to the different ports; another deficiency in water costs shown is failure to include return on property used for transportation purposes.—Canned Goods from Pacific Coast to Eastern Points, 315 I.C.C. 769 (787-8).

In addition, though the 9-month study period includes about 2 months when allowance was made for shipments tendered on pallets, volume of shipments so tendered is not shown; though expenses for shipments handled loose and on pallets are not shown separately, expense for stevedoring palletized shipments is at least 2.85 cents per 100 pounds less than for stowing loose and, therefore, protestant's net revenue position as to such shipments, contrasted with those tendered loose, was improved by at least 8.5 cents; its claim that the reduced rail rate would deprive it of necessary revenue is not sustained by the evidence.—Id., p. 788.

No valid comparison between water and rail costs can be made because, in addition to the deficiencies noted, water costs shown do not consider protestant's entire operation, thus it cannot be determined if full costs have been considered; also, since objective is to determine what constitutes the lower-cost service for the entire transportation from origins to destinations, cost

of transportation to and from the ports (as to which there is no probative showing) would have to be combined with adequate water costs to obtain total costs comparable to those shown for respondents; though one shipper ceased using intercoastal service when spread between the rail and water rates became 40 cents, the record affords no definite indication of overall costs of the water routes for comparison with like costs over the all-rail routes.—Id., pp. 788-9.

Protestant's argument that the commission should see that such deficiencies in its cost computations were cured before proceeding to a decision is apparently directed to promulgation of a cost formula for water carriers; however, the inadequancies pointed out are in basic data solely within protestant's knowledge, not in treatment or application of particular formulas.—Id., p. 789.

77. Water-and-rail rates v. all-rail rates. [Vols. 1, 11, 14, 16, 19].—The court has carefully examined the record before the commission, including the railroads' cost evidence, which failed to show additional costs for handling ex-barge shipments of grain from the river ports over corresponding handling of ex-rail shipments covered by the outbound carrier's division of the joint rail rates. The reshipping division applied from the interchange points, and the reshipping rate sought by the water carriers was for the same service. Plaintiffs' witnesses could not specify any circumstance entitling the outbound carrier to greater compensation for reshipment of ex-barge than received for ex-rail grain; only where the witness assumed that a service performed by the inbound rail carrier for all-rail shipments would be performed by the outbound carrier on an ex-barge shipment could a cost differential to the outbound carrier be anticipated, and no such service or cost thereof was established. The commission's finding that a cost differential for transited ex-rail and ex-barge grain for reshipment from the ports was not substantiated is supported by the evidence and was not erroneous.—Chicago, R.I. & P. R. Co. v. United States, 233 F. Supp. 381 (388)*.

78. Costs related to particular rates or sets of rates.—[Vols. 1, 6, 11, 12, 18, 19].—Assailed rates on grain and products within, from, and to the South embrace services holding out many costly features, of which transit is not the least, and move a huge volume of traffic over wide areas; in those circumstances, the contribution to overhead cannot be found excessive when the effective maximum basis of rates averages 99 percent of fully distributed costs.—Southeastern Assn. of R. & Util. Commrs. v. A., T. & S.F. Ry., 321 I.C.C. 519 (545)*; use of the average is entirely proper since complaint is directed against the through or total charges for transportation between the surplus producing areas outside the South and the southern destinations. Thus, it is not controlling that a somewhat higher rate-to-cost ratio obtains within the South; rates and costs from all origins must be considered.—Id., p. 544.

To affirm, as requested, the finding in original report that assailed joint rail-water rates on coal from Illinois-Indiana mines to upper lake ports for transshipment beyond the docks are noncompensatory would entail use of outdated cost evidence. Recommended report on further hearing contains current cost data not available at original hearing, and examiners' restatement of such current costs, which the commission accepts, shows that assailed rates exceed such costs to representative destinations; the rates are therefore compensatory and not below a minimum reasonable level; approved.—Chicago, B. & Q. R. Co. v. Chicago & E.I. R. Co., 322 I.C.C. 138 (145-6)*.

Mere showing that assailed rates on grain and products from stations on Illinois Central in northern and central Illinois to port elevators at Mobile, Ala., and Pascagoula, Miss., for export bear a higher percentage ratio to territorial average out-of-pocket costs than rates 3.5 cents lower to New Orleans group does not establish that the assailed rates exceed reasonable maxima or are otherwise unreasonable.—Standard Milling Co. v. Illinois Central R. Co., 321 I.C.C. 252 (259).

Overstatements in respondents' computation of costs for movement of packaged wine from California to the Midwest result from, among other things, application of western district average interchange switching costs to all movements regardless of whether or not such switching occurs, and from application of full 1960 national average less-and-damage expense for alcoholic beverages although experience of one respondent shows that such claims have been materially reduced through use of DF cars. However, even with the overstatements, proposed reduced rates equal or exceed out-of-pocket costs for all but 6 of 50 representative movements studied. Giving due recognition to the overstatements, it is reasonable to conclude that the proposed rates would exceed out-of-pocket costs for all movements and are thus compensatory.—Wine, Pacific Coast to Western, S.W. & Central States, 321 I.C.C. 683 (706, 708, 712).

Equipment used in transportation of coal is subject to some nonproductive time due to variation in demand, strikes, and shut-down of mines for annual vacations. Also, certain size coal is loaded for which the mines have no immediate orders, and those cars are left at the mines until the coal is sold; additional switching is required for separation of such no-bill cars from traffic ready to move. Idle time should therefore be included in turnaround time on coal movements.—Louisville & N.R. Co. v. Southern Ry. Co., 319 I.C.C. 639 (646)*.

Since the cost data of record result in part from studies developed in another proceeding, which concerned the movement of traffic generally, to extent that such data affect the ultimate costs shown for considered vegetable traffic there is a failure to establish cost of performing the particular services involved. Moreover, since the cost evidence was developed the circumstances of the transportation have changed considerably, owing to publication of incentive rates and changes in packing methods which have reduced claims and eliminated much origin switching. For these reasons the cost evidence does not warrant finding that the fresh vegetable rates under investigation are less than compensatory and therefore less than minimum reasonable.—Fresh Vegetables from Tex., Calif., Ariz., and N. Mex., 319 I.C.C. 141 (158-9).

Protestants' objection to restatement in recommended report of costs for transporting asphalt in 20-tank-car lots, based on public statement No. 5-60 and respondents' underlying costs, on ground that the restated costs were not based on information of record and not prepared by a person subject to cross-examination, is without merit. Statement 5-60 is a public document which was used by all parties in submitting cost evidence, and was available for use in evaluating the submitted cost statements based thereon; and working papers used in developing respondents' cost statement were available at hearing and were used by protestants.—Asphalt to Iowa, Michigan, Minnesota, and Wisconsin, 316 I.C.C. 117 (123-4).

Although respondents have had insufficient experience with considered multiple-car rates to determine actual costs, and record does not permit determination of the precise savings from moving shipments in 20-car lots and returning the empties in lots of more than one car, it is axiomatic that handling of 20-car units would be less expensive per unit than handling of the same shipments in single-car units; thus, it seems certain that system average costs overstate expenses on asphalt traffic in 20-car units.—Id., pp. 123, 124.

80. Rates below cost of service.[Vols. 1, 11, 19].—In absence of special circumstances, a rate less than fully distributed costs of the service is less than a maximum reasonable rate.—Alabama State Docks Dept. v. Alabama, T. & N. R. Co., 321 I.C.C. 347 (353)*.

Although the added-traffic theory of rate-making finds little support in commission reports, this is not to say that rates constructed on that basis should never be approved: unregulated competitors of

authorized carriers can and do employ added-traffic pricing. Moreover, some added-traffic rates of authorized carriers have become effective without specific commission approval; railroads have made rates on that theory from time immemorial in meeting competitive rates of carriers more favorably situated. However, the rates in issue can be approved without invoking the added-traffic theory.—Coal from Southern Mines to Tampa and Sutton, Fla., 318 I.C.C. 371 (388).

Considered reduced rates on coal should not be condemned solely because they fail by a small margin to meet long-term out-of-pocket costs as determined under Rail Form A; notwithstanding advantages of an inflexible application of commission's cost formulas, where cancellation of reduced rates would mean loss of important large-volume traffic that can be handled in existing trains the commission should exercise discretion to arrive at a sound and logical conclusion consistent with the national transportation policy. In light of directive of §15a(3) to consider facts and circumstances attending movement of the traffic by proponent of a rate, the reduced rates are compensatory even though they fail to produce the return on investment in road and equipment normally considered in computation of out-of-pocket costs.—Id., pp. 389, 390.

81. Wages, taxes, interest.—[Vols. 9, 11-19].—*Taxes:* By act of June 28, 1962, § 5, provisions of statute imposing 10-percent tax on amounts paid for transportation of persons, 26 USC §4261, were amended so as to extend application thereof to all such transportation beginning before Nov. 16, 1962. Public Law 87-508, 87th Congress, H. R. 11879.

Federal income taxes are a proper consideration in determining compensativeness of rates, since it is the variable portion of operating expenses, rents, and taxes, plus a return on investment and an allowance for Federal income taxes, that comprise the out-of-pocket cost level.—Wisconsin & Michigan S.S. Co. v. Grand Trunk W. R. Co., 323 I.C.C. 298 (303)*.

In computing costs of considered movements, defendants computed Federal income tax on basis of 52 percent of revenue of the North Western (initial carrier) in excess of the computed out-of-pocket costs; however, railroads do not pay Federal income taxes on such an inflated basis, and the North Western, because of its large carry-forward of losses, has paid no Federal income taxes for several years. The base amount against which that tax rate was applied is therefore wholly unrealistic and contrary to acceptable accounting principles and practices.—American Colloid Co. v. Akron, C. & Y. R. Co., 321 I.C.C. 91 (105).

Wages: Return on investment, in cost computation reflecting 1959 level exclusive of costs for line haul and damage claims, should not be increased by wage and price increases since 1958.—Pig Iron, Buffalo, N.Y., to Chicago, Ill., and Gary, Ind., 315 I.C.C. 601 (608)*.

What Constitutes Cost of Service

85. Out-of-pocket costs.—[Vols. 1, 6, 9, 11-19].—The term out-of-pocket costs, as now used in railroad parlance, refers to "long term out-of-pocket costs" which include much more than a layman might think from the description; see 199 F. Supp. 635.—New York Central R. Co. v. United States, 207 F. Supp. 483 (493, Note 8)*.

Rate reduction, counterreductions, and further cuts in retaliation could go unchecked until the rates reached the level of out-of-pocket costs. However, when rates in issue cover long term out-of-pocket costs, reviewing court may fairly require from the commission some intelligible and factually supported statement of a ground, within the commission's statutory power, why they should not be allowed to take effect.—Id., 494.

Exclusion of return on investment in road property from out-of-pocket costs requires special justification. Use of this cost factor is not an attempt to reflect further investment needs for movement of any given traffic, but rather to consider railroads'

long-term needs for investment capital.—Wisconsin & Michigan S.S. Co. v. Grand Trunk W. R. Co., 323 I.C.C. 298 (303)*.

Where a large number of rates are in issue and they generally exceed out-of-pocket costs by a reasonable margin, all of the rates may be considered just and reasonable. Subject to the qualification, rates should be compensative over all routes for which they are published. On basis of restated out-of-pocket costs, assailed joint rail-motor rates on automobiles in trilevel cars from Lansing and Pontiac, Mich., to Minneapolis for motor movement beyond generally meet that criterion for the rail part of the movement, including movement over car-ferry routes, and are reasonably compensatory.—Id., pp. 306, 309, 312; on reconsideration, however, to the extent that assailed rates do not exceed restated out-of-pocket costs on movements involving railroad car-ferry service, as specified, they are found to be unjust and unreasonable.—Id., 325 I.C.C. 244 (246)*.

Where carriers are permitted, in exercise of their managerial discretion, to establish rates only slightly above out-of-pocket costs, proponents are required to show special circumstances justifying their establishment at such a low level, especially where the rates are published to apply on other than low-grade traffic.—Malt Liquors from Peoria, Ill., to Newark, N.J., 316 I.C.C. 378 (380).

Proposed multiple-car rates on corn are compensatory when they exceed out-of-pocket costs for single-car movements by 123 to 153 percent and, since multiple-car movements are less costly than single-car, would yield an even greater excess over out-of-pocket costs for that service.—Corn, Mich., Ohio, and Pa. to Augusta and Portland, Maine, 319 I.C.C. 344 (353)*.

Respondents' study, which is reasonably representative of their costs of operation, especially in view of their knowledge of what adjustments are necessitated for the particular movement, indicates that proposed reduced rates on grain and products from Pittsburgh to trunkline and New England territories, applied via normal routes and depending on the particular route used, exceed out-of-pocket costs in all but a few instances; and comparison of rates in effect from Buffalo, Chicago, and St. Louis reveals similar exceptions. In those circumstances, and in such a territorial group adjustment, cost studies raising mere doubts as to compensatory nature of a few rates do not justify condemning the entire adjustment or a minor part thereof. Proposed rates found reasonably compensatory.—Grain from Pittsburgh, Pa., to Eastern Base Points, 322 I.C.C. 218 (232-3)*.

Defendent's cost data for considered movements of bentonite clay are defective in exclusing the 4-percent return on investment normally included in out-of-pocket costs.—American Colloid Co. v. Akron, C. & Y. R. Co., 321 I.C.C. 91 (105); return on investment is included in the commission's cost finding section's statements as an item in computing out-of-pocket costs and, while such statements have not been formally adopted by the commission, numerous decisions have reflected computations consistent therewith.—Coal from Fulton County, Ill., to Minnesota, 315 I.C.C. 627 (631); before rates may be found reasonably compensatory, they must be shown to cover out-of-pocket costs of the service and to make some contribution to overhead.—Paper and Paper Articles from Wisconsin to Illinois, 315 I.C.C. 165 (168).

Normally, the proper level by which to judge a rate is the long-term out-of-pocket cost, which includes a proportionate share of the joint round-trip cost. Respondents' omission of that expense in computing costs for southbound coal movement, on theory that covered hopper cars used are returning empty in phosphate rock service and that loading coal in them creates no additional car-miles or train-miles, results in a short-term variable cost, and reduced rate thereon is essentially a backhaul rate.—Coal from Southern Mines to Tampa and Sutton, Fla., 318 I.C.C. 371 (382).

Although the commission generally employs fully distributed costs to determine relative inherent cost advantages

of competing transportation modes, it may, in exercise of its informed judgment, make intermodal cost comparisons on basis of out-of-pocket costs; use of out-of-pocket costs as a determinant is especially appropriate where no other cost evidence has been presented by the parties.—Automobile Lamps, Alcoholic Liquors—Pa. to Tex. and La., 319 I.C.C. 335 (338).

86. —Full proportion of all costs.—[Vols. 1, 6, 12, 15, 19].—Fully distributed costs are not necessarily the proper standard of reasonableness for assailed rates; the commission has frequently, in competitive rate situations, approved rates which exceed out-of-pocket costs and thus make some contribution to overhead expenses.—Prue Motor Transp., Inc. v. Boston & M. R., 316 I.C.C. 299 (302).

Ascertainment of Cost

90. Principles involved, generally.[Vols. 1, 6, 9, 11-14, 17-19].—Weighted average miles generally reflect distance factors with greater accuracy than average mileage over all available singleline routes, as they relate to actual transportation performed during a representative period and may therefore properly be used in ascertainment of cost of service, whereas simple averages may merely represent hypothetical conditions.—Pig Iron, Buffalo, N.Y., to Chicago, Ill., and Gary, Ind., 321 I.C.C. 121 (127)*.

Suggested use of composite costs for all 6 railroads involved in movement of imported iron ore from ports of Baltimore, Philadelphia, and New York to 17 destinations in central territory would serve no useful purpose when one primary reason for determining costs is to provide comparisons as between those ports and the routes serving them. Protestants' proposal to "normalize" maintenance costs by use of average expense over a 5-year period, rather than considering such costs for the most recent year available, is unsound in light of differences in financial condition and capital expenditures of certain carriers during that period, and effects of mergers and eliminations of track mileage, all of which directly affected maintenance costs.—Iron Ore from Eastern Ports to C.F.A. Points, 321 I.C.C. 473 (485)*.

While costs of an individual carrier are more appropriate than those based on regional averages, separation of expenses of TOFC service based on respondent's own formula provides no basis for inclusion of equipment and joint facility rents and return on investment, excludes all taxes other than payroll, and does not provide for determining costs of various kinds of switching, or for separation of out-of-pocket and constant cost elements; moreover, there is no way of varifying the summary data used in its cost statement.—Glassware, Illinois and Missouri to New Orleans, La., 316 I.C.C. 559 (561-2).

In computing cost of movement of packaged wines from California to the Midwest, respondents' use of tare weight of 33 tons for noninsulated DF cars, rather than average of 24.8 tons for standard boxcars, was proper, since that type of equipment is extensively used and the weight reflects an average between the lighter boxcars and refrigerator cars and the heavier, insulated DF cars.—Wine, Pacific Coast to Western, S.W. & Central States, 321 I.C.C. 683 (704-5).

Since complainant motor carrier is not shown to have definite knowledge of type of train service operated between considered points, defendant's use of average-weight train costs for entire distance to farthest destination over route of movement through an intermediate destination was proper in absence of evidence definitely establishing the type of trains, way or through-freight, used.—Prue Motor Transp., Inc. v. Boston & M. R., 316 I.C.C. 299 (301); but in computing line-haul costs, complainant's use of mileage over route actually used for the traffic was proper.—Id., p. 301.

In defendant's cost computation, actual weight of trains handling the lake-cargo coal during the test period was not used because such trains were experimental and

not necessarily permanent in that operation; in the circumstances, complainant's use of average tons per train-mile based on actual operations in preceding year is more representative of day-to-day operations than defendant's computation on basis of constructive train weights.—Chicago, B. & Q. R. Co. v. Chicago & E.I. R. Co., 315 I.C.C. 37 (50)*.

Objection to protestant's computation of line-haul out-of-pocket costs for considered multiple-car movement of coal based on average tonnage for through trains in western district, which is less than tonnage in a 45-car movement used by respondent, overlooks tonnage of trains handling empty cars to the mines. Line-haul costs should be computed on basis of train weights for the round-trip movement, and while record does not show such weights other than those used by respondent, since latter are slightly higher than the territorial average they may be accepted for the through train movement.—Coal from Fulton County, Ill., to Minnesota, 315 I.C.C. 627 (632).

Since proposed rate on liquefied gas from Oklahoma City to Memphis area would cover only respondent's line-haul movement, adjustment to reduce car-mile cost based on Rail Form A data by amount included therein for average interchange services was appropriate; adjustment to include only costs for one intertrain or intratrain switch movement was based on the best data available—a survey of trains operating between those points; use of through-train costs was also correct for movement between two large shipping areas; however, such costs should have been computed on basis of published minimum rather than maximum weight of contemplated shipments.—Liquefied Petroleum Gas, Oklahoma City to Memphis Area, 316 I.C.C. 189 (191).

91. —Equitable distribution of transportation burdens.—[Vols. 1, 9, 11, 13, 15-17, 19].—Amounts for passenger and l.c.l. deficits are properly includible in fully distributed costs; as long as those deficits exist, they must be borne by the c.l. traffic, including the commodity movement concerned.—Pig Iron, Buffalo, N.Y., to Chicago, Ill., and Gary, Ind., 315 I.C.C. 601 (608)*.

Though each transportation service should pay its own way so far as is practicable, without casting any burden on other traffic, passenger deficits have been considered in passing on reasonableness of general freight-rate increases, on assumption that such deficits could not reasonably be expected to be borne by the passenger traffic from which they resulted.—Texas Intrastate Passenger Coach Fares, 318 I.C.C. 151 (153)*.

Although all cost studies submitted are based on defendant's 1960 operating costs, which for the first time reflected a change in its allocation of certain expenses between passenger and freight services that resulted in a reduction in freight costs, evidence respecting the study which produced the new allocation is inadequate to support any conclusion as to its validity, and it cannot be found, therefore, that the revised allocation is improper.—Baltimore & O. R. Co. V. Chicago & E.I. R. Co., 318 I.C.C. 771 (777-8)*.

92. —Cost accounting not an exact science.[Vols. 1, 6, 9, 11-13]—Since the issue as to proper method of determining cost of movement of considered import ore traffic is debatable, to say the least, the court respects the commission's judgment.—New York Central R. Co. v. United States, 207 F. Supp. 483 (493-4)*.

94. —Localization of items to particular service costs.—[Vols. 1, 6, 9, 12-17, 19].—Rail Form A formula provides for assignment of actual costs of operation, including rents and taxes other than Federal income taxes, to service units used by the railroads in performing the transportation. It is adaptable for use in ascertaining the service-unit costs of a single railroad or a group of railroads collectively.—Frozen Juice and Fruit from Florida to the North, 319 I.C.C. 577 (582).

Average through train weights are more representative of actual train weights in computing costs of transporting bentonite clay from Belle Fourche, Wyo., to w.t.l. and

official territory points than lower western district average train weight.—American Colloid Co. v. Akron, C. & Y. R. Co., 321 I.C.C. 91 (107).

95. —Apportionment of joint costs; system average costs.—[Vols. 1, 6, 9, 11, 13, 15-19].—Use of cost developed by studies of the actual traffic movement is preferable to system-average costs.—Chicago, B. & Q. R. Co. v. Chicago & E.I. R. Co., 315 I.C.C. 37 (49)*; however, though open-top equipment used in moving coal entails lower investment cost than boxcars and, for considered coal movement, costs relating solely to open-top equipment would have been preferable, in absence thereof use of system average freight-car expense for origin or destination service is the only reliable alternative.—Id., p. 51.

In restating rail costs for movement of imported frozen meats, use of average tare weight for all refrigerator cars, rather than that for refrigerator cars placed in service since 1960, was proper, since there was no showing that the traffic moved or would move in the newer cars, or that they were more representative of cars actually used.—Midwest Emery Freight System, Inc. v. Baltimore & O.R., 321 I.C.C. 637 (641).

While ordinarily average costs are of limited value in determining lawfulness of rates on particular movements, they are entitled to full consideration when they have been adjusted to meet the particular situation and show that the assailed rates are substantially below a compensatory level; such a showing, if not overcome, justifies a finding of unreasonableness. Rail respondents' criticism of cost studies of Bureau of Inquiry and Compliance is insufficient, in absence of actual cost data, to overcome the Bureau's prima facie showing that considered TOFC rates on petroleum and products are unreasonably low; cancellation required.—Petroleum and Products from Oklahoma to Illinois, 318 I.C.C. 425 (428).

Territorial costs used by protestants based on regional averages applying almost wholly to single-car movements are not indicative of probable costs of multiple-car shipments. Where traffic is limited to certain railroads and to specific area, special studies covering costs of those particular movements provide better measure of costs than cost study based on territorial averages; costs computed by respondents afford reasonable approximation of cost of handling involved traffic and are convincing that proposed multiple-car rate on cement is compensatory.—Cement from Pennsylvania to New Jersey, 318 I.C.C. 217 (219-20).

In increasing unit costs for car depreciation to reflect current costs of rail boxcars and hopper cars as established by American Assn. of Railroads, defendants doubled the territorial average car depreciation figure where the AAR's current published cost per car was twice the average for a car of like type in the western and eastern districts, resulting in substantial overstatement of that cost. Such procedure is contrary to sound accounting principles because it not only ignores the average actual value of defendants' equipment but results in a value rightfully attributable to only a fraction of their total equipment. At best, only average class B or class C cars were supplied for movement of complainant's traffic, and in many instances such equipment was rejected for unfitness.—American Colloid Co. v. Akron, C. & Y. R. Co., 321 I.C.C. 91 (105).

Comparisons of per-car and car-mile earnings under proposed multiple-car rates on coal with respondents' system average operating expenses on all c.l. traffic have no probative value for judging a particular point-to-point rate since such average traffic transportation characteristics as load per car, length of haul, weight of car, tare weight of equipment, and percent of empty return do not correspond with those of particular movement in given type of car; in addition, system average expenses shown omitted such items as payroll and freight taxes, per diem rental, and allowance for return on investment.—Coal from Fulton County, Ill., to Minnesota, 315 I.C.C. 627 (630).

Distance as Measure of Cost

104. Distance, computation; circuity.—Although commission's cost-finding statement No. 3-16 increases short-line mileages by 13 percent, in computing line-haul costs on packaged wines moving from California to the Midwest respondents' evidence, based on examination of waybills for movements over basic routes over which the bulk of that traffic moves, has greater probative value as indicating that actual movements average about 5 percent longer than the short-line miles; the 5-percent factor is therefore accepted in restating costs.—Wine, Pacific Coast to Western, S.W. & Central States, 321 I.C.C. 683 (707).

Distances used by respondents in recomputing rail costs for movement of export cottonseed oil to Texas ports are generally based on shortest routing, whether single- or joint-line, authorized in tariff which specifically provides routes to be used and publishes rates from origins on line of each respondent to respective ports. Frequently, numerous routes are published from a given origin to a port or group of ports, although rates are the same regardless of routing, but the record does not show the volume of traffic moving over the various routes. On further hearing, evidence is inconclusive with respect to routes over which considered traffic moves; while respondents would use distances via "logical," "direct," or "practical" routes on assumption that non-transited traffic would not move over more circuitous routes, they admit that large quantities of oil are transited en route; also, what proportion of traffic moves in single- or joint-line service is not clear. Record does not show that proposed rates would be compensatory; not approved.—Cottonseed Oil, Shreveport, La., & Texas to Texas Ports, 323 I.C.C. 698 (702-4)*.

Cost of Particular Services

118. Loading.—[Vols. 1, 6, 9, 11-19].—In restating rail costs for movement of imported frozen meats, examiner's use of at least 10 cents per hundredweight for loading costs at New York, which admittedly reflected cost at Port Newark, N.J., was proper. Assailed rates are restricted to apply on traffic discharged from vessel at Port Newark or Jersey City, or when handled in float service elsewhere in New York port area, but only one float movement was shown, from Brooklyn, a point with which complainant is not concerned. Complainant has the burden of proof, and more representative costs for other than Port Newark are not shown.—Midwest Emery Freight System, Inc. v. Baltimore & O. R., 321 I.C.C. 637 (641).

Unloading service on automobiles moving in trilevel cars is performed at destination or point of interchange with motor carriers by an outside firm at a charge per automobile, and under the uniform system of accounts payments made to other companies or individuals for loading and unloading commercial freight, under contract or otherwise, should be included in expense account 373. Unloading cost is thus included in direct expenses used in computing the overhead ratio and should be increased for its appropriate share of that expense.—Motor Vehicles (Trilevel-Truckaway) from Flint, Mich., 323 I.C.C. 215 (218); Motor Vehicles—Wayne & Wixom, Mich., to Milwaukee, Wis., 323 I.C.C. 266 (269); that a switching absorption for transfer across Chicago is not increased for overhead is not inconsistent, since that cost is properly charged to revenue, while unloading cost is an expense item.— Id., pp. 269-70.

Cost per thousand board feet of loading lumber into rail cars should be considered as an incidental cost in comparing total charges via water and rail routes.—Reduced Transcontinental Lumber Rates, 1961, 318 I.C.C. 815 (821).

Average weights of 133,200 and 134,600 pounds used by respondents in computing cost of transporting pig iron from Lake Erie ports to Chicago were based on a period immediately following a steel strike when

demand for pig iron was unusual; composite average for official territory in 5 years including that period was 116,800 pounds; thus, use of an average loading of 117,000 pounds in recomputing costs appears appropriate; and as no movement is shown from Neville Island and Sharpsville, Pa., to Chicago, there is no basis for use of a higher loading than from the Lake Erie ports.—Pig Iron, Buffalo, N.Y., to Chicago, Ill., and Gary, Ind., 315 I.C.C. 601 (608, 609)*.

119. Return loading.—[Vols. 1, 6, 9, 11-14, 16, 18, 19].—In restating rail costs for movement of imported frozen meats, use of empty-return ratio of 13.7 percent for mechanical refrigerator cars, as developed by defendants, study in relation to the traffic involved and subsequent use of the cars in official territory, was more accurate and specific than ratios for movements of all refrigerator cars in eastern district or experience of the car companies.—Midwest Emery Freight System, Inc. v. Baltimore & O.R., 321 I.C.C. 637 (640-1).

As DF boxcars replace standard boxcars and refrigerator cars, ratio of empty to loaded miles for such cars will assume ratios for those being replaced, since no additional traffic in reverse direction will be generated merely by replacing one type of equipment with another; while a more favorable ratio may be achieved on some commodities, owing to managerial policies or shipper preference, this can only result from replacement of other traffic normally shipped in the equipment. In considered movement of packaged wine from California to the Midwest, it is less a question of empty-return ratio for a particular type of boxcar than of existing directional flow of traffic in refrigerator cars and boxcars of all types now and in future. For these reasons, protestants' use of a composite ratio of 44 percent, based on averages shown in cost statement No. 3-62 for general and special service boxcars in western district, is more realistic than respondents' use of 22-percent ratio based on experience with DF cars, and the higher figure is used in restating line-haul costs.—Wine, Pacific Coast to Western, S.W. & Central States, 321 I.C.C. 683 (704, 705).

Movement of empty equipment which is necessary to protect traffic is an overhead expense of operation.—Foodstuffs, Magazines or Periodicals—N.Y., Pa., to West, 314 I.C.C. 767 (770).

Empty return ratios of standard refrigerator cars are 90 percent in eastern, and 66 percent in western, districts; insulated (RB and RBL) boxcars, which are more desirable for movement of canned goods and are being used in increasing numbers, have a much lower empty return ratio, averaging 20.7 percent for first half of 1960; however, respondents' use of 20 percent as empty return ratio for all movements of canned goods in insulated cars understates costs unless standard refrigerator cars have been wholly replaced; on the other hand, since 40-foot cars are used, respondents' use of the greater weight factor for 50-foot cars increases costs. Assuming that only 30 percent of total movement from transcontinental group A to mountain-Pacific States is in RB or RBL cars, proposed reduced rate covers out-of-pocket costs and makes a substantial contribution to constant costs and is therefore compensatory.—Canned Goods from Eastern Points to Pacific Coast, 315 I.C.C. 757 (760).

To assume that the empty-return ratios for standard refrigerator cars are proper for the new types of insulated cars ignores the distinctive characteristics of the latter and fails to recognize actual experience shown of record; respondents' use of a ratio of 23 percent for RB- and RBL-type insulated cars has substantial support in statement No. 5-59 of commission's cost-finding section and in special studies of off-line performance of such cars by three western respondents.—Canned Goods from Pacific Coast to Eastern Points, 315 I.C.C. 769 (785).

Respondents' use of a 15-percent empty return ratio for refrigerated trailers used in westbound transportation of fresh meats and packinghouse products in plan II

TOFC service appears reasonable when their experience of about 3 months with the first 48 such trailers revealed an empty return ratio of 13 percent; as the trailers are designed to handle dry freight as well as perishables and semiperishables, and tariff rules permit their substitution for boxcars or refrigerated cars, respondents should be able to maintain the low empty return ratio which is the cornerstone of their justification for proposed rates.—Meats, Fruits, Vegetables—TOFC—Transcontinental, 316 I.C.C. 585 (588-9).

Though in general the commission recognizes the jointness of line-haul expense to the round trip, without considered southbound movement of coal to Tampa area respondents' northbound rates on phosphate rock would have to cover out-of-pocket costs on 100-percent empty return of covered hopper cars. As the southbound coal movement in such cars reduces unit costs of loaded movements in both directions, each movement benefits from the coal traffic because of the additional loaded movements over which to distribute a smaller amount of out-of-pocket cost for the empty movements. Evidence establishes that the coal traffic can be handled in existing trains at very little if any additional expense, that respondents would still have to operate those trains if such added traffic were lost, and that utilization of the covered hopper cars under reduced coal rates has improved their revenue position.—Coal from Southern Mines to Tampa and Sutton, Fla., 318 I.C.C. 371 (377, 386-7).

Return-haul rate on motor vehicles in bilevel cars from Atlanta to Norfolk, approximately one-half of southbound rate premised on a 100-percent empty return haul, and conditioned on a prior inbound movement at that rate, is compensatory when it exceeds fully distributed costs over 2 of 3 routes and will cover out-of-pocket costs and make a contribution toward respondents' total revenue needs over the third route; considered rate is moving traffic that otherwise would not be available to respondents; approved.—Automobiles from Atlanta, Ga., to Norfolk, Va., 316 I.C.C. 99 (101, 102).

As several movements shown in defendents' random sampling of originating carrier's waybills, tracing movement of every tenth car from point of last unloading until delivery to complainant for loading at Belle Fourche, Wyo., showed incorrect mileages, and there is no basis of record for determining whether the mileages used or merely the points named were actually incorrect, the 112-percent empty return factor used for western portion of the through movement cannot be accepted in lieu of average empty mileage for the western district.—American Colloid Co. v. Akron, C. & Y. R. Co., 321 I.C.C. 91 (106-7).

Sea-Land's use of a 100-percent empty-return ratio for mechanical refrigerator cars in computing cost to rail respondents of movement of considered citrus traffic overstates costs; since other carriers may participate in the traffic and some dry-freight shipments would be moved in Fruit Growers Express equipment, ratios of 91, 73, and 75 percent experienced by that company are more acceptable.—Frozen Juices and Fruit from Florida to the North, 319 I.C.C. 577 (585-6).

120. Special equipment required.—[Vols. 1, 6, 11, 13, 14, 19].—Determination of costs for movement of automobiles in trilevel cars involves equipment of greater than average length, with operational capacity that entails relatively light loading, length considered, and computation of costs on a gross ton-mile basis would not accurately reflect those factors.—Wisconsin & Michigan S.S. Co. v. Grand Trunk W. R. Co., 323 I.C.C. 298 (305)*; cost of cars and racks per active car day, increased for overhead, and multiplied by number of turnaround days, produces the estimated cost per movement.—Motor Vehicles—Wayne & Wixom, Mich., to Milwaukee, Wis., 323 I.C.C. 266 (270); rack expense is ascribable only to automobile traffic and is based on annual ownership cost broken down to a cost per trip. Though protestants would add an amount reflecting

per diem rental paid by the nonowning carrier while the rack is on its lines, amounts paid in such rental balance out with those received by the owner line. The most accurate measure of cost for the entire movement is the ownership basis.—Id., pp. 272, 275.

Suggested use of $17.50 per day per car-rack unit for computing car and rack costs, based on per diem rate for trilevel equipment, overlooks fact that all lines over which the rates apply contribute cars and racks to the origin pool in proportion to their participation in the traffic, to be used indiscriminately by all carriers in the pool. Thus, per diem payments cancel out and true cost of the equipment is that incurred in contributing to the pool. And a base cost for cars and racks calculated from data in another proceeding is unacceptable because unrelated to costs of carriers involved and derived from evidence not of record.—Motor Vehicles (Trilevel Truckaway) from Flint, Mich., 323 I.C.C. 215 (220); and car-rental cost per day, increased for overhead and applied to number of turnaround days, tends to underestimate total car cost per trip, as no allowance is made for "downtime" (nonproductive plant time). Daily rental plus overhead should be multiplied by 265 to arrive at yearly cost, then divided by active car-days per year, and the result multiplied by turnaround time, to compute trip cost. —Motor Vehicles, Wayne & Wixom, Mich., p. 275.

Use of current rental figures, rather than costs computed on an 8-year life for the trilevel cars, was proper, since the 8-year life adjustment is intended for costing owned racks rather than rented cars and racks, and costs to defendants for a 5-year period are the present rental charges. And where amount of per diem received from other railroads in the origin pool which is attributable to the traffic involved cannot be accurately measured, no adjustment for per diem credits from other railroads should be made; only the average of present rentals, as increased for overhead, paid by defendant railroads, is used in restatement. And though complainants would also add cost factors for repairs per car-day, no such factor is included, since defendants will have no such expense in the initial 5-year period.—Wisconsin & Michigan S.S. case, pp. 303-4.

Argument that, in computing costs for movement by Chesapeake & Ohio and the Milwaukee, only cost of rack ownership should be considered, not equipment rental paid by the Milwaukee, because per diem payments cancel out between owning and nonowning lines, ignores that such rental is not per diem paid to C&O but a contractual rental paid to an outside supplier, and there is no setoff between participating carriers as to that cost. Milwaukee's cost of contributing cars and racks to the pool is cost of the rental payments; and cost to C&O, which owns trilevel racks but rents cars, is rental expense for the car and annual rack ownership expense, allocated to active days per year and then to round-trip days of movement. Simple average of Milwaukee's and C&O's costs should be used, and there is no basis for weighing such costs to reflect differing equipment contributions from the carriers because there is no evidence that they will not participate equally in the traffic.—Motor vehicles (Trilevel Truckaway), p. 221.

In computing active car-days per year, Saturdays, Sundays, and holidays are included, because cars are under load and actually moving on those days; and computation on basis of average number of days per year that protestant steamship company received vehicles for shipment does not necessarily reflect actual shipping days or days of actual rail movement.—Motor Vehicles, Wayne & Wixom, Mich., pp. 270-1, 274; and though at time of hearing no traffic had yet moved under considered rates from Flint, Mich., to Minneapolis, Flint is very close to Wixom, another origin of trilevel traffic, and Wixom traffic terminates at Milwaukee, an intermediate point in the Flint-Minneapolis movement; therefore, in computing number of days required to complete a round-trip movement between

latter points, the rail experience between Wixom and Milwaukee is used, with time added for the Milwaukee-Minneapolis haul.—Motor Vehicles (Trilevel-Truckaway), p. 222.

Respondents' use of 42 RB or RBL cars, representing 30 percent of the 140-car sample, in computing cost of transporting canned goods from Pacific coast to transcontinental group A, is corroborated by their analysis of car types in independent 1-percent waybill sample for 1959; however, though need for such larger-capacity cars and rapid increase in numbers owned by respondents creates strong probability of their greater use for such traffic, substitution of 13 additional cars of the improved type for the smaller-capacity standard refrigerator cars is a departure from actual experience during the study period and is therefore not justified.—Canned Goods from Pacific Coast to Eastern Points, 315 I.C.C. 769 (784).

123. Special service; terminal services.—[Vols. 1, 6, 9, 11-13, 15-17, 19].—A local rate, unlike a proportional, contemplates a terminal service at both origin and destination; and as receipt and delivery of cars between carriers is generally governed by mutual agreements, each line having the right within reasonable limits to designate the interchange point, carriers may agree for one of them to bear the transfer costs in both directions at an interchange point.—Dairy Products from Twin Cities to Chicago, 321 I.C.C. 720 (722).

In computing station clerical cost for trilevel automobile traffic, TOFC billing cost factor is an improper basis for estimate, since it is not convincingly shown that trilevel traffic incurs station cost equivalent to that on TOFC movements. Also, since billing costs are not the only component of station expense, reduction of that one factor is not necessarily accompanied by comparable reductions in other types of cost properly ascribed to station operation.—Motor Vehicles—Wayne & Wixom, Mich., to Milwaukee, Wis., 323 I.C.C. 266 (268, 269).

As trilevel traffic entails certain special services at origin and destination, including cleaning cars and racks of ice and snow during winter months, expense incurred therefor should be reflected in terminal costs; protestants' estimate, being the only one of record, accepted.—Id., pp. 268, 269.

Use of station clerical costs based on single-car territorial average is improper in computing cost for 45-car shipments moving on one waybill.—Coal from Fulton County, Ill., to Minnesota, 315 I.C.C. 627 (632); however, inclusion in terminal costs of the special services as developed by Rail Form A was not improper when that item of expense includes such services related to coal traffic as inspection of hopper cars and closing of hopper doors.—Id., p. 632.

Defendants' splitting of New York rate group cannot be justified merely on ground that assailed rates and charges on fruits and vegetables differentially higher to New York City stations than to New Jersey terminals fail to cover out-of-pocket costs of performing the service involved. Though differentially higher rates to New York stations could be justified to cover cost of providing services differing in kind from those provided at other stations in the group, the $14.14 per car higher cost of effecting delivery to New York piers is not controlling, as cost differences of that degree may be found between stations in any large group. Cost of delivery is not the same at any 2 of the 125 stations in the New York group, and if defendants were permitted to establish 125 different rates on each of the 4 major movements, ostensibly on basis of cost differences, neither the commission nor any combination of shippers could as a practical matter prove that more than a few such rates were unjustified costwise.—Port of New York Authority v. Aberdeen & R.R. Co., 321 I.C.C. 738 (743, 744-5, 750)*.

Analysis of defendants' cost exhibits indicates that about $25.83 of station costs of $62.65, including car floats and pier rentals, shown for piers 27-29 reflects equivalent of such costs as billing, inspection, and provision of team tracks and driveways that would be incurred in ordinary station

delivery. Thus, though differentially higher per-car charges in approximate amount of $36.82 appear justified at those three piers, cost of providing extraordinary services and facilities at that one pier station does not justify imposition of assailed higher rates and charges at other New York stations where no such pier services are performed.—Id., p. 745.

In computing cost to rail respondent of rail portion of barge-rail movement of coal to Chicago district, protestants' estimate of noncompensated freight-train car expense based on 4 days' detention of the car in Chicago appears conservative when interchange records of two protestants at Chicago show an average detention of 7.93 days.—Barge-Rail Coal, Huntington, W. Va., to Chicago District, 315 I.C.C. 129 (131-2).

124. —Switching.—[Vols. 1, 6, 9, 11, 12, 14, 15, 18, 19].—Computation of line-haul switching costs for automobile traffic in trilevel cars on a car-mile basis is a more reasonable method than on actual number of switching operations involved, since it recognizes cost of such operations as car setoffs en route.—Wisconsin & Michigan S.S. Co. v. Grand Trunk W. R. Co., 323 I.C.C. 298 (302)*.

Respondents' computation of origin switching cost on trilevel automobile traffic at Flint, Mich., on basis of eastern district average cost per switch-engine-minute, multiplied by number of minutes shown in a 1-week study, restated using regional average time. While results of special studies are usually preferable to regional average figures, being more representative of actual costs and operations, study offered was based on a week in peak-traffic period and is replete with errors; witness who prepared it admitted that time for coupling and air test was improperly excluded and that time allotted to classification was based on his estimate rather than observed experience.—Motor Vehicles (Trilevel-Truckaway) from Flint, Mich., 323 I.C.C. 215 (217).

In computing destination switching cost, examiner properly used western district average time instead of time developed by respondents' study at Minneapolis. Though the study was put in evidence early in hearing, respondents did not use it at that time, but only on rebuttal, when witness who had prepared it was no longer available for cross-examination; also, underlying work papers were not submitted in evidence.—Id., pp. 217-8; and respondents' use of western district average time and cost for TOFC traffic is not appropriate for trilevel service, since trilevel traffic must generally be accorded more careful switching than TOFC traffic; cars must be coupled and uncoupled only on straight track, and must be shoved to rest rather than "kicked." Protestants, figures based on time and cost for cars other than box, flat, or TOFC are more representative of actual costs incurred.—Motor Vehicles, Wayne & Wixom, Mich., to Milwaukee, Wis., 323 I.C.C. 266 (269).

In computing intertrain and intratrain carload switching costs east of Chicago, respondents, following Rail Form A, allowed for such service for each 200 car-miles. As round trip between Wixom, Mich., and Indiana Harbor, Ind., where cars are interchanged with Indiana Harbor Belt, is slightly under 600 miles, approximately three switches were properly included. Picking up or setting out a car at a place which is its origin or terminal point is origin or destination switching service, not intertrain switching.—Id., p. 272; while a given car may be charged with intratrain switching even though it is not physically moved within the train, it is improper to charge it for costs incurred at points where other cars are merely picked up or set off; that expense is attributable to origin, termination, or interchange expense of those particular cars. On evidence showing that trilevel cars from Flint, Mich., would be switched at Grand Rapids in both loaded and empty directions and at Saginaw in the empty direction 75 percent of the time, intratrain switching cost was properly computed on 2.75 switches.—Motor Vehicles (Trilevel-Truckaway) case, p. 219.

In computing out-of-pocket cost of crosstown switching of grain within St. Louis switching district, cost of movement by respondent from elevator on its line to connecting lines which make delivery to consignees is more appropriately considered as an interterminal switching, rather than an interchange, expense.—Absorption of Cross-Town Switching Charges on Grain, 316 I.C.C. 633 (636-7)*.

See also Increased Switching Charges; n. 522, below.

Although in computing cost of plan III TOFC service to southwestern points respondent reduced cost of interchange switching at Texarkana by 75 percent to reflect only caboose switching minutes, because it considered that interchange merely a "paper" one, such sizable reduction was not warranted when record indicates that cars are added or dropped off there, thus requiring more switching minutes than mere switching of a caboose.—Motor Vehicles from Kansas City to Ark., La., and Tex., 318 I.C.C. 301 (311).

Plant spotting and pulling from the plant of an empty car, in intraplant switching, are similar to movement of the empty car to and from an industry for loading and subsequent line-haul movement. As an equal amount of service must be given to an empty as to a loaded car, one-half of the car-minutes for intraplant switching may be assigned to the movement of the empty.—Increased Switching Charges, 318 I.C.C. 485 (487)*.

Defendant's study based on its own operations is a more reliable guide in determining switching minutes per car for considered movements than average of all carriers operating in eastern district, which includes all types of switching.—Prue Motor Transp., Inc. v. Boston & M. R., 316 I.C.C. 299 (301).

Although no costs are shown for transportation of pig iron from Niagara Falls, Supension Bridge, and North Tonawanda, N.Y., to Chicago, reduced rate from those origins was made by adding a 51-cent switching charge to the reduced rate from Buffalo; that charge is the best measure of record of the difference in operating costs from those origins and from Buffalo.—Pig Iron, Buffalo, N.Y., to Chicago, Ill., and Gary, Ind., 315 I.C.C. 601 (613)*.

Since there has been no coal movement between points involved and no opportunity to make a time study based on actual movements, protestant's use of switching computations based on actual operations in Pocahontas region where coal is the major commodity moved is entitled to more weight than respondent's estimates unsupported by any underlying data.—Coal from Fulton County, Ill., to Minneasota, 315 I.C.C. 627 (632).

Although consignor and consignees of considered traffic are not on respondent's lines and it incurs no switching expense between industry locations and its trainyards, it must provide switching between its trainyard and interchange points; and as switching charges made by other railroads to complete hauls of respondent line-haul carrier do not cover full terminal services necessary in originating and terminating a shipment, the switching cost portion of respondent's terminal expenses needs adjustment. In addition, respondent's comparison of proposed rate plus origin and destination switching charges with its computed out-of-pocket costs has no merit; if those switching charges are included in the revenues, attendant expenses must likewise be included in the total costs.—Liquefied Petroleum Gas, Oklahoma City to Memphis Area, 316 I.C.C. 189 (192).

127. Multiple lines involved in haul.—[Vols. 1, 6, 9, 11, 19].—Costs developed for specific routes of movement are more representative of cost of handling particular traffic than territorial averages, since they reflect the actual way and through train elements and the actual number of interchanges.—Frozen Juice and Fruit from Florida to the North, 319 I.C.C. 577 (585, 586).

Examiner's use of averages of weights, mileages, and number of interchanges for specific movements shown by defendants' cost study was not improper in restating rail

costs for transporting imported frozen meats. As the study covered a sufficient period and number of movements to be considered representative, specific data, where available from study of actual movements, were properly used to reflect costs more accurately; where such data were not available, short-line mileages, with line-haul cost increased 13 percent for circuity, and territorial average number of interchanges were used. Averages of weights used in the study at each alternative rate level were representatively used, since they reflect weights of shipments which moved generally from involved origins. Also, examiner's use of territorial average through train weights was better cost evidence than overall average train weight, since any effect of heavy traffic such as coal on that item was not shown, and considered traffic generally moves in through trains.—Midwest Emery Freight System, Inc., v. Baltimore & O.R., 321 I.C.C. 637 (640, 641).

128. Bridge, ferry, or lighterage.—[Vols. 1, 9, 11, 15, 17, 19].—In computing car-ferry costs on trilevel automobile traffic moving over car-ferry routes, use of 80 percent of operating expenses and 100-percent return on the car-ferry investment was correct, since such costs are treated in Rail Form A as railroad costs which are for the entire rail movement, not just for the car-ferry portion of the haul; and since only average dock-expense figures were available, out-of-pocket costs for maintenance and depreciation of wharves and docks were correctly included.—Wisconsin & Michigan S.S. Co. v. Grand Trunk W. R. Co., 323 I.C.C. 298 (302-3)*.

And examiner correctly treated floating car-ferry costs on a space basis, using twice the space and costs for a trilevel car as for a standard car. Though defendants claim that only additional fuel cost is involved, and computed car-ferry costs on a space-occupied basis, using hypothetical boat trips, compensativeness of rates may not be determined on assumed ideal operating conditions. However, since number of trips has been declining and defendants would otherwise be penalized for a situation they are trying to correct, in restatement an average of number of car-ferry trips in the 5-year period shown is used and costs therein adjusted for added costs of fuel.—Id., pp. 304-5.

Sea-Land's inclusion in computation of rail costs for movement of citrus products to southern New England of $40 for car floatage to Harlem River interchange with the New Haven, based on a loaded car-floatage cost introduced in another proceeding, as increased to reflect the longer float movement than to New York piers, has more merit than rail respondents' addition of 30 miles in their line-haul computations to cover car-float expense, since termination of traffic in large metropolitan areas generally occasions costs greater than territorrial averages. Rail respondents should have stated actual cost of float service performed.—Frozen Juice and Fruit from Florida to the North, 319 I.C.C. 577 (583-4).

Restriction of reduced alternative transcontinental rates on eastbound lumber not to apply to shipments delivered by lighter or car float is not shown to be unreasonable. Since carriers' cost for lighterage delivery vary almost directly with weight of load, the higher minimum weights applicable to the reduced rates would substantially increase handling costs for such deliveries, which are already higher than costs of track deliveries. As such incentive rates reflect the fact that cost of moving additional weight is usually negligible compared to increased revenue anticipated, application of the reduced rates to lighterage deliveries would be inconsistent with their purpose of increasing respondents' revenues by inducing heavier loading.—Reduced Transcontinental Lumber Rates, 1961, 318 I.C.C. 815 (837-8, 847).

130. Susceptibility to loss or damage.—[Vols. 1, 6, 9, 11-19].—Respondents' estimate of 50 cents per vehicle for loss-and-damage payments as a terminal cost factor in computing costs for trilevel automobile shipments approximates the national average for the commod-

ity group including vehicles, and is properly allocated half to origin and half to destination terminal costs. While amount of payments shown is not related directly to movement of vehicles which incurred the expense, it is more representative of actual cost than protestants' estimate not drawn from rail operations.—Motor Vehicles (Trilevel-Truckaway) from Flint, Mich., 323 I.C.C. 215 (217).

Defendant's allowance per hundredweight for loss-and-damage claim payments, based on its own experience, more accurately reflects its costs than the eastern-district average.—Prue Motor Transp., Inc. v. Boston & M. R., 316 I.C.C. 299 (301).

Value of the Service

145. In general.—[Vols. 1, 6, 9, 11-17, 19].—Mere fact that a charge is published for a more complete service does not prevent a carrier from offering to perform a lesser service at a lower charge; similarly, a lesser service at a lower charge is not a bar to publication of a more complete service at a higher charge.—Texas Intrastate Passenger Coach Fares, 321 I.C.C. 569 (578)*.

Though, historically, different rates applied on fresh meats and on packinghouse products because latter were inferior products of lower value and susceptible of heavier loading, many items in packinghouse products list today have same or greater value than meats, and same westbound rates were approved for both in 309 ICC 529. As those commodities generally move in mixed carloads, application of same rate and minimum eliminates expense of billing and weighing separate portions of each.—Cudahy Packing Co. v. Akron, C. & Y. R. Co., 318 I.C.C. 229 (242-3)*.

Tank-car service is not shown to be less valuable to complainant shippers than boxcar service for movement of brine stock; though railroads furnish and maintain cars for boxcar movement, whereas they do not hold out to furnish tank cars, and it is not possible for shippers to recover investment in a tank car during its 20-year life from present mileage allowance, loading and unloading of a tank car requires less labor and is therefore less expensive; moreover, complainants do not have to invest in barrels or pay freight charges normally incurred for their empty return.—Budlong Pickle Co. v. Ann Arbor R. Co., 315 I.C.C. 333 (337-8).

As present express charges on cut flowers approximate 10 percent of the net wholesale price, proposed increases averaging about 21 percent in express commodity rates would cause further diversion to air and bus transportation and would probably force producers still using respondent's service to eliminate at least some shipments to small retail florists and marginal wholesalers. However, deficits incurred in handling considered traffic cannot be ignored; continued availability of respondent's reliable service is to advantage of the shipping public, and the special service and preferred handling provided warrant premium rates. Proposed increases found just and reasonable, but respondent will be expected to make further adjustment where necessary to prevent hardship or protect revenue.—Cut Flowers—Throughout Continental United States, 319 I.C.C. 202 (214, 218).

While value of service to shippers is a factor to be considered in determining maximum reasonable rates, its asserted lessening due to increased use of motortrucks and barges is not controlling in determining reasonableness of existing adjustment of grain rates to, from, and within the South. Moreover, to extent that such lessening is merely subjective, assessments of some shippers should not unduly influence a rate level established for use of all shippers, particularly in absence of affirmative showing that shippers cannot afford to pay the rates and charges under attack.—Southeastern Assn. of R. & Util. Commrs. v. A., T. & S.F. Ry., 321 I.C.C. 519 (537-8)*.

147. "What the traffic will bear" as a rate-making principle.—[1, 6, 9, 11-19]—Although the commission, in interest

of fostering sound economic conditions in the industry, relied on the "value of service" theory in setting the rail and motor rates on cigars in issue, record in the investigation proceeding contains no substantial cost evidence, nor indeed any evidence, to warrant a finding of compelling need of artificially high rates on tobacco in order to enable carriers to stabilize their overall rate structure. Order of the commission annualled and set aside,—St. Louis-S.F. Ry. Co. v. United States, 207 F. Supp. 293 (298)*.

Rates prescribed as reasonable maxima for movement of clay or shale from Haydite, Mo., because existing level was discouraging movement of the traffic and prescribed level was the highest at which it would move, have little value to show that higher level of rates on bentonite clay from Belle Fourche, Wyo., which is not shown to discourage the movement thereof, is unreasonably high.—American Colloid Co. v. Akron, C. & Y. R. Co., 321 I.C.C. 91 (101, 104).

Proposed reduced rates on brandy in packages or in tank cars from Pacific coast to eastern transcontinental groups do not properly reflect the relatively high value of the traffic, its classification ratings, or the fact that it embraces articles in the luxury class; considering those factors, the traffic would not bear its fair share of the transportation burden under the proposed rates.—Brandy—West Coast to Eastern Points—Bulk & Packaged, 315 I.C.C. 21 (25).

Financial Interests of Shipper

156. Equalization; market equalization.—[Vols. 1, 6, 9, 13, 16, 17, 19].—Though in competing in official and southwestern territory markets shippers from Greybull, Wyo., in mountain-pacific territory, are at a rate and geographical disadvantage in relation to shippers from Belle Fourche, Wyo., in lower-rated w.t.l. territory, it is not within the commission's power to adjust or equalize rates for the primary purpose of enabling competing shippers to market their products.—Magnet Cove Barium Corp. v. Chicago, B. & Q. R. Co., 315 I.C.C. 555 (558).

For grain and products grown and processed in Pacific Northwest to be competitive in the California market with those from southern Idaho and Utah, rates from both areas must be reasonably related. Reduced rates under investigation from Pacific Northwest are reasonably compensatory and are otherwise lawful when they almost restored the approximate parity between those areas which had been disrupted by reductions from southern Idaho and Utah.—Grain from Idaho, Oreg. & Wash. to Ports in Oreg. & Wash., 319 I.C.C. 534 (564-5)*.

157. —Relation of cost of production.—[Vols. 1, 6, 9, 11, 13, 17].—The commission has no power to adjust rates from competing territories to equalize manufacturing costs.—Reduced Transcontinental Lumber Rates, 1961, 318 I.C.C. 815 (820).

160. —Commercial and economic conditions affecting industry considered.—[Vols. 1, 6, 9, 11-14, 17, 18].—Protestant coal operators have not established that the relatively small increases approved in rates and charges on coal and coke will further weaken the industry's ability to compete, to detriment also of the railroads; it is apparent that the plight of the industry, and consequently of the producing areas (along with effect of mechanization on the latter), is due to greatly expanded use of competitive fuels and not in any material degree to the level of rates. In the past the railroads have made adjustments in coal rates to aid the industry's ability to compete in particular situations, and their statements on the record indicate that their concern in that respect will continue.—Increased Rates on Coal and Petroleum Coke, 316 I.C.C. 159 (165).

161. "Missonary" or development rates.—[Vols. 1, 6, 9].—Although establishment of a grain industry at Pittsburgh is an initial step in a plan for stimulating industrial growth of the area and promoting employment, and a milling company marketing

flour in trunkline and New England territories and desiring to acquire a mill adjacent to those markets prefers for competitive reasons to locate its mill at Pittsburgh rather than at Buffalo, construction of a flour mill at Pittsburgh is not economically feasible so long as existing rate relationship of Pittsburgh and Buffalo prefers the latter to such degree as to render the former noncompetitive. Removal of the rate barrier is a necessary preliminary to further consideration of construction of mills or storage facilities at Pittsburgh; proposed reduced rates from Pittsburgh which are reasonably compensatory and otherwise lawful, approved.—Grain from Pittsburgh, Pa., to Eastern Base Points, 322 I.C.C. 218 (219-22, 231-2)*.

Use of Articles

165. Use as basis for rate differences.—[Vols. 1, 6, 9, 12, 13, 15-19].—Neither rates prescribed on clay and bentonite within southwestern territory nor prescribed 12 percent of southwestern zone III first-class scale, voluntarily extended to apply from Belle Fourche, Wyo., to the Southwest, is determinative of a maximum reasonable level for bentonite from Belle Fourche to w.t.l. and official territory points. Belle Fourche bentonite and southwestern subbentonites has different chemical and physical qualities; latter are predominantly suitable for and used in the oil drilling industry, and voluntary extension of the 12-percent scale to movements from Belle Fourche was due to market competition. Basic differences between Belle Fourche and southwestern bentonites are even more significant with respect to their use in the foundry industry; while both types are used, they are seldom used interchangeably, and no movements of southwestern subbentonites to the complaint destination area are shown. Therefore, compared northbound commodity-rate scale on bentonites from the Southwest is likewise not a proper standard for measuring reasonableness of assailed rates from Belle Fourche.—American Colloid Co. v. Akron, C. & Y. R. Co., 321 I.C.C. 91 (101).

Value of the Goods as an Element

176. In general.—[Vols. 1, 6, 9, 13, 15-18].—Though it is contended that, because of the high value of automobile traffic, fully distributed costs should provide the floor for rates on automobiles in trilevel cars, rates may be established at levels below fully distributed costs where there is competitive necessity to do so; relative value of the commodities transported is not controlling.—Wisconsin & Michigan S.S. Co. v. Grand Trunk W. R. Co., 323 I.C.C. 298 (311)*.

There is no sufficient or specific evidence to support complainant-protestant's claim that the rail rate structure as a whole required that involved automobile traffic return considerably more than fully distributed costs in order to subsidize low-grade deficit freight and l.c.l. and passenger service, or to show what the extent of such a contribution should be. While an automobile may be considered an article of high value, in today's mobile and mechanized civilization it is generally a necessity rather than a strictly luxury commodity; considered TOFC plan III and plan V rates which are clearly compensatory are not shown to be below a reasonable level.—Motor Vehicles from Kansas City to Ark., La., and Tex., 318 I.C.C. 301 (320, 321).

Paco sand, a natural feldspar-silica blend used for same purposes as feldspar mixed with silica sand, is unique in ready availability of its feldspathic value; however, in determining a proper level of rates thereon, allowance should be made for disadvantage of its high quartz content, since about 1-1/2 times as much Paco sand as feldspar is required to obtain the same feldspathic content. Depending on relative volume of movement of the coarse and ground types and using value as a criterion, the weighted average rate charged on Paco sand would be about 83.4 percent of the feldspar rate. Assailed rates approximately 85 percent of the feldspar rates, which attempt to

recognize the lower value and inferior feldspathic quality of the feldspar-silica mixtures, do not exceed reasonable maxima.—Copps v. Alabama G.S.R. Co., 319 I.C.C. 192 (198, 199).

177. Determination of value.—[Vols. 1, 6, 9, 12, 17, 18].—As there was no ambiguity in terminology of tariff governing transportation of alcohol "in bond," and no issue of unreasonableness, the commission's conclusion that underlying cost-allocation was not relevant to its finding, that "in bond" has a settled meaning not applicable to considered shipments, is a reasonable one. Decision in 352 US 59, relied on by complainant, did not hold that cost-allocation is relevant to construction of a term which by settled usage has a plain and unambiguous meaning.—United States v. I.C.C., 309 F. 2d 645 (646)*.

179. Gradation according to value.—[Vols. 1, 6].—That proposed automobile rates per bilevel or trilevel flatcar, which make no distinction as to value and weight between luxury and economy types, are not in traditional concept of ratemaking is no reason for disapproving them. Value is only one factor properly to be considered, and its influence diminishes where competitive forces are controlling. Underlying motor and rail classifications make no distinction as to value, and customary fixing of rates on weight basis is grounded, not on different values of vehicles, but on difference in weights; though proposed rates are the same for all types, fewer of the luxury than of the compact models can be loaded on a flatcar, thus charges per vehicle are substantially greater for the former. Considering the numerous types and wide variation in values of automobiles, a graduated scale based solely on value would be impracticable, and failure to reflect such distinction in proposed rates is not unlawful. Approved.—Motor Vehicles on Bilevel and Trilevel Cars, 316 I.C.C. 777 (781).

Grade and State or Condition of Commodity

190. High vs. low grade commodities.—[Vols. 1, 6, 9, 11-15].—Although wines and liquors are high-grade traffic and normally should move at relatively high rates, proposed reduced incentive rates which substantially exceed full costs will not be detrimental to respondents' revenue position and represent a proper exercise of managerial discretion in seeking to increase volume and revenue. Evidence concerned traffic of only one shipper, but others are located at involved origins, and a considerable volume moves in motor carriage to undisclosed destinations; moreover, principal shipper incurs additional expense in using rail service. Approved.—Alcoholic Liquors from N.H. and N.Y. to Tex. and La., 319 I.C.C. 396 (397-8)*.

192. Raw vs. finished or partially finished product.—[Vols. 1, 6, 9, 12, 13, 15-19].—Complainants' Plaswood lumber, unlike yellow pine lumber with which it competes, is a finished product, the waste pine lumber material used in its manufacture having lost its identity as lumber when it was transformed into a new article by being bound together with resin, whereas yellow pine lumber remains unchanged as a basic raw material. Application on Plaswood of higher class rates charged is consistent with the commission's findings in many proceedings that rates on raw materials are generally lower than those on products manufactured therefrom. Assailed rates were not unreasonable merely because they exceeded lumber rates applicable on yellow pine lumber.—Plaswood Corp. v. Alton & S.R., 321 I.C.C. 434 (448, 449).

Rates on scrap iron and steel within official territory are not shown to be unreasonable in relation to rates on manufactured iron and steel articles; under prevailing 80,000-pound basis on scrap, 87 percent of rates on manufactured articles, many rates are much below the 70-percent basis approved as maximum on 40,000-pound minimum between many points in that territory; 70-percent basis sought on the 80,000-pound minimum would be about 71 percent of the present level, resulting in an annual revenue loss to defendants of about $8,726,000, and 50-percent basis sought on 100,000-pound minimum would be about

51 percent of existing rates, with a revenue loss approximating $15,000,000.—Institute of Scrap Iron & Steel, Inc. v. Akron, C. & Y. R., 316 I.C.C. 55 (57-8, 61).

Moreover, there is no justification from a transportation standpoint for requiring a rigid relationship between scrap and manufactured articles; latter move almost everywhere and throughout almost every type of industry, in far greater volume than scrap; scrap moves for much shorter distances, usually in opposite direction, and to relatively few destinations; truck competition is much more severe on manufactured articles and is effective at substantially all distances, whereas motor transportation of scrap is concentrated largely in shorter hauls, and certain advantages of truck movement for manufactured articles either do not apply to scrap or are of much less significance.—Id., pp. 63-4, 67.

In addition, though volume of scrap consumed varies with steel production, relative consumption of scrap has been stable whether measured in relation to total steel production or in relation to volume of other raw materials consumed; technological advances in steelmaking (discussed at pp. 58-9) have had no significant effect on proportion of scrap used therein, and of the four basic raw materials used, scrap is the only one which has not declined in consumption per ingot ton produced.—Id., pp. 64, 65.

Rates applicable on pipeline-coating compound consisting of 81 percent asphalt and 19 percent slate flour were not unreasonable compared with lower rates on asphalt and articles such as roofing asphalt taking same rates; considered coating is something more than asphalt and as a more highly processed product is generally more valuable; rates found applicable are not shown to exceed those prescribed on pipe coating in same general territory in 192 ICC 509.—Monsanto Chemical Co. v. Alton & S.R., 314 I.C.C. 745 (747-8).

Comparison of Rates

210. In general.—[Vols. 1, 6, 9, 11, 13-19].—Assailed rates on sugar beets from three Kansas points to Sugar City, Colo., are not shown to be unreasonable; there are no rates on that traffic between those States on lower level; complainant offered no operating costs or rate comparisons other than rates on same level from origins on another line, whereas defendant states that assailed rates are substantially below level prescribed as reasonable for Kansas intrastate shipments in 293 ICC 57, lower than level of rates on such low-grade commodities as sand and gravel, and below operating cost computed on western-district averages.—National Sugar Mfg. Co. v. Missouri Pac. R. Co., 315 I.C.C. 244 (246).

See also General Motors Corp. v. United States, n. 23, above.

Earnings Compared

211. Comparison of earnings.—[Vols. 1, 6, 9, 12, 13, 15-19].—Though transportation conditions over defendant's through routes with complainant from mines on its lines to Krannert, Ga., are no less favorable than over more circuitous through routes with Central of Georgia, rates on fine coal over its routes with complainant are not shown to be unreasonable merely by comparison of per-car, car-mile, and ton-mile earnings with those under lower joint rates established by defendant over its routes with Central, when no cost data were presented.—Southern Ry. Co. v. Louisville & N. R. Co., 315 I.C.C. 175 (177)*.

Comparisons of rates and revenues thereunder do not provide a basis for cost determination sufficient to establish that rates on particular segments of traffic are compensatory, particularly reduced rates established to meet competition of other transport modes.—Grain from Idaho, Oreg. & Wash. to Ports in Oreg. & Wash., 319 I.C.C. 534 (550)*.

Complainant's comparison of revenues from assailed tank-car rates on brake fluid and those from tank-car rates on other commodities is defective and has little probative value because it computed the former for a short route over which only 2 of 29 shipments moved, and while it used actual shipping weights for considered

shipments, it computed revenues for most of the compared rates on the tariff tail-end minimum weight, although in most cases the minimum is governed by capacity of the car.—R. M. Hollingshead Corp. v. Alton & S. R., 319 I.C.C. 86 (90).

Proposed plan II TOFC rate on sheet steel, minimum 80,000 pounds, approved when relatively high car-mile earnings are persuasive of its compensativeness; also, per-car revenues are greater than under compared rates although distance is less. But proposed rate on 32,000-pound minimum may not be approved when per-car earnings are below those for compared rates and in some instances car-mile yield would be less than under the compared rates, contrary to principle that car-mile earnings properly decrease as distance increases.—Sheet Steel from Chicago, Ill., to Simpsonville, Ky., 316 I.C.C. 105 (107).

213. Car-mile earnings compared.—[Vols. 1, 6, 9, 11, 12, 15-18].—In considering compensativeness of particular rates on automobiles in trilevel cars, car-mile earnings under those rates were properly compared with earnings produced by other trilevel rates on basis of tariff-route mileages. And mileage of intermediate switching carrier at Chicago was properly included because that line received an allowance not deducted from the revenue shown; if total revenue is shown, total miles should also be shown. To use short-line distance for considered rates and not for those compared would obviously overstate earnings for the former and invalidate the comparison.—Motor Vehicles—Wayne & Wixom, Mich., to Milwaukee, Wis., 323 I.C.C. 266 (273-4)*.

Reduced alternative rates on liquefied petroleum gas in jumbo tank cars from Canadian origins to United States destinations are compensatory when, since they apply on higher minimum weights than rates found lawful in 314 ICC 596, car-mile earnings are consequently greater.—Liquefied Petroleum Gas in Jumbo Tank Cars—S.W.F.B., 319 I.C.C. 31 (37).

Proposed rates per bilevel or trilevel flatcar on motor vehicles from Chicago to Des Moines and Omaha-Council Bluffs are compensatory when car-mile earnings exceeding out-of-pocket costs by 15 to 39 percent and fully distributed costs by 2 to 22 percent compare favorably with earnings under similar rates for multilevel cars from other origins to same destinations.—Motor Vehicles on Bilevel and Trilevel Cars, 316 I.C.C. 777 (780).

While revenue from empty returned barrels may properly be included in comparing car-mile earnings from canned-goods rates applicable on brine stock in barrels in boxcars with those from assailed rates on brine stock in tank cars, round-trip mileage allowance for shippers' tank cars should not have been deducted from the latter without deducting cost of furnishing and maintaining the boxcar from the former; moreover, defendants' comparison used shipments of substantially different weights, those in tank cars being about 15,000 pounds less than the compared shipments in boxcars.—Budlong Pickle Co. v. Ann Arbor R. Co., 315 I.C.C. 333 (339).

Class rates on uniform classification basis on furniture from official, southern, southwestern, and w.t.l. territories to w.t.l. points north of so-called furniture line established February 10, 1959, and generally lower specific commodity rates from southern territory, on higher level than commodity column rates established to remainder of w.t.l. territory, are not unreasonable when 1959 average earnings on furniture traffic over lines of Northern Pacific and Great Northern to those points for average distance of 1,188 miles were 44.1 cents a car-mile, compared with 42 cents for average distance of 872 miles from same territories to w.t.l. territory and between points in that territory, compiled from commission's 1-percent waybill study for 1958.—North Dakota Public Service Comm. v. Great Northern Ry., 315 I.C.C. 137 (139-40, 144, 146).

Similarity of Services and Circumstances

220. Comparison of rates for services under similar circumstances, prop-

er.—[Vols. 1, 6, 9, 11-19].—Comparisons of assailed rates with other rates for same or similar commodities in same general territory have substantial evidentiary value where the party offering such evidence shows that transportation conditions surrounding movements under the rate attacked and the compared rates are substantially similar; i.e., there must be sufficient evidence to show that the rates brought in for comparison are just and reasonable. Where reduced rate charged on involved shipments was the maximum going rate in the area on the same commodity from the same origin, transportation conditions on that traffic to the various destinations were substantially the same, and the reduced rate was subsequently established to destination of considered shipments, complainant has made a prima facie showing, which defendants have not rebutted, that the higher applicable rate was unreasonable to extent it exceeded the reduced rate. Waiver of undercharges authorized.—American Colloid Co. v. Illinois Central R. Co., 321 I.C.C. 375 (378).

In rate controversies it is often necessary to cite other rates which, though not in issue, provide the standard for measuring those that are; thus, comparisons with other rates are commonly acceptable in determining whether a particular rate is just and reasonable.—Aluminum Articles from Sandow, Tex., to Pa. and N.Y., 319 I.C.C. 431 (438)*.

Though comparison with other rates concurrently applicable on like traffic under similar transportation conditions is acceptable evidence of unreasonableness of an assailed rate, complainant presented no persuasive evidence of that nature; assailed rate found not shown to be unreasonable.—Universal-Rundle Corp. v. Texas & N.O. R. Co., 319 I.C.C. 458 (461)*.

221. —Rates over other routes.—[Vols. 1, 6, 9, 11, 12, 14-19].—Although establishment of through rates on coarse grains to the South, based on combinations made over northeastern Arkansas points via Memphis, disrupted former rate equalization of Chicago and Indianapolis gateways on such traffic, rates on those grains were excmpted from the exclusive rate-break principle in 298 ICC 261 because of force of unregulated truck competition, and no basis appears for restoration of route-equality thereon.—Southeastern Assn. of R. & Util. Commrs. v. A., T. & S.F. Ry., 321 I.C.C. 519 (556)*.

Combination rates found applicable on shipments from Pittsburgh to New York City which owing to clearance difficulties moved over line of the Pennsylvania to interchange with New York Central at latter's West 72d Street float bridge were not unreasonable because they exceeded level of rates over normal route with interchange at Buffalo, when defendants are not shown ever to have held out to accept shipments for movement over route used; finding that there is no basis for prescription of joint rates over that route is decisive of the issue of unreasonableness.—Westinghouse Electric Corp. v. Pennsylvania R. Co., 318 I.C.C. 460 (463-4).

222. Value of comparison dependent upon similarity of circumstances.—[Vols. 1, 6, 9, 12-19].—Mere comparison of rates without any showing of competitive or transportation conditions under which the compared rates were established provides no basis for condemning the higher rates assailed; assailed rates were not unreasonable by comparison with lower rates on the same commodities from and to points in the same territories when complainant's shipments were not part of a regular movement but were made to complete rebuilding following hurricane destruction, and the compared rates did not become effective until nearly 3 years thereafter.—Dolby Advertising of Lake Charles v. Texas & N.O. R. Co., 315 I.C.C. 33 (35-5).

Before rate comparisons may be considered controlling in determining reasonableness of other rates, the compared rates must be shown to apply on traffic moving under substantially similar transportation characteristics and conditions, and lower bases of rates prescribed or voluntarily established for compared movements do not alone establish unreasonableness of assailed rates

on bentonite clay from Belle Fourche, Wyo., to w.t.l. and official territory points that are on considerably higher level in relation to class 100. Even though bentonite and many of the compared commodities have similar value, loading, and density, bensonite and the compared clays, sand, etc., have different chemical and physical qualities and different predominant uses, and are subject to different carrier and market competitive conditions; the transportation conditions and characteristics surrounding movement of the compared commodities are thus not shown to be the same as for movements under the assailed rates.—American Colloid Co. v. Akron, C. & Y. R. Co., 321 I.C.C. 91 (100-2).

Although fact that compared rates on grain, under which no hold charge is assessed for inspection at rate-break markets, were not prescribed by the Commission is immaterial to issue of reasonableness of assailed hold charge assessed for inspection at Grand Forks and Jamestown of North Dakota grain, a showing of circumstances and conditions surrounding establishment of the compared rates is necessary. No such showing is made except as to westbound rates established to meet truck-barge competition; however, reasonableness of assailed charge must be determined in light of all circumstances. As assailed charge is generally below costs involved in holding cars for inspection and disposition orders at Grand Forks and Jamestown, other considerations such as free holds at various inspection points and complainants' rate comparisons are not persuasive that assailed charge is unreasonable.—Grand Forks Cham. of Com v. Great Northern Ry. Co., 321 I.C.C. 356 (361).

Charges at brake-fluid rates found applicable on brake-fluid mixtures were not unreasonable because higher than those at rates on proprietary antifreeze compounds; though complainant's mixture are stated to be physically and chemically similar to such compounds, they are not shown to be competitive therewith, and finished brake fluid contain lubricants not required in antifreeze compounds.—R. M. Hollingshead Corp. v. Alton & S. R., 319 I.C.C. 86 (89).

Although complainant compares assailed rates on green salted hides from 5 midwestern origins to Tanco, Fla., with rates prescribed on like traffic from 31 points in 8 southern States, including Florida, to Peabody, Mass., it does not attempt to compare transportation conditions northbound from the southern origins with those southbound from the midwestern point, but assumes that they are similar and that the commission should take official notice of that fact. Burden of proof is on complainant; it has not shown existence of similar transportation conditions.—Lakeland Hide & Leather Co. v. Atlantic Coast Line R., 316 I.C.C. 303 (304-5).

223. Difference in rates warranted when transportation conditions dissimilar.—[Vols. 1, 6, 9, 11-19].—Owing to difference in competive circumstances affecting wheat and flour movements, on one hand, and coarse grain and products, on the other, reduced rates on latter do not establish that higher rates on former between same points exceed reasonable maxima.—Southeastern Assn. of R. & Util. Commrs. v. A., T. & S.F. Ry., 321 I.C.C. 519 (547)*.

Although assailed rates on bentonite, minimum 60,000 pounds, from Belle Fourche, Wyo., to Great Lakes ports for export are higher mile-for-mile than 100,000-pound rates to gulf ports, total charges per ton paid by shipper to accomplish shipside delivery are lower on a 60,000-pound shipment at the lake ports than on a 100,000-pound shipment at the gulf ports; and since the line-haul rates to the lake and gulf ports are in most instances the same, the greater charges per ton for shipside delivery at the gulf ports reflect differences in terminal aspects of transportation conditions affecting the respective movements. Therefore, in view of the different minimum weights and total charges per ton, assailed rates on export shipments to the lake ports are not shown to be unreasonably high, and prescription

of lower rates on 100,000-pound minimum is not warranted.—American Colloid Co. v. Akron, C. & Y. R. Co., 321 I.C.C. 91 (114).

Single-factor rate on coke from Indianapolis to Niagara Falls, Ont., on higher level than corresponding rates from Detroit and Buffalo, is not shown to be unreasonable when transportation conditions are not shown to be similar, since movements from Buffalo and Detroit would be almost entirely in Canada, while movements from Indianapolis would entail a substantial haul within United States; moreover, there is no evidence that any shipments have moved to Niagara Falls, Ont., or that any will move in future.—Board of Directors for Utilities v. Canadian National Rys., 315 I.C.C. 471 (474, 475).

224. Comparisons based on distance alone.—[Vols. 1, 6, 9, 11, 17-19].—That the rate on fine coal to Danville, Va., is the same as that to Lynchburg, although Danville is farther from the mines, does not alone establish, in law or in fact, that the Lynchburg rate is unfair; many factors other than distance enter into a rate.—Lynchburg Traffic Bureau v. United States, 225 F. Supp. 874 (876)*.

Existence of a lower rate on same commodity from same origin for a longer distance to a different destination does not establish unreasonableness of assailed rate when the compared rate is not shown to be representative of the general basis of rates on that commodity from and to the areas concerned.—Clements Foods Co. of Okla. City v. St. Louis-S.F. Ry., 315 I.C.C. 516 (517-8).

Assailed rates on superphosphate from Florida to northern-line points in Minnesota and the Dakotas for distances from 1,650 to 2,250 miles are not unreasonable because rates on lower basis are maintained from Sheffield, Ala., and Mount Pleasant, Tenn., to same points for such substantially shorter distances as 1,161 and 1,203 miles; moreover, competitive conditions are not shown to be similar.—Agsco Chemicals, Inc. v. Alabama Great Southern R. Co., 314 I.C.C. 725 (732).

225. Comparisons not showing circumstances of compared rates, of little value,—[Vols. 1, 6, 9, 12-19].—Comparison of applicable rate on kiln shell sections with lower rates on various other commodities lacks probative value when the compared articles are not shown to have transportation characteristics similar to those of rotary kiln parts.—Forms or Unfinished Shapes, Fabricated—Classification, 316 I.C.C. 679 (682).

Comparisons of rates and revenues on liquefied petroleum gas in jumbo tank cars with those for recent movements of other commodities in tank cars have little probative value without a showing of similarity of transportation circumstances.—Liquefied Petroleum Gas in Jumbo Tank Cars—S.W.F.B., 319 I.C.C. 31 (36-7).

Complainant has not established that its brake-fluid mixtures should be subject to lower rates than other tank-car commodities which are corrosive, explosive, detrimental to health, or of high value, since it failed to show average loadings, volume of movement, similarity of transportation conditions, or respective values of the compared commodities, from which validity of its comparisons might be determined.—R. M. Hollingshead Corp. v. Alton & S. R. 319 I.C.C. 86 (90).

226. Special circumstances surrounding situation under review, considered.—[Vols. 1, 6, 9, 12-14, 19].—Combination rate applicable on shipment consisting of an electric transformer and parts from Sharon, Pa., to Spokane, routed via Vancouver, Wash., because of clearance difficulties on Union Pacific's line, was not unreasonable compared with the factor to Vancouver, which also applied over routes through Spokane, when route of movement was 36 percent circuitous, shipment required a special type car which was returned empty the entire distance, speed of entire train was limited because of exceptional size and weight of the transformer, and instructions called for inspection at each Union Pacific terminal en route.—Westinghouse Electric Corp. v. Pennsylvania R. Co., 318 I.C.C. 1.

As Baltimore is a typical origin of cane sugar moving from eastern refineries to

considered central-territory area, the most equitable comparison of rates from the East with reduced rates proposed on beet sugar from the West to restore competitive relations of western processors and eastern refiners is comparison of the Baltimore rates with those from Greeley, Colo., in group 1, which has 40 percent of the total beet processing capacity of factories from which the proposed rates would apply, and from which the largest beet sugar processor ships 85 to 90 percent of its sugar to that area.—Sugar from the West to Central Territory, 319 I.C.C. 686 (688, 701-2).

227.—Operating difficulties considered.—[Vols. 1, 6, 9, 12, 18].—Cases in which combination rates applicable on shipments routed over nontariff routes because of clearance difficulties were found unreasonable to extent they exceeded reasonable maximum rates prescribed on like traffic in same territory are not controlling in similar situation where the lower rates sought is not shown ever to have been prescribed as maximum on commodity concerned in considered territory, and circuity of route of movement was approximatelly twice that of routes involved in cases cited.—Westinghouse Electric Corp. v. Pennsylvania R. Co., 318 I.C.C. 1 (4).

228. Depressed or subnormal rates.—[Vols. 1, 6, 9, 11-19].—Rates on a depressed level are not a proper standard for determining reasonableness of other rates.—Grain from Pittsburgh, Pa., to Eastern Base Points, 325 I.C.C. 669 (677)*; rates depressed by competition with other forms of transportation afford no measure of maximum reasonableness of other rates.—Southeastern Assn. of R. & Util. Commrs. v. A., T. &S.F. Ry., 321 I.C.C. 519 (547)*; similarly, per-car rates depressed to meet motor competition are not a proper measure of maximum reasonableness of assailed per-100-pounds rates from intermediate points.—Farmers Potato Distr. Co., Inc. v. Atchison, T. & S.F. Ry., 315 I.C.C. 105 (109)*.

Showing that proposed reduced rates on grain and products from Pittsburgh to trunkline and New England territories are lower than rates from numerous nearby Ohio and Pennsylvania points and Wheeling, W. Va., does not warrant their condemnation; in absence of evidence of record, it may not be assumed that the compared rates are on a minimum reasonable level.—Grain from Pittsburgh, Pa., to Eastern Base Points, 322 I.C.C. 218 (228)*.

Rates depressed by competition are not an acceptable standard for measuring reasonableness of other rates. Charges on Plaswood lumber at applicable class rates are not shown to have been unreasonable by comparison with lower commodity rates applicable on yellow pine lumber, which were established on depressed level due to commercial or water competition.—Plaswood Corp. v. Alton & S.R., 321 I.C.C. 434 (447, 448).

Comparison with lower rates on proprietary antifreeze compounds, which are shown to be on depressed basis originally established to meet water competition, does not provide a proper measure of maximum reasonableness for rates on brake fluid mixtures.—R. M. Hollingshead Corp. v. Alton & S. R., 319 I.C.C. 86 (89).

229.—Compelled or competitive rates.—[Vols. 1, 6, 9, 11-19].—Rates depressed to meet competition provide no standard for determining maximum reasonable rates.—Alabama State Docks Dept. v. Alabama, T. & N. R. Co., 321 I.C.C. 347 (353)*; United States v. Oklahoma City-Ada-Atoka Ry. Co., 319 I.C.C. 182 (186)*; Agsco Chemicals, Inc. v. Alabama Great Southern R. Co., 314 I.C.C. 725 (733).

Rates depressed to meet competition are not a proper measure of maximum reasonableness of other rates. Though assailed rates on fresh meats, minimum 21,000 pounds, from Louisville and Columbus and Madison, Ind., to trunkline and New England territories reflect percentages of Chicago-New York rates under McGraham formula exceeding those approved for higher minima from those and other origins, and considered origins are the only ones in central territory from which different percentage bases (depending on weight of shipment) apply, the lower rates are compelled by motor competition; there is no showing of any movement at assailed rates for some time or any likelihood of

future movement if lower percentages sought were prescribed for that minimum; and complainants have not rebutted defendants' showing that many of lower rates sought are below out-of-pocket costs. Assailed rates are not shown to be unreasonable.—Louisville Chamber of Commerce v. Ahnapee & W. Ry. Co., 318 I.C.C. 749 (750, 753-4).

Rates compelled by competition may not be accepted as a standard of maximum reasonableness; assailed rates on wooden dowels and handle material are not shown to be unreasonable by comparison with rates on certain other articles in lumber list which were reduced to meet unregulated truck competition.—Union Fork & Hoe Co. v. Chesapeake & O. Ry. Co., 314 I.C.C. 784 (785-6).

230. Comparison with "paper" rates on which little traffic moves.—[Vols. 1, 6, 11, 12, 14-16, 18, 19].—Since boxcar rates and services have not been attractive to automobile shippers for some time and probability that such rates may generate future movements of any consequence appears remote, comparison of plan III TOFC rates on automobiles with boxcar rates which generally move not traffic, except possibly in emergency, has little value in determining reasonableness of level of the TOFC rates.—Motor Vehicles from Kansas City to Ark., La., and Tex., 318 I.C.C. 301 (315).

235. Comparison with rates authorized under or violative of provisions of §4.—*Aggregate-of-intermediates clause.*—[Vols. 1, 6, 9, 17, 18].—Although assailed rates on superphosphate from Florida to northern-line points in Minnesota and the Dakotas exceed combinations on other w.t.l. points to which lower southern fertilizer scale applies, they are not unlawful when those situations result from defendants' attempt to compete with routes by rail-barge to Minneapolis and truck beyond, and they hold out under rule 56 of Tariff Circular 20 to publish the lower combinations as single-factor rates and to make reparation to that basis on any movements occurring before publication can be effected.—Agsco Chemicals, Inc. v. Alabama Great Southern R. Co., 314 I.C.C. 725 (730, 731).

—*Long-and-short-haul clause.*—[Vols. 1, 6, 9, 12, 14, 15, 17, 18].—Assailed per-100-pounds rates on potatoes from Virginia origins in official territory to other official-territory points were not unreasonable merely because charges thereunder exceeded those from a Virginia point in southern territory computed as provided by holdout rules in tariff publishing per-car rates from southern territory points to which those origins are intermediate over circuitous routes, when the per-car rates were authorized by fourth-section order granting relief over direct routes, and §4 permits reduction of rates over circuitous routes to meet the direct-route rates. Moreover, assailed rates did not exceed basis found reasonable on potatoes from and to the same territories in 208 ICC 347.—Farmers Potato Distr. Co., Inc. v. Atchison, T. & S.F. Ry., 315 I.C.C. 105 (109)*; Id., 318 I.C.C. 415 (418, 419)*.

Although, because assailed scale rates on superphosphate from Florida to northern-line points in Minnesota and the Dakotas are on higher level than southern fertilizer scale applicable on superphosphate to other w.t.l. points, combinations via Minneapolis to northern-line points less distant from Grand Forks, N. Dak., than from Minneapolis are lower than rates for movements to same points via Grand Forks, thereby giving Minneapolis shippers a competitive advantage in marketing fertilizer and materials at points geographically closer to Grand Forks, the assailed rates are not therefore unreasonable; to remain competitive at w.t.l. destinations which they serve over routes through northern-line points, principal defendants observe the basis of rates published by their competitors to those points, and maintenance of lower rates to more distant w.t.l. points than to intermediate northern-line points comports with fourth-section relief granted in 304 ICC 535.—Agsco Chemicals, Inc., v. Alabama Great Southern R. Co., 314 I.C.C. 725 (730, 731-2).

236. Through rates compared with combinations of factors.—[Vols. 1, 6, 9, 13, 17].—Carriers have a right to maintain combination rates so long as factors thereof

do not exceed maximum reasonableness, and joint single-factor rates should not be used as a standard of maximum reasonableness for combination rates. Combination rates applicable over route of movement which gave initial carrier (the only carrier named in shipper's routing) its long haul was not unreasonable merely because a lower single-factor rate applied over other and substantially longer routes between same points. As factors composing it are not shown to be unreasonable, assailed combination is not shown to exceed a maximum reasonable level.—Eaton Metal Products Co. v. Union Pac. R. Co., 321 I.C.C. 340 (342)*.

Contention that combination rates applicable on cotton from Mississippi Valley origins to southern territory destinations over routes restricted against application of revised joint rates by defendant's tariff routing provisions are unreasonable in violation of §1(4) and (5), because they are higher than the revised joint rates, would have merit only if the restricted routes were shown to be through routes. However, all the restricted routes have been closed to that traffic since effective date of defendant's revised routing provisions, and mere existence of higher combinations over those routes does not violate §1(4) and (5).—Atlantic Coast Line R. Co. v. Southern Ry. Co., 321 I.C.C. 314 (326)*.

Comparison with Divisions of Through Rates

240. Pertinency and weight of comparison; as to through rates.—[Vols. 1, 6, 11, 12, 17, 19].—Division of rates have no bearing on lawfulness of rates separately established for shippers.—Reduced Transcontinental Lumber Rates, 1961, 318 I.C.C. 815 (819).

In determining a minimum reasonable proportional rate on ex-river coal from Mount Vernon, Ind., to Chicago district, little weight should be accorded divisions received by defendant for transportation of coal to Chicago from other origins.—Baltimore & O. R. Co. v. Chicago & E.I. R. Co., 318 I.C.C. 771 (783)*.

Rates in Opposite Direction

251. Normally, rates the same in both directions.—[Vols. 1, 6, 9, 11-15, 17, 18].—Where transportation conditions affecting movements in opposite directions between same points are substantially similar, there should be no material difference in rates. Rate charged on shipments of superphosphate from Memphis to North Little Rock was unreasonable to extent it exceeded contemporaneous rate in reverse direction, when no claim of dissimilarity of transportation conditions is made.—Arkansas Plant Food Co. v. St. Louis S.W. Ry. Co., 315 I.C.C. 680 (681).

Territories Compared

260. Rates in same general territory.—[Vols. 1, 6, 9, 11-19].—One of the best tests of reasonableness of particular rates is the level of rates maintained on like traffic from or to other points in same general territory. Commodity rates charged on air coolers and dehumidifiers from Springfield, Mass., to Chicago area were unreasonable to extent they exceeded charges based on exceptions class rates established on those commodities for general application in official territory; while the exceptions rates were designed to meet motor competiton, there is no indication that such competition was less severe to Chicago than to other destinations in the territory.—Westinghouse Electric Corp. v. New York Central R. Co., 318 I.C.C. 277 (279-80).

There is generally no valid reason, in readjustment of intraterritorial rates, for exclusion of any points not previously excluded from the territorial basis. When, prior to general reduction of rates on fish oil residuum within official territory, rates to Muscatine, Iowa, and Mendota, Ill., were on same basis as to other official territory points, and there is no reason to believe that transportation conditions were materially different for movements to those two points than to the others, failure to establish the reduced rates to Muscatine because it is a w.t.l. border point, and to

Mendota because it is also served by western carriers, resulted in unreasonable charges. Reparation awarded to the reduced basis.—Kent Feeds, Inc. v. Pennsylvania R. Co., 319 I.C.C. 427 (428, 429)*.

While uniformity of rates in relation to distance is desirable when the territory in which the rates apply is homogeneous and transportation conditions are generally uniform, the 23-State area comprised of Wisconsin and States west of Mississippi River is not homogeneous nor are conditions uniform throughout it; differences in operating conditions between mountain-Pacific territory and territory east thereof were recognized in 296 ICC 555. Therefore, prescription of a uniform cement scale for application throughout entire western territory would not be warranted.—United States v. Oklahoma City-Ada-Atoka Ry. Co., 316 I.C.C. 731 (754)*.

Average length of cement hauls in western district has remainded relatively unchanged in the 200-mile range since original prescription of scale basis, and though reduced scales voluntarily established in portions of that district for the shorter hauls have enabled railroads to retain a substantial share of the traffic in competition with motor carriage, extension of reductions to the longer hauls would not result in improved revenues, as consumers generally resort to the supply nearest point of use. As present rates appear generally to serve needs of the cement industry and are not shown to exceed reasonable maxima, defendants should not be reduce previously prescribed rates where intermode competition is not influential.—Id. 319 I.C.C. 182 (186)*.

261. Rates in different territories.—[Vols. 1, 6, 9, 11-19].—That proposed reduced rates on automobile body parts, minimum 15,000 pounds, within official territory and from that to southern territory are on same level as rail 15,000-pound rates on same articles between points in southwestern and w.t.l. territories has little probative value when the compared rates are of very recent origin.—Automobile Body Parts, Official and Southern Territories, 323 I.C.C. 149 (152).

That level of assailed rates on bentonite clay from Belle Fourche, Wyo., to w.t.l. and official territory destinations is higher than level maintained on movements to southwestern territory, and also considerably higher than prescribed or voluntarily maintained levels within or between segments of docket No. 28300 territory, does not warrant finding assailed rates unreasonable when there are substantial differences in transportation characteristics and conditions surrounding movements under the assailed and the compared rates, and high level of those assailed is not shown to impair complainant's ability to market its product.—American Colloid Co. v. Akron, C. & Y. R. Co., 321 I.C.C. 91 (113).

Under the rate-break principle governing establishment of rates on grain and products from western district to both the East and the South, the same western factors apply to the same gateways regardless of ultimate destination. Proportionals east of the gateways to eastern destinations have for years been influenced by over-the-Lakes competition and are not a proper measure of lawfulness of assailed proportionals to the South.—Southeastern Assn. of R. & Util. Commrs. v. A., T. & S.F. Ry. Co., 321 I.C.C. 519 (547)*.

Rates on bentonite clay from Greybull, Wyo., in mountain-Pacific territory, to destinations in official and southwestern territories are not unreasonable merely because they are on higher level than those from Belle Fourche, Wyo., in w.t.l. territory; higher scale of class rates was approved from, to, and within mountain-Pacific territory in recognition of more difficult operating conditions in that territory than in uniform class-rate territory east of Rocky Mountains; so far as appears, assailed commodity rates from Greybull and Belle Fourche reflect those differences in operating conditions.—Magnet Cove Barium Corp. v. Chicago, B. & Q.R. Co., 315 I.C.C. 555 (557-8).

Kinds of Rates Compared

270. Through rates with components thereof.—[Vols. 1, 6, 9, 12].—The commission has consistently held that rates used in a combination are not unreasonable merely because they are higher than joint rates

established on the same traffic.—Aluminum Articles from Sandow, Tex., to Pa. and N.Y., 319 I.C.C. 431 (442)*.

Assailed combination rates on coke from Indianapolis to Hamilton, Galt, and Sarnia, Ont., are not shown to be or to have been unreasonable merely because in excess of 3511 scale basis prescribed in 194 ICC 640, plus authorized United States general increases. The commission has no jurisdiction over the Canadian factors and increases made therein; factors from Indianapolis to Detroit and Port Huron, which apply to international boundary, were and are on the sought scale basis plus authorized increases and are not indicated to be unreasonable; and single-factor rate to Niagara Falls, Ont., also on that scale basis, is not unreasonable because it reflects Canadian as well as United States increases, when car-mile and ton-mile earnings thereunder compare favorably with the average earned on coke traffic by official-territory carriers.—Board of Directors for Utilities v. Canadian National Rys., 315 I.C.C. 471 (473, 474, 475).

Combination rate made on Vancouver, Wash., which applied on an electric transformer and parts shipped from Sharon, Pa., to Spokane, routed circuitously via Vancouver because of clearance difficulties, was not unreasonable compared with the factor applicable to Vancouver, which also applied over routes through Spokane, when that rate is not shown ever to have been prescribed as reasonable maximum on transformers in involved territory.—Westinghouse Electric Corp. v. Pennsylvania R. Co., 318 I.C.C. 1 (2, 4).

Competition

286. How far competition considered in determining reasonableness; by commission.—[Vols. 1, 6, 9, 11-14, 16-19].—See also NTP, n. 5 *Destructive competition;* §15a(3), n. 2.

The commission has no power to proscribe a reduced rate otherwise lawful under §§ 3 and 1(5) simply to prevent diversion resulting from competition; it may prohibit a rate as too low only if that rate is too low from a transportation standpoint. In absence of findings commonly made in support of conclusion that a rate is too low, the commission's disapproval of reduction in rates on import ore from New York to rates the same as from Baltimore and Philadelphia, since rate parity would help New York and hurt Baltimore, cannot be sustained. The act does not give the commission so great an umpiring role over the fate of cities; standards it establishes are transportation standards, not criteria of general welfare. [Citing 289 US 627 and 331 US 284.]—New York Central R. Co. v. United States, 207 F. Supp. 483 (494-5)*.

The commission cannot compel carriers to meet competition; in absence of a showing of unlawfulness, railroads have a right to decide the level of rates to be established to meet competition of other transportation modes.—Southeastern Assn. of R. & Util. Commrs. v. A., T. & S.F.R., 321 I.C.C. 519 (546)*.

Since 1953 respondent railroads have been subject to keen competition for liquefied petroleum gas traffic from other modes of transportation, particularly pipeline-truck and barge-truck, both regulated and unregulated, and increasing pipeline competition seriously threatens their remaining LPG traffic. Further reductions in standard tank-car rates are impractical for reasons of cost; proposed reduced alternative distance rates on shipments in jumbo tank cars are compensatory on overall basis and are necessary for respondents to remain competitive and perform their function of providing essential transportation services; approved.—Liquefied Petroleum Gas in Jumbo Tank Cars—S.W.F.B., 319 I.C.C. 31 (33-4, 40).

Although a showing of competitive necessity may be a factor in establishment of return-haul rates, absence thereof does not establish unlawfulness of reduced return-haul rate on motor vehicles in bilevel cars; though only one shipper is presently in position to utilize that rate, no other shipper is shown to be unduly prejudiced thereby, and the rate is compensatory and is moving traffic that otherwise would not be available to

respondents.—Automobiles from Atlanta, Ga., to Norfolk, Va., 316 I.C.C. 99 (101, 102).

289. —Extent to which carriers may consider.—[Vols. 1, 6, 9, 11, 12, 16-19].—Regulated carriers should be given considerable leeway in meeting competition of private and other carriers not subject to commission regulation, particularly where such competition is clearly dominant.—Grain in Multiple-Car Shipments—River Crossings to So., 321 I.C.C. 582 (594)*.

It is not required that carriers which fear diversion of traffic must wait until the diversion is an accomplished fact before they may establish competitive reductions. Where institution of private carriage is imminent, common carriers should be allowed considerable leeway to meet that competition.—Pig Iron, Buffalo, N.Y., to Chicago, Ill., and Gary, Ind., 321 I.C.C. 121 (129)*.

Reduced flat rate on corn and products for distances of approximately 300 to 600 miles from specified w.t.l. area to Chicago group, and scale rates for longer distances, are shown to be compensatory and no lower than necessary to meet unregulated truck competition which has caused a sharp decline in respondents' corn traffic, also to afford involved destination area equal opportunity to attract traffic diverted to western and southwestern markets as result of rail rate reductions authorized in 298 ICC 261, which vacated outstanding rate orders on coarse grain in western district and left carriers free to make any adjustment they found necessary to meet truck competition.—Corn and Corn Products, Iowa, Nebr., Minn., S. Dak. to Ill., 318 I.C.C. 291 (292-3, 294, 296).

300. Competition or lack of it not justification for unreasonable rates.—[Vols. 1, 13, 15, 19].—Respondents' mere apprehension of diversion of the traffic to motor carriers does not justify TOFC rates on malt liquors 65 cents below present motor rates and only slightly above out'of-pocket costs; before such diversion would occur the motor rates would have to be reduced, and any such attempt would be subject to protest and suspension. However, finding that considered rates are unreasonable is without prejudice to their republication if special circumstances should develop requiring their establishment.—Malt Liquors from Peoria, Ill., to Newark, N.J., 316 I.C.C. 378 (380).

301. Competitive articles.—[Vols. 1, 6, 9, 11-14, 17, 19].—There is competitive justification for assailed unit train rates on steam coal based on annual volume minima delivered at Hammond, Ind. Coal consigned to electric generating plant competes with natural gas, but boiler fuel gas is subject to interruption or curtailment whenever gas is needed by other customers, which is one reason why annual coal consumption at that plant has not changed markedly in past 10 years despite lower price of gas. However, rail delivery of coal declined by 22.68 percentage points of total fuel consumption during that period, whereas both percentage and total amount of gas increased. In establishing assailed rates defendant acted lawfully to prevent a further percentage decline.—Natural Gas Pipeline Co. of America v. N.Y.C. R. Co., 323 I.C.C. 75 (85).

Although rates on bentonite clay from Belle Fourche, Wyo., to w.t.l. and official territory destinations have increased about 40 percent since 1950, compared with increase of only about 17 percent for all products of mines, higher level of bentonite rates is not shown to have impaired complainant's ability to market its product. Fire clay is bentonite's largest competitor in the foundry market, but there is no evidence that complainant has lost sales to fire clay; on the contrary, substantial gains of bentonite and corresponding losses of fire clay and stoneware clay in sales to foundry and steeworks industries have occurred despite the difference in rate levels. Nor can assailed rates be found to impair export movements of bentonite, when Belle Fourche bentonite sells in European markets at higher prices than European bentonites, and there is no evidence as to the relative quantities of each required to perform any particular function.—American Colloid Co. Akron, C & Y. R. Co., 321 I.C.C. 91 (103-4).

And though complainant lost a considerable portion of its animal-feed pelletizing market to lignin liquor, the

quantity of lignin liquor required to perform same function as a ton of bentonite is not shown and there is no showing that at any of involved destinations the price of bentonite, added to the freight rate from Belle Fourche, is equal to the price per ton of lignin liquor. Level of assailed rates therefore cannot be considered a major factor in complainant's loss of business in that market.—Id., pp. 102, 103.

Fatty acids and fatty-acid esters of coconut oil have transportation characteristics similar to, and are interchangeable in manufacture of detergents with, other vegetable-oil products and fatty alcohols, and, since they compete in price as well as use, a difference in freight costs may determine a sale. Disruption of former rate parity by application of Ex Parte 212 percentage increases to fatty acids and esters, higher than maximum increase authorized on coconut oil and other vegetable and nut oils, was therefore prima facie unreasonable.—Foremost Food & Chemical Co. v. Alton & S. R., 318 I.C.C. 35 (36-7).

Although scrap iron or steel, iron ore, and pig iron are major raw materials of the steel industry, present rates on scrap in official territory are not shown to be unreasonable in relation to those on iron ore and pig iron; scrap and iron ore are used largely in different steelmaking processes, and there is little room for competition between them; and while use of scrap is to some extent alternative to use of pig iron, throughout 1948-59 percentages of scrap tons to total tons of scrap and pig iron consumed in steelmaking furnaces varied from the average for the entire period by no more than 2 percent. Scrap iron has not been at a market disadvantage compared with iron ore and pig iron, and there is no suggestion that scrap dealers' difficulties are attributable in any major degree to rates on those commodities.—Institute of Scrap Iron & Steel, Inc. v. Akron, C. & Y. R., 316 I.C.C. 55 (65, 66).

Wallboard and fiberboard shipped from Lockport, N.Y., have similar transportation characteristics, there is no substantial difference in their average value, they compete in many markets, and take same rating in governing classification; it will therefore be unjust and unreasonable for defendants to charge higher rates on future shipments of wallboard from Lockport to southern territory than those contemporaneously maintained on fiberboard.—Upson Co. v. Erie R. Co., 316 I.C.C. 217 (220).

302. Water competition.—[Vols. 1, 6, 9, 11-19].—Whether other lake carriers suffered diversion of pig iron traffic from Cleveland as result of reduction of rail rate to Chicago is now shown, but there is no indication of diversion from the only water carrier which appeared in opposition to the reduced rates from Lake Erie ports. Respondents have been unable to obtain any pig iron traffic at Toledo, and that from Cleveland consisted largely of emergency movements. Respondents are the low-cost mode from those ports, and the reduced rates are necessary for them to participate in the traffic; the rates are compensatory and will serve to enhance rather than impair respondents' revenue position; approval of the reduced rates from Cleveland and Toledo is therefore warranted. But the reduced rates from Erie and from Buffalo and related New York points, from which protestant water carriers are the low-cost mode, are competitively destructive and may not be approved.—Pig Iron, Buffalo, N.Y., to Chicago, Ill., and Gary, Ind., 321 (124, 128-9)*.

See also Newprint Paper from Tenn. and Ala. to Baton Rouge, La., NTP, n. 5 *water carriers.*

In meeting prospective intensified barge competition, carriers are not required to withhold counter-action until diversion actually takes place. Bargelines already enjoy 90 percent of total annual tonnage of iron or steel bars moving outbound from Lemont, Ill., and testimony of Lemont shipper shows that construction of improved barge-loading facilities, which would necessarily increase its use of barge service, is feasible and would materially reduce cost of that service. Reduced rail rates in issue are just and reasonable when they are amply compensatory and no lower than necessary to enable the railroads to obtain a greater share of the traffic and increase their revenues.—Steel Bars, Lemont, Ill., to Iowa, Kans., Mo., Minn., & Nebr., 319 I.C.C. 292 (303, 304).

Since less than 5 percent of plastics shipped from Texas to New York-New Jersey area and New England has been moving all-rail, reduced rates proposed to meet water competition are justified when they exceed out-of-pocket costs by substantial margins and are not competitively destructive.—Pastics from Texas to the East, 319 I.C.C. 379 I.C.C. 379 (381)*.

Since rail respondents are willing to have their 70,000-pound rates on citrus fruits and juices from Florida to New England and middle Atlantic States raised to level of Sea-Land's present rates, and latter are not unreasonably high, equalization of the competitive rail and Sea-Land rates at that level would be justified.—Frozen Juice and Fruit from Florida to the North, 319 I.C.C. 577 (596).

Considering the destination area as a whole, as must be done to avoid fourth-section departures and other rate inconsistencies, inherent advantages as between all-rail and rail-water-rail routes for movement of phosphate rock from Florida to the Southwest do not differ materially; reduced rail rates which are compensatory and substantially equalize all-rail with rail-water-rail charges are necessary to meet existing water carrier competition and the threat posed by proposed expansion of grinding facilities along Mississippi and Ohio rivers which could be served by water carriers.—Phosphate Rock, Florida to S.W. and W.T.L. Territories, 316 I.C.C. 207 (211-12).

303. Market competition.—[Vols. 1, 9, 11, 12, 14, 15, 17-18].—There is intense competition among all producers and suppliers of sugar, and western sugar beet processors are entitled to market their sugar in considered central destination area in competition with eastern cane sugar refiners at rates reasonably related to those from the eastern refineries, distance considered. For some years there was a reasonably stable relation in the rates on cane and beet sugar, until in 1960 railroads serving the eastern refineries greatly reduced rates to that destination territory to meet motor competition; those reductions substantially distorted and increased disparities theretofore existing in favor of the eastern refiners. [See discussion of economic and marketing conditions on pp. 691-697.] Proposed reduced rates on beet sugar for the greater distances from the West, on slightly lower level than the reduced scale from the East, will partially restore the historic relationship of western processors with eastern refiners, and, on the whole, represent an equitable adjustment; approved.—Sugar from the West to Central Territory, 319 I.C.C. 686 (690, 692, 706-7).

Although purported purpose of proposed reduced rate is to enable a liquefied petroleum gas producer at Oklahoma City to compete in Memphis area with gulf coast and other producers who use barge, pipeline, and private or common motor carriage, and competition for that traffic throughout the Southwest is generally so keen that at least two modes of transportation compete for the movement to every major destination, respondent's statements that there are barge movements to Memphis and that the Oklahoma City producer has not hesitated to construct pipelines where economically feasible are too general to establish competitive necessity for reduction of present rate which is the lowest into the Memphis market and is under investigation in another proceeding.—Liquefied Petroleum Gas, Oklahoma City to Memphis Area, 316 I.C.C. 189 (190, 192).

305. Competition with carriers not subject to act.—[Vols. 1, 6, 9, 11, 13, 16-19].—While a carrier need not wait until the traffic is lost before reducing rates to meet proprietary competition, where private carriage is the sole justification advanced for proposed reductions carrier must show that it is indeed real, imminent, or reasonably foreseeable with respect to the traffic involved.—Tractors—T.L & W.T.L. Territories to S.W. & W.T.L. Ter., 319 I.C.C. 758 (766).

Common carriers should be allowed considerable leeway to meet competition of a shipper transporting his own goods. Respondents' claim that reduced rate on pig iron from Cleveland, Ohio to Chicago is necessary to meet private vessel competition is substantiated by unequivocal statements of shipper witnesses that present rate is so high as to preclude use of rail

service and that their company will resort to private carriage if the reduced rate is not approved; probable costs shown, based on operation of shipper's vessel between other lake ports, indicate that private vessel movement would be feasible. Institution of private carriage at Cleveland therefore appears imminent, and the reduced rate, though below fully distributed costs, is compensatory; approved.—Pig Iron, Buffalo, N.Y., to Chicago, Ill., and Gary, Ind., 321 I.C.C. 121 (123, 129)*.

Proposed reduced rail rate on soda ash from Baton Rouge area to Georgia ports is compensatory, compares favorably with competitive rail rate from Saltville, Va., and is necessary for respondents to participate in the traffic when shipper states that it can move the traffic to Savannah in private carriage at lower cost per ton. Approved.—Aluminum Articles from Sandow, Tex., to Pa. and N.Y., 319 I.C.C. 431 (437)*.

In estimating volume of unregulated truck movement of grain into the Southwest, the grain consuming animal unit method (GCAU) developed by Department of Agriculture for estimating grain deficits should be accorded weight and probative value. In light of its history and use, that method is sufficiently reliable to approximate the volume of such shipments and, considering also the demonstrated trends, evidence warrants finding that actual volume in 1960 of exempt truck shipments of grain (including soybeans) into that territory was from about 4 to over 6 million tons, and probably nearer the latter, greatly exceeding volume handled by either railroads or bargelines. Consideration also of results of an 8-State road check, shipper and receiver testimony as to their use of trucks, and rates already maintained in effort to meet truck competition compels the conclusion that such unregulated movement is the most substantial and growing competition for grain traffic confronting southern railroads.—Grain in Multiple-Car Shipments-River Crossings to So., 318 I.C.C. 641 (677)*.

All of such tonnage moves under exemption of §203(b6) at rates hitherto kept below rail rates and subject to further reductions without notice; but in exempting those truckers from licensing and rate regulation Congress did not intend to isolate them from competition. Proposed reduced rates of Southern Ry. on multiple-car grain shipments in jumbo hopper cars, minimum 450 tons, from Ohio and Mississippi River crossings to the South, restricted not to apply to grain products and not including transit, switching absorptions, and certain other privileges accorded at single-car rates, are compensatory and competitively necessary to meet that growing competition, which has increasingly depleted its prospective grain revenues, with no end of the trend in sight. Approved.—Id., pp. 685, 687, 688.

Although Southern Ry. failed to show that its proposed rate reductions are not substantially lower than the general level of unregulated truck rates and charges, such charges are difficult to ascertain and are subject to change without notice. It would be unreasonable to require a carrier to prove with any degree of precision that its proposed rates are not lower than necessary to meet the competition created by unpublished charges subject to change without notice.—Id., 321 I.C.C. 582 (595, 606)*.

When some 30 percent of present beer traffic between considered points is moving in contract or private carriage, and shipper is considering expanding its private carrier operations to obtain lower total transportation costs, reduced rail rate, which—plus accessorial charges—is no lower than the indicated cost of private carriage, is justified to meet threat of increased use thereof and is no lower than necessary to do so; respondents should not be required to delay efforts to protect their traffic until it has actually been lost.—Beer, in Containers, St. Louis to Arlington Heights, Ill., 316 I.C.C. 812 (815, 818, 819-20).

Lower rates on some articles in the lumber list, established by defendants to meet competition of unregulated motor carriers engaged in buy-and-sell operations, are not a proper measure of maximum reasonableness of assailed rates on wooden dowels and handle material; rates on some lumber products affected by competition might well be reduced without necessity of

a corresponding change in rates on others not so affected.—Union Fork & Hoe Co. v. Chesapeake & R. Ry. Co., 314 I.C.C. 784 (785-6).

See also Iron and Steel from Ill., Ind., Kans., and Mo. to Iowa, §15(7), n. 96.

307. Motor carriers.—[Vols. 1, 6, 9, 11-19].—Although it was noted in prior report that practically all of considered export cottonseed oil moved to Texas ports by tank truck and, on further hearing, rail respondents argue that proposed rates on 60,000-pound minimum are vital to their participation in the traffic, no evidence was presented on further hearing as to volume of the traffic moving via motor carrier or rail other than to Houston; furthermore, respondents' evidence (1) does not include costs related to circuity, single- or joint-line service, or refining-in-transit and (2) reflects average cost of all equipment in the area involved rather than cost reflecting characteristics of considered traffic and equipment actually used. Evidence presented on further hearing does not afford adequate basis for determining compensativeness of proposed rates; not approve.—Cottonseed Oil, Shreveport, La., & Texas to Texas Ports, 323 I.C.C. 698 (700-2, 704)*.

Protestants' contention that decline in volume of rail movement of tractors, agricultural implements, roadmaking machinery, and related articles is due to decline in production rather than to motor competition is supported by data published by Department of Agriculture which also show a progressive decline in total amount of such traffic transported over the last 10 years; evidence supported by reports of Car Service Division of A.A.R. further indicates that a shortage of serviceable flatcars, and use of a portion of available cars of that type in TOFC service, may be partially responsible for respondents' failure to handle more of the traffic; assailed reduced ratings are therefor not shown to be compelled by loss of traffic to motor carriers.—Exceptions Ratings on Agric., Roadmaking, Other Articles, 315 I.C.C. 9 (15-6, 18)*.

That assailed furniture rates are lower than certain competitive motor common carrier rates has little significance when the major truck competition to considered territory is with private carriage, which is increasing.—North Dakota Public Service Comm. v. Great Northern Ry., 315 I.C.C. 137 (144-5).

Proposed reduced rates on bulk cement in southern territory, ranging from 2 to 21.5 cents lower than corresponding tank-truck rates for distances from 20 to 200 miles, are amply compensatory and necessary to arrest diversion of the traffic to regulated and unregulated motor carriage and forestall future diversion. While it seems unlikely that respondents can prevent all erosion of their cement traffic, proposed rates will at least give them reasonable opportunity to compete, and will return more revenue than they would receive at present rates on a small amount of retained traffic. Approved.—Cement within Southern Terr. & from Hagerstown to So., 319 I.C.C. 465 (474, 476, 479).

Reduced import rates on bananas from Baltimore to central and trunkline territory points on approximately same level as competitive motor rates, and differentially related rates from Philadelphia and New York City group, are no lower than necessary to meet truck competition; though truck shipments incur top wharfage and loading charges not assessed on rail movements, rail shipments are subject to substantial additional charges for heater service in winter and icing in summer, whereas motor rates include refrigeration, heat, and dunnage without extra charge; and prior to the reductions substantial tonnages were diverted to trucks notwithstanding respondents' special facilities for fast and efficient transfer of bananas from vessels to refrigerator cars.—Bananas, Import, from Eastern Ports to Official Terr., 315 I.C.C. 215 (216-7, 219).

Assailed TOFC rates are not unreasonable merely because they are lower than corresponding rates of competing motor carriers.—Middlewest Motor Freight Bureau v. Great Northern Ry., 316 I.C.C. 443 (447).

Presumptions, Evidence, Admissions as to Reasonableness

310. Rates prescribed by authority of law; the commission or other Federal authority.—[Vols. 1, 6, 9, 11-19].—Generally, past

prescriptions are the best evidence of the reasonableness of corresponding rates on a latter date.—Agsco Chemicals, Inc. v. Alabama Great Southern R. Co., 314 I.C.C. 725 (733).

Past and present rates on superphosphate, not deflourinated or feed grade, from Florida to northern-line points Minnesota and the Dakotas are not shown to have been or to be unreasonable when prior to establishment of present northern-line scale they were on scale basis prescribed in 289 ICC 307 and since then have been below that level.—Id., p. 733.

While freight-rate increases authorized in the several general revenue proceedings were not "prescribed" within meaning of Arizona Grocery case principle, they were nevertheless found justified and authorized by the commission, and the rate basis prescribed on considered traffic plus the subsequent general increases is entitled to substantial weight in determining whether assailed rate exceeds a reasonable maximum basis. However, though rate applicable on complainant's shipments is not unreasonably high measured by that standard, that showing is not conclusive and may be (and in instant case is) rebutted by countervailing evidence.—American Colloid Co. v. Illinois Central R. Co., 321 I.C.C. 375 (377-8).

313. Presumption from long continuance of rates.—[Vols. 1, 6, 9, 11-15, 17, 19].—Where rates have long been in effect without protest, and were on level no higher than that approved by the commission as not unreasonable, there is no sound basis for a finding of unreasonableness in the past.—Upson Co. v. Erie R. Co., 316 I.C.C. 217 (219).

When for nearly 40 years prior to period when considered shipments moved transcontinental rates on fatty acids and fatty-acid esters of coconut oil were the same as on coconut and other vegetable and nut oils and have been the same since that period, and these commodities have similar transportation characteristics and compete in use and in price, rates on considered shipments of fatty acids and esters were prima facie unreasonable to extent that they included Ex Parte 212 percentage increases higher than the maximum increase provided on vegetable and nut oils generally.—Foremost Food & Chemical Co. v. Alton & S. R., 318 I.C.C. 35 (36-7).

When a basis of rates has long been used and rates on that basis have been found not shown to be unjust or unreasonable in prior proceedings, and changes brought about by competitive conditions have been gradual, there is no sound basis for a finding of unjustness or unreasonableness on past shipments.—Budlong Pickle Co. v. Ann Arbor R. Co., 315 I.C.C. 333 (342).

316. Presumption as to rates forced by competition.—[Vols. 1, 6, 13].—Prior findings that maintenance of higher rates on some articles in the lumber list than on others is unlawful do not establish that all articles in that list are entitled to rate reductions found competitively necessary on only some of the articles therein.—Union Fork & Hoe Co. v. Chesapeak & O. Ry. Co., 314 I.C.C. 784 (785).

318. Presumption as to voluntarily established rates.—[Vols. 1, 6, 9, 12, 13, 17].—The mere fact that defendant offered to establish reduced rates on fine coal from mines on its lines to Krannert, Ga., over its through routes with complainant does not prove unreasonableness of present rates over those routes.—Southern Ry. Co. v. Louisville & N.R. Co., 315 I.C.C. 175 (177)*.

319. —Evidentiary effect of subsequent reduction.[Vols. 1, 6, 9, 11, 12, 14-19].—Voluntary reduction of a rate by a carrier creates no presumption that the former rate was unreasonable.—Universal-Rundle Corp. v. Texas & N.O. R. Co., 319 I.C.C. 458 (461)*; Lakeland Hide & Leather Co. v. Atlantic Coast Line R. 316 I.C.C. 303 (305); Farmers Potato Distr. Co., Inc. v. Atchison, T. & S.F. Ry. Co., 315 I.C.C. 105 (109)*; particularly where the voluntary reductions followed a period of negotiations between the interested parties and affected a large territory.—Upson Co. v. Erie R. Co., 316 I.C.C. 217 (219).

Though subsequent establishment of a lower rate creates no presumption of former unreasonableness, that fact is entitled to consideration along with other evidence. Where specific rates on cement had been reduced over other routes, and origin, destination, and competitive factors

of complainant's shipments were the same, and there is no significant difference in transportation conditions over route of movement with New York Central delivery, no reason appears by that reduction should not have been extended to include delivery by Central. While the reduced rate was established to meet motor competition, there is no indication that Central was less affected by such competition than other railroads in the territory. Reparation awarded.—Penn-Dixie Cement Corp. v. Chesapeake & O. Ry. Co., 319 I.C.C. 289 (290)*.

Although subsequent establishment of a lower rate creates no presumption of former unreasonableness, that fact is entitled to consideration along with other evidence of record.—United States v. Atchison, T. & S.F. Ry. Co., 315 I.C.C. 259 (263); Arkansas Plant Food Co. v. St. Louis S.W. Ry. Co., 315 I.C.C. 680 (682); and fact reduced rates on salt were established in anticipation of a continuing movement expected to recur each year is an indication of unreasonableness of prior rate to one destination, compared to rate subsequently established on that same basis (prior to considered movement) to other points normally grouped therewith.—Van Waters & Rodgers, Inc. v. Western Pac. R. Co., 315 I.C.C. 743 (746).

Similarity of rate treatment accorded Muscatine, Iowa, and Mendota, Ill., with that accorded other official territory points prior to general reduction of rates within that territory on considered traffic, and establishment of the reduced rates to Muscatine and Mendota some 9 months after they were reduced elsewhere, constitutes, in absence of substantive evidence justifying a difference in rate relations, a prima facie showing of unreasonableness of a practice resulting in unreasonable charges on shipments to Muscatine and Mendota during the intervening period.—Kent Foods, Inc. v. Pennsylvania R. Co., 319 I.C.C. 427 (429-30)*.

321. Commodity rates in excess of contemporaneous class rates.—[Vols. 1, 6, 9, 11, 12, 14-19].—Although proposed increased express commodity rates on cut flowers in many instances exceed level of corresponding class rates, an anomoly which generally requires special justification, the anomoly results from respondent's attempt to establish proposed rates on a strictly block-to-block basis; moreover, proposed rates are subject to official express classification rule providing for application of class rates when lower. Approved.—Cut Flowers—Throughout Continental United States, 319 I.C.C. 202 (204-5, 216).

The general rule is that the classification imposes the highest rate which a particular commodity should bear under normal conditions, and an excepttions or commodity rate exceeding the classification basis is an abnormality requiring special justification. Before, during, and after the 1939 class-rate investigation the carriers were on notice that any commodity or exceptions rates higher than the class rates prescribed in that proceeding would be presumptively unreasonable, and there is no merit to contention that assailed rates were not unreasonable in themselves because they were not unreasonable in relation to the predocket 28300 class-rate basis; with prescription of the new class rates, all rates higher than that basis became unreasonable.—William Volker & Co. of Texas v. Atchison, T. & S.F. Ry., 318 I.C.C. 249 (270-1).

While recognizing the many complex problems involved in bringing the rate structure into alinement with the new class rates, the commission notified the carriers in 300 ICC 373 that, except in extraordinary circumstances, a period of 5 years from effective date of the new class rates would be a maximum reasonable time for doing so. No convincing evidence is presented that any different period would be more appropriate, or that extraordinary circumstances prevented defendants from establishing an alternative rule (such as was later established), on or before expiration of that period, which would have made the uniform class rates the maximum level. Presumption that the classification basis represents the highest reasonable level for any commodity is not rebutted; reparation awarded on shipments charged higher commodity or exceptions rates.—Id., p. 271; however, instant findings do not apply to export shipments, since the docket

28300 scale was not prescribed for application on export traffic.—Id., p. 267.

Application of a higher commodity rate on complainant's shipments than exceptions class rates which applied in same general territory and to more distant points over same route was prima facie unreasonable, and burden rested on defendants to rebut that presumption. There is no indication that motor carrier rates were lower, or that motor competition was more severe, at destinations other than those involved; assailed rates found unjust and unreasonable to extent they exceeded rates on the exceptions basis—Westinghouse Electric Corp. v. New York Central R. Co., 318 I.C.C. 277 (279-80).

323. Rates not conforming to long-and-short-haul clause of §4.—[Vols. 1, 6, 9, 17-19].—Commodity rate charged complainant which was higher than exceptions class rates applying to more distant points over the same route was prima facie unreasonable.—Westinghouse Electric Corp. v. New York Central R. Co., 318 I.C.C. 277 (279-80).

Nonapplicability of intermediate rule during period of movement, apparently through error in tariff publication, is no warrant for a finding of unreasonableness where the presumption arising from a fourth-section departure is otherwise rebutted.—Wertheimer Cattle Co., Inc., v. Chicago, B. & Q. R. Co., 318 I.C.C. 167 (170).

Although plan V TOFC (joint rail-motor) rates on automobiles in some instances result in application of lower rates to more distant than to less distant points, this is generally due to the different routes followed, involving different railheads and longer motor hauls from interchange point to destination, and is not unreasonable.—Motor Vehicles from Kansas City to Ark., La., and Tex., 318 I.C.C. 301 (316-319).

Rates by Commodities

350. Rates prescribed or approved.—[Vols. 9, 11-19].—Part II, see §216(b), n. 125; Part III, §305(a), n. 125; Part IV, §404(a), n. 125.

Alcoholic beverages: [Vols. 11, 12, 15-18].—Reduced boxcar commodity rates on vermouth and wine, except champagne and sparkling wines, in packages, minimum 64,000 pounds, the same as current rates on bulk wine, minimum 150,000 pounds in jumbo tank cars, and lower rates on three carloads, minimum 64,000 pounds per car or 192,000 pounds per shipment, 21 cents lower than the jumbo tank-car rates, from points in Arizona, California, Nevada, New Mexico, and Utah, and from Lakeview, Oreg., to destinations in transcontinental groups D through J and related midwestern groups, approved as compensatory and otherwise lawful, and justified to restore former differential relation of rates on bulk and packaged wines.—Wine, Pacific Coast to Western, S.W. & Central States, 321 I.C. 683.

Reduced commodity rates on alcoholic liquors, n.o.i.b.n., including wine, in glass in wicker baskets, covers sealed, and on vermouth in containers in barrels or boxes, or in bulk in barrels, from Boston, Mass., and Hartford, Conn., to destinations in Georgia and Florida, 154 to 200 costs to representative Florida points on 40,000-pound minum (equivalent to average of present rates on that minimum), and 123 to 160 cents (80-percent of the 4,000-pound rates) on minimum 60,000 pounds, found just and reasonable.—Alcoholic Liquors from Md., N.J., N.Y., and Pa. to Fla., 319 I.C.C. 323.

Reduced rates $2.30 and $2.53 on alcoholic liquors, wine, and vermouth from Hammondsport, N.Y., to Shreveport, La., and Dallas-Fort Worth, Tex., on minimum 30,000 pounds, with incentive rates $1.84 and $2.03 on weight in excess of that minimum, found just and reasonable.—Alcoholic Liquors from N.H. and N.Y. to Tex. and La., 319 I.C.C. 396*.

Reduced rate, 280 cents, minimum 50,000 pounds, on wine, n.o.s., and champagne, in packages as described in western classification, from numerous origin groups east of Rocky Mountains, but excluding many origins in the South, to various Pacific area points, to alternate with present rates on 30,000- and 40,000-pound minima, approved when it exceeds fully distributed

costs and is not shown to constitute a destructive competitive practice.—Wine and Champagne—Westbound Transcontinental, 318 I.C.C. 53.

Aluminum; articles, scrap: [Vols. 11, 14-19].—Plan II TOFC rates of 45 and 42 cents, minima 30,000 and 40,000 pounds per trailer, respectively, on aluminum ingots between Chicago, Ill., and Detroit, Mich., approved as compensatory and necessary for respondent to compete for the traffic.—Pickled Pork & Aluminum Ingots between Chicago & Detroit, 316 I.C.C. 431.

Reduced rate 78 cents, minimum 30,000 pounds, on aluminum billets, blooms, etc., in plan II TOFC service between Milwaukee, Wis., and Kansas City, Mo.-Kans., found just and reasonable.—Addition of Milwaukee to Chicago Group Rates—K. C., 318 I.C.C. 755.

Ammunition: [Vol. 18].—Reduced plan II TOFC rates 315 and 273 cents, minima 30,000 and 40,000 pounds, on ammunition from Bridgeport and New Haven, Conn., to El Paso, Tex., approved as just and reasonable.—Automobile Lamps, Alcoholic Liquors—Pa. to Tex. and La., 319 I.C.C. 335.

Asphalt: [Vols. 9, 11, 12, 14, 16-19].—Multiple tank-car rates from origin groups in Arkansas, Colorado, Kansas, Louisiana, Missouri, Oklahoma, Texas, Montana, and Wyoming to points in Iowa, Michigan, Minnesota, Nebraska, and Wisconsin, and from Tulsa, Okla., to Oil City, Ill., ranging from 76 to 95 percent of corresponding single-car rates (generally 80 percent of refined-oil rates), restricted to shipments of not less than 20 tank-car loads (except 10 tank-car loads to Adams, Wis.), shipped on one bill of lading from one consignor to one consignee ate one time to one destination, each car loaded to full gallonage capacity of tank, subject to estimated weight of 8 pounds per gallon, minimum 80,000 pounds per car, except that when loaded heated to 150°F. or higher charges must be computed on actual weight, minimum 74,000 pounds, are compensatory, reasonably related, and necessary for respondents to participate in considered large-volume traffic.—Asphalt to Iowa, Michigan, Minnesoata, and Wisconsin, 316 I.C.C. 117.

Automotive vehicles, parts, accessories: [Vols. 9, 11, 13-19].—Joint rail-motor rates on motor vehicles in trilevel cars from Lansing and Pontiac, Mich., to points in Minnesota, Iowa, the Dakotas, and Montana, interchanged with motor carriers at Minneapolis, ranging from $47.08 to $217.78 for standard automobiles (over 3,150 pounds), and from $38.47 to $187.82 for compacts, found reasonably compensatory and not shown to be otherwise unlawful.—Wisconsin & Michigan S.S. Co. v. Grand Trunk W. R. Co., 323 I.C.C. 298*.

Joint rail-truck rates on motor vehicles in trilevel cars from Flint and North Flint, Mich., to destinations in Iowa, Minnesota, the Dakotas, and Montana, interchanged with motor carriers at Minneapolis, ranging from $65.35 to $221.65 per automobile for standard automobiles and $53.45 to $190.50 for compacts, approved as reasonably compensatory and otherwise lawful; and all-rail rate of $552 per carload on automobiles in trilevel cars from same origins to Minneapolis, Minn., found not shown to be unreasonable or otherwise unlawful.—Motor Vehicles (Trilevel-Truckaway) from Flint, Mich., 323 I.C.C. 215.

Rate of $355 per carload on motor vehicles in trilevel cars from Wixom, Mich., to Milwaukee, Wis., approved as reasonably compensatory and otherwise lawful, and rate of like amount from Dearborn, Mich., to Milwaukee found not shown to be unreasonable or otherwise unlawful.—Motor Vehicles—Wayne & Wixom, Mich., to Milwaukee, Wis., 323 I.C.C. 266.

Round-trip rates per trilevel flatcar, $572 between Chicago and Kansas City, and $422 between St. Louis and Kansas City or Chicago, to alternate with one-way rates $380 and $280, on freight or passenger motor vehicles, finsihed or not finished, in straight or mixed carloads, to apply only when consignee of the inbound shipment and consignor of the outbound are the same and shipper tenders the return movement within 48 hours after first 7 a.m. following arrival of the inbound shipment, also conditioned on loading and unloading at shupper's expense and on shipper's certification on outbound billing that the full one-way rate was paid on the inbound shipment, found just and reasonable.—Motor

Vehicles on Trilevel Flatcars—Chicago, 318 I.C.C. 89.

Plan III TOFC rates per carload on freight and passenger motor vehicles from Kansas City, $220 to Fort Smith, Ark., $330 to Texarkana, Ark.-Tex., $336 to Shreveport, La., and Greenville, Tex., $405 to Irving, Tex., $450 to Beaumont-Nederland, Tex., and Lake Charles, La., $480 to Baton Rouge, La., and $520 to New Orleans; from St. Louis, $365 to Tulsa, Okla., $405 to Birmingham, Ala., and $432 to Irving; from St. Louis-East St. Louis, $384 to Shreveport, La., and $432 to Dallas, Tex.; from Detroit, $704 to Tulsa and $784 to Dallas and Irving; $328 between Detroit and East St. Louis, and $504 between Detroit and Kansas City, found just and reasonable, subject to elimination of certain discriminatory tariff provisions for substituted service in multilevel cars. Per-vehicle rates of certain respondents between Detroit and East St. Louis and from St. Louis to Shreveport and Dallas, resulting in c.l. charges on eight-vehicle minimum equal to carload bases approved, will be just and reasonable if republished on per-carload basis.—Motor Vehicles from Kansas City to Ark., La., and Tex., 318 I.C.C. 301 (308, 316, 323-4).

Assailed joint rail-motor rates of St. Louis-SF. Ry. and connecting motor carriers on freight and passenger automobiles handled in plan V TOFC service from St. Louis to points in Alabama, Georgia, Mississippi, New Mexico, and Texas, and from Kansas City to points in Texas are not shown to be on an unreasonable level and will be just and reasonable if published on a per-carload instead of a per-vehicle basis.—Id., pp. 319, 323, 324.

Reduced plan II TOFC rate of 293 cents, minimum 24,000 pounds, on automobile lamps from Boyertown, Pa., to Laredo, Tex., approved as just and reasonable.—Automobile Lamps, Alcoholic Liquors—Pa. to Tex. and La., 319 I.C.C. 335.

Reduced rates on motor vehicles, freight or passenger or combination thereof, $276 per bilevel flatcar from Chicago to Des Moines, Iowa, and $365 to Council Bluffs, Iowa, and Omaha, and $321 and $428, respectively, per trilevel car, found just and reasonable.—Motor Vehicles on Bilevel and Trilevel Cars, 316 I.C.C. 777.

Return-haul rate of $209 on freight or passenger motor vehicles in straight or mixed shipments, in bilevel cars not over 85 feet in length, from Atlanta, Ga., to Norfolk, Va., applicable only when shipper, after accepting and paying charges on an inbound shipment at the $415 rate from Norfolk to Atlanta, reloads the same bilevel car for movement to Norfolk over the same route, found compensatory and otherwise lawful.—Automobiles from Atlanta, Ga., to Norfolk, Va., 316 I.C.C. 99.

Bakery goods, bakers' supplies: [Vols. 9, 11, 17, 19].—Plan II TOFC rates on bakery goods, 92 cents, minimum 20,000 pounds, and 86 cents, minimum 27,000 pounds, from Chicago to Erie, Pa., found just and reasonable.—Various Commodities between Chicago, Erie, Pa., & Columbus, Ohio, 315 I.C.C. 111.

Books, magazines, newspapers: [Vols. 11, 15, 17, 19].—Reduced rates on magazines or periodicals and magazine parts or sections, in boxcars, from Miami, Fla., to Derby-Shelton, Conn., 128 cents, minimum 40,000 pounds, and 118 cents, minimum 60,000 pounds, approved as compensatory and not competitively destructive.—Magazines or Periodicals, Miami, Fla., to Derby-Shelton, 319 I.C.C. 340.

See also Foodstuffs, Magazines or Periodicals—N.Y., Pa., to West, n. 663, below.

Candy, confectionary: [Vols. 9, 11, 12, 15, 16, 18].—Reduced rate 158 cents, minimum 65,000 pounds, on candy and confectionery from 17 origins in New York, New Jersey, and Pennsylvania to Dallas, Fort Worth, and Great Southwest, Tex., approved as reasonable and otherwise lawful.—Candy and Confectionery from N.J., N.Y., & Pa. to Tex., 321 I.C.C. 154.

Canned goods: [Vols. 9, 11, 12, 14, 15, 17-19].—Reduced commodity rate 175 cents, minimum 75,000 pounds, on canned or preserved foodstuffs, not cold-packed or frozen, from Transcontinental groups A and A-1 to destinations in Washington, Oregon, California, Arizona, western portions of Idaho, Utah, and New Mexico, and all but northeastern portion of Nevada, approved as compensatory and not shown to be competitively destructive.—Canned Goods from Eastern Points to Pacific Coast, 315 I.C.C. 757.

See also Foodstuffs, Magazines or Periodicals—N.Y., Pa., to West, n. 663, below.

Reduced commodity rate 174 cents, minimum 75,000 pounds, on canned goods from Pacific north and south coast territories to transcontinental groups A and A-1, approved as compensatory and not shown to be competitively destructive or otherwise unlawful.—Canned Goods from Pacific Coast to Eastern Points, 315 I.C.C. 769.

Cement: [Vols. 9, 12-14, 17, 19].—Reduced rate 9.5 cents on cement from Evansville, Pa., to Jersey City, N.J., in single shipments of at least 10 cars, bulk cement in covered hopper cars to be loaded to a minimum of 140,000 pounds per car, except certain types to be loaded to full visible capacity but not less than 130,000 pounds, and cement in bags in boxcars to be loaded to a minimum of 83,000 pounds, each shipment to contain not less than 8 carloads of bulk cement or more than 5 carloads of cement in bags, approved as compensatory and no lower than necessary to meet existing competition.—Multiple—Car Rates on cement, Evansville, Pa., to N.J., 315 I.C.C. 672.

Multiple-car rate of 9.5 cents on bulk cement in covered hopper cars, minimum 140,000 pounds per car, and bagged cement in boxcars, minimum 83,000 pounds per car, from producing plants in Lehigh district of Pennsylvania to Jersey City, N.J., restricted to single shipments of not less than 10 cars, approved as compensatory.—Cement from Pennsylvania to New Jersey, 318 I.C.C. 217.

Reduced point-to-point and mileage scale rates 3 to 36 cents for distances 10 to 900 miles on hydraulic, natural, and portland cement, minimum 140,000 pounds, in bulk in covered hopper cars, within southern territory and from Hagerstown, Md., Lone Star, Norfolk, and Rivco, Va., St. Louis, and Ironton, Ohio, to specified points in Kentucky, North Carolina, Virginia, and West Virginia, approved as just, reasonable, and otherwise lawful.—Cement within Southern Terr. & from Hagerstown to So., 319 I.C.C. 465.

Rates on bulk cement in covered hopper cars, including unloading or allowance of 35 cents per net ton for shipper unloading, from Pennsylvania and New York origins to New Jersey and New York destinations, ranging from 20.5 to 29.5 cents, or 18.75 to 27.75 cents less unloading allowance, are highly compensatory and therefore just and reasonable.—Allowance, Unloading Cement, Covered Hopper Cars.—East, 319 I.C.C. 711*.

Cereals: [Vols. 9, 13].—Reduced TOFC rate 207 cents, minimum 40,000 pounds, on cereal from West Chester, Pa., to Great Southwest, Tex., found just and reasonable.—Cereal, Coffee, Tea, Drugs, Related Art., N.J. & Pa. to Tex., 319 I.C.C. 424*.

Clay; fullers' earth: [Vols. 9, 11, 14-17].—Increased classification rating of class 20 and reduced minimum weight of 60,000 pounds on clay or sand, n.o.i.b.n., granulated or pulverized but not processed, containing other ingredients admixed not to exceed 3.5 percent, found just and reasonable.—Class Rating on Pulverized Clay or Sand, 316 I.C.C. 687.

Coal: [Vols. 9, 11-19].—Unit train rates on bituminous steam coal, other than for coking or metallurgical purposes, from Lynnville Mine, Ind., to Hammond, Ind., $1.75 per net ton subject to a minimum annual volume of 750,000 tons, and $1.45 per net ton or a flat rate of $150 per loaded car, whichever produces lowest total charge, subject to a minimum annual volume of 1,300,000 tons, cars to be supplied by shipper or consignee at no expense to carrier and returned empty without additional cost to shipper, shipments to be tendered on one bill of lading on ond day, destined to one consignee, in minimum lots of 10,000 net tons, minimum weight per loaded car 100 tons, and loaded or empty cars to be tendered to carrier within 4 hours after placement, found not shown to be noncompensatory or otherwise unlawful.—Natural Gas Pipeline Co. of America v. N.Y.C. R. Co., 323 I.C.C. 75.

Initial joint rail-water rates on coal from Illinois-Indiana mine groups to upper lake ports for transshipment beyond the docks by rail, barge, or truck, ranging from $2.67 to $3.17 per net ton, found not shown to be unjust, unreasonable, or otherwise unlawful.—Chicago, B. & Q. R. Co. v. Chicago & E.I. R. Co., 322 I.C.C. 138.*.

Flat increases in line-haul rates on bituminous coal of 7 cents on all-rail, rail-water, and water-rail movements, including lake-cargo coal moving rail-lake to destination, movements to river ports for transshipment to destination by barge, and tidewater coal moving to North Atlantic ports for ocean movement to New England ports; on lake-cargo coal moving to United States ports on Lake Superior and west bank of Lake Michigan, thence moved to interior destinations, and on rail-river-rail movement, 4 cents on the initial rail haul and 3 cents on the second; and on tidewater coal moved from New England ports by rail barge, or truck, 4 cents on the haul to the North Atlantic ports and 3 cents on any subsquent rail haul; also, flat increase of 4 cents in line-haul rates on lignite coal; also, increase of 2 cents per ton in charges for handling or dumping at lake and river ports—all found justified by carriers' need for revenue to meet increased operating costs. Authorized as part of Ex Parte No. 223 general increases.—Increased Rates on Coal and Petroleum Coke, 316 I.C.C. 159.

Reduced rates 466 to 512 cents a ton on fine coal, minimum marked capacity of car or actual weight when loaded to full visible capacity, from Illinois, Indiana, and western Kentucky mines to Red Wing, Minn., approximately 77 percent of Midland scale including Ex Parte 223 increase, approved as compensatory and no lower than necessary to meet rail-barge and rail-barge-truck competition; §4 relief granted.—Bituminous Coal from Ill., Ind. & Ky. to Red Wing, Minn., 318 I.C.C. 17.

Rates on fine coal from mines on Louisville & N. R. in Alabama, Kentucky, Tennessee, and Virginia to Tampa and Sutton, Fla., and from mines in same States on Southern Ry. and its short-line connections to Tampa, $3.46 to $3.91 per net ton, minimum marked capacity of car, representing a uniform reduction of 86 cents in rates approved in 304 ICC 579, approved as reasonably compensatory and necessary to meet competition of unregulated waterborne shipments of coal and imported fuel oil and avert loss of part of northbound movement of phosphate rock; §4 relief granted.—Coal from Southern Mines to Tampa and Sutton, Fla., 318 I.C.C. 371.

Coke: [Vols. 9, 11, 12, 18, 19].—Increase of 2 cents per ton for handling or dumping at lake or river ports, authorized as part of Ex Parte No. 223 general increases.—Increased Rates on Coal and Petroleum Coke, 316 I.C.C. 159 (173, 178).

Dairy products; dressed poultry: [Vols. 9, 11, 14-19].—Proportional plan II TOFC rate on dairy products of 54 cents from Twin Cities to Chicago for movement beyond, found not shown to noncompensatory or otherwise unlawful for three respondents named.—Dairy Products from Twin Cities to Chicago, 321 I.C.C. 720.

Drugs, medicines, toilet preparations: [Vols. 9, 11, 14-17].—Reduced TOFC rate of 166 cents, minimum 40,000 pounds, on drugs from Parsippany-Troy Hills, N.J., to Houston, Tex., found just and reasonable.—Cereal, Coffee, Tea, Drugs, Related Art., N.J. & Pa., to Tex., 319 I.C.C. 424*.

Extracts: [Vol. 9].—Reduced TOFC rate 191 cents, minimum 30,000 pounds, on coffee and tea extracts from Paterson, N.J., to Fort Worth, Tex., found just and reasonable.—Cereal, Coffee, Tea, Drugs, Related Art., N.J. & Pa. to Tex., 319 I.C.C. 424*.

Florist, nursery stock: [Vol. 17].—Express rates on cut flowers, see Cut Flowers—Throughout Continental United States, n. 731, below.

Fruits, berries, melons: [Vols. 9, 11, 12, 14, 15, 17, 18].—Reduced import rates on bananas from Baltimore to 66 destinations in central and trunk-line territories, 105 to 142 cents, minimum 20,000 pounds, and reduced rates 1 and 3 cents higher, respectively, from Philadelphia and New York City group, reflecting existing port differentials, are compensatory and no lower than necessary to enable respondents to compete on a reasonable basis with motor carriers for the traffic.—Bananas, Import, from Eastern Ports to Official Terr., 315 I.C.C. 215.

Gases: [Vols. 9, 11-19].—Reduced alternative distance rates on liquefied petroleum gas, in jumbo tank cars, between points in United States and Canada, ranging from 44 to 88 cents on 78,000-pound minimum, 42 to 83 cents on 87,000 pounds, 41 to 78 cents on 93,000 pounds, and 37 to 67 cents on 127,000 pounds, for representative distances, approved as compensatory, competitively necessary, and otherwise

lawful.—Liquefied Petroleum Gas in Jumbo Tank Cars—S.W.F.B., 319 I.C.C. 31.

Grain, grain products: [Vols. 9, 11-19].—Reduced rates on grain products from Pittsburgh, Pa., to trunkline and New England territories, ranging from 35 to 48.5 cents to representative base points on 60,000-pound minimum, and grain rates uniformly 1/2-cent lower, approved as just, reasonable, and otherwise lawful, and necessary to enable Pittsburgh shippers to compete with those from Buffalo, N.Y.; §4 relief granted.—Grain from Pittsburgh, Pa., to Eastern Base Points, 322 I.C.C. 218*.

Combination rate of 68 cents on corn and products from 24 origins on Chicago & E.I.R. and 13 on New York Central in Illinois and Indiana to eastern destinations on Central and Wabash R., consisting of a local rate of 12.5 cents to Danville, Ill., and a proportional of 55.5 cents beyond; combinations from 51 origins on the Wabash consisting of increased local rate of 14.5 cents to Danville and reduced proportionals of 55 and 55.5 cents beyond; also reduced single-factor rate of 68 cents from certain of involved Central origins to same destinations via Chicago, approved as just, reasonable, and otherwise lawful; §4 relief granted for rates to certain destination on direct route to Oneonta, N.Y.—Corn and Corn Products from Ill. and Ind. to the East, 319 I.C.C. 605.

Domestic multiple-car commodity rate of 48 cents per 100 pounds, minimum 55 tons per car and 500 tons per shipment, on bulk corn from northern Ohio, southeastern Michigan, and western Pennsylvania to Augusta and Portland, Maine, and Manchester, Conn., restricted to season of open navigation of New York State Barge Canal, approved as just and reasonable; §4 relief granted.—Corn, Mich., Ohio, and Pa. to Augusta and Portland, Maine, 319 I.C.C. 344*.

Reduced flat rates on whole coarse grains over single-line routes from western Iowa, eastern Nebraska, southeastern South Dakota, and Bigelow, Minn., to Chicago, Ill., Duluth, Minn., and Green Bay, Itaska, Manitowoc, Milwaukee, and Superior, Wis., for export, generally 34.5 cents but 35.5 cents from South Dakota to Duluth-Superior and ranging up to 43 cents from Nebraska and up to 50 cnets from South Dakota, with only one transit stop on routes to Duluth and Chicago; also reduced flat and proportional rates on coarse grains and certain products thereof, 53 and 32 cents, respectively, from Kansas City, Mo.-Kans. (including Atchison and Leavenworth, Kans., and St. Joseph, Mo.), and 56 and 35.5 cents from Omaha, Nebr. (including South Omaha, Nebr., and Council Bluffs, Iowa), to Gulf ports, Pensacola, Fla., to Corpus Christi, Tex., for export, with the flat rates observed as minima from the country origins, approved as just, reasonable, and otherwise lawful.—Export Grain and Grain Prod.—WTL to Gulf-Lake Ports, 319 I.C.C. 729*.

Joint rail-water rates ranging from 28 to 36 cents per 100 pounds on corn and wheat in bulk from St. Louis and Illinois and Indiana points on Chicago & E.I.R. Co. to Buffalo, N.Y., approved as just, reasonable, and otherwise lawful.—Rail-Water, Grain in Bulk, from Mo., Ill., & Ind. to Buffalo, 319 I.C.C. 123*.

Reduced rates on corn, minimum 80 percent of car capacity, and on corn products, minimum 100,000 pounds, from Iowa, Minnesota, Nebraska and South Dakota origins to Chicago group, 36 cents for distances of 317.4 to 581.6 miles, and scale rates grading up to 53 cents for longer distances, approved as compensatory, no lower than necessary to meet unregulated truck competition, and otherwise lawful.—Corn and Corn Products, Iowa, Nebr., Minn., S. Dak. to Ill., 318 I.C.C. 291.

Proportional rate 40.5 cents, minimum 80,000 pounds, on grain and products from Kansas City, Mo., to Council Bluffs, Iowa, and Omaha, Nebr., applicable only on shipments transited at Springfield, Ill., is just and reasonable.—Grain from Kansas City, Mo. to Nebraska and Iowa, 318 I.C.C. 31.

Flat all-rail rates on corn and sorghum grains, 31 cents from Kansas City rate group and 41.5 cents from Omaha rate group to Lawrenceburg, Ind., without transit privileges and restricted to apply when lots of 20 or more carloads, minimum 110,000 pounds per car, are shipped on one bill of lading on one day from one consignor to one consignee at one destination, would be compensatory and no

lower than necessary to meet all-barge competition. However, due to certain tariff errors, proposed rates as published result in violations of §4; cancellation required without prejudice to refiling of the rates free of indicated unlawfulness.—Grain—K.C., Omaha & Related Origins to Lawrenceburg, 315 I.C.C. 83.

Although considered reduced group 3 rates on wheat, rye, and flaxseed from certain origins in Minnesota, Wisconsin, and the Dakotas to Twin Cities and Duluth-Superior, 0.5 to 20.5 cents lower than prescribed standard or normal group 1 gathering rates, are compensatory, tariff restrictions against transit and against their application as factors of combinations beyond those rate-break markets are unlawful; also, the rates in issue appear to be improperly graded, and are unlawful where and to extent they disrupt long-established origin relations; cancellation required without prejudice to their republication upon correction of those maladjustments.—Wheat, Rye, and Flaxseed to Duluth and Minneapolis, 315 I.C.C. 89 (95).

Groceries: [Vols. 9, 11, 19].—Maximum reasonable rates for the future on brine stock (cucumbers in brine), in tank cars, minimum 70,000 pounds, from points in Indiana and Michigan to Chicago, Ill., Louisville, Ky., and Medina, Ohio, prescribed on basis of corresponding 36,000-pound rates now applicable on canned or preserved foodstuffs in glass or tin containers, in boxes.—Budlong Pickle Co. v. Ann Arbor R. Co., 315 I.C.C. 333 (342-3).

Heating apparatus: [Vol. 9].—TOFC rate of 233 cents, minimum 24,000 pounds, on cast iron boilers from Boyertown, Pa., to Dallas, Tex., found not shown to be unlawful.—Cast Iron Boilers, Boyertown, Pa., to Points in Texas, 319 I.C.C. 319.

Insecticides: [Vol. 9].—Reduced all-rail rate on DDT, $1.45, minimum 70,000 pounds, from Avon, Pa., to Mission, Edinburg, Harlingen, and Los Fresnos, Tex., which would alternate with existing rate $1.71, minimum 50,000 pounds, to Mission, approved as just, reasonable, and otherwise lawful.—Aluminum Articles from Sandow, Tex., to Pa. and N.Y., 319 I.C.C. 431 (433, 445)*.

Reduced tank-car rate of 155 cents on agricultural insecticides, subject to classification rule 35 but not less than 90,000 pounds, from Heyden, N.J., to Houston, Tex., found just and reasonable. Agricultural Insecticides—Heyden, N.J., to Houston, Tex., 319 I.C.C. 493*.

Iron and steel; articles: [Vols. 9, 11-19].—Reduced all-rail rate $1.01, minimum 60,000 pounds, on iron or steel articles from origins in New York, New Jersey, Pennsylvania, Delaware, and Maryland to Baton Rouge, New Orleans, Lake Charles, and West Lake Charles, La., and Beaumont, Galveston, Houston, Nederland, Orange, Port Arthur, and Texas City, Tex., approved as reasonably compensatory and otherwise lawful; §4 relief granted.—Iron or Steel Articles from the East to the Southwest, 321 I.C.C. 419*.

Alternative rates on iron or steel bars, minimum 150,000 pounds or actual weight when loaded to full visible capacity or cubical capacity, but not less than 140,000 pounds, reflecting an average reduction of 11.9 cents under existing rates on lower minima, from Lemont, Ill., and Chicago and Chicago district points to Iowa, Kansas, Minnesota, Missouri, and Nebraska destinations; from St. Louis district to Omaha, Nebr. and Council Bluffs, Iowa; from Kansas City to Chicago, Omaha, and Council Bluffs; and on single shipments of not less than 420,000 pounds from Chicago area origins to Houston, Tex., approved as compensatory and otherwise lawful; §4 relief granted.—Steel Bars, Lemont, Ill., to Iowa, Kans., Mo., Minn., and Nebr., 319 I.C.C. 292.

Reduced rates, minima 40,000 and 80,000 pounds, on a limited list of manufactured iron and steel articles and on kindred articles which may be added to that list from time to time, which applicants seek to establish and maintain over standard and differential all-rail routes (rates over standard routes to be constructed on basis of distance scales set forth in the application and those over differential routes to be uniformly 1 cent lower) from official territory points east of Illinois-Indiana border to w.t.l. destinations generally north and east of the Missouri River without observing the long-and-short-haul and aggregate-of-intermediates pro-

visions of §4, would be compensatory; unrebutted evidence shows that yields under proposed rates would exceed average earnings and expenses of class I railroads in the eastern district; approved.—Iron and Steel from Official to W.T.L. Territory, 318 I.C.C. 449 (458).

Plan II-1/2 TOFC rate of 70 cents, minimum 45,000 pounds, on iron or steel plates and sheets, n.o.i.b.n., between St. Louis, Mo., and Atlanta, Ga., approved as compensatory and necessary to enable respondents to share in the traffic.—Iron and Steel Articles between Atlanta and St. Louis, 318 I.C.C. 80.

Cast iron pipe, fittings, etc., see *Pipe*, below.

Plan II TOFC rate of 41.5 cents, minimum 80,000 pounds, on sheet steel in flat-bed trailers, Chicago to Simpsonville, Ky., found compensatory and no lower than necessary to meet existing competition.—Sheet Steel from Chicago, Ill., to Simpsonville, Ky., 316 I.C.C. 105.

Lime, limestone: [Vols. 9, 11, 12, 14-19].—Reduced rates, minimum 90,000 pounds, on ground or pulverized limestone, in bulk, in open cars without protective covering, value not exceeding $8 per net ton, from Bessemer, Ala., Jefferson City and Mascot, Tenn., to named destinations on Mississippi Central R., found just, reasonable, and not shown to be otherwise unlawful.—Limestone from Bessemer, Ala., to Mississippi Points, 316 I.C.C. 383 (389).

Lumber, timber, logs; products: [Vols. 9, 11-19].—Reduced rates on lumber and related articles (except shipments delivered by lighterage or by car float in lieu of lighterage), minima 75,000 pounds in closed or open cars over 42 feet in length (or 70,000 pounds if loaded to full visible capacity), and 70,000 pounds in shorter cars (or 55,000 pounds if loaded to full visible capacity), reflecting a uniform reduction of 7 cents in present transcontinental rail rates, from Pacific coast origins (see footnote 2) to destinations on and east of a north-south line running along western boundary of the Dakotas and through Cheyenne, Wyo., Denver and Colorado Springs, Colo., and El Paso, Tex., to alternate with existing rates on lower minima, approved as just, reasonable, and otherwise lawful.—Reduced Transcontinental Lumber Rates, 1961, 318 I.C.C. 815.

Malt beverages: Reduced rates on beer in containers from St. Louis to Chicago, Aurora, and Arlington Heights, Ill., 32.5 cents, minimum 60,000 pounds, found lawful when they are compensatory and justified to meet threat of increased private-carrier competition.—Beer, in Containers, St. Louis to Arlington Heights, Ill., 316 I.C.C. 812.

See also Malt Liquors, East St. Louis and St. Louis to Kenosha, n. 663, below.

Meats, packinghous products: [Vols. 9, 11-19].—Rates related to Docket No. 28300 class-rate scale, class 55 on fresh meats and class 37.5 on packinghouse products, including all authorized general increases, prescribed as reasonable maxima for the future between various points east of Rocky Mountains.—William Volker & Co. of Texas v. Atchison, T. & S. F. Ry., 318 I.C.C. 249 (265, 268, 272).

Plan II TOFC rates on fresh meats (hanging or boxed) and packinghouse products, 250 to 275 cents on 33,000-pound minimum and 200 to 225 cents on 66,000-pound minimum to representative destinations, latter rates being uniformly 50 cents lower than the former, from named points in western or midwestern States to specified destinations in California, Arizona, and southwestern corner of New Mexico, found compensatory and otherwise just and reasonable, subject to elimination of rule requiring certification of ownership by shipper on bill of lading.—Meats, Fruits, Vegetables—TOFC—Transcontinental, 316 I.C.C. 585.

Plan II TOFC rates of 43.5 cents and 41.5 cents, minima 35,000 and 40,000 pounds per trailer, respectively, on pickled pork in brine in barrels, Chicago to Detroit, approved as compensatory.—Pickled Pork & Aluminum Ingots between Chicago & Detroit, 316 I.C.C. 431.

Reduced rate 205 cents on fresh meats, minimum 21,000 pounds, Davenport, Iowa, to Melbourne, Fla., to restore prior rate increased by error in republication of rates on that minimum in connection with publication of new alternative rates, is on same level as or reasonably alined with

similar rates on like traffic from Illinois Territory to Florida destinations and therefore just and rasonable.—Fresh Meats, Davenport, Iowa, To Melbourne, Fla., 315 I.C.C. 621.

Newsprint paper: [Vols. 17, 19].—Reduced rate $9.75, minimum 60,000 pounds, not subject to classification rule 24, from Calhoun, Tenn., and Childersburg and Coosa Pines, Ala., to Baton Rouge, La., found just and reasonable and no lower than necessary to meet barge competition; §4 relief granted.—Newsprint Paper from Tenn. and Ala. to Baton Rouge, La., 315 I.C.C. 117*.

Oleomargarine: [Vols. 12, 17].—Plan II-1/2 TOFC rates on oleomargarine, Mayonnaise, and table sauces from Macon, Ga., 53 and 65 cents without and with protective service, respectively, to Cincinnati, Ohio, 53 and 66 cents to Louisville, Ky., 58 and 72 cents to Indianapolis, Ind., 35 and 46 cents to Jacksonville and South Jacksonville, Fla., 44 and 57 cents to Tampa, Fla., and 54 and 68 cents to Miami, Fla., approved as reasonable and otherwise lawful.—Foodstuffs, Macon, Ga., to Florida, Indiana, Kentucky, Ohio, 321 I.C.C. 132.

Ores: [Vols. 9, 12, 14-19].—Reduced multiple-car rates on iron ore, minimum 10,000 gross tons per shipment and for each car the marked capacity thereof, each shipment to be tendered at one time from one consignor to one consignee, from Cleveland, Ohio, 188 cents per ton to 7 named destinations in Ohio and 5 in Pennsylvania (M&S Valleys group), and 199 cents to Leetonia, Ohio, and Franklin and New Castle, Pa., would compensatory and just and reasonable if restricted to shipments destined to not more than two points.—Iron Ore from Cleveland, Ohio, to Ohio and Pennsylvania, 323 I.C.C. 746*.

Rate of $4.03 per ton on imported iron ore from New York, N.Y., to three destinations in Pennsylvania and six in Ohio approved as compensatory and otherwise lawful.—Iron Ore from Eastern Ports to C.F.A. Points, 321 I.C.C. 473*.

Paper, paper products: [Vols. 9, 11, 12, 15-19].—Reduced plan II TOFC rates on paper and paper articles, 101 cents on minimum 20,000 pounds and 83 and 84 cents on minimum 30,000 pounds, between Milwaukee, Wis., and Kansas City, Mo.-Kans., found just and reasonable.—Addition of Milwaukee to Chicago Group Rates-K. C., 318 I.C.C. 755.

Increased rate 44 cents, minimum 20,000 pounds, on paper and paper articles in plan II TOFC service from 10 Wisconsin origins on Chicago & N.W. Ry. to Chicago, found just and reasonable.—Paper and Paper Articles from Wisconsin to Illinois, 315 I.C.C. 165.

Phosphate rock: [Vols. 14, 16-19].—Reduced rates on phosphate rock, ground and unground, minima 100,000 pounds in boxcars, 140,000 pounds in covered hopper cars, from Florida to points in Texas, Arkansas, Oklahoma, western Lousiaina, and Missouri, approved as compensatory and necessary to meet water competition.—Phosphate Rock, Florida to S.W. and W.T.L. Territories, 316 I.C.C. 207.

Pig iron: [Vols. 9, 17-19].—Since the commission expressly found multiple-car rate of $4.61 per gross ton on single shipments of 600 gross tons, minimum 140,000 pounds per car, from Neville Island, Pa., to Louisville, Ky., to be compensatory, there was no reason for its order cancelling proposed schedule, without prejudice to establishment of rate of $4.99 which would include amount of certain switching and weighing charges; the commission's order set aside.—Pennsylvania R. Co. v. United States, 202 F. Supp. 584 (586)*.

Reduced rates on pig iron, minimum 112,000 pounds, $6.01 from Cleveland, Ohio, to Chicago, Ill., and $5.93 from Toledo, Ohio, to Chicago and Gary, Ind., approved as just, reasonable, and no lower than necessary to meet water competition.—Pig Iron, Buffalo, N.Y., to Chicago, Ill., and Gary, Ind., 321 I.C.C. 121*.

Pipe, pipe fittings: [Vols 11, 12, 15-19].—Reduced plan II rates, minimum 60,000 pounds, 100 cents lower than and alternative to present TOFC 30,000-pound rates, on cast iron pipe, fittings, and related articles, Birmingham, Ala., to Florida points, restricted to single shipments loaded in not more than two vehicles, approved as compensatory.—Pipe and Related Articles, Birmingham, Ala., to Florida, 318 I.C.C. 465.

Plastics, products, materials: [Vol. 18].—Increased l.c.l. rating of class 110 on flexible synthetic plastic games or toys, found just and reasonable.—Increased Ratings on Plastic Games—All Territories, 316 I.C.C. 130.

Reduced all-rail rates 105 to 136 cents, minimum 70,000 pounds on synthetic plastics and plastic sheets from Texas City, Houston, Orange, Williams, Longview, North Seadrift, Freeport, and Baytown, Tex., to Jersey City, Edgewater, Newark, and Secaucus, N.J.; New York, N.Y.; Easthampton, Blackstone, and Boston, Mass.; and Providence and Woonsocket, R.I., found just and reasonable; §4 relief granted.—Plastics from Texas to the East, 319 I.C.C. 379*.

Reduced TOFC rate 218 cents, minimum 30,000 pounds, on plastic garden or water hose, Paterson, N.J., to Dallas and Fort Worth, Tex., approved as compensatory and otherwise lawful.—Garden Hose & Electric Cable from N.J. or R.I. to Tex., 319 I.C.C. 227*.

Radiators: [Vol. 18].—Plan II TOFC rate 81 cents, minimum 30,000 pounds, on radiators, hot water or steam, from Erie, Pa., to Chicago, found just and reasonable.—Various Commodities between Chicago, Erie, Pa., & Columbus, Ohio, 315 I.C.C. 111.

Radios, televisions sets, phonographs: Reduced plan II TOFC rate, 96 cents, minimum 14,000 pounds, on radios, television sets, and talking machines, Bloomington, Ind., to Chicago, approved as compensatory.—Radios, Televisions, Talking Machines from Bloomington, 318 I.C.C. 221.

Soap; powders, etc.: [Vols. 9, 12, 16].—TOFC rate of 87 cents on soap and related articles between Kansas City and Jeffersonville, Ind., would be just and reasonable if made subject to a 32,000-pound minimum.—Soap & Related Art. between Kansas City & Jeffersonville, 316 I.C.C. 421 (426).

Soda, sodium compounds: products: [Vols. 9, 11, 13-16, 17, 19].—Reduced all-rail rate on soda ash, $9.89 per ton, minimum 100,000 pounds, from Baton Rouge and North Baton Rouge, La., to Port Wentworth, Savannah, and West Savannah, Ga., approved as just, reasonable, and otherwise lawful; and local interstate rate of $4.13, minimum 80,000 pounds, from same origins to New Orleans when used as rail factor of combination rail-water rate to same destinations, found not shown to be unlawful.—Aluminum Articles from Sandow, Tex., to Pa. and N.Y., 319 I.C.C. 431 (434, 445)*.

Soybeans; products: [Vols. 9, 16, 17, 19].—Multiple-car rates on soybean cake and meal, including shipments in pellet form, in bulk or in bags, minimum 100,000 pounds per car, subject to aggregate minima of 500, 1,000, and 2,000 tons per shipment, from origins in central, Illinois, and w.t.l. territories to Atlantic, south Florida, and gulf ports for export, and like rates on linseed cake meal from Minnesota to the southern ports, alternating with and reflecting 90.85 or 75 percent of corresponding single-car ratemade 7 cents higher on shipments in bags than in bulk, subject to single-car origination and maximum-pay-in rules, approved as just, reasonable, and not otherwise unlawful.—Vol. Rates on Processed Meal—Midwest to Ports, 322 I.C.C. 456.

Sulphur; compounds, products: [Vols. 9, 11, 12, 14-19].—Proportional rate 196 cents a gross ton on crude sulphur, Texas points to Galveston, Houston, Texas City for coastwise movement beyond, reflecting addition to the base rate of 107 cents of aggregated general increases to and including Ex Parte No. 206-A (except Ex Parte Nos. 162 and 166), found lawful.—Sulphur—Tex. to Tex. Ports—Coastwise Movement Beyond, 315 I.C.C. 415*.

Sugar: [Vols. 9, 11, 12, 14-19].—Reduced rates on sugar from New Orleans, west side Louisiana origins, and related gulf, south Florida, and south Atlantic ports to Indiana points, Ohio River crossings, and intermediate southern territory points, of which rate from New Orleans to Cincinnati, $10.40 per net ton or 52 cents per 100 pounds, is representative, approved as fully compensatory and otherwise lawful.—Sugar, South to Indiana, Ohio River, Intermediate Points, 319 I.C.C. 782*.

Reduced rates 89 to 136 cents on beet sugar, minimum 100,000 pounds, from 84 origins in 4 differentially related groups in

11 midwestern or western States to 163 destinations in 7 central or eastern States, approved as compensatory and otherwise lawful, except to extent that they may include free storage or other transit privileges.—Sugar from the West to Central Territory, 319 I.C.C. 686.

Wallboard: [Vols. 9-12, 17, 18].—Rates on future shipments of wallboard from Lockport, N.Y., to southern territory will be unreasonable to extent they exceed contemporaneous rates on fiberboard, n.o.i.b.n., from and to same points.—Upson Co. v. Erie R. Co., 316 I.C.C. 217 (220).

Wire, wire goods: [Vol. 15].—Reduced rates 170 cents, minimum 40,000 pounds, and 166 cents, minimum 50,000 pounds, subject to an incentive rate 116 cents on weight in excess thereof, on electric wire and cable from Worcester, Mass., to Houston, Tex., found just and reasonable.—Electric Cable & Wire, Worcester, Mass., to Houston, Tex., 319 I.C.C. 390*.

Wool; products, woolen articles: [Vols. 9, 11, 12, 14, 15, 17-19].—Import rates, 74.5 and 73.5 cents, minima 30,000 and 60,000 pounds, respectively, Norfolk and Newport News, Va., to Charleston, S.C., found compensatory, necessary to enable respondents to meet water carrier competition, and not competitively destructive; approved.—Wool, Norfolk and Newport News, Va., to Charleston, S.C., 316 I.C.C. 109 (109, 112).

Local, Through, Joint, and Proportional Rates

400. Through rates; relation to local rates.—[Vols. 1, 6, 9, 11-19.]—Even where the commission has authority to find separate components of through rates unlawful, it must give careful consideration to effect of such a finding on the through rates.—Motor Vehicles from Kansas City to Ark., La., and Tex., 318 I.C.C. 301 (320, Note 9).

402. Proportional rates.—[Vols. 1, 6, 9, 11-19].—Part II, §216(b), n. 180. See also §6(11), n. 30.

Proposed proportional plan II TOFC rate of three respondents on dairy products from Twin Cities to Chicago for movement beyond is necessary for them to participate in the traffic and is not shown to be noncompensatory; approved.—Dairy Products from Twin Cities to Chicago, 321 I.C.C. 720 (724).

Proposed through proportional rate on grain from Kansas City to Omaha area, restricted to shipments transited at Springfield, Ill., approved as compensatory and necessary to enable Springfield miller to compete in Omaha area markets with mills at Alton and Beardstown, Ill., which have available over other routes a proportional, with transit, lower than present combination on Springfield over respondent's route. As Springfield is not a rate-break market under the grain-rate adjustment, proposed rate does not violate rule requiring exclusive application of proportionals from such markets.—Grain from Kansas City, Mo., to Nebraska and Iowa, 318 I.C.C. 31 (32, 34, 35).

See also Export Grain and Grain Prod.—WTL to Gulf-Lake Ports, n. 602, below.

Proposed proportional rate, the initial factor of combination rail-water-rail rates, which is shown to be otherwise deserving of approval, should not be disapproved solely because ratemaking method used is not followed by other parties not before the commission, even though an increase in level of combination rates may result therefrom. That the through charge may exceed authorized increases does not of itself establish that proposed rate factor is unlawful. Approved.—Sulphur—Tex. to Tex. Ports—Coastwise Movement Beyond.—318 I.C.C. 625 (628)*.

See also Corn and Corn Products from Ill. and Ind. to the East, n. 46, above.

Where proposed rates are published as separate proportionals, and respondents' revenue on the contemplated movements would be provided solely by those rates, their compensativeness does not depend on earnings from the through rates; they must themselves be shown to be compensatory. The situation thus differs from one where past lawfulness of through rates composed of separate factors is in issue.—Proportional Rates on Grain, Kansas City to Chicago, 315 I.C.C. 249 (252).

Exceptions to the rate-break principle of market equalization on grain (205 ICC 301) have been permitted only where it was shown beyond doubt that no injustice would result; proposed varying proportionals from Kansas City, Kans., to Chicago on grain which has previously moved from certain Nebraska origins to Omaha and been reconsigned to Kansas City would enable Kansas City interests to invade principal sources of the Omaha market without latter's obtaining benefit of invading territory tributary to Kansas City for grain to be transited at Omaha and reshipped to Chicago area; moreover, proposed proportionals are not shown to be compensatory per se; not approved.—Id., pp. 250, 251, 252.

Group Rates

420. Propriety of grouping; reasonable limitations.—[Vols. 1, 6, 9, 12, 13, 16, 17, 19].—Requested modification of outstanding orders to permit use of docket No. 28300 class-rate groupings in applying prescribed mileage rates on livestock in western district, approved. Although such groups are 40 miles in diameter, they have been generally satisfactory in the past in connection with other commodities rates based on distance, and if any undue prejudice or other unlawfulness should result from their use respondents are willing, and will be expected, to make any changes shown to be actually necessary.—Livestock—Western District Rates, 321 I.C.C. 332 (339)*.

Although Milwaukee is about 85 miles north of Chicago, it is only 36 miles more distant from Kansas City, and under intermediate rules plan II TOFC rates between Chicago and Kansas City also apply between latter point and Milwaukee, thus inclusion of Milwaukee in Chicago rate group on such traffic would not change existing rates; moreover, TOFC rates between Milwaukee and Omaha, Sioux City, and Sioux Falls are the same as between those points and Chicago. Considering also operating conditions and terminal costs, proposed grouping of Milwaukee with Chicago is just and reasonable.—Addition of Milwaukee to Chicago Group Rates—K. C., 318 I.C.C. 755 (756, 759).

433. Reasonableness of rates.—[Vol. 1, 6, 11, 13, 15, 19].—Rates sought by Texas interests on grain and products to the South, based on revised southwestern scale and revised groupings, would necessitate disregard of all transportation services performed west of Enid, Okla. Location of the surplus grain-producing areas in Texas precludes any substantial movement to the South, and there is no sound basis for grouping Texas origins with Enid or for modification of boundaries of existing Texas groups. Assailed rates from Texas found not unreasonable or otherwise unlawful, except to extent that rates to Memphis were found unduly prejudicial in 301 ICC 703.—Southeastern Assn. of R. & Util. Commrs. v. A., T. & S.F. Ry., 321 I.C.C. 519 (551-2)*.

Establishment of same reduced rate on canned goods from Pacific coast territories to transcontinental groups A and B is not unreasonable; blanketing of same transcontinental rates on many commodities to both those groups, or even more extensively, is not uncommon, and from 1922 to 1932 rates on canned goods were blanketed from group D to eastern seaboard; a blanket rate from groups A, B, K, L, and M to north and south Pacific coast territories was approved in 301 ICC 255; moreover, no shipper or receiver of canned goods has complained of the rate equality.—Canned Goods from Pacific Coast to Eastern Points, 315 I.C.C. 769 (783).

450. General considerations bearing on reasonableness; nature of commodity.—[Vols. 1, 6, 13, 18].—While the commission has held that maintenance of higher rates on some articles than on others in the lumber list is unlawful, it has also recognized that rates on some lumber products affected by competition might well be reduced without the necessity of a corresponding change in rates on others not so affected.—Union Fork & Hoe Co. v. Chesapeake & O. Ry. Co., 314 I.C.C. 784 (785).

452.—Long continued maintenance of group.—[Vols. 1, 6, 9, 12, 13, 15-17].—Wide destination blanketing is not uncommon in eastbound transcontinental rates. A blanket rate on a limited description of lumber from all western origins to an area roughly coextensive with official territory was approved in 1935 (210 ICC 317); on other articles within the full lumber description the blanket territory is divided into the usual transacontinental groups. Since lawfulness of broad area and destination groupings has been recognized by the commission for over 50 years, there is no merit to contention that observance of the same grouping in connection with proposed uniform reduction in eastbound rates is unlawful.—Reduced Transcontinental Lumber Rates, 1961, 318 I.C.C. 815 (816-7, 845-6).

Historically, the railroad rate structure has been characterized by maintenance of terminal rate groups, many of which have been observed for over a century. Exceptions to principle of preservation of rate-group integrity are more apparent than real, and those existing at New York must be regarded, so far as pertinent, as proving the rule. Practice of equalizing rates at all points in New York port district antedates Federal transport regulation by half a century, and was upheld, after extensive investigation, in 47 ICC 643 and again in 203 ICC 481, which found that both the commerce of the country and the general public interest require continuance of such terminal groups as the New York, Hampton Roads, San Francisco, Chicago, and St. Louis rate groups. However, the practice of rate equalization should not be required merely for the sake of tradition, but only if resulting benefits are substantial and in the public interest.—Port of New York Authority v. Aberdeen & R.R. Co., 321 I.C.C. 738 (746-9)*.

460. Disruption of groups.—[Vols. 1, 6, 9, 11, 12, 14, 15, 17-19].—There is no clear showing that assailed unit train rates on steam coal from Lynnville Mine, Ind., to Hammond, Ind., conditioned on minimum annual volume, would specifically destroy the origin mine group system to detriment of competing carriers or others; nor, without more, may such a result be inferred.—Natural Gas Pipeline Co. of America v. N.Y.C. R. Co., 323 I.C.C. 75 (84-5).

The commission may find proposed rates and charges unreasonable because they disrupt integrity of long-established groups; and whether continuance of traditional uniformity of rates to all points in New York port district should be required must be determined on its merits, not on basis of whether splitting the New York rate group is proposed by carriers or by port or other interests. Fears expressed in 203 ICC 481 as to creation of an unworkable rate structure and a chaotic rate situation are vindicated by defendants' maintaining (1) higher per-car charges on fruits and vegetables to New York City stations than to New Jersey stations, based on pier services at only one New York station; (2) higher rates on hydrocooled peaches to New York than to New Jersey stations, though few such shipments move over considered piers; (3) higher rates on southwestern vegetables and melons to certain piers than to all other stations in the group; and (4) rates on Florida citrus which vary between different New York and different New Jersey stations in same group. Such splitting of long-established groups is inconsistent with the tariff-simplification goal.—Port of New York Authority v. Aberdeen & R. R. Co., 321 I.C.C. 738 (749, 750)*.

Unjustness and unreasonableness resulting from splitting the New York rate group is demonstrated by fact that assailed per-car charges on vegetables from the Southeast to New York City stations are the same as those to the Boston rate group 220 miles more distant. This anomaly cannot be explained by the 1-mile float movement to New York piers 27-29, since traffic destined to Boston is interchanged at Greenville piers, where a water movement precedes the 220-mile overland haul. Though defendants claim that their great revenue needs preclude continued extension of benefits of rate equalization to shippers and localities, defendants benefit from the practice in some instances, while shippers and localities are correspondingly disadvantaged; the practice can hardly be maintained solely for benefit of carriers.

Assailed rates on fruits and vegetables from the Southeast and Southwest, and on hydrocooled peaches from Kansas and Colorado, found unjust and unreasonable.—Id., pp. 750, 752.

472. Group adjustment; proper relation required to insure uniform, reasonable rate structure.—[Vols. 1, 6, 9, 11-14, 17].—Respondents' rates on asphalt in single shipments of at least 20-tank-car lots from 9 western or southwestern States to points in 6 midwestern States apply from recognized origin groups, related in a manner similar to that previously approved on a single-car shipments, which should not be disturbed without compelling reasons; southwestern group differentials under the multiple-car rates are comparable to those approved in 258 ICC 75, and considering the adjustment as a whole the rates under investigation are reasonably related.—Asphalt to Iowa, Michigan, Minnesota, and Wisconsin, 316 I.C.C. 117 (120, 124-5).

Differential Rates and Routes

481. In General.—[Vols. 1, 6, 9, 11, 12, 17, 19].—Conflicting comparisons indicate that there is no set pattern in the transcontinental rate structure whereby rates on packaged commodities are higher than those on bulk commodities; and there is no recognized relationship between rates on the same commodities when moving in tankcars and when moving in boxcars; each case must be considered on its own merits.—Wine, Pacific Coast to Western, S.W. & Central States, 321 I.C.C. 683 (709).

Fact that during a period of more than 24 years rates on bulk wine from California to the Midwest were never lower than those on packaged wine, while latter rates ranged from parity to 22 cents under the bulk rates, and that for 5 years preceding 1962 water-competitive reduction of eastbound transcontinental rates on bulk wine in jumbo tankcars to 26 to 35 cents below the package rates the latter were consistently 21 cents under the bulk rates, is significant. The prior relation between bulk and package rates appears to have been necessary to enable California bettlers to compete in Midwest markets, and restoration thereof is necessary for them to remain competitive. Proposed reduced rates on packaged wine in boxcars from California and other far-western States to transcontinental groups D through J, the same amount on single-car shipments as the tankcar rates and 2½ cents lower on three-car shipments, are compensatory and otherwise lawful; approved.—Id., pp. 708-9, 711-2.

Although 279 ICC 377 prescribed reasonable and nonprejudicial differential relations between competitive rail rates on new automobiles, in carloads, from manufacturing and assembly plants in midwestern States, that proceeding concerned only transportation in boxcars and had no reference whatsoever to TOFC movements, which contemplate holding out of a diffrent service. Order therein is therefore inapplicable to relation of rates on boxcar traffic from one point and TOFC traffic from another; moreover, no shipper, for whose benefit that order was designed, now invokes it in connection with involved TOFC rates.—Motor Vehicles from Kansas City to Ark., La., and Tex., 318 I.C.C. 301 (321).

See also Meats, Fruits, Vegetables—TOFC—Transcontinental, n. 663, below.

Rates on fine coal to Lynchburg, Va., are not unreasonable because they are a lesser amount under lump-coal rates than the spread in rates from same origins to Danville. In prescribing maximum reasonable rates on all bituminous coal, which still apply on lump coal to both destinations, the commission considered relative distances, but no specific rate relation between lump and fine coal, or between Lynchburg and Danville, was prescribed or required; and the greater reduction voluntarily made in rates on fine coal to Danville than to Lynchburg was compelled by natural-gas competition materially more severe than at Lynchburg.—Lynchburg Traffic Bureau v. Chesapeake & O. Ry. Co., 319 I.C.C. 74 (76-7, 80-1)*.

Weight of evidence indicates that the spread between the rail rates applying on coal in connection with water movements and the all-rail rates is generally so sub-

stantial that the relatively small increases per ton authorized on rail-water movements and rail portions of rail-water-rail movements to meet railroads' increased operating costs would not seriously impair ability of the water carriers to offset any increases in their operating costs by increasing their own rates; the water tonnage generally has been increasing and it is unlikely that the rail increases will divert any substantial tonnage.—Increased Rates on Coal and Petroleum Coke, 316 I.C.C. 159 (176).

Although widening of differentials prescribed in 243 ICC 589 in rates on naphtha from Oklahoma group 3 to certain Indiana points over rates to Effingham, Ill., as result of general increases was permitted by modification of the commission's outstanding orders in the exparte increase proceedings, the ex parte orders did not protect the even greater differentials over Effingham resulting from subsequent competitive reduction of the rates to Illinois points. However, the assailed rates to Indiana during the period between that reduction and corresponding reduction of the Indiana rates were not unreasonable merely because defendants were not in compliance with the order prescribing the diffrentials: the differential rates to Indiana were not prescribed as reasonable maxima, but to remove undue prejudice. Reparation denied.—Anderson—Prichard Oil Corp. v. Alton & S.R., 315 I.C.C. 59 (61-2).

482. Barge and rail.—[Vols. 1, 6, 9, 11-14, 18, 19].—Although proposed reduced rail rate on newsprint paper closely approximates average cost per ton of shipping by barge, there remains a differential of 10 to 72 cents a ton, or 1 to 8 percent of the rate, in favor of the bargelines, depending on factors of efficiency in barge operations; in determining that such rate met the test laid down in 74 ICC 48, the commission carefully considered its report in prior proceeding approving the present rate, fairly evaluated the evidence in present record, and brought to bear on its determination that a special case had been presented for §4 relief its expertise in the complex process of ratemaking; the commission's order sustained.—Igert v. United States, 211 F. Supp. 42 (44, 46)*.

Differential in favor of bargelines which would result from proposed reduced rail rate on newsprint paper 2 cents higher than average total cost to shipper for barge service, including 7 months' storage at destination, is not unlawful and, considering shipper's investment in barge loading and unloading facilities, should suffice to offset any disadvantages of barge service; since the barge route is over twice as long as the longest rail route, it may not be assumed, in absence of barge cost data to the contrary, that bargelines are the low-cost route. Under present differential of approximately 10 percent, railroads have lost nearly all the traffic; thus, any differential in favor of bargelines must be less if railroads are to remain competitive.—Newsprint Paper from Tenn. and Ala. to Baton Route, La., 315 I.C.C. 117 (120, 122, 123)*.

See also Export Grain and Grain Prod.—WTL to Gulf-Lake Ports, NTP, n. 5 *Destructive competition.*

485. Water and rail.—[Vols, 1, 6, 9, 11, 12, 14-16, 18, 19].—The commission's conclusions that proposed TOFC rates were an initial step in a program of rate reductions that could threaten continued operations, and thus continued existence, of coastwise water-carrier industry generally; that coastwise shipping was important to national defense, the shipping public, and the economy of ports and coastal areas; and that objectives of the national transportation policy required establishment and maintenance of a differential between rail rates and those of Sea-Land and Seatrain which would enable coastwise carriers to continue their service, are not supported by substantial evidence. Decision of the district court vacated, and the cause remanded to the commission for further proceedings consistent with the Court's opinion.—I. C. C. v. New York, N.H. & H. R. Co., 372 U.S. 744 (750-1, 761, 762-3, 764)*.

Since respondents' present rate on garden hose from Paterson, N.J., to Dallas and Fort Worth, 72 cents over corresponding Sea-Land rate, precludes participation in the traffic, proposed reduction to the Sea-Land level is justified when it is compensatory and not shown to be competitively destructive. Though Sea-Land con-

tends that a differential is necessary to offset alleged rail advantages, it did not show how the claimed disability of water carriage could affect transportation of a seasonal commodity it had handled only during January. In the circumstances, imposition of a differential in favor of a carrier not shown to be the low-cost mode would be unwarranted.—Garden Hose & Electric Cable from N.J. or R.I. to Tex., 319 I.C.C. 227 (228, 229)*.

See also Reduced Transcontinental Lumber Rates case, NTP, n. 5 *Inherent advantages.*

In prescribing minimum differentials in ocean-rail under all-rail rates on wrought-iron or steel pipe from offical territory to the Southwest in 251 ICC 405, disabilities of breakbulk ocean carriers, which do not now participate in the traffic, were a significant factor; but present Seatrain service, while entailing greater transit time than all-rail, does not suffer the handling disabilities of break-bulk service. In view of the substantially changed conditions since the outstanding order was entered, and considering the provisions of §15a(3) and fact that the present record affords no adequate basis for continuing the prescribed minimum differentials, vacation of that order to extent it requires such differentials is warranted.—Wrought Pipe to the Southwest, 319 I.C.C. 310 (317-8)*; no immediate alteration in any rate relations will result, and any published charges in rates will be subject to protest suspension, and investigation.—Id., p. 317.

Since proposed incentive class rates on traffic rated class 35 or higher between official and southern territories will disrupt differential relationship prescribed in 286 ICC 5 between uniform rail class rates and joint rail-ocean class rates between eastern seaboard and New Orleans, and record affords no basis for modification of outstanding order therein, approval of the incentive rates is subject to extension of their application to the prescribed joint rates with water carriers, upon concurrence of the water carriers.—Incentive Class Rates—Between Official & Southern Ter., 319 I.C.C. 448 (456).

Inbound and Outbound Rates

491. Round-trip rates.—Common carriers should be permitted to meet competition by establishing round-trip rates under reasonable return-load rules, provided total charges for the round trip are reasonably compensatory. Under proposed motor-competitive round-trip rates on motor vehicles on trilevel flatcars between Chicago, St. Louis, and Kansas City, consignee of inbound shipment would pay full one-way rate and, upon an outbound shipment tendered within two days after arrival of an inbound one, would pay the balance of the round-trip rate. Proposed rates are just and reasonable when they would reduce wasteful empty-return movement of specially equipped flatcars, would yield substantially more per loaded car-mile than respondents' system average earnings, and compare favorably with round-trip rates between other points where assembly plants are located.—Motor Vehicles on Trilevel Flatcars—Chicago, 318 I.C.C. 89.

All-Commodity Rates

495. In general.—[Vols. 9, 11, 12, 14-19].—The commission's order striking down plaintiffs' all-commodity boxcar rates on manufactured articles in mixed or straight shipments is unlawful because based on an erroneous interpretation of §1(6); those rates do not violate that section merely because they represent a departure from the classification. Commodity rates are sufficiently policed under §§ 1(5), 2, 3(1), and 15a(3), and the considered rates are not shown to violate those sections; all-commodity rates are a natural outgrowth of the rate structure, and those under review are an advance only in being lower than existing class and commodity rates and intended to apply to exclusion of those rates on the commodities they cover; they are admittedly compensatory, exceeding out-of-pocket costs and in most instances making a substantial contribution to overhead, and there is no finding based on evidence that they would

destroy or impair inherent advantages of other transportation modes. The commission's order set aside.—New York, N.H. & H. R. Co. v. United States, 221 F. Supp. 370*.

Reduced rates 62 and 65 cents on all freight, minimum 40,000 pounds, from New York City area to Baltimore and Washington, when loaded by shipper or at his expense into not more than two boxcars of standard length or less, but not subject to promiscuous loading or marriage rules, found amply compensatory and not indefinite, since shipper controls the loading and thus determine whether the attached conditions are met, nor unjustly discriminatory, since they are open to any shipper willing to meet those conditions. Approved.—All Commodities, New York to Baltimore and Washington, 319 I.C.C. 627*.

See also Freight, All Kinds, L.C.L. Container Charges. n. 725, below.

Under proposed all-freight rate, minimum 26,500 pounds in one car, to alternate with present all-freight rates from and to the same points, minimum 30,000 pounds subject to promiscuous loading and marriage rules, applicable rate could not be determined until the car doors are closed; to avoid unlawful discrimination and prejudice, rates and charges on a particular shipment must be readily ascertainable proposal would open the door to discriminatory treatment; not approved.—Freight, All Kinds, from Eastern Points to Milwaukee, Wis., 316 I.C.C. 49 (50); for similar reasons, proposed all-freight rate, minimum 40,000 pounds in no more than two cars, which would alternate with present single-car rate on 30,000-pound minimum and with a rate on 26,500-pounds minimum that is subject to promiscuous loading and marriage rules, is not approved.—Freight, All Kinds, N.Y. & N. J. Stations to Indianapolis, 316 I.C.C. 623 (623, 625).

Equalization of Ports or Markets

502. Purpose and effect of differential adjustments.—[Vols. 1, 6, 9, 11, 15, 18].—Establishment of port equalization, however desirable in ordinary circumstances, is no substitute for adequate proof that a rate proposed for that purpose would be compensatory.—Clay Products, West and Southwest to Pac. Coast Ports, 315 I.C.C. 571 (575).

503. North Atlantic ports adjustment.—[Vols. 1, 6, 9, 11, 12, 15, 17-19].—In requiring parity of rates on import iron ore from Baltimore and Philadelphia to 17 interior points, it appears that the commission, instead of considering port competition as a whole, restricted its concern to movements to the 17 points only. While the specific question to be considered was whether parity between Baltimore and Philadelphia to the 17 points was justified, the correct answer can be given only if total ore shipments to all inland points are considered, and the commission made no adequate findings as to probable total tonnage that will pass through each port, with and without parity.Balimore & O. R. Co. v. United States, 212 F. Supp. 13 (18-19)*.

Even in treatment of ore moving to the 17 points the commission apparently proceeded on theory, not of port against port, but of railroad against railroad; in disregarding tonnage moving to Midland, Pa., and Weirton, W. Va., on ground that it is noncompetitive because only the Pennsylvania serves those points from either port, it ignored fact that a substantial amount moves thereto from Baltimore; while that amount may be small compared with the tonnage from Philadelphia, it is a significant part of Baltimore's total. Baltimore and Philadelphia compete for ore moving to Midland and Weirton, regardless of carrier used, and there is no justification for elimination of that tonnage, either in considering the respective share of each port in traffic to the 17 points, or in an overall port comparison.—Id., p. 20.

And since rates from Baltimore to points west of the 17 points are $0.82 to $2.65 lower per ton than from Philadelphia, it is obvious that a ship carrying ore both for one of the 17 points and for a point west thereof will unload at Baltimore to avoid the prohibitive differential on that part of

the cargo destined west of the 17 points. When the commission's whole theory apparently is that a 20-cent differential to the 17 points in favor of Baltimore would divert practically all import ore for those points to that port, its statement that there is no evidence that a differential of $0.82 to $2.65 to the farther points actually influenced routing of vessels to Baltimore is not understandable.—Id., p. 21

While it is not explained why the rates from Philadelphia to points west of the 17 points have not been reduced to parity or at least to the standard 20-cent differential over Baltimore, it would seem unreasonable to assume that Baltimore will in future be permitted to retain 98-1/2 percent of that traffic. If the 17-point parity is maintained, the Pennsylvania intends to file parity rates from Philadelphia to some of these western points and perhaps even lower rates to others; thus the probable future movement of import ore as between Baltimore and Philadelphia is a matter for consideration and a finding by the commission on remand; cost studies should also include evidence as to the Pennsylvania's unloading and terminal costs on that traffic at Philadelphia, for comparison with the 63 cents a ton paid by it for services at Baltimore.—Id., p. 21.

Evidence presented to the commission by plaintiffs established prima facie that their proposed reduced export-import rates between northern tier of North Atlantic ports and a defined central territory, designed to equalize those ports with the southern tier of North Atlantic ports, were just and reasonable. Although the commission refused to find proposed rates compensatory, it did find after restating and adjusting cost evidence before it that those rates would equal or exceed by a very small margin carriers' estimated out-of-pocket costs; order requiring cancellation of proposed rate schedule, set aside.—Boston & M. R. v. United States, 202 F. Supp. 830 (834-5, 838)*.

Continued parity of rates on imported iron ore from Philadelphia and Baltimore to 17 points in Ohio, West Virginia, and western Pennsylvania is warranted when, as result of diversion of all Canadian ore traffic to St. Lawrence Seaway route, Philadelphia no longer has any advantage over Baltimore in costs of ocean transportation, and establishment of any differentially higher rates from Philadelphia would divert all other imported ore to movement through Baltimore. Evidence as to strikes preventing use of one port but not the other is convincing that ore consumers need at least two ports providing equal through transportation costs; and through those receivers control choice of the port to be used, it is unlikely that they would elect to starve one port by routing most of their traffic through the other. When rail rates are equal and other considerations do not materially affect movement of the traffic, imported iron ore flows freely through both ports in substantially equal volume.—Iron Ore from Eastern Ports to C.F.A. Points, 321 I.C.C. 473 (477, 487-8)*.

And though there has been no importation of iron ore through the port of New York, the Port Authority stands ready to construct a modern ore-unloading facility if rail rates from that port are equalized with Baltimore and Philadelphia, and if movement of sufficient tonnage to support such a facility seems probable. Ocean costs from foreign sources other than Canada are the same to all three ports, and nothing short of proposed parity will permit respondents serving New York to participate in movement of imported iron ore. Considering desirability from a defense standpoint of availability of another port, proposed rate from New York to 9 of the 17 points, the same as from Baltimore and Philadelphia, is just and reasonable when it is shown to be reasonably compensatory over route of each respondent.—Id., pp. 478, 484, 489.

504. South Atlantic and Gulf ports adjustment.—[Vols. 1, 6, 9, 11, 12, 15-17, 19].—Distances between points in interior southern territory and Virginia, South Atlantic, and gulf ports are in many instances not long enough to warrant complete equalization; and though carriers have voluntarily utilized specific formulas as a guide in relating export-import rates as between the ports, they have disregarded them in particular situations, and record does not warrant freezing rate relations between those ports on commodities

generally on any specific basis.—City of Wilmington v. Alabama G.S. R. Co., 316 I.C.C. 709 (715, 723-4)*.

506. Consideration of element of distance.—[Vols. 1, 6, 9, 11, 12, 17, 19.]—Equalization sought by New Orleans with upper river gateways on grain traffic moving to the South subject to Kansas City rate-break, found not warranted for reasons discussed in 298 ICC 151.—Southeastern Assn. of R. & Util. Commrs. v. A., T. & S.F. Ry., 321 I.C.C. 519 (553)*.

The commission's general policy has been to permit or require port equalization where the geographically handicapped port appeared to be at serious competitive disadvantage by reason of the rate adjustment, provided such equalization was confined within reasonable limits determined by needs of the ports concerned, the carriers serving them, and the public. As there is usually less difference percentagewise in export-import rates for the longer hauls to and from the various ports, justification for port equalization of rates increases with length of haul; but such equalization has generally not been approved in areas close to the respective ports.—City of Wilmington v. Alabama G.S. R. Co., 316 I.C.C. 709 (715, 725)*.

Rates Based on Quantity of Traffic

514. In general.—[Vol. 19].—Reduced rates approved on coal in 308 ICC 99 and 311 ICC 355, conditioned on shipment of a minimum tonnage during a stated period, were motivated by market competition and did not appear competitively destructive, thus afford no precedent for approval of contract rates based on a percentage of shipper's traffic, which are designed to meet carrier competition and would have destructive effect on the entire rate structure.—Guaranteed Rates, Sault Ste. Marie, Ontario, to Chicago, 315 I.C.C. 311 (313, 321, 323).

518. Trainload rates.—[Vols. 1, 6, 9, 11, 15-19]—Tariff naming unit train rates on coal contingent on a minimum annual volume, cars to be supplied by shipper or consignee, does not create contract rate such as were condemned in 313 ICC 247 and 315 ICC 311. In those proceedings, application of the lower rates required movement by proponent carriers of stated percentages of shipper's entire traffic, whereas the unit train rates require only stated annual tonnages to the named destination; such a volume requirement is a proper method of classification. Defendant merely offers an incentive for use of its motive power, otherwise its normal rates apply, and there is no substantially exclusive patronage contract as such. Since other coal-carrying railroads need only furnish motive power at appropriate reductions to be competitive, there is no insurmountable barrier to such competition; moreover, no coal carriers of any mode have complained of the assailed rates.—Natural Gas Pipeline Co. of America v. N.Y.C. R. Co., 323 I.C.C. 75 (82-3).

Maintenance of a relationship between single-car and multiple-car rates was required in prior proceedings to protect single-car shippers; however, such shippers are in no better position if the volume movement is by barge; no single-car shipments of considered grain traffic have moved in the recent past, and no prospect of such movement appears; proposed flat rates from Kansas City and Omaha groups to Lawrenceburg, Ind., restricted to single shipments in lots of 20 or more carloads, without transit privilege are compensatory and no lower than necessary to meet all-barge competition, and would not discriminate against smaller shippers.—Grain—K.C., Omaha & Related Origins to Lawrenceburg, 315 I.C.C. 83 (87).

Proposed multiple-car rate on fine coal from Sherwood and origins in Fulton County, Ill., to Twin Cities and Black Dog, Minn., is not shown to be compensatory and, considering its effect on the differentially related midwestern coal adjustment, should not be approved. While from Sherwood to St. Paul proposed rate exceeds out-of-pocket cost by 4.5 cents, respondent admits that it would be used only in emergencies, and considering large storage capacity of consignee at St. Paul, no such emergency appears likely; even if emergency occured, no reason appears why the singlecar rate would not serve to move

the traffic.—Coal from Fulton County, Ill., to Minnesota, 315 I.C.C. 627 (633).

Line-haul, Terminal, and Switching Services Included

521. Line-haul rates and terminal services.—[Vols. 1, 6, 9, 11-19].—The general rule that it is carrier's reponsibility, as part of the transportation service covered by the line-haul rate, to deliver the goods by placing them in such position as to be accessible to consignee is not an inflexible one (347 US 645). The law recognizes and reflects the practicalities of transportation by rail and the diversities to which they give rise; thus, departure from the general rule of access would be legally justified by a special situation such as that existing at Manhattan produce piers by virtue of special facilities there provided, together with availability of optional team track delivery. The commission's finding that unloading of plantiff's shipments of onions at the produce pier was not a part of carrier's line-haul obligation and thus not covered by the line-haul rate, sustained.—William N. Feinstein & Co. v. United States, 209 F. Supp. 613 (622, 623)*.

522. Switching and spotting.—[Vols. 1, 6, 9, 11, 13-19].—On principle that an increased rate which is below cost of performing the service is intrinsically just and reasonable, plaintiffs' flat increase in intraterminal and interterminal switching charges in eastern district was reasonable on its face when the commission found that resulting charges would generally be below out-of-pocket costs. While fact that it would result in greater percentage increases at some localities than at others might have some validity if the rate were being examined for each terminal separately and if it were found that the increased rate at a given terminal would exceed a fair return over cost, the flat increase was a general one as to which the commission found use of average figures appropriate, and there is nothing in the record to show unreasonableness at any given locality. On the commission's own finding the increased rates remain within the zone of reasonableness, and resulting percentage disparties are not enough, without any indication of why this makes the rates unreasonable, to support a finding of unreasonableness. The commission's order requiring cancellation of the increase set aside.—Pennsylvania R. Co. v. United States, 216 F. Supp. 199 (201, 202)*.

While respondents have shown need for additional revenue to offset increased costs, proposed flat general increase would apply only on switching movements not connected with line-haul; no such distinction should be made when evidence shows no relation between the varying levels of increase and the cost or quantum of service rendered in the respective switching operations; such increases should apply to charges for interchange switching movements regardless of type of carrier or agency serving as connection.—Increased Swtiching Charges, 315 I.C.C. 199 (211)*.

While overall costs of performing both terminal and line-haul rail services have risen considerably, the greater increase is in terminal costs; costs of intraplant switching, which is terminal in nature, have been subject to economic pressures similar to those influencing increased costs of intraterminal and interterminal switching; even the most conservative cost data support increase in charges for intraplant switching. But though proposed increase is restricted not to apply on shipments billed to move without interruption from or to a line-haul carrier in connection with a prior or subsequent movement by line-haul common carrier, there is no indication that costs or increases therein differ materially for any of considered intraplant services; respondents will be expected to apply the increases approved to that type of switching service, regardless of type of carrier or agecy which serves as a connection.—Id., 318 I.C.C. 485 (488, 489)*; modified as to western district and southern and Pochahontas regions.—Id., 322 I.C.C. 560 (563)*.

523.—Reciprocal switching rates and services.—[Vols. 1, 6, 9, 11, 16-19].—Reciprocal switching charges generally are made without regard to cost of service and may not accurately measure a maximum reasonable charge.—Absorption of Switching to or from High Point, N.C., 319 I.C.C. 522 (525).

526. Terminal services.—[Vols. 1, 6, 9, 11-13, 16, 18].—See Absorption—Lumber & Plywood, §1(6), n. 680.

Multiple-Line Movements

538. Application of single-line scale to movements over commonly-controlled railroads.—[Vols. 6, 9, 11, 12].—Under minimum-rate rule in transit tariff governing application of multiple-car rates on soybean cake and meal, applicable rate on a representative shipment, comprising an inbound movement of soybeans to transit point in lots of one or more cars and an outbound movement of cake or meal subject to same per-car minimum and an aggregate volume minimum, is the rate on soybean cake or meal "(in volume unit forwarded from the transit point)" from origin of the soybeans or from the transit point whichever is higher. That parenthetical phrase, in conjunction with other portions of the minimum-rate rule, invites conclusion that the multiple-car rate named from the transit point, which under provisions of the rate tariff does not apply on shipments originated at that point, but only on those transited there from soybeans originating elsewhere and moved in volume beyond, is the other rate specifically designated to be used in applying the minimum-rate rule. Therefore, a higher single-car rate named on cake or meal originating at the transit point has no application under specific provisons of the minimum-rate rule.—Vol. Rates on Processed Meal-Midwest to Ports, 322 I.C.C. 456 (476-8).

Percentage Increases

540. In general.—[Vols. 15-19].—Reasonableness of interim increases on past shipments see §8, n 134.

Mere fact that a flat general increase in switching charges may or will result in greater percentage increases at some localities than at others does not brand the increase as unacceptable so long as it remains under cost; plaintiffs' flat increase in intraterminal and interterminal switching charges in eastern district was reasonable on its face when the commission found that resulting charges would generally be below out-of-pocket costs, and since it was treated as a general increase there is nothing in the record to show unreasonableness at any given locality. The commission's order requiring cancellation of the increase because of the resulting percentage disparity, set aside.—Pennsylvania R. Co. v. United States, 216 F. Supp. 199 (200, 201)*.

See also Increased Switching Charges, in. 522, above.

Proposed general increase of 7 cents per ton in line-haul rates on bituminous coal, and 2-cent increase per ton in charges for transfer or dumping of coal and coke at lake or river ports, are justified by railroads' showing of increased operating costs; proposed 4-cent increase in rates on lignite coal is in line with increases thereon in previous general increase proceedings and likewise warrants approval.—Increased Rates on Coal and Petroleum Coke, 316 I.C.C. 159 (175).

Record does not indicate that application of same general increase for the rail portion of rail-water or water-rail movements as for all-rail movements, and application of the full increase to the combined rail portions of rail-water-rail movements, will undermine the inherent advantage of the water carriers; protestants do not contend that the rail-water or rail-water-rail rates as increased exceed reasonable maxima in violation of §1(5); moreover, the water tonnage generally has been increasing, and it is unlikely that the rail increase will divert any appreciable tonnage.—Id., pp. 176, 178.

Under the single-increase rule, maximum general increases authorized in ex parte proceedings must be applied to through combination rates so as to result in total increases not exceeding the stated maxima. Application to initial rail factor of rail-water combination rates on crude sulphur of a percentage of the maximum allowable increase equal to the intial factor's percentage of the through combination produces approximately the same overall result as that authorized in the ex parte proceedings; approved.—Sulphur—Tex. to Tex. Ports—Coastwise Movement Beyond, 315 I.C.C. 415 (416, 417, 418)*.

But application of the authorized percentage increases, without regard to maxi-

mum holddowns, to corresponding proportionals on ground or refined sulphur is not justified by showing that, as there is no movement between the points concerned, there was no basing point which could be used in arriving at a rate to the ports.—Id., p. 417.

The commission has no jurisdiction over increases made in Candian factors of international combination rates.—Board of Directors for Public Utilities v. Canadian National Rys., 315 I.C.C. 471 (474).

In view of the longstanding parity of rates on fatty acids and fatty-acid esters of coconut oil and on coconut and other vegetable and nut oils, the similarity of their transportation characteristics, and the competition between them both in use and in price, application of Ex Parte 212 increases of 3 percent to rates on fatty acids of coconut oil, and 2 percent to rates on esters, was prima facie unreasonable to extent those increases exceeded the 1-cent maximum provided on nut and vegetable oils generally.—Foremost Food & Chemical Co. v. Alton & S. R., 318 I.C.C. 35 (36-37).

That petitioning railroads in Ex Parte No. 212 did not include in their proposals any increase specifically on iron or steel waster sheets and that none was authorized, does not establish unreasonableness of basic rate on such sheets as republished to reflect general 2-percent increase therein authorized. In absence of any outstanding maximum-rate orders, railroads, need not obtain prior authority from the commission to increase their rates; they are free to change rates on 30 days' notice to the commission and the public, subject to possible suspension and investigation; republished basic rate under consideration was not suspended and was allowed to become effective; burden of proving it unjust or unreasonable is on complainant.—Joliet Wrought Washer Co. v. Chicago, R. I. & P. R. Co., 315 I.C.C. 477 (480).

Complainant's evidence respecting issues of unreasonableness is directed solely to reasonableness of the increase factor and fails to indicate that the total rates exceeded or exceed the maximum of reasonableness; defendants, on the other hand, show that such rates compare favorably with those contemporaneously charged on similar commodities to and from same points; assailed rates are thus not shown to be or to have been unreasonable.—Id., pp. 480-1.

Class Rates

544. In general.—[Vols, 6, 9, 11-19].—Part II, §216(b), n. 200. See also §1(6), n. 130.

In view of the commission's analysis of the factors underlying railroads' application of first-class rating, provided in their classification on incendiary bombs, to considered napalm gel and Pyrogel bombs shipped without bursters, fuses, or arming wires, and its conclusion from such analysis that resulting rates charged were lawful, the record affords no basis for a different result in the courts. Decision of the district court dismissing the complaint is affirmed.—United States v. I.C.C., 315 F 2d 44 (46-7)*.

Class rates represent the highest level of rates which the particular traffic can be expected to bear, and increase in rating of clays including bentonite from class 17.5 to class 20, minimum 80,000 pounds, was approved in 316 ICC 687. That considered bentonite traffic moves generally under the class rates or commodity rates reflecting high percentages thereof, while similarly rated commodities move under commodity rates or exceptions ratings reflecting considerably lower percentages of the class rates, does not, in absence of a showing of substantially similar transportation circumstances and conditions, establish that the assailed rates are unreasonably high; and in absence of a specific finding that assailed rates on domestic shipments exceed a reasonable maximum level, requested prescription of rates 13 percent of class 100, on the 80,000-pound minimum, would be unwarranted.—American Colloid Co. v. Akron, C. & Y. R. Co., 321 I.C.C. 91 (98, 113).

Incentive class rates proposed to meet private and contract motor carrier competition between official and southern territories, 75 percent of class rates otherwise applicable, to apply on that portion of a shipment rated class 35 or higher in uniform classification which exceeds 22,000

pounds or a lower published minimum weight, when the entire shipment moves in one car, approved as compensatory and otherwise lawful, provided application thereof is extended to joint ocean-rail rates prescribed in 286 ICC 5 between eastern seaboard and New Orleans.—Incentive Class Rates—Between Official & Southern Ter., 319 I.C.C. 448.

547. Distance scales.—[Vols. 1, 6, 9, 11-19].—That reduced rates on corn and products to Chicago include a flat rate for distances of approximately 300 to 600 miles, whereas rates for longer distances are on a scale basis, does not render them unlawful in view of truck and other competition which compelled their establishment.—Corn and Corn Products, Iowa, Nebr., Minn., S. Dak. to Ill., 318 I.C.C. 291 (294).

Cement: [Vols. 9, 12, 13, 15, 17, 19].—Voluntarily reduced rates in western district, on M-K-T, Southwestern Freight Bureau, 11-395, 11-599, and 11-616 scales, found not shown to exceed reasonable maxima.—United States v. Oklahoma City-Ada-Atoka Ry. Co., 319 I.C.C. 182 (183, 186)*.

Coal: [Vols. 9, 11, 12-19].—Rates approximately 77 percent of Midland scale prescribed in 232 ICC 5, including Ex Parte 232 increase, approved on fine coal from Illinois, Indiana, and western Kentucky mines to Red Wing, Minn.—Bituminous Coal from Ill., Ind. & Ky. to Red Wing, Minn., 318 I.C.C. 17 (19).

Coke: [Vols. 9, 11, 19].—3511 scale: Board of Directors for Utilities v. Canadian National Rys., 315 I.C.C. 471 (474-5).

Gases: Reduced alternative distance scales on liquefied petroleum gas in jumbo tank cars, minima 78,000 87,000, 93,000, and 127,000 pounds, between points in United States and from Canada to United States points, approved as just and reasonable.—Liquefied Petroleum Gas in Jumbo Tank Cars—S.W.F.B., 319 I.C.C. 31 (35-6, 37).

Limestone: [Vols. 9, 11, 12, 14-17].—17517 scale as revised.—Limestone from Bessemer, Ala., to Missisippi Points, 316 I.C.C. 383 (384).

Superphosphate: [Vols. 17, 18].—Rates charged on past shipments from Florida to northern-line points in Minnesota and the Dakotas on 16925 scale basis prescribed to Grand Forks, N. Dak., in 289 ICC 307, found not unreasonable merely because they exceeded concurrent reduced scale basis established to w.t.l. territory other than northern-line points; present northern-line scale, lower than the prescribed basis but higher for distances to considered destinations than scale basis maintained from the South to other w.t.l. points, found not unreasonable merely because it exceeds basis 80 percent of 16925 scale.—Agsco Chemicals, Inc. v. Alabama Great Southern R. Co., 314 I.C.C. 725 (727-8, 733).

548.—Progression of scales.—[Vols. 1, 6, 9, 13, 17-19].—Proposed reduced distance rates in southern territory on bulk cement, generally 2 cents lower than existing motor rates at 20 miles, 2.5 cents lower at 25 miles, 3 cents lower at 30 miles, and 4 or 4.5 cents lower for 31 to 100 miles, with rates for longer distances continuing at same rate of progression as present rates, found just and reasonable.—Cement within Southern Terr. & from Hagerstown to So., 319 I.C.C. 465 (467).

549.—Computation of mileage.—[Vols. 1, 6, 9, 12, 15].—Requested modification of outstanding orders prescribing maximum distance rates on livestock in western district, to permit use of docket No. 28300 rate bases and groupings in lieu of short-line distances, or a combination of both on movements from or to area west of the 28300 class-rate territory, approved as beneficial to both shippers and carriers without substantially affecting the level of rates. Present method of determining rates is difficult and time-consuming, as short-line distances vary with abandonments and new construction; the 28300 rate bases have been satisfactorily used in other adjustments for over 10 years, and fact that they do not reflect current changes in actual mileages is not a serious objection to their use, since minor variations in distance do not necessarily result in unreasonable rates, and respondents have offered, and will be expected, to correct any inquitable situations that may arise.—Livestock—Western District Rates, 321 I.C.C. 332*.

Commodity Rates

566a. Justification; percentage of shipper's traffic.—[Vol. 19].—Guaranteed or agreed rates, based on tender of a percentage on shipper's traffic during their effective period, as used in Canada under statutory sanction, discussed.—Guaranteed Rates, Sault Ste. Marie, Ontario, to Chicago, 315 I.C.C. 311 (318-9).

Proposed reduced rate on steel or wrought iron pipe or tubing from Sault Ste. Marie, Ontario, to Chicago, to apply only when not less than 90 percent of shipper's total tonnage consigned to Chicago group for local delivery or movement beyond is shipped over respondents' lines during its effective period, disapproved as a destructive competitive practice; record leaves no doubt, considering results of agreed rates in Canada and the wide interest manifested in the ratemaking principle involved, that, were this guaranteed rate approved, similar rates would be established on the same and other commodities and could be expected to spread to most of traffic moved by for-hire carriers in this country, ending in destruction in large measure of what is in general a reasonable and lawful rate structure necessary to maintenance of an adequate national transportation system.—Id., pp. 312, 323.

Moreover, undertaking in the tariff that, unless ordered by commission, no increase will be made in the rate during period fixed for its duration, even though changed conditions might warrant such increase, appears inconsistent with the continuing obligation of common carriers to establish and maintain just, reasonable, and otherwise lawful rates.—Id., p. 322.

Therefore, carriers which require commission's approval of their rates should be on notice that, in absence of a statutory amendment, contract rates and agreed charges are deemed unlawful per se.—Id., p. 323.

571. Exceeding class rates.—[Vols. 1, 6, 9, 11, 12, 16-19].—A commodity rate in excess of the class rate on the same traffic raises presumption that the commodity rate is unreasonable, and by analogy the same is true where charges based on a commodity rate exceed those based on an exceptions class rate; such an anomaly requires special justification, and fact that exceptions ratings, having general application throughout official territory, were established to enable rail carriers to attract traffic in competition with motor carriers is not conclusive proof that the exceptions ratings were below reasonable maximum level.—Westinghouse Electric Corp. v. New York Central R. Co., 318 I.C.C. 277 (279).

Although assailed commodity rate on peanut skins exceeded the contemporaneous class rate, cost evidence indicates that the uniform classification rating originally established was less than a reasonable maximum and therefore affords no basis for finding the assailed rate unlawful.—William Volker & Co. of Texas v. Athcison, T. & S. F. Ry., 318 I.C.C. 249 (266).

572. Less-than-carload commodity rates.—[Vols, 1, 6, 9, 11, 13, 14, 18, 19].—See Freight, all kinds, L.C.L. Container Charges, n. 720 below.

573. Considerations bearing on reasonableness generally.—[Vols, 1, 9, 17, 19].—On account of higher 72,000-pound minimum point-to-point rate on ground limestone in section 1 of tariff, which provides, that rates named therein take precedence over mileage rates, minimum 54,000 pounds, in sections 3 and 4 thereof, would result in greater minimum charge per shipment than under sec. 4 rates and, thus, in violation of requirement of rule 7(b)(4) of Tariff Circular 20 that the nonalterating section of a tariff (section 1) shall contain only commodity rates which in all instances result in lower charges than those in any other section. Accordingly, charges resulting from applicable point-to-point rate are unjust and unreasonable to the extent that they exceed charges based on corresponding sec. 4 rate.—Calcium Carbonate Co. v. Missouri Pac. R. Co., 329 I.C.C. 458 (462-3)*.

574. Relation to class-rate structure.—[Vols. 1, 6, 9, 12, 14, 15, 17-19].—Reduced rates proposed on beet sugar from western origin groups to central territory to restore former competitive relation between western processors and eastern refiners in that market reflect an average of slightly over 16 percent of docket

28300 first-class rates and 15 percent of the higher docket 30660 mountain-Pacific first-class rates, or approximately the same percentage as rates on cane sugar from Baltimore, which are typical of reduced rates established from the East in 1960, and thus represent an equitable adjustment.—Sugar from the West to Central Territory, 319 I.C.C. 686 (691, 702, 707).

Wholly aside from the fact that little traffic moves at class rates and that commodity or exceptions rates generally are established on high-volume movements, a class-rate structure affords a standardization of rate relations, and where an assailed misalinement of rates is shown to be unjustified, recourse may be had to the class-rate structure to determine a proper basic relationship. Along with their relative reasonableness, shippers are concerned with the quantum of rates they pay, not with what they are called in the technical terminology of transportation.—Cudahy Packing Co. v. Akron, C. & Y. R. Co., 318 I.C.C. 229 (245)*.

Assailed rates on scrap iron or steel in official territory are not shown to be unreasonable per se; although scrap has borne the full impact of every ex parte increase but two since World War II, in 1952-59 the level of scrap rates fell from 15.2 to 12.8 percent of uniform first-class rates, and none of rates that move the traffic exceed 21 percent; southwestern and southern rates, which apparently are satisfactory to complainants, reflect 21 percent of first class on 50,000-pound minimum and 18 percent on 80,000-pound minimum, considerably above assailed level.—Institute of Scrap Iron & Steel, Inc. v. Akron, C. & Y. R., 316 I.C.C. 55 (58, 66-7).

Rates charged on past shipments of superphosphate, not defluorinated or feed grade, from Florida origins to northern-line points in Minnesota and the Dakotas on basis prescribed in 289 ICC 307, averaging 13.6 percent of class 100 rates, and present rates on northern-line scale, averaging 13 percent thereof, are not shown to have been or to be in excess of reasonable maxima; no commodities in the classification are rated as low as the 12-percent basis sought by complainants, and only one is accorded an exception rating that low from the South to northern-line points.—Agsco Chemicals, Inc. v. Alabama Great Southern R. Co., 314 I.C.C. 725 (729, 732).

Protective Services

594. Icing and reicing; refrigeration.—[Vols. 1-19].—

Inclusion of compensation in line-haul rates: [Vols, 1, 6, 9, 11, 12, 14, 17].—Proposed inclusion of refrigeration service in respondents' line-haul rates on meats and packinghouse products is justified when resulting revenues are shown to be compensatory. Rates of competing motor common carriers include refrigeration, and respondent are at a disadvantage in soliciting the traffic; proposed inclusion overcomes some of railroads' difficulties in meeting for-hire and private motor competition, especially those due to widely fluctuating costs of refrigeration, summer versus winter, and shippers' inability to forecast transportation costs when charges are separately stated. Outstanding orders in 215 ICC 684, 241 ICC 503, and 253 ICC 351 modified to extent that such approval is inconsistent therewith.—Refrigeration, Meats & Packinghouse Products—Midwest, 319 I.C.C. 113 (120).

Western trunkline railroads other than the Burlington presented no cost evidence or meaningful comparisons to establish compensativeness of rates on meats and packinghouse products which include refrigeration services and allowances therefor, but merely compared their rules with those of the Burlington. Their attempt to show that the involved rules are competitively necessary for all respondents between points in the same general territory does not establish that the rates are on a level sufficient to cover cost of the refrigeration service. Mere fact that the Burlington's rates were approved in another proceeding does not establish that respondents' rates, which cover additional origins served by other railroads, are just and reasonable. Not approved.—Refrigeration Allowances, Midwest, West, and Southwest, 322 I.C.C. 148 (151, 153).

Export and Import Rates

602. Differences justified by competition.—[Vols. 1, 6, 9, 11].—Since domestic production of soybean cake and meal increasingly exceeds domestic consumption, domestic processors must have access to world markets, where they compete with foreign processors who largely use soybeans imported from United States; and while many factors affect exportability of soybean cake and meal, rates, to the extent they affect the price in world markets, are an important one, since a difference in price of $1 a ton may affect an export sale. Though reduced multiple-car rates on soybean cake and meal from midwestern origins to southern and eastern ports, established to enable domestic processors to compete more effectively with foreign processors, have not been in effect for a full crop-year and have not been fully exploited by processors and exporters, they have stimulated exportation of cake and meal and may be expected to increase respondents' revenues. Considered rates, being compensatory and not below a minimum reasonable level, are therefore just and reasonable.—Vol. Rates on Processed Meal—Midwest to Ports, 322 I.C.C. 456 (462, 465-6, 468).

Reduced flat export rates on coarse grains over respondents' single-line routes from western Iowa, eastern Nebraska, southeastern South Dakota, and Bigelow, Minn., to Lake ports are justified to meet increased competition of unregulated trucks and enable respondents to obtain a fair share of increased export movement through those ports. Level of the reduced rates compares favorably with reduced rates established by eastern railroads to meet competition via St. Lawrence Seaway, and unrebutted cost evidence indicates that they will make a substantial contribution to overhead; they are therefore compensatory and are not shown to be otherwise unlawful; approved.—Export Grain and Grain Prod.—WTL to Gulf-Lake Ports, 319 I.C.C. 729 (731-2, 741)*.

Reduced flat and proportional rates on coarse grains and certain products thereof from Kansas City and Omaha and points grouped therewith to Gulf ports for export are justified to meet regulated and unregulated barge competition. The reduced proportionals, which are uniformly 21 cents under the flat rates, compare favorably with like rates from other grain markets to North Atlantic and Gulf ports and are compensatory when they exceed out-of-pocket costs and make a reasonable contribution to overhead. The proportional rates from Kansas City exceed combination barge rates and shipper costs by about 4 cents, and though those from Omaha are about 1 cent below such costs the flat rates apply as minima on through movements from country origins; and since the proportionals do not apply on grain trucked in to Omaha, the bargelines have a minimum differential of 21 cents on such grain. Considered adjustment as a whole is not shown to be competitively destructive or otherwise unlawful; approved.—Id., pp. 733-4, 742-3.

Reduced import rates on bananas from Baltimore to central and trunkline territories are compensatory when they exceed out-of-pocket costs by 3 to 61 percent, and reduced rates from Philadelphia and New York City group 1 and 3 cents higher, respectively, reflect prior port differentials over Baltimore. Though respondents maintain extensive specialized facilities for fast and efficient transfer of bananas from ocean vessels to refrigerator cars, thare was substantial diversion to trucks at prior rail rate level, and the reduced rates, on approximately same level from Baltimore as competitive motor rates, are no lower than necessary to meet such competition and thus not competitively destructive.—Bananas, Import, from Eastern Ports to Official Terr., 315 I.C.C. 215 (219).

604. Relation to reasonable domestic rates.—[Vols. 1, 6, 9, 11-19].—Commodity or exceptions rates charged on export shipments of various commodities were not unreasonable although higher than corresponding uniform class rates, since the docket 28300 class-rate scale was not prescribed for application on export traffic.—William Volker & Co. of Texas v. Atchison, T. & S. F. Ry., 318 I.C.C. 249 (267).

There is nothing inherent in export traffic which requires it to have lower rates

than domestic traffic; assailed rates on grain from Kansas, Oklahoma, and Texas to Lake Charles, La., for export, based on prescribed domestic rates, are not shown to be unjust or unreasonable merely because rates from same origins to Texas ports were reduced to meet competition not affecting Lake Charles.—Lake Charles Harbor & Term. District v. Atchison, T. & S. F. Ry. Co., 315 I.C.C. 485 (487-8); similarly, assailed rates on grain to Corpus Christi, Tex., for export are not shown to be unjust or unreasonable when they are based on prescribed domestic rates.—Nueces County Nav. Dist. No. 1 v. Atchison, T. & S.F. Ry. Co., 315 I.C.C. 155 (160).

See also City of Wilmington case, n. 24, 58, above; and Pennsylvania R. Co. v. United States, n. 20, above.

Rates for Special Classes of Service

643. Dumping, trimming, and leveling.—[Vols. 1, 6, 9, 11, 12, 15, 19].—Argument that proposed 2-cent increase per ton in charges for transfer or dumping of coal and coke at lake and river ports is disproportionate percentagewise with increase in line-haul coal rates overlooks fact that line-haul and handling charges encompass entirely diffrent services, and a percentage comparison of those increases does not demonstrate that either is unreasonable; nor does mere fact that railroads have not increased handling charges at tidewater ports or that certain private facilities have not increased their dumping charges establish that the proposed increase is unreasonable or otherwise unlawful. Handling charges were not increased in Ex Parte Nos. 206 and 212, and as respondents have shown that costs of operating lake and river port dumping facilities have increased somewhat and that present charges are not generally returning cost of the service, the increased charges are approved.—Increased Rates on Coal and Petroleum Coke, 316 I.C.C. 159 (173, 178).

645. Lighterage.—[Vols. 1, 6, 9, 11, 12].—See Reduced Transcontinental Lumber Rates, n. 128, above.

646. Loading and unloading.—[Vols. 1, 6, 9, 11-19].—In proceeding on complaint filed in aid of a previously filed civil damage suit, assailing charge assessed for unloading shipments of onions at Manhattan pier station, the primary issue before the commission was whether the unloading charge could lawfully be exacted in any amount. If exaction of any charge was determined lawful, then the commission could properly pass on the reasonableness of the amount, to aid the district court in determining the quantum of damage, if any, sustained by plaintiff; but if the charge was unlawful or its unlawfulness left undetermined, the reasonableness in amount of the charge could not sustain its exaction.—William N. Feinsten & Co. v. United States, 209 F. Supp. 613 (620-1)*.

The commission's findings that produce was sent to the pier stations (where consignees were not permitted access to shipments until after they had been unloaded on the pier floors) primarily for use of the special auction and sales facilities there, and that at time plaintiff's shipments moved he had option of taking team track in lieu of pier delivery, are inferences which it could reasonably draw from the evidence before it. Whether those two findings constitute such an unusual situation as to require an exception to the general rule that delivery must permit access to the freight without charge in addition to the line-haul rate is a question peculiarly within the specialized knowledge of the commission; as the findings on which it resolved that issue in favor of exception have warrant in the record and a rational basis in law, and its findings supporting reasonableness in amount of the assailed charge have strong support in the record, the commission's decision that assailed charges were not unreasonable is sustained.—Id., pp. 622, 623.

Requirement of rate equalization on fruits and vegetables to all stations in New York rate group need not contravene carriers' revenue needs; unloading charge at New York piers 27, 28, and 29, to extent that it fails to cover cost of performing that service, can be increased; or defendants may recover cost of extraordinary services furnished at the pier stations in form of a

separately stated accessorial charge.—Port of New York Authority v. Aberdeen & R. R. Co., 321 I.C.C. 738 (750)*.

648. Multiple-car shipments.—[Vols. 1, 15, 17-19].—See also n. 514, 518, above. Multiple-truck service, §216(b), n. 430.

Multiple-car rates may be approved where they appear to be compensatory, reasonably related to corresponding single-car rates, and competitively justified. Protestants have stipulated compensativeness of Erie-Lackawanna's proposed multiple-car rates on iron ore from Cleveland, Ohio, to destinations in Ohio and Pennsylvania, subject to a minimum of 10,00 tons per shipment and to marked capacity of each car; while the exact spread of 20 cents per gross ton is a judgment figure, the proposed rates are about 90 percent of the single-car rates, a ratio within the range approved in other proceedings and therefore reasonable; and, owing to present inaccessibility of respondent's Cleveland docks to the larger vessels increasingly used for iron ore movement, it is unable to compete successfully for ore carried in such ships and the proposed rates appear necessary for it to compete more effectively for a share of the tonnage transported in smaller vessels.—Iron Ore from Cleveland, Ohio, to Ohio and Pennsylvania, 323 I.C.C. 746 (747, 748-9, 754)*.

And though the rates are not restricted to delivery at only one destination because one shipper requires delivery at two, the tariff wording specifying 10,000-ton shipments tendered at one time by one consignee clearly denotes volume rates. But though the commission has previously approved multiple-car rates which depart from the conditions normally attached to such rates, it appears that deliveries of the involved traffic are ordinarily confined to a single destination, that the rates were designed to apply only to shipments moving to not more than two, and that the cost stipulation was based on those facts. Thus the proposed rates are not shown to be compensatory for shipments destined to more than two points, and approval is contingent on their republication as restricted accordingly.—Id., pp. 754-5.

Multiple-car rates on soybean cake and meal from midwestern origins to southern and eastern ports, minima 500, 1,000, and 2,000 tons per shipment and 100,000 pounds per car, averaging approximately 84 percent of corresponding single-car rates, are compensatory and not below a reasonable minimum level. Though any economies shown to result from multiple-car service are insignificant, the spread under the single-car rates is not controlled entirely by differences in cost of the two services; other factors ordinarily considered in ratemaking enter into determination thereof. Considered rates were established to enable domestic processors of soybean cake and meal to compete more effectively with foreign processors of soybeans, and the spread under the single-car rates is within range previously found to constitute a just and reasonable relationship; the rate have stimulated exportation of soybeans, will increase respondents' revenues, and are just and reasonable.—Vol. Rates on Processed Meal—Midwest to Ports, 322 I.C.C. 456 (468, 469-70).

Although multiple-car rates are generally restricted to shipments moving in multiple-car lots at one time from one consignor at one origin, considered rates are a departure from those normal conditions in being subject to a single-car origination rule under which they apply as through rates from origins of the soybeans, even though inbound movement to the transit point is in single carloads. Lawfulness of such innovations in ratemaking must be determined on the surrounding circumstances and conditions, including material economic as well as physical facts; country elevators cannot originate more than one to five cars of soybeans a day, and application of the multiple-car rates under that rule is responsive to the physical manner in which soybeans move into transit points for processing into cake or meal; considered rates are therefore not unlawful per se.—Id., pp. 458-60.

Under a maximum-pay-in rule, application of the multiple-car rates on through shipments from country origins is limited to instances where the applicable single-car rate on the inbound movement of soybeans does not exceed 22 cents, and where the inbound rate exceeds that maximum the

excess is added to the through rate; effect of this rule is to restrict application of the multiple-car rates to through shipments of cake and meal processed from soybeans originating within a radius of about 160 miles from a transit point. These provisions are responsive to competitive conditions encountered by railroads in movement of soybeans to transit points, and are consistent with practices of the processing industry; rates on soybeans for distances up to 160 miles from transit points are depressed to meet truck competition, and soybeans are normally obtained from points within that radius. The maximum pay-in-rule also does not result in rates that are unlawful per se.—Id., pp. 460-2.

Proposed multiple-car nontransit rates on corn, minimum 500 tons per shipment, restricted to apply only during season of open navigation on New York State Barge Canal, are compensatory and necessary to meet potential barge competition; their relation to existing single-car transit rates, approximately 80 percent, is within range found just and reasonable in other proceedings; approved.—Corn, Mich., Ohio, and Pa. to Augusta and Portland, Maine, 319 I.C.C. 344 (353)*.

Reduced nontransit rates proposed by Southern Ry. on grain (but not products) in jumbo hopper cars, minimum 450 tons in 5 cars, are compensatory and competitively necessary to meet growing competition of unregulated truckers. Existing higher single-car transit rates on grain and products have not increased Southern's relative participation in the traffic despite growth of grain movements to the Southeast; shipments in multiple jumbo cars greatly lessen the added costs, grain waste, and infestation occurring in single boxcar and regular hopper movements; and since much grain traffic already moves and will continue to move in large lots, the reduced rates will not adversely affect small shippers. Considering those circumstances, the relation between the single-car and the 450-ton rates is reasonable, nondiscriminatory, and commercially feasible despite differences in the respective rate levels and percentages.—Grain in Multiple-Car Shipments—River Crossings to So., 318 I.C.C. 641 (687-8)*.

And there are compelling reasons for permitting Louisville & Nashville and other southern railroads also to participate in the reduced multiple-car rate adjustment. Even with conventional equipment L&N's ton-mile revenue from its proposed 450-ton, 9-car rates would exceed Southern's on a number of important movements because its more direct routes offset economies derived by Southern from its "Big John" cars. Approval of multiple-car rates for L&N and others would have salutary effect of preventing widespread discrimination among southeastern shippers and receivers of grain, many of whom are served by those carriers but not by Southern. Even though L&N and others will undoubtedly eventually equip themselves with fleets of jumbo cars, the temporary hardship inflicted on their shippers by treating those carriers less favorably than Southern would be severe and difficult to justify even on a temporary basis.—Id., 321 I.C.C. 582 (611, 612)*.

Approval of the 450-ton rates for L&N and others on same basis as for Southern will not tend to nullify Southern's great expenditure for the jumbo cars, as any significant economies to be derived from use of those cars will accrue to Southern and not to carriers which failed to exercise comparable ingenuity and foresight.—Id., p. 613; but reduced rates on minima of 900 and 1,800 tons proposed both by Southern (10 and 20 jumbo cars) and by the other southern roads (18 and 36 boxcars), which omprehend large and costly shipments, may not be approved when they are not shown to be compensatory and there appears to be no commercial need competitive necessity, or other justification for them.—Id., 318 I.C.C. 641 (680, 690-1)*.

Respondents' present or proposed rates on asphalt in single shipments of at least 20-tank-car lots from 9 western or southwestern States to destinations in 6 midwestern States, ranging from about 76 to 95 percent of corresponding single-car rates, are reasonably related and are compensatory when on the 80,000-pound minimum weight per car they yield greater revenue than the minimum set in 304 ICC 535 in granting fourth-section relief for commodity rates east of Rocky Mountains;

earnings exceed $5,000 a shipment on traffic which respondents would be unlikely to attract at higher rates, thus will yield substantial additional revenue, and competing carriers do not object; protesting shippers in the destination area have not shown that multiple-car rates would be feasible for their use or that considered rates are lower than necessary to enable shippers using them to compete in the destination area; rates under investigation found lawful.—Asphalt to Iowa, Michigan, Minnesota, and Wisconsin, 316 I.C.C. 117 (121, 122, 124, 125).

Proposed reduced rate on cement in bulk and in bags from Evansville, Pa., to Jersey City, in single shipments of not less than 10 cars each, each shipment to contain not less than 8 carloads of cement in bulk and not more than 5 carloads of cement in bags, found compensatory and no lower than necessary to meet increasing motor competition, as well as competition from domestic water carriers and imported cement; shipper plans to erect terminal facilities at Jersey City for handling expected large volume of its traffic, and will use rail service for the long haul to that point and truck service for short hauls to destinations beyond.—Multiple-Car Rates on Cement, Evansville, Pa., to N.J., 315 I.C.C. 672 (673-4).

659. Wharfage and dockage.—[Vols. 1, 6, 9, 11-19].—Reduction in handling or dockage charge on iron ore moving over respondents' docks at Marquette, Mich., for transshipment beyond via lake vessel, proposed to meet increasing importation of ores from Canada and other foreign countries, would have no measurable influence on relative competitive position of considered and foreign ores; foreign-produced ore has gained United States markets for reasons remote from matter of rates and charges on domestic ores. Lacking any competitive necessity therefore, proposal would merely dissipate respondents' revenues, and prospectively revenues of all other upper-lake carriers; would constitute a destructive competitive practice.—Reduced Handling Charges on Iron Ore, Marquette, Mich., 315 I.C.C. 347 (349, 350).

660. Tank cars.—[Vols. 6, 9, 11-19].—The mere fact that assailed tank-car rate on brake fluid exceeds the package rate thereon does not establish unreasonableness of the former. Complainant offered no evidence to show competitive or other conditions under which the respective rates were established, or other information to support its contention that they should be the same.—R. M. Hollingshead Corp. v. Alton & S. R., 319 I.C.C. 86 (91).

Review of past decisions in convincing that there is no recognized relationship for general application between rates on the same commodities when moving in tank cars and when moving in boxcars, and that each case must be considered on own merits.—Budlong Pickle Co. v. Ann Arbor R. Co., 315 I.C.C. 333 (337).

Tank-car service is not shown to be less valuable to complainant shippers than boxcar service for movement of brine stock; and though minimum motor-competitive rates prescribed for boxcar movement of canned goods (including brine stock and pickles in barrels) in official territory in 294 ICC 371 do not necessarily reflect the lowest level for the heavy tank-car shipments of brine stock involved, assailed rates from Michigan and Indiana, while higher than the canned-goods rates, were not unreasonable on past shipments when those on 70,000-pound minimum to Chicago were relatively lower than level of present rates to other official-territory points, and those on 40,000-pound minimum to the three destinations concerned were in all instances lower than the long-prevailing official-territory basis of fifth class, which was found not unreasonable on considered traffic in 222 ICC 679. Reparation denied.—Id., pp. 335, 338, 340, 342.

However, transportation characteristics of brine stock moving in tank cars are as favorable, and surrounding circumstances and conditions are substantially the same, as for movement of canned goods (including brine stock) in boxcars; rates on both movements have fluctuated, due primarily to motor competition, so that at first tank-car and then boxcar rates were lower, and evidence is clear that there is now substantial motor competition, both common- and private-carrier, with both types of rail movement; thus no justification appears for a higher level of rates on brine stock in tank cars than on same commodity in

boxcars between the points concerned.—Id., pp. 341, 342.

But canned-goods rates on 60,000-pound minimum, which are available to shippers of brine stock in barrels and which complainants seek for tank-car shipments, were published as incentive to higher loading, whereas average loading of tank-car shipments is about 78,000 pounds and it does not appear that the incentive rates would increase it; prescription of that basis would give effect to an element affecting canned-goods traffic generally which has not influenced complainants' traffic. The 36,000-pound canned-goods rates were established under competitive conditions similar to those encountered by instant traffic and thus appear to be an appropriate standard of future rates thereon; in order to maintain defendants' earnings at a level commensurate with value of the rail service, latter rates, subject to a minimum of 70,000 pounds, appear just and reasonable for tank-car shipments of brine stock. Id., p. 343.

661. Container service.—[Vols. 6, 9, 11].—Among advantages derived from containerization of freight are avoidance of multiple handling of individual pieces and expensive packaging; elimination of detailed checking, record keeping, and billing; reduction in claims involving loss, damage, or pilferage; and simplification of tariff search and application, making rate ascertainment less costly and more convenient. Proposed l.c.l. express rates and charges on all commodities in straight or mixed shipments in containers loaded to not over 3,000 pounds, including shipments in shipper-furnished containers, are compensatory and not shown to be competitively destructive or otherwise unlawful; and exception therefrom of live creatures, human remains, articles requiring protection from heat or cold, those named in the money classification, and those whose movement by express is prohibited by governing tariffs, is not unreasonable since those commodities do not lend themselves readily to shipment in the described containers.—Freight, All Kinds, L.C.L. Container Charges—U.S.A., 323 I.C.C. 468 (470-2, 475, 480)*.

663. Trailer-on-flatcar service.—[Vols. 17-19].—Apart from deficiencies in respondent's cost data which indicate that proposed plan II TOFC rate is below out-of-pocket level, the costs as computed by respondent are only slightly below the minimum revenue under the proposed rate. Since the rate was published solely to meet a competitive interstate rate which has since been canceled, no competitive necessity appears for a rate on so low a level. As the cost evidence is convincing that the proposed rate is not reasonably compensatory, comparisons showing that minimum revenue thereunder compares favorably with that under other TOFC rates on similar commodities between same points are not controlling; not approved.—Resin Plasticizers, East St. Louis-St. Louis and Chicago, 322 I.C.C. 693 (694, 695)*.

Modified plan II (plan II-1/2) TOFC rates, under which the railroad furnishes the trailer but leases it to shipper or consignee for performance of the movements to and from the railroad ramps and holds out only a ramp-to-ramp service, should not be restricted to apply only for shippers located within terminal areas of the origin and destination cities. Inclusion of part or all of the compensation for use of the trailer in the line-haul rate, under a standard lease agreement, does not alter the lessor-lessee relationship; the pickup and delivery services performed by the shipper and consignee at origin and destination are private carriage not subject to economic regulation and need not be confined to terminal areas of those points.—Foodstuffs, Macon, Ga., to Florida, Indiana, Kentucky, Ohio, 321 I.C.C. 132 (134-5).

Reduced TOFC rate proposed on garden hose from Paterson, N.J., to Dallas and Fort Worth on same level as Sea-Land's rate is lawful when it is well above restated out-of-pocket costs, may be expected to make a subsantial contribution toward fixed costs, and, irrespective of accuracy of respondents' estimate of prospective volume of the traffic, is necessary for them to participate therein.—Garden Hose & Electric Cable from N.J. or R. I. to Tex., 319 I.C.C. 227 (229)*.

Though proposed modified plan II TOFC rate on aluminum billets, minimum 70,000 pounds, restricted to apply in not more than two trailers, is compensatory in covering respondent's fully distributed costs and

is necessary to enable respondent to participate in traffic now moving by private carriage, it is unlawful as published when tariff holds out to provide service from Mechanicsburg, Pa., whereas carrier actually provides rail service only from Harrisburg and shipper moves the trailers in line-haul service the 9 miles from point of origin.—Aluminum Billets, Mechanicsburg, Pa., to Youngstown, Ohio, 319 I.C.C. 307 (308).

Reduced plan II TOFC rates on automobile lamps and ammunition from eastern origins to Texas points, the same as Sea-Land's present truck-water-truck rates, are compensatory when they exceed out-of-pocket costs and are not competitively destructive when they are substantially above Sea-Land's costs.—Automobile Lamps, Alcoholic Liquors—Pa. to Tex. and La., 319 I.C.C. 335 (338).

Proposed reduced TOFC rates on drugs, cereals, and tea or coffee extract, the same as corresponding rates of Sea-Land and Seatrain, are compensatory on an overall basis when, except for a one-trailer movement of drugs, ratios of rates to out-of-pocket costs range from 102 to 148 percent, and movements are predominantly in two trailers; approved.—Cereal, Coffee, Tea, Drugs, Related Art., N.J. & Pa. to Tex., 319 I.C.C. 424 (425)*.

Proposed plan III TOFC rates on tractors from and to numerous points are not justified by a showing of private carriage of a relatively few tractors by one shipper from one origin to only two destinations. Because they are so much lower than existing rates for conventional service, the proposed rates pose a threat to respondents' net-revenue position, and in addition they would incur cost of returning empty trailers for no additional compensation; not approved.—Tractors—T.L. & W.T.L. Territories to S.W. & W.T.L. Terr., 319 I.C.C. 758 (764-6).

Plan III TOFC rates on automobiles from Detroit, Kansas City, St. Louis, and East St. Louis to named destinations in the South and Southwest, and between Detroit and Kansas City and East St. Louis, are clearly compensatory when even on the most unfavorable showing the carload charges not only cover out-of-pocket costs but for the most part exceed fully distributed costs. Generally, considered rates or earnings thereunder compare favorably with many TOFC rates and some all-motor rates on automobiles cited of record; respondents have steadily lost automobile traffic to motor carriers, and publication of the plan III rates in endeavor to increase their share of it, overcome competitive disabilities of boxcar rates, and obtain a substantial contribution to their overhead burden, cannot be found to result in an unreasonably low or competitively destructive rate level.—Motor Vehicles from Kansas City to Ark., La., and Tex., 318 I.C.C. 301 (319, 320, 321).

And level of assailed joint rail-motor plan V automobile rates from Kansas City to Texas and from St. Louis to six southwestern or southern States is not shown to be unreasonable. Complainant has confined its attack to the rail portions, which are actually merely divisions of the revenue from the single-factor joint rates; regardless of how they were originally constructed (by combining factors approximating the respective carriers' separate line-haul rates), the single-factor rates are the only ones in issue and any unreasonableness thereof must be shown for the through rail-motor service in entirety. But, even considered separately, the level of the rail portions is not shown to fall below the zone of reasonableness when they also cover out-of-pocket costs and mostly exceed fully distributed costs.—Id., pp. 309, 319-20.

However, a few of the plan III rates under investigation, and the assailed plan V rates, are published on a per-automobile basis which ignores such ratemaking factors as weight and size or type, and are manifestly unjust and unreasonable when they result in lower rates per 100 pounds to one c.l. shipper than to another for transportation of same commodity between same points at same minimum number of vehicles. Rates should provide for some differentiation reflecting size and weight of the automobiles, so that shipper of a large and heavy car, while paying same amount per 100 pounds, would pay a higher total charge than shipper of a smaller and lighter car. Under rates on a per-carload basis, fact that more compacts than larger cars can be

loaded on the trailers tends to largely equalize total weight and value of c.l. shipments; conclusion is warranted that the per-carload rates are just and reasonable, and that the per-vehicle rates (which on eight-vehicle minimum result in same c.l. charges) would be lawful if republished on a per-carload basis.—Id., pp. 308, 322-3.

In addition, some of the plan III rates are subject to tariff provisions permitting optional substitution of multilevel cars by the carrier, which are potentially discriminatory because use of such cars would eliminate cost of trailer rental borne by shipper in plan III service. Moreover, in view of the greater capacity of trilevel cars, when either plan III or plan V rates are published on per-carload basis such a substitution rule results in similar unlawfulness unless the number of automobiles to be hauled in the substituted multilevel car is restricted to substantial equivalent of number which can be carried on a flatcar in TOFC service. Considered schedules ordered canceled to extent they are found unlawful, without prejudice to filing by respondents and defendants of schedules free of the indicated unlawfulness.—Id., pp. 323-4.

Proposed rate for TOFC plan II-1/2 service, in which respondents provide trailers but consignors and consignees must move them between ramp sites and their warehouses and perform loading and unloading, is compensatory and essential if respondents are to participate in considered movement of iron and steel plates and sheets; respondents' boxcar and plan II and III rates and charges do not move any of this traffic, most of which is presently handled by private carriage. Approved, subject to elimination of provision that shippers or their agents may transport trailers to destinations beyond tariff terminal areas if prior arrangements are made with respondents, which is not shown to be lawful.—Iron and Steel Articles between Atlanta and St. Louis, 318 I.C.C. 80 (82).

Although TOFC service utilizes a new type of equipment, it does not require establishment of new routes, and there is no substantial difference between handling of TOFC and other freight cars at interchange points. Respondent's refusal to enter into joint rates with petitioner at Martin, Tenn., over through routes existing at time of respondent's merger of line connecting with petitioner at Martin prevents traffic, for which through boxcar and other rates existed at that time and still exist, from moving as TOFC freight via Martin, and violates condition on merger authority for preservation of existing through routes and channels of trade.—Rates, TOFC, between Midwest & South—Louisville & N. R., 318 I.C.C. 40 (43).

TOFC rate on soap and related articles between Kansas City and Jeffersonville, Ind., is shown to be noncompensatory on present 20,000-pound minimum, but to be adequately compensatory on a minimum of 32,000 pounds; would be reasonable if made subject to latter minimum.—Soap & Related Art. between Kansas City & Jeffersonville, 316 I.C.C. 421 (426).

Plan IV TOFC rates on freight, all kinds, between New Jersey-Maryland-Pennsylvania and Chicago and East St. Louis, substantially the same as plan IV rates approved over lines of other railroads in 314 ICC 5, are compensatory when they exceed out-of-pocket costs by substantial amounts and in most instances exceed fully distributed costs.—Freight, All Kinds, TOFC, N.J. to Chicago & East St. Louis, 316 I.C.C. 397 (398).

Proposed plan II TOFC rates on fresh meats and packinghouse products, minimum 33,000 pounds, on same level as rates of protestant motor common carriers on boxed meats, and rates uniformly 50 cents lower on 66,000-pound minimum, from specified origins in western and midwestern States to specified destinations in California, Arizona, and southwestern New Mexico, are reasonably compensatory when they produce revenues substantially above out-ofpocket costs, and appear necessary to meet competition of unregulated motor carriers. Development of 85-foot flatcars which can handle two 40-foot refrigerated trailers promises economies from heavier net loads than can be handled in meatpacker and standard refrigerated boxcars; also, flexibility of use of trailers designed for dry freight as well as perishables minimises empty return handling of both flatcars and trailers.—Meats, Fruits, Vegetables—TOFC—Transcontinental, 316 I.C.C. 585 (586, 590, 591).

Proposed rates are not unlawful in failing to provide a differential between hanging and boxed meats; though protestant motor carriers' tariffs all provide a higher charge on former than on latter, rail tariffs generally do not. Hanging meats can be loaded in TOFC trailers in excess of the minimum weight, and there is no evidence suggesting that imposition of a differential would be appropriate. Proposed rates approved as lawful.—Id., pp. 590, 594.

Plan II TOFC rates on insecticides and fungicides from Twin Cities to Grand Forks and Fargo, N. Dak., are not shown to be noncompensatory; assailed rates apply on a long list of groceries and other articles, and no straight t.l. shipments of insecticides or fungicides have actually moved on those rates; mere fact that they are lower than competing motor rates does not establish their unreasonableness.—Middlewest Motor Freight Bureau v. Great Northern Ry., 316 I.C.C. 443 (445, 447).

The fact that TOFC service cannot compete favorably at equal rates with motor carriers does not justify rates lower than or barely equal to out-of-pocket cost. Proposed reduced plan II TOFC rate on paper and paper articles from Wisconsin origins to Chicago, lower than out-of-pocket costs in many instances and barely above them in others, may not be approved; but increased rate of one respondent on lower minimum from the 10 origins served by it is just and reasonable.—Paper and Paper Articles from Wisconsin to Illinois, 315 I.C.C. 165 (168).

Proposed plan II TOFC rate on malt liquors, 65 cents lower than present TOFC and motor-carrier rates and only slightly above out-of-pocket costs, is not justified by respondents' mere apprehension of diversion to motor carriage, particularly considering the relatively high-grade character of the traffic. Rate of same kind and amount maintained by another railroad between same points is likewise unreasonable; both rates ordered canceled, without prejudice to their republication if special circumstances requiring their establishment should develop.—Malt Liquors from Peoria, Ill., to Newark, N.J., 316 I.C.C. 378 (380).

Proposed plan II TOFC rate on malt liquors from East St. Louis and St. Louis to Kenosha, Wis., of 40 cents, minimum 80,000 pounds, each shipment to be loaded in not more than two trailers, shown to be compensatory and necessary to enable respondents to recapture the traffic from private carriage; approved.—Malt Liquors, East St. Louis and St. Louis to Kenosha, 315 I.C.C. 762 (763-4).

Plan II TOFC rates on bakery goods and radiators between specified central territory points, the same as rates of competing motor carriers except for emergency surcharge, are compensatory when they substantially exceed out-of-pocket costs; approved.—Various Commodities between Chicago, Erie, Pa., & Columbus, Ohio 315 I.C.C. 111 (112).

Proposed reduced plan II TOFC rates on certain commodities between points in New York, New Jersey, and Pennsylvania and points in Texas are not shown to be compensatory when restatement of respondent's costs indicates that even if 75 percent of the traffic moved in two trailers per flatcar the costs on the whole would still exceed the proposed rates. Not approved.—Commodities, TOFC, between the East and Texas, 314 I.C.C. 763 (766)*.

Proposed reduced plan II TOFC rates on canned goods and foodstuffs from New York origins to w.t.l. points, approved when respondents' unrebutted showing of out-of-pocket costs indicates that they would be compensatory; similar reduced rate on magazines from Philadelphia to Milwaukee is also approved, although respondents' costs are not susceptible of verification to the degree desirable, when fact that it is on a level both with other rail rates from that origin to destinations in same territory and with competitive motor rates to those destinations indicates that it will be compensatory.—Foodstuffs, Magazines or Periodicals—N.Y., Pa., to West, 314 I.C.C. 767 (768, 771). [But see dissent as to the rate on magazines.]

664. Handling.—[Vol. 19].—Over wharves, docks, see n. 659, above.

Requirement of rate equalization on fruits and vegetables to all points in New York rate group need not contravene carriers' revenue needs. Although evidence does not show that cost of performing extraordinary services on shipments delivered at New York pier stations

approaches assailed charge of $57 per car, it indicates that such cost is substantial and that service performed differs in kind from delivery service provided at New Jersey stations in the group. Defendants may recover such cost in form of a separately stated accessorial charge.—Port of New York Authority v. Aberdeen & R.R. Co., 321 I.C.C. 738 (750)*.

Pipe Lines

700. Pipe lines.—[Vols. 1, 11, 12, 15, 16, 18].—

Rates: Reductions of 3 to 7 cents in respondent's rates on propane, minimum 10,000 barrels delivered into its line in 1 calendar week, from New Mexico-western Texas and Texas-Oklahoma Panhandle areas to 5 of its 7 terminals in w.t.l. territory, and reduction of 5 cents from its storage station in Conway-Hutchinson, Kans., area to all its terminals to decrease difference between the through rates and combinations on shipments in and out of that area, with additional reductions up to 7 cents from that area to 5 terminals to preserve existing rate relations, approved as just and reasonable. The reduced rates are generally higher than those of other pipeline companies.—Pipeline Rates on Propane from Southwest to Midwest, 318 I.C.C. 615 (617-8, 623).

Though rail protestants dispute respondent's estimate of the volume of propane which can reasonably be expected to move into the destination area in its service, probative value of their volume estimates is seriously weakened by their use of data for movements prior to commencement of operations by respondent and by their failure to show pipeline movement to States where it has actually made deliveries. Results of operations after the reduced rates became effective show that actual volume of movement slightly exceeded respondent's estimate and demonstrate that the reduced rates are compensatory.—Id., pp. 622-3.

Express

709. In general; competition, etc.—[Vols. 6, 9, 13-18].—As a result of increased competition from motor carriers for short-haul traffic and from forwarders for long-haul traffic, and Railway Exp. Agency's relatively higher rates for what has come to be generally equivalent service, REA lost substantial l.c.l. traffic, particularly in the 2,000- to 3,000-pound weight bracket. These changes in transportation conditions over the years do not and should not prevent REA from applying new and advanced techniques or methods of handling its traffic, or of pricing its service, in order to achieve economies and efficiencies which may inure to benefit of the public, and thereby enable it to recapture a portion of the lost traffic. Proposed l.c.l. rates on all commodities, with exceptions, in containers, between principal U.S. cities, found compensatory and not competitively destructive or otherwise unlawful.—Freight, All Kinds, L.C.L. Container Charges—U.S.A., 323 I.C.C. 468 (473, 483-4)*.

Proposed incentive express rates on shipments from one shipper to multiple consignees, aggregated under a consolidation rule, cannot be found unlawful merely because independent freight consolidators are able to use them. However, this does not necessarily apply to Express Agency's interposition of its wholly owned subsidiary between itself and shipper of the goods; if separate corporate entities were disregarded, REA would derive no economies from aggregation of shipments by its subsidiary. The Commission, however, may not treat operations of REA and its subsidiary as a single commercial enterprise unless it can find that the separate corporate entities were devised purposely to avoid some clear legislative purpose embodied in the act. Record fails to show that REA's competitors are adversely affected by its use of the subsidiary as a consolidator, or to what extent economies claimed to result therefrom are nullified by subsidiary's costs; judgment on the matter is reserved pending development of necessary facts.—Aggregate Rates on Wearing Apparel—Ry. Exp. Agency, 318 I.C.C. 737 (740-1)*.

718. Expedition; special services at origin and destination.—[Vols. 1, 6, 13, 14, 18]—Cut flowers require preferred handling because of their fragility and per-

ishability; scheduling of shipments so that carloads of flowers will be loaded when passenger train arrives to pick them up is necessary; they have low weight density, and packing requirements cause a certain amount of car space to be unused; some of the heaviest traffic moves in winter when special heated equipment is required in nothern climates; deliveries to wholesale markets in early morning hours require extra drivers; and generally, due to need of cars or vehicles free from contamination, no regular backhauls are available. Such special service warrants premium rate levels; proposed rates reflecting an average 21 percent increase do not exceed a maximum reasonable level.—Cut Flowers—Throughout Continental United States, 319 I.C.C. 202 (209, 217, 218).

720. Relation between express and freight rates.—[Vols. 1, 6, 9, 13, 16].—Such attributes of express service as transportation of small shipments at premium rates are descriptive rather than limiting in nature; as most shipments attracted by holding out of express service weigh less than 500 pounds, cost of providing that service for all traffic tendered must necessarily be recovered by a level of rates generally higher than that of carriers whose service is influenced by economies to be derived from volume movement. However, Railway Exp. Agency has historically handled shipments exceeding 500 pounds, including carloads, and traffic to which proposed container rates apply moves just as expeditiously as its other traffic, often in same cars. REA has lost substantial l.c.l. traffic, particularly in the 2,000- to 3,000-pound range, and proposed nonpremium l.c.l. rates on traffic in containers loaded to not over 3,000 pounds, equivalent generally to rates of motor freight carriers on a class 55 shipment weighing 2,300 pounds, are not shown to be unlawful.—Freight, All Kinds, L.C.L. Container Charges—U.S.A., 323 I.C.C. 468 (475, 479, 481-2)*.

725.—Merchandise rates.—[Vol. 1].—Proposed l.c.l. express rates between principal U.S. cities, also rules governing such rates, on all commodities, with exceptions, in straight or mixed shipments in containers loaded to not over 3,000 pounds, consisting of flat charges per container on weights not exceeding 2,500 pounds and an additional charge for each 100 pounds or fraction thereof above that weight, approved as compensatory and otherwise lawful. Where consignor tenders more than one container at one time for delivery to one consignee at one destination, the charge for the second or subsequent containers will be about 95 to 97 percent (depending on length of haul) of that for the first; and on single-container shipments consigned to REA's agent, split delivery service will be provided on prepaid shipments, at stated charges, to not over 10 consignees within prescribed limits of the destination city. And while containers furnished by REA are subject to a maximum of 48 hours' free time for loading and unloading, to assure the shipping public of opportunity to use the rates during peak traffic periods and for specialized movements the rates apply also to shipper-furnished containers.—Freight, All Kinds, L.C.L. Container Charges—U.S.A., 323 I.C.C. 468 (470-1), 475, 484)*.

731. Basis prescribed; block system.—[Vols. 1, 6, 11, 16].—Proposed express commodity rates and charges on cut flowers on a block-to-block basis throughout continental United States, reflecting level of present mountain-Pacific first-class rates, with rates 50-percent higher on orchids, and representing an average increase of 21 percent in present rates, found just and reasonable. While proposed increases will cause some diversion to other transportation modes, respondent has suffered a substantial annual deficit on considered traffic under present rates, and volume thereof has been declining, due chiefly to competition from unregulated trucks. Evidence is persuasive that respondent will be able to improve its financial condition under the proposed rates, and there is no sound basis for finding that they exceed a maximum reasonable level for the service performed.—Cut Flowers—Throughout Continental United States, 319 I.C.C. 202 (204-5, 206, 217-8).

Coordinated Freight Service

860. In general.—[Vols. 9, 18, 19].—Although railroads providing substiuted serv-

ice for motor carriers under TOFC plan I customarily filed directories listing the carriers with whom they have contracted to participate in such movements, they are not required to do so by the law or the commission's regulations. Therefore, under plan I contracts, they may accept trailers tendered by either a common or a contract motor carrier, even though contract carriers may not participate in joint-line arrangements.—National Auto. Transporters Assn.—Declaratory Order, 91 M.C.C. 395 (402, 413).

In Plan II-1/2 TOFC service the railroad holds out merely to provide ramp-to-ramp service and to furnish the trailer, which is under its complete control during the line haul; and by a standard lease agreement between the railroad and the shipper or consignee the trailer is placed under the lessee's complete control for performance of the terminal pickup and delivery service as a private carrier. Since transportation subject to regulation under Part I begins when the merchandise has been placed in possession of the carrier, the railroad's service under plan II-1/2 does not begin until shipper delivers the loaded trailer at the origin ramp, and ends when the shipment leaves its possession with delivery of the trailer to consignee at the destination ramp. Inclusion of part or all of the compensation for use of the trailer in the line-haul rate does not alter the lessor-lessee relationship; and charges for detention of the trailer beyond 24 hours' free time are designed merely to ensure prompt return of the leased equipment to the carrier.—Foodstuffs, Macon, Ga., to Florida, Indiana, Kentucky, Ohio, 321 I.C.C. 132 (134).

Although examiner recommended that railroads be prohibited from leasing equipment from shippers, there is no evidence that respondents ever have or will lease shipper-owned trailers for performance of plan II-1/2 service. And while the fact that charges for use of trailers are not required to be published does not mean that the commission has no power to promulgate regulations governing leasing practices associated with TOFC services, the question of whether such regulations should be adopted is under consideration in Ex Parte No. 230 and should not be prejudged.—Id., p. 135.

Though plan V TOFC rates published to apply from and to points grouped with named origin and destinations offer a joint motor-rail-motor service, with a rail line-haul between the points named, there is no showing that any of the grouped points are beyond terminal areas of the named points, and therefore no proof that the motor respondent would perform any service beyond terminal area pickup and delivery, which has been held to be service of and for the line-haul carrier within §202(c). While there is some merit to argument that approval of the proposed rates would encourage intermodal cooperation and not violate the letter of §202(c)(2), in view of the questions raised as to statutory interpretation and regulatory policy, the more responsible course for the present is to follow established precedents and require cancellation of the proposed rates.—Rubber Articles, Philadelphia to Ill., Ky., Mich., & Mo., 319 I.C.C. 632 (635), 637-8).

Since substituted rail service may be provided only for actually available motor service, rates proposed by a certificated motor carrier must apply for motor service and must be shown to be compensatory over motor routes, even though tariff provides for subsitution of rail movement at carrier's option.—Candy & Confectionery, Ill. & N.Y. to Ill., Ky., N.Y. & Pa., 318 I.C.C. 540 (542-3).

Fact that rates are published for a complete service does not prevent a carrier from offering to perform a lessor service for a lower rate; decision in 314 ICC 5 is controlling on lawfulness of considered plan IV TOFC rates.—Freight, All Kinds, N.J. to Chicago & East St. Louis, 316 I.C.C. 397 (398).

865. Cost of service, generally.—[Vols. 9, 18, 19].—While territorial average cost figures were never intended to replace the actual cost experience of an individual carrier, there is no showing that respondent Illinois Central's cost data for considered plan II TOFC movement reflect its experience or even a sound projection for the future. Use of a 30-percent factor for empty TOFC movements does not reflect a system average of 1.4 loaded trailers per flatcar, since empty return reflects the ratio of flatcar mileages without trailers to that with trailers, not the number of loaded

trailers per flatcar, and respondent admits that the figure would be less than the 2 per flatcar used by it; protestant's use of the territorial average 1.6 trailers per flatcar therefore appears more reasonable. Also, respondent's use of 2 days in computing trailer rental costs is too low when the line-haul movement takes 10 to 12 hours in each direction; protestant's increase of such costs was therefore justified.—Resin Plasticizers, East St. Louis-St. Louis and Chicago, 322 I.C.C. 693 (694-5)*.

Reduced TOFC rates on syrup between Chicago and Kansas City are noncompensatory and threfore unjust and unreasonable. Though railroads' cost data purport to show that they exceed out-of-pocket costs, such costs were computed on basis of loading in both directions for cars and trailers used; motor carrier bureau's cost computations reflect an empty return of 30 percent, which appears reasonable for operations of that type, and is more representative of actual costs.—Syrup between Kansas City, Mo., and Chicago, Ill., 321 I.C.C. 214 (218).

In view of respondent's unrebutted testimony that the only railroad which has moved considered traffic beyond Chicago has agreed to and is performing transfer service at Chicago under its local TOFC rate without expense to respondent, latter properly omitted cost of such transfer from its computation of cost of moving the traffic from Twin Cities to Chicago at proposed proportional plan II rate; and for like reason clerical costs covering two terminal services are overstated by half. But protestant's upward adjustment of respondent's cost for pickup at Twin Cities is acceptable when it is based on a specific cost for tractor rental rather than on territorial averages. Protestant's adjustment for additional trailer rental is not acceptable because it assumes an elapsed time exceeding 2 days for movement by that respondent, whereas evidence is convincing that total rental time chargeable for both terminal and line-haul by that respondent does not exceed 2 days.—Dairy Products from Twin Cities to Chicago, 321 I.C.C. 720 (722-3).

Amounts for fuel for refrigeration unit and for loss and damge claims should also be included in respondents' costs. But protestant improperly applied an overhead ratio for pickup and delivery of trailers; payments to motor carriers for terminal collection and delivery service, on which the overhead ratio is based, should not be included in railroads' TOFC operating expenses. With corrections indicated, out-of-pocket costs for three respondents are well below proposed rate, which is therefore not shown to be noncompensatory for those respondents.—Id., p. 724.

Though respondent's empty-return ratios for TTX cars of 18 percent in the West and 19 percent in the East were apparently taken from cost finding section's statement of December 1957, the latest study of c.l. cost scales uses a 50-percent empty return ratio for TOFC traffic, which is more realistic in absence of specific evidence to the contrary; respondents' cost studies are also defective in other respects indicated, and in absence of underlying data cannot be verified; commission's restatement indicates that even if 75 percent of the traffic moved in two trailers per flatcar, costs on the whole would still exceed the proposed rates.—Commodities, TOFC, between the East and Texas, 314 I.C.C. 763 (765-6)*, respondents submitted no probative evidence to substantiate the lower ratios used by them, which reflect results of a 1957 study of empty-return movement for all TOFC service, whereas proposed rates are for plan II service, which is more like boxcar service than other types of TOFC service; consequently use of 50-percent ratio developed by later study was appropriate.—Id., 319 I.C.C. 393 (394)*.

While respondents' costs for plan II TOFC movement of magazines are not susceptible of verification to the degree desirable, since working papers for the adjustments are not part thereof and are not referred to, the adjustments were made by witnesses who could have been cross-examined upon request. Other evidence indicates that proposed rate would be compensatory.—Foodstuffs, Magazines, or Periodicals—N.Y., Pa., to West, 314 I.C.C. 767 (770-1).

Using a ratio of 1.4 trailers per flatcar reflecting loaded-trailer movements only, which should be applied rather than factor

of 1.9 developed by respondent based on all TOFC movements including both loaded and empty trailers, out-of-pocket costs would exceed proposed rate; reduced plan II TOFC rate on iron or steel rings disapproved as noncompensatory.—Iron or Steel Rings from Pittsburgh, Pa., to Cincinnati, 316 I.C.C. 399 (401).

Cost data developed for straight truckloads of insecticides or fungicides do not establish noncompensativeness of assailed TOFC rates thereon when those rates apply on a long list of groceries and other articles, or straight shipments of insecticides of fungicides have actually moved at those rates, and there is no showing as to volume of traffic which could so move.—Middlewest Motor Freight Bureau v. Great Northern Ry., 316 I.C.C. 443 (446-7).

Respondents' use of $30 as cost of pickup or delivery of trailers in plan II TOFC service, and $15 to $21.60 for tying and untying of trailers to flatcars, appears reasonable compared with actual charges or contractual arrangements of certain respondents in the origin and destination areas; respondents propose to limit pickup and delivery to approximately 20 miles from their ramps, which are already located in metropolitan areas where the bulk of considered traffic will move; at other points, if warranted by volume of traffic, respondents have available or will install portable ramps.—Meats, Fruits, Vegetables—TOFC—Transcontinental, 316 I.C.C. 585 (589).

Protestants' assumption that respondents serving each origin would participate equally in the traffic therefrom, and at destinations would each participate in proportion to food consumed at its destinations as measured by statistics of Census Bureau, tends to increase costs. Volume of Food Store Sales at each destination is not a reliable indicator of the pattern of distribution of meats and packinghouse products under proposed TOFC rates; one of protestants' own exhibits tends to confirm respondents' contention that by far the greatest proportion of such traffic moves to a few large metropolitan areas, and it is reasonable to expect that the bulk of the traffic will continue to move to the same points.—Id., p. 589.

Respondent erroneously assumed that car-mile cost includes trailer rental or ownership cost, and that pickup and delivery costs do not include "stop costs" since loading and unloading services are not performed under proposed TOFC plan II rates; even if carrier is not required by its tariff to perform loading or unloading, necessity of parking trailer and returning for it upon loading and unloading would somewhat offset pickup and delivery expenses. In absence of actual expenses which respondent incurs in pickup and delivery of TOFC trailers, full motor-carrier cost plus an increment for profit would provide a better estimate of such costs than out-of-pocket motor costs, since motor carriers could not be expected to furnish service to competing railroads at out-of-pocket level.—Radios, Televisions, Talking Machines from Bloomington, 318 I.C.C. 221 (224).

Moreover, respondent's cost study is not acceptable merely because basically it follows same formula used in another proceeding to show compensativeness of other TOFC rates; there is no indication that transportation characteristics and services attending that movement were similar to considered movement; commodities involved are lighter and bulkier, which tends to increase transportation costs. By proper application of data from public statements Nos. 5-60 and 1-61, and giving due consideration to shipping characteristics of commodities concerned and services contemplated, out-of-pocket costs for 12,000-pound and 11,000-pound minima exceed proposed rates.—Id., pp. 223, 224.

Since in joint rail-motor movement of automobiles in plan V TOFC service the connecting motor carrier furnishes the trailers, trailer rentals, should be considered an item of cost to the railroad in performance of its segment of the through service, and a sufficient amount should be included as out-of-pocket costs for use of the motor carrier's trailers to be covered by the rail revenue.—Motor Vehicles from Kansas City to Ark., La., and Tex., 318 I.C.C. 301 (304, 312).

Respondents' cost evidence based on docket 28300 short-line rail distances indicates that proposed plan II TOFC rates on pipe will yield car-mile earnings of 73 to

86 cents, with minimum revenue exceeding cost by $89.48 to the most distant destination and substantially greater than that from present rates; since respondents intend to use 85-foot flatcars which will carry two highway trailers, cost computations on basis of two trailers per flatcar are more representative than average 1.4 loaded trailers used in public statement No. 5-60. Approved as compensatory.—Pipe and Related Articles, Birmingham, Ala., to Florida, 318 I.C.C. 465 (467, 468).

Section 1. (5 1/2) Exchange of services.—[Unchanged. See vol. 11. p. 9096, vol. 15, p. 11951.]

Amendment, see footnote, vol. 11, p. 9096.

Historical Note

Rates and fares of railroads within the Alaska Railroad Act, jurisdiction of the commission, see Historical Note concerning Executive Order 11107 following §1(1).

Notes of Decisions

§1(5), n. 850. Volume 1—p. 631; Volume 6—p. 4802.

Section 1. (6) Classification of property for transportation; regulations and practices.—[Unchanged See vol. 9, p. 7218.]

Amendments, see footnotes, vol. 1, p. 633, historical notes, p. 633, vol. 9, p. 7218.

Historical Note

Rates and fares of railroads within the Alaska Railroad Act, jurisdiction of the commission, see Historical Note concerning Executive Order 11107 following §1(1).

Notes of Decisions

Volume 1—p. 640; Volume 6—p. 4803; Volume 9—p. 7219; Volume 11—p. 9096; Volume 12—p. 10185; Volume 13—p. 10909; Volume 14—p. 11390; Volume 15—p. 11951; Volume 16—p. 12587; Volume 17—p. 13237; Volume 18—p. 14007.; Volume 19—p. 15035.

In General

2. "Classification," "regulation," and "practice" defined.—[Vols. 1,6,11,15-17].—Section 1(6) applies only to charges levied on the public. Contention that it is an unreasonable practice to require switching carriers in Chicago terminal area to pay mileage allowances on private cars when switching lines in other terminal areas do not pay them is basically an argument between carriers as to which shall pay the allowances; the actions complained of do not constitute a "practice" within meaning of §1(6).—Cancellation of Private Car Allowances, 322 I.C.C. 565 (571)*: but proposal of two Chicago switching carriers to cancel tariff provisions for payment of mileage allowances on shippers' cars handled in interchange switching, unless interchanged with their parent railroads, is in derogation of their obligation to pay mileage allowances and is an unreasonable practice violative of §1(6).—Id., p. 571.

Transportation of Property

4. Carrier's duty and right to initiate regulations and practices, generally.—[Vols. 1, 6, 11].—See Denver Oil Co. case, n. 762, below.

9. Showing necessary as to competition.—[Vols. 1, 6, 9].—See Pipeline Demurrage & Minimum Shipment Rule on Propane, §15a(3), n. 2.

Weights and Weighing

23. Pipe lines.—[Vol. 1].—Proposed rule requiring propane shipments to be tendered in quantities not less than 10,000 barrels, to be delivered into respondent's pipeline in one calendar week in lieu of 48-hour period required by present rule, will reduce costs and tend to more efficient operation by reducing overtime and traveling expenses of gauging personnel, and will permit the smaller shipper to tender his product without necessity for exchange or purchase arrangements with other shippers; elimination of requirement that shipment be from one consignor to one consignee at one destination will reduce paperwork of reconsigning shipments, without increasing delivery costs; approved.—Pipeline Demurrage & Minimum Shipment Rule on Propane, 315 I.C.C. 443 (447).

Though the rule renders respondent's service more flexible and thus more directly competitive with rail tank-car service, it is designed to meet respondent's operating problems and benefit its particular shippers, and minimum-shipment rules of other pipeline reflect a like purpose. A tariff rule established by one mode of transportation, otherwise lawful and peculiarly adapted to its operating methods, may not be condemned simply because it might result in competitive disadvantage to another mode.—Id., p. 448.

24. Minimum weight as factor.—[Vols. 1, 6, 9, 11-19].—Where a carrier holds itself out to accept a shipment at a particular rate, compensativeness of the rate should be determined by use of the minimum weight to which it is subject. TOFC rate on soap and related articles is shown to be noncompensatory for present 20,000-pound minimum, but to be adequately compensatory on a minimum of 32,000 pounds; would be just and reasonable if made subject to latter minimum.—Soap & Related Art. between Kansas City & Jeffersonville, 316 I.C.C. 421 (425-6).

Assailed rates on sugar beets from three Kansas origins to Sugar City, Colo., including a 100,000-pound rate from one origin higher than 45,000-pound rate from same point, are not shown to be unreasonable; "incentive" rates sought on 80,000-pound minimum are actually reduced rates without any element of incentive loading, since the traffic now moves at weights substantially in excess of the requested minimum; no "incentive" rates are published from Kansas to Colorado on such traffic, and there are no rates on sugar beets between such points on lower level than those assailed.—National Sugar Mfg. Co. v. Missouri Pac. R. Co., 315 I.C.C. 244 (245, 246).

Carload Minimum Weights or Transportation Units

27. In general.—[Vols. 1, 6, 9, 13, 15, 16, 19].—Joint rail-water rates on bulk grain, based on a fixed quantity booked in advance, as published in respondent water carrier's tariff, do not violate §1(6) or §6(1). Rail carriers also publish minimum weights based on capacity loading of cars, which is what respondent seeks to do; that several c.l. shipments make up the cargo and that large quantities may be transported is an inherent advantage of water transportation rather than an unfair competitive practice.—Rail-Water, Grain in Bulk, from Mo., Ill., & Ind. to Buffalo, 319 I.C.C. 123 (132)*.

29. Considerations affecting fixation of carload minima.—[Vols. 1,6,9,11,13,15,16-19].—Carload minimum weight of "not less than 180,000 pounds per car" provided in connection with reduced multiple-car rates on grain in jumbo hopper cars is not shown to be unlawful. Though protestants contend that oats cannot load to that minimum and must therefore bear a relatively higher charge, oats, as a bulkier, lighter loading grain, may properly be required to bear such a charge. The proposed rates still accord a reduction on oats, and the proposed minimum represents essentially an average of the different weight densities of the various grains.—Grain in Multiple-Car Shipment—River Crossings to So., 318 I.C.C. 641 (688)*.

41. Larger cars furnished than ordered.—[Vols. 1, 6, 9, 12, 15-17, 19].—While Rule 66(a) of Tariff Circular 20 creates a presumption of unreasonableness where for carrier's convenience a larger car than that ordered by shipper is furnished and charges are assessed on basis of the minimum weight

published for the car furnished instead of lower minimum for the car ordered, that presumption does not come into play unless and until the facts on which its application is predicated are established by substantial evidence. Before the rule becomes operable it must be established (1) that the shipper ordered a car of a particular size, (2) that the carrier was given sufficient time to furnish the car ordered, and (3) that the shipment would have fitted on the car ordered; and it is only reasonable that the burden of providing those facts should rest on the shipper as the person seeking the advantage of the presumption.—Baltimore & O. R. Co. v. United States, 217 F. Supp. 918 (920, 922)*.

The commission found a conflict of testimony as to whether cars for shipments of military vehicles were ordered by size and, in view thereof, relied on the bills of lading (signed by carriers' agents without protest) as the best evidence that they were so ordered. Inconsistent and confusing evidence concerning custom and mechanics of ordering cars at military depots considered as typical origins cannot form sufficient basis to support one side of asserted "conflict in testimony"; the military, not the carrier, selected the cars from a pool at the depot maintained by weekly orders for a number of cars, and cars were used, not when furnished, but at a later date after they had been moved into the pool. Also, factually and legally, notations on the bills of lading, and evidence concerning origin of data therein as to size of car ordered, are not sufficient to support the commission's finding that the cars were ordered from the carriers by size; moreover, most of the bills of lading were prepared after date of shipment.—Id., pp. 921, 922-4.

There is equally lacking a substantial evidentiary basis for the second and third basic findings upon which the application of Rule 66(a) is predicated. Therefore, the commission's conclusion that Rule 66(a) rendered the charges in question unjust and unreasonable, and that plaintiffs had failed to overcome that presumption, is erroneous and cannot stand; order set aside and case remanded for further proceedings not inconsistent with the court's opinion.—Id., pp. 925-6.

Though arrangements were made informally over the telephone, it appears that both parties were aware that a 40-foot car was ordered, that shipment could have been loaded therein, and that a 53-foot car was available, and evidence is persuasive that use of latter car was agreed on by both parties and served the convenience of both. Requirements of tariff circular rule 66 as to notations on the bill of lading were generally followed, and if defendants had published a rule in conformity with rule 66 the applicable charges would have been those on basis of the 40-foot car ordered. In the circumstances, defendants' failure to publish a tariff provision is accordance with rule 66 was prima facie unreasonable and resulting presumption of unreasonableness of charges collected on the minimum weight for the 53-foot car used is not rebutted. Reparation awarded with interest.—United States v. Atlantic Coast Line R. Co., 318 I.C.C. 869 (871, 872).

42. Smaller car furnished than ordered.—[Vols. 1, 17] In view of finding that other southern railroads should be permitted to establish multiple-car rates on grain in boxcars or standard hopper cars on same level as those approved for Southern Ry. for movement in jumbo hopper cars, and in view of establishment by the others of single-car rates 120 percent of the multiple-car rates, which were permitted to become effective without suspension, Southern's tariff item permitting it to substitute boxcars for the jumbo cars at its convenience is approved in order to accord in equal treatment with the other respondents.—Grain in Multiple-Car Shipments—River Crossing to South, 321 I.C.C. 582 (613)*.

47. Unusual type of cars.—[Vols. 1, 6, 9, 12, 17].—See Budlong Pickle Co. case, §1(5), n. 660.

49. Alternative minima.—[Vols. 1, 6, 9, 11-19].--Prescription of reduced domestic rates on bentonite, minimum 100,000 pounds, from Belle Fourche, Wyo., to w.t.l. and official-territory destinations, to alternate with existing rates on lower minima, is not warranted when there is no evidence of movement to considered destination areas in such quantities and no indication that receivers (who bear the charges) cannot negotiate with defendants

for equitable charges at the higher minimum weight.—American Colloid Co. v. Akron, C. & Y. R. Co., 321 I.C.C. 91 (113-4).

While the commission seldom requires carriers to publish alternative minima, it has approved such publication where needed to attract tonnage which would not otherwise move, or to meet competition of other forms of transportation. Proposed reduced rates on liquefied petroleum gas in jumbo tank cars, minima 78,000, 87,000, 93,000, and 127,000 pounds, alternating with each other and with standard tank-car rates on 44,000-pound minimum, are compensatory and necessary to meet both regulated and unregulated competition of trucks and pipelines; approved.—Liquefied Petroleum Gas in Jumbo Tank Cars.—S.W.F.B., 319 I.C.C. 31 (38, 40).

Increased loading in same vehicle generally promotes efficiency and should be encouraged. As 60,000 pounds of magazines or periodicals can be loaded in a boxcar, and both proposed reduced rate on 40,000-pound minimum and lower rate on 60,000 pounds exceed fully distributed costs and are not shown to be unlawful, they are approved.—Magazines or Periodicals, Miami, Fla., to Derby-Shelton, 319 I.C.C. 340 (342).

Reduced alternative transcontinental rates on lumber and related articles eastbound, on increased minima of 75,000 pounds for 42-foot or longer cars and 70,000 pounds for shorter cars (70,000 and 55,000 pounds when loaded to full visible capacity), should furnish needed incentive for heavier loading; even small shippers should have no difficulty in meeting those minima, since two can buy together and share a car. Record indicates that a progressively larger share of the traffic will be loaded at and above the higher minima which produce the most favorable ratios of revenue to out-of-pocket cost, and that the tail-end tariff minimum of 55,000 pounds will become progressively less important with retirement of the older, low-capacity boxcars. Experience of some respondents with similar incentive rates on lumber indicates that, owing to loading conditions peculiar to the lumber industry, actual loadings will exceed the applicable minima by substantial amounts; proposed rates approved as compensatory and otherwise lawful.—Reduced Transcontinental Lumber Rates, 1961, 318 I.C.C. 815 (825, 841).

Comparisons of proposed TOFC rates on alternative minima with motor carrier rates have little value when the compared rates are subject to much lower minimum weights; heavier loading has been recognized as justifying lower rates, and alternative rates prescribed on that basis. Proposed rates on minima specified are compensatory and necessary for respondent to compete effectively for involved traffic; do not constitute a destructive competitive practice.—Pickled Pork & Aluminum Ingots betw. Chicago & Detroit, 316 I.C.C. 431 (433-4).

Computation of Charges According to Weight

53. Package or per article basis.—[Vols. 1, 6, 9, 12].—Ordinarily, charges vary according to weight of freight tendered by shippers. Rates on automobiles on a per-vehicle basis tend to ignore such ratemaking factors as weight and size or type which generally have direct relation to value of the automobile, give no consideration to differences among certain types of automobile, and, where they result in lower rates per 100 pounds to one c.l. shipper than to another for transportation of same commodities between same points at same minimum, are manifestly unjust and unreasonable. Rates should provide for some differentiation reflecting size and weight of the automobile, so that shipper of a large and heavy car, while paying approximately same amount per 100 pounds, would pay a higher total charge than shipper of a smaller and lighter car. This may be accomplished by publishing rates per 100 pounds, per carload, or per trailer load, or even per automobile, so long as the latter provides a graduation with weight.—Motor Vehicles from Kansas City to Ark., La., and Tex., 318 I.C.C. 301 (322).

54. What weight governs.—[Vols. 1, 6, 9, 15, 16].—Application of promiscuous

loading rule, see Ford Motor Co. case, §6(7), n. 16.

65. Bills of lading act—Shipper's weight, load, and count.—[Vols. 1, 6, 9, 17, 19].—**In general:** In action to recover for damages to steel sheets shipped in open gondola-type car, there is no dispute that, as evidenced by the bill of lading, the shipment moved as "Shippers load and count"; thus, under the Bills of Lading Act, the railroad is not liable for damage occurring in transit, which was caused by improper loading by the shipper or his agent.—Solway Metal Sales, Ltd. v. Baltimore & O. R. Co., 344 F. 2d 568 (569).

In consignee's action against delivering carrier for damage to goods transported, when shipment moved on a through bill of lading containing a "shipper's load and count" clause and the shipper, in fact, improperly loaded the shipment into boxcars at its siding, shipper is liable therefor; plaintiff must then show that some independent act of negligence on carrier's part contributed to cause damage to the shipment, notwithstanding shipper's negligence, before the carrier can be held liable. Carrier cannot be held liable for shipper's act in improperly loading the car without evidence that the defect was patent and apparent by ordinary observation.—Minneapolis, St. P. & S.S.M.R.Co. v. Metal-Matic, Inc., 323 F. 2d 903 (906-7).

66. Container service.—[Vol. 6].—Proposed l.c.l. express rates on all commodities, with exceptions, in straight or mixed shipments in containers loaded to not over 3,000 pounds, generally reflecting equivalent of motor carrier charges for transportation of a class 55 shipment weighing 2,300 pounds, do not violate the just and reasonable classification requirement of §1(6) although Railway Exp. Agency estimates that on an overall basis its traffic would be rated above the motor carrier average rating of class 100.—Freight, All kinds, L.C.L Container Charges—U.S.A., 323 I.C.C. 468 (470-2, 475)*.

Just and Reasonable Classification

80. Reasonableness, comparison with classification of analogous articles.—[Vols. 1, 6, 9, 14, 16, 17, 19].—Increased l.c.l. rating on flexible synthetic plastic games and toys of class 110, the same as on nonflexible plastic toys, is justified when l.c.l. rating was formerly the same for both flexible and nonflexible games and toys, and line of demarcation between them is often difficult to draw; plastic items of utility with characteristics similar to those of flexible toys are rated the same as nonflexible plastic toys; and density of considered games and toys is well within range of that of commodities such as inflated pneumatic toys and games made of flexible plastic material, and expanded polystyrene decorations and ornaments, for which class 300 was found to be a reasonable rating.—Increased Ratings on Plastic Games—All Territories, 316 I.C.C. 130 (133-4).

85. Purpose; generally.—[Vols. 1, 13, 15, 19].—Purpose of the just and reasonable classification requirement of §1(6), giving the commission power to control classifications, was to protect shippers by controlling the maximum charges for transportation of commodities; this purpose is fulfilled by maintenance in being of class rates, even though competitive conditions lead to furnishing of service through variously constructed rates at lower charges. The commission's past practice has been consistent with this interpretation in permitting competitively compelled departures from the classification in form of all-commodity rates in numerous cases, and there appears to be no difference in priciple between rates therein approved and plaintiffs' all-commodity boxcar rates on mixed or straight shipments of manufactured articles, and no sound reason for interpreting §1(6) as prohibiting such competitively compelled rates, within the established maxima, absent some other violation of the act than the mere departure from the classification.—New York, N.H. & H. R. Co. v. United States, 221 F. Supp. 370 (374)*.

Although the commission fears that approval of the considered rates would be legislation on its part, apparently because it would be a final blow to classification as a control over minimum rates, it would seem that, having long permitted exceptional rates lower than the class rates and which

actually move the vast preponderance of the traffic, it has already effectually legislated or interpreted the modification of what it now claims was the original meaning and purpose of §1(6). In any case, the considered rates are not and never were a violation of the language or intent of §1(6); commodity rates are sufficiently policed under §§ 1(5), 2, 3(1), and 15a(3), and no violation of those sections is disclosed. Order striking down the rates in unlawful and is set aside because based on an erroneous interpretation of §1(6).—Id., pp. 372, 374-5.

Primary purpose of a freight classification is to assign each article or group of articles to a class according to well-known principles which recognize distinctions from a transportation standpoint, along fairly broad lines, to meet the needs of commerce. However, it is not the function of the uniform classification to correct maladjustments in commodity rates, and any inequities in port relations under export commodity rates are not controlling in establishment of an appropriate classification.—Class Rating on Pulverized Clay or Sand, 316 I.C.C. 687 (691).

94. Not an exact science.—[Vols. 1, 6, 11, 13, 17, 19].—Difficulty of making classification revisions necessary to reflect current values of the various types of property transported and keep abreast of changes due to scientific, engineering, and industrial developments, noted.—Released Rate Rules—National M. Freight Classification, 316 I.C.C. 499 (500, 513)*.

102. Matters of classification distinct from those of rates.—[Vols. 1, 11, 13, 19].—Although increase in classification rating on admixed clay would result in application of commodity rate to Duluth and possible elimination of volume which has been moving via that port, since commodity rates from same origins to Minneapolis and New Orleans are but 1 cent higher for greater distances, any inequities in port relations under export commodity rates are not controlling in establishment of an appropriate classification.—Class Rating on Pulverized Clay or Sand, 316 I.C.C. 687 (691).

Jurisdiction of the Commission

121. Classification in first instance voluntary by carriers.—[Vols. 1, 9, 16].—A carrier may lawfully classify its traffic; separation of the all-bituminous coal rates into two classes and establishment of lower rates on fine than on lump coal where necessary to meet competition of other fuels did not violate §1(6).—Lynchburg Traffic Bureau v. United States, 225 F. Supp. 874 (877)*.

Classification Structure

126. In general.—[Vols. 1, 11, 12, 14, 17, 19].—[All-commodity rates, vols. 11,12,17,19].—It is clear that §1(6) gives the commission power to require that carriers maintain just and reasonable classifications of property in conjunction with setting of class rates; and no doubt the language thereof is susceptible of a construction which would embrace considered all-commodity rates that apply to a large group of commodities, but not to a single, uniquely identifiable article, which could be described as a classification of freight. However, fact that the statute can be interpreted broadly enough to encompass such rates without doing violence to the English language does not settle the question of whether such a broad interpretation is warranted.—All States Freight, Inc. v. New York, N.H. & H. R. Co., 379 U.S. 343 (384)*.

Legislative history shows that the object of §1(6) was to give the commission clear power to deal with two problems which has arisen in administration of class rates (possibility of their manipulation to avoid maximum rate regulation and their lack of uniformity) that never affected commodity rates, since latter were competitively compelled reductions from class rates otherwise applicable, and standardization thereof would be completely inconsistent with their basic function of accommodating specific competitive conditions; and fully supports the conclusion that the reach of §1(6) was confined to class rates. That conclusion is amply confirmed by pattern

of the commission's decisions since its enactment which hold that §1(6) is not applicable to all-commodity rates. Thus, while such rates are subject to full policing by the Commission under other provisions of the act, both the legislative history and the course of the commission's decisions impel the conclusion that §1(6) does not apply to all-commodity rates.—Id., pp. 351-5.

129. Class percentage relationships.—[Vols. 1, 13].—Class 10 exceptions rates (22.5 percent of first class) applicable on past shipments of fiberboard wallboard from Lockport, N.Y., to southern territory were not unreasonable when there is no indication that the commission has ever approved a reasonable maximum level of less than 22.5 percent of first class on wallboard anywhere in the country; that level was prescribed on that commodity from southern to official territory in 227 ICC 235, and assailed rates have never exceeded it; moreover, the class 10 rates were in effect on considered traffic for over 22 years without complaint prior to filing of instant complaint. Reparation denied.—Upson Co. v. Erie R. Co., 316 I.C.C. 217 (219).

130. Exceptions.—[Vols. 1, 6, 9, 13-19].—Commodity rates exceeding class rates, §1(5), n. 571. Assailed exceptions ratings on agricultural implements, tractors, roadmaking machinery and related articles within and between w.t.l., southwestern, and Illinois territories and from those territories to southern east-bank Mississippi River points are not justified by motor competition when respondents' loss of traffic volume is shown to be due chiefly to other causes, principally decreased production; resulting rates, though compensatory, are substantially below reasonable maxima, and their establishment has precipitated a destructive rate war in contravention of §1(15) and the national transportation policy; in absence of a showing that railroads are the low-cost mode, fact that in some instances corresponding motor rate reductions are precluded by outstanding minimum-rate order strengthens conviction that assailed ratings are not on a just and reasonable level. Cancellation required.—Exceptions Ratings on Agric., Roadmaking, Other Articles, 315 I.C.C. 9 (14-5, 18)*.

Charges at exceptions rates which exceeded corresponding uniform class rates found unreasonable on shipments delivered after cut-off date of the 5-year period fixed in 303 ICC 373 as a reasonable time for correction of abnormalities resulting from general class-rate revision and establishment of uniform classification basis, which did not affect existing exceptions.—United States v. Missouri Pac. R. Co., 322 I.C.C. 418 (421).

131. Descriptions of commodities.—[Vols. 1, 6, 9, 17-19.] Proposed description of clay or sand, n.o.i.b.n., granulated or pulverized, containing other ingredients admixed not to exceed 3 1/2 percent, is not unreasonable in connection with increased rating the same as on crushed, ground, or pulverized clay. Revision of existing description tends to eliminate dispute as to its meaning, and omission of granulated clay, not admixed, may be otherwise rectified if material.—Class Ratings on Pulverized Clay or Sand, 316 I.C.C. 687 (690, 692).

See also Atlantic Coast Line R. Co. v. United States, n. 171, below.

Elements Considered in Determining Classification

135. In General.—[Vols. 1, 6, 9, 13, 16, 19].—Since addition of iron oxide and certain other ingredients to granulated or pulverized clay up to 3.5 percent does not reduce its value or affect its density or other transportation characteristics, there is no reason why such admixed clay should have lower classification rating than other clays; increase in rating from class 17.5 to class 20 and reduction in minimum weight to conform to ratings and minima on unadmixed clays of similar grade removes any incentive to admix solely to obtain the lower rating, and is just and reasonable.—Class Rating on Pulverized Clay or Sand, 316 I.C.C. 687 (688, 692).

142. Cost of service—carload minimum weights.—[Vols. 1, 9].—Specified minimum weight does not appear to be a controlling factor in movement of admixed clay, and reduction in c.l. minimum from 80,000 to

60,000 pounds in connection with increase in rating to class 20 is reasonable in order to maintain a consistent relationship between the classification rating and minimum on various clays.—Class Rating on Pulverized Clay or Sand, 316 I.C.C. 687 (692).

144.—Density of commodity, relatively.—[Vols. 1, 6, 14, 16, 17].—Increase in rating on flexible plastic games and toys to class 110, the same as on nonflexible toys, is justified when many flexible plastic boys are extremely light and bulky, whereas the higher-rated nonflexible toys often have materially greater density per cubic foot; as the flexible toys have become lighter and bulkier, their transportation circumstances have altered and their ability to make adequate contribution to the transportation burden has been imapired. While there is no precise evidence of density at which l.c.l. shipments of plastic games or toys have been moving, or their value, evidence is convincing that their value per pound varies widely, and that l.c.l. movement includes toys of density well within range of commodities for which class 300 has been found to constitute a reasonable rating. Considering all circumstances, proposed rating is within the zone of reasonableness.—Increased Ratings on Plastic Games—All Territories; 316 I.C.C. 130 (133-4).

156.—Value of commodity.—[Vols. 1, 6, 9, 12, 13, 15, 17, 18].—Ordinary meaning of "value" is market value, or fair market price reached by buyer and seller, both willing to act and both informed about the open market; however, in the sale of ores, value contemplates commercial price reasonably to be paid upon consideration of costs to be incurred to produce therefrom a metal which can be used or marketed profitably. Thus, "value" as used in plaintiff's intrastate commodity rate tariff rules concerning certification of ore values means commercial or market value made on the basis of smelting industry assays or other ore tests. Railroad found not entitled to recover additional charges, based on its class rates, on intrastate shipments of manganese ore for the government.—Northern Pac. Ry. Co. v. United States, 355 F. 2d 601 (605). [Not arising hereunder.]

The various grades of standard feldspars have the same rates regardless of their different values, and establishment on Paco sand, described by its producer as "a natural feldspar-silica blend" and used for same purposes and sold on same basis as other feldspar-silica mixtures, of tariff descriptions "Sandspar, feldspathic" and "Feldspar, containing in excess of 23 percent free silica" was not unreasonable. Those descriptions, and rates approximately 85 percent of feldspar rates established thereon, attempt to recognize the lower value and inferior feldspathic quality of such mixtures as compared with concentrated feldspars.—Copps v. Alabama G.S.R.Co., 319 I.C.C. 192 (196, 198).

165. Value of the service to the shipper.—[Vols. 1, 6, 17].—Although under the value-of-service concept of ratemaking commodities of higher value but otherwise having no different transportation characteristics than those of lower value have historically been charged higher rates, thereby enabling railroads to carry low-priced goods (which otherwise might not be able to move at all) at rates not much above out-of-pocket costs, truck competition has today skimmed off most of the high-rated traffic leaving railroads with the unprofitable freight and resulting deficits. Thus, while the value-of-service principle was useful in the early years of the act when the railroads were powerful monopolies, its continuing application is contrary to the letter and spirit of the national transportation policy which, as its legislative history makes clear, was intended to permit the railroads, no longer effective monopolies, to respond to competition by asserting whatever inherent advantages of cost and service they possess.—New York, N.H. & H. R. Co. v. United States, 221 F. Supp. 370 (373, 375-6)*.

171.—Use to which article is put.—[Vols. 1, 6, 9, 11-17, 19].—In accordance with primary—use rule set forth in 91 F. Supp. 762, unconventional military wheeled vehicle named "Mechanical Mule" must be classified as a freight automobile, rather than as a platform or warehouse truck which carries a lower classification, for transportation purposes. Since considered vehicle was created and designed to

function as a "small" lightweight infantry cross-country equipment carrier, and its fundamental purpose is to carry weapons and other military equipment in support of combat troops, conclusion is inescapable that its primary use is that of a specialized freight vehicle; in addition, the manufacturer describes and advertises it as a cargo carrying unit. Railroads are entitled to recover from defendant charges for transporting such vehicles on basis of the higher rates applicable on freight automobiles.—Atlantic Coast Line R. Co. v. United States, 355 F. 2d 154 (155-7).

172.—Use, generally improper as test.—[Vol. 1].—When an article has moved than one use, it may not be rated differently for the various uses; however, a tariff description may not be condemned because it is indicative of the use to which the material is most frequently put. Paco sand is used for same purpose as feldspar mixed with silica sand and is sold like other feldspar mixtures on basis of chemical analysis; it is unique in that its feldspathic value is more readily available, and is described for advertising and sale purposes as "a natural feldspar-silica blend." For rating purposes it is not a sand, and establishment thereon of tariff descriptions "Sand spar, feldspathic," and "Feldspar, containing in excess of 23 percent free silica (quartz)" was not unreasonable.—Copps v. Alabama G.S.R. Co. 319 I.C.C. 192 (194, 196, 198).

173.—Normal use as means of describing articles.—[Vols. 1, 6, 12].—The primary purpose of applying thin coast of material to exterior or exposed surfaces of metal or wood is for protection, and any material so applied for that purpose is often conveniently referred to as a paint; therefore, although complainant's asphalt-based product, designed as a pipe coating to prevent corrosion, has no decorative purpose, it is just and reasonable to classify it generically as a paint material.—Monsanto Chemical Co. v. Alton & S.R., 314 I.C.C. 745 (746).

178. --State of manufacture.—[Vols. 1, 6, 13, 15].—Proposals to make rates dependent on method of manufacture rather than on nature of the commodity should not be approved. Proposed increase in transcontinental rates on furfural residue further processed than screened, while retaining present rates on that not further processed than screened, is not shown to constitute a just and reasonable classification within §1(6). Present rates apply without distinction on unprocessed furfural residue and on that which is processed by screening or by both grinding and screening, of which screening is the more complex and costly operation, and the processing involved is not shown to materially alter their physical transportation characteristic. Even though screening doubles the value of the unprocessed residue, proposed distinction is between that which is merely screened and that both ground and screened, and difference of $9 a ton in value of resulting products is insufficient to justify that distinction.—Transit of Furfural Residue at Various Points, 322 I.C.C. 794 (804, 805-6).

In seeking reparation on shipments of Plaswood lumber to basis of lumber rates lower than applicable class rates charged, complainants seek application on a finished product of lower commodity rates which apply on commodities that are basically raw materials used in manufacture of numerous articles. For classification purposes, distinction must be recognized that the pine wood shavings or pieces used as a material base for manufacture of Plaswood are further processed by addition of resin as a binder, whereby the pine wood loses its identity as lumber, resulting in a new article with an independent identification, whereas yellow pine lumber, with which it is compared, remains unchanged as a basic raw material subject to the lower rates applicable on the lumber group.—Plaswood Corp. v. Alton & S.R., 321 I.C.C. 434 (448).

179. —Competition.—[Vols. 1, 6, 15].—Competition is not normally a consideration either in initial establishment of classification ratings or in making amendments to the classification, and fact that yellow pine lumber boards compete with complainants' plaswood lumber is immaterial to issue of reasonableness of charges assessed on latter at class rates under applicable classification rating, rather than at lower commodity rates on lumber, including yellow pine

lumber.—Plaswood Corp. v. Alton & S.R., 321 I.C.C. 434 (448).

Specific Rules

210. Rule 10. Carload mixtures.—[Vols. 1, 6, 9, 11-19].—Proposed mixed-carload rule for application in southern territory and between that and official territory, providing that any deficit in the minimum weight shall be charged for at the lowest class rate under uniform classification applicable to any article in the mixed shipment, in lieu of the highest rate as required by existing rule, merely reduces the cost to shipper of unused space and is just and reasonable.—Incentive Class Rates—Between Official & Southern Ter., 319 I.C.C. 448 (449, 455, 456).

221. Rule 20. Parts or pieces constituting a complete article.—[Vols. 1, 6, 9, 11-19].—In interpreting rule 20 it has been held consistently that when missing parts do not alter the fundamental character of the complete article from a transportation or tariff standpoint, or affect its identity, the rate on the complete article is applicable.—Dolby Advertising of Lake Charles v. Texas & N.O. R. Co., 315 I.C.C. 33 (35).

Shipments consisting of poster panel stiffeners, angle stringers, plates, braces, stiffener, spacers, bolts, and nuts were within classification description of billboards or signboards, and rates thereon were applicable; absence of materials required for erection or operation would not affect fundamental character of the complete articles or their identity, when assembled from parts shipped, as panel posters or billboards on which advertisements are displayed.—Id., p. 35.

See also Traylor Engineering & Mfg. case, §6(7), n. 49.

225. Rule 24. Follow lots—minimum weight for single carload shipments when more than one car required.—[Vols. 1, 6, 9, 11, 12, 14, 15, 17, 18].—Proposed cancellation of application of official-classification rule 24 to shipments of peat and humus from eastern Canada to southern United States, which will require volume in each car to be considered separately and minimum for the rate used to be applied to each, found just and reasonable. It does not appear that that commodity, which moves in bags or bales, requires shipment in quantities that cannot properly be accommodated in 40-foot-6-inch cars which carriers have generally been furnishing and which evidence shows can load to or above the minimum weight; and respondents' cost evidence showing noncompensatory nature of involved rate basis when applied in connection with the follow-lot rule is not refuted.—Peat and Humus from Canada to Southern United States, 319 I.C.C. 188 (189, 190).

However, carriers' furnishing, for their own convenience, of either a larger car or two standard cars when a car suitable to a given shipment was not available does not support contention that application of rule 24 to that traffic is conducive to wasteful transportation. If the lead car on any follow-lot shipment was not loaded to capacity, it should not have moved under rule 24. Moreover, weight is not the only factor controlling loading capabilities even though it varies with moisture content and extent of compression in the bale or package; variation in size of packages also affects loading.—Id., p. 189.

228. Rule 27. Owners to load and unload c.l. freight and heavy or bulky l.c.l. shipments.—[Vols. 1, 6, 9, 11, 12, 14-17, 19].—Tariff provision (Rule 27, sec. 1, Uniform Freight Classification), included in bill of lading covering considered shipment, although not expressly written into it, and requiring owners to load and unload freight under specified circumstances, did not create a contract of indemnity upon which railroad can recover from consignee any sums awarded against railroad for accidental injury to consignee's employee which occurred while he was unloading the car.—Halstead v. Norfolk & W. Ry. Co., 236 F. Supp 182 (184, 189).

234. Rule 34. Carload minimum weights graduated for length of car.—[Vols. 1, 6, 9, 11-13, 15-17].—See Chicago & E.I. R. Co. v. Midwest Homes, Inc., §6(7), n. 263.

236. —Furnishing cars shorter or longer than ordered.—[Vols. 1, 6, 9, 16, 17].—Presumption of Rule 66(a) of Tariff Circular 20 that a tariff which provides minimum weights varying with size or

capacity of car is prima facie unreasonable if it fails to incorporate a rule providing that, when carrier for its own convenience furnishes a car larger than ordered by shipper, such car may be used on basis of minimum weight for the car ordered, depends on possibility of loading the shipment into a car of size ordered. When at time of shipment originating carrier, as shipper was admittedly aware, owned no 40-foot cars with both tie-down equipment and end doors wide enough for loading considered firefighting apparatus, and its only cars thus equipped were 50-foot cars, which it customarily furnished as the only available means of providing those facilities, furnishing of a 50-foot car in lieu of 40-foot car ordered was not for carrier's convenience but in compliance with shipper's request for special equipment necessary to accommodate shipment tendered; thus presumption of Rule 66(a) is inapplicable.—United States Department of Defense v. Alton & S.R., 316 I.C.C. 658 (659-60).

While Rule 66(a) places a duty on defendants to maintain a tariff provision for application of charges based on the lower minimum weight when a larger car is furnished for carrier convenience, absence of such a rule in governing tariff was not unjust or unreasonable in the circumstances disclosed. Charges collected on considered 12,000-pound shipment on basis of 15,000-pound minimum for car used instead of 12,000-pound minimum for car ordered are not shown to have been unreasonable; reparation denied.—Id., p. 660.

Express Classification Rules

251. Specific rules.—[Vols. 1, 6, 15-18].—To have a lawful consolidation rule, the consolidation of shipments must be controlled by either consignor or consignee and not left to discretion of the carrier; whether control is exercised by consignor or by consignee or the shipment is prepaid or collect are not controlling since, so long as control is clear, those variations are relatively unimportant. As proposed rule governing incentive express rates on consolidated shipments of wearing apparel from one shipper to multiple consignees provides for a single shipper, and applies on aggregations tendered and receipted for at one time, it eliminates the evil inherent in ability of a carrier to manipulate the consolidation to the detriment of shippers. Proposed rule meets a very real need of many shippers; found just and reasonable.—Aggregate Rates on Wearing Apparel—Ry. Exp. Agency, 318 I.C.C. 737 (744, 746-7)*.

Demurrage

255. Definitions.—[Vols. 1, 6, 9, 11, 17].—Demurrage charges are no part of the rate charges in effect for transportation of shipments; although they may follow the shipment and be collected together with the transportation charges, they are for separate and distinct service.—Great Northern Ry. Co. v. United States, 312 F. 2d 906 (910).

257. Nature and purpose.—[Vols. 1, 6, 14-19].—Inasmuch as demmurage is not concerned with culpable or wilful delay, but only with delay which it penalizes in order to insure prompt release of a carrier's equipment, it is immaterial that defendant's inability to receive considered cargo from plaintiff's lighters before demurrage charges could accrue was due to a strike against defendant's vessels and was not of its making; thus, since failure to release was not due to the carrier's default, demurrage accrued as a matter of law under provisions of the governing tariff.—Pennsylvania R. Co. v. Moore-McCormack Lines, Inc., 246 F. Supp. 143 (146)*.

258.—Partly compensatory, partly penal.—[Vols. 1, 6, 9, 11, 13-19].—Although demurrage is computed to include two elements—compensation for use of the equipment and a penalty designed to prevent undue detention—recovery of demurrage for detention of plaintiff's lighters at defendant's private piers may not be limited to value of the actual loss of use of carrier's equipment; the governing tariff provides otherwise. Filed tariff has the weight of law; it may not be altered or modified by the parties or the court.—Pennsylvania R. Co.

v. Moore-McCormack Lines, Inc., 246 F. Supp. 143 (147)*.

Under railroads' new scale of higher charges to shippers for delay in releasing freight cars, which became effective July 1, 1964, the standard 2-day limit for loading and unloading is continued but after that free time the charge is $5 a day for first 4 days a car is held by shipper, $10 a day for the next 4 days, and $15 per car for each following day.—Annual Report, 1964, p. 38.

266. Against whom assessed.—[Vols. 1, 6, 9, 17].—Since company to which tank-car shipments of cotton-seed oil (which moved under commercial bills of lading for Commodity Credit Corp.) were shipped for storage was not a "public warehouse" within demurrage tariff rule governing average agreement between plaintiff and the company, the company was not liable under that agreement for demurrage accruing on the cars after expiration of free time for unloading. And plaintiff's efforts to collect those demurrage charges from the company did not estop it from asserting its claim therefor against the Government.—Reading Co. v. United States, 316 F. 2d 738 (739-40). [Not arising hereunder.]

Bill of lading under which the shipments moved constituted a contract between plaintiff and defendant and, although endorsement thereon specified where payment would be made by the Government for all charges accruing prior to expiration of free time, it does not state that the Government would not be liable for line-haul and accessorial charges accruing after expiration of free time. Plaintiff railroad is entitled to judgment for unpaid demurrage charges.—Id., p. 740.

Car Held for Consignor or Consignee

280. Holding short of destination.—[Vols. 1, 6, 9, 14-16].—Proposed rules providing that, if a car of grain destined for export from Galveston, Houston, or Texas City cannot reasonably be accommodated on tracks at destination owing to yard congestion, the car will be held at an available hold point short of destination and arrival notice will not be given until it arrives at destination and is made available for inspection, computation of free time to begin only after giving of such notice, are just and reasonable. Construction of additional yard-storage facilities at Galveston is shown to be impractical, and to allow collection of demurrate charges as result of respondents' own disability would permit them to profit through their own fault. As periods of congestion at Galveston are few, it is unlikely that the proposed rules would tend to increase use of rail cars for storage of grain in times of car shortage.—Holding of Loaded Grain Cars—Texas Gulf Ports, Export, 321 I.C.C. 328 (329-30)*.

Free Time

302. Allowance; for unloading.—[Vols. 1, 9, 12]Provision in tariff governing demurrage on cars held for delivery to water carriers, allowing 10 days' free time on export shipments, did not apply to Government shipments of ammunition originally destined to port of Mukilteo, Wash., but diverted because of port congestion to Gold Bar, some 32 miles inland and not a point of interchange with water carriers. Shipper by its diversion order named Gold Bar as destination, and subsequently in new billing treated it as origin for the movement to the port, thus there was no constructive delivery or placement of the cars at Mukilteo while they were held at Gold Bar, and they were not held "in transit" under that tariff. Neither could they be considered as held at Gold Bar for unloading within the tariff provisions, since there were no facilities there for receipt and storage of ammunition.—Great Northern Ry. Co. v. United States, 312 F. 2d 906 (907-9).

See also Western Maryland Ry. Co. case, §6(7), n. 222, 263.

303.—Reconsignment or reshipment.—[Vols. 1, 6, 9, 14, 16, 19].—Demmurage rule allowing 24 hours' free time on cars held for reshipment governed computation of demurrage charges on Government shipments originally destined to Mukilteo, Wash., but diverted inland because of port congestion to Gold Bar and there held on plaintiff's tracks until reshipped to Mukilteo for

export. Although that rule was subject to general exception for cars held in transit because they could not reasonably be accommodated at the port, the diversion order to Gold Bar and issuance of a second bill of lading on each shipment from there to Mukilteo formed a new contract, under a new rate, within definition of "reshipment" in the demurrage rules, and determined that the cars were not "in transit" to Mukilteo when held at Gold Bar, within meaning of the general exception. Considered cars were held at Gold Bar for reshipment and settlement of demurrage bills on basis of 24 hours' free time was correct.—Great Northern Ry. Co. v. United States, 312 F. 2d 906 (907-9).

Computation of Time

312. In general.—[Vols. 1, 6, 9, 14-17].—See Holding of Loaded Grain Cars case, n. 280, above.

Notification of Arrival or Readiness to Deliver

321. Notice; arrival at port.—[Vols. 1, 14].—Since inland point to which Government shipments (originally destined to nearby port) were diverted because of congestion at the port was not a point of interchange with water carriers, plaintiff's notice of arrival at that point was not a notice of "readiness to deliver at port" or a "notice of arrival at port" as provided for computation of free time on export shipments in tariff governing demurrage on cars held for delivery to water carriers.—Great Northern Ry. Co. v. United States, 312 F. 2d 906 (909).

As respondents' holding of cars of export grain at hold points short of Texas destination ports is generally due to congestion at their Galveston storage yard and not to any inability of elevator or consignee to place a loaded car in position for inspection and tender of delivery, respondents properly should not issue notices of arrival on cars so held until they have arrived at destination and been made available for inspection; proposed provision to that effect, approved.—Holding of Loaded Grain Cars—Texas Gulf Ports, Export, 321 I.C.C. 328 (330)*.

Causes Relieving from Demurrage Charges

373. Vis major.—[Vols. 9, 11, 15].—Assuming that strike against defendant's vessels occurred through no fault of defendant, and that it had no control over its happening, it was not such vis major as would in law excuse it from paying demurrage for detention of plaintiff's lighters at its private pier. While applicable rate on the cargo included unloading of lighters by carrier, plaintiff's duty to unload under governing tariff would not arise until defendant was ready to receive the cargo in the customary fashion. No stevedoring services being available during strike to receive the cargo, had plaintiff attempted to discharge it, neither consignee nor carrier could carry out its agreed part in the unloading; thus both were in default. It is immaterial that defendant's inability to receive, which relieved plaintiff of its duty to unload before demurrage could accrue, was not of its making; demurrage is concerned only with prompt release of carrier's equipment; plaintiff is not barred from recovering the demurrage in question.— Pennsylvania R. Co. v. Moore-McCormack Lines, Inc., 246 F. Supp. 143 (144-7)*.

Average Agreement

403. Weather interference.—[Vols. 1, 9, 14, 16, 17, 19].—Average basis for computing car detention is a concession from straight demurrage charge in favor of shipper or receiver of freight; one of its purposes is, by credits for cars promptly released, to offset detention caused by bunching or weather conditions; in view of benefits thus obtained, demurrage charges resulting from detention due to extraordinary weather conditions are not unreasonable even though complainant has used reasonable diligence to avoid or abate the detention. See 289 ICC 535 and 311 ICC 795—Marshall-Putnam Oil Co. v. Chicago, R. I. & P. R. Co., 316 I.C.C. 581 (583-4).

Transit

501. General definitions.—[Vols. 1, 6, 9, 11, 13-15, 17-19].—Part II, §216(b), n. 425.

"Transit privileges" has a particular connotation in the rail transportation field: it cannot refer to any privileges a shipper might insist on while his commodity is in transit, but must in reason be limited to certain previously understood conditions. The commission's traditional view, as accepted by the courts, is that "transit privilege" involves actual unloading and treatment, or at least storage, of the commodity in transit and is quite different from "inspection" or "reconsignment," which are accomplished without unloading. Question of whether those general conclusions preclude possibility of inspection and reconsignment being considered as transit privileges is not arguable in instant case; that specific question was considered by the commission in a proceeding involving the same tariff, like traffic, and a similar situation, wherein it was found that "transit privilege" as so used did not include inspection or reconsignment. That decision conforms with the historical view and should have been given weight by the district court.—United States v. Great Northern Ry. Co., 337 F. 2d 243 (246, 247-8)*.

Tariff provision for computation of distance rates on grain shipments "accorded transit privileges as authorized in tariffs of the lines parties hereto" does not apply to shipments held for inspection and disposition orders at Minneapolis; no reference is made to any of defendants' tariffs wherein inspection, holding for disposition orders, and forwarding from the hold point are described as transit services, and master grain tariff defines "transit privileges" as unloading and passing through elevators, cleaning houses, malt houses, manufacturies, mills and/or warehouses for storing and other purposes, with no mention of inspection or reconsignment.—Farmers Union Grain Term. Assn. v. Canadian Natl. Rys., 315 I.C.C. 559 (562, 563, 565)*.

510. Restriction of practice.—[Vols. 1, 6, 9, 11-13].—While transit arrangements authorized under single-car rates on grain and products have aided considerably in equalizing disadvantages of location with respect to partucular markets, the privilege of authorizing transit, provided it is uniformly granted to or withheld from shippers similarly situated, rests with the carriers. Respondents' withholding of transit in connection with proposed barge-competitive multiple-car rates on corn to three New England destinations, while allowing it under corresponding single-car rates, is not unlawful (321 ICC 582). The fact that rates are published for a complete service does not prevent a carrier from offering a lesser service at a lower rate-Corn, Mich., Ohio, and Pa. to Augusta and Portland, Maine 319 I.C.C. 344 (354)*.

There is no unlawfulness in failure of Southern Ry. to grant transit in connection with its reduced multiple-car rates on grain from Ohio and Mississippi River crossings to the South, since it treats everybody equally. The trend is sharply against use of rail transit, a costly privilege, in the Southeast; trucks do not provide it on the vast amount of grain they handle, and barge transit is rarely used. Though protestants contend that it is necessary to equalize competitive opportunities of milling interests located outside the South, rail rates on coarse grains and feed from the river crossings are on a flat basis and millers located at or beyond the crossings do not now have rate equalization to the South. Moreover, equalization assumes that everbody uses the railroads, whereas unregulated motor carriage is actually the predominant mode.—Grain in Multiple-Car Shipments—River Crossings to So., 318 I.C.C. 641 (688)*.

See also Transit of Furfural Residue, §15(7), n. 25.

512. Considered as a privilege.—[Vols. 1, 6, 9, 17, 19].—Transit is a privilege that must be specifically authorized and may not be inferred; when a transit privilege is given by express authorization in a tariff or §22 quotation, all conditions and limitations therein prescribed with reference to it must be strictly observed.—Gulf, M. & O. R. Co. v. United States, 312 F. 2d 921 (925).

Nature of Carriers' Services

528. Back hauls and out-of-line hauls.—[Vols. 1, 6, 9, 11-14, 17, 19].—Although general purpose of maximum-pay-in rules is to limit backhauls

and circuitous routing of transited shipments, rule published in connection with multiple-car rates on soybean cake and meal (which under single-car origination rule apply as through rates from origins of the soybeans) also limits length of direct inbound hauls of soybeans to instances there the inbound single-car rate does not exceed 22 cents, in practical effect restricting the multiple-car rates to shipments processed from soybeans originating within a radius of about 160 miles from transit points. As that provision is responsive to competitive conditions encountered by railroads in movement of soybeans to transit points and consistent with practices of the processing industry, the maximum-pay-in rule does not result in rates unlawful per se.—Vol. Rates on Processed Meal—Midwest to Ports, 322 I.C.C. 456 (460-2).

Manner of Assessing Charges

538. Rates and regulations applicable.—[Vols. 1, 6, 9, 11-19].—Preference and prejudice, §3(1), n. 147.

Transit tariff item permitting substitution of non-transit tonnage in outbound shipments, if impractical to maintain identity of transit and non-transit tonnage in shipper's facilities, did not entitle appellant-shipper to transit privilege claimed on its operation, i.e., shipping isobutane from Texas origins, selling it at refinery there, and shipping locally produced propane gas therefrom to Missouri destinations at the transit rates; shipper had no storage facilities, and did not store isobutane, at Sunray. While some substitution of non-transit tonnage is permitted under carefully formulated rules and regulations, it is of a similar article from the same or a comparable rate origin; however, propane gas purchased at, and shipped from, Sunray was produced locally from crude oil obtained elsewhere. Appellant's operation amounted to substitution of basically dissimilar products with no perceptible relation between inbound and outbound shipments; transit tariff did not contemplate such an operation. Thus, local rates applied on the propane shipments; and, in paying a lesser rate, appellant received concessions in violation of the Elkins Act; judgment affirmed.—Union Petroleum Corp. v. United, 376 F. 2d 569 (570-2)*.

See also United States v. Atchison, T. & S.F. Ry., §16(3), n. 106.

Under §22 quotations, see Gulf, M. & O. R. Co. v. U.S., 312 F. 2d 921, §22(1), n. 5.

Though respondents contend that stopoff provisions in transcontinental tariffs do not apply in connection with reduced rates on three-car shipments of packaged wine, because limited by their terms to freight moving at c.l. rates and minima, that wording was used to distinguish c.l from l.c.l freight and should not be construed to distinguish three-car from single-car volume rates. While the three-car rates are restricted to single shipments moving at one time on one bill of lading, stoppage for partial unloading does not entail issuance of a new bill of lading, and such stopoffs are not precluded under those rates; but stopoff provisions permitting three stops mean three stops per shipment, not three stops per car. And since the privilege of transloading is always contingent on authorization of partial unloading, it follows that transloading privileges are available to the same extent under the three-car rates as under the single-car rates.—Wine, Pacific Coast to Western, S.W. & Central States, 321 I.C.C. 683 (694).

Proposed plan II proportional TOFC rate on dairy products from Twin Cities to Chicago would not apply on shipments moving to Twin Cities from points beyond for storage. Transit is not provided for TOFC movements, thus considered tariffs contain no provision which would ascribe to shipments stored in transit the fiction of a through movement.—Dairy Products from Twin Cities to Chicago, 321 I.C.C. 720 (721-2).

Steel sheets or plates fabricated into pipe, then coated and wrapped, at Portland, Oreg., were not entitled to through transit rates. Governing tariff item listed inbound commodities in column 1 and authorized processes in column 2, both divided into parallel paragraphs, and use of "and" in description of authorized outbound commodities as those subjected to any process named "in Paragraphs A, B, and C" did not alter the unmistakable grouping of

inbound commodities with privileges applicable to each. Under a fair and reasonable construction, inbound commodities listed in paragraph A of column 1 were limited to transit privileges listed in paragraph A of column 2; thus, although paragraph B authorized wrapping of pipe without restriction, paragraph A, which during period of shipment restricted wrapping in connection with fabrication of sheets not to apply at Portland, precluded application of the through rates.—Petition of South Pacific Co. for Declaratory Order, 316 I.C.C. 661 (662-4).

Classification or rate tariffs providing for application of same rating or rates on steel pipe when coated or wrapped as when not so treated have no probative value to show that "coating" includes wrapping, since those provisions did not govern privileges allowed by the transit tariff; and interpretation by other carriers of "coating" as used in other transit tariffs is also of little value. There was no provision in governing tariff for transit on pipe fabricated from sheets and wrapped at Portland, and thus no fiction of transit to transform the separate movements to and from Portland into a single through movement from origin to ultimate destination.—Id., pp. 664, 665.

In respondents' present transit tariff authorizing application of "carload flat grain rate" on nontransit portion of feed moving from transit stations, "grain rate" refers to normal wheat or grain basis of rates; the words "grain rate" also appear under heading of "Feed, animal of poultry." in that tariff, and animal or poultry feed takes wheat or grain basis of rates in the generic grain tariff. A contrary construction could be reached only by considering the term "grain rate" out of its normal context and would be strained and unnatural.—Nonapplication of Coarse or Feeding Grain Rates, 316 I.C.C. 547 (550).

Moreover, specific descriptions of coarse grains in commodity tariffs naming rates thereon lower than normal grain rates are subject to notations that these descriptions may not be used as a basis for arriving at rates based with relation to the grain rates. Respondents' present tariff provisions are clear and unambiguous, and proposed amendments clearly making the normal grain rates applicable on nontransit mixed feeds moving from transit stations do not change applicability of those provisions.—Id., pp. 548, 551.

Particular Transit Services

562. Inspection.—[Vols. 1, 6, 9, 17-19].—Requirement that defendants initiate a hold service for inspection of grain at points where no such service is now afforded should be prescribed only upon a clear showing of public need; no such need is shown for placing of grain cars on hold tracks for inspection at Fargo and West Fargo, N. Dak., and Moorhead, Minn.; defendants appear to have provided adequate hold points for grain inspection and sampling throughout their systems, and it would be impractical to expect them to provide all intermediate points with facilities which might be desired locally; grain business in the Fargo area has steadily expanded, and record would not support a finding that the present system of inspection and sampling has resulted in material injury to Fargo.—Fargo, N. Dak., Cham. of Com. v. Great Northern Ry. Co., 315 I.C.C. 737 (741).

There is no price-fixing market at Fargo and local buyers are few as compared with markets at Minneapolis and Duluth; carloads of grain are usually consigned to commission houses at the markets and are not subject to purchase or diversion except at order of the consignee; thus, if established as a hold point for grain inspection, Fargo would be merely another hold point largely for the Minneapolis and Duluth markets, and there is no showing that inspection at Fargo would get a sample on the floor of the grain markets more quickly than from present hold points.—Id., p. 740.

566. Stopping to partially load or unload.—[Vols. 1, 6, 9, 11, 12, 14-17. 19].—Contention that, with equal rates on canned goods from Pacific coast territories to transcontinental groups A and B, shippers will make greater use of stops to partially unload in group B (which can be done without incurring higher charges on weight not unloaded in that group), thus increasing cost of the service, is not supported by any showing of increased present use of the stop privilege, which has

been used in varying degree in the past; however, charges collected for any additional stops should be sufficient to offset expense of the added service.—Canned Goods from Pacific Coast to Eastern Points, 315 I.C.C. 769 (782, 783).

Protection of Shipments

627. Loading, unloading, reloading.—[Vols. 1, 6, 9, 12, 14, 16, 17, 19].—See also Minneapolis, St. P. & S.S.M. R. Co. v. Metal-Matic, n. 65, above.

Rule providing for promiscuous loading of all-commodity freight by shippers at certain eastern origins, at carrier's option, subject to a minimum weight of 15,000 pounds per car used, is designed to encourage shipper loading; as shipper is in best position to know type and amount of traffic that will be moving at any given time, it can use its labor force where most needed, while carrier must maintain a constant force capable of handling peak amounts, even during periods of low traffic flow. Promiscuous loading by shippers reduces deficits incurred under carrier loading without impairing line-haul revenues, and there is a guaranteed revenue on 15,000 pounds per car, which is not the case when carrier loads promiscuously; that fact, together with shippers ability to load more efficiently and lack of carrier responsibility for loss and damage during loading, strongly indicates enhanced revenues under shipper promiscuous loading. Approved, subject to deletion of provision for extension of the privilege at carrier's option, which is found discriminatory.—Loading of Freight by Shippers at Eastern Origins, 321 I.C.C. 300 (303-4, 306)*.

Terminal Services and Facilities

651. Receiving (delivery to carrier).—[Vols. 1, 11].—Although Railway Exp. Agency's consolidation rule governing incentive quanity rates on multiple packages from a single shipper requires tender at one time, it contends that it is often impossible for it to accept physical possesion of an entire aggregation at one time, and no shipper has complained of its practice of permitting tender of portions of such a shipment and treating them as tendered at one time if shipper advises it that it can pick up the entire aggregation at its convenience. However, tariff should be restricted to provide that the incentive rates apply only to aggregations tendered and receipted for during course of a single business day.—Aggregate Rates on Wearing Apparel—Ry. Exp. Agency, 318 I.C.C. 737 (747)*.

652. Delivery; generally.—[Vols. 1, 12].—Provision of tariff naming TOFC rates under which shippers move railroads' trailers to and from ramp sites, that, unless prior arrangements are made with respondents, shippers or their agents may not transport the trailers to destinations beyond tariff terminal areas, is not shown to be just and reasonable since, though it holds out to provide something of value to shippers, neither the charge therefor nor its compensativeness is shown; moreover, proposed provision is potentially discriminatory and a possible source of illegal rebating. Cancellation required, without prejudice to any different conclusion in Ex Parte No. 230.—Iron and Steel Articles between Atlanta and St. Louis, 318 I.C.C. 80 (83).

670. Switching; delivery and receipt on private tracks.—[Vols. 1, 9, 13-16].—Except under extraordinary conditions a carrier may not lawfully refuse to transport a shipment from or to any point on its lines which it holds out to serve, including an established interchange with a connecting line; and fact that a competing carrier absorbs a switching charge constitutes no such condition. Refusal of Southern Ry. to perform switching to or from industries at Highway Point, N.C., having private or assigned siding served by it or its subsidiary, when the switching charge is absorbed or refunded in whole or in part by complainant High Point, T. & D. R., is an unreasonable practice in violation of §s1(6). Cease and-desist order entered.—Absorption of Switching to or from High Point, N.C., 319 I.C.C. 522 (526, 527).

674.—Reciprocal switching.—[Vols. 1, 6, 9, 11-14, 16].—Reciprocal switching is a mutal scheme of carriers for effecting switching deliveries within a switching

district or other defined area, wherein each party reciprocates in substantial degree with the other; its effect is to extend lines of the line-haul carrier to all designated tracks within the area, without the switching carrier receiving a line-haul. Respondent's proposal to absorb Southern's switching charges at High Point, N.C., on traffic to or from industries having private or assigned sidings served by Southern or its subsidiary and line-hauled by respondent and its connections differ from reciprocal switching; it contemplates no reciprocity, since respondent does not publish the same charge or furnish a similar service.—Absorption of Switching Co. or from High Point, N.C., 319 I.C.C. 522 (525).

Proposed cancellation of reciprocal switching to and from specified industries and team tracks at Richmond, Va., on traffic on which respondent does not receive a line haul, is lawful when it will affect only a small volume of traffic, in which no shipper interest is manifested and which can readily be absorbed at respondent's principal team track or alternatively at team tracks of connecting line-haul carriers, and is similar to practices generally observed by other lines serving Richmond.—Swtiching at Richmond, Va., on Richmond, F. & P. R. Co., 316 I.C.C. 786 (793, 794).

680. Terminal railroads; absorptions.—[Vols. 1, 6, 9, 11, 12, 14, 16].—Proposed absorption of crosstown switching charges within St. Louis switching district, from elevator on respondent's line, out of line-haul rates on grain originating at Omaha or points on its lines in Iowa and Missouri, or received from connections at Kansas City or Iowa junctions, would result in revenues exceeding out-of-pocket costs and is compensatory.—Absorption of Cross-Town Switching Charges on Grain, 316 I.C.C. 633 (637, 638)*.

Respondent's proposal does not provide for absorption on shipments from a greater origin territory than that available to East St. Louis elevators. Tariff items of which the comission takes official notice provide at least as broad origin coverage for grain transited at East St. Louis as they do for St. Louis; grain from any point on respondent's lines or beyond, transited at East St. Louis and destined to points beyond, may be switched back to St. Louis without additional charge. As purpose of the proposal is to place respondent's St. Louis elevator on parity with East St. Louis elevators, and no resulting unlawfulness is shown, it is approved.—Id., 319 I.C.C. 776 (780)*.

While a carrier cannot be required to absorb switching charges of a connecting line in absence of unjust discrimination or undue prejudice, it may not be prohibited from doing so if it chooses, in absence of any indication that the remaining line-haul revenue would be inadequate, or of other unlawfulness. Absorption is a device used in carrier's discretion, for competitive reasons, to equalize or more nearly equalize charges paid by shipper for service over competing routes; it is not in itself unlawful, and respondent's proposal to absorb Southern Ry's switching charge at High Point, N.C., on traffic to or from industries having private or assigned sidings served by Southern or its subsidiary, when line-hauled by respondent and its connections, is a reasonable and lawful practice.—Absorption of Switching to or from High Point, N.C., 319 I.C.C. 522 (526).

Proposed absorption of port charges on lumber and plywood imported through Los Angeles and Long Beach, when stored and processed at nine designated interior California points prior to rail movement to transcontinental destinations, is lawful when it would merely enlarge the area within which such storage, processing, and carloading could be accomplished, and is necessitated by lack of facilities at those ports. The proposal would not change the inbound ocean rate or the rail transcontinental import rate, or amounts absorbed by the ocean carriers for handling or by rail respondents for wharfage, and would reduce amounts absorbed for carloading. Shipper would be required to move the lading at its own expense, by means other than rail, from shipside to storage points, and there would be no reduction in rates and charges paid by shippers using those ports, nor would they differ from those paid at north pacific coast ports.—Absorption—Lumber & Ply-

wood—Pac. Coast Interior Orig., 316 I.C.C. 15 (25).

And agreement whereby the ocean and rail carriers will split 50-50 the charges they hold out to absorb in no way relates to the public and neither broadens nor lessens the absorptions they are lawfully obligated to make under their published tariffs.—Id., p. 24.

Consolidated Shipments

701. Consolidated shipments.—[Vols. 1, 6, 9, 11, 12, 18].—While general rule requiring equality of charges on collect and prepaid shipments ordinarily applies with equal force to a consolidation rule, such equality does not ipso facto establish the lawfulness thereof. In determining lawfulness of proposed rule governing incentive express rates on consolidated shipments of wearing apparel, the heart of the matter is its applicability to collect shipments. One overriding consideration in background cases cited is that, to have a lawful rule, consolidation must be controlled by either consignor or consignee and not left to carrier's descretion; so long as the control is clear, it is immaterial whether it is exercised by consignor or consignee, or whether shipment is prepaid or collect. By providing for a single shipper, proposed rule eliminates evils inherent in ability of a carrier to manipulate the consolidation to detriment of consignors or consignees; evidence is convincing that the rule meets a very real need of many shippers and is just and reasonable.—Aggregate Rates on Wearing Apparel—Ry. Exp. Agency, 318 I.C.C. 737 (744, 746-7)*.

Tickets, Receipts, and Bills

725. Bills of lading; provisions in bills to which paragraph applicable.—[Vols. 1, 9, 15, 19].—While each of the bills of lading on government shipments of military vehicles indicated by notation that car used was longer than the car ordered, factually and legally the notations do not constitute substantial evidence to support the commission's finding that the cars were ordered by size; they do not show the person from whom a car of particular size was ordered and there is no other evidence to establish that fact. While by statute a bill of lading may be prima facie evidence of other facts which it recites, no statute has been found that has that effect as to any notation of size of car ordered. In accordance with general law, the court concludes that the notations relied on by the government were neither a record of an actual order to the carrier nor an admission of that fact by carrier's representatives and, either alone or in conjunction with other evidence, cannot be a substantial basis to support a finding of ordering cars by size from carriers concerned.—Baltimore & O. R. Co. v. United States, 217 F. Supp. 918 (924, 925)*.

728.—Reasonableness of limitations.—[Vol. 1].—See Meats, Fruits, Vegetables—TOFC—Transcontinental, § 15 (7), n. 77a.

Pipelines

760. Demurrage rules, charges.—Respondent's present rule imposing demurrage charges on propane remaining in its pipeline after 30 days from date of shipment having improved too rigid for a miltiproduct line, proposed revised rule eliminating the 30 days' free time and providing for notice to shipper or consignee to remove propane from the line and, if that is not done within 5 days following date of service notice, for a charge of 1 cent per barrel per day, is justified by peculiarities of pipeline operations. It is to respondent's advantage to keep enough products in the line to maintain necessary pressure, but when there is great demand for use of the line proposed rule will permit clearing it on 5 days' notice; similar provisions in tariffs of other pipeline operators are of long standing and have not been subject of complaint by any pipeling shipper.—Pipeline Demurrage & Minimum Shipment Rule on Propane, 315 I.C.C. 443 (444-5, 446).

Proposed rule is for respondent's operating convenience, not to afford any storage advantage to shippers, but any such incidental advantage would be available to all shippers under similar circumstances and conditions; while such rule might, at respondent's election, result in unlimited

storage without payment of demurrage charges, mere possibility that a carrier might apply a lawful tariff rule in an unlawful manner cannot operate to condemn an otherwise lawful rule.—Id., pp. 444, 445.

Protestants' contention that demurrage rules and charges of pipelines should be required to be as definite and specific as those of railroads, in order to place both modes on a fair competitive basis, overlooks uniqueness of pipeline operations as compared with those of rail, water, or motor carriers; demurrage rules and charges designed to discourage shipper detention of rail cars are not necessarily suitable for pipeline operations. However, proposed rule violates §6 in being too indefinite; approved as modified.—Id., p. 445.

762. Segregation rules, commodities.—Section 1(6) makes it the duty of common-carrier pipelines to establish, enforce, and observe just and reasonable regulations and practices affecting classification of property transported. Although defendant's tariff contains no rules governing segregation of crude oil into streams, thus permitting it to set arbitrary standards in individual cases, complainant's crude oil meets tariff requirement that only "good merchantable crude petroleum" will be accepted for transportation; defendant accepts such oil for movement in its general sour stream, and its rejection thereof as unsuitable for movement in its asphalt sour stream is shown to be fully justified; thus there is no violation of the tariff. However, tariff should be amended to provide segregation rules so that shippers may know conditions governing acceptance of particular grades.—Denver Oil Co. v. Platte Pipe Line Co., 316 I.C.C. 599 (603, 604)*.

Regulations of the Commission

31 FR 14945, Nov. 26, 1966, Part 31: Bills of Lading, §31.4 Requirement for certain forms of export bill of lading; §31.5 Permission to print form of through bill of lading on both sides of paper; and §31.6 Appendix II, form of through export bill of lading, all revoked, effective on date of order.

Section 1. (7)—Free transportation for passengers prohibited; exceptions; penalty.—[Unchanged. See vol. 11, p. 9116, vol. 15, p. 11974.]

Amendments, see footnotes, vol. 1, p. 850, vol. 11, pp. 9116—9118; historical notes, vol. 1, p. 851, vol. 9, p. 7277.

Notes of Decisions

Volume 1—p. 852; Volume 6—p. 4913; Volume 9—p. 7277; Volume 12—p. 10203; Volume 13—p. 10925; Volume 14—p. 11405; Volume 15—p. 11974; Volume 17—p. 13261.

6. Construction, carrier's contracts and stipulations.—[Vols. 1, 6, 13-15, 17].—Following holding in 234 US 576 and 260 US 459 that the waiver—of—liability clause in a free pass issued by an interstate railroad under the Hepburn Act is valid, and that the person accepting and using such pass is bound by its provisions and stipulations, the doctrine of 192 US 440, reaffirmed in 333 US 445, that such waiver provision relieves the railroad of liability to a passenger riding on such a pass for the railroad's ordinary negligence, is controlling. Thus the waiver provision in plaintiff's pass insulates defendant railroad from liability for ordinary negligence if the pass provisions were applicable and operable at time of plaintiff's accident.—Gonzales v. Baltimore & O. R. Co., 318 F. 2d 294 (297-8).

Plaintiff was checking her baggage for express purpose of traveling on defendant's train and in the process was required to show her pass; thus she was using services and facilities of the railroad available only to passengers. As the weight of evidence is against her contention that she entered the baggage check room (where she was injured by a fall) at the invitation of the baggage man, it is plain that she was a mere licensee

and, under the provisions of her gratuitous pass, was not entitled to recover damages from defendant for injuries resulting from its ordinary negligence. District court's action is granting defendant's motion for judgment n.o.v., affirmed.—Id., p. 299.

Defendant railroad was not required, by its duty to serve the public, to grant plaintiff a permit to use its facilities as part of agreement between plaintiff and his employer, on one hand, and defendant, on the other, purpose of which was to provide defendant with the gratis services of plaintiff. Fact that plaintiff's services incidentally aided defendant in executing its common-carrier business does not necessarily makde the contract one for performance of a common carrier duty.—Foland v. St. Louis.S.F. Ry. Co., 208 F. Supp. 295 (297).

Acceptance and use by railroad employee, not in connection with his duties as such, of a free pass containing a waiver of liability for personal injury, or loss or damage to property, except issuing railroad from liability for ordinary negligence. In absence of showing of gross, wanton, or willful negligence on part of defendant railroad, which would render such waiver ineffective, plaintiff employee's purchase of a pullman ticket from defendant's agent does not establish him as a paying passenger so as to negate provisions of the pass limiting defendant's liability. —Luerssen v. Seaboard Air Line R., 203 F. Supp. 707 (708-9).

14. Classes of persons excepted—families of employees.—[Vol. 1].—Alleged provisions in contracts between railroads and employee unions, or in contract between railroads, for issuance of passes to their own and other railroads' employees and members of their families are not shown to establish a consideration for pass issued by Baltimore & Ohio to plaintiff, the wife of an employee of another railroad; it affirmatively appears that B & O was under no obligation to issue passes even to its own employees and their families, and that passes were issued on a complimentary basis. Absent a consideration, waiver-of-liability provision in plaintiff's pass absolved the B & O from liability for ordinary negligence if the pass provisions were applicable and operable at time of plaintiff's accident. (Decision in 227 F. 2d 501 distinguished.)—Gonzales v. Baltimore & O. R. Co., 318 F. 2d 294 (296-8).

Regulations of the Commission

31 FR 5319, April 2, 1966, Part 101: Rail and Water Carrier Passes, §§101.3 Officers issuing and requesting passes, revised, effective on publication in Federal Register.

31 FR 11550, Sept. 1, 1966, Part 101: Rail and Water Carrier Passes, §§101.5, 101.24, and 101.101 amended to read as set forth, effective on publication in Federal Register.

Section 1. (8) Transportation of commodity manufactured or produced by railroad forbidden.—[Unchanged. See vol. 9, p. 7279.]

Amendments, see footnotes, vol. 1, p. 862; historical notes, vol. 1, p. 862, vol. 9, p. 7279.

Notes of Decisions

Volume 1—p. 863; Volume 6—p. 4916; Volume 9—p. 7279; Volume 14—p. 11405; Volume 15—p. 11975; Volume 16—p. 12611; Volume 17—p. 13263; Volume 18—p. 14019; Volume 18—p. 15058.

7. Interpretation, in general.—[Vols. 1, 6, 9, 14-18].—The commodities clause does not prevent a railroad from transporting commodities of a corporation substantially controlling it, unless the control of the railroad is so exercised as to make it the alter ego of the holding company [333 US 771]. And, while the question arises as to whether noncarrier holding company's relationship with enlarged subsidiary railroad system will involve violation of §1(8), there is no indication of record that, if proposed control transaction is approved, the resulting relationship will involve any violation of the commodities clause.—Texas & Pac. Ry. Co.—

Control—Kansas, O. & G. Ry. Co., 324 I.C.C. 309 (323-4)*

15. Ownership of both railroad and producer by common interest.[Vols. 1, 9, 14].—Since consummation of proposed control transaction will give noncarrier holding company control over an enlarged railroad system, question arises as to whether noncarrier's relation to the system will involve a violation of the statute. However, as held in 333 US 771, unless control of the railroad is so exercised as to make it the alter ego of controlling holding company, there is no violation of the commodities clause; thus, as record shows no complaints that relationship between parent corporation and rail subsidiaries violates §1(8), there is no indication that, if proposal is approved, the relationship of the holding company and the enlarged rail system will involve such a violation.—Texas & Pac. Ry. Co.—Control—Kansas, O. & G. Ry. Co., 324 I.C.C. 309 (323-4)*.

Section 1. (9) Switch connections and tracks.—[Unchanged. See vol. 9, p. 7282.]

Amendments, see footnoes, vol. 1, p. 877; historical note, vol. 1, p.877.

Notes of Decisions

Volume 1—p. 878; Volume 6-p. 4917; Volume 9—p. 7282; Volume 11-p. 9118; Volume 12—p. 10204; Volume 13—p. 10925; Volume 14—p. 11407; Volume 15—p. 11975; Volume 16—p. 12612; Volume 19—p. 15059.

1. Switch connections with lateral, branch line of railroad, or private sidetrack.—[Vols. 1, 9, 11, 14, 16].—Section 1(9) imposes an obligation on a rail carrier to construct, maintain, and operate on reasonable terms a switch connection with a private sidetrack which may be constructed to connect with such railroad, provided such connection is reasonably practicable, can be put in and used with safety, and will furnish sufficient business to justify its construction and maintenance. This obligation is clearly brought out in 20 ICC 56, wherein the commission stated that if the prerequisite statutory conditions exist the connection must be made whether desired by the carrier or not.—Union Carbide Corp. v. Norfolk & W. Ry. Co., 323 I.C.C. 65 (70-1).

The provisions of §1(18)-(21) are separate and apart from those of §1(9), and a shipper may use the latter to obtain railroad service without regard to provisions of the former; and the mere fact that a sidetrack with which a connection is sought extends to an industry located on another railroad does not make the switch connection or the shipper's track, or both, an extension of the railroad within meaning of §1(18)-21). Although the court in 214 F. Supp. 549 enjoined Norfolk & Western from using a spur track under construction in direction of industrial plant served by New York Central for any purpose other than interchange with Central, the industry's complaint seeking to compel N&W to install a switch connection with that spur (since acquired by the industry) does not involve the questions of convenience and necessity under §1(18)-(21) which were the only issues before the court. Installation sought is a switch connection within §1(9) and may be considered apart from provisions of §1(18)-(21).—Id., pp. 67, 71-2.

17. Conditions—sufficient business to justify construction and maintenance.—[Vols. 1, 6, 15, 16].—When inbound movement of inbound raw materials to complainant's plant averages about 10,000 rail cars a year, and average annual amount of freight charges on outbound and inbound rail shipments is approximately $4,000,000, it is apparent that there will be sufficient business to justify construction and maintenance of switch connection sought.—Union Carbide Corp. v. Norfolk & W. Ry. Co., 323 I.C.C. 65 (73)

18.—Side or spur track previously constructed.—[Vols. 1, 6].—Although complainant's property now adjoins that of Norfolk & Western, owing to injunction against

N&W's use of certain trackage then in vicinity of complainant's plant for any purpose other than interchange with New York Central (the only railroad now serving the plant directly), complainant's traffic line-hauled by N&W must be interchanged with Central, hauled by latter to a point 17 miles west of the plant, and backhauled to it. Complainant has since acquired the spur track involved in the injunction proceeding, and seeks a switch connection to close the gap of 175 feet remaining between its private track and N&W's main line. As the injunction does not foreclose any action under §1(9) by complainant, a shipper, or by the commission, and the connection sought meets requirements of §1(9), installation thereof is ordered.—Union Carbide Corp. v. Norfolk & W. Ry. Co., 323 I.C.C. 65 (66, 73-4).

26. When switch or connection not installed or operated—determination as to safety and practicability and compensation.—[Vol. 1].—In installation of a switch connection, allowance must be made for sufficient distance between the main track and the fouling or clearance point so that cars or other equipment can safely clear both the main and the siding or spur tracks, for, unless proper clearance is provided, the route over the switch connection would not be usable. Therefore a switch connection necessarily includes a switch and track from point of switch to the fouling or clearance point on the spur or siding. Proposed switch connection is reasonably practicable from an operational standpoint and can be installed and operated with safety, as the distance of about 175 feet between defendant's main tracks, which at that point is not a high speed track, and the clearance or fouling point on complainant's private track will provide ample clearance for cars and equipment on both tracks.—Union Carbide Corp. v. Norfolk & W. Ry. Co., 323 I.C.C. 65 (72).

Section 1. (10) "Car service" defined.—[Unchanged. See vol. 9, p. 7284.]

4Amendments, see footnotes, vol. 2, p. 887; historical note, vol. 2, p. 887; vol. 17, p. 13263.

Notes of Decisions

Volume 2—p. 887; Volume 6—p. 4918; Volume 15—p. 11976; Volume 16—p. 12613; Volume 18—p. 14020.

1. Car service defined, generally.—[Vols. 2, 6, 15, 16, 18].—"Car service" as defined in §1(10) connotes the use to which vehicles of transportation are put, not the transportation service rendered, of which cars and locomotives, like tracks and terminals, are the instrumentalities; and the commission has consistently held that "car service," as used in the act, relates to vehicles used in the transportation of property.—Prevention of Rail-Highway Grade-Crossing Accidents, 322 I.C.C. 1 (48)*.

Section 1. (11) Duty to furnish car service; rules and regulations.—[Unchanged. See vol. 9, p. 7284.]

Amendments, see footnotes, vol. 2, p. 889; historical notes, p. 887, vol. 11, p. 9119.

Notes of Decisions

Volume 2—P. 890; Volume 6—p. 4919; Volume 9—p. 7284; Volume 11—p. 9119; Volume 12—p. 10205; Volume 13—p. 10926; Volume 14—p. 11407; Volume 15—p. 11976; Volume 16—p. 12613; Volume 17—p. 13263; Volume 18—p. 14020; Volume 19—p. 15060.

1. Duty to furnish safe and adequate car service.—[Vols. 2, 6, 9, 12, 14, 19].—Under §1(11), it is respondents' duty to furnish adequate car service to the public and to establish reasonable rules and practices with respect thereto. As construction of additional yard-storage facilities at Galveston, Tex., is shown to be impractical, proposed rule providing for holding of export grain cars at points short of that port group during periods of yard congestion, without accrual of demurrage, is justified. Since periods of congestion at Galveston are few, it does not appear that the proposed rule would tend to increase use of rail cars for storage of grain in times of car shortage.—Holding of Loaded Grain Cars—Texas Gulf Ports, Export, 321 I.C.C. 328 (330)*.

See also Clinchfield R. Co. v. Boston & Maine Corp., 28 USC §1337, n. 1.

5. Duty not absolute.—[Vols. 2, 16-18].—In shipper's action for mandatory injunction to require railroad to provide certain service beyond that plaintiff currently receives, and alleging that railroad failed and refused to deliver and pick up coal cars as needed and requested by plaintiff, a shipper's right to as many cars as are needed is not an absolute right; the law exacts only what is reasonable of the railroad under all of the existing circumstances.—Elgin Coal Co. v. Louisville & N. R. Co., 277 F. Supp. 247 (250)*.

Size, Suitability, and Time Element

23. Time in which cars furnished.—[Vol. 2].—Defendant's refusal, in purported compliance with Revised Service Order No. 939, to permit complainant to load shipments destined for Pontiac, Mich., into Southern Pacific cars unloaded earlier same day at its Detroit plant did not deprive complainant of adequate car service and transportation in violation of §1. Defendant furnished its own system cars of type ordered as soon as they were available, and resulting delays of 4 1/2 hours and 1 day in complainant's loading operations are not shown to have been unreasonable. Complaint dismissed.—Allen Industries, Inc. v. Grand Trunk Western R. Co., 319 I.C.C. 721 (723, 724).

Ownership of Cars Supplied

37. Carrier's right to use own equipment.—[Vols. 2, 6].—Defendant's refusal to permit complainant to load a shipment destined to Pontiac, Mich., into a foreign-line car which complainant had unloaded earlier the same day at its detroit plant did not deprive it of adequate car service in violation of §1; defendant, within a reasonable time, furnished one of its own system cars, and it is a reasonable practice to provide system cars rather than those of another carrier for local movements.—Allen Industries, Inc. v. Grand Trunk Western R. Co., 319 I.C.C. 721 (722,724).

Remedies

83. Jurisdiction of courts.—[Vols. 2, 9].—See Elgin Coal Co. v. Louisville & N. R. Co., §23, n. 2.

84. Jurisdiction of commission.—[Vols. 2, 9, 12, 16].—Under the doctrine of primary jurisdiction, the question of reasonableness of car service provided by defendant railroad to plaintiff coal shipper is a matter for the initial determination of the Commission. Therefore, resort to the commission is prerequisite to shipper's maintenance of suit in court for mandatory injunction to require the railroad to provide car service beyond that which the plaintiff presently receives. Lawsuit dismissed.—Elgin Coal Co. v. Louisville & N. R. Co., 277 F. Supp. 247 (250)*.

Section 1. (12) Distribution of coal cars; failure to prorate; penalty.—[Unchanged. See vol. 9, p. 7289.]

Historical notes, see vol. 2, p. 887.

Notes of Decisions

Volume 2—p. 925; Volume 6—p. 9425; Volume 9—p. 7289.

Regulations of the Commission

32 FR 10794, July 22, 1967, Part 107a: Administrative Collection of Enforcement Claims, new Part 107a, adopting regulations published in 4 CFR Parts 101 through 105, added, effective Aug. 1, 1967.

Section 1. (13) Rules and regulations as to car service to be filed, etc.—[Unchanged. See vol. 9, p. 7290.]

Amendments, see footnotes, vol. 2, p. 950; historical notes, vol. 2, p. 887.

Notes of Decisions

Volume 2—p. 950; Volume 6—p. 4927; Volume 14—p. 11408; Volume 18—p. 14022.

Section 1. (14)(a) Establishment by commission of rules, etc., as to car service.—[Unchanged except by addition thereto of the two sentences, below, by act of May 26, 1966, Pub. Law 89-430, §2, 80 Stat. 168. See vol. 11, p. 9120.]

***In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation shall be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest.

Amendments, see footnotes, vol. 2, p. 951, vol. 11, p. 9120; historical notes, vol. 2, p. 887, vol. 12, p. 10206.

Historical Note

The commission recommends that §1(14) be amended to authorize the commission to determine whether per diem charges for use of freight cars shall be computed on basis of cost of ownership and maintenance, value of use, or on such other basis or combination of bases as will, in its judgment, provide reasonable compensation to the owner, contribute to sound car service practices, and encourage acquisition of an adequate national fleet of freight cars.—Annual Report, 1962, p. 198; renewed, Annual Report, 1963, p. 17; Annual Report, 1964, p. 63; Annual Report, 1965, pp. 50, 116.

Notes of Decisions

Volume 2—p. 951; Volume 6—p. 4928; Volume 9—p. 7290; Volume 11—p. 9121; Volume 12—p. 10206; Volume 13—p. 10927; Volume 14—p. 11408; Volume 15—p. 11978; Volume 16—p. 12614; Volume 17—p. 13265; Volume 18—p. 14022; Volume 19—p. 15061.

1. Establishment of reasonable car-service rules, regulations, and practices.—[Vols. 2, 6, 9, 11, 13, 14, 17, 18].—Railroads' returns to questionnaire confirm that, despite the nation's economic growth, the national freight car fleet has been reduced by over a quarter of a million cars since 1947, and that recurring car shortages are no longer a local problem or limited to particular types of equipment. For competitive reasons there has been a trend to purchase of specialized, large-capacity cars attractive to individual shippers, but this does not eliminate the need for more conventional types, particularly boxcars. Managerial discretion has failed to solve the problem of the chronic freight car shortage, and the service order technique does not add cars; a different and more comprehensive approach to ownership and control of freight car supply is necessary if shippers are to have the adequate national transportation system envisioned by the national policy. All respondents will therefore be called on for additional information with a view to determining what rules, if any, can or may be prescribed.—Investigation of Adequacy of Freight Car Ownership, 323 I.C.C. 48 (49-52, 60).

2. Compensation for equipment not owned by using carrier.—[Vols. 2, 6, 9, 11, 13-15, 18].—See also Clinchfield R. Co. v. Boston & Maine Corp., 28 USC §1337, n. 1.

Complainant short-line is not entitled as a line-haul carrier to any free-time allowance on freight cars used by it, since it participates in divisions of joint rates which include compensation for hire of cars; if short lines' earnings are insufficient for full payment of car-hire costs, the remedy lies in increasing rates or readjusting divisions. [284 US 80.] Complainant's car-hire costs were considered in proceeding which prescribed increased divisions for it, and neither §1(14)(a) nor findings in prior cases involving car-hire apportionment support contention that it is entitled to free-time allowance regardless of adequacy of those divisions or what they include.—New Jersey & N.Y. R. Co. v. Erie R. Co., 318 I.C.C. 555 (561, 562-3).

4. —Per diem basis.—[Vols. 2, 6, 11-16, 18, 19].—New multilevel system of per diem charges, instituted by AAR to become effective for all railroads on Jan. 1, 1964, is based generally on the concept of adequate compensation to owners of cars purchased, on the basis of cost; however, compliance with the plan is voluntary.—Annual Report, 1963, p. 17; replacing the standard rate of $2.88, the new system is keyed to the value of each type of freight car. Charges are on a graduated scale of $2.16 for older cars to $7.74 for newer and more expensive units.—Annual Report, 1964, p. 37.

Although voluntary car-hire apportionment arrangements have been made, where railroads have sought orders requiring such apportionment the commission has held that they should make car-hire settlements in accordance with per diem rules, without free-time allowance on railroad-owned freight cars used in line-haul service.—New Jersey & N.Y. R. Co. v. Erie R. Co., 318 I.C.C. 555 (561, 562-3).

Section 1. (14)(b) Contracts for agreements for protective service.—[Unchanged. See vol. 11, p. 9121.]

Amendment, see footnotes, vol. 11, p. 9121.

Notes of Decisions

Volume 11—p. 9122; Volume 12—p. 10207; Volume 15—p. 11979.

15. Protective service contracts.—[Vols. 11, 12, 15].—In accordance with regulations prescribed in 318 ICC 111, protective-service contracts which may be approved unconditionally should require that charges shall be the cost to the carlines or other companies performing such services and may include a reasonable profit not exceeding 6 percent of book value of property, less depreciation, plus a reasonable allowance for working capital, and should also provide for adjustments of the interim charges as soon as practicable after end of each calendar year. Contracts listed in appendix 1, between railroads and railroad-controlled carline companies, include such requirements and are unconditionally approved. However, those listed in appendix 2, between railroads and independent protective-service companies, include those provisions in part only, or not at all; those contracts are therefore approved subject to condition that new or supplemental contracts be submitted for approval from time to time to revise specified unit charges and prices to basis of current costs.—Contracts for Protective Services, 321 I.C.C. 758 (761-2)*.

That none of charges for mechanical refrigeration services in railroads' protective service contracts with proprietary car-line companies or unaffiliated companies cover cost of the service cannot be attributed to experimental nature of that service after 9 years' experience. Though the car-line companies' total operations are profitable, losses from protective service should not be absorbed by profits from their car-service operations; and to avoid burdening one protective service with helping to support another, charges for each service should cover costs thereof. However, to relieve the railroads from operating under unapproved contracts (approval of numerous contracts having been withheld because of lack of information as to compensativeness of charges for mechanical refrigeration service), all outstanding unapproved contracts are approved on condition that new or superseding contracts in compliance with regulations prescribed be filed within 120 days from service of report and order.—Contracts for Protective Services, 318 I.C.C. 111 (123-6, 127)*.

Regulations prescribed provide for modification of charges for protective services to meet current conditions without first obtaining commission approval, thus avoiding a multiplicity of contracts. Under those rules, charges for each service should yield at least the cost of performing it, taking into consideration prior costs and forseeable future expenses, and may be based either on cost of performance for the particular railroad or express company, or on average cost of performing the service for all such carriers served; and since the car-line companies, though railroad subsidiaries, require funds for such purposes as replacement or expansion of equipment, a maximum profit of 6 percent is consistent with public interest; but unit charges to nonproprietary companies higher than the proprietary companies are prohibited as not justified on any sound cost basis.—Id., pp. 124 126-7.

Regulations of the Commission

27 FR 9406, Sept. 21, 1962, Part 105: Contracts for Protective Services, regulations amended by adding thereto §105.2 Content of contracts, effective Oct. 29, 1962.

Section 1. (15) Powers of Commission in case of emergency.—[Unchanged. See Vol. 9, p. 7292.]

Amendments, see footnotes, vol. 2, p. 957; historical notes, vol. 2, p. 887, vol. 9, p. 7292, vol. 11, p. 9124, vol. 12, p. 10207, vol. 13, p. 10928, vol. 14, p. 11410, vol. 15, p. 11980, vol. 17, p. 13265.

Historical Note

27 FR 7762, Aug. 7, 1962: Administrative Order DTA 3—Appointment and Operation of Industry Advisory Committees (17 FR 3604), revoked, effective on date of order.

Notes of Decisions

Volume 2—p. 958; Volume 6—p. 4932; Volume 9—p. 7293; Volume 12—p. 10208; Volume 13—p. 10928; Volume 14—p. 11411; Volume 15—p. 11981; Volume 16—p. 12616; Volume 17—p. 13265; Volume 18—p. 14023; Volume 19—p. 15062.

2. Interpretation.—[Vols. 2, 6, 9, 13, 15-17].—Although customary practice of the commission is to issue rules and regulations after a hearing at which interested carriers may present their views, §1(15) authorizes it to dispense with a preliminary hearing whenever it is of the "opinion that *** emergency requiring immediate action exists ***." Thus, when the commission issued Car Service No. 947 under §1(15), based on its "opinion" that an emergency existed and railroad failed to contest the order's validity until after commencement of action against it in single-judge district court for penalties for alleged violations thereof, the trial judge erred in entertaining railroad's challenge to validity of the order as a defense to the suit against it. In view of provisions of the act permitting an affected carrier to request commission rehearing and reconsideration and statutory provisions governing judicial review of commission orders, district court was without authority to consider the challenge to merits of the order. Reversed and remanded with instructions.—United States v. Southern Ry. Co., 380 F. 2d 49 (51-5, 57)*.

Although in issuing Second Rev. S.O. No. 939 the Safety and Service Board did not state facts on which its finding of an existing emergency was based, there is nothing in the statute which requires such a statement. Only test for exercising the power to issue such orders, as outlined by Congress, was "opinion" of the commission as to existence, at the time, of type of emergency contemplated by the statute. An emergency consists of a combination of circumstances which calls for immediate action; and decision in 141 F. Supp. 576, also involving challenge of a service order, analyzes the difference between an "emergency" in the legislative sense and the same work when viewed from the commonplace meaning. Thus, fact that the problem of an acute car shortage which the challenged service order attempted to solve may have been of long standing, gives no support to a finding that an emergency did not exist at the time the order was issued.—United States v. Southern Ry. Co., 364 F. 2d 86 (93-4).

3. Presumption of existence of emergency.—[Vols. 2, 13, 17].—In action to recover penalties in connection with railroad's alleged violations of Second Rev. S.O. No. 939, the presumption that the commission properly performed its official function gives complete validity to its declaration of an emergency, in absence of clear evidence to the contrary. In addition, Congress intended that the commission's opinion that an emergency existed be controlling in absence of proof that such opinion was motivated by fraud, wrongdoing or capriciousness. Thus, lower court's holding that an emergency could not exist over an extended period of time does not follow the law on the subject; a judge is not permitted to exchange his judgment for that of the Commission.—United States v. Southern Ry. Co., 364 F. 2d 86 (93-4).

5. Service orders.—[Vols. 2, 12-19].—District judge erred in ruling that the commission's Car Service Order No. 947, issued under §1(15), was open to attack in action against railroad for civil penalties for alleged violations thereof and in granting railroad's motion for summary judgment based on its claimed invalidity of the order. While §1(15) does not afford the commission *carte blanche* to issue permanent and sweeping regulations, it does authorize it to dispense with a preliminary hearing whereever in its "opinion" an emergency exists. Railroad did not contest the order's validity until after commencement of instant action and, considering provisions of the act for commission rehearing and reconsideration and statutory provisions governing judicial review of commission orders, single-judge court had no authority to consider railroad's challenge to the merits of the order. Reversed and remanded with instructions.—United States v. Southern Ry. Co., 380 F. 2d 49 (53-6)*.

When the only record of the commission before the lower court, in action against railroad to recover penalties for alleged violations of Second Rev. S.O. No. 939, was the service order itself which contained safety and Service Board's summary findings, statement of its opinion as to existence of an emergency and the order based thereon, record fails to support the court's conclusion that the order was invalid. It is well established that the commission's findings may not be challenged on review in the absence of evidence on which they are made, and complainant may not free itself of that restriction by attempting to introduce additional evidence on the hearing.—United States v. Southern Ry. Co., 364 F. 2d 86 (93, 94).

Congress recognized the experience of the commission's specially trained experts and granted them special power in connection with issuance of railroad car special orders and with reference to declaring an emergency. Only test for exercise of that power, outlined by Congress, was the "opinion" of the commission as to existence, at that time, of the type of emergency contemplated by the law; there is no statutory requirement that facts which form the basis of declaration of an existing emergency be stated. Presumption that the commission properly performed its official function gives complete validity to such declaration of an emergency, in absence of evidence to the contrary. Congress intended that the opinion of the commission be controlling in absence of proof that it was motivated by fraud, wrong-doing or capriciousness; a judge may not exchange his judgment for that of the commission.—Id., pp. 93-4.

Moreover, language of challenged service order does not support lower court's view that it was too vague for enforcement because phrase "used only for loading" in two paragraphs thereof was so ambiguous and vague that men of common intelligence could differ as to its meaning and application. The railroad, being a common carrier, was familiar with language used in the transportation field and, also, being a party responsible for the then existing (but ineffective) carrier rules for which the service order was intended as a substitute, is presumed to be familiar with their requirements. The service order directed each railroad to observe, enforce and obey the rules and regulations therein with respect to its car service; and there can be no doubt that it covered transportation of loaded rail cars and the act of placing cars for loading by the railroads. Lower court's judgment set aside and cause remanded with directions to allow appellant's motion for summary judgment as to issues decided.—Id., pp. 95-6.

In ruling on defendant's motion to dissolve injunction against its unlawful operations over challenged extension of its line to coal mine site until it obtains necessary authority from the commission, the court assumes validity of Car Service Order which authorizes defendant to operate over the extension pending the commission's final determination of its application for certificate authorizing construction thereof, and which defendant claims is equivalent to a "temporary certificate of public convenience and necessity." While this is a question of first impression, and apparently the Safety and Service Board has never before entered a service order where an application for authority is pending and an outstanding court injunction prohibits the activity purportedly authorized by the service order, such order is found not to be a temporary certificate of convenience and necessity. Sections of the act dealing with such certificates, §1(18)-(20), do not provide for "temporary certificates"; and, in view of the specific provisions of §1(20), to call the service order a "temporary certificate" validating operation is incorrect; motion denied.—Chigago & E.I. R. Co. v. Illinois Central R. Co., 261 F. Supp. 289 (307-8).

See also Western Maryland Ry. Co. Case, §6(7), n. 263.

Although the commission has attempted to alleviate the car-supply problem and improve utilization of the freight car fleet through issuance of service orders requiring prompt handling of cars by carriers, return of certain specialized ownerships to owning lines, restricting loading of certain cars to specified areas, reducing free time and imposing increased demurrage charges for car detention by shippers and receivers,

restricting light loading and circuitous routing, etc., the service order technique does not add cars. It simply requires all shippers to share in the existing freight car poverty, and is not an adequate solution to the problem of recurring car shortages due to inadequate ownership in more than one category throughout the country. All respondents will be called on for additional information to permit determination of what rules, if any, can or may be prescribed to relieve the chronic freight car shortage.—Investigation of Adequacy of Freight Car Ownership, 323 I.C.C. 48 (49, 60).

Since Revised Service Order No. 939, which was designed to relieve a shortage of longer boxcars by expediting their return to the owning carriers, contains no qualification as to distance, and under a literal interpretation thereof a movement over defendent's line from Detroit to Pontiac, Mich., could be considered "in the direction of the owner," defendant would not be in violation of that order if it had allowed complainant to load a shipment for Pontiac into a Southern Pacific car unloaded at its Detroit plant earlier the same day. That order, however, does not require defendant to grant such permission if the purpose of the order would, in its managerial judgment, be best served by provision of its own system cars for such local movements. While defendant may not thereby deprive a shipper of adequate car service and transportation in violation of §1, the delays complained of are not shown to have been of such nature. Complaint dismissed—Allen Industries, Inc. v. Grand Trunk Western R. Co., 319 I.C.C. 721 (723, 724).

Service Order No. 68, which suspended tariff provisions permitting carriers to charge on basis of car ordered when for their convenience a longer car was furnished, and had effect of rebutting the presumption of unreasonableness arising under tariff circular rule 66, was issued to prevent wasteful use of cars during a national emergency and has no bearing on reasonableness of charges at a time when no such order is in effect.—United States v. Atlantic Coast Line R. Co., 318 I.C.C. 869 (871-2).

Regulations of the Commission

27 FR 3235, Apr. 5, 1962, Part 95: Car Service, §95.938, Service Order 938, Amdt.4, Annulment of New York Central R. Co. Embargo, Extends expiration date of S.O. 938 until June 30, 1962.

27 FR 4965, May 26, 1962, Part 95: Car Service, §95.939, Service Order 939, Utilization of fifty-foot long or longer plain box cars and plain box cars forty-foot long or longer with side-door openings eight-foot wide or wider, effective May 27, 1962.

27 FR 5141, June 1, 1962, Part 95: Car Service, §95.939, S.O. No. 939 corrected.

27 FR 5399, June 7, 1962, Part 95: Car Service, §95.939, Rev. S.O. No. 939 vacates and sets aside Corrected S.O. 939, effective day after date of order.

27 FR 12718, Dec. 22, 1962, Part 95: Car Service, §95.939, Rev. S.O. 939, extends expiration date, effective Dec. 31, 1962.

27 FR 6234, June 30, 1962, Part 95: Car Service, Sixth Rev. S.O. 95, §95.95 Appointment of refrigerator car agent, vacates and supersedes Fifth Rev. S.O. 95, effective July 1, 1962.

27 FR 6234, June 30, 1962, Part 95: Car Service §95.928 Indiana Harbor Belt R. Co. authority to operate over certain trackage, S.O. 928, Amdt. 7 extends expiration date of S.O. 928, effective June 30, 1962.

27 FR 6234, June 30, 1962, Part 95: Car Service, §95.930 Chicago, M., St. P. & P. R. Co. authority to operate over certain trackage, S.O. 930, Amdt. 7 extends expiration date of S.O. 930, effective June 30, 1962.

27 FR 6235, June 30, 1962, Part 95: Car Service, §95.940 Chicago, M., St. P. & P. R. Co. authorized to operate over certain trackage, effective 2 days after date of order.

27 FR 12718, Dec. 22, 1962, Part 95: Car Service, §95.939, Rev. S.O. 939, Amdt. 1, extends expiration date of Rev. S.O. 939 to Apr. 30, 1963, effective December 31, 1962.

27 FR 12894, Dec. 29, 1962, Part 95: Car Service, §95.940, S.O. 940, Amdt. 1, extends expiration date of S.O. 940 until Dec. 31, 1963, effective Dec. 31, 1962.

28 FR 263, Jan. 10, 1063, Part 95: Car Service, §95.935, S.O. 935 Appointment of Embargo Agent, Amdt. 1, extends expiration date of S.O. 935 to Dec. 31, 1963, effective on date of order.

28 FR 645, Jan. 24, 1963, Part 95: Car Service, §95.941 Service Order 941. Chicago & N. W. Ry. Co. authorized to operate over certain trackage of Chicago N. S. & M. Ry. to Great Lakes, Ill., effective through April 30, 1963.

28 FR 826, Jan. 29, 1963, Part 95: Car Service, §95.942 Feather River Ry. Co. authorized to operate over certain trackage formerly operated by Western Pac. R. Co. through June 30, 1963.

28 FR 1297, Feb. 9, 1963, Part 95: Car Service, §95.939 Utilization of fifty-foot long or longer plain box cars and plain box cars forty-foot long or longer with side door openings eight-foot wide or wider, S.O. 939, Rev. 2 vacates and supersedes Rev. S.O. 939, effective day following date of order.

28 FR 3857, Apr. 19, 1963, Part 95: Car Service, §95.939, 2d Rev. S.O. 939, Amdt. 1, extends expiration date of 2d Rev. S.O. 939 until Dec. 31, 1963, effective Apr. 30, 1963.

28 FR 3917, Apr. 20, 1963, Part 95: Car Service, §95.941 Chicago & N.W. Ry. Authorized to Operate Over Certain Trackage of Chicago N.S. & M. Ry., S.O. 941, Amdt. 1, extends expiration date of S.O. 941, effective Apr. 30, 1963.

28 FR 4618, May 8, 1963, Part 95: Car Service, §95.943 Railroad operating regulations for freight car movement, including appointment of Permit Agent, effective May 8, 1963.

28 FR 5648, June 8, 1963, Part 95: Car Service, §95.943 Railroad operating regulations for freight car movement, Rev. S.O. 943, effective 2 days after date of order.

28 FR 6510, June 25, 1963, Part 95: Car Service, §95.95 Appointment of refrigerator car agent, extends expiration date of Sixth Rev. S.O. No. 95, effective June 30, 1963.

28 FR 6016, June 13, 1963, Part 95: Car Service, §95.942 Feather River Ry. Co. authorized to operate over trackage formerly operated by Western Pac. R., S.O. 942, Amdt. 1, extends expiration date of S.O. 942, effective June 30, 1963.

28 FR 6401, June 21, 1963, Part 95: Car Service, §95.943 Railroad operating regulations for freight car movement, Rev. S.O. 943-A, vacates and sets aside Rev. S.O. 943.

28 FR 7479, July 23, 1963, Part 95: Car Service, §95.944 Distribution and return of empty coal cars. S.O. 944 prescribed, effective 2 days after date of order.

28 FR 11276, Oct. 22, 1963, Part 95: Car Service, §95.945 Railroad operating regulations for freight cars movement. S.O. 945 prescribes regulations with respect to certain types of box car of railroads listed, effective 2 days after date of order.

28 FR 11734, Nov. 2, 1963, Part 95: Car Service §95.945 Railroad operating regulations for freight car movement, Rev. S.O. 945 prescribes regulations respecting certain types of boxcar of railroads listed, effective two days after date of order.

28 FR 11735, Nov. 2, 1963, Part 95: Car Service, §95.946 St. Louis, S.F. & T. Ry. Co. authorized to operate over certain trackage of the Southern Pac. Co. (formerly T&NO), S.O. 946, effective two days after date of order.

28 FR 12127, Nov. 14, 1963, Part 95: Car Service, §95.939, Second Rev. S.O. 939, Amdt. 1-A, Utilization of fifty-foot long or longer plain box cars and plain box cars forty-foot long or longer with side door openings eight-foot wide or wider, vacates and sets aside S.O. 939, effective three days after date of order.

28 FR 12127, Nov. 14, 1963, Part 95: Car Service, §95.944, S.O. 944-A, Distribution and return of empty coal cars, vacates and sets aside S.O. 944, effective three days after date of order.

28 FR 12127, Nov. 14, 1963, Part 95: Car Service, §95.945, S.O. 945-A, Railroad operating regulations for freight car movement, vacates and sets aside S.O. 945, effective three days after date of order.

28 FR 12127, Nov. 14, 1963, Part 95: Car Service, §95.947, S.O. 947 Railroad operating regulations for freight car movement, effective four days after date of order, expiration date July 31, 1964.

28 FR 12256, Nov. 19, 1963, Part 95: Car Service, §95.946, Corrected S.O. 946, St. Louis, S.F. & T. Ry. authorized to operate over certain trackage of Southern Pac. Co. (formerly T&NO); correction.

28 FR 13936, Dec. 21, 1963, Part 95: Car Service, §95.935, S.O. 935, Amdt. 3, Appointment of embargo agent, extends expiration date, effective Dec. 31, 1963.

28 FR 13936, Dec. 21, 1963, Part 95: Car Service, §95.940, S.O. 940, Amdt. 2, Chicago, M., St. P. & P. R. Co. authorized to operate over certain trackage of Fort Dodge, D.M. & S. Ry. Co., extends expiration date, effective Dec. 31, 1963.

28 FR 14225, Dec. 24, 1963, Part 95: Car Service, §95.941, S.O. 941, Amdt. 2, Chicago & N.W. Ry. Co. authorized to operate over certain trackage of Chicago N.S. & M. Ry., extends expiration date, effective Dec. 31, 1963.

28 FR 14225, Dec. 24, 1963, Part 95: Car Service, §95.942, S.O. 942, Amdt. 2, Feather River Ry. Co. authorized to operate over certain trackage formerly operated by Western Pac. R. Co., extends expiration date, effective Dec. 31, 1963.

29 FR 564, Jan. 23, 1964, Part 95: Car Service, §95.948 Service Order 948, Chicago, R. I. & P. R. Co. authorized to operate over trackage of Union Pac. R., effective on date of order.

29 FR 564, Jan. 23, 1964, Part 95: Car Service, §95.949 Service Order 949, Atchison, T. & S.F. Ry. Co. authorized to operate over trackage of Union Pac. R., effective on date of order.

29 FR 565, Jan. 23, 1964, Part 95: Car Service, §95.950 Service Order 950, Chicago, B. & Q. R. authorized to operate over trackage of Union Pac. R., effective on date of order.

29 FR 1386, Jan. 28, 1964, Part 95: Car Service, §95.951 S.O. 951, Union Pac. R. authorized to operate over trackage of Freeport Center, Inc., effective Feb. 1, 1964.

29 FR 1386, Jan. 28, 1964, Part 95: Car Service, §95.952 S.O. 952, Denver & R.G. W. R. authorized to operate over trackage of Freeport Center, Inc., effective Feb. 1, 1964.

29 FR 1570, Jan. 30, 1964, Part 95: Car Service, §95.953 S.O. 953 Free time on unloading box cars at ports, effective Feb. 1, 1964.

29 FR 3230, Mar. 11, 1964, Part 95: Car Service, §95.954 Service Order No. 954, Wellsville, A. & G. R. authorized to operate over certain trackage of New York Central R., effective Mar. 9, 1964.

29 FR 5757, Apr. 30, 1964, Part 95: Car Service, §95.948 Service Order No. 948, amended by substituting new paragraph (d) *Expiration date*, effective April 30, 1964.

29 FR 5757, Apr. 30, 1964, Part 95: Car Service, §95.949 Service Order No. 949, amended by substituting new paragraph (d) *Expiration date*, effective April 30, 1964.

29 FR 5757, Apr. 30, 1964, Part 95: Car Service, §95.950 Service Order No. 950, amended by substituting new paragraph (d) *Expiration date*, effective April 30, 1964.

29 FR 6014, May 7, 1964, Part 95: Car Service, §95.947 Railroad operating regulations for freight car movement, S.O. 947, Amd't 1, suspends provisions during two weeks' period prior to coal miners' vacation (as to coal billed during that period), effective June 15, 1964, expires July 25, 1964.

29 FR 7425, June 9, 1964, Part 95: Car Service, §95.946 Revised Service Order 946. St. Louis-S.F. Ry. Co. authorized to operate over certain trackage of Southern Pac. Co. (formerly T&NO), effective 2 days after date of order.

29 FR 8419, July 3, 1964, Part 95: Car Service, §95.95 Service order 95, Amdt. 2, Appointment of refrigerator car agent, extends expiration date of S.O. 95 to June 30, 1965.

29 FR 8419, July 3, 1964, Part 95: Car Service, §95.941 Service Order 941, Amdt. 3, Chicago & N.W. Ry. Co. authorized to operate over certain trackage of Chicago N.S. & M. Ry., extends expiration date of S.O. 941 to Dec. 31, 1964.

29 FR 8420, July 3, 1964, Part 95: Car Service, §95.942 Service Order 942, Amdt. 3, Feather River Ry. authorized to operate over certain trackage formerly operated by Western Pac. R., extends expiration date of S.O. 942 to Dec. 31, 1964.

29 FR 8419, July 3, 1964, Part 95: Car Service, §95.951 Service Order 951, Amdt. 1, Union Pac. R. authorized to operate over industrial trackage of Freeport Center, Inc., extends expiration date of S.O. 951 to Dec. 31, 1964.

29 FR 8419, July 3, 1964, Part 95: Car Service, §95.952 Service Order 952, Amdt. 1, Denver & R.G. W. R. authorized to operate over industrial trackage of Freeport Center, Inc., extends expiration date of S.O. 952 to Dec. 31, 1964.

29 FR 9670, July 17, 1964, Part 95: Car Service, §95.947 Railroad operating regulations for freight car movement, S.O. 947, Amdt. 2, extends expiration date of S.O. 947 to Dec. 31, 1964, effective July 31, 1964.

29 FR 10586, July 30, 1964, Part 95: Car Service, §95.954 Weelsville, A. & G. R. authorized to operate over certain trackage of New York Central R., S.O. 954-A, vacates and sets aside S.O. 954 effective July 27, 1964.

29 FR 11273, Aug. 5, 1964, Part 95: Car Service, §95.955 Service Order 955, Canadian Pac. Ry. Co. authorized to operate over certain trackage of St. Johnsbury & L. C. R. pending decision in F. D. Nos. 22829 and 22888, effective 2 days after date of order.

29 FR 15127, Nov. 10, 1964, Part 95: Car Service, §95.956 Service Order 956, utilization of certain plain box cars, effective until Dec. 31, 1964.

29 FR 18062, Dec. 19, 1964, Part 95: Car Service, §95.957 Service Order 957, Missouri-K.T. R. Co. rerouting of traffic; substitute switching service at Mangum and Frederick, Okla. because of certain track and roadbed conditions, effective Dec. 17, 1964.

29 FR 18426, Dec. 25, 1964, Part 95: Car Service, §95.946 St. Louis-S.F. Ry. Co. authorized to operate over certain trackage of Southern Pac. Co., Rev. S.O. 946, Amdt. 1, extends expiration date of Rev. S.O. 946, effective Dec. 31, 1964.

29 FR 18426, Dec. 25, 1964, Part 95: Car Service, §95.948 Chicago, R.I. & P. R. Co. authorized to operate over trackage of Union Pac. R., S.O. 948, Amdt. 2, extends expiration date of S.O. 948, effective Dec. 31, 1964.

29 FR 18427, Dec. 25, 1964, Part 95: Car Service, §95.949 Atchison, T. & S.F. Ry. Co. authorized to operate over trackage of Union Pac. R., S.O. 949, Amdt. 2, extends expiration date of S.O. 949, effective Dec. 31, 1964.

29 FR 18427, Dec. 25, 1964, Part 95: Car Service, §95.950 Chicago, B. & Q. R. Co. authorized to operate over trackage of Union Pac. R., S.O. 950, Amdt. 2, extends expiration date of S.O. 950, effective Dec. 31, 1964.

29 FR 18427, Dec. 25, 1964, Part 95: Car Service, §95.951 Union Pac. R. authorized to operate over industrial trackage of Freeport Center, Inc., S.O. 951, Amdt. 2, extends expiration date of S.O. 951, effective Dec. 31, 1964.

29 FR 18427, Dec. 25, 1964, Part 95: Car Service, §95.952 Denver & R.G. W. R. authorized to operate over industrial trackage of Freeport Center, Inc., S.O. 952, Amdt. 2, extends expiration date of S.O. 952, effective Dec. 31, 1964.

30 FR 2712, March 3, 1965, Part 95: Car Service, §95.958 Service Order 958, Norfolk & W. Ry. Co. authorized to operate over certain trackage of Chesapeake & O. Ry. Co., pending action on its application to acquire that trackage, effective until Dec. 31, 1965.

30 FR 4254, Apr. 1, 1965, Part 95: Car Service, §95.959 Service Order 959, Louisville & N. R. Co. authorized to operate over certain trackage of Illinois Central R. Co. pending disposition of its application to acquire trackage rights thereover, effective until Dec. 31, 1965.

30 FR 5419, Apr. 16, 1965, Part 95: Car Service, §95.960 S.O. No. 960 Chicago, M., St. P. & P. R. Co. authorized to operate over abandoned trackage of Chicago G.W. Ry. Co., pending final disposition of it application to acquire that trackage, effective on date of order.

30 FR 6220, May 4, 1965, Part 95: Car Service, §95.935 Appointment of Embargo Agents. Rev. S.O. 935, effective May 1, 1965 through Dec. 31, 1965.

30 FR 6220, May 4, 1965, Part 95: Car Service, §95.947 Railroad operating regulations for freight car movement. Rev. S.O. 947, effective May 1, 1965 through Dec. 31, 1965.

30 FR 7522, June 9, 1965, Part 195: Car Service, §95.947 Railroad operating regulations for freight car movement. Rev. S.O. 947; Amdt. 1, order suspended as to certain coal shipments, effective July 14, 1965 through July 24, 1965.

30 FR 7945, June 19, 1965, Part 95: Car Service, §95.951 Service Order 951, Amdt. 3, Union Pac. R. Co. authorized to operate over industrial trackage of Freeport Center, Inc., extends expiration date of S.O. 951, effective June 30, 1965.

30 FR 7945, June 19, 1965, Part 95: Car Service, §95.952 Service Order 952, Amdt. 3, Denver & R. G. W. R. authorized to operate over industrial trackage of Freeport Center, Inc., extends expiration date of S.O. 952, effective June 30, 1965.

30 FR 8163, June 25, 1965, Part 95: Car Service, §95.95 Sixth Rev. S.O. 95, Amdt 3, Appointment of refrigerator car agent, extends expiration date of Sixth Rev. S.O. 95, effective June 30, 1965.

30 FR 8163, June 25, 1965, Part 95: Car Service, §95.950 Service Order 950, Amdt. 3, Chicago, B. & Q. R. authorized to operate over trackage of Union Pac. R., extends expiration date of S.O. 950, effective June 30, 1965.

30 FR 8269, June 29, 1965, Part 95: Car Service, §95.946 Rev. S.O. 946, Amdt. 2, extends expiration date of Rev. S.O. 946, effective June 30, 1965.

30 FR 8269, June 29, 1965, Part 95: Car Service, §95.948 Service Order 948, Amdt. 3, extends expiration date of S.O. 948, effective June 30, 1965.

30 FR 8269, June 29, 1965, Part 95: Car Service, §95.949 Service Order 949, Amdt. 3, extends expiration date of S.O. 949, effective June 30, 1965.

30 FR 8523, July 3, 1965, Part 95: Car Service §95.961 Terminal Ry. Alabama State Docks authorized to operate additional lines of railroad in Mobile County, Ala., S.O. No. 961, effective July 1, 1965 through Dec. 31, 1965.

30 FR 8793, July 13, 1965, Part 95: Car Service, §95.962 Service Order No. 962, Brimstone & N. R. Ry. Corp. authorized to operate over certain trackage of Brimstone R. Co., effective on date of order.

30 FR 8968, July 16, 1965, Part 95: Car Service, §95.963 Service Order No. 963, Atchison, T. & S.F. Ry. Co. authorized to operate over trackage of Missouri Pac. R. Co., effective day after date of order.

30 FR 9206, July 23, 1965, Part 95: Car Service, §95.964 Service Order No. 964, Missouri Pac. R. Co. authorized to operate over trackage of St. Louis-S.F. Ry. Co., effective until Dec. 31, 1965.

30 FR 10245, Aug. 18, 1965, Part 95: Car Service, §95.965 Service Order No. 965, Louisville & N. R. authorized to operate over trackage of former St. Louis & O'F. Ry., pending disposition of L&N's purchase application, effective Aug. 16, 1965.

30 FR 12294, Sept. 25, 1965, Part 95: Car Service, §95.966 Service Order No. 966, Northern Pac. Ry. Co. authorized to operate over trackage of Union Pac. R., effective on day after date of order.

30 FR 12294, Sept. 25, 1965, Part 95: Car Service, §95.967 Service Order No. 967, St. Louis-S. F. Ry. Co. authorized to operate over trackage of Missouri Pac. R. Co., effective Sept. 27, 1965.

30 FR 12839, Oct. 8, 1965, Part 95: Car Service, §95.947, Service Order No. 947, 2nd Rev., Railroad operating regulations for freight car movement, effective on date of order.

30 FR 12731, Oct. 6, 1965, Part 95: Car Service, §95.968, Service Order No. 968, Utilization of fifty-foot-long or longer plain boxcars and plain boxcars forty-foot-long or longer with side door openings eight-foot or wider, effective Oct. 4, 1965.

30 FR 13262, Oct. 19, 1965, Part 95: Car Service, §95.935, 2nd Rev. Service Order No. 935, Appointment of Embargo Agents, R. D. Pfahler and H. R. Longhurst, effective on date of order.

30 FR 13542, Oct. 23, 1965, Part 95: Car Service, §95.969, St. Louis-San Francisco Railway Co., Missouri Pacific Railroad Co., and Union Railway Co. authorized joint trackage rights over tracts at Memphis, Tenn., effective Oct. 25, 1965.

30 FR 14853, Dec. 1, 1965, Part 95: Car Service, §95.970, Service Order No. 970, Missouri Pacific R. Co., authority to operate over certain trackage of Saint Louis-S.F. R. Co., effective Nov. 23, 1965.

30 FR 15292, Dec. 10, 1965, Part 95: Car Service, §95.971, Service Order No. 971, Union R. Co., authority to operate over certain trackage of the Pa. R. Co., effective until June 30, 1965.

30 FR 16114, Dec. 28, 1965, Part 95: Car Service, §95.963, Service Order No. 963, amdt. 1, Atchison, T & S. F. Ry. Co., authorized to operate over trackage of the Missouri Pac. R. Co., extends expiration date of S. O. 963 to June 30, 1966, effective, Dec. 31, 1965.

30 FR 16114, Dec. 28, 1965, Part 95: Car Service, §95.958, Service Order No. 958, amdt. 1, Norfolk and W. Ry. Co. authorized to operate over trackage of the Chesapeake and O. Ry. Co., extends expiration date of S. O. 958 to June 30, 1966, effective Dec. 31, 1965.

30 FR 16082, Dec. 24, 1965, Part 95: Car Service, §95.935, 2nd Rev. Service Order No. 935, amdt. 1., appointment of embarge agents, extends expiration date of S. O. 935 to Dec. 31, 1966, effective, Dec. 31, 1965.

30 FR 16082, Dec. 24, 1965, Part 95: Car Service, §95.964, Service Order No. 964, amdt. 1., Missouri Pac. R. Co. authorized to operate over trackage of St. Louis-S.F. Ry. Co. extends expiration date of S. O. 964, to June 30, 1966, effective Dec. 31, 1965.

30 FR 16082, Dec. 24, 1965, Part 95: Car Service §95.965 Service Order 965, amdt. 1., Louisville and N. R. Co., authorized to operate over certain trackage, extends expiration date of S. O. 965 to Jan. 31, 1966, effective Dec. 31, 1965.

30 FR 16005, Dec. 23, 1965, Part 95: Car Service, §95.948, Service Order No. 948, amdt. 4 Chicago, R. I. and Pac. R. Co., authorized to operate over certain trackage, extends expiration date of S. O. 948 to June 30, 1966, effective Dec. 31, 1965.

30 FR 16006, Dec. 23, 1965, Part 95: Car Service, §95.949, Service Order No. 949, amdt. 4, Atchison, T and S. F. Ry. Co., authorized to operate over certain trackage, extends expiration date of S. O. 949 to June 30, 1966, effective Dec. 31, 1965.

30 FR 16006, Dec. 23, 1965, Part 95: Car Service §95.950, Service Order No. 950, amdt 4, Chicago, B & Q R. Co., authorize to operate over certain trackage, extends expiration date of S. O. 950 to Dec. 31, 1966, effective Dec. 31, 1965.

30 FR 16006, Dec. 23, 1965, Part 95: Car Service, §95.953 Service Order No. 953 amdt. 2, Free Time on unloading box cars at ports, extends expiration date of S. O. 953 to Dec. 31, 1966, effective Dec. 31, 1965.

31 FR 125, Jan. 6, 1966, Part 95: Car Service, §95.962, Service Order No. 962, Amdt. 1, Brimstone & N. R. Ry. Corp., authorized to operate over certain trackage of Brimstone R. Co., extends expiration date of S. O. No. 962 (30 FR 8793) to June 30, 1966, effective Dec. 31, 1965.

CONSULT THE TABLE OF CASES WHENEVER A CITATION IS FOLLOWED BY AN ASTERISK

31 FR 710, Jan. 19, 1966, Part 95: Car Service, §95.972, Service Order No. 972, Southern Pac. Co., authorized to operate over trackage of the Kansas City S. Ry. Co., effective date Jan. 17, 1966, expiration date May 31, 1966.

31 FR 1303, Feb. 3, 1966, Part 95: Car Service, §95.973, Service Order 973, R. D. Pfahler, Director, and H. R. Longhurst, Assistant Director, Bureau of Railroad Safety and Service, appointed agents, and vested with authority to issue Car Distribution Directions, effective Jan. 28, 1966, expiration date Dec. 31, 1966.

31 FR 2692, Feb. 12, 1966, Part 95: Car Service, §95.974 Service Order 974 Norfolk S. Ry. Co., authority to operate over certain trackage of Westinghouse Electric Corp., effective through June 30, 1966.

31 FR 3077, Feb. 24, 1966, Part 95: Car Service, §95.972, Service Order 972-A Southern Pac. Co., authorized to operate over certain trackage of Kansas City Ry. Co., vacates and sets aside S. O. 972 (31 FR 710), effective day after date of order.

31 FR 4685, Mar. 19, 1966, Part 95: Car Service, §95.976, S. O. 976 Unloading Boxcars and Covered Hopper Cars at Ports, effective until Dec. 31, 1966.

31 FR 4686, Mar. 19, 1966, Part 95: Car Service, §95.977, S. O. 977, Great Northern Ry. Co., and Northern Pac. Ry. Co., freight car distribution, effective until May 28, 1966.

31 FR 4686, Mar. 19, 1966, Part 95: Car Service, §95.978, S. O. 978, Interstate Commerce Commission Car Service Rules, effective until Dec. 31, 1966.

31 FR 4763, Mar. 19, 1966: 3rd Rev. S. O. 562, Pfahler's I. C. C. Order 201-A, Chicago, M. St. P. & P. R. Co., vacates Pfahler's Order 201, effective Mar. 14, 1966.

31 Fr 4802, Mar. 22, 1966, Part 95: Car Service, §95.975, S. O. 975, Railroad Operating Regulations for Freight Car Movement, effective until Dec. 31, 1966.

31 FR 4803, Mar. 22, 1966, Part 95: Car Service, §95.979, S. O. 979, Demurrage and Detention on Freight Cars, effective until Dec. 1, 1966.

31 FR 4894, Mar. 24, 1966, Part 95: Car Service, §95.966, S. O. 966, Amdt. 1., Northern Pac. Ry. Co., authority to operate over certain trackage of Union Pac. R. Co., entends expiration date of S. O. 966 (30 FR 12294) to Dec. 31, 1966, effective Mar. 31, 1966.

31 FR 5014, Mar. 26, 1966, Part 95, Car Service, §95.953 Free time on unloading boxcars at ports, S. O. 953-A, vacates and sets aside S. O. 953 (29 FR 1570, 18506; 30 FR 16006) effective day after date of order.

31 FR 5196, Mar. 31, 1966, Part 95: Car Service §95.976, 2nd Rev. S.O. 976, Unloading Boxcars and Covered Hopper Cars at Ports, effective until Dec. 31, 1966.

31 FR 5196, Mar. 31, 1966, Part 95: Car Service, §95.979, Rev. S. O. 979, Demurrage and Detention of Freight Cars, effective until Dec. 31, 1966.

31 FR 5197, Mar. 31, 1966, Part 95: Car Service, §95.980, S. O. 980, Substitution of Stock Cars for Boxcars, effective until Oct. 31, 1966.

31 FR 5432, April 6, 1966, Part 95: Car Service §95.973 Appointment of Agents, S. O. 973-A, vacates and sets aside S. O. 973 (31 FR 1303), effective on date of order.

31 FR 5317 Apr. 2, 1966, Part 95: Car Service §95.975, S. O. 975, Railroad operating regulations for freight car movement, revised, effective until Dec. 31, 1966.

31 FR 5318, Apr. 2, 1966, Part 95: Car Service §95.977, S. O. 977, Great Northern Ry. Co., and Northern Pac. Ry. Co., freight car distribution, revised, effective until May 28, 1966.

31 FR 5356, Apr. 5, 1966, Part 95: Car Service §95.981, Service Order 981, R. D. Pfahler, Director, and H. R. Longhust, Assistant Director, Bureau of Railroad Safety and Service, Appointed agents, and vested with authority to issue Car Distribution Directions, expiration date Dec. 31, 1966.

31 FR 5965, Apr. 19, 1966, Part 95: Car Service, §95.976, 2d Rev. S. O. 976 corrected, Unloading Boxcars and Covered Hopper Cars At Ports, effective until Dec. 31, 1966.

31 FR 5966, Apr. 19, 1966, Part 95: Car Service, §95.979, Rev. S. O. 979 corrected, Demurrage and Detention of Freight Cars, effective until Dec. 1, 1966.

31 FR 5966, Apr. 19, 1966, Part 95: Car Service, §95.982, S. O. 982, Substitution of Refrigerator Cars for Boxcars, effective until June 15, 1966.

31 FR 5691, Apr. 13, 1966, Part 95: Car Service, §95,977, 2nd Rev. S. O. 977, Great Northern Ry. Co., and Northern Pac. Ry. Co., freight car distribution, effective until May 28, 1966.

31 FR 6547, Apr. 30, 1966, Part 95: Car Service, §95.979, 2nd Rev. S. O. 979, Demurrage and Detention of Freight Cars, effective until Dec. 1, 1966.

31 FR 8816, June 24, 1966, Part 95: Car Service, §95.983, freight car distribution, S. O. 983-A, vacates and sets aside S. O. 983 (31 FR 6060, 7469) effective June 21, 1966.

31 FR 8816, June 24, 1966, Part 95: Car Service, §95.985, freight car distribution, Rev. S. O. 985-A, vacates and sets aside S. O. 985 (31 FR 7468, 8064), effective June 21, 1966.

31 FR 8816, June 24, 1966, Part 95: Car Service, §95.986, S. O. 986, Chicago & N. W. Ry. Co., et al., freight car distribution, effective until July 31, 1966.

31 FR 8954, June 29, 1966, Part 95: Car Service, §95.958, S. O. 958, Amdt. 2., Norfolk & W. Ry. Co., authorized to operate over certain trackage of Chesapeake & O. Ry. Co., extends expiration date of S. O. 958 (30 FR 2712, 16114) to Dec. 31, 1966, effective June 30, 1966.

31 FR 8872, June 25, 1966, Part 95: Car Service, §95.948, S. O. 948, amdt. 5, Chicago, R. I. and Pac. R. Co., authorize to operate over certain trackage of Union Pac. R., extends expiration date S. O. 948 (29 FR 564, 5757, 18426; 30 FR 8269, 16005) to Dec. 31, 1966, effective June 30, 1966.

31 FR 8872, June 25, 1966, Part 95: Car Service, §95.949, S. O. 949, amdt 5, Atchison T. and S. F. Ry. Co., authorize to operate over certain trackage of Union Pac. R., extends expiration date S. O. 949 (29 FR 564, 5757, 18427; 30 FR 8269, 16006) to Dec. 31, 1966, effective June 30, 1966.

31 FR 9084, July 1, 1966, Part 95: Car Service, §95.964, S. O. 964, Admt. 2., Missouri Pac. R. Co. authorized to operate over trackage of St. Louis-S.F. Ry. Co., extends expiration date of S. O. 964 (30 FR 16082) to Aug. 31, 1966, effective on date of order.

31 FR 9085, July 1, 1966, Part 95: Car Service, §95.970 S. O. 970, Admt., 1., Missouri Pac. R. Co., authorized to operate over trackage of St. Louis-S.F. R. Co., extends expiration date of S. O. 970 (30 FR 14853) to Aug. 31, 1966, effective on date of order.

31 FR 6832, May 7, 1966, Part 95: Car Service, 3d Rev. S. O. 977-A, Corrected (31 Fr 6059) freight car distribution, vacates S. O. 977, effective May 5, 1966.

31 FR 7468, May 24, 1966, Part 95: Car Service, §95.985, S. O. 985, Atchison, T. & S.F. Ry. Co., et. al., freight car distribution, effective until July 3, 1966.

31 FR 7469, May 24, 1966, Part 95: Car Service §95.983, S. O. 983 Amdt. 1, Southern Pac. Co., and Union Pac. R. Co., freight car distribution, extends expiration date S. O. 983 (31 FR 6060) to July 3, 1966, effective May 28, 1966.

31 FR 8064, June 8, 1966, Part 95: Car Service §95.985, Rev. S. O. 985, Atchison T. and S. F., Ry. Co., et. al., freight car distribution, effective until July 3, 1966.

31 FR 7806, June 2, 1966, Part 95: Car Service, §95.975, 2d Rev. S. O. 975, Amdt. 1, Railroad Operating Regulations for Freight Car Movement, revised S. O. 975, effective until July 22, 1966.

31 FR 10274, July 29, 1966, Part 95: Car Service, §95.986. S. O. 986 amdt. 1., freight car distribution, extends expiration date S. O. 986 (31 FR 8816) to Aug. 14, 1966, effective July 31, 1966.

31 FR 6058, April 20, 1966, Part 95: Car Service §95.975, 2d Rev. S. O. 975, Railroad Operating Regulations for Freight Car Movement, effective until Dec. 31, 1966.

31 FR 6059, April 20, 1966, Part 95: Car Service §95.977, 3d Rev. S. O. 977, Great Northern Ry. Co. and the Northern Pac. Ry. Co., freight car distribution, effective until May 28, 1966.

31 FR 6060, April 20, 1966, Part 95: Car Service §95.983 S. O. 983, Southern Pac. Co. and the Union Pac. R. Co., freight car distribution, effective until May 28, 1966.

31 FR 6061, April 20, 1966, Part 95: Car Service, §95.984 S. O. 984 All Railroads, Regulation for Return of Covered Hopper Cars, effective until Dec. 31, 1966.

31 FR 10923, Aug. 17, 1966, Part 95: §95.987, S. O. 987, Northern Pac. Ry. Co., Great Northern Ry. Co., See Line R. Co., freight Car distribution, effective until Aug. 31, 1966.

31 FR 11231, Aug. 25, 1966, Part 95: §95.987, S. O. 987, Corrected, freight car distribution, effective on date of order.

31 FR 14878, Nov. 24, 1966, Part 95: Car Service, §95.979, 2nd Rev. S. O. 979, amdt. 1, Demurrage and Detention of Freight Cars, effective Dec. 1, 1966.

31 FR 15488, Dec. 8, 1966, Part 95: Car Service, §95.988, S. O. 988, Union Pacific Railroad Co. authorized to operate over Trackage of Southern Pacific Co., effective date Dec. 8, 1966, expiration date March 31, 1967.

31 FR 15580, Dec. 10, 1966, Part 95: Car Service, §95.989, S. O. 989, Illinois Central Railroad Co. authorized to operate over Trackage in Jefferson County, Ill., effective Dec. 12, 1966, expiration date March 31, 1967.

31 FR 16363, December 22, 1966, Part 95: Car Service, §95.975, 2d Rev. S. O. 975, amdt. 2, Railroad Operating Regulations for Freight Car Movement, revised S. O. 975, effective until June 30, 1967.

31 FR 16363, December 22, 1966, Part 95: Car Service §95.976, 2d Rev. S. O. 976, amdt. 1, corrected, Unloading Boxcars and Covered Hopper Cars at Ports, amended, expiration date June 30, 1967, effective date of amendment December 31, 1966.

31 FR 16363, December 22, 1966, Part 95: Car Service §95.981, Service Order 981, amdt. 1, (31 FR 5356) appointment of agents, and vested with authority to issue Car Distribution Directions, amended expiration date until June 30, 1967, effective December 31, 1966.

32 FR 4499, March 24, 1967, Part 95: Car Service, §95.988 Service Order 988, Amdt. 1, extends expiration date of S. O. 988, effective March 31, 1967.

NOTE: For recodification, see 49 CFR, Editorial Note, 32 FR 5606, April 5, 1967.

32 FR 5931, April 13, 1967, Part 195 [formerly Part 95]; Car Service, §195.935 Service Order No. 935, appointment of embargo agents, expires Dec. 31, 1967.

32 FR 6033, April 15, 1967, Part 195 [formerly Part 95]: Car Service, §195.981 Service Order No. 981, boxcar distribution directions, appointment of agents, expires Dec. 31, 1967.

32 FR 6780, May 3, 1967, Part 195 [formerly Part 95]; Car Service, §195.988 Service Order 988, Amdt. 2, extends expiration date of S.O. 988 until May 31, 1967.

32 FR 8037, June 3, 1967, Part 195 [former 95]: Car Service, §195.992 Service Order 992, Union Pac. R. Co. authority to operate over trackage of Great Northern Ry., expiration date, Dec. 31, 1967.

32 FR 8038, June 3, 1967, Part 195 [formerly 95]: Car Service, §195.993 Service Order 993, Louisville & N. R. Co. authority to operate over trackage of Frankfort & C. R. Co., expiration date, Dec. 31, 1967.

32 FR 8718, June 17, 1967, Part 195: Car Service, §195.976 Unloading boxcars and covered hopper cars at ports, 2nd Rev. S.O. 976-A vacates and sets aside S.O. 976, effective June 30, 1967.

32 FR 8718, June 17, 1967, Part 195: Car Service, §195.979 Demurrage and detention of freight cars, 2nd Rev. S.O. 979-A vacates and sets aside S.O. 979, effective July 1, 1967.

32 FR 8678, June 16, 1967, Part 195: Car Service, §195.966 Service Order 966, Amdt. 3, extends expiration date of S.O. 966, effective June 30, 1967.

32 FR 8678, June 16, 1967, Part 195: Car Service, §195.975 Service Order 975 Railroad operating regulations for freight car movement. 2nd Rev. S.O. 975, Amdt. 3, suspends S.O. 975 as to coal billed during the 2 weeks prior to miners' vacation. Amendment expires July, 24, 1967.

32 FR 9230, June 29, 1967, Part 195: Car Service, §195.948 Service Order No. 948, expiration date extended by S.O. 948; Amdt. 7, effective June 30, 1967.

32 FR 9230, June 29, 1967, Part 195: Car Service, §195.949 Service Order No. 949, expiration date extended by S.O. 949; Amdt. 7, effective June 30, 1967.

32 FR 9231, June 29, 1967, Part 195: Car Service, §195.950 Service Order No. 950, expiration date extended by S.O. 950; Amdt. 6, effective June 30, 1967.

32 FR 9689, July 4, 1967, Part 195: Car Service, §195.975 Service Order No. 975, expiration date extended by 2nd Rev. S.O. 975; Amdt. 4, effective June 30, 1967.

32 FR 10515, July 18, 1967, Part 195: Car Service, §195.990 Service Order No. 990, vacated and set aside by S.O. 990-A, effective on date of order.

32 FR 11277, Aug. 3, 1967, Part 195: Car Service, §195.949 Service Order No. 949, vacated and set aside by S.O. 949-A, effective on date of order.

32 FR 14156, Oct. 12, 1967, Part 195 [formerly Part 95]: Car Service, §195.996 Service Order No. 996. Southern Pac. Co. authorized to operate over trackage of Missouri Pac. R. Co., effective Oct. 6, 1967.

32 FR 14601, Oct. 20, 1967, Part 195: Car Service, §195.966, Service Order 966 vacated and set aside by S.O. 966-A, effective on date of order.

32 FR 14755, Oct. 25, 1967, Part 195: Car Service, §195.996, Rev. S.O. 996 Southern Pac. Co. authorized to operate over Missouri Pac. R. Co. trackage, revised order effective on date thereof.

32 FR 14953, Oct. 28, 1967, Part 195: Car Service, §195.997 Service Order No. 997. Louisville & N. R. Co. authorized to operate over trackage of Seaboard Coast Line R., effective on date of order.

NOTE: For Republication and Redesignations of Regulations, see 32 FR 20003, Dec. 20, 1967.

32 FR 20817, Dec. 27, 1967, Part 1033 [former Part 195, formerly Part 95]: Car Service, §1033.995 Service Order No. 995 (Appointment of Agents), S.O. 995, Amdt. 1, extends expiration date of S.O. 995, effective Dec. 31, 1967.

32 FR 20861, Dec. 28, 1967, Part 1033: Car Service, §1033.948 Service Order No. 948 (Chicago, R.I. & P. R., operation over trackage of Union Pac. R.), S.O. 948, Amdt. 8, extends expiration date of S.O. 948, effective Dec. 31, 1967.

32 FR 20862, Dec. 28, 1967, Part 1033: Car Service, §1033.950 Service Order 950 (Chicago, B. & Q. R., operation over trackage of Union Pac. R.), S.O. 950, Amdt. 7, extends expiration date of S.O. 950, effective Dec. 31, 1967.

32 FR 20862, Dec. 28, 1967, Part 1033: Car Service, §1033.992 Service Order 992 (Union Pac. R., operation over tracks of Great Northern Ry.) S.O. 992, Amdt. 1, extends expiration date of S.O. 992, effective Dec. 31, 1967.

33 FR 3282, Feb. 22, 1968, Part 1033: Car Service, §1033.998 Service Order No. 998. Peoria & Pekin Union Ry. authorized to operate over trackage of Chicago & N.W. Ry. in order to serve bulk warehouse facility, expires June 30, 1968.

33 FR 4805, March 21, 1968, Part 1033: Car Service, §1033.992, Service Order 992, Amdt. 2, extends expiration date of S. O. No. 992 (Union Pac. R. Co. authorized to operate over trackage of Great Northern Ry.), effective March 31, 1968.

33 FR 5266, Apr. 2, 1968, Part 1033: Car Service, §1033.950 Service Order 950, Amdt. 8, extends expiration date of S.O. 950 (Chicago, B. & Q. R. Co. authorized to operate over trackage of Union Pac. R.) until June 30, 1968.

33 FR 7495, May 21, 1968, Part 1033: Car Service, §1033.999 Service Order 999. Missouri -K.-T. R. authorized to operate over trackage of Fort Worth & D. Ry. because of unsafe condition of track and roadbed, expires July 31, 1968.

33 FR 9295, June 22, 1968, Part 1033: Car Service, §1033.998 Service Order 998, Amdt. 1, extends expiration date of S.O. 998 (Peoria & P. U. Ry. authorized to operate over trackage of Chicago & N.W. Ry.) until Sept. 30, 1968, effective June 30, 1968.

27 FR 4966, May 26, 1962, Part 97: Routing of Traffic, §97.562 Rerouting of traffic—appointment of agent, paragraphs (a) and (d) of Rev. Service Order 562 amended, effective 3 days after date of order.

28 FR 5304, May 29, 1963, Part 97: Routing of Traffic, §97.562 Rerouting of traffic; appointment of agent, Rev. S.O. 562, Amdt. 15, further amends paragraphs (a) and (d) of Rev. S.O. 562, effective May 31, 1963.

29 FR 7241, June 3, 1964, Part 97: Rerouting of traffic, §97.562 Rerouting of traffic; appointment of agent, Rev. S.O. 562, Amdt. 16, further amends paragraphs (a) and (d) of Rev. S.O. 562, effective 4 days after date of order.

30 FR 6394, May 7, 1965, Part 97: Routing of Traffic, §97.562 Rerouting of traffic—Appointment of agents. Second Rev. S.O. 562, effective May 4, 1965 through Dec. 31, 1965.

30 FR 13375, Oct. 21, 1965, Part 97; Routing of traffic, §97.562 Rerouting of traffic; Appointment of agents. 3rd Rev. S.O. 562, effective Oct. 15, 1965.

30 FR 16006, Dec. 23, 1965, Part 97: Routing of Traffic, §97.562 Rerouting of Traffic; appointment of agents, 3rd Rev. S. O. 562, amdt. 1, extends expiration date of 3rd Rev. S. O. 562 to Dec. 31, 1966, effective Dec. 31, 1965.

31 FR 16271, Dec. 20, 1966, Part 97: Routing of Traffic, appointment of agents, 3d. Rev. S. O. 562, amdt. 2, extends expiration date of S. O. 562 to Dec. 31, 1967, effective Dec. 31, 1966.

NOTE: For recodification, see 49 CFR, Editorial Note, 32 FR 5606, April 5, 1967.

32 FR 5931, April 13, 1967, Part 197 [formerly Part 97]: Rerouting of Traffic, §197.562 Service Order No. 562, 4th Rev. S.O. 562, appointment of agents, expires Dec. 31, 1967.

32 FR 11949, Aug. 18, 1967, Part 197 [formerly Part 97]: Rerouting of Traffic, §197.562 Service Order No. 562 (appointment of agents), vacated and set aside by 4th Rev. S.O. 562-A, effective Aug. 16, 1967.

32 FR 11949, Aug. 18, 1967, Part 197: Rerouting of Traffic, §197.994 Service Order No. 994 (Rerouting of traffic—appointment of agents), effective Aug. 16, 1967.

NOTE: For Republication and Redesignations of Regulations, see 32 FR 20003, Dec. 20, 1967.

32 FR 20817, Dec. 27, 1967, Part 1034 [former Part 197, formerly Part 97]: Routing of Traffic, §1034.994 Service Order No. 994 (Appointment of Agents), S.O. 994, Amdt. 1, extends expiration date of S.O. 994, effective Dec. 31, 1967.

32 FR 10538, July 18, 1967: General Emergency Transport Order 1-67. Preference and Priority for the Transportation of Passengers and Freight Necessary to the National Defense, Health, and Safety, because of emergency due to nationwide cessation of railroad service, effective on date of order.

32 FR 10896, July 25, 1967: General Emergency Transport Order 1-67 vacated and set aside, normal rail transportation having been resumed, effective on date of order.

32 FR 12025, Aug. 19, 1967: S. O. 994; I.C.C. Order 1, Chicago, R. I. & P. R. Co., rerouting and diversion of traffic, effective on date of order.

32 FR 12026, Aug. 19, 1967: S.O. 994; I.C.C. Order 2, Frankfort & C. R. Co., rerouting and diversion of traffic, effective on date of order.

32 FR 12026, Aug. 19, 1967: S.O. 994; I.C.C. Order 3, Southern Industrial R. Co., rerouting and diversion of traffic, effective on date of order.

32 FR 12026, Aug. 19, 1967: S.O. 994; I.C.C. Order 4, Chicago, B. & Q. R. Co., rerouting and diversion of traffic, effective on date of order.

32 FR 12815, Sept. 7, 1967: S.O. 994; I.C.C. Order 5, Lancaster & Chester Ry. Co., rerouting and diversion of traffic, effective on date of order.

32 FR 12733, Sept. 2, 1967: S.O. 994; I.C.C. Order 3, Amdt. 1 Southern Industrial R. Co., extends expiration date of I.C.C. Order 3.

32 FR 13106, Sept. 14, 1967: S.O. 994; I.C.C. Order 6, Pennsylvania R. Co., rerouting or diversion of traffic, effective Sept. 14, 1967.

32 FR 13363, Sept. 21, 1967: S.O. 994; I.C.C. Order 6-A, vacates and sets aside ICC Order No. 6, effective on date of order.

32 FR 13393, Sept. 22, 1967: S.O. 994; I.C.C. Order 5-A, vacates and sets aside ICC Order No. 5, effective on date of order.

32 FR 13625, Sept. 28, 1967: S.O. 994; I.C.C. Order 7, St. Louis-S.F. Ry. Co., rerouting and diversion of traffic, effective on date of order.

32 FR 13685, Sept. 29, 1967: S.O. 994; I.C.C. Order 1, Amdt. 1, extends expiration date of I.C.C. Order 1 (Chicago, R. I. & P. R. Co), effective Sept. 30, 1967.

32 FR 13900, Oct. 5, 1967: S.O. 994; I.C.C. Order No. 8, Baltimore & O. R. Co., rerouting and diversion of traffic, effective on date of order.

32 FR 13954, Oct. 6, 1967: S.O. 994; I.C.C. Order 8-A, vacates and sets aside ICC Order No. 8 (B & O. R. Co.), effective on date of order.

32 FR 14186, Oct. 12, 1967: S.O. 944; I.C.C. Order No. 9, Southern Pac. Co. and Missouri Pac. R. Co., diversion or rerouting of traffic, effective on date of order.

32 FR 14355, Oct. 17, 1967: S.O. 944; I.C.C. Order 7-A, vacates and sets aside ICC Order No. 7 (St. Louis-S.F. Ry. Co.), effective on date of order.

32 FR 15048, Oct. 31, 1967: S.O. 994; I.C.C. Order 10, Lehigh Valley R. Co., rerouting or diversion of traffic, effective on date of order.

32 FR 15217, Nov. 2, 1967: S.O. 994; I.C.C. Order 2, Amdt. 1 (Frankfort & C. R. Co.), extends expiration date of ICC Order 2, effective on date of order.

32 FR 15217, Nov. 2, 1967: S.O. 994; I.C.C. Order 4, Amdt. 1 (Chicago, B. & Q. R. Co.), extends expiration date of ICC Order 4, effective on date of order.

32 FR 20792, Dec. 23, 1967: S.O. 994; I.C.C. Order 2, Amdt. 2 Frankfort & C. R. Co., diversion or rerouting of traffic, extends expiration date of ICC Order 2, effective on date of order.

32 FR 20829, Dec. 27, 1967: S.O. 994; I.C.C. Order 1, Amdt. 2 Chicago, R.I. & P. R. Co., rerouting or diversion of traffic, extends expiration date of ICC Order 1, effective Dec. 31, 1967.

32 FR 20912, Dec. 28, 1967: S.O. 994; I.C.C. Order 4, Amdt. 2 Chicago, B. & Q. R. Co., rerouting and diversion of traffic, extends expiration date of ICC Order 4, effective Dec. 31, 1967.

33 FR 5913, April 17, 1968: S.O. 994; I.C.C. Order No. 11, New York, N.H. & H. R. Co. and Pennsylvania R. Co., rerouting or diversion of traffic, effective day after date of order.

33 FR 6844, May 4, 1968: S. O. 994; I.C.C. Order No. 12, New York, S. & W. R. Co., rerouting and diversion of traffic (bridge out of service), effective day after date of order.

33 FR 9232, June 21, 1968: S. O. 944; I.C.C. Order No. 1, Amdt. 1 (Chicago, R.I. & P. R. Co.) rerouting or diversion of traffic, extends expiration date of ICC Order 1 to Dec. 31, 1968, effective June 30, 1968.

27 FR 4650, May 16, 1962: Rev. Service Order 562, Taylor's I.C.C. Order 143, Menon Railroad, rerouting of traffic because of work stoppage, effective on date of order.

27 FR 4723, May 17, 1962: Taylor's I.C.C. Order 143-A, vacates and sets aside Taylor's Order 143, effective on date of order.

27 FR 6064, June 27, 1962: Rev. S.O. 562, Taylor's I.C.C. Order 136, Amdt. 7, Rutland R. Corp. rerouting or diversion of traffic, extends expiration date of Taylor's Order 136, effective June 30, 1962.

27 FR 6245, June 30, 1962: Rev. S.O. 562, Taylor's I.C.C. Order 144, Fort Dodge, Des Moines & S. Ry. Co., rerouting of traffic, effective on day following date of order.

27 FR 7511, July 31, 1962: Rev. S.O. No. 562, Taylor's I.C.C. Order No. 145, Chicago, R.I. & P. R. Co., diversion or rerouting of traffic, effective on date of order.

27 FR 7749, Aug. 4, 1962: Rev. S.O. No. 562, Taylor's I.C.C. Order No. 146, Chicago B. & Q. R. Co., rerouting and diversion of traffic, effective on date of order.

27 FR 8199, Aug. 16, 1962: Rev. S.O. No. 562, Taylor's I.C.C. Order No. 133, Amd't. 3, Louisville & N. R. Co. and Southern Ry. Co., rerouting of traffic, extends expiration date of Taylor's I.C.C. Order 133 until Sept. 30, 1962.

27 FR 8818, Sept. 1, 1962: Rev. S.O. No. 562, Taylor's I.C.C. Order No. 147, Chicago & N.W. Ry. Co., diversion or rerouting of traffic, effective day after date of order.

27 FR 9368, Sept. 20, 1962: Rev. S.O. 562, Taylor's I.C.C. Order 147, Amdt. 1, extends expiration date of Taylor's Order 147, effective on date of order.

27 FR 9634, Sept. 28, 1962: Rev. S.O. No. 562, Taylor's I.C.C. Order 136, Amdt. 8, extends expiration date of Taylor's Order 136, effective Sept. 30, 1962.

27 FR 10729, Nov. 2, 1962: Rev. S.O. 562, Taylor's I.C.C. Order 136, Amdt. 9, extends expiration date of Taylor's Order 136, effective Oct. 31, 1962.

27 FR 10669, Nov. 1, 1962: Rev. S.O. 562, Taylor's I.C.C. Order 148, Baltimore & O. R. Co., diversion and rerouting of traffic handled through Lorain, Ohio coal docks, effective on date of order.

27 FR 12850, Dec. 28, 1962: Rev. S.O. 562, Taylor's I.C.C. Order 144, Amdt. 1, extends expiration date of Taylor's Order 144 to Dec. 31, 1963, effective Dec. 31, 1962.

28 FR 45, Jan. 1, 1963: Rev. S.O. 562, Taylor's I.C.C. Order 136, Amdt. 10, extends expiration date of Taylor's Order 136 to March 31, 1963, effective Dec. 31, 1962.

28 FR 622, Jan. 23, 1963: Rev. S.O. 562, Taylor's I.C.C. Order 149, Chicago N. S. & M. Ry., rerouting of traffic, due to railroad's abandonment of operations and placing an embargo against all freight, effective through Feb. 28, 1963.

28 FR 708, Jan. 25, 1963: Rev. S.O. 562, Taylor's I.C.C. Order 150, Florida East Coast Ry., diversion or rerouting of traffic due to impending work stoppage, effective on date of order.

28 FR 1395, Feb. 13, 1963: Rev. S.O. 562, Taylor's I.C.C. Order 151, Ann Arbor R. Co., diversion and rerouting of traffic, account ferry out of service and heavy ice condition on Lake Michigan, effective on date of order.

28 FR 1618, Feb. 20, 1963: Rev. S.O. 562, Taylor's I.C.C. Order 151-A, vacates and sets aside Taylor's Order 151, effective on date of order.

28 FR 1618, Feb. 20, 1963: Rev. S.O. 562, Taylor's I.C.C. Order 152, Ann Arbor R. Co., rerouting of traffic for ferry movement across Lake Michigan, effective on date of order.

28 FR 1824, Feb. 27, 1963: Rev. S.O. 562, Taylor's I.C.C. Order 150, Amdt. 1, Florida East Coast Ry., rerouting of traffic, extends expiration date of Taylor's Order 150, effective on date of order.

28 FR 2078, March 2, 1963: Rev. S.O. 562, Taylor's I.C.C. Order 152, Amdt. 1, Ann Arbor R. rerouting and diversion of traffic, extends expiration date of Taylor's Order 152 until March 31, 1963.

28 FR 2078, March 2, 1963: Rev. S.O. 562, Taylor's I.C.C. Order 153 Southern Pac. Co., rerouting and diversion of traffic because of impending work stoppage, effective on date of order.

28 FR 2156, March 5, 1963: Rev. S.O. 562, Taylor's I.C.C. Order 153-A, vacates and sets aside Taylor's Order 153, effective on date of order.

28 FR 2204, March 6, 1963: Rev. S.O. 562, Taylor's I.C.C. Order 154 Ann Arbor R., rerouting and diversion of certain traffic moving by ferry across Lake Michigan, effective on date of order.

28 FR 2609, March 16, 1963: Rev. S.O. 562, Taylor's I.C.C. Order 155, Chesapeake & O. Ry. Co. rerouting and diversion of traffic, due to washout, effective on date of order.

28 FR 2609, March 16, 1963: Rev. S.O. 562, Taylor's I.C.C. Order 156, railroads serving Alabama, Tennessee, Kentucky, West Virginia, and Virginia, rerouting and diversion of traffic because of floods and washouts, effective on date of order.

28 FR 2782, March 20, 1963: Rev. S.O. 562, Taylor's I.C.C. Order 150, Amdt. 2, Florida East Coast Ry. rerouting and diversion of traffic, extends expiration date of Taylor's Order 150, effective on date of order.

28 FR 3104, March 29, 1963: Rev. S.O. 562, Taylor's I.C.C. Order 136, Amdt. 11, extends expiration date of Taylor's Order 136, effective March 31, 1963.

28 FR 3301, Apr. 4, 1963: Rev. S.O. 562, Taylor's I.C.C. Order 152, Amdt. 2, Ann Arbor R. Co. rerouting of traffic, extends expiration date of Taylor's Order 152 until Apr.: 12, 1963.

28 FR 3301, Apr. 4, 1963: Rev. S.O. 562, Taylor's I.C.C. Order 154-A, Ann Arbor R. Co., rerouting of traffic, vacates and sets Taylor's Order 154, effective on date of order.

28 FR 3684, Apr. 13, 1963: Rev. S.O. 562, Taylor's I.C.C. Order 152-A, Ann Arbor R., vacates and sets aside Taylor's Order 152, effective on date of order.

28 FR 4653, May 8, 1963: Rev. S.O. 562, Taylor's I.C.C. Order 157, Georgia & F. R., rerouting of traffic because of unsafe bridge, effective on date of order.

28 FR 5450, June 1, 1963: Taylor's I.C.C. Order 157, Amdt. 1, Georgia & F. R., rerouting of traffic, extends expiration date of Taylor's Order 157 until Nov. 30, 1963.

28 FR 5450, June 1, 1963: Taylor's I.C.C. Order 150, Amdt. 3, Florida East Coast Ry., rerouting of traffic, extends expiration date of Taylor's Order 150 until Nov. 30, 1963.

28FR 6607, June 26, 1963: Rev. S.O. 562, Taylor's I.C.C. Order 136, Amdt. 12, Rutland R. Corp. rerouting of traffic, extends expiration of Taylor's Order 136, effective June 30, 1963.

28 FR 7113, July 11, 1963: Rev. S.O. 562, Taylor's I.C.C. Order No. 158, Chicago, B. & Q. R. Co., rerouting of traffic, effelctive on date of order.

28 FR 7409, July 19, 1963: Rev. S.O. 562, Taylor's I.C.C. Order 157-A, Georgia & F. R., diversion or rerouting of traffic, vacates and sets aside Taylor's Order 157.

28 FR 7410, July 19, 1963: Rev. S.O. 562, Taylor's I.C.C. Order 159, Georgia & F. R., diversion or rerouting of traffic because of unsafe operating conditions, effective on date of order.

28 FR 7624, July 26, 1963: Taylor's I.C.C. Order 159 corrected.

28 FR 7491, July 23, 1963: Rev. S.O. 562, Taylor's I.C.C. Order 160, Fort Dodge, D.M. & S. Ry., rerouting of traffic, effective on date of order.

28 FR 9833, Sept. 7, 1963: Taylor's I.C.C. Order 160, Amdt. 1, extends expiration date of Taylor's Order 160, effective on date of order.

28 FR 12780, Nov. 30, 1963: Rev. S.O. 562, Taylor's I.C.C. Corrected Order 159, Amdt. 1, Georgia & Florida Ry. rerouting or diversion of traffic, extends expiration date, effective Nov. 30, 1963.

28 FR 13916, Dec. 20, 1963: Rev. S.O. 562, Taylor's I.C.C. Order 136, Amdt. 13, Rutland R. Corp. rerouting of traffic, extends expiration date, effective Dec. 31, 1963.

29 FR 547, Jan. 22, 1964: Rev. S.O. 562, Taylor's I.C.C. Order 163, Union Pac. R., rerouting and diversion of traffic, due to court order that it cease operations over its Junction City Branch, effective on date of order.

29 FR 244, Feb. 13, 1964: Rev. S.O. 562, Taylor's I.C.C. Order 164, Lehigh Valley R., rerouting of traffic destined to New York pier, account of labor difficulty, effective on date of order.

29 FR 2533, Feb. 15, 1964: Taylor's I.C.C. Order 164-A, Lehigh Valley R., vacates and sets aside Taylor's Order 164, effective day after date of order.

29 FR 2533, Feb. 15, 1964: Rev. S.O. 562, Taylor's I.C.C. Order 165, Central R. Co. of New Jersey, rerouting of traffic destined to New York pier because of tugboat operators' strike, effective day after date of order.

29 FR 2969, Mar. 4, 1964: Rev. S.O. 562, Taylor's I.C.C. Order 162, Amd't. 1, Kansas, O. & G. Ry. rerouting of traffic, extends expiration date of Taylor's Order 162 until April 30, 1964.

29 FR 2969, Mar. 4, 1964: Rev. S.O. 562, Taylor's I.C.C. Order 165, Amd't. 1, Central R. Co. of N.J., rerouting of traffic, extends expiration date of Taylor's Order 165 until Mar. 31, 1964.

29 FR 3122, Mar. 6, 1964: Rev. S.O. 562, Taylor's I.C.C. Order 166, Pennsylvania R., rerouting of traffic at South Amboy, N.J., because of tugboat strike, effective on date of order.

29 FR 3287, Mar. 11, 1964: Taylor's I.C.C. Order 165-A, Central R. Co. of N.J., vacates and sets aside Taylor's Order 165, effective on date of order.

29 FR 3411, Mar. 14, 1964: Rev. S.O. 562, Taylor's I.C.C. Order 167, Norfolk & W. Ry. Co., diversion or rerouting of traffic moving to or via Cincinnati, Ohio, because of floods, effective on date of order.

29 FR 3412, Mar. 14, 1964: Rev. S.O. 562, Taylor's I.C.C. Order 168, St. Louis-S.F. Ry. Co., diversion or rerouting of traffic because of bridge wash-out on its River Division, effective on date of order.

29 FR 3457, March 17, 1964: Rev. S.O. 562, Taylor's I.C.C. Order 169, Railroads serving Pennsylvania, West Virginia, Ohio, Kentucky, Indiana, Illinois, and Missouri, rerouting of traffic because of floods, effective on date of order.

29 FR 3842, Mar. 27, 1964: Rev. S.O. 562, Taylor's I.C.C. Order 136, Amdt. 14, Rutland R. Corp. rerouting of traffic, extends expiration date of Taylor's Order 136, effective Mar. 31, 1964.

29 FR 4900, Apr. 7, 1964: Rev. S.O. 562, Taylor's I.C.C. Order 170, Georgia & F. Ry., rerouting of traffic because of unsafe track conditions, effective on date of order.

29 FR 4984, Apr. 9, 1964: Rev. S.O. 562, Taylor's I.C.C. Order 171, Missouri-K.-T. R., rerouting of traffic because of bridge damage, effective on date of order.

29 FR 5261, Apr. 16, 1964: Taylor's I.C.C. Order 171-A, vacates and sets aside Taylor's Order 171, effective on date of order.

29 FR 5107, Apr. 14, 1964: Rev. S.O. 562, Taylor's I.C.C. Order 172, Illinois Central R. Co., rerouting of traffic because of work stoppage and embargo, effective on date of order.

29 FR 5204, Apr. 15, 1964: Taylor's I.C.C. Order 172-A, vacates and sets aside Taylor's Order 172, effective on date of order.

29 FR 5524, Apr. 24, 1964: Rev. S.O. 562, Taylor's I.C.C. Order 163, Amdt. 1, Union Pac. R., rerouting or diversion of traffic, extends expiration date of Taylor's Order 163, effective Apr. 30, 1964.

29 FR 5726, Apr. 29, 1964: Rev. S.O. 562, Taylor's I.C.C. Order 162, Amdt. 2, Kansas, O. & G. Ry., rerouting or diversion of traffic, extends expiration date of Taylor's Order 162, effective Apr. 30, 1964.

29 FR 8192, June 27, 1964: Rev. S.O. 562, Taylor's I.C.C. Order 173, Missouri-K. T. R. Co., rerouting or diversion of traffic because of bridge damage at Bartlesville, Okla., effective on date of order.

29 FR 8388, July 2, 1964: Rev. S.O. 562, Taylor's I.C.C. Order 136, Amdt. 15, Rutland R. Corp. rerouting of traffic, extends expiration date of Taylor's Order 136 to Dec. 31, 1964.

29 FR 8388, July 2, 1964: Rev. S.O. 562, Taylor's I.C.C. Order 170, Amdt. 1, Georgia & F. Ry. rerouting of traffic, extends expiration date of Taylor's Order 170 to Dec. 31, 1964.

29 FR 9362, July 8, 1964: Rev. S.O. 562, Taylor's I.C.C. Order 174, Missouri-Illinois R. rerouting or diversion of traffic because of work stoppage, effective on date of order.

29 FR 9688, July 17, 1964: Rev. S.O. 562, Taylor's I.C.C. Order 174, Amdt. 1, Missouri-Illinois R. Co. rerouting of traffic, extends expiration date of Taylor's Order 174 to Aug. 15, 1964.

29 FR 11666, Aug. 14, 1964: Rev. S.O. 562, Taylor's I.C.C. Order 174-A, Missouri-Illinois R. Co., rerouting of traffic, vacates and sets aside Taylor's Order 174, effective on date of order.

29 FR 11666, Aug. 14, 1964: Rev. S.O. 562, Taylor's I.C.C. Order 175, Ann Arbor R. Co., rerouting and diversion of traffic, car ferry being out of operation, effective on date of order.

29 FR 15668, Nove. 21, 1964: Rev. S.O. 562, Taylor's I.C.C. Order 176, Midland Valley R. Co., rerouting or diversion of traffic, effective on date of order.

29 FR 16238, Dec. 3, 1964: Rev. S.O. 562, Taylor's I.C.C. Order 177, Missouri-K.-T. R. Co., rerouting of traffic because of derailment, effective on date of order.

29 FR 16448, Dec. 5, 1964: Taylor's I.C.C. Order 177, Amdt. 1, extends expiration date of Taylor's Order 177, effective on day after date of order.

CONSULT THE TABLE OF CASES WHENEVER A CITATION IS FOLLOWED BY AN ASTERISK

29 FR 18026, Dec. 18, 1964: Rev. S.O. 562, Taylor's I.C.C. Order 170, Amdt. 2, Georgia & F. Ry., extends expiration date of Taylor's Order 170, effective Dec. 31, 1964.

29 FR 18026, Dec. 18, 1964: Rev. S.O. 562, Taylor's I.C.C. Order 176, Amdt. 1, Midland Valley R. Co., extends expiration date of Taylor's Order 176, effective Dec. 17, 1964.

29 FR 18112, Dec. 19, 1964: Rev. S.O. 562, Taylor's I.C.C. Order 136, Amdt. 16, Rutland R. Corp. extends expiration date of Taylor's Order 136, effective Dec. 31, 1964.

29 FR 18194, Dec. 22, 1964: Rev. S.O. 562, Taylor's I.C.C. Order 177-A, Missouri-K.T. R. Co., vacates Taylor's Order 177, effective day after date of order.

29 FR 19270, Dec. 31, 1964: Rev. S.O. 562, Taylor's I.C.C. Order 178, Southern Pac. Co., rerouting of traffic due to slides and washouts, effective on date of order.

29 FR 19271, Dec. 31, 1964: Rev. S.O. 562, Taylor's I.C.C. Order 179, Western Pac. R. Co., rerouting of traffic due to slides and washouts, effective on date of order.

29 FR 19271, Dec. 31, 1964: Rev. S.O. 562, Taylor's I.C.C. Order 180, Spokane, P. & S. Ry. System, rerouting of traffic due to floods and washouts, effective on date of order.

30 FR 72, Jan. 5, 1965: Rev. S.O. 562, Taylor's I.C.C. Order 180-A, vacates Taylor's Order 180, effective on date of order.

30 FR 123, Jan. 6, 1965: Rev. S.O. 562, Taylor's I.C.C. Order 181, Washington, I. & M. Ry. Co., rerouting of traffic due to damage to bridges, effective on date of order.

30 FR 2009, Feb. 12, 1965: Rev. S.O. 562, Taylor's I.C.C. Order 182, Ann Arbor R. Co., rerouting of traffic because of heavy ice conditions in Menominee, Mich., harbor, effective on date of order.

30 FR 2570, Feb. 26, 1965: Taylor's I.C.C. Order 182, Amdt. 1, Ann Arbor R. Co., rerouting of traffic, extends expiration date of Taylor's Order 182 until March 10, 1965.

30 FR 2964, March 6, 1965: Rev. S.O. 562, Taylor's I.C.C. Order 183, Chicago G.W. Ry., diversion or rerouting of traffic because of flood conditions, effective on date of order.

30 FR 3255, March 9, 1965: Rev. S.O. 562, Taylor's I.C.C. Order 184, Valdosta S. R., diversion or rerouting of traffic because of high water conditions, effective on date of order.

30 FR 3282, March 10, 1965: Rev. S.O. 562, Taylor's I.C.C. Order 183-A, Chicago G.W. Ry., vacates and sets aside Taylor's Order 183, effective on date of order.

30 FR 3409, Mar. 13, 1965: Rev. S.O. 562, Taylor's I.C.C. Order 184-A, vacates and sets aside Taylor's Order 184, effective on date of order.

30 FR 5407, Apr. 15, 1965: Rev. S.O. 562, Taylor's I.C.C. Order 185, Railroads Serving Iowa and Minnesota, diversion or rerouting of traffic because of floods, effective on date of order.

30 FR 5495, Apr. 16, 1965: Rev. S.O. 562, Amended Taylor's I.C.C. Order 185, Railroads Serving Iowa, Minnesota, and Wisconsin, diversion or rerouting of traffic because of floods, effective on date of order.

30 FR 5722, Apr. 22, 1965: Rev. S.O. 562, 2d amended Taylor's I.C.C. Order 185, diversion and rerouting of traffic, adds Illinois and Missouri to list of States, effective on date of order.

30 FR 6100, Apr. 29, 1965: Rev. S.O. 562, 2d amended Taylor's I.C.C. Order 185, Amdt. 1, diversion or rerouting of traffic, extends expiration date of 2d amended Taylor's Order 185, effective on date of order.

30 FR 6628, May 13, 1965: 2d Rev. S.O. 562; Pfahler's I.C.C. Order 186, Railroads Serving Illinois, Iowa, Minnesota, Missouri, Wisconsin, diversion and rerouting of traffic, effective on day after date of order.

30 FR 7132, May 27, 1965: Rev. S.O. 562; Pfahler's I.C.C. Order No. 186, Amdt. 1, extends expiration date of Pfahler's Order 186, effective on date of order.

30 FR 7936, June 18, 1965: Rev. S.O. 562; Pfahler's I.C.C. Order 170, Amdt. 3, Georgia & F. Ry., diversion and rerouting of traffic, extends expiration date of I.C.C. Order 170, effective June 30, 1965.

30 FR 8144, June 24, 1965: 2d Rev. S.O. 562, Pfahler's I.C.C. Order No. 187, Atchison, T. & S.F. Ry. Co., diversion or rerouting of traffic, effective on date of order.

30 FR 8144, June 24, 1965: 2d. Rev. S.O. 562, Amended Pfahler's I.C.C. Order 187, Atchison, T. & S.F. Ry. Co., et al., diversion or rerouting of traffic, effective on date of order.

30 FR 8144, June 24, 1965: 2d Rev. S.O. 562, Pfahler's I.C.C. Order 188, Chicago, R. I. & P. R. Co., diversion or rerouting of traffic, effective on date of order.

30 FR 8177, June 25, 1965: 2d Rev. S.O. 562, Pfahler's I.C.C. Order 176, Amdt. 2, Midland Valley R. Co., diversion and rerouting of traffic, extends expiration date of Pfahler's Order 176, effective June 30, 1965.

30 FR 8428, July 1, 1965: Rev. S.O. 562, Pfahler's I.C.C. Order 187-A, Atchison, T. & S.F. Ry. Co., vacates and sets aside Pfahler's Order 187, effective on date of order.

30 FR 8657, July 8, 1965: 2d Rev. S.O. 562, Pfahler's I.C.C. Order 189, Missouri Pac. R. Co., rerouting of traffic because of bridge damage, effective on date of order.

30 FR 11891, Sept. 16, 1965: 2nd Rev. S.O. 562, Pfahler's Order 190, Railroads serving Louisiana and Mississippi, diversion and rerouting of traffic because of flood conditions, effective on date of order.

30 FR 12108, Sept. 22, 1965: 2nd Rev. S.O. 562, Pfahler's Order 191, Berlin Mills Ry., diversion and rerouting of traffic because of work stoppage, effective on date of order.

30 FR 12520, Sept. 30, 1965: 2d Rev. S.O. 562, Pfahler's Order 192, Missouri Pac. R. Co., diversion or rerouting of traffic because of bridge damage, effective on date of order.

30 FR 12840, Oct. 8, 1965: 2d Rev. S.O. 562, Pfahler's Order 193, Ann Arbor Railroad Co., diversion or rerouting of traffic because car ferry out of service, effective on date of order.

30 FR 12964, Oct. 12, 1965: 2nd Rev. S.O. 562, Pfahler's Order 192-A, Missouri Pacific Railroad Co., vacates Pfahler's I.C.C. Order 192, effective on date of order.

30 FR 12964, Oct. 12, 1965: 2nd Rev. S.O. 562, Pfahler's Order 193-A, Ann Arbor Railroad Co., vacates Pfahler's I.C.C. Order 193, effective on date of order.

30 FR 13348, Oct. 20, 1965: 3d Rev. S.O. 562, Pfahler's I.C.C. Order No. 194, Ann Arbor Railroad Co., Rerouting of traffic, effective on date of order.

30 FR 14291, Nov. 13, 1965: 3d Rev. S.O. 562, Pfahler's Order 194-A, Ann Arbor Railroad Co., Vacation of Order 194, effective date of order.

30 FR 14690, Nov. 25, 1965: 3d Rev. S.O. 562; Pfahler's I.C.C. Order 196, Ann Arbor R. Co., diversion or rerouting of traffic because of car ferry being out of order, effective on date of order.

30 FR 14958, Dec. 2, 1965: 3d Rev. S.O. 562, Pfahler's I.C.C. Order 197, Texas O. & E. R. Co., diversion and rerouting of traffic because of bridge damage, effective until Dec. 10, 1965.

30 FR 14959, Dec. 2, 1965: 3d Rev. S.O. 562, Pfahler's I.C.C. Order 195, Admt. 1, Duluth, W. & P. Ry. Co., diversion and rerouting of traffic, extends expiration date of Pfahler's Order 195, until Dec. 15, 1965.

30 FR 16240, Dec. 29, 1965: 3d Rev. S.O. 562, Pfahler's I.C.C. Order 170-A, Georgia F. Ry. Co., vacates Pfahler's Order 170, effective on date of order.

30 FR 15837, Dec. 22, 1965: 3d Rev. S.O. 562, Pfahler's I.C.C. Order 196, Admt. 1, Ann Arbor R. Co., diversion and rerouting of traffic, extends expiration date of Pfahler's Order 196, until Jan. 15, 1966.

30 FR 4371, Mar. 12, 1966: 3d Rev. S.O. 562, Pfahler's I.C.C. Order 198, Great Northern Ry., diversion and rerouting of traffic because of blizzard and heavy snow conditions, effective until Mar. 14, 1966.

31 FR 4371, Mar. 12, 1966: 3d Rev. S.O. 562, Pfahler's I.C.C. Order 199, Northern Pac. Ry., diversion and rerouting vf traffic because of blizzard and heavy snow conditions, effective until Mar. 14, 1966.

31 FR 4434, Mar. 15, 1966: 3d Rev. S.O. 562, Pfahler's I.C.C. Order 200, Southern Industrial R. Inc., diversion and re-routing of traffic because of track conditions, effective until Apr. 9, 1966.

31 FR 5164, Mar. 30, 1966: 3d Rev. S.O. 562, Pfahler's I.C.C. Order 202, Soo Line R. Co., diversion and rerouting of traffic because of track conditions, effective until May 31, 1966.

31 FR 5395, Apr. 5, 1966, Rev. S.O. 562, Pfahler's I.C.C. order No. 203, Any Railroad in the United States, rerouting or diversion of traffic, expiration date Apr. 8, 1966.

31 FR 5527, Apr. 7, 1966, Third Rev. S.O. 562, Pfahler's I.C.C. Order No. 203-A, Certain U.S. Railroads, vacates Pfahler's I.C.C. Order No. 203, effective on date of order.

31 FR 5735, Apr. 13, 1966: 3d Rev. S.O. 562, Pfahler's I.C.C. Order 200, Amdt. 1, Certain U.S. Railroads, diversion and rerouting of traffic, amended expiration date May 9, 1966.

31 FR 8898, June 25, 1966: Third Rev. S.O. 562, Pfahler's I.C.C. Order 202-A, Soo Line R. Co., vacates Pfahler's I.C.C. Order 202, effective July 1, 1966.

31 FR 6848, May 7, 1966, 3d Rev. S.O. 562, Pfahler's I.C.C. Order 206, Admt. 1, Missouri Pac. R. Co., et al., rerouting or diversion of traffic, extends I.C.C. Order 206 expiration date of May 6, 1966.

31 FR 6848, May 7, 1966, 3d Rev. S.O. 562, Pfahler's I.C.C. Order 206, Admt. 1, Missouri Pac. R. Co., et al., rerouting or diversion of traffic, extends I.C.C. Order 206 expiration date of May 6, 1966.

31 FR 7591, May 26, 1966: 3d Rev. S.O. 562, Pfahler's I.C.C. Order 202 Admt. 1, Soo Line R. Co., diversion and re-routing of traffic, extends I.C.C. Order 202 expiration date to Aug. 31, 1966, effective May 31, 1966.

31 FR 6937, May 11, 1966: 3d Rev. S.O. 562, Pfahler's I.C.C. Order 200, Amdt. 2, All Railroads, diversion and re-routing of traffic, extends I.C.C. Order 200 expiration date to July 31, 1966, effective on date of order.

31 FR 8514, June 17, 1966: 3d Rev. S.O. 562, Pfahler's I.C.C. Order 207, Frankfort & C. R. Co., diversion and re-routing of traffic, extends I.C.C. Order 207 expiration date to July 31, 1966, effective on date of Order.

31 FR 6599, May 3, 1966: 3d Rev. S.O. 562, Pfahler's I.C.C. Order 206, Missouri Pac. R. Co., et al., diversion and re-routing of traffic, extends I.C.C. Order 206 expiration date to May 3, 1966, effective on date of Order.

31 FR 6599, May 3, 1966: 3d Rev. S.O. 562, Pfahler's I.C.C. Order 204-A, Canadian National Rys., diversion and re-routing of traffic, vacates Pfahler's I.C.C. Order 204, effective on date of Order.

31 FR 6455, April 28, 1966: 3d Rev. S.O. 562, Pfahler's I.C.C. Order 205, Texas & Pac. Ry. Co., diversion and re-routing of traffic, over any available route, effective until April 30, 1966.

31 FR 10302, July 29, 1966: 3d Rev. S.O. 562, Pfahler's I.C.C. Order 207, amdt. 1, All Railroads, diversion and re-routing of traffic, extends I.C.C. Order 207 expiration date to Sept. 30, 1966, effective July 31, 1966.

31 FR 10441, Aug. 3, 1966: 3d Rev. S.O. 562, Pfahler's I.C.C. Order 200, Amdt. 3, Southern Industrial R. Inc., diversion and rerouting of traffic, extends I.C.C. Order 200 expiration date to Sept. 30, 1966, effective on date of order.

31 FR 11163, Aug. 23, 1966: 3d Rev. S.O. 562, Longhurst's I.C.C. Order 209, St. Johnsbury & Lamoille County R., diversion and rerouting of traffic over any available route, effective until Sept. 16, 1966.

31 FR 11407, Aug. 27, 1966: 3d Rev. S.O. 562, Pfahler's I.C.C. Order 211, Canadian Pac. Ry. Co. et al., diversion and rerouting of traffic over any available route, effective until Aug. 31, 1966.

31 FR 11698, Sept. 3, 1966: 3d Rev. S.O. 562, Pfahler's I.C.C. Order 211, Amdt. 1, diversion and rerouting of traffic, extends expiration date of I.C.C. Order 211 to Sept. 7, 1966, effective Aug. 31, 1966.

31 FR 11205, Aug. 24, 1966: 3d Rev. S.O. 562, Pfahler's I.C.C. Order 210, Chicago, B. & Q. Ry. Co., diversion and re-routing of traffic, because of bridge damage, effective until Aug. 26, 1966.

31 FR 11522, Aug. 31, 1966: 3d Rev. S.O. 562, Pfahler's I.C.C. Order 210, Amdt. 1, Chicago, B. & Q. Ry. Co., diversion and rerouting of traffic, because of bridge damage, extends effective date until Sept. 16, 1966.

31 FR 11922, Sept. 9, 1966: 3d Rev. S.O. 562, Pfahler's I.C.C. Order 211-A, Canadian Ry., diversion and rerouting of traffic, vacates I.C.C. Order 211, effective on date of order.

31 FR 12503, Sept. 21, 1966, 3d Rev. S.O. 562, Longhurst's I.C.C. Order 209, Amdt. 1, St. Johnsbury & Lamoille County R., diversion and rerouting of traffic, extends I.C.C. Order 209 expiration date to Nov. 30, 1966, effective on date of order.

31 FR 12504, Sept. 21, 1966, 3d Rev. S.O. 562, Pfahler's I.C.C. Order 212, Ann Arbor R. Co., diversion and rerouting of traffic, because of car ferries out of service for annual inspection, effective until Nov. 19, 1966.

31 FR 12989, Oct. 5, 1966, 3d Rev. S.O. 562, Pfahler's I.C.C. Order 200, Amdt. 4, Southern Industrial R. Inc., diversion and rerouting of traffic, extends I.C.C. Order 200 expiration date to Dec. 31, 1966, effective on date of order.

31 FR 15051, Nov. 30, 1966, 3d Rev. S.O. 562, Pfahler's I.C.C. Order 207, Amdt. 3, Frankfort & C. R. Co., diversion and rerouting of traffic, extends expiration date of I.C.C. Order 207, to Mar. 31, 1967.

31 FR 15260, Dec. 6, 1966, 3d Rev. S.O. 562, Pfahler's I.C.C. Order 213, Columbus & G. R. Co., diversion and rerouting of traffic, because of fire damage to trestle, effective until Dec. 15, 1966.

32 FR 69, Jan. 5, 1967: 3d Rev. S.O. 562, Pfahler's I.C.C. Order 214, Amdt. 1, St. Johnsbury and Lamoille County Railroad, rerouting of traffic, extends expiration date of I.C.C. Order 214 to June 30, 1967, effective day after date of order.

32 FR 1196, Feb. 2, 1967, 3d Rev. S.O. 562, Pfahler's I.C.C. Order 215, railroads in Illinois and Indiana, rerouting and diversion of traffic because of severe snow conditions, over any available route, effective Jan. 27, 1967, expires Feb. 3, 1967.

31 FR 16271, Dec. 20, 1966, Part 95: Car Service §95.935, S.O. 935, Appointment of Embargo Agent, Amdt. 2, extends expiration date of S.O. 935 to Dec. 31, 1967, effective Dec. 31, 1966.

31 FR 16271, Dec. 20, 1966, Part 95: Car Service §95.958, Service Order No. 958, Amdt. 3 Norfolk and W. Ry. Co. authorized to operate over trackage of Chesapeake and O. Ry. Co., extends expiration date of S.O. 958 to June 30, 1967, effective Dec. 31, 1966.

32 FR 793, Jan. 24, 1967, Part 95: Car Service, §95.990, S.O. No. 990, Union Pacific Railroad Co. authorized to operate over trackage of Denver and Rio Grande Western Railroad Co., effective date Feb. 1, 1967, expiration date Sept. 1, 1967.

32 FR 2797, Feb. 10, 1967, 3d Rev. S.O. 562, Pfahler's I.C.C. Order 216, railroads operating in States of Wisconsin, Illinois, and Indiana, rerouting and diversion of traffic because of severe snow conditions, over any available route, effective Feb. 5, 1967, expires Feb. 10, 1967.

32 FR 3205, Feb. 22, 1967: 3d Rev. S.O. 562, Pfahler's I.C.C. Order 217, Rerouting and Diversion of Traffic, Ann Arbor R. Co. authorized to reroute or divert traffic because of ice in Green Bay interfering with ferry operations, effective on date of order.

32 FR 3431, March 1, 1967: 3d Rev. S.O. 562, Pfahler's I.C.C. Order 218, Rerouting and Diversion of Traffic, Boston & M. Corp. authorized to reroute traffic because of derailment on its line, effective on date of order.

32 FR 3492, March 2, 1967: 3d Rev. S.O. 562, Pfahler's I.C.C. Order 217, Amdt. 1, extends expiration date of Pfahler's Order 217 until March 31, 1967.

32 FR 3723, March 3, 1967: 3d Rev. S.O. 562, Pfahler's I.C.C. Order 218, Amdt. 1, extends expiration date of Pfahler's Order 218, effective one day after date of order.

32 FR 4298, March 18, 1967: 3d Rev. S.O. 562, Pfahler's I.C.C. Order 219, Missouri-K.-T. R. Co., diversion or rerouting of traffic due to damaged trestle, effective on date of order.

32 FR 4298, March 18, 1967: 3d Rev. S.O. 562, Pfahler's I.C.C. Order 220, Southern Industrial R., Inc., diversion or rerouting of traffic because of track conditions, effective on date of order.

32 FR 4451, March 23, 1967: 3d Rev. S.O. 562, Pfahler's I.C.C. Order 221, Chicago, R. I. & P. R. Co., rerouting and diversion of traffic due to track condition, effective on date of order.

32 FR 6249, Apr. 20, 1967: 4th Rev. S.O. 562, Pfahler's I.C.C. Order 214-A, St. Johnsbury & L.C. R., rerouting and diversion of traffic, vacates I.C.C. Order 214, effective on date of order.

32 FR 7233, May 13, 1967: 4th Rev. S.O. 562, I.C.C. Order 222 Frankfort & Cincinnati R. Co., rerouting and diversion of traffic, effective day after date of order.

32 FR 8945, June 22, 1967: 4th Rev. S.O. 562, I.C.C. Order No. 223, Norfolk & W. Ry., Co., rerouting and diversion of traffic, effective on date of order.

32 FR 8945, June 22, 1967: 4th Rev. S.O. 562; I.C.C. Order No. 224, Chicago, R.I. & P. R. Co., rerouting and diversion of traffic, effective on date of order.

32 FR 8944, June 22, 1967: 4th Rev. S.O. 562; I.C.C. Order No. 225, Southern Industrial R. Co., rerouting and diversion of traffic, effective on date of order.

32 FR 9052, June 24, 1967: 4th Rev. S.O. 562; I.C.C. Order No. 226, Unnion Pac. R. Co., rerouting and diversion of traffic, effective on date of order.

32 FR 9052, June 24, 1967: 4th Rev. S.O. 562; I.C.C. Order No. 227, Chicago, B. & Q. R. Co., rerouting and diversion of traffic, effective on date of order.

32 FR 9053, June 24, 1967: 4th Rev. S.O. 562; I.C.C. Order No. 228, Chicago, B. & Q. R. Co., rerouting and diversion of traffic, effective on date of order.

32 FR 9136, June 27, 1967: 3d Rev. S.O. 562; I.C.C. Order No. 221, Amdt. 1, extends expiration date of I.C.C. Order 221 (Chicago, R.I. & P. R. Co.) until Sept. 30, 1967.

32 FR 9197, June 28, 1967: 4th Rev. S.O. 562; I.C.C. Order No. 223, Amdt. 1, extends expiration date of I.C.C. Order 233 (Norfolk & W. Ry. Co.), effective on date of order.

32 FR 9278, June 29, 1967: 4th Rev. S.O. 562; I.C.C. Order No. 229, Missouri-K.-T. R. Co., rerouting or diversion of traffic, effective on date of order.

32 FR 9864, July 6, 1967: 4th Rev. S.O. 562; I.C.C. Order No. 228, Amdt. 1, extends expiration date of I.C.C. Order 228 until July 31, 1967.

32 FR 10038, July 7, 1967: 4th Rev. S.O. 562; Rev. I.C.C. Order 229, Missouri-K.-T. R. Co., rerouting and diversion of traffic, effective on date of order.

32 FR 10536, July 18, 1967: 4th Rev. S.O. 562; I.C.C. Order No. 224-A, Chicago, R.I. & P. R. Co., rerouting or diversion of traffic, vacates and sets aside I.C.C. Order 224, effective on date of order.

32 FR 11252, Aug. 2, 1967: 4th Rev. S.O. 562; I.C.C. Order No. 228, Amdt. 2, Chicago, B. & Q. R. Co., rerouting and diversion of traffic, extends expiration date of I.C.C. Order 228 until Oct. 31, 1967.

32 FR 1136, Aug. 4, 1967: 4th Rev. S.O. 562; I.C.C. Order 225, Amdt. 1, Southern Industrial R. Co., rerouting and diversion of traffic, extends expiration date of I.C.C. Order 225, effective on date of order.

32 FR 11948, Aug. 18, 1967, Part 195: Car Service, §195.935 (Appointment of embargo agents), vacated and set aside by 3d Rev. S.O. 935-A, effective Aug. 16, 1967.

32 FR 11948, Aug. 18, 1967, Part 195: Car Service, §195.995 Service Order No. 995 (Appointment of embargo agents), effective Aug. 16, 1967.

29 FR 15477, Nov. 18, 1964: S.O. 947; Taylor's Car Distribution Order 13, Amdt. 1, extends expiration date of Car Distribution Order 13.

29 FR 15477, Nov. 18, 1964: S.O. 947; Taylor's Car Distribution Order 14, Amdt. 1, extends expiration date of Car Distribution Order 14.

29 FR 15478, Nov. 18, 1964: S.O. 947; Taylor's Car Distribution Order 15, Amdt. 1, extends expiration date of Car Distribution Order 15.

29 FR 15478, Nov. 18, 1964: S.O. 947; Taylor's Car Distribution Order 16, Amdt. 1, extends expiration date of Car Distribution Order 16.

29 FR 15478, Nov. 18, 1964: S.O. 947; Taylor's Car Distribution Order 18, Amdt. 1, extends expiration date of Car Distribution Order 18.

29 FR 15478, Nov. 18, 1964: S.O. 947; Taylor's Car Distribution Order 19, Amdt. 1, extends expiration date of Car Distribution Order 19.

29 FR 15478, Nov. 18, 1964: S.O. 947; Taylor's Car Distribution Order 21, Amdt. 1, extends expiration date of Car Distribution Order 21.

29 FR 15478, Nov. 18, 1964: S.O. 947; Taylor's Car Distribution Order 22, Amdt. 1, extends expiration date of Car Distribution Order 22.

29 FR 15479, Nov. 18, 1964: S.O. 947; Taylor's Car Distribution Order 23, Amdt. 1, extends expiration date of Car Distribution Order 23.

29 FR 15550, Nov. 19, 1964: S.O. 947; Rev. Taylor's Car Distribution Order 1, All Railroads, shortage of freight cars, expires Nov. 30, 1964.

29 FR 15550, Nov. 19, 1964: S.O. 947; Taylor's Car Distribution Order 25, All Railroads, shortage of freight cars, expires Dec. 31, 1964.

29 FR 15887, Nov. 26, 1964: S.O. 947; Rev. Taylor's Car Distribution Order 19, Reading Co. et al, shortage of freight cars, effective day after date of order.

29 FR 15965, Dec. 1, 1964: S.O. 947; Rev. Taylor's Car Distribution Order 1, Amdt. 1, extends expiration date of Rev. car distribution order 1.

29 FR 15965, Dec. 1, 1964: S.O. 947; Rev. Taylor's Car Distribution Order 4, Baltimore & O. R. Co., shortage of freight cars, effective 2 days after date of order.

29 FR 15965, Dec. 1, 1964: S.O. 947; Taylor's Car Distribution Order 5, Amdt. 2, extends expiration date of Car Distribution Order 5.

29 FR 15966, Dec. 1, 1964: S.O. 947; Taylor's Car Distribution Order 6, Amdt. 2, extends expiration date of Car Distribution Order 6.

29 FR 15966, Dec. 1, 1964: S.O. 947; Taylor's Car Distribution Order 7, Amdt. 2, extends expiration date of Car Distribution Order 7.

29 FR 15966, Dec. 1, 1964: S.O. 947; Taylor's Car Distribution Order 8, Amdt. 2, extends expiration date of Car Distribution Order 8.

29 FR 15966, Dec. 1, 1964: S.O. 947; Rev. Taylor's Car Distribution Order 9-A, Baltimore & O. R. Co. and Chicago, R.I. & P. R. Co., shortage of freight cars, effective 2 days after date of order.

29 FR 15966, Dec. 1, 1964: S.O. 947; Taylor's Car Distribution Order 10-A, Amdt. 2, extends expiration date of Car Distribution Order 10-A.

29 FR 15967, Dec. 1, 1964: S.O. 947; Rev. Taylor's Car Distribution Order 11, Amdt. 1, extends expiration date of Rev. Car Distribution Order 11.

29 FR 15967, Dec. 1, 1964: S.O. 947; Taylor's Car Distribution Order 12, Amdt. 2, extends expiration date of Car Distribution Order 12.

29 FR 15967, Dec. 1, 1964: S.O. 947; Taylor's Car Distribution Order 13, Amdt. 2, extends expiration date of Car Distribution Order 13.

29 FR 15967, Dec. 1, 1964: S.O. 947; Taylor's Car Distribution Order 14, Amdt. 2, extends expiration date of Car Distribution Order 14.

29 FR 15967, Dec. 1, 1964: S.O. 947; Taylor's Car Distribution Order 15, Amdt. 2, extends expiration date of Car Distribution Order 15.

29 FR 15967, Dec. 1, 1964: S.O. 947; Taylor's Car Distribution Order 16, Amdt. 2, extends expiration date of Car Distribution Order 16.

29 FR 15968, Dec. 1, 1964: S.O. 947; Rev. Taylor's Car Distribution Order 17, Amdt. 1, extends expiration date of Rev. Car Distribution Order 17.

29 FR 15968, Dec. 1, 1964: S.O. 947; Rev. Taylor's Car Distribution Order 19, Amdt. 1, extends expiration date of Rev. Car Distribution Order 19.

29 FR 15968, Dec. 1, 1964: S.O. 947; Taylor's Car Distribution Order 21, Amdt. 2, extends expiration date of Car Distribution Order 21.

29 FR 15968, Dec. 1, 1964: S.O. 947; Taylor's Car Distribution Order 22, Amdt. 2, extends expiration date of Car Distribution Order 22.

29 FR 15968, Dec. 1, 1964: S.O. 947; Taylor's Car Distribution Order 23, Amdt. 2, extends expiration date of Car Distribution Order 23.

29 FR 15969, Dec. 1, 1964: S.O. 947; Taylor's Car Distribution Order 24, Amdt. 1, extends expiration date of Car Distribution Order 24.

29 FR 16448, Dec. 5, 1964: S.O. 947; Second Rev. Taylor's Car Distribution Order 11, Lehigh Valley R. Co. and Norfolk & W. Ry. Co., shortage of freight cars, effective until Dec. 8, 1964.

29 FR 16942, Dec. 10, 1964: S.O. 947; Rev. Taylor's Car Distribution Order 12, Terminal Railroad Assn. of St. Louis and Chicago, B. & Q. R. Co., shortage of freight cars, effective until Dec. 22, 1964.

29 FR 17021, Dec. 11, 1964: S.O. 947; Rev. Taylor's Car Distribution Order 1, Amdt. 2, extends expiration date of Rev. Car Distribution Order 1.

29 FR 17021, Dec. 11, 1964: S.O. 974; Rev. Taylor's Car Distribution Order 4, Amdt. 1, extends expiration date of Rev. Car Distribution Order 4.

29 FR 17021, Dec. 11, 1964: S.O. 974; Taylor's Car Distribution Order 5, Amdt. 3, extends expiration date of Car Distribution Order 5.

29 FR 17022, Dec. 11, 1964: S.O. 947; Taylor's Car Distribution Order 6, Amdt. 3, extends expiration date of Car Distribution Order 6.

29 FR 17022, Dec. 11, 1964: S.O. 947; Taylor's Car Distribution Order 7, Amdt. 3, extends expiration date of Car Distribution Order 7.

29 FR 17022, Dec. 11, 1964: S.O. 947; Taylor's Car Distribution Order 8, Amdt. 3, extends expiration date of Car Distribution Order 8.

29 FR 17022, Dec. 11, 1964: S.O. 947; Rev. Taylor's Car Distribution Order 9-A, Amdt. 1, extends expiration date of Rev. Car Distribution Order 9-A.

29 FR 17022, Dec. 11, 1964: S.O. 947; Taylor's Car Distribution Order 10-A, Amdt. 3, extends expiration date of Car Distribution Order 10-A.

29 FR 17023, Dec. 11, 1964: S.O. 947; Second Rev. Taylor's Car Dstribution Order 11, Amdt. 1, extends expiration date of Second Rev. Car Distribution Order 11.

29 FR 17023, Dec. 11, 1964: S.O. 947; Taylor's Car Distribution Order 13, Amdt. 3, extends expiration date of Car Distribution Order 13.

29 FR 17023, Dec. 11, 1964: S.O. 947; Taylor's Car Distribution Order 14, Amdt. 3, extends expiration date of Car Distribution Order 14.

29 FR 17023, Dec. 11, 1964: S.O. 947; Taylor's Car Distribution Order 15, Amdt. 3, extends expiration date of Car Distribution Order 15.

29 FR 17023, Dec. 11, 1964: S.O. 947; Taylor's Car Distribution Order 16, Amdt. 3, extends expiration date of Car Distribution Order 16.

29 FR 17024, Dec. 11, 1964: S.O. 947; Taylor's Car Distribution Order 22, Amdt. 3, extends expiration date of Car Distribution Order 22.

29 FR 17024, Dec. 11, 1964: S.O. 947; Taylor's Car Distribution Order 23, Amdt. 3, extends expiration date of Car Distribution Order 23.

29 FR 19270, Dec. 31, 1964: S.O. 947; Taylor's Car Distribution Order 25, Amdt. 1, extends expiration date of Car Distribution Order 25.

30 FR 1022, Jan. 30, 1965: S.O. 947; Taylor's Car Distribution Order 25, Amdt. 2, extends further expiration date of Car Distribution Order 25.

30 FR 4440, April 6, 1965: S.O. 947; Taylor's Car Dist. Direction No. 1, Denver & R.G.W. R. Co. and Union Pac. R. Co., freight car distribution, effective until May 14, 1965.

30 FR 4440, Apr. 6, 1965: S.O. 947; Taylor's Car Dist. Dir. No. 2, Terminal Railroad Assn. of St. Louis and Chicago & N.W. Ry. Co., freight car distribution, effective until May 14, 1965.

30 FR 4440, Apr. 6, 1965: S.O. 947; Taylor's Car Dist. Dir. No. 3, Terminal Railroad Assn. of St. Louis and Chicago, R.I. & P. R. Co., freight car distribution, effective until May 14, 1965.

30 FR 4441, Apr. 6, 1965: S.O. 947; Taylor's Car Dist. Dir. No. 4, Louisville & N. R. Co. and Chicago, B. & Q. R. Co., freight car distribution, effective until May 14, 1965.

30 FR 4441, Apr. 6, 1965: S.O. 947; Taylor's Car Dist. Dir. No. 5, Chicago & N.W. Ry. Co. and Great Northern Ry. Co., freight car distribution, effective until May 14, 1965.

30 FR 4442, Apr. 6, 1965: S.O. 947; Taylor's Car Dist. Dir. No. 6, Missouri Pac. R. Co. and Chicago & N.W. Ry. Co., freight car distribution, effective until May 14, 1965.

30 FR 4442, Apr. 6, 1965: S.O. 947; Taylor's Car Dist. Dir. No. 7, Norfolk & W. Ry. Co. et al., freight car distribution, effective until May 14, 1965.

30 FR 4443, Apr. 6, 1965: S.O. 947; Taylor's Car Dist. Dir. No. 8, Baltimore & O. R. Co et al., freight car distribution, effective until May 14, 1965.

30 FR 4444, Apr. 6, 1965: S.O. 947; Taylor's Car Dist. Dir. No. 9, Reading Co. et al., freight car distribution, effective until May 14, 1965.

30 FR 4444, Apr. 6, 1965: S.O. 947; Taylor's Car Dist. Dir. No. 10, Lehigh Valley R. Co. et al., freight car distribution, effective until May 14, 1965.

30 FR 5496, Apr. 16, 1965: S.O. 947; Rev. Taylor's Car Dist. Dir. No. 7, Norfolk & W. Ry. Co. et al., freight car distribution, effective until May 14, 1965.

30 FR 5722, Apr. 22, 1965: S.O. 947; 2d Rev. Taylor's Car Dist. Dir. 7, Norfolk & W. Ry. Co., et al., freight car distribution, expires May 14, 1965.

30 FR 12808, Oct. 7, 1965: S.O. 947, 2d Rev.; Pfahler's Car Dist. Dir. No. 1, Pennsylvania Railroad Co. and Chicago, Burlington & Quincy Railroad Co., boxcar distribution, effective until Nov. 30, 1965.

30 FR 12808, Oct. 7, 1965: S.O. 947, 2d Rev.; Pfahler's Car Dist. Dir. No. 2, Kansas City Southern Railway Co. and Illinois Central Railroad Co., boxcar distribution, effective until Nov. 30, 1965.

30 FR 12809, Oct. 7, 1965: S.O. 947, 2d Rev.; Pfahler's Car Dist. Dir. No. 3, New York Central Railroad Co. and Atchison, Topeka & Santa Fe Railway Co., boxcar distribution, effective until Nov. 30, 1965.

30 FR 12809, Oct. 7, 1965: S.O. 947, 2d Rev.; Pfahler's Car Dist. Dir. No. 4, Louisville & Nashville Railroad Co. and Chicago, Burlington & Quincy Railroad Co., effective until Nov. 30, 1965.

29 FR 14704, Oct. 28, 1964: S.O. 947; Taylor's Car Distribution Order 1, Association of American Railways, Car Service Division, shortage of freight cars, effective until Nov. 30, 1964.

29 FR 14704, Oct. 28, 1964: S.O. 947; Taylor's Car Distribution Order 2, Boston & M. R. Co., shortage of freight cars, effective until Nov. 15, 1964.

29 FR 14704, Oct. 28, 1964: S.O. 947; Taylor's Car Distribution Order 3, New York Central R. Co., shortage of freight cars, effective until Nov. 15, 1964.

29 FR 14704, Oct. 28, 1964: S.O. 947; Taylor's Car Distribution Order 4, Baltimore & O. R. Co. and Chicago, B. & Q. R. Co., shortage of freight cars, effective until Nov. 15, 1964.

29 FR 14705, Oct. 28, 1964: S.O. 947; Taylor's Car Distribution Order 5, New York Central R. Co. and Chicago, B. & Q. R. Co., shortage of freight cars, effective until Nov. 15, 1964.

29 FR 14767, Oct. 29, 1964: S.O. 947; Taylor's Car Distribution Order 6, New York, N.H. & H. R. Co., shortage of freight cars, effective until Nov. 15, 1964.

29 FR 14767, Oct. 29, 1964: S.O. 947; Taylor's Car Distribution Order 7, Central R. Co. of N.J. and Erie-Lackawanna R. Co., shortage of freight cars, effective until Nov. 15, 1964.

29 FR 14767, Oct. 29, 1964: S.O. 947; Taylor's Car Distribution Order 8, Louisville & N. R. Co., shortage of freight cars, effective until Nov. 15, 1964.

29 FR 14768, Oct. 29, 1964: S.O. 947; Taylor's Car Distribution Order 9, Baltimore & O. R. Co., shortage of freight cars, effective until Nov. 15, 1964.

29 FR 14768, Oct. 29, 1964: S.O. 947; Taylor's Car Distribution Order 10, New York Centeal R. Co., shortage of freight cars, effective until Nov. 15, 1964.

29 FR 14768, Oct. 29, 1964: S.O. 947; Taylor's Car Distribution Order 11, Lehigh Valley R. Co. and Norfolk & W. Ry. Co., shortage of freight cars, effective until Nov. 15, 1964.

29 FR 14910, Nov. 3, 1964: S.O. 947; Taylor's Car Distribution Order 12, Terminal Railroad Assoication of St. Louis, shortage of freight cars, effective until Nov. 15, 1964.

29. F.R. 14910, Nov. 3, 1964: S.O. 947; Taylor's Car Distribution Order 13, Pennsylvania R. Co., shortage of freight cars, effective until Nov. 15, 1964.

29 FR 14910, Nov. 3, 1964: S.O. 947; Taylor's Car Distribution Order 14, Pennsylvania R. Co., shortage of freight cars, effective until Nov. 15, 1964.

29 FR 14972, Nov. 4, 1964: S.O. 947; Taylor's Car Distribution Order 15, Denver & R. G. W. R. Co., shortage of freight cars, effective until Nov. 15, 1964.

29 FR 14973, Nov. 4, 1964: S.O. 947; Taylor's Car Distribution Order 16, Missouri Pac. R. Co. and Chicago, B. & Q. R. Co., shortage of freight cars, effective until Nov. 15, 1964.

29 FR 14973, Nov. 4, 1964: S.O. 947; Taylor's Car Distribution Order 17, Chesapeake & O. R. Co., shortage of freight cars, effective until Nov. 15, 1964.

29 FR 14973, Nov. 4, 1964: S.O. 947; Taylor's Car Distribution Order 18, Norfolk & W. Ry., shortage of freight cars, effective until Nov. 15, 1964.

29 FR 14973, Nov. 4, 1964: S.O. 947; Taylor's Car Distribution Order 19, Reading Co., et al., shortage of freight cars, effective until Nov. 15, 1964.

29 FR 14974, Nov. 4, 1964: S.O. 947; Taylor's Car Distribution Order 20, Missouri Pac. R. Co., shortage of freight cars, effective until Nov. 15, 1964.

29 FR 15005, Nov. 5, 1964: S.O. 947; Taylor's Car Distribution Order 21, Western Maryland Ry. Co., shortage of freight cars, effective until Nov. 15, 1964.

29 FR 15006, Nov. 5, 1964: S.O. 947; Taylor's Car Distribution Order 22, Erie-Lackawanna R. Co. and Soo Line R. Co., shortage of freight cars, effective until Nov. 15, 1964.

29 FR 15006, Nov. 5, 1964: S.O. 947; Taylor's Car Distribution Order 23, Erie-Lackawanna R. Co., and Chicago, B. & Q. R. Co., shortage of freight cars, effective until Nov. 15, 1964.

29 FR 15006, Nov. 5, 1964: S.O. 947; Taylor's Car Distribution Order 9-A, Baltimore & O. R. Co. and Chicago, R.I. & P. R. Co., substituted for Order 9, expires Nov. 15, 1964.

29 FR 15006, Nov. 5, 1964: S.O. 947; Taylor's Car Distribution Order 10-A, New York Central R. Co. and Chicago, M., St. P. & P. R. Co., substituted for Order 10, expires Nov. 15, 1964.

29 FR 15191, Nov. 10, 1964: S.O. 947; Taylor's Car Distribution Order 20-A, Missouri Pac. R. Co., vacates Car Distribution Order 20, effective day after date of order.

29 FR 15308, Nov. 14, 1964: S.O. 947; Rev. Taylor's Car Distribution Order 11, Lehigh Valley R. Co. and Norfolk & W. Ry. Co., shortage of freight cars, expires Nov. 30, 1964.

29 FR 15400, Nov. 17, 1964: S.O. 947; Rev. Taylor's Car Distribution Order 17, Chesapeake & O. Ry. Co., shortage of freight cars, expires Nov. 30, 1964.

29 FR 15400, Nov. 17, 1964: S.O. 947; Taylor's Car Distribution Order 24, Missouri Pac. R. Co., shortage of freight cars, expires Nov. 30, 1964.

29 FR 15475, Nov. 18, 1964: S.O. 947; Taylor's Car Distribution Order 2, Amdt. 1, extends expiration date of Car Distribution Order 2.

29 FR 15476, Nov. 18, 1964: S.O. 947; Taylor's Car Distribution Order 3, Amdt. 1, extends expiration date of Car Distribution Order 3.

29 FR 15476, Nov. 18, 1964: S.O. 947; Taylor's Car Distribution Order 4, Amdt. 1, extends expiration date of Car Distribution Order 4.

29 FR 15476, Nov. 18, 1964: S.O. 947; Taylor's Car Distribution Order 5, Amdt. 1, extends expiration date of Car Distribution Order 5.

29 FR 15476, Nov. 18, 1964: S.O. 947; Taylor's Car Distribution Order 6, Amdt. 1, extends expiration date of Car Distribution Order 6.

29 FR 15476, Nov. 18, 1964: S.O. 947; Taylor's Car Distribution Order 7, Amdt. 1, extends expiration date of Car Distribution Order 7.

29 FR 15476, Nov. 18, 1964: S.O. 947; Taylor's Car Distribution Order 8, Amdt. 1, extends expiration date of Car Distribution Order 8.

29 FR 15477, Nov. 18, 1964: S.O. 947; Taylor's Car Distribution Order 9-A, Amdt. 1, extends expiration date of Car Distribution Order 9-A.

29 FR 15477, Nov. 18, 1964: S.O. 947; Taylor's Car Distribution Order 10-A, Amdt. 1, extends expiration date of Car Distribution Order 10-A.

29 FR 15477, Nov. 18, 1964: S.O. 947; Taylor's Car Distribution Order 12, Amdt. 1, extends expiration date of Car Distribution Order 12.

30 FR 13920, Nov. 3, 1965: S.O. 947; 2d Rev.; Pfahler's Car Dist. Dir. No. 3, New York Central Railroad Co. and Atchison, Topeka and Santa Fe Railway Co., expires Nov. 30, 1965.

30 FR 14403, Nov. 17, 1965: S.O. 947; 2d Rev.; Pfahler's Car Dist. Dir. No. 3, New York Central Railroad Co. and Chicago & North Western Railway Co., freight car distribution, effective until Nov. 30, 1965.

30 FR 14582, Nov. 23, 1965: 2d Rev. S.O. 947, Pfahler's Car Dist. Dir. 5, Chicago, R.I. & P. R. Co., and Soo Line R. Co., freight car distribution, effective Nov. 22, 1965.

30 FR 14956, Dec. 2, 1965: 2d Rev. S.O. 947; Rev. Pfahler's Car Dist. Dir. No. 4, Louisville & N. R. Co., and Chicago, B. & Q. R. Co., freight car distribution, effective until Dec. 31, 1965.

30 FR 14955, Dec. 2, 1965: 2d Rev. S.O. 947; Rev. Pfahler's Car Dist. Dir. No. 1, Pennsylvania R. Co. and Chicago, B. & Q. R. Co., boxcar distribution, effective until Dec. 31, 1965.

30 FR 14955, Dec. 2, 1965: 2d Rev. S.O. 947; Pfahler's Car Dist. Dir. No. 2, Amdt. 1, extends expiration date of Car Distribution Dir. No. 2.

30 FR 14956, Dec. 2, 1965: 2d Rev. S.O. 947; Pfahler's Car Dist. Dir. No. 3, Amdt. 1, extends expiration date of Car Distribution Dir. No. 3.

30 FR 15046, Dec. 4, 1965: 2d Rev. S.O. 947, Pfahler's Car Dist. Dir. No. 7, New York, N. H. & H. R. Co., Erie-Lackawanna R. Co., Soo Line R. Co., and the Northern P. R. Co., freight car distribution, effective until Dec. 31, 1965.

30 FR 15047, Dec. 4, 1965: 2d Rev. S.O. 947, Pfahler's Car Dist. Dir. No. 6, Southern Pac. Co., and the Chicago, R. I. & Pac. R. Co., boxcar distribution, effective until Dec. 31, 1965.

30 FR 15386, Dec. 14, 1965: 2d Rev. S.O. 947; Rev. Pfahler's Car. Dist. Dir. No. 4, Louisville and N. R. Co., Chicago, B. & Q. R. Co., and the Northern Pac. R. Co., boxcar distribution, effective until Dec. 31, 1965.

30 FR 15386, Dec. 14, 1965: 2d Rev. S.O. 947; Rev. Pfahler's Car. Dist. Dir. No. 1, Pennsylvania R. Co., Chicago, B. & Q. R. Co., and the Northern Pac. R. Co., boxcar distribution, effective until Dec. 31, 1965.

31 FR 1279, Feb. 2, 1966: S.O. 973; Pfahler's Car Dist. Dir. No. 1, Atlantic Coast Line R. Co., et al., freight car distribution, effective until Apr. 30, 1966.

31 FR 1282, Feb. 2, 1966: S.O. No. 973; Pfahler's Car Dist. No. 2, Seaboard Air Line R. Co., et al., freight car distribution, effective until Apr. 30, 1966.

31 FR 1282, Feb. 2, 1966: S.O. No. 973; Pfahler's Car Dist. No. 3, Pennsylvania R. Co., and Chicago, M. St. P. & P. R. Co., freight car distribution, effective until Apr. 30, 1966.

31 FR 1279, Feb. 2, 1966: S.O. No. 973; Pfahler's Car. Dist. Dir. No. 4, Baltimore & O. R. Co., et al., freight car distribution, effective until Apr. 30, 1966.

31 FR 1280, Feb. 2, 1966: S.O. No. 973; Pfahler's Car Dist. No. 5, Erie-Lackawanna R. Co., et al., freight car distribution, effective until Apr. 30, 1966.

31 FR 1281, Feb. 2, 1966: S.O. No. 973; Pfahler's Car Dist. Dir. No. 6, Missouri-K-T. R. Co., et al., freight car distribution, effective until Apr. 30, 1966.

31 FR 1280, Feb. 2, 1966: S.O. No. 973; Pfahler's Car Dist. Dir. No. 7, Illinois Central R. Co., and Great Northern Ry. Co., freight car distribution, effective until Apr. 30, 1966.

31 FR 1281, Feb. 2, 1966: S.O. No. 973; Pfahler's Car Dist. Dir. 8, New York Central R. Co., and Chicago & N.W. R. Co., freight car distribution, effective until Apr. 30, 1966.

31 FR 2404, Feb. 4, 1966: S.O. No. 973; (Corrected) Pfahler's Car Dist. Dir. 8, New York Central R. Co., and Chicago & N.W. Ry., Co., freight car distribution, effective until Apr. 30, 1966.

31 FR 2405, Feb. 4, 1966: S.O. No. 973; Pfahler's Car Dist. Dir. 9, Louisville & N. R. Co., and Chicago & E. I. R. Co., freight car distribution, effective until Apr. 30, 1966.

31 FR 2405, Feb. 4, 1966: S.O. No. 973; Pfahler's Car Dist. Dir. 10, Reading Co., et al., freight car distribution, effective until Apr. 30, 1966.

31 FR 2458, Feb. 5, 1966: S.O. 973; Pfahler's Car Dist. Dir. 11, Gulf M. & O. R. Co., and Union Pac. R. Co., freight car distribution, effective until Apr. 30, 1966.

31 FR 2459, Feb. 5, 1966: S.O. 973; Pfahler's Car Dist. Dir. 12; Southern Ry. Co., and St. Louis. S.F. Ry. Co., freight car distribution, effective until Apr. 30, 1966.

31 FR 2459, Feb. 5, 1966: S.O. 973; Pfahler's Car Dist. Dir. 13; Western Maryland Ry. Co. et al., freight car distribution, effective until Apr. 30, 1966.

31 FR 2573, Feb. 9, 1966, 2d Rev. S.O. 973; Rev. Pfahler's Car Dist. Dir. 1, Atlantic Coast Line R. Co., et al., freight car distribution, effective until Apr. 30, 1966.

31 FR 2574, Feb. 9, 1966, S.O. 973; Pfahler's Car Dist. Dir. 14, Southern Pac. Co., and Atchison, T. & S. F. Ry. Co., freight car distribution, effective until Apr. 30, 1966.

31 FR 2574, Feb. 9, 1966, S.O. 973; Pfahler's Car Dist. Dir. 15, Atlantic Coast Line R. Co., et al., freight car distribution, effective until Apr. 30, 1966.

31 FR 2507, Feb. 8, 1966, Rev. S.O. 973; Rev. Pfahler's Car Dist. Dir. 1, Atlantic Coast Line R. Co., et al., freight car distribution, effective until Apr. 30, 1966.

31 FR 2672, Feb. 11, 1966, Rev. S.O. 973: Rev. Pfahler's Car Dist. Dir. 7, Illinois Central R. Co., and Great Northern Ry. Co., freight car distribution, effective until Apr. 30, 1966.

31 FR 2673, Feb. 11, 1966, S.O. 973: Pfahler's Car. Dist. Dir. 17, Illinois Central R. Co., et al., freight car distribution, effective until Apr. 30, 1966.

31 FR 2673, Feb. 11, 1966, Rev. S.O. 973: Rev. Pfahler's Car Dist. Dir. 10, Reading Co., et al., freight car distribution, effective until Apr. 30, 1966.

31 FR 2674, Feb. 11, 1966, S.O. 973: Pfahler's Car Dist. Dir. 16, Reading Co. et al., freight car distribution, effective until Apr. 30, 1966.

31 FR 2707, Feb. 12, 1966, S.O. 973: Pfahler's Car Dist. Dir. 18, Boston and Maine Corp. et al., freight car distribution, effective until Apr. 30, 1966.

31 FR 2741, Feb. 15, 1966, S.O. 973: Pfahler's Car Dist. Dir. 20, Chesapeake & O. Ry. Co. and Soo Line R. Co., freight car distribution, effective until Apr. 30, 1966.

31 FR 2741, Feb. 15, 1966, S.O. 973: Pfahler's Car Dist. Dir. 19, Chicago & E. I. R. Co., and Soo Line R. Co., freight car distribution, effective until Apr. 30, 1966.

31 FR 2742, Feb. 15, 1966, S.O. 973: Pfahler's Car Dist. Dir. 21, St. Louis & S. F. Ry. Co., and Union Pac. R. Co., freight car distribution, effective until Apr. 30, 1966.

31 FR 3102, Feb. 24, 1966: S.O. 973: Pfahler's Car Dist. Dir. 14-A, Southern Pac. Co., and Atchison, T. & S. F. Ry. Co., freight car distribution, vacates Car Dist. Dir. 14 (31 FR 2574), effective Feb. 20, 1966.

31 FR 3102, Feb. 24, 1966: S.O. 973; Pfahler's Car Dist. Dir. 15-A, Atlantic Coast Line R. Co. et al., freight car distribution, vacates Car Dist. Dir. 15 (31 FR 2574), effective Feb. 17, 1966.

31 FR 3102, Feb. 24, 1966, S.O. 973: Pfahler's Car Dist. Dir. 22, Atlantic Coast Line R. Co. et al., freight car distribution, effective until Apr. 30, 1966.

31 FR 3103, Feb. 24, 1966, S.O. 973: Pfahler's Car Dist. Dir. 23, Atlantic Coast Line R. Co., and Gulf, M. & O. R. Co., freight car distribution, effective until Apr. 30, 1966.

31 FR 3103, Feb. 24, 1966, S.O. 973: Pfahler's Car Dist. Dir. 24, Louisville and N. R. Co., et al., freight car distribution, effective until Mar. 13, 1966.

31 FR 5028, Mar. 26, 1966, S.O. 973: Pfahler's Car Dist. Dir. 1-A, Atlantic Coast Line R. Co., et al., freight car distribution, vacates Car Dist. Dir. No. 1, effective Mar. 31, 1966.

31 FR 5028, Mar. 26, 1966, S.O. 973: Pfahler's Car Dist. Dir. 2-A, Seaboard Air Line R. Co., et al., freight car distribution, vacates Car Dist. Dir. No. 2, effective Mar. 31, 1966.

31 FR 5028, Mar. 26, 1966, S.O. 973: Pfahler's Car Dist. Dir. 3-A, Pennsylvania R. Co., and Chicago, M. St. P. & P. R. Co., freight car distribution, vacates Car Dist. Dir. No. 3, effective Mar. 31, 1966.

31 FR 5029, Mar. 26, 1966, S.O. 973: Pfahler's Car Dist. Dir. 4-A, Baltimore & O. R. Co., et al., freight car distribution, vacates Car Dist. Dir. No. 4, effective Mar. 31, 1966.

31 FR 5029, Mar. 26, 1966, S.O. No. 973: Pfahler's Car Dist. Dir. 5-A, Erie-Lackawanna R. Co., et al., freight car distribution, vacates Car Dist. Dir. No. 5, effective Mar. 31, 1966.

31 FR 5029, Mar. 26, 1966, S.O. No. 973: Pfahler's Car Dist. Dir. 6-A, Missouri-K-T R. Co., et al., freight car distribution, vacates Car Dist. Dir. No. 6, effective Mar. 31, 1966.

31 FR 5029, Mar. 26, 1966, S.O. No. 973: Pfahler's Car Dist. Dir. 7-A, Illinois Central R. Co., and Great Northern Ry. Co., freight car distribution, vacates Car Dist. Dir. No. 7, effective Mar. 31, 1966.

31 FR 5029, Mar. 26, 1966, S.O. 973: Pfahler's Car Dist. Dir. 8-A, New York Central R. Co., and Chicago & N. W. R. Co. freight car distribution, vacates Car Dist. Dir. No. 8, effective Mar. 31, 1966.

31 FR 5029, Mar. 26, 1966, S.O. 973: Pfahler's Car Dist. Dir. 9-A, Louisville & N. R. Co., and Chicago & E. I. R. Co., freight car distribution, vacates Car Dist. Dir. 9, effective Mar. 31, 1966.

31 FR 5030, Mar. 26, 1966, S.O. 973: Pfahler's Car Dist. Dir. 10-A, Reading Co., et al., freight car distribution, vacates Car Dist. Dir. No. 10, effective Mar. 31, 1966.

31 FR 5030, Mar. 26, 1966, S.O. 973: Pfahler's Car Dist. Dir. 11-A, Gulf M. & O. R. Co., and Union Pac. R. Co., freight car distribution, vacates Car Dist. Dir. No. 11, effective Mar. 31, 1966.

31 FR 5030, Mar. 26, 1966, S.O. 973: Pfahler's Car Dist. Dir. 12-A, Southern Ry. Co., and St. Louis S. F. Ry. Co., freight car distribution, vacates Car Dist. Dir. 12, effective Mar. 31, 1966.

CONSULT THE TABLE OF CASES WHENEVER A CITATION IS FOLLOWED BY AN ASTERISK

31 FR 5030, Mar. 26, 1966, S.O. 973; Pfahler's Car Dist. Dir. 13-A, Western Maryland Ry. Co., et al., freight car distribution, vacates Car Dist. Dir. 13, effective Mar. 31, 1966.

31 FR 5030, Mar. 26, 1966, S.O. No. 973: Pfahler's Car Dist. Dir. 16-A, Reading Co., et al., freight car distribution, vacates Car Dist. Dir. 16, effective Mar. 31, 1966.

31 FR 5031, Mar. 26, 1966, S.O. No. 973: Pfahler's Car Dist. Dir. 17-A, Illinois Central R. Co., et al., freight car distribution, vacates Car Dist. Dir. No. 17, effective Mar. 31, 1966.

31 FR 5031, Mar. 26, 1966, S.O. No. 973: Pfahler's Car Dist. Dir. 18-A, Boston & Maine Corp. et al., freight car distribution, vacates Car Dist. Dir. No. 18, effective Mar. 31, 1966.

31 FR 5031, Mar. 26, 1966, S.O. No. 973 : Pfahler's Car Dist. Dir. 19-A, Chicago & E. I. R. Co., and Soo Line R. Co., freight car distribution, vacates Car Dist. Dir. No. 19, effective Mar. 31, 1966.

31 FR 5031, Mar. 26, 1966, S.O. No. 973: Pfahler's Car Dist. Dir. 20-A, Chesapeake & O. Ry. Co., and Soo Line R. Co., freight car distribution, vacates Car Dist. Dir. No. 20, effective Mar. 31, 1966.

31 FR 5031, Mar. 26, 1966, S.O. No. 973: Pfahler's Car Dist. Dir. 21-A, St. Louis & S. F. Ry. Co., and Union Pac. R. Co., freight car distribution, vacates Car Dist. Dir. No. 21, effective Mar. 31, 1966.

31 FR 5031, Mar. 26, 1966, S.O. No. 973: Pfahler's Car Dist. Dir. 22-A, Atlantic Coast Line R. Co., et al., freight car distribution, vacates Car Dist. Dir. No. 22, effective Mar. 31, 1966.

31 FR 5032, Mar. 26, 1966, S.O. 973, Pfahler's Car Dist. Dir. 23-A, Atlantic Coast Line R. Co., and Gulf, M. & O. R. Co., freight car distribution, vacates Car Dist. Dir. No. 23, effective Mar. 31, 1966.

31 FR 5389, Apr. 5, 1966, S.O. 981: Pfahler's Car Dist. Dir. No. 1, Louisville & N. R. Co., and Chicago, B & Q. R. Co., freight car distribution, expiration date May 28, 1966.

31 FR 5389, Apr. 5, 1966, S.O. 981: Pfahler's Car Dist. Dir. No. 2, Seaboard Air Line R. Co., et al., freight car distribution, effective until May 28, 1966.

31 FR 5390, Apr. 5, 1966, S.O. 981: Pfahler's Car Dist. Dir. No. 3, Erie-Lackawanna R. Co., and Chicago & E. I. R. Co., freight car distribution, effective until May 28, 1966.

31 FR 5390, Apr. 5, 1966, S.O. 981: Pfahler's Car Dist. Dir. No. 4, Baltimore & O. R. Co., and Chicago & N. W. Ry. Co., freight car distribution, expiration date May 28, 1966.

31 FR 5390, Apr. 5, 1966, S.O. 981: Pfahler's Car Dist. Dir. No. 5, Reading Co., et al., freight car distribution, expiration date May 28, 1966.

31 FR 5391, Apr. 5, 1966, S.O. 981: Pfahler's Car Dist. Dir. No. 6, Atlantic Coast Line R. Co., et al., freight car distribution, expiration date May 28, 1966.

31 FR 5391, Apr. 5, 1966, S.O. 981: Pfahler's Car Dist. Dir. No. 7, Missouri-K-T R. Co., and Union Pac. R. Co., freight Car distribution, expiration date May 28, 1966.

31 FR 5392, Apr. 5, 1966, S.O. 981: Pfahler's Car Dist. Dir. No. 8, Pennsylvania R. Co., and Soo Line R. Co., freight car distribution, expiration date May 28, 1966.

31 FR 5994, Apr. 19, 1966, S.O. No. 981: Pfahler's Rev. Car Dist. Dir. No. 1, Louisville & N.R. Co. and Chicago, B. & Q. R. Co., freight car distribution, expiration date May 28, 1966.

31 FR 6654, May 4, 1966, S.O. No. 981: Pfahler's Car Dist. Dir. No. 9, Kansas City Southern Ry. Co. and Atchison T. & S.F. Ry. Co., freight car distribution, effective until May 28, 1966.

31 FR 6655, May 4, 1966, S.O. No. 981: Pfahler's Car Dist. Dir. No. 10, Kansas City Southern Ry. Co. and Union Pac. R. Co., freight car distribution, effective until May 28, 1966.

31 FR 7496, May 24, 1966, S.O. No. 981: Pfahler's Rev. Car Dist. Dir. No. 1-A, vacates Car. Dist. Dir. No. 1, effective May 24, 1966.

31 FR 7496, May 24, 1966, S.O. No. 981: Pfahler's Car Dist. Dir. No. 2-A, vacates Car Dist. Dir. No. 2, effective May 24, 1966.

31 FR 7497, May 24, 1966, S.O. No. 981: Pfahler's Rev. Car Dist. Dir. No. 3, Erie-Lackawanna R. Co. and Chicago & E. I. R. Co., freight car distribution, effective May 25, 1966.

31 FR 7497, May 24, 1966, S.O. No. 981: Pfahler's Rev. Car Dist. Dir. No. 4, Baltimore & O. R. Co. and Chicago & N.W. Ry. Co., freight car distribution, effective May 25, 1966.

31 FR 7497, May 24, 1966, S.O. No. 981: Pfahler's Rev. Car Dist. Dir. No. 5, Reading Co., et al., freight car distribution, effective May 25, 1966.

31 FR 7498, May 24, 1966, S.O. No. 981: Pfahler's Rev. Car Dist. Dir. No. 6, Atlantic Coast Line R. Co., et al., freight car distribution, effective May 25, 1966.

31 FR 7498, May 24, 1966, S.O. No. 981: Pfahler's Rev. Car Dist. Dir. No. 8, Pennsylvania R. Co. and Soo Line R. Co., freight car distribution, effective May 25, 1966.

31 FR 7498, May 24, 1966, S.O. No. 981: Pfahler's Car Dist. Dir. No. 9-A, vacates Pfahler's Car Dist. Dir. No. 9, effective May 24, 1966.

31 FR 7499, May 24, 1966, S.O. No. 981: Pfahler's Car Dist. Dir. No. 7-A, vacates Pfahler's Car Dist. Dir. No. 7, effective May 24, 1966.

31 FR 7499, May 24, 1966, S.O. No. 981: Pfahler's Rev. Car Dist. Dir. No. 10, Kansas City Southern Ry. Co. and Union Pac. R. Co., freight car distribution, effective May 25, 1966.

31 FR 8167, June 9, 1966, S.O. No. 981: Pfahler's 2d Rev. Car Dist. Dir. No. 4, Baltimore & O. R. Co. and Soo Line R. Co., freight car distribution, expiration date July 3, 1966.

31 FR 8167, June 9, 1966, S.O. No. 981: Pfahler's Car Dist. Dir. No. 11, Louisville & N. R. Co. and Chicago & N.W. Ry. Co., freight car distribution, expiration date July 3, 1966.

31 FR 8167, June 9, 1966, S.O. No. 981: Pfahler's 2d Rev. Car Dist. Dir. No. 8, Pennsylvania R. Co. and Soo Line R. Co., freight car distribution, expiration date July 3, 1966.

31 FR 9249, July 6, 1966, S.O. No. 981: Pfahler's 2d Rev. Car Dist. Dir. No. 6, Atlantic Coast Line R. Co. and Illinois Central R. Co., freight car distribution, expiration date July 24, 1966.

31 FR 9250, July 6, 1966, S.O. No. 981: Pfahler's 2d Rev. Car Dist. Dir. No. 3, Erie-Lackawanna R. Co. and Chicago & E. I. R. Co., freight car distribution, expiration date July 31, 1966.

31 FR 9250, July 6, 1966, S.O. No. 981: Pfahler's 2d Rev. Car Dist. Dir. No. 10, Kansas City Southern Ry. Co. and Chicago, R. I. & P. R. Co., freight car distribution, expiration date July 24, 1966.

31 FR 9250, July 6, 1966, S.O. No. 981: Pfahler's Rev. Car Dist. Dir. No. 11, Louisville & N. R. Co. and Chicago, B. & Q. R. Co., freight car distribution, expiration date July 24, 1966.

31 FR 9251, July 6, 1966, S.O. No. 981: Pfahler's 3d Rev. Car Dist. Dir. No. 8, Pennsylvania R. R. Co. and Chicago, B. & Q. R. Co., freight car distribution, expiration date July 24, 1966.

31 FR 10011, July 22, 1966, S.O. No. 981: Longhurst's Car Dist. Dir. No. 10-A, Kansas City Southern Ry. Co. and Chicago, R. I. & P. R. Co., vacates Car Dist. Dir. No. 10, effective July 18, 1966.

31 FR 10011, July 22, 1966, S.O. No. 981: Longhurst's Car Dist. Dir. No. 12, Kansas City Southern Ry. Co. and Illinois Central R. Co., freight car distribution, effective until Aug. 14, 1966.

31 FR 10162, July 27, 1966, S.O. No. 981: Pfahler's 2d Rev. Car Dist. Dir. No. 6, Amdt. 1, Atlantic Coast Line R. Co. and Illinois Central R. Co., freight car distribution effective until Aug. 14, 1966.

31 FR 10302, July 29, 1966, S.O. 981: 2d Rev. Pfahler's Car Dist. Dir. 3, Amdt. 1, Erie-Lackawana R. Co., and Chicago & E. I. R. Co., freight car distribution, extends expiration date S.O. 981 to August 14, 1966, effective on date of order.

31 FR 10999, Aug. 18, 1966, S.O. 981: 2d Rev. Pfahler's Car Dist. Dir. 6, Amdt. 2, Atlantic Coast Line R. Co., and Illinois Central R. Co., freight car distribution, extends expiration date S.O. 981 to Aug. 31, 1966, effective on date of order.

31 FR 10999, Aug. 18, 1966, S.O. 981: 2d Rev. Pfahler's Car Dist. Dir. 3, Amdt. 2, Erie-Lackawana R. Co., and Chicago & E. I. R. Co., freight car distribution, extends expiration date S.O. 981 to Aug. 31, 1966, effective on date of order.

31 FR 11000, Aug. 18, 1966, S.O. 981: Longhurst's Car Dist. Dir. 12, Amdt. 1, Kansas City Southern Ry. Co. and Illinois Central R. Co., freight car distribution, extends expiration date S.O. 981 to Aug. 31, 1966, effective on date of order.

31 FR 11922, Sept. 9, 1966, S.O. 981: Pfahler's Car Dist. Dir. 16, Erie-Lackawana R. Co., and Chicago B. & Q. R. Co., freight car distribution, effective until Sept. 24, 1966.

31 FR 11923, Sept. 9, 1966, S.O. 981: Pfahler's Car Dist. Dir. 14, Kansas City Southern Ry. Co. and Chicago B. & Q. R. Co., freight car distribution, effective until Sept. 24, 1966.

31 FR 11923, Sept. 9, 1966, S.O. 981: Pfahler's Car Dist. Dir. 13, Louisville & N. R. Co., and Chicago B. & Q. R. Co., freight car distribution, effective until Sept. 24, 1966.

31 FR 11923, Sept. 9, 1966, S.O. 981: Pfahler's Car Dist. Dir. 15, Pennsylvania R. Co. and Chicago B. & Q. R. Co., freight car distribution, effective until Sept. 24, 1966.

31 FR 12693, Sept. 28, 1966, S.O. 981: Pfahler's Car Dist. Dir. 16, Amdt. 1, Erie-Lackawana R. Co., and Chicago B. & Q. R. Co., freight car distribution, extends expiration date S.O. 981 to Oct. 16, 1966, effective on date of order.

31 FR 12693, Sept. 28, 1966, S.O. 981: Pfahler's Car Dist. Dir. 14, Amdt. 1, Kansas City Southern Ry. Co. and Chicago B. & Q. R. Co., freight car distribution, extends expiration date S.O. 981 to Oct. 16, 1966, effective on date of order.

31 FR 12693, Sept. 28, 1966, S.O. 981: Pfahler's Car Dist. Dir. 13, Amdt. 1, Louisville & N. R. Co., and Chicago B & Q. R. Co., freight car distribution, extends expiration date S.O. 981 to Oct. 16, 1966.

31 FR 12693, Sept. 28, 1966, S.O. 981: Pfahler's Car Dist. Dir. 15, Amdt. 1, Pennsylvania R. Co., and Chicago B & Q. R. Co., freight car distribution, extends expiration date S.O. 981 to Oct. 16, 1966, effective on date of order.

31 FR 13066, Oct. 7, 1966, S.O. 981: Pfahler's Car Dist. Dir. 17, Central R. Co. of New Jersey and Lehigh Valley R. Co., freight car distribution, effective until Oct. 23, 1966.

31 FR 13066, Oct. 7, 1966, S.O. 981: Pfahler's Car Dist. Dir. 18, Lehigh Valley R. Co. and Norfolk & W. Ry. Co., freight car distribution, effective until Oct. 23, 1966.

31 FR 13066, Oct. 7, 1966, S.O. 981: Pfahler's Car Dist. Dir. 19, Norfolk & W. Ry. Co., and Illinois Central R. Co., freight car distribution, effective until Oct. 23, 1966.

31 FR 13498, Oct. 19, 1966, S.O. 981: Pfahler's Car Dist. Dir. 16, Amdt. 2, Erie-Lackawana R. Co., and Chicago B. & Q. R. Co., freight car distribution, extends expiration date to Nov. 13, 1966.

31 FR 13498, Oct. 19, 1966, S.O. 981: Pfahler's Car Dist. Dir. 15, Amdt. 2, Pennsylvania R. Co., and Chicago B. & Q. R. Co., freight car distribution, extends expiration date to Nov. 13, 1966.

31 FR 12693, Oct. 19, 1966, S.O. 981: Pfahler's Car Dist. Dir. 13, Amdt. 2, Louisville & N. R. Co., and Chicago B. & Q. R. Co., freight car distribution, extends expiration date to Nov. 13, 1966.

31 FR 13498, Oct. 19, 1966, S.O. 981: Pfahler's Car Dist. Dir. 14, Amdt. 1, Kansas City Southern Ry. Co., and Chicago B. & Q. R. Co., freight car distribution, extends expiration date to Nov. 13, 1966.

31 FR 13780, Oct. 26, 1966, S.O. 981: Pfahler's Car Dist. Dir. 19, Amdt. 1, Norfolk & W. Ry. Co., and Illinois Central R. Co., freight car distribution, extends expiration date to Nov. 13, 1966, effective on date of order.

31 FR 13780, Oct. 26, 1966, S.O. 981: Pfahler's Car Dist. Dir. 18, Amdt. 1, Lehigh Valley R. Co. and Norfolk & W. Ry. Co., freight car distribution, extends expiration date to Nov. 13, 1966, effective on date of order.

31 FR 13780, Oct. 26, 1966, S.O. 981: Pfahler's Car Dist. Dir. 17, Amdt. 1, Central R. Co. of New Jersey and Lehigh Valley R. Co., freight car distribution, extends expiration date to Nov. 13, 1966, effective on date of order.

31 FR 14620, Nov. 16, 1966, S.O. 981: Pfahler's Car Dist. Dir. 13, Amdt. 3, Louisville & N. R. Co., and Chicago B. & Q. R. Co., freight car distribution, extends expiration date to Dec. 4, 1966, effective on date of order.

31 FR 14620, Nov. 16, 1966, S.O. 981: Pfahler's Car Dist. Dir. 14, Amdt. 3, Kansas City Southern Ry. Co. and Chicago B. & Q. R. Co., freight car distribution, extends expiration date to Dec. 4, 1966, effective on date of order.

31 FR 14621, Nov. 16, 1966, S.O. 981: Pfahler's Car Dist. Dir. 15, Amdt. 3, Pennsylvania R. Co., and Chicago B. & Q. R. Co., freight car distribution, extends expiration date to Dec. 4, 1966, effective on date of order.

31 FR 14621, Nov. 16, 1966, S.O. 981: Pfahler's Car Dist. Dir. 16, Amdt. 3, Erie-Lackawana R. Co., and Chicago B. & Q. R. Co., freight car distribution, extends expiration date to Dec. 4, 1966, effective on date of order.

31 FR 14621, Nov. 16, 1966, S.O. 981: Pfahler's Car Dist. Dir. 17, Amdt. 2, Central R. Co. of New Jersey and Lehigh Valley R. Co., freight car distribution, extends expiration date to Dec. 4, 1966, effective on date of order.

31 FR 14621, Nov. 16, 1966, S.O. 981: Pfahler's Car Dist. Dir. 18, Amdt. 2, Lehigh Valley R. Co. and Norfolk & W. Ry. Co., freight car distribution, extends expiration date to Dec. 4, 1966, effective on date of order.

31 FR 14621, Nov. 16, 1966, S.O. 981: Pfahler's Car Dist. Dir. 19, Amdt. 2, Norfolk & W. Ry. Co., and Illinois Central R. Co., freight car distribution, extends expiration date to Dec. 4, 1966, effective on date of order.

Section 1. (16) Rerouting of traffic on failure of initial carrier to serve public.—[Unchanged. See vol. 9, p. 7294.]

Amendments, see footnotes, p. 962; historical note, p. 887.

Notes of Decisions

Volume 2—p. 962; Volume 9—p. 7294.

Section 1. (17)(a). Directions of Commission as to car service; disobedience; rights of States.—[Unchanged. See vol. 9, p. 7295, vol. 18, p. 14025.]

For previously reported amendments, see footnotes, p. 963; historical note, p. 887; for earlier notes of decisions, p. 963.

Regulations of the Commission

32 FR 10794, July 22, 1967, Part 107a: Administrative Collection of Enforcement Claims, new Part 107a, adopting regulations published in 4 CFR Parts 101 through 105, added, effective Aug. 1, 1967.

Section 1. (17)(b). Bribery affecting car supply or distribution; penalty.—[Unchanged. See vol. 11, p. 9127.]

Section 1. (18) Extension or abandonment of lines; certificate required; contracts for joint use of spurs; switches, etc.—[Unchanged. See vol. 9, p. 7296, vol. 11, p. 9128.]

Historical notes, vol. 2, p. 694, vol. 9, p. 7296, vol. 11, p. 9128, vol. 12, p. 10211, vol. 13, p. 10931, vol. 14, p. 11414, vol. 16, p. 12618, vol. 17, p. 13269.

Cross Reference

See § 13a, infra, Discontinuance or change of certain operations or services, authorized by State statutes and authorities.

Notes of Decisions

Volume 2—p. 966; Volume 6—p. 4934; Volume 9—p. 7297; Volume 11—p. 9128; Volume 12—p. 10212; Volume 13—p. 10932; Volume 14—p. 11414; Volume 15—p. 11984; Volume 16—p. 12619; Volume 17—p. 13269; Volume 18—p. 14026; Volume 19—p. 15068.

1. Purpose.—[Vols. 2, 6, 9, 11, 14].—Underlying purposes of statutory requirement that a railroad obtain a certificate of convenience and necessity before undertaking construction of an extension of its line are: to prevent improvident expenditures for construction and operation of unnecessary lines, to protect carriers from weakening themselves by constructing and operating superfluous lines and from

being weakened by another carrier operating a competing line not required in the public interest, and to preserve well balanced competition.—Chicago, R.I. & P. R. Co. v. United States, 205 F. Supp. 378 (381)*.

Principal evil which §1(18) was designed to eradicate was waste of carrier funds through building or extension of unnecessary lines, which, without any promise of profitable operation, became a burden upon the public. While destructive competition among carriers is a most important consideration where investment of carriers' funds is involved, such competition is not determinative where investment of shipper's funds is involved; thus, private construction for private transportation is not subject to §1(18), although it may cause a loss of business to a carrier.—New York Central R. Co. v. Southern Ry. Co., 226 F. Supp. 463 (473)*.

The statute reflects a legislative policy for protection not only of carriers and their interests, but also of shippers and their interests. At points those interests inevitably conflict; thus, it appears entirely logical to apply a diversion-of-carrier-business test to determine whether a track may be built, owned, or operated by a competing carrier without authorization under §1(18), but not to apply such a test where the track is built, owned, and operated by a shipper.—Id., p. 474.

The national railroad policy formulated by Congress is to develop and maintain an adequate railway system; to preserve the earning capacity and conserve the financial resources of individual railroads; to ensure a reasonable return on the property employed for transportation purposes; to avert losses resulting from unnecessary lines; and to prevent destructive competition between carriers. Congress acted in the considered belief that when a railroad inflicts injury upon its rival it is the public that ultimately bears the loss; therefore, in determining whether proposed trackage is an extension of the railroad's line within §1(18) or merely a spur or industrial track within exemption of §1(22), the particular facts in each case must be appraised in light of that congressional policy. [270 US 266.]—Georgia R. Construction and Operation, 320 I.C.C. 25 (28, 29).

As distinguished from §5(2) governing unification of continuing carrier enterprises, §1(18) is designed to cover abandonments, acquisitions, and extensions of lines of railroad. Instant proposal involves, not the consolidation or joining of railroad interests, properties, or operations, but merely the expiration of one carrier, which due to business adversity can no longer successfully compete, and willingness of another to move into the vacuum to the extent that some need for rail service may remain. While the latter would extend its operation to shippers it does not now serve, such extension would occur only after and because of the abandonment by the former; §1(18) is therefore the most specific statutory provision relating to the abandonment and acquisition involved.—Okmulgee Northern Ry. Co. Abandonment, 320 I.C.C. 637 (639-40).

2.—Intent as to intrastate construction, operation, abandonment.—[Vols. 2, 6, 12, 14-16].—Where a railroad physically crosses a State line, carries on both interstate and intrastate business over same tracks in an integrated system of operation, and the two services are inextricably intertwined, the commission's exclusive jurisdiction over the railroad's interstate operations includes its intrastate operations as well; this conclusion is supported by legislative history of the act. The commission's finding that the systemwide operations of the North Shore are not capable of a practical disjunction is well supported; hence, the railroad fits squarely within that rule. And where operation of a railroad line, or part of a line, vitally affects revenues of an interstate carrier, the commission may authorize abandonment of the intrastate as well as the interstate operations.—State of Illinois v. United States, 213 F. Supp. 83 (90)*.

Section 1(18) is not limited to abandonment of interstate operations or to such intrastate operations as may be found to impose an undue burden on interstate commerce (271 US 153), but by its terms includes "all or any portion of a line of railroad" subject to Part I; and §1(20) provides

that from and after issuance of certificate applicant may proceed to abandon without securing other approval. When the commission finds that public convenience and necessity permit abandonment of an entire line located in more than one State, the States involved cannot frustrate that action by requiring continuance of intrastate operations.—Chicago N.S. & M. Ry. Abandonment of Entire Operation, 317 I.C.C. 363(368)*.

The commission has consistently construed the Eastern Texas R. case (258 US 204) as applying only to abandonment of an entire line of railroad located in a single State and not operated as part of an interstate railway system; but while in such cases abandonment has been authorized only of operations in interstate or foreign commerce, the commission has consistently asserted exclusive jurisdiction to authorize complete abandonment (1) of a portion of a line by a railroad operating solely in a single State, (2) of a line wholly within a State by a carrier operating in more than one State or which is part of a multiple-State railroad system, and (3) of lines operated in more than one State.—Id., p. 366.

Although segment proposed to be abandoned lies wholly within California, and service thereover is intrastate in nature, it is part of an interstate railway system. Section 1(18) includes "all or any portion of a line of railroad" subject to Part I, except the exemptions in §1(22); as to the rest of every railroad line used in interstate commerce, Congress reserved full authority to determine whether, and to what extent, public convenience and necessity permit abandonment (271 US 153). That power has been delegated to the commission and the application is within its exclusive jurisdiction. That the county has filed suit to condemn the right-of-way for a highway project has no effect on such jurisdiction.—Southern Pac. Co. Abandonment, 317 I.C.C. 645 (656)*.

4. State statutes and regulations.—[Vols. 2, 6, 9, 11-13, 17-19].—Whether commission approval is required before considered terminal company rail tracks may be abandoned, as required by Jefferson Parish, La., ordinance, depends on construction and application of §1(18) and §1(22); if they are spur, industrial, team, switching or side tracks with §1(22), they are subject to valid State regulation and Jefferson Parish, a subdivision or agency of the State, may require the railroad to abandon them by ordinances such as that enacted. On the other hand, tracks which are part of a "line of railroad" or extension thereof, within §1(18) cannot be abandoned nor can the abandonment be required by the action of a State or state subdivision without issuance of a certificate by the commission. The Parish may apply to the commission for an abandonment order and, pending action by the commission (if such application is made), the district should retain jurisdiction, issue a temporary injunction against the Parish pending the commission's decision, and then proceed as may seem proper.—New Orleans Terminal Co. v. Spencer, 366 F. 2d 160 (163-4, 166)*.

The commission's report, order and certificate in proceeding involving abandonment of portion of a rail line in California were based on its assumption, without deciding authoritatively, that the State would bear the cost of relocating a new line; thus, the holding of the commission that public convenience and necessity require operations of "a line of railroad to be constructed by the State of California" and its order permitting applicant to abandon the portion of its line to be innundated following the State's construction of a large flood-control and power dam "upon the commencement of operation over the line to be constructed by the State of California" did not determine whether the State is obligated and did not have any binding effect on the State's obligation, if any existed, to relocate the railway's line or to pay the relocation cost.—State of California v. United States, 255 F. Supp. 607 (608-9, 610)*.

Moreover, the question of whether or not the California Water Code might require the State to relocate the rail line or pay the cost thereof, presented by the condition precedent on which the abandonment authority is based (payment by the State of the relocation cost, which may or may not

take place), is one over which the commission has no jurisdiction. So long as the Federal Power Commission's jurisdiction is not curtailed, the question is purely a State matter; however, fact that the commission's report, order and certificate are subject to such condition precedent, which is hypothetical in character, does not invalidate them. Complaint dismissed.—Id., p. 610.

It is not the commission's province to determine constitutionality of provisions of the California water code which require substitution of new railroad facilities for those destroyed by dam construction, or to interpret or enforce them; but though those provisions have never been enforced because there have previously been no dam projects that would be affected thereby, and their constitutionality is now questioned in the courts by the State's attorney general, the commission takes offical notice of a decision of the California Public Utilities Commission that the disputed sections of the water code are valid, and that if Feather River Ry's line is relocated thereunder the route of relocation will be determined by that commission. Although that decision is subject to review by the California Supreme Court, findings in instant proceeding contemplate that the new line proposed by applicant railway will be provided by the State under either the provisions of the water code or any other authority it may resort to.—Feather River Ry. Co. Abandonment, Acquisition, 320 I.C.C. 417 (426)*.

5. Construction of paragraph in general.—[Vols. 2, 6, 9, 11, 14, 15, 17-19].—The statute was intended to apply to those cases where a railroad seeks to abandon a portion of its rail line and possibly where it is sought to compel it to make such an abandonment. In action to enjoin enforcement of city's paving lien against railroad property, the railroad can remove any question of abandonment by the simple expedient of paying a debt supported by a valid lien. While "abandonment" under the act has a peculiar meaning, the statute does not contemplate that a creditor would have to initiate abandonment proceedings in order to collect a relatively small just debt from a solvent railroad.—City of Alexandria, La. v. Chicago, R. I. & P. R. Co., 321 F. 2d 822 (823-5)*.

Defendant seeks to interpose the commission between railroads and any federal, state, or municipal body attempting to collect an unpaid tax by executing a lien levied on railroad property, even when railroad concedes validity of the tax and lien and when payment would avoid a forced sale; however, there is nothing in the language of §1(18) or in the legislative history of the act to indicate that Congress intended any such power of the commission in the federal system.—City of Alexandria, La. v. Chicago, R. I. & P. R. Co., 311 F. 2d 7 (12)*.

The language of §1(18) is clearly directed to an intentional and voluntary act of abandonment on the part of the railroad. The Government's taking of the Union Pacific's property by exercise of its power of eminent domain is entirely beyond the railroad's control and is forced upon it against its will; however, the power of eminent domain is inherent in the sovereign and exercise of that power may not be denied, even when property is already devoted to public or quasi-public use. By the Government's taking of track and other property, the railroad will be granted abandonment by operation of law; and, under the circumstances, railroad's operations as to remaining portion of considered line will be suspended until the commission determines, in pending abandonment proceeding, whether the entire line should be relocated.—United States v. Certain Tracts of Land, Etc., 225 F. Supp. 549 (550-2).

Plantiff's contentions that railroad's termination of passenger service on certain of its lines, through discontinuance of the last passenger trains operating between points involved pursuant to §13a(1), though continuing freight service on those lines, meant that the lines were being "abandoned" within meaning of §1(18), and that the commission did not have proper jurisdiction of the matter since service could not be abandoned under §13a(1), are without merit. To "abandon" a line means to completely quit using it for any service; and discussions in recent cases indicate the Supreme Court's view that a line

is not abandoned as long as the carrier uses it for freight service. Moreover, even if considered discontinuances were thought of as abandonment, since §13a(1) was enacted about 40 years after §1(18) and is directed to specific type of problem presented, it would be reasonable to hold that it provided an alternative ground for jurisdiction even if proceedings could have been instituted under §1(18).—State of Minnesota v. United States, 328 F. Supp. 107 (110-11)*.

Substantial power vested in the commission to regulate defendant passenger terminal company under other provisions of the statute, as a common carrier, is indicative of a Congresssional intent to treat terminals and terminals tracks as part of a "line of railroad" under §1(18). From definition of "railroad" in §1(3)(a) as including "all switches, spurs, tracks, terminals and terminal facilities *** freight depots, yards and grounds," it appears that the act recognizes terminals and terminal facilities as a category separate from spurs and switches, thus indicating that terminal tracks are not meant to be excluded from the commission's jurisdiction by §1(22); moreover, that definition is at least some indication that terminals or terminal tracks may be part of a "line of railroad" within §1(18).—I.C.C. v. Memphis Union Station Co., 230 F. Supp. 456 (462-3)*.

Considering that statutory language and apparent policy, together with that of other sections of the act, cases construing the statute, character of the tracks and operations thereover, and effect of defendants' changes in passenger operations on the public, the railroads, and railroad employees, the court concludes that at least some of the Union Station tracks in question constitute a line of railroad within §1(18). Accordingly, having terminated their use of the Union Station without the commission's approval, defendants have abandoned a line of railroad in violation of §1(18).—Id., pp. 463-7.

Although in rate review cases it is clear that agency action is not unconstitutional unless it results in confiscation of property without just compensation, and although the Supreme Court has apparently never held that the confiscation standard applies to abandonment as well as rate cases, from the court's language in 376 US 93 (in reviewing standards to be applied by the commission in abandonment cases) there is no reason to think that the Supreme Court would not adopt the same standard of confiscation for abandonment cases that it has adopted for rate cases. Consequently, no confiscation results from an order of the commission denying the abandonment of rail services which are shown to be unprofitable, as long as there is no net loss to the overall system.—Northwestern Pac. R. Co. v. United States, 228 F. Supp. 690 (693-4)*.

The provisions of §1(18)-(21) are separate and apart from those of §1(9), and a shipper may use the latter to obtain railroad service without regard to provisions of the former; and the mere fact that a sidetrack with which a connection is sought under §1(9) extends to an industry located on another railroad does not make the switch connection, or the shipper's track, or both, an extension of the railroad within meaning of §1(18)-(21).—Union Carbide Corp. v. Norfolk & W. Ry. Co., 323 I.C.C. 65 (71).

In ordering carrier, in response to the Government's condemnation suit, to surrender a portion of its Junction City branch to the United States for use in connection with construction of a dam and reservoir and to suspend operation over the entire line, the district court did not usurp or invade the commission's jurisdiction. The forced cessation of operations is merely incidental to the superior right of the Government in exercise of its power of eminent domain; under that power the Government is acquiring possession of railroad property because of demands of a superior public interest, and the court merely required temporary cessation of operations pending the commission's determination of whether the entire line should be relocated, thereby giving full recognition to the commission's jurisdiction in abandonment proceedings.—Union Pac. R. Co. Abandonment, 320 I.C.C. 624 (626-7, 628).

See also McGrody v. B. & O., §13(1), n. 3.

Carriers Affected

15. In general.—[Vols. 2, 6, 9, 17, 19].—Present operations of applicant, a farmers' cooperative grain company, over line of railroad owned by it (consisting of about 1.9 miles of track) are not, and operations it proposes to continue would not be, those of a common carrier subject to the act. All traffic handled over the line has been and will continue to be that of the grain company, except for a few shipments for phosphate company whose owner is a member stockholder of the grain company, and on which no transportation charges are assessed. At least since 1942 applicant has operated the line for financial benefit of its farmer-stockholder members, and has derived no revenue from the members for transportation as such. No evidence is submitted or allegation made that it will offer or provide transportation service to the general public; nor is need for such service shown to exist in the territory tributary to the line. Applicant's apparent purpose in seeking a certificate is to benefit from common carrier status through participation in divisions of joint rates on its own traffic without actually functioning as a common carrier for hire; denied.—Newark Farmers Grain Co. Operation, 320 I.C.C. 55.

Acts for which certificate is prerequisite

26. Construction in general.—[Vols. 2, 6, 9, 11, 15, 19].—Although defendant railroad constructed final segment of coal company's private track, the company requested such construction, has paid for the track, and holds title to both the track and the right of way over which it runs. Building of the segment was private construction by the company, the same as if it had contracted with any other builder for the job, and private construction for private transportation is not subject to provisions of §1(18). That carrier lost money in the transaction does not mean that its loss amounted to an expenditure of funds for construction subject to §1(18); defendant did receive cash consideration for the construction, and the price paid could have reflected any number of considerations unrelated to initial construction cost.—New York Central R. Co. v. Southern Ry. Co., 226 F. Supp. 463 (475-6)*.

The commission has assumed jurisdiction of railroad relocations where they involved development of new territory or traffic or more than ordinarily affected a carrier's revenues or operating expenses. While short line's principal purpose in seeking to have the State construct a new line to replace a segment inundated by State construction of a dam is to restore its connection with a trunk line (the connecting portion of latter's line having been relocated), the new line would pass through territory not now served by the short line and would enable it for the first time to serve a municipality on the trunk line directly; proposed construction would also increase its mileage from 18 to 28 miles, with proportionate increase in its operating expenses. Those factors alone are sufficient to establish the commission's jurisdiction over the proposed relocation.—Feather River Ry. Co. Abandonment, Acquisition, 320 I.C.C. 417 (421)*.

29.—Extensions.—[Vols. 2, 6, 9, 12, 14, 16-19].—Defendant railroad's operation over private track owned and maintained by coal mine exclusively served by the carrier over that track is not an extension of line within §1(18), when carrier does not serve or hold itself out to serve the general public over that track. Plaintiff's contention that defendant's operations must be regarded as an extension of line because latter has not previously served the mine or territory, while plantiff already serves other mines in the area, overlooks the fact that the track involved is not owned and operated by defendant carrier.—New York Central R. Co. v. Southern Ry. Co., 226 F. Supp. 463 (468-71)*.

While authority from the commission is required for a carrier to operate as a common carrier over a private track, i.e., where carrier holds itself out by tariff or otherwise to serve the public thereover, where it undertakes to maintain or assist in maintaining such track, or where it pays rental to track owner for the use thereof, the "operation" under §1(18) is not achieved without the element of common carriage

and/or expenditure of carrier funds. Thus, commission authority is not required for operating over a private track when carrier does not engage in common carrier services thereover and does not expend its funds in order to conduct such operation.—Id., pp. 471-3.

30. Abandonment.—[Vols. 2, 6, 9, 11, 12, 14, 17-19].—No commission approval is necessary where cessation of operations results not from volition of the railroad but as result of conditions over which it has no control; but if railroad refrains from paying valid city street paving assessment against its property, and city seizes and sells the property at public auction (which sale might be said to constitute an abandonment), that would be the railroad's deliberate decision. In such case, railroad is under a duty to apply to the commission for certificate permitting abandonment of part of its line. However, not every change in ownership or mode of operation constitutes an abandonment; even a forced sale, or transfer of title to a third party, is not necessarily inconsistent with railroad's continued uninterrupted operation of the line.—City of Alexandria, La. v. Chicago, R.I. & P. R. Co., 311 F. 2d 7 (10)*.

Where terminal company, part of the Southern Railway System, is engaged in handling freight movements, both interstate and intrastate, from, to, and through metropolitan area of New Orleans, and uses considered tracks B and C in handling such traffic movements, those tracks are part of the line of railroad of the terminal company; and its use thereof for temporary storage of cars and for occasional switching operations does not make them any the less "lines of railroad" within §1(18) since they are used substantially in the through movement of freight from shipper to consignee. There can be no abandonment of such trackage without obtaining a certificate of public convenience and necessity from the commission; nor can abandonment thereof be required by an action of the State or a state subdivision without the issuance of such certificate.—New Orleans Terminal Co. v. Spencer, 366 F. 2d 160 (163-4, 165-6)*.

The State's proposed taking, by eminent domain, of certain land (consisting of right of way owned by one railroad currently in reorganization and being operated as an integral part of a railroad system by trustees of second railroad also in reorganization) for use in developing a transportation corridor constitute an abandonment of the property and the operation thereof within 1(18), since it would result in complete abandonment of substantial trackage and the termination of all railroad operations thereover; approval of the commission is therefore required, even though the railroad is in reorganization, and even though the abandonment would be wholly involuntary on the part of the railroad or its trustee and caused solely by intervention of a third party. Plaintiffs must secure authorization and approval of the commission before carrying out proposed taking of railroad's property by eminent domain.—Commonwealth of Massachusetts v. Bartlett, 266 F. Supp. 390 (391-2, 393)*.

See also Flaherty v. Kansas, O. & G. R. Co., n. 91, below.

Abandonment, within contemplation of §1(18), means to give up permanently, not merely to suspend operations. Although carrier, pursuant to court order in the Government's condemnation suit, suspended operations over entire branch line of which a substantial portion would be flooded by construction of a dam and reservoir, the forced cessation was merely incidental to the Government's supervening right of eminent domain, and the Government's taking of the railroad's property in exercise of that power was entirely beyond the railroad's control. As the court required only temporary cessation of operations pending the commission's determination as to whether the entire line should be relocated, such forced cessation pending final determination does not constitute an abandonment within §1(18).—Union Pac. R. Co. Abandonment, 320 I.C.C. 624 (628).

See also Asbury v. Chesapeake & O. Ry. Co., §1(20), n. 16.

In view of permitted passenger train discontinuances, abandonment of operations, used exclusively in passenger service,

over tracks of two other carriers is approved where carrier is discontinuing operation of its last two passenger trains.—Chicago Great Western Ry. Co. Discontinuance, 328 I.C.C. 664 (665, 678).

See also I.C.C. v. Memphis Union Station Co., n. 5, above.

31a.—Termination of lease.—[Vols. 13, 15].—See Rutland Ry. Corp. Case, §1(19), n. 18.

34. Trackage rights.—[Vols. 2, 6, 9, 11, 13, 15, 17, 18].—Authorized, §5(2), n. 56.

Since §1(18) requires a certificate from the commission for abandonment of a line of railroad "or the operation thereof," once applicant short line has commenced operation under trackage rights over a State-owned segment of line pending determination of its application to acquire and operate a new line to be constructed by the State to replace a segment of the short line that will be flooded by a State dam, it may not abandon such operation without a certificate therefor. However, since such operation is only temporary and will be unnecessary upon commencement of operation over the new line, applicant will not be subjected to expense of filing application for abandonment of operation over the State-owned line, and certificate issued will permit such abandonment upon commencement of operation over the new line to be constructed.—Feather River Ry. Co. Abandonment, Acquisition, 320 I.C.C. 417 (428)*.

Since line of Baltimore & Ohio between Washington, D.C., and Cleveland, Ohio, stops short of Cleveland Union Terminal, it utilizes tracks of that carrier and Nickel Plate under trackage agreements to reach the station. Thus, if abandonment of operation under those trackage rights is subject to §1(18), discontinuance of its passenger trains between those termini and resulting elimination of all operations under such rights, without filing and determination of an abandonment application, would be in violation of that section.—Baltimore & O. R. Co. Discontinuance of Service, 317 I.C.C. 371 (388)*.

Although it was indicated at hearing on application of Rutland Ry. to abandon its entire line that New York Central intends to seek authority to abandon operation under trackage rights over Norwood-Malone Junction segment thereof, no such application has been received, and authority for physical abandonment would amount to prejudgment of any application which may later be filed by Central. As to that segment, therefore, authority is granted Rutland for abandonment of operation only.—Rutland Ry. Corp. Abandonment of Entire Line, 317 I.C.C. 393 (424)*.

Public Convenience and Necessity

44. In general.—[Vols. 6, 9, 11-15, 18, 19].—The court has no jurisdiction, in injunction proceeding, to decide whether defendant's operation over coal mine's private track to serve that mine, if an extension of line within §1(18), is required by public convenience and necessity; that question is the exclusive province of the commission.—New York Central R. Co. v. Southern Ry. Co., 226 F. Supp. 463 (466)*.

When the commission considers a proposed abandonment, the sole test prescribed is that the abandonment be consistent with public necessity and convenience. Abandonment is authorized, not to protect the railroad, but to protect interstate commerce from undue burdens or discrimination. Therefore carrier agreements with private or official parties to continue operation of, and never to abandon, a line can have no effect on the commission's decision in subsequent abandonment proceeding involving that line.—Burke County, Ga. v. United States, 206 F. Supp. 586 (588-9)*.

In determining whether public convenience and necessity requires construction of a line or performance of service by a particular carrier, the interest of shippers, the establishment of new markets, and rate advantages are matters of substantial importance to be considered.—Georgia R. Construction and Operation, 320 I.C.C. 25 (36).

While the constitutional basis for issuance of a certificate of abandonment is the power of Congress to regulate interstate commerce, the sole statutory test is that the abandonment be consistent with public

convenience and necessity. In its determination the commission must have regard to the needs of both interstate and intrastate commerce and balance their respective interests where those needs conflict; in that balancing, demonstrated prejudice to interstate commerce in continued operation, or absence of earnings adequate to afford reasonable compensation for use of the carrier's property in intrastate commerce, are relevant and often controlling, but the statute does not make issuance of a certificate dependent on specific findings to that effect.—Chicago, N.S. & M. Ry. Abandonment, 317 I.C.C. 363 (365-6)*.

Whether passsengers using applicant's Silverton, Colo., branch, who are primarily tourists and sightseers desiring to ride on a vintage narrow-gage train pulled by an old-time steam locomotive through an area of scenic beauty, are to be classified as interstate or intrastate traffic is of no consequence in abandonment proceeding, since the sole test for such proceedings is whether abandonment would be permitted by present or future public convenience and necessity; in determining whether it is, needs of both intrastate and interstate commerce must be considered. Denver & R.G.W.R. Co. Abandonment, 312 I.C.C. 791 (793, 795).

45. Definitions.—[Vols. 2, 14].—Words "public convenience and necessity" in §1(18) are not defined, and so the courts have allowed the commission a wide range of discretion in determining their meaning. The commission has stated that justification for construction of an extension of line must reflect by clear proof a strong or urgent need for such line. [Citing 244 ICC 470.]—Chicago, R. I. & P. R. Co. v. United States, 205 F. Supp. 378 (381-2)*.

47. Public distinguished from private interest.—[Vols. 2, 6, 9].—The commission being concerned only with public interest to be served by a proposed abandonment, prior carrier agreements with private or official parties to continue operation of a line can have no effect on its decision. Such promises, if made, did not restrict in anywise discharge by the commission of its delegated duties with respect to the public interest.—Burke County, Ga. v. United States, 206 F. Supp. 586 (588, 589)*.

Coast Line's proposed extension of its line into newly reclaimed and developed area in Florida would not be a mere "private line," as contended by Florida East Coast. The new line would serve two vegetable producers who are moving their operations into the area and constructing new processing and handling facilities there; one sugarcane mill is located in that area and there is possibility of another being located nearby. The vegetable shippers conduct separate businesses, and fact that one may become a tenant at the other's packing facility does not in itself make it a subsidiary or affiliate of its landlord; nor does the record show any corporate relationship between the vegetable and sugar producers.Atlantic Coast Line R. Co. Construction, 324 I.C.C. 286 (288, 291-2)*.

That Central of Georgia's president testified in control proceeding that Central's purpose in acquiring control of Savannah & Atlanta was investment in a going railroad, not abandonment, does not preclude authorization of abandonment of a segment of latter's line, in view of changes in the transportation industry in the 10 years since that testimony and the growing obviousness of need for efficient operation of the nation's transportation facilities. In the circumstances, there appears to be no breach of faith, and little weight can be accorded protestants' argument that public support for Central's control of Savannah & Atlanta was with definite understanding that no part of latter's line would ever be abandoned.—Central of Georgia Ry. Co. Abandonment, 317 I.C.C. 184 (188).

49. Private contracts as affecting public convenience and necessity.—[Vols. 2, 6, 9, 11, 19].—Private agreements cannot thwart the commission in its Congressionally delegated duty to regulate interstate commerce. Alleged promise by Central of Georgia Ry., at time it was authorized to acquire control of Savannah & A. R., that latter's line would never be abandoned did not restrict the commission's power to subsequently permit abandonment of that line in the public interest.—Burke County, Ga. v. United States, 206 F. Supp. 586 (588-9)*.

Existence of a private contract for continued service between a carrier and a shipper is not sufficient to prevent abandon-

.nent of the line if the facts so warrant; power of Congress over interstate commerce is unrestricted by obligations of private contracts, and the commission's decision may not be affected thereby. Denial of authority for abandonment of considered line is not warranted because agreement covering loan made by a shipper to applicant for repair of damage caused by a washout contained a provision seemingly requiring applicant to maintain the track and furnish service for an unstated time.—Fort Dodge, Des Moines & Southern Ry. Co. Abandonment, 312 I.C.C. 708 (710-1)*.

50. Taxes.—[Vols. 11, 12, 15-18].—Property taxes are not properly chargeable to line segment proposed for abandonment, since no substantial savings in such taxes would be realized by the abandonment. In absence of evidence to show that carrier's overall property tax liability to the State would be reduced, amount allocated for such taxes should be excluded from cost of operating the line.—Southern Pac. Co. Abandonment, 317 I.C.C. 645 (650)*.

Principle that effect of abandonment on a carrier's subsequent tax liability is a matter that rests entirely with the appropriate State taxing authority applies equally to effect that a new or substitute line would have on carrier's overall property tax liability. Recognizing the jurisdiction of the State in the matter of property taxes, the commission accepts for purposes of abandonment proceeding the State commission's contention that property taxes should have been omitted in computing cost to carrier of operating proposed substitute line.—Northern Pac. Ry. Co. Abandonment and Construction, 317 I.C.C. 513 (516)*.

That applicant's parent corporation will realize substantial tax savings as result of applicant's abandonment of its entire operation has no bearing on whether public convenience and necessity permit abandonment, except that it might lead to a more thorough inquiry as to the facts; however, there is no evidence showing any financial dealings or other arrangements between applicant and its parent which might have improperly affected applicant's case in support of proposed abandonment.—Chicago, N.S. & M. Ry. Abandonment of Entire Operation, 317 I.C.C. 191 (199)*.

Abandonment

55. Abandonment defined.—[Vols. 2, 6, 9, 11, 15, 17, 18].—City's enforcement of its street paving lien against railroad property, through seizure and sale of the property at public auction, is not tantamount to the railroad's "abandonment" of the line within §1(18). Abandonment requires cessation of service or long disuse of the line coupled with intention not to resume such service or use, and involves more than mere non-user; there must be an intention on part of the railroad to abandon. Record shows no evidence of intention to abandon, on the contrary railroad's attorneys assert its intention not to abandon operations or any portion of its line in the city. There has been no interruption or discontinuance of service, and the city has no intention to interfere with operation of the line.—City of Alexandria, La. v. Chicago, R.I. & P. R. Co., 311 F. 2d 7 (8-11)*.

Failure of railroad to perform an operation for which there has been no demand for some time does not of itself constitute an abandonment. Defendant's tariff for considered tugboat operations is still in effect and it holds itself out to the public to perform the service; it has ceased operations, but has not abandoned the operation within meaning of the statute.—McGrody v. Baltimore & O. R. Co., 217 F. Supp. 252 (254).

56. Physical abandonment distinguished from abandonment of use.—[Vols. 2, 6, 12, 19].—To abandon within context of the statute means to give up permanently, not merely to suspend operations; abandonment involves more than mere nonuser; there must be an intention to abandon. Defendant has ceased tugboat operations for which there has been no demand for some time, but, as its tariff therefore is still in effect and it holds itself out to the public to perform the service, it has not abandoned the operation.—McGrody v. Baltimore & O. R. Co., 217 F. Supp. 252 (254).

Where the matter at issue is something other than employee protection, the discontinuance of railroad service because of forces beyond the railroad's control is not held to be an "abandonment."—Smith v. United States, 211 F. Supp. 66 (69)*.

57. Partial abandonment.—[Vols. 2, 6, 9, 18].—See also §13a, below.

Section 1(18) confers no jurisdiction over partial abandonment of railroad service, and enactment of §13a did not broaden the commission's jurisdiction under §1(18). Though discontinuance of carrier's only remaining passenger trains operating within a State would be tantamount to complete abandonment of passenger service within that State, it does not require authorization under provisions of §1(18-20).—Chicago & N.W. Ry. Co. Discontinuance, 320 I.C.C. 85 (86-7)*.

Heavy rains causing washouts and soft track contributed to continuing deterioration of considered branch line, particularly the eastern section thereof, and although, owing to pendency of abandonment proceeding, applicant in 1959 performed the minimum amount of maintenance required to keep the line in operation, amount spent was 38 percent of revenue, contrasted with normal systemwide allocation of 15 percent of revenue for maintenance of track. Despite that abnormally large expenditure, physical condition of entire line was not brought up to minimum standards necessary to provide the type of service responsive to needs of the public; to afford such service, applicant would be required to make additional expenditures far in excess of net revenues realized in 1959, during which year maintenance expenses on the eastern section was 66 percent of amount spent on the entire line and 77.6 percent of revenues assigned to the entire line.—Chicago & N.W. Ry. Co. Abandonment, 317 I.C.C. 207 (209-10, 214, 216-7)*.

While operations on the western section would support necessary rehabilitation thereof, traffic available on the eastern section would not support cost of operation even at present inadequate rate of service, and applicant is not otherwise in financial position to make the outlay required to rehabilitate that section. Moreover, applicant's main line serves substantially the same grain-producing territory, with more points in affected counties than are located on the eastern section, and those grain shippers, equally with all others on applicant's road, have right to expect that their train service will not be endangered or impaired by requiring applicant to make debilitating and noncompensatory investments on the eastern section; abandonment of that section is therefore warranted.—Id., p. 217.

But in light of evidence indicating a substantial successful continuance, financially and otherwise, of operations over the western section separately and apart from remainder of the branch, authority for abandonment of that section is not warranted, especially as with rehabilitation shippers thereon stand to turn over to applicant a materially increased volume of traffic.—Id., p. 213.

See also Denver & R.G.W.R. Co. Abandonment, §1(19), n. 18.

58. Abandonment as to interstate traffic on State lines.—[Vols. 2, 6, 9, 12, 15, 19].—The North Shore operates in both Wisconsin and Illinois and its interstate and intrastate operations cannot be separated realistically; the commission's conclusions that the railroad's present and future revenues are and will be insufficient to cover cost of continued operation with sufficient maintenance of facilities for safety of operation, and that operation of the line solely in intrastate commerce, or continued operation of any portion of the line, would unduly burden interstate commerce, are justified by the evidence, particularly the fact that, except during World War II years, the North Shore has for the past 30 years sustained large operating losses; the commission's authorization of abandonment of entire operation, sustained.—State of Illinois v. United States, 213 F. Supp. 83 (90-2)*.

Applicant's line physically crosses the boundary of Wisconsin and Illinois, and it handles passengers and freight in interstate and intrastate commerce in both States; all of its present revenues from both interstate and intrastate operations are insufficient to maintain facilities necessary to safety of operation, and obviously revenues from intrastate operations alone would not suffice for continued safe operation. Moreover, certificate of abandonment is permissive, and if it were granted for abandonment of interstate operations only, and applicant was compelled by the States to

continue intrastate over separate segments in Illinois and Wisconsin, economics of the situation would dictate continuance of its interstate operations to minimize its losses, with the likely result that safety of interstate as well as intrastate passengers would be endangered. Prior findings authorizing complete abandonment, affirmed.—Chicago, N.S. & M. Ry. Abandonment of Entire Operation, 317 I.C.C. 363 (366-7, 370)*.

59. Grounds for abandonment in general—[Vols. 2, 6, 9, 11, 15-19].—Though the State, which seeks total abandonment of short line which would be isolated through inundation of a portion upon construction of a dam, instead of relocation of that portion at State expense, argues that stripping the short line's parent lumber company and principal shipper of its present advantage of lower transportation costs than other lumber producers in the area would serve public interest by reviving competition, the equalization of competition among noncarrier industries is insufficient reason for requiring the railway to abandon its entire line.—Feather River Ry. Co. Abandonment, Acquisition, 320 I.C.C. 417 (425)*.

Since applicant's only use of its trackage rights over certain tracks and facilities of Cleveland Union Terminals Co. and Nickel Plate is for movement into and out of the terminal of passenger trains it concurrently seeks to discontinue, discontinuance would render continued effectiveness of the trackage agreements and resulting expenses an unnecessary burden on applicant and on interstate commerce. Abandonment of operation under such trackage rights, authorized.—Baltimore & O. R. Co. Discontinuance of Service, 317 I.C.C. 509 (510)*.

Application to abandon a short segment of main line in Marin County, Calif., to avoid cost of rebuilding a tunnel destroyed by fire, denied. Since the area has in the past and will in the foreseeable future generate sufficient traffic and revenues to support restoration program and continued through service, reconstruction of the tunnel for an estimated $861,655 will not unduly burden applicant, especially as all or the major portion of such costs can be treated as capital expenditures and amortized over a reasonable period; as the line was being profitably operated prior to the tunnel's destruction, its restoration will not result in a marginal operation.—Northwestern Pac. R. Co. Abandonment, 320 I.C.C. 19 (23, 24)*.

Moreover, applicant is a member of Southern Pacific System, and Southern Pacific's anticipated increase in gross revenues as result of circuitous rerouting of traffic to and from the northern segment of the line for interchange with it instead of the Santa Fe would not exceed the sum of anticipated decrease in applicant's revenues (due to lower divisions) and loss of revenues by the Santa Fe. Where the question is only the degree of profits to the railroads as against a loss by the shipping public through fewer facilities and less efficient service, it must be resolved in favor of the public.—Id., pp. 23, 24.

Proposed abandonment of a portion of applicant's Mandan South Branch in North Dakota, between Flasher and a point 6 miles south of Mandan, is necessitated by construction of Oahe Dam and prospective inundation of the line, which will render it inoperable. Certificate granted.—Northern Pac. Ry. Co. Abandonment and Construction, 317 I.C.C. 225 (227-8, 237)*.

Though in most proceedings seeking abandonment of entire line the applicant is actively engaged in operating its railroad, Rutland Ry., owing to a strike by its operating employees, has provided no service for approximately a year, and there is strong possibility that abandonment and acquisition of the line or portions thereof by others may bring about resumption of service to some or all points on the line. As Rutland's financial condition and history of traffic and revenue losses render future profitable operation by it improbable, authorization of abandonment is warranted.—Rutland Ry. Corp. Abandonment of Entire Line, 317 I.C.C. 393 (422, 424)*.

And it is immaterial that a carrier's owners may profit from abandonment. Though the operating brotherhoods refer to the low price paid for Rutland's preferred stock by certain interests in 1959 and present prospect of recovering face value thereof in liquidation, the subsequent de-

crease in percentage of stock held by those interests would hardly be expected if they were seeking to liquidate the carrier to realize a capital gain. Moreover, to question the bona fides of purchase of preferred stock by Rutland's management in 1959 would require knowledge of current and past strikes and loss of traffic, none of which was available to the directors at that time.—Id., p. 423.

Abandonment of a portion of considered branch line is justified when there has been no objection thereto and no freight operation over that segment. But 6 months' operation under; operating economies inaugurated on remainder of the line is insufficient for determining financial results thereof; shippers should be given ample opportunity to show whether they can support the line under applicant's new plan of service; 1 calendar year would be a reasonable time, and results of operation during that period should show whether traffic handled will generate enough revenue to offset the reduced operating costs. Denied in part, without prejudice to submission of a new application after a year's operating results are available.—Lehigh Valley R. Co. Abandonment, 317 I.C.C. 242 (243, 244).

Although §1(18) requires that applicant continue using facilities of B. & O.C.T. at Chicago under its present trackage agreement until abandonment thereof is authorized, there was nothing to prevent its seeking a more favorable arrangement looking toward expiration of its contractual relations with B. & O.C.T., especially when it became aware that latter was unlikely to offer it terms which it considered fair; such action was only prudent on applicant's part. Trackage agreements executed with other lessors will result in savings and operating advantages to applicant, and abandonment of rights over B. & O.C.T. tracks should not materially impair latter's ability to serve the public, in view of its profitable operations in recent years and likelihood that some of resulting revenue loss may be distributed among the 10 other railroads using its lines. Abandonment authorized.—Wisconsin Central R. Co. Abandonment, 317 I.C.C. 218 (220-1).

Proposals whereby Central of Georgia and Savannah & Atlanta will establish a single route between Savannah and Waynesboro, Ga., through use of portions of their existing parallel routes, involving abandonment of other portions, grant to each other of trackage rights over their respective portions of proposed route, and construction of certain connecting tracks, will result in continuance of present operations of both applicants and allow them to participate in substantial annual savings; approved and authorized.—Central of Georgia Ry. Co. Abandonment, 317 I.C.C. 184 (185, 189).

Even if applicant acquired considered line primarily for purpose of effectuating its abandonment in order to avoid or exterminate competition, and no such tendency on applicant's part is apparent, such purpose has long been delayed; in any event, motives that may have influenced acquisition of the line are not material in abandonment proceeding nearly 40 years later.—Southern Pac. Co. Abandonment, 312 I.C.C. 685 (687)*.

60.—Losses from operation.—[Vols. 2, 6, 9, 11-19].—See also §13a, n. 20, 25.

In action to review the commission's order permitting bankrupt railroad to abandon considered branch line, wherein plaintiff seeks preliminary injunction pending final determination thereof, the commission's findings that the railroad had suffered staggering financial losses for some time, and that it is financially unable to undertake extensive rehabilitation program necessary to make the line reasonably safe for operation, are assumed to be supported by substantial evidence when the evidence on which those findings are based was not before the court, and the plaintiff made no showing to the contrary. Also, since the commission's conclusion that future operation of the branch would be a burden on the railroad and upon interstate commerce is supported by detailed findings, and plaintiff failed to show benefit to the public that would justify imposing burden on railroad to rehabilitate and operate the line during pendency of court action, grant of preliminary injunction would not be in public interest; denied.—Whitehead Bros. Co. v.

United States, 247 F. Supp. 614 (615-6)*.

In finding that continued operation of unprofitable branch line would impose a burden on interstate commerce, and in authorizing abandonment thereof notwithstanding profitable operation of the railroad's system as a whole, the commission applied the correct legal standard in light of decision in 376 US 93.—Humphreys v. United States, 228 F. Supp. 910 (913)*.

In action to set aside the commission's order denying plaintiff authority to abandon segment of its line, sought because of destruction by fire of tunnel through which segment runs, there is no evidence that requiring reconstruction of the tunnel would result in net loss to plaintiff; and no confiscation of property results from an order of the commission denying abandonment of unprofitable rail services, as long as there is no net loss to the overall system. Whether plaintiff be treated as part of Southern Pac. Co., its parent railroad, or as an independent entity for purposes of determining whether net loss amounting to confiscation resulted from the order in question is immaterial because there is no confiscation under either theory; evidence shows that no net loss would result if effect of the tunnel reconstruction on entire Southern Pac. System is considered. Moreover, evidence further supports the findings that plaintiff, if considered as a separate entity, will realize net revenues from continued operation through the tunnel.—Northwestern Pac. R. Co., v. United States, 228 F. Supp. 690 (694-5)*.

The commission may not require a carrier to operate a segment of trackage at a loss to ensure lower rates to shippers, nor should it prescribe a method of routing overhead traffic in order to improve operating results of a particular line; in determining whether abandonment should be authorized, circumstances evidencing resulting loss and inconvenience to the public must be weighed against the burden and retarding effect continued operation of the service may have on applicant and interstate commerce.—Southern Pac. Co. Abandonment, 320 I.C.C. 38 (41)*.

It is recognized that a carrier itself has an obligation to seek means of continuing a service for which a demand has been shown. [Citing 307 ICC 189.] For some 3 years prior to hearing, $55,000 to $58,000 a year was spent to maintain at one point on considered line a yard crew classified as unnecessary by both applicant and protestants, but which is required to be maintained under a labor agreement entered into in 1937, and informal conferences between applicant and labor representatives concerning removal of that crew have failed. While the commission is not authorized to make a determination respecting that dispute, the interested parties are reminded that that item of continuing expense may not be ignored; it would be unfortunate to cause a large number of employees, shippers, and communities to suffer because agreement cannot be reached on that matter.—Id., pp. 41-2.

Applicant short line's traffic and revenues are declining and its expenses rising, and present poor condition of the line will undoubtedly worsen, thus requiring future expenditure of a greater proportion of its diminishing revenues for rehabilitation and maintenance. The only section of the line which generates any traffic is that serving industries which can be served by a connecting trunkline upon acquisition of that portion as proposed. As applicant's income has declined to the point where inevitable operating losses justify abandonment, continued operation by it at a small and declining profit, thereby preventing more profitable and efficient operation by the trunkline, would constitute an undue and unnecessary burden on interstate commerce. Abandonment of entire line authorized.—Okmulgee Northern Ry. Co. Abandonment, 320 I.C.C. 639 (644).

In balancing the interests of communities directly affected by a proposed abandonment against the interest of the carrier and the general public interest, demonstrated prejudice to interstate commerce and absence of earnings adequate to afford reasonable compensation are relevant and frequently controlling, although the act does not make issuance of certificate dependent on a specific finding to that effect (271 US 153). Applicant's evidence shows that operations over involved branch-line seg-

ment, principally in commuter train service, resulted in losses, exclusive of avoidable capital costs, of $21,495 in 1960 and $20,911 in 1961, compared with cost of proposed alternative method of operation; there was no substantial change in number of passengers in 1962, and any significant improvement in future appears unlikely. Continued operation of the line will therefore burden interstate commerce; abandonment authorized.—Southern Pac. Co. Abandonment, 320 I.C.C. 278 (280-1)*.

Where State property taxes are by law computed on a valuation determined by such methods as allocation of the railroad's stock and bond value and capitalized net earnings based on its physical properties and gross earnings in the State, the commission has consistently held that such taxes are not chargeable as out-of-pocket expenses in connection with abandonment, as no substantial tax savings would be realized from abandonment.—Northern Pac. Ry. Co. Abandonment and Construction, 317 I.C.C. 513 (515)*.

Carriers should not be required to continue the business of carriage where their overall operations have been conducted at a systemwide deficit for a substantial period and there is no reasonable prospect of conducting those operations at a profit in the foreseeable future.—Rutland Ry. Corp. Abandonment of Entire Line, 317 I.C.C. 393 (422)*.

Since its reorganization in 1950 Rutland Ry. has sustained annual deficits in net operating income except for 4 years during construction of St. Lawrence Seaway, and its prospects as a profitmaking road are questionable. In addition to gradual attrition of traffic by motor competition and business failing or moving away from the line, also loss of traffic due to 1960 strike of its employees, current strike has so impoverished it that resumption of operations would be difficult, if not impossible. Results of its past operations and probability that it would be unable to regain much of traffic lost to other carriers during its long period of inoperation warrant conclusion that it would incur substantial losses if it resumed operations, and that continued operation and maintenance of the line would unduly burden interstate commerce. Abandonment of entire line except a short segment over which New York Central holds trackage rights, and abandonment of operation over that segment, authorized.—Id., pp. 420-2, 424.

In lieu of crediting line proposed to be abandoned with any portion of bridge traffic revenues, allowance of credit to the line for cost of handling bridge traffic is acceptable.—Southern Pac. Co. Abandonment, 317 I.C.C. 489 (493)*.

Applicant should have included in its operating results revenues derived from its motortruck operations along the line; had such revenues been included, it would be proper to include expenses attributable to the motor operations.—Id., p. 496.

No allocation of bridge revenues to line proposed to be abandoned is required where such revenues will be substantially retained through the abandoning carrier's handling of the overhead traffic over an alternate route. Since considered line was rendered unserviceable for such traffic by washouts, applicant has used line of another railroad (over which it seeks trackage rights) under a commission service order, and fact that prior thereto it may not have been free to reroute the overhead traffic does not alter the basis for not requiring such assignment.—Chicago & N.W. Ry. Co. Trackage Rights, 317 I.C.C. 350 (352, 354); and there is no merit to argument that, since the line handled predominantly overhead traffic, not over 10 percent of expenses allocated to the line is properly chargeable thereto; annual expenses directly attributable to movement of overhead traffic should be deducted in determining expense which would be avoided by abandonment.—Id., p. 354.

Although in 1959 the eastern section of considered branch line received only about half the service afforded the western section, and during the last 5 months little service was provided, applicant made bona fide efforts, commensurate with its financial ability and amount of traffic available, to provide the public thereon with service responsive to its needs; operations were conducted in exercise of sound managerial discretion so as to place the minimum bur-

den on a seriously impaired roadbed, and additional revenues from maintenance of regular schedules would have made no significant contribution toward eliminating deficit assignable to that section; maintenance expenses thereon in 1959 was 66 percent of amount spent on, and 77.6 percent of revenue assigned to, the entire line. Traffic available on the eastern section would not support continued operation even at present inadequate rate of service, and applicant is not otherwise in financial position to make the outlay necessary for rehabilitation thereof; abandonment of that section is warranted.—Chicago & N.W. Ry. Co. Abandonment, 317 I.C.C. 207 (209, 214, 217)*.

Ad valorem property taxes may not properly be considered a savable item of out-of-pocket expenses in computing losses from operation of a branch line.—Id., p. 213.

Carriers should not be required to continue the business of carriage where their overall operations have been conducted at a systemwide deficit for a substantial time and there is no reasonable prospect of conducting those operations at a profit in the foreseeable future. Contrary to decline in applicant's annual deficit in 1958 and its realization of a cash income in last 6 months of that year, financial data for subsequent years show substantially increased deficits, and those figures do not take into consideration its failure to keep up normal maintenance in recent years. Applicant's present revenues have not been, and future revenues will not be, sufficient to cover cost of continued operation with maintenance of facilities adequate to safety; abandonment of all operations is warranted.—Chicago, N.S. & M. Ry. Abandonment of Entire Operation, 317 I.C.C. 191 (192-3, 199, 200)*.

Applicant's continuing and increasing deficits were incurred despite an average increase of 23 percent in its interstate and intrastate fares in 1960; its failure to increase fares until required to do so by action of commuters' association and finding in prior report cannot be criticized, as its prediction that no net gain would result has been realized. And although revenues resulting from the fare increase were more than offset by a concurrent wage increase, no suggestion is offered as to what might have been done differently; there is merit to argument that extent to which applicant's employees have worked at wages below the national average amounted to a "subsidy" to the railroad and its patrons.—Id., pp. 193, 198-9.

Notwithstanding that applicant's parent company will benefit financially from abandonment of the railroad, its present management has not failed to exert its best efforts to continue operations without loss, and for the year ended May 31, 1961, reduced its operating expenses, exclusive of wages paid, by $221,077 below those for the previous year; those operating the line are entitled to full credit for maintaining a safe operation, without serious criticism from the public of the service rendered, on a railroad which for years has had a minimum of maintenance work performed and has had only antiquated equipment available for use.—Id., p. 198.

In deducting from benefits of abandonment of applicant's South line between El Paso and Tucson the cost of routing over its North line all bridge traffic now moving to or from Douglas, Ariz., area over the South line, applicant's estimate of such costs for a future representative year, based on local conditions except where system average costs do not vary with terrain or locale, more nearly reflect actual added expense of handling such traffic over the North line than protestant's computations based on the commission's unit cost studies for entire western district and on general estimates of traffic volume applied to maximum circuity for cars moving from the Douglas area over the North line.—Southern Pac. Co. Abandonment, 312 I.C.C. 685 (692-3)*.

Annual interest on savings from salvageable material is not includible as a cash saving resulting directly from abandonment; economic and financial authorities cited pertain generally to enterprises not subject to regulation by the commission, and commission cases cited were decided under criteria not necessarily controlling in an abandonment proceeding; no valid reason appears for reversing findings in 254 ICC 745 and 271 ICC 261 and accepting

interest on capital cost savings as a savable expense for abandonment purposes.—Id., p. 693.

Nor should applicant's losses through nonabandonment of the line be reduced by amounts they represent in adjusted income tax benefits; Federal income taxes have never been considered an element in determination of losses from operation, and applicant's saving in taxes is not a factor to be considered in determining public need for the South line.—Id., p. 694.

Although determination of precise operating results of considered segment for the 3 years preceding filing of abandonment application would require additional adjustments which cannot be made for lack of express data, it is inconceivable that any further adjustments could reduce the loss figures by more than $2,000 to $3,000, which would show losses ranging from $15,000 to $27,000 for those years, due to steady decline in number of carloads of freight handled. Discontinuance of l.c.l. service has little significance when that traffic also declined during periods when it was offered, and it does not appear that any revenue which might have been derived therefrom would have affected the losses shown to any appreciable degree; in view of recent financial results of the line it is doubtful that l.c.l. service was discontinued for any reason other than to economize in operation. Abandonment found justified.—Fort Dodge, Des Moines & Southern Ry. Co. Abandonment, 312 I.C.C. 708 (710)*.

Though applicant operates its Silverton, Colo., branch only during the period June 1 to October 1 of each year, and primary use of the line is by tourists desiring to ride on one of the last narrow-gage passenger railroads in North America, substantial profit is realized on that service and there is substantial need for its continuance, as well as some need for the limited freight service now provided; denial of abandonment authority will therefore not unduly burden interstate commerce.—Denver & R.G.W.R. Co. Abandonment, 312 I.C.C. 791 (795, 796).

Crediting a branch line with all revenues to be lost is reasonable and consistent with out-of-pocket approach to cost determination in abandonment cases. Use of a factor of 65 percent of c.l. traffic to and from considered branch, on assumption that the balance would be handled through an off-branch team track to be established on another line, does not reflect the burden on interstate commerce of operating the branch; all revenue which the branch produces for carrier's system must be considered, without regard to necessity for shippers to haul their traffic from a station on another line after abandonment, particularly where it is not conclusively established through shipper evidence that proposed team track would be utilized; the branch should be credited with the total amount earned thereon.—Northwestern Pacific R. Co. Abandonment, 312 I.C.C. 783 (786-7).

Applicant's computation of earnings should be adjusted to reflect amounts properly disallowed as savable expenses, for cost of annual interest on cash flowback from (a) net salvage, (b) an income tax writeoff benefit, and (c) tunnel rebuilding costs, and for California property taxes. Computation of maintenance of way and structures should be reduced by amount included for tunnel repairs which are properly classified as capital expenditures under accounting regulations. But annual salary of the only station agent on the branch was properly charged as an operating expense when it is reasonable to assume that his position was essential to performance of operations over the branch.—Id., pp. 786-7.

Such recomputation of operating results shows net income accruing to applicant and its parent system for each of the years considered. While the record supports applicant's contention that a major reconstruction program must be instituted if the branch is to be continued in operation, particularly replacement of a tunnel, the type of reconstruction is for applicant to determine; whatever method is chosen will, on basis of the branch earnings shown, enable applicant to realize a profit even after deferred maintenance is taken into consideration. Abandonment denied.—Id., pp. 737, 788.

61.—Industry sought to be served no longer existing.—[Vols. 2, 6, 9, 11, 12].—Abandonment of a short segment of branch line is justified when traffic generated by coal mine it was built to serve has disappeared, other users of the segment have diverted their traffic to other transportation modes, and there is no foreseeable increase in demand for service; any service required can be provided with a minimum of inconvenience over remainder of the branch. Certificate granted.—Reading Co. Abandonment Portion of Mount Carmel Branch, 317 I.C.C. 592.

62.—Other service being made available.—[Vols. 2, 6, 9, 11, 12, 14, 16-19].—In finding that abandonment of branch line would not impose undue hardship on the 170 daily commuters using it, it was reasonable, in light of the record, for the commission to assume that the railroad planned to provide alternative service in the full sense of its main line, including regular stops at stations within short driving distance of commuters' homes. And though, while the case was still pending, the railroad applied to the State commission for reduction of its local passenger service, including elimination of station stops cited as substitute service for branchline passengers, amendment of that proposal, after authorization of abandonment, to restore all but one of the station stops in the affected area has virtually rendered moot plaintiffs' contentions regarding the railroad's radical change of position; motion for remand to the commission is therefore denied. Plaintiffs' contentions may properly be addressed to the State commission in proceeding now pending before that body.—Humphreys v. United States, 228 F. Supp. 910 (913-4, 916-7)*.

Although, following destruction of a tunnel by fire, applicant rerouted traffic to and from the northern segment of considered main line, the number of cars moving over the line via gateway south of the tunnel before the fire and the circuity of the alternate route are convincing that the traffic involved cannot be handled as efficiently via the alternate route. Reconstruction of the tunnel will prevent loss to the shipping public through fewer facilities for rail transportation and a less efficient, slower service; application for abandonment of the destroyed tunnel segment denied.—Northwestern Pac. R. Co. Abandonment, 320 I.C.C. 19 (23, 24)*.

A primary concern in abandonment proceedings is preservation of service for the public previously served by the abandoning line. Applicant short line's only section which generates any traffic is that serving industries which could be served by connecting trunkline concurrently seeking authority to acquire it. Since the section whereon shippers are located can be operated profitably by the trunkline by reason of the more attractive single-line service it will be able to offer present and potential shippers, as well as the more economical maintenance it can furnish owing to its greater facilities, continued operation by the short line at inevitable loss, thereby preventing more efficient and profitable operation by the trunkline, would unnecessarily burden interstate commerce. Complete abandonment authorized.—Okmulgee Northern Ry. Co. Abandonment, 320 I.C.C. 637 (640, 644).

Although some 30 percent of production of short line's parent lumber company is trucked by customers over existing roads, those roads are below modern standards and some must be relocated upon completion of a State dam that will also inundate part of the rail line and isolate the remainder; and while the State intends to build a new highway which it contends will meet the lumber company's transportation requirements, location thereof has not yet been determined. Moreover, as the bulk of the lumber company's production is high-grade lumber which would require extra handling at increased expense if moved by truck, only the low-grade production now being hauled by motortrucks, the highway facilities which the State proposes to construct would not afford comparable transportation facilities and would not be an adequate substitute for rail service that would be provided by relocation of the flooded portion of the line. The State's application for total abandonment of the short line, denied.—Feather River Ry. Co. Abandonment, Acquisition, 320 I.C.C. 417 (424)*.

Abandonment of a portion of applicant's line located north of ship channel in Corpus Christi, Tex., in connection with pro-

posed operation over a new line to be constructed by the port authority, authorized; the north line is not necessary for continued service to facilities and industries on south side of the ship channel, and abandonment will allow removal of an obsolete city-owned bridge and permit planned development of the channel, which is vitally necessary to the port and in public interest.—Texas & N.O. R. Co. Abandonment, 317 I.C.C. 245 (247, 251).

Although State commission requests that Union Pacific, which pursuant to court order suspended operation over a branch to be flooded by a dam project, be required to restore service on a temporary basis partly over tracks of the Rock Island, circuity of such routing would substantially increase mileage and Union Pacific would have to pay $2.75 a train-mile for use of the Rock Island tracks, thus greatly increasing cost of operating over the branch; therefore, in absence of urgent need for service, the commission would not be warranted in either authorizing or ordering Union Pacific to conduct operations over the Rock Island tracks even on a temporary basis.—Union Pac. R. Co. Abandonment, 320 I.C.C. 624 (628).

63.—Competing carriers adequately serving field.—[Vols. 2, 6, 9, 11, 12, 14, 15, 18].—Each of the three railroads operating local passenger service between Chicago and Milwaukee competes for intrastate as well as interstate traffic, and it is clear that the total traffic is insufficient to support all on a reasonably profitable basis. If applicant continues operations either on present basis or solely in intrastate commerce, it will carry passengers who would otherwise patronize one or other of its competitors; thus, latter's ability to continue their present interstate operations should be improved by proposed abandonment of applicant's entire operation. Prior findings authorizing such abandonment, affirmed.—Chicago N.S. & M. Ry. Abandonment of Entire Operation, 317 I.C.C. 363 (367, 370)*.

64.—Traffic insufficient to justify existence of line.—[Vols. 2, 6, 9, 11-13, 19].—The commission has never stated that a certain volume of traffic will create a presumption in favor of continued operation; extent of demand must be balanced in each case against extent of operating losses, and setting of a fixed level-of-traffic formula would not be justified. Each case must be determined on basis of its own facts.—Rutland Ry. Corp. Abandonment of Entire Line, 317 I.C.C. 393 (407)*.

Carriers should be free to use their facilities as they deem necessary for promotion of efficiency and economy, rather than to maintain a line which local shippers cannot support, and use of an alternate route for handling of bridge traffic is a matter of managerial discretion. Potential bridge traffic that could have moved over line carrier seeks to abandon has little or no significance when claim that applicant's rerouting of bridge traffic has been the greatest contributing factor to losses on the line is not substantiated. Public convenience and necessity do not require, and a sound transportation policy does not permit, enforced movement of bridge traffic over a particular line when it can as efficiently and economically be handled over an alternate line.—Southern Pac. Co. Abandonment, 317 I.C.C. 489 (493)*.

Revenue capability of eastern section of considered branch line must be appraised from traffic presently and actually available; future revenue potential of Government grain in storage no longer constitutes a valid or reliable basis for requiring continued operation, and applicant is not otherwise in position financially to make the outlay necessary to rehabilitate that section; other traffic available would not support operation of the eastern section even at the present inadequate rate of service; abandonment of that section is warranted.—Chicago & N.W. Ry. Co. Abandonment, 317 I.C.C. 207 (217)*.

Although 36-mile segment between Sylvania and Waynesboro, Ga., is Savannah & Atlanta's main-line track and its only route to Waynesboro, and therefore has relatively high density of bridge traffic, abandonment is justified when the few shippers on the line are not supporting it sufficiently to warrant expenditure required for rehabilitation if it were to be continued in operation; the only three points on involved segment

with population above 100 will continue to receive scheduled motor service, and through rail service will be provided by single route to be established with Central of Georgia between Savannah and Waynesboro.—Central of Georgia Ry. Co. Abandonment, 317 I.C.C. 184 (187, 189).

Since, with increased capacity and efficiency of applicant's North line between Tucson and El Paso following installation of centralized traffic control, all bridge traffic will henceforth move thereover, the only traffic available for transportation over its South line will be that originating and terminating thereon; the sparsely settled communities involved cannot generate enough traffic to support a line over 200 miles long, and while abandonment of the South line will cause some inconvenience and additional expense to users thereof, applicant cannot be expected to continue unprofitable operations for their benefit; such operations would impose an undue and unnecessary burden on interstate commerce. Abandonment authorized.—Southern Pac. Co. Abandonment, 312 I.C.C. 685 (696)*.

65.—Road unsafe for operation.—[Vols. 2, 6, 9, 11, 13, 17, 19].—Abandonment of segment of line between Pomfret and Putnam, Conn., which was damaged by flood, authorized when its restoration would require rebuilding of a bridge, which is not warranted when there has been no passenger service over the line for some years and all freight movements are being adequately handled over other of applicant's lines.—New York, N.H. & H.R. Co. Abandonment, 317 I.C.C. 204 (205-6).

Abandonment of branch line between Platte River and Seward, Nebr., authorized when owing to extensive washouts on an 8-mile segment overhead traffic which constituted the principal movement has had to be rerouted over a parallel line of the Burlington, and even prior thereto successful bridge movement was uncertain because of frequent derailments due to condition of the line. Abandonment will eliminate substantial annual operating losses, avoid extensive expenditures required merely to restore the line to condition superior to its present extremely deteriorated state, and enable applicant to realize a considerable salvage value. Bridge traffic will continue to move efficiently over the Burlington under trackage rights, and local traffic can move without too great inconvenience over other railroads serving the area.—Chicago & N.W. Ry. Co. Trackage Rights, 317 I.C.C. 350 (352, 354, 355).

66.—Relocation of line.—[Vols. 2, 6, 9, 11, 14, 16, 17, 19].—In proceeding on application to abandon certain lines and trackage operations comprising Union Pacific's Junction City branch in Kansas, a substantial portion of which will be flooded by construction of a dam and reservoir, the real issue is whether relocation of the line is required to meet transportation needs of the public, since the land underlying the lines is needed to meet demands of a superior public interest, and the lines must give way to the flood control and water conservation program. Four of the largest towns on the branch are served by other railroads and there is abundance of motor carrier service throughout most of the area; only 4 towns, the largest of which has a population of 679, will be left without rail service, and, without rock shipments from a quarry that is to be made into a recreation area, the traffic of those 4 towns would amount to less than 1 car a day. As increased maintenance costs for the first 5 years would exceed the annual gross revenue for the entire branch, relocation to serve those 4 towns does not appear justified.—Union Pac. R. Co. Abandonment, 320 I.C.C. 624 (629, 631).

The issue, regardless of the number of shippers affected, is whether the proposed relocation is economically justified in terms of reasonably predictable revenues and the need for service. Determination of the traffic potential of the relocated line on basis of traffic handled during the past 5 years is an acceptable method, and the rock shipments were properly excluded since it appears extremely doubtful that the quarry would be reopened elsewhere on the relocated line. Even including the rock traffic, revenues would still fail to cover operating costs, without regard to increased maintenance costs for the first 5 years; thus, under the most liberal interpretation of the

evidence, it is clear that the line would not operate at a profit.—Id., p. 632.

Moreover, the amount the Government will pay the railroad for the abandoned lines has little significance compared to the cost of relocation, which would substantially exceed the present value of the line. Estimated minimum cost to the Government of $7.4 million for construction of the substitute line appears to be a reasonably close approximation of probable actual cost; and the same consideration must be given to proposed expenditures of public funds for relocating the line as if the railroad were to bear the expense. The final determination must be made by balancing all relevant factors; to justify such a large expenditures there must be a strong showing of public need for service over the line, which has not been made. Balancing the reasonably predictable future traffic and revenues, the heavy expenditures required to relocate the branch, and the increased maintenance costs and taxes against the need for rail service, particularly in consideration of available alternate service, proposed relocation is unnecessary, wasteful, and not required by public convenience and necessity.—Id., pp. 632, 633.

State freeway and county expressway which would displace the 6-mile segment of branch line for which abandonment authority is sought are necessary to alleviate existing motor traffic problems. While no precise study has been made of cost of relocating the line along median strip of the expressway, costs additional to applicant's estimates of $100,000 for redesign and right-of-way changes and $203,000 for relocating the tracks would be required to provide loading and unloading facilities for passengers and a means for them to cross the expressway. Considering losses from operation of the line and fact that the only freight traffic can be handled over remainder of the branch, need of a limited number of commuters for continuance of the passenger-train service (which will be shifted to applicant's main line) does not justify expense of relocation. Abandonment authorized.—Southern Pac. Co. Abandonment, 320 I.C.C. 278 (281-2)*.

Although the county plans to construct an express highway on right-of-way of line sought to be abandoned, there is urgent need for continuance of applicant's commuter service. The parties' estimates of relocation cost are grossly exaggerated, therefore unreliable, and in absence of necessary cost data it cannot be assumed that cost of placing the line in the median strip of the expressway would be prohibitive. Since the county's expressway program will ultimately cost $210 million, it would not be too great an additional financial burden for it to pay cost of relocating the rail line in the involved segment. Denied, without prejudice to filing of application to relocate the line so as to permit both construction of expressway and continued operation of applicant's branch-line passenger trains.—Southern Pac. Co. Abandonment, 317 I.C.C. 645 (654, 655-6).

67. Prospect of developing traffic.—[Vols. 2, 6, 9, 19].—Although record shows a downward trend in c.l. traffic over applicant's Sausalito branch for periods considered, there is no indication that such trend will continue; protestant shippers' chief motive for selecting their present sites was availability of applicant's direct rail service, and several industries testified that their businesses are expanding; while such increases in future traffic are entirely speculative, there appears to be an increased traffic potential, and any additional c.l. traffic will serve to increase applicant's income from the branch, which is already operated at a profit. Abandonment denied.—Northwestern Pacific R. Co. Abandonment, 312 I.C.C. 783 (789).

Far from serving an area of declining resources available for exploitation, Feather River Ry. serves an area of steady production, with potential for increased production in the future. If continued rail service is assured, its parent lumber company and principal shipper intends to install facilities that will more than double its annual volume of rail traffic and appreciably increase the short line's revenues; though installation of those facilities has been deferred owing to uncertainty of the line's future, they are standard equipment in all modern lumber mills, and even without them the lumber company is one of the three major industries in the county. Most of its production is handled by interstate

carriers through the short line's connection with Western Pacific, thus generating substantial revenues for them, and timber resources in the territory will permit it to operate indefinitely if the short line continues in service, whereas if abandonment sought by the State is required the lumber company might be forced to cease operation of its mill, with adverse effects on economy of the area. Authority for total abandonment denied.—Feather River Ry. Co. Abandonment, Acquisition, 320 I.C.C. 417 (423, 425)*.

Abandonment of applicant's Silverton, Colo., branch is not warranted when there is prospect of new mining operations in the area, as well as a substantial amount of harvestable timber, neither of which operations could be profitably undertaken without rail facilities; sheepherders have also envinced interest in use of the line for movement of their flocks between spring and fall ranges; although amount of any such future traffic is speculative, an increased potential exists, and any realization thereof would increase applicant's income from the line, which is already operated at a profit.—Denver & R.G.W. R. Co., 312 I.C.C. 791 (794-5).

There would be no overall justification for continuance of applicant's line between Sylvania and Waynesboro, Ga., even if lumber mill at Sardis were rebuilt, when in year before its destruction entire gross revenue from that segment was only a little over half the cost of maintenance; though a large pulpwood consumer has 8,500 acres of timber adjacent to the line, pulpwood traffic therefrom will probably move by truck to shipper's woodyards at Sylvania and Waynesboro, which applicant will continue to serve; and there is no tangible evidence that prospective industrial development of area between the line and Savannah River would generate sufficient traffic in the foreseeable future to enable applicant to recover cost of rehabilitation work that would be immediately required if operation were continued. Abandonment authorized.—Central of Georgia Ry. Co. Abandonment, 317 I.C.C. 184 (187).

68. Interest of communities and patrons.—[Vols. 2, 6, 9, 11-19].—In authorizing abandonment of branch line the commission in effect found that, as a local matter, the county's desire to build an expressway on the right-of-way to meet needs of large numbers of automobile owners who found congestion of existing highways intolerable outweighed convenience and necessity of the railroad's 170 daily commuters, and not unreasonably relied on evidence indicating that the railroads would provide substitute service on its main line. Though plaintiffs charge the railroad with bad faith concerning the substitute service, based on applications filed with the State commission, that body, which has jurisdiction over the matter of station stops in affected area, has been vigilant in attempting to preserve reasonable regularity of service for the commuters and can be presumed to continue with the same vigor as in the past in recognizing their established rights and in affording them all necessary and proper remedies. Motion for remand to the commission, denied, and order authorizing abandonment sustained.—Humphreys v. United States, 228 F. Supp. 910 (915-6, 917)*.

Segment of main line sought to be abandoned to avoid cost of rebuilding a destroyed tunnel is part of applicant's main line between Eureka, Calif., and San Francisco Bay area; since collapse of the tunnel, shippers on the line south thereof have had their daily rail service decreased and their all-rail route to and from northern and eastern points cut off, and truck service is more costly and less satisfactory for some traffic; shippers north of the tunnel are deprived of rail service to points on the line south thereof and of a more direct route to the Bay area; these adverse effects preclude finding that abandonment would work no immediate substantial injury to shippers; denied.—Northwestern Pac. R. Co. Abandonment, 320 I.C.C. 19 (22)*.

While abandonment might result in a saving to the State when expanding its parallel freeway, no definite plan has been adopted and no changes in the highway system are contemplated within the next 5 to 10 years.—Id., p. 22.

There is evidence of public need for service currently offered over branch line

sought to be abandoned. The cattle industry, which not only uses the service for movement of livestock but also makes substantial use of it for transportation of feed, and the cotton industry which has made extensive use of the facilities in the past, would be severely inhibited if the direct rail service now available were curtailed. Other industries in the area would also be severely affected, and applicant, in recognition of probable movement of stone in substantial amounts, has stated that if abandonment is authorized it will request extension of the time within which such authority may be exercised. A carrier has an obligation to seek means of continuing a service for which a demand is shown; applicant has failed to show that the line or some portion thereof cannot be operated in such manner as not to be a burden on it or interstate commerce. Certificate denied.—Southern Pac. Co. Abandonment, 320 I.C.C. 38 (40-1, 42)*.

Complete abandonment of Feather River Ry., instead of construction by the State of a new line replacing a segment to be flooded upon completion of a State dam, thus restoring the short line's connection with Western Pacific, is not warranted. Increase in operating expenses of the short line's parent lumber company and principal shipper, if it were deprived of rail service, would so hamper it in competing in national markets that it might be forced to cease operation, with adverse effect on economy of the area. And while the examiner suggested removal of the mill from the short line's railhead to a point on the Western Pacific, the lumber company would not only lose its competitive advantage of lower costs for trucking in timber from the surrounding area, but would have to bear the additional expense of relocating the mill, since the State water code does not authorize payment of cost of relocating private industries. Authority denied for abandonment of other than the segment to be flooded.—Feather River Ry. Co. Abandonment, Acquisition, 320 I.C.C. 417 (421, 423-4)*.

As freight shipments will be unaffected by proposed abandonment of a 6-mile segment of branch line which is to be displaced by a motor expressway, any adverse effects will be limited to commuters using the branch-line stations. However, considering other means of transportation available, it is unlikely that they will suffer severe hardship or serious inconvenience as result of shift of the commuter trains to applicant's main line. The commuter situation is, for practical purposes, local in nature, and the problem faced by commuters is an outgrowth of local decisions made by duly elected or appointed officials in the area involved, which are believed to be of benefit to and in best interest of most of the citizens concerned. In the circumstances the loss and inconvenience placed on a limited number of commuters is not of sufficient significance to warrant denial of certificates; abandonment authorized.—Southern Pac. Co. Abandonment, 320 I.C.C. 278 (282)*.

Following authorized abandonment of eastern section of branch line, all points thereon will continue to have available transportation service by motor carrier, either exclusively or in conjunction with remaining rail service, which is reasonably adequate and efficient for their needs respecting inbound traffic. As to outbound grain movement, there is abundance of rail service in close proximity to points on that section, the area is served by all-weather highways, and regulated and exempt truckers in the area should be well able to provide adequate and satisfactory service in movement of grain to the nearby rail stations; that use of trucking services will presumably involve some increase in costs is not determinative of issues concerning abandonment.—Chicago & N.W. Ry. Co. Abandonment, 317 I.C.C. 207 (215, 216)*.

Territory tributary to line proposed to be abandoned is in close proximity to two other railroads; no station is more than 12 miles from another railroad and 2 are already served by another line. Inconvenience to some shippers is not a unusual result of abandonment, and adverse impact on a relatively few cannot be made basis for rehabilitation and continued operation when farmers and elevator operators who may be inconvenienced more only a small portion of total grain production in the area

over considered line, and the great bulk of overhead traffic will move more efficiently over alternate route than if continued operation of the line were required.—Chicago & N.W. Ry. Co. Trackage Rights, 317 I.C.C. 350 (355).

A carrier cannot reasonably be expected to operate a line of railroad at a loss in order to provide shippers with transportation for a part of their traffic; though public need for railroad service in the north country of New York and Vermont is well established, and there has been concentrated effort by civic groups to encourage industry to locate on line of Rutland Ry., movement of industry away from area served by it has contributed to its revenue losses. Abandonment of its entire operation will not entirely deprive that area of rail service, especially as other carriers, individuals, or specially created corporate bodies are likely to purchase the line or important segments thereof for resumption of service. When injury to affected communities is weighed against burden that would be imposed on carrier and interstate commerce by refusal to permit abandonment, continued operation by the Rutland is not warranted.—Rutland Ry. Corp. Abandonment of Entire Line, 317 I.C.C. 393 (423, 424)*.

Shippers who have other rail service available or who also use other means of transportation have the right, in order to enhance their profit or competitive advantage, to seek to ensure continuance of a service that will aid them in operation of their businesses, but their interests must be weighed with all the surrounding circumstances. While some of protesting shippers may suffer inconvenience and some financial loss from proposed abandonment, other means of transportation are available; and their allegations of future increases in traffic are largely speculative when no estimates are offered as to amount thereof, revenue to be derived therefrom, or probable time it would materialize. Considering applicant's losses, decline in traffic on considered line, an availability of other transportation modes in the area, abandonment should be authorized.—Fort Dodge, Des Moines & Southern Ry. Co. Abandonment, 312 I.C.C. 708 (711)*.

Although protesting shippers state that in event of abandonment they might well purchase the line to protect their interests, in view of indefiniteness of their plans detailed provisions of sale should be left to private negotiation as in case of any other private industrial trackage; a period of 35 days is sufficient for fair consideration of purchase of involved trackage and will not penalize applicant by requiring it to wait an unnecessarily long time; abandonment authority conditioned accordingly.—Id., p. 712.

Acquisition and Operation

75. In general.—[Vols. 2, 6, 9, 15-17, 19].—Although applicant railway requests certificate for acquisition and operation of a new line to be constructed by the State in lieu of a segment that will be flooded upon completion of a State dam, it is willing to accept trackage rights thereover and to have the State retain ownership thereof. As it will therefore be unnecessary for the State to transfer such ownership unless it chooses, authority is granted for acquisition and operation of, or operation over, the line in question, and the parties are left free to negotiate a reasonable trackage agreement and just compensation for the railway's segment to be abandoned, if ownership of the new line is not transferred to it. But if the State chooses to transfer ownership of the new line it should so inform the commission immediately following such election.—Feather River Ry. Co. Abandonment, Acquisition, 320 I.C.C. 417 (427)*.

If the State chooses not to transfer ownership of the line to the railway and a trackage agreement is negotiated, the parties should, by petition, request the commission's approval of its terms before the railway commences operations thereunder; however; it is not anticipated that trackage rentals and maintenance or other charges provided for therein will be of such nature as to prohibit the railway's use of the new line or otherwise serve to defeat the commission's authorization of its operation thereover.—Id., p. 427.

Although approving purchase by the State of Vermont of a portion of abandoned

line of Rutland Ry., for lease to and operation by a new railway corporation, the commission considers the carrier status of the State resulting from ownership of the properties to be both undesirable and unnecessary, and suggests that consideration be given to an arrangement whereby the State itself would not have status of a carrier subject to the act.—State of Vt. and Vermont Ry., Inc., Acquisition and Op., 320 I.C.C. 330 (335)*; however, on further consideration, although within the statutory definition of a railroad, the State is found not to be a common carrier subject to the act merely by reason of its purchase and ownership of the rail line and properties.—Id., 320 I.C.C. 609, p. 616*.

Since definition of "railroad" in §1(3)(a) includes lines operated under lease, authority for acquisition of line of former Hudson & Manhattan from its successor in reorganization includes trackage of Pennsylvania R. leased or operated by the successor.—Port Authority Trans-Hudson Corp. Acquisition and Operation, 317 I.C.C. 357 (360).

76. Operation in particular class of service.—[Vols. 2, 6, 9, 12-15, 18].—Proposed acquisition of branch line serving a Michigan area dependent on summer tourists and winter sports, for purpose of operation primarily as a tourist attraction in manner similar to other short-line steam railroad, approved. Requiring company anticipates that it can operate the line at substantial savings in present costs, and that its tourist excursion trips will attract business to the area, thereby increasing freight traffic and enabling a profitable operations.—Cadillac & Lake City Ry. Co. Acquisition and Operation, 320 I.C.C. 617 (620-2).

Acquisition and operation of a construction spur extending from a branch of Pennsylvania R. to a new coal cleaning plant, in connection with applicant's construction of a connecting track from its line to that branch and acquisition of trackage rights over the intervening portion of the branch, to enable it to deliver coal to the new plant from mines on its line and cleaned coal from the plant to other connections with the Pennsylvania and New York Central, will benefit all carriers concerned. Though the Pennsylvania could serve the new plant by interchange if it acquired the spur, such operation would entail substantially greater initial outlay for construction of new tracks and improvement of those existing than applicant's proposal, as well as increased annual expense for maintenance, motive power, and labor, whereas applicant's proposal permits simpler and more efficient operation. Certificate granted.—Cambria & I. R. Co. Construction and Acquisition, 320 I.C.C. 43 (46-9, 50)*.

78. Continuation of needed service.—[Vols. 2, 6, 9, 11, 17, 19].—Acquisition by State of Vermont of a portion of abandoned main line of Rutland Ry., and lease of the properties for a 10-year period to a new railway corporation for operation, is required to restore rail service in involved western Vermont area. Rutland's discontinuance of service forced shippers in that area to make other, less advantageous, arrangements for shipment and receipt of raw materials and manufactured products, and high costs of the alternative means of transportation placed industries formerly using the line in a noncompetitive position, which could eventually require curtailment of their operations, with resultant adverse effect on economy of a large section of the State.—State of Vt. and Vermont Ry., Inc., Acquisition and Op., 320 I.C.C. 330 (333, 334)*.

Since New York Port Authority, through its wholly owned subsidiary, is willing to take over operation of line of former Hudson & Manhattan for benefit of the metropolitan area population of New Jersey and New York, knowing that it will probably continue to incur deficits, it should be permitted to do so, as otherwise, in view of present operating deficits, it is doubtful that operation of the line could long continue; acquisition and operation authorized.—Port Authority Trans-Hudson Corp. Acquisition and Operation, 317 I.C.C. 357 (361).

Although the line is to be acquired through condemnation proceedings and the definite price thereof has not yet been ascertained, the commission has previously authorized acquisition of a line of railroad without a showing of details of financing, etc., in order to keep the line in operation;

compensation to be paid will be determined by the State courts and will thus reflect the fair and reasonable value of the properties.—Id., p. 361.

Acquisition, to resume operation, of trackage which would otherwise be dismantled or lie deserted, is in public interest and should be encouraged. Preservation of service for the public previously served by an abandoning line is a matter of primary concern, since shippers dependent thereon might lose their competitive position at the market, or be forced to relocate or switch to other modes of transportation; and any hiatus in rail service could render its restoration impractical. Therefore, concurrently with authorization of short line's complete abandonment, connecting trunkline is authorized to acquire and operate that section of the line on which shippers are located, thereby enabling it to provide dependent shippers with a more attractive single-line service at a profit to itself. Purchase price of $180,000, arrived at through arms-length bargaining, appears fair and adequate, considering value of the properties, the additional traffic and revenue accruing to the purchaser, and the lower cost to it of serving the industries involved.—Okmulgee Northern Ry. Co. Abandonment, 320 I.C.C. 637 (640-1, 644).

89. Acquisition or operation of abandoned line or to avoid abandonment.—[Vols. 2, 6, 9].—Under a trackage agreement, the State will allow applicant short line to use a segment of line abandoned by Western Pacific and now owned by the State, to afford it a trunkline connection pending final determination of its application for construction by the State of a new line to replace a segment of its line that will be flooded by a State dam; the agreement also provides that, if construction or operation of the dam and reservoir so require, the State will provide temporary facilities to supply service substantially equal to that of the railway. Certificate and order therefore include authority for the short line to operate over such facilities between the termini of the State-owned segment, and it need not file applications for authority to operate over such substitute facilities so long as such operations are confined between those termini.—Feather River Ry. Co. Abandonment, Acquisition, 320 I.C.C. 417 (427-8)*.

Although prospective traffic and revenues that may be realized from acquisition by a new company of branch line to be abandoned by the Pennsylvania, and operation thereof principally as a tourist attraction, must be classed as speculative, the acquisition will assure an effort to continue rail service in the area, and if stockholders of the new carrier have such confidence in success that they are willing to finance the effort, they should have opportunity to do so. In view of their expectations and the salvage value of the line, proposed price of $40,000 is not unreasonable.—Cadillac & Lake City Ry. Co. Acquisition and Operation, 320 I.C.C. 617 (622-3).

Employees

91. In general.—[Vols. 9, 11-19].—Consolidation-control affecting, §5(2), n. 70.

Discontinuance of passenger service, see §13a, n. 30.

Unlike requirements of §5(2)(f), in the case of a merger of rail lines, Congress has not required the commission to establish protective provisions for employees in cases involving abandonment of a line of railroad or part thereof and, of course, is then silent on subject of the right of the railroad and employees to enter into an agreement as to terms, conditions and arrangements for employees' protection. However, the courts have held that it is discretionary with the commission as to whether to impose employee-protective provisions in an abandonment proceeding.—Flaherty v. Kansas, O. & G. R. Co., 252 F. Supp. 736 (740-1).

The commission's imposition of protective labor conditions in the Savannah Union Station case [312 ICC 797] shows that it does not have an absolute per se rule against imposition of such conditions in total abandonment cases; language in its report authorizing total abandonment by Rutland Ry., which found that there was no evidence of circumstances similar to those which justified imposition of protective conditions in that case, indicates that, after

considering the evidence on whether such conditions should be imposed, it exercised its discretion to deny them. Under 318 US 80 an agency is required only to give clear indication that it has exercised the discretion with which Congress empowered it; the commission's decision meets that standard.—Brotherhood of Locomotive Engineers v. United States, 217 F. Supp. 98 (102-3)*.

Plaintiffs' contention that the commission failed to set out sufficient findings of fact to support its refusal to impose protective conditions is not supported either by the law or by the record; even if technical requirements of §8 of Administrative Procedure Act were applicable, contrary to the court's finding, the numerous factual findings in the commission's report meet all requirements of that act. The real essence of plaintiffs' contention is that the commission is obligated to impose protective conditions unless it sets forth facts to support its reasons for refusing to do so—in other words that the burden of proof is on the commission. No authority has been cited which holds that conditions must be imposed absent a reason for refusing them; and contention that the burden was on the commission to show why they should not be imposed appears to be contrary to §7(c) of APA. Plaintiffs' motion to set aside the commission's order on such bases, denied and complaint dismissed.—Id., pp. 103-4.

The commission's power to impose Burlington conditions (257 ICC 700) for protection of employees adversely affected by an authorized abandonment has been recognized by the Superme Court as a part of its statutory duty to consider public convenience and necessity. [315 US 373 and 339 US 142.]—Smith v. United States, 211 F. Supp. 66 (69)*.

Where cessation of railroad service which results in layoff or demotion of employees is suddenly brought about by forces beyond the carrier's control, and thereafter leave to abandon the damaged line is granted, the employees in most instances have already been laid off or demoted before the order of abandonment; in those cases the commission has proceeded as if duties of which carrier is relieved by the abandonment order had been lifted from it at time of the actual cessation of railroad activity, and as if the affected employees had been laid off or demoted in direct consequence of the termination of the carrier's duty to operate rail services on the line damaged. Under such circumstances retroactive imposition of the Burlington conditions is a reasonable extension or application of the rule governing employee protection in abandonment cases.—Id., p. 69.

Under the Burlington conditions, there must be a causal relationship between the abandonment and the adverse effect on the employee; his dismissal or demotion must have been due to the abandonment, otherwise he is not entitled to protection. To justify imposition of those conditions on abandonment of a segment of track over which no railroad service had been performed since destruction of the railroad's bridge by floods, the commission had to find that some employees were injured by abandonment of the track; evidence to effect that within a week after cessation of train service over that segment certain crossing tenders' jobs were abolished, and that thereafter certain track gangs and others were either discharged or demoted, affords sufficient basis for the commission's finding that some employees were adversely affected.—Id., pp. 68, 69.

Although discontinuance of passenger service over considered segment resulted from the Connecticut and Massachusetts commissions' authorization of discontinuance of such service over carrier's entire line between Boston and Hartford over a year before abandonment of the track was authorized, the commission was justified, under the circumstances, in including within benefit of the Burlington conditions employees engaged exclusively in the passenger service. Everything that happened constituted, for that segment, a single series of events leading to the authorized abandonment; for purpose of application of the Burlington conditions no reasonable distinction can be made between passenger and freight employees on basis of the means through which the railroad was granted the right to abandon the

respective services.—Id., pp. 68, 70.

While carrier could have applied to the commission for authority to abandon the segment shortly after the cessation of services, the issue of a passenger service employee's right to benefit of the Burlington conditions should not be determined by the carrier's decision as to what course to follow to obtain the right to abandon a portion of line on which passenger and freight operations had already and simultaneously ceased.—Id., p. 70.

The Burlington conditions provide that the actual number of employees adversely affected and losses incurred by each shall be determined by arbitration; and while the employee, to receive an award, need not have had a work station precisely within the segment abandoned, the adverse effect suffered must have been the direct consequence of the abandonment, or he must have been "bumped" into discharge or demotion by someone or through a chain of employees from someone who was. This calls for thorough exploration of available evidence and careful findings by the arbiters, since there probably were layoffs or demotions due, not to the abandonment, but to discontinuance of passenger service on remaining portions of the line. The commission had no power to, and did not, include such employees within application of the Burlington conditions, and claims as to such employees are not before the arbiters.—Id., p. 71.

Although, on the evidence presented, neither the commission nor the court could reach any accurate determination of the sum required or whether the damage to railroad's prospect of continuing other services calls for an exception to the Burlington conditions, it is improbable that total amount of the arbiters' awards will seriosusly affect the railroad's financial stability. Should it turn out that there are many affected employees, the commission may well entertain an application by the railroad for leave to show a change of circumstances on the issue of financial stability. The commission's order affirmed, without prejudice to submission of application for modification following the awards of the arbiters.—Id., p. 71.

Where a branch line is to be simultaneously abandoned by one carrier and acquired by a new corporation that will immediately commence operations, the only employees who might be adversely affected are those of the abandoning carrier, and they are entitled to protection of the Burlington (257 ICC 700) at expense of the abandoning carrier, in same manner as if there were an abandonment alone.—Cadillac & Lake City Ry. Co. Acquisition and Operation, 320 I.C.C. 617 (618).

Disputes as to particular employees or groups affected by carrier's actions in anticipation of approval of abandonment may be resolved by following the arbitration provisions of the Burlington conditions imposed.—Reading Co. Abandonment Portion of Mount Carmel Branch, 317 I.C.C. 592 (594).

The commission has consistently imposed conditions for protection of employees adversely affected by railroad abandonments, and fact that proposed abandonment is necessitated by prospective flooding of applicant's line upon completion of a dam is not of controlling importance; Burlington conditions (257 ICC 700) imposed.—Northern Pac. Ry. Co. Abandonment and Construction, 317 I.C.C. 225 (239-40)*.

Ultimate effect of any abandonment on carrier's employees cannot be definitely determined until the abandonment is actually accomplished; while it does not appear that any employee will be adversely affected as result of proposed abandonment, imposition of the Burlington conditions (257 ICC 700) will not harm the carrier, and for the commission to retain jurisdiction over the matter for an undetermined period would in effect result in needless prolongation of the decision; Burlington conditions imposed.—New York, N.H. & H.R. Co. Abandonment, 317 I.C.C. 204 (204-5).

Abandonment authority granted subject to Burlington conditions (257 ICC 700) for protection of employees.—Southern Pac. Co. Abandonment, 312 I.C.C. 685 (686)*; Fort Dodge, D.M. & S. Ry. Co. Abandonment, 312 I.C.C. 708 (709, 712)*; Chicago & N. W. Ry. Co. Abandonment, 317 I.C.C. 207 (217)*; Baltimore & O. R. Co. Discontinuance of Service, 317 I.C.C. 509 (512)*; Chicago & N.W. Ry. Co. Trackage Rights, 317 I.C.C. 350 (356); Southern Pac. Co. Abandonment, 320 I.C.C. 278 (283)*;

Union Pac. R. Co. Abandonment, 320 I.C.C. 624 (633); Feather River Ry. Co. Abandonment, Acquisition, 320 I.C.C. 417 (428)*.

See also McGrody v. B. & O., §13(1), n. 3.

Though at least five of carrier's employees would be subject to loss of their jobs upon abandonment of its entire line, denial on basis of adverse effect on employees is not justified; §1(18) was never intended to compel a carrier to remain in business merely to provide employment. And while the commission has authority to impose protective conditions in abandonment proceedings, even though §1(18) contains no mandatory provisions therefor like those of §5, that authority is discretionary and need not be exercised unless the circumstances of the case so warrant. Imposition of protective conditions on abandonment of a carrier's entire line would not in most instances serve to strengthen the transportation system and is normally not warranted. A departure from this principle in particular cases must be supported by clear and convincing evidence; in absence of any special circumstances dictating such a departure in instant case, employee protective conditions are not imposed on authority granted.—Okmulgee Northern Ry. Co. Abandonment, 320 I.C.C. 637 (645-6).

Generally, the commission has no jurisdiction to intervene in settlement of labor disputes, and in abandonment proceeding it is not properly concerned with question of whether parties to agreement wherein applicant agreed to maintain a yard switching crew at a point on involved line bargained in good faith or otherwise used every possible effort to modify such agreement; matter therein has traditionally been subject of negotiations between carrier and unions involved and is at present being litigated in Federal courts; in the circumstances, carrier may not be found at fault in not reducing yard crew expense at considered point.—Southern Pac. Co. Abandonment, 317 I.C.C. 489 (494)*.

No conditions for protection of employees are imposed on authority for abandonment of applicant's entire operation. See 252 ICC 81 and 271 ICC 171.—Chicago, N.S. & M. Ry. Abandonment of Entire Operation, 317 I.C.C. 191 (199)*; affirmed; 282 ICC 271 and 312 ICC 797, distinguished.—Id., 317 I.C.C. 363 (368)*.

See also Chicago Great Western Ry. Co. Discontinuance case, §13a, n. 30.

While the commission has no jurisdiction over labor disputes, it does not follow that it may not in the proper performance of its statutory duties authorize abandonment of a rail line, merely because the carrier is involved in a labor dispute. There is no provision of law requiring that decision in instant proceeding be deferred pending settlement of existing dispute between applicant and its employees; the issue is whether public convenience and necessity permit abandonment of the entire line. And record does not support contention that filing of application is merely a device for breaking the current strike and extricating the carrier from its labor difficulties, since if granted it would sever the employer-employee relationship, and carrier's management appears convinced that profitable operation is not possible either at present or in the future.—Rutland Ry. Corp. Abandonment of Entire Line, 317 I.C.C. 393 (407-8)*.

No justification appears for departure from the commission's policy of refusing to impose conditions for protection of employees adversely affected by authorized abandonment of an entire line of railroad; and denial as to physical abandonment of a short segment over which New York Central has been operating under trackage rights, while permitting abandonment of operation thereover by applicant, does not warrant imposition of protective conditions since it will not require retention of any employees by applicant for purpose of railroad operations. Decision in 312 ICC 797, distinguished.—Id., pp. 408-9, 424.

Authority granted for acquisition and operation of a line of railroad is made subject to New Orleans conditions (282 ICC 271) for protection of employees.—Port Authority Trans-Hudson Corp. Acquisition and Operation, 317 I.C.C. 357 (362).

Although the commission has not generally imposed employee protective conditions in cases involving abandonment of an entire line of railroad, there is no statutory prohibition on its doing so; where circumstances make such action reasonable and in

the public interest, it is the commission's duty to afford protection to employees who may be adversely affected by such an abandonment. The ultimate objective and primary justification for labor conditions are not the private benefit of particular employees, but the strengthening of the national transportation system through avoidance of unstabilizing effects which result from displacement of labor without protection [citing 315 US 373].—Seaboard Air Line R. Co. Trackage Rights, 312 I.C.C. 797 (800)*.

Since the same two carriers which now have power together through stock ownership to control Savannah passenger terminal authorized to be abandoned, and thus develop and direct its policies and decisions, will construct and own the proposed new station, and will continue to provide passenger service at Savannah not unlike that now provided, conditions for protection of employees of the terminal company who may be adversely affected by abandonment incident to the new plan of operation will be in public interest and consistent with general purposes of the act. As those two carriers are the real parties in interest and the beneficiaries of the modified plan of operation, cost incident thereto with respect to employees of the terminal company should be borne equally by them.—Id., p. 801.

Since abandonment of the station and utilization of trackage rights authorized to give one of controlling carriers access to the new station will commence some 18 months after approval by the commission, imposition of Oklahoma conditions (257 ICC 177), which are limited to expire 4 years from date of order, will deprive affected employees of a corresponding period of protection; New Orleans conditions prescribed in 282 ICC 271 afford more protection where the authorized operation will not be initiated until some time after effective date of the order and employees are not affected until then or a still later date; imposition of latter conditions will assure employees of full protection should any unforeseen delays occur in commencement of the operation; those conditions are therefore imposed in both the abandonment and trackage rights proceedings.—Id., p. 801.

Authority for Central of Georgia and Savannah & Atlanta to acquire trackage rights over portions of each other's parallel lines between Savannah and Waynesboro, Ga., and abandon certain other portions, for purpose of establishing a single route, is subject to Oklahoma conditions (257 ICC 177) for protection of employees.—Central of Georgia Ry. Co. Abandonment, 317 I.C.C. 184 (190).

Although there is no indication that railroad employees will be adversely affected by proposed abandonment of a segment of line and operation over a line to be constructed by port authority, authorizations are made subject to Oklahoma conditions (257 ICC 177).—Texas & N.O. R. Co. Abandonment, 317 I.C.C. 245 (251); Oklahoma conditions imposed on authority granted for abandonment of trackage rights.—Wisconsin Central R. Co. Abandonment, 317 I.C.C. 218 (223).

Construction of New Lines or Reconstruction of Old

97. Adequacy or inadequacy of existing service.—[Vols. 2, 6, 9, 18, 19].—In determining whether construction of a line is required by public convenience and necessity, it is necessary to consider whether adequate service to the public will otherwise be provided. Building of surplus lines of railroad creates an oversupply of transportation facilities and entails unnecessary expenditures, thus is wasteful. Where existing railroad facilities are physically available, addition of competitive or duplicating facilities is unwarranted unless it is shown that use of existing facilities would not provide adequate service or would be uneconomical. And mere preference of a shipper for service of a particular carrier is not enough to support a finding of convenience and necessity for construction of additional railroad facilities when adequate facilities are already in existence.—Cambria & I. R. Co. Construction and Acquisition, 317 I.C.C. 685 (688-9)*.

99. Development of territory or traffic.—[Vols, 2, 6, 9, 11, 17-19].—Applicant's proposed construction of a track connecting with a branch of Pennsylvania R., acquisition of trackage rights over a seg-

ment of that branch, and acquisition and operation of a construction spur extending from the branch to a new coal cleaning plant, to enable it to deliver coal to the cleaning plant from mines on its line and clean coal to its connections Pennsylvania and New York Central, authorized. The new cleaning plant will contribute significantly to economic health of area involved and will probably result in substantially larger shipments of coal over all railroads concerned; both Pennsylvania and Central will benefit from applicant's service, the former both additional coal traffic and from applicant's rental payments for the trackage rights, and the latter through protection of origin of traffic it now receives from the area.—Cambria & I.R. Construction and Acquisition, 320 I.C.C. 43 (50)*.

Construction of Accessorial Lines or Facilities

111. Cut-offs and connecting tracks.—[Vols. 2, 6, 9, 11, 14, 18, 19,].—Proposed construction of additional connecting tracks at Lincoln and Seward, Nebr., in connection with authorization of trackage rights over the Burlington's line between those points, will afford more convenient connections between that line and applicant's Superior and Lincoln lines than those now existing; authorized.—Chicago & N.W.Ry. Co. Trackage Rights, 317 I.C.C. 350 (352, 356).

Construction of a track approximately 0.951 mile from a point on applicant's line to a connection with Pennsylvania R., in connection with acquisition of trackage rights over a portion of that branch and acquisition of construction spur from the branch to a new coal cleaning plant, to enable applicant to deliver coal to that plant from mines on its line, authorized when it will require less expenditure than suggested alternative operation involving the Pennsylvania's acquisition of the spur and interchange with applicant, will be more economical and efficient, and will benefit all carriers concerned.—Cambria & I. R. Co. Construction and Acquisition, 320 I.C.C. 43 (50)*.

114. Relocation of line.—[Vols. 2, 6, 16].—While short line's probable revenues, if a new connection with Western Pacific is constructed by the State to replace a line segment that will be inundated upon completion of a dam, cannot be predicted with any certainty, construction of the new line is not a wasteful expenditure and would not be precluded by decision in 315 US 381 in view of the facts that the short line's c.l. traffic will be more than doubled following installation of improved facilities by its parent lumber company and principal shipper; timber resources of the area will permit that company to operate indefinitely if continued rail service is assured; motor service is an uneconomic substitute for transportation of that company's high-grade lumber; and economy of the area would be adversely affected if the lumber company were to cease operation due to loss of the short line's service.—Feather River Ry. Co. Abandonment, Acquisition, 320 I.C.C. 417 (425)*.

While the parties disagree as to cost of the new line, particularly in respect of whether a necessary bridge should be built to accommodate automobile as well as rail traffic, the commission is not required to settle any dispute between the railway and the State concerning cost of the new trackage or location of the bridge; it is sufficient to find that construction of the line proposed will cost the State some $5 to $8 million, and that expenditure of the amounts required, as part of the total expenses involved in the dam project, is warranted. It is assumed that, in its own interest, the State will construct the new line as economically as possible consistent with safe operations.—Id., pp. 425-6.

Extensions

129. Extension defined.—[Vols. 6, 9, 11, 12, 14-16, 18, 19].—In determining whether a given segment of trackage is an extension or a spur track, one factor (when present) is controlling; a finding that the segment extends into territory not tributory to, and not theretofore served by constructing carrier, or into territory already adequately served by another carrier, com-

pels the conclusion that it is an extension. Accordingly, the controlling factor being present, segments of trackage in issue in injunction proceeding are each found to be an "extension" as that term is used in the act.—Chicago & E.I. R. Co. v. Illinois Central R. Co., 261 F. Supp. 289 (298, 299, 302).

While proposed construction of track from defendant's line into plant of single industry to be served thereover satisfies 6 of 11 listed criteria for distinguishing spur tracks from line extensions, evidence clearly shows that effect of that construction would be to extend defendant's operations into an area not previously served by it which is immediately adjacent to and presently served by plaintiff's line. Under such circumstances, it constitutes an extension of line within §1(18) and the construction is unlawful until and unless defendant obtains a proper certificate from the commission.—New York Central R. Co. v. Norfolk & W. Ry. Co., 214 F. Supp. 549 (553-4).

Under principles laid down in 270 US 266, the final test in determining whether proposed trackage constitutes an extension within §1(18) is whether it will substantially extend the carrier's line into new territory, and that test must be applied in light of the national transportation policy and the rule of statutory construction that "extension" is to be given a liberal or broad construction. Area to be served by track proposed to be constructed from a point in yard limits of Georgia R. at Milledgeville, Ga., to a new electric generating plant on north bank of Lake Sinclair is new territory to applicants since they do not now serve the area, and the line is a substantial extension when it would run a significant distance of 10.2 miles and would cost from $854,108 to $1,160,000; proposed line is therefore an extension within meaning of §1(18) and the commission has jurisdiction to consider the merits of its construction.—Georgia R. Construction and Operation, 320 I.C.C. 25 (29).

The same principles warrant conclusion that line being constructed by Central of Georgia to the new plant site, which it does not now serve, is likewise an extension for which the commission's authorization is required. Mere fact that length of Central's new track would be only 2.18 miles does not distinguish it from the Georgia's proposed 10.2-mile track; moreover, while cost of Central's track is estimated to be only $192,320, before it can be placed in operation Central must expend considerable funds for rehabilitation of a 27-mile segment of branch line from which it will extend.—Id., pp. 33-4, 35.

130. Necessity; in general.—[Vols. 2, 6, 11, 13, 14, 16-19].—The statute authorizes issuance of certificates for extension of rail lines when the commission finds that future public convenience and necessity will require additional rail service; however, the commission must be convinced that proposed venture will not drain applicant's resources and weaken performance of its public-service duties, with consequent detriment to the public. While evidence as to future possibilities of new Chicago port is somewhat conflicting, record as a whole supports the commission's findings that estimates of future traffic through Chicago Port District facilities warranted granting applications of seven railroads for proposed extension project, including construction of trackage to, and operation over tracks within, the Port District. Furthermore, the lower court upheld specific commission findings which, in the light of others which it did not overturn, are sufficient to sustain the commission's action. Since the Commission's orders were proper under the circumstances, and its action is substantially supported, district court judgment is reversed and the case remanded with directions to sustain the orders.—Illinois Central R. Co. v. Norfolk & W. R. Co., 385 U.S. 57 (62-4, 66-8, 75)*.

Reviewing court must sustain the commission on the question of issuance of a certificate under §1(18)-(20) when its findings as to present or future public convenience and necessity are supported by substantial evidence. The commission found that, while recognizing the benefits that would inure to two shippers supporting railroads' application for certificate to operate over considered connecting trackage (held by the Supreme Court to be an

extension of lines and not a switch track), benefits to supporting shippers did not offset detriment to established carriers in the area and to the general public; that finding is supported by substantial evidence. Therefore, order of the commission denying plaintiffs the certificate sought is sustained; complaint dismissed.—Chicago, M., St. P. & P. R. Co. v. United States, 242 F. Supp. 698 (699-700)*.

While interests of a single shipper may be of substantial importance in determining the question of public convenience and necessity, interests and desires of one entity alone may be insufficient to establish "public" need. In many instances one industry in an area would reflect interests of the public, as far as shippers are concerned, even though other industries were present, but needs of a single plant in area of expanding and diversified industrialization usually do not suffice alone as evidence of public convenience and necessity. Statutory reference to public convenience and necessity means the public generally even, though that public may be seen only through a single person, and in determining true public convenience the effect upon such whole public must be taken into account.—Chicago, R. I. & P. R. Co. v. United States, 205 F. Supp. 378 (382)*.

Courts are less likely to be motivated by prearranged plans and special needs of a single corporation in an industrial park, as reflecting "public convenience and necessity," than are commissions. However, because the commission is an agency presumably equipped or informed by experience to deal with the specialized field, it can provide an insight of inestimable worth in evaluating evidence relevant to that question. The court may not substitute its judgment as to whether inference drawn by the commission is the right one or whether a different inference would be better supported; the test is one of reasonableness, not rightness. The commission's findings that public convenience and necessity warranted extension of rail line to serve paper company's plant were reasonable and supported by substantial evidence; sustained.—Id., pp. 383-4.

Due to changes in the area in past 7 years, public convenience and necessity require extension of a rail line into newly reclaimed area in Florida, but record does not support approval of both Coast Line's and East Coast's applications. There is no rail service now in the area, consequently no rail competition would be affected by construction of a new line by either applicant. Extension proposed by Coast Line would not unduly disturb competitive situation in the area; but, even if competition were substantially affected, competition for the sake of competition is not an objective of regulatory policy. Competition is useful where it effects improvement of transportation service; where retention of the status quo among competitors precludes provision of needed service to shippers, competition becomes secondary. Grant to Coast Line will enable it to fulfill demonstrated need for service in newly developed area, without undue erosion in competitive position of any of the parties; and that carrier is in position to begin construction immediately.—Atlantic Coast Line R. Co. Construction, 324 I.C.C. 286 (291, 294-6)*.

Proposed extension of line of Georgia R. from Milledgeville to site of new electric generating plant on north bank of Lake Sinclair is urgently needed. Business of the power company as a public utility is impressed with a public interest and affects a substantial segment of Georgia's population; both the power company and the State commission which fixes intrastate electric rates have a substantial interest in uninterrupted and expeditious movement of coal to the new plant on a competitive rate basis. In adidition, coal producers of Harlan County, Ky., are vitally interested in participating in the new market created by construction and operation of the power plant; their interest, as well as needs of the power company, can best be served by construction and operation of proposed line. Certificate granted, subject to condition that applicants grant protestant railroad an option to acquire trackage rights over the new line.—Georgia R. Construction and Operation, 320 I.C.C. 25 (37).

134. To reach territory or resources in general.—[Vols. 2, 6, 9, 11, 15].—Construc-

tion by Nueces County Navigation District No. 1 of extension of line to give access, via a new bridge, to area south of ship channel at Corpus Christi, Tex., by railroads entering the port area from the north, authorized.—Texas & N. O. R. Co. Abandonment, 317 I.C.C. 245 (248, 251).

Situation has changed materially since applicants were denied authority 7 years earlier to extend their lines into considered Florida area because then there was no necessity for additional rail service; vast acreage, formerly wilderness, has been reclaimed and converted into vegetable producing territory of great commercial value. Even though there is no rail service at present, shippers are moving their vegetable growing operations into the newly reclaimed area and are constructing new processing and handling plants there; also, new sugarcane mills are being located in the territory. Due to those changes, public convenience and necessity require extension of a rail line into the newly developed territory, but need shown does not warrant construction of both of proposed extensions. Application of Coast Line approved, since it can begin construction immediately and is more capable, financially and otherwise, of its proposed undertaking.—Atlantic Coast Line R. Co. Construction, 324 I.C.C. 286 (289-91, 292, 296)*.

138. Probable returns.—[Vol. 2].—Though prospective traffic volume and revenues from operation of extension authorized to be constructed by Georgia R. to serve a new electric power plant are based to some extent on opinion testimony, anticipated productive capacity of the plant fairly establishes that large quantities of coal will be consumed, amounting to 4 million tons annually when the plant reaches maximum capacity; assuming that two rail carriers would share equally in the traffic (since certificate is conditioned on applicants' giving protestant option to acquire trackage rights over the new line), each would realize net operating income of $387,000 therefrom in the fifth and subsequent years of the plant's operation.—Georgia R. Construction and Operation, 320 I.C.C. 25 (32).

140. Traffic diverted from existing lines.—[Vols. 2, 14, 18, 19].—Florida East Coast's contention that approval of Coast Line's application for authority to extend its line into newly developed territory, to serve vegetable processing plant and sugarcane mills, would result in invasion of its territory and diversion of traffic from its line, is without merit; contrary to its contention, the new territory has not been set aside as the exclusive preserve of East Coast. A carrier does not have a right to exclusive occupancy of a territory; moreover, since East Coast had previously refused to extend its line into the new area, except at shippers' expense, the situation can hardly be said to portray an invasion by one carrier of the territory of another. Furthermore, there is now no rail service in the territory and, to the extent Coast Line would acquire traffic from hitherto undeveloped territory, the position of East Coast would not be affected; in addition, East Coast will retain some of existing vegetable traffic and should obtain more sugar and molasses traffic.—Atlantic Coast Line R. Co. Construction, 324 I.C.C. 286 (289-91, 294-5)*.

See also New York Central R. Co. v. Southern Ry. Co., n. 1, above.

Since site of new electric power plant appears to be no more within the tributary territory of protestant Central of Georgia than within that of applicant Georgia R., and since Central is not now rendering service to the plant site, its contention that the Georgia's proposed construction of a new track from Milledgeville, Ga., to the plant site would divert traffic and revenue from it is entitled to little weight in considering the primary issue of public need for the proposed extension. Moreover, it has been consistently held that carriers have no legal right to exclusive occupancy of a territory.—Georgia R. Construction and Operation, 320 I.C.C. 25 (35, 36); however, though there is no support for Central's claim that its right to serve the plant is superior to the Georgia's, it appears that location of the plant may have been decided through joint efforts of both carriers; therefore, to afford Central equal opportunity to serve the power plant, while

avoiding wasteful construction of duplicate facilities, certificate authorizing construction of the proposed line is conditioned on applicants' giving Central an option to acquire trackage rights over the new line.—Id., pp. 35, 37.

Section 1. (19) Application for certificate of commission; notice and hearing.—[Unchanged. See vol. 9, p. 7328.]

Historical note, vol. 2, p. 964.

Notes of Decisions

Volume 2—p. 1040; Volume 6—p. 4994; Volume 9—p. 7328; Volume 11—p. 9143; Volume 12—p. 10217; Volume 13—p. 10935; Volume 14—p. 11420; Volume 15—p. 11990; Volume 16—p. 12624; Volume 17—p. 13279; Volume 18—p. 14034; Volume 19—p. 15090.

1. Application in general.—[Vols. 2, 6, 14, 15, 17-19].—Application for "initial license," see Brotherhood of Locomotive Engineers v. U.S., APA, 5 USC *Precedure.*

Railroad need not apply for certification by the commission for operating over private track to serve the track owner when, since carrier does not engage in common carrier service over the track and does not use its funds to maintain such track or to pay rental for use thereof, it is not operating any kind of road—branch, extension, spur or other—within §1(18); in such circumstances the question of carrier competition is never reached, and is therefore not relevant.—New York Central R. Co. v. Southern Ry. Co., 226 F. Supp. 463 (473)*.

Concurrent filing under §1(18) of application by one railroad to abandon its entire line and application by another to acquire a portion thereof is consistent with prior decisions conditioning abandonment on abandoning carrier's offering its line for quick sale to any person willing to continue the operations. Preservation of service for the public previously served by an abandoned line is a matter of primary concern and should be encouraged; but to require a carrier interested in a short segment of the line to acquire it pursuant to §5(2) might well discourage it from the acquisition, to detriment of both dependent shippers and railway labor. And if it were required to await completion of the abandonment before taking steps under §1(18) to extend its operations over a useful segment of the abandoned facilities, the hiatus in rail service, besides injuring or inconveniencing shippers, could render reinstitution of rail service impractical. Both applications are therefore considered on their merits under §1(18) as filed.—Okmulgee Northern Ry. Co. Abandonment, 320 I.C.C. 637 (640-1).

See also Feather River Ry. Co. case, §1(18), n. 34, 89.

Even though abandonment of duplicative lines is one long-range objective of proposed merger, filing of abandonment applications coincidental with filing of merger application would be premature, for unless and until merger is effected the proposed abandonments would not be within contemplation of either carrier.—Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122 (135)*.

Although losses of, and traffic carried on, applicant's Lake City, Mich., branch-line indicate that public convenience and necessity would permit proposed abandonment, the line will be immediately acquired and operated by a new company, without any interruption of service. In the circumstances it is unnecessary to consider issues raised by the abandonment application, and that proceeding is therefore dismissed as a procedural matter.—Cadillac & Lake City Ry. Co. Acquisition and Operation, 320 I.C.C. 617 (620).

Motion to dismiss application for abandonment of entire railroad, on ground that applicant had not obtained authority from its stockholders, overruled; under the commission's regulations it is sufficient that

reference be made to action taken by applicant's board of directors authorizing filing of the application, and copy of resolution of its board was filed with original application, moreover, the board's action was subsequently ratified at a stockholders' meeting and certificate showing such approval was received as a late-filed exhibit.—Rutland Ry. Corp. Abandonment of Entire Line, 317 I.C.C. 393 (395)*.

Application under §1(18) seeking permission for Hudson & Manhattan to abandon certain of its line and operation thereof, and for organization of a new company to acquire and operate those lines, is unnecessary, as adequate authority can and will be granted under §5; dismissed.—Hudson & M.R. Co. Trustee Abandonment, 312 I.C.C. 701 (704)*.

3.—Time for filing.—[Vol. 2].—Although applicant's line may be affected adversely by dam construction for some time, application for abandonment cannot be considered premature in view of uncertainty as to time when inundation of the line will permanently interrupt operations.—Northern Pac. Ry. Co. Abandonment and Construction, 317 I.C.C. 225 (236)*.

9. Proceedings on application in general.—[Vols. 2, 13, 14, 16, 19].—Exceptions should not be invalidated or ignored merely because they are not in the technical form required by the Rules of Practice.—Southern Pac. Co. Abandonment, 317 I.C.C. 645 (647)*.

11. Parties.—[Vols. 2, 6, 9, 11-14, 16, 17, 19].—Although railway labor association did not, as was its right under §17(11), file protest of application for abandonment of union passenger station at Savannah, it did intervene in proceeding on application of one of three railroads controlling the terminal company for trackage rights giving it access to new station to be constructed; though the abandonment and trackage rights applications were filed separately, they involved interrelated matters and were decided by Finance Board on a consolidated record; thus, as intervener in one of the proceedings, the association was qualified as a party to petition for reconsideration of the board's order authorizing abandonment without imposition of employee-protective conditions. Moreover, at time the association's petition for reconsideration was filed, §1.225(b) of special rules of practice provided that petition for reconsideration of a Finance Board's order may be filed by any interested person, and the associations, interest on behalf of employees in abandonment proceedings has been consistently recognized.—Seaboard Air Line R. Co. Trackage Rights, 312 I.C.C. 797 (799)*.

14. Hearing; participation of State authorities.—[Vols. 2, 6, 19].—The commission's approval of proposed extension of tracks up to the Chicago Port District and operation over tracks within the district, without further hearing sought by appellees (protestants in commission proceeding), after filing of supplemental applications and execution of final operating agreement between appellants (applicants) and the Port District, did not deprive appellees of due process of law. At every stage of the commission proceeding, appellants' operations within the port were considered an integral part of the overall plan proposed; appellees (though invited) refused to sit in on negotiation of the contract, are not bound thereby, and they had ample opportunity and did present evidence as to reasonableness of charges for the use of port facilities, Under the circumstances, and in view of insignificance of changes in the final agreement compared with former ones proposed, appelles were not entitled to another hearing. Lower court's judgment reversed and case remanded with directions to sustain the commission's action.—Illinois Central R. Co. v. Norfolk & W. R. Co., 385 U.S. 57 (63-4, 73-5)*.

The first sentence of §1(19), which governs conduct of abandonment proceedings, requires that issuance of any certificate therefor shall be under such rules and regulations as the commission may prescribe; thus there is no statutory requirement of a hearing in that sentence, such matters being left to the commission's discretion. The only other provision of §1(19) concerning hearings is that which gives the governor of any State wherein the line is located the right to be heard "as

hereinafter provided with respect to * * * the issuance of securities"; that right is contained in §20a(6), which provides that the commission may hold hearings if it sees fit. Thus, in regard to such hearings as may be accorded both to private parties and to governors of the respective States, determination of whether hearings will be held is left expressly to the commission.—Brotherhood of Locomotive Engineers v. United States, 217 F. Supp. 98 (100)*.

Request for further hearing to show financial results for a 6-month period under applicant's new plan of operation on branch line it seeks to abandon, denied; since traffic on the line is not seasonal, a 6-month test period is insufficient to show normal operation of the line.—Lehigh Valley R. Co. Abandonment, 317 I.C.C. 242 (244).

18. Issues before commission.—[Vols. 2, 6, 13-16, 18, 19].—Section 1(20) places in issue throughout the pendency of a §1(18) proceeding the possibility of an authorization less extensive than that sought where warranted by the circumstances.—Southern Pac. Co. Abandonment, 320 I.C.C. 38 (40)*.

By the very language of §1(20), all parties to abandonment proceedings under §1 are put on notice that commission consideration toward authorizing a partial abandonment of the line involved is a matter in issue throughout the pendency of the proceeding, concurrently and equally with all other issues.—Chicago, & N.W. Ry. Co. Abandonment, 317 I.C.C. 207 (209)*.

Notwithstanding applicant's willingness to publish an allowance for all grain trucked for movement through its main-line stations from elevators on branch sought to be abandoned, in order to alleviate burdens on those elevators resulting from abandonment, instant proceeding is not a proper one for determining whether such allowance should be published.—Id., p. 216.

Although, in proceeding on application of Rutland Ry. to abandon its entire line, proposals are advanced for restoration of rail service through subsequent acquisition and operation by other carriers or interested parties, no acquisition proposal involving the Rutland is before the commission in form seeking authority for consummation; abandonment application is therefore entitled to be considered on the merits.—Rutland Ry. Corp. Abandonment of Entire Line, 317 I.C.C. 393 (420)*.

And though Boston & Maine's operations over tracks owned by it on rights-of-way leased from the Rutland, if within purview of §1(18), could not lawfully be discontinued without the commission's prior approval, its request for imposition of condition requiring Rutland to lease such rights-of-way to it at a nominal rental, to permit it to continue serving certain industries, goes beyond confines of abandonment proceeding.—Id., pp. 413-4.

Examiner's refusal in abandonment proceeding to permit inquiry into substituted service by applicant was not improper; considering the number of years service has been rendered to protestants over the segment of track involved, contention that inquiry would show that applicant never intended to operate it but was merely interested in its salvage value is without merit.—Fort Dodge, Des Moines & Southern Ry. Co. Abandonment, 312 I.C.C. 708 (711)*.

Motion to dismiss abandonment application on ground that authority is not requested for abandonment of passenger service on retained segment of the line, denied. The commission recognizes that changes in operation will result from abandonment even though they are not before it for consideration therewith; while neither granting nor denying authority for discontinuance of such passenger service on present record, the commission recognizes that applicant intends to restrict service on that segment to freight only, and consideration is given that fact.—Southern Pac. Co. Abandonment, 312 I.C.C. 685 (687)*.

Applicant's policy of operating its Silverton, Colo., branch only during the period June 1 to October 1 of each year was adopted because the line is subject to damage from snow and landslides during winter months and operation on a year-round basis would entail substantial additional expenditures without meeting any apparent public need. Applicant has

not sought authority for partial abandonment, and whether such should be permitted is not properly for determination on application for total abandonment of the branch. In absence of any complaints, no reason appears for disturbing applicant's policy.—Denver & R.G.W.R. Co. Abandonment, 312 I.C.C. 791 (796).

Since considered line is contributing a substantial profit to applicant's system and denial of abandonment application would not unduly burden interstate commerce, there was no need for examiner to seriously consider applicant's proposal to sell the line to a noncarrier which would perform only the intrastate passenger service now performed by applicant.—Id., p. 796.

20. Showing required and burden of proof.—[Vols. 2, 6, 14-19].—Applicant, Florida East Coast, failed to show that it is either ready or capable of undertaking proposed extension of its line from existing privately owned spur into newly reclaimed and recently developed area in Florida. It has not made meaningful studies of specific terrain to be traversed; has not obtained commitment for a right-of-way, nor investigated possibilities for acquisition thereof; its proposal contemplates bridging waterways, crossing a highway, occupying a length of canal embankment, use of private spur, and location on private land—all of which require authority beyond the commission's province to give, and which it has made no effort to obtain from appropriate authorities.—Atlantic Coast Line R. Co. Construction, 324 I.C.C. 286 (287, 292)*.

In addition, so far as shown of record, applicant's financial capacity for the undertaking is sorely lacking; it states that construction will be financed out of current funds, but its most recent balance sheet shows it has working capital hardly sufficient to meet current operating expenses; also, it only recently emerged from receivership. Further, it is noted that applicant's estimate of expenditures necessary for the construction, which is probably understated, substantially exceeds amount authorized therefor by its board of directors. While record does not warrant finding that proposed construction would place applicant in such precarious financial position as to endanger the service it renders its shippers, it is obvious that it would be likely to encounter financial difficulties in providing facilities required by shippers in the new territory; denied.—Id., pp. 292-5, 296.

Applicant proposes to abandon three separate, but related, portions of its line which, for operating purposes, are divided into two distinct sections, each section being served (3 days a week on one section and 6 days a week on the other) by local trains; but its financial presentation did not separate the revenues and expenses applicable to each portion of line. Segregation of financial data is important where evidence indicates possibility that one segment is producing, or would with certain economies produce, a profit; since lengths of the segments and services thereover differ, operating expenses and deferred maintenance for each must likewise differ; and,a while operating results for any segment cannot be expected to be shown with mathematical exactness, more than aggregated expenses and revenues for different segments is required. Applicant must establish the burden which continued operation of the line would impose on it; the commission cannot accept carrier's conclusion as to that burden, but must have before it items thereof in sufficient detail to support a finding as to justification for carrier's claim.—Southern Pac. Co. Abandonment, 320 I.C.C. 38 (39-40, 42)*.

Since §1(20) places in issue throughout the pendency of a §1(18) proceeding the possibility of an authorization less extensive than that sought, protestants as well as applicants are duty bound to present evidence in such form as will best enable the commission fairly and fully to discharge its obligation in that regard. Though protestants attempted to distribute revenues and expenses to portions of the line on a percentage basis, certain items do not lend themselves to that method, particularly revenues from operation, because of the varying charges on different commodities. It cannot be determined on the record whether any portion of the line is operating at a profit; applicant has not met the burden of showing that at least some

portion of the line is not or could not be operated in a manner that would not be a burden on it or on interstate commerce. Denied, without prejudice to submission of a new application whereon it may be determined whether any or all of involved segments constitutes such a burden.—Id., pp. 40, 42.

The Commission is entitled to have before it for consideration all evidence adduced which is relevant and material to issues raised by orders providing for further hearing on abandonment application, not just that which protestants believe would best serve their own interests. Although protestants argue that evidence bearing on applicant's maintenance expense and difficulties should properly have been presented as part of its evidence-in-chief, not as rebuttal, objection to taking of evidence out of order at best raises nothing more than a technical procedural question of little substance; protestants have not been materially prejudiced by procedure followed; objection overruled.—Chicago & N. W. Ry. Co. Abandonment, 317 I.C.C. 207 (208)*.

And since question of abandonment of a portion, rather than the whole, of the line involved is in issue throughout the proceeding, protestants as well as applicants are in duty bound to present evidence in such form as will best enable the commission to discharge fully and fairly its obligations under the statute. The parties are free to develop the record in that respect at any stage of the proceeding at which they may properly present evidence on the question of abandonment. Accordingly, where applicant alone has adduced evidence at the further hearing concerning results of its operations over separate sections of the line, no new issue has been raised and the evidence must be considered in connection with all determinations the commission is required to make under the act.—Id., p. 209.

Though conflict appears to exist between oral testimony of applicant's foreman, adduced by protestants, as to total number of ties laid on western section of the line in 1959 and his official daily reports showing number laid each day during that year, the written records are not disproved and must prevail. Such records are not only the source of information supporting applicant's financial data for amount spent on ties, but are also the basic documents relied on by its accounting and engineering departments in performance of their functions; applicant's exhibits based thereon are entitled to full weight.—Id., p. 211.

Applicant's exhibit showing volume of bridge traffic transported over eastern segment of the line during period covered thereby was properly admitted in evidence; in objecting thereto on ground that there was no significant movement of such traffic in last 5 months of the period covered, protestants ignored the service provided during remainder of the period when trains operated over entire line from west to east, and also disregarded evidence of their own witnesses located on the western section who were receiving service on eastbound traffic.—Id., pp. 211-2.

However, in light of evidence indicating a substantial successful continuation of separate operations over the western segment, applicant's representations and requested abandonment of the entire line, submitted after close of hearing and filing of its brief in which it requested abandonment of only the eastern section, are entitled to no weight and are not persuasive.—Id., p. 213.

Applicants' estimate of $854,108 for construction of line to serve a new power plant appears to be a fair approximation of probable costs; while a variance between estimated and actual costs is likely, so great a divergence as protestant's estimate of $1,1600,000 is not substantiated. Applicant's estimate of grading costs, based on discussions with a grading contractor, is more reliable than protestant's estimate based on its witnesses' general knowledge and judgment; cost of trestle bridge across a lake depends on condition of the lake bed, and no conditions requiring extraordinary construction are shown. And the particular type of crossing over a U.S. Highway which may be required by the State in interest of public safety depends on many factors, of which volume of both rail and vehicular traffic is the most important; rail operations consisting of one daily switch movement in

each direction would hardly justify an expensive grade separation.—Georgia R. Construction and Operation, 320 I.C.C. 25 (31).

Evidence concerning possible benefits to that portion of the public affected by economic conditions in Harlan County, Ky., as result of approval of proposed construction and movement of coal in large volume to the new plant may properly be considered along with other evidence in determining the issue of convenience and necessity. But as little weight can be accorded the parties' contentions founded on pending proceedings for control of protestant by, or merger of one of applicants with, nonparty carriers, protestant has not been prejudiced by examiner's admission or exclusion of evidence concerning competitive effects thereof.—Id., pp. 32-3, 36.

Burden of proof as to imposition of employee protective conditions, see Brotherhood of Locomotive Engineers v. U.S.C., APA, 5 UBC *Burden of Proof.*

Motion to strike as incompetent an agreement whereby applicant consents to a condition on abandonment of its line that the State of Vermont may designate a purchaser for described segments thereof for operating purposes, overruled; the agreement was admissible to show the State's position in the abandonment proceeding and the areas of agreement between it and the carrier, and failure to include provisions of the agreement in the findings does not affect its admissibility.—Rutland Ry. Corp. Abandonment of Entire Line, 317 I.C.C. 393 (395-6, 412)*.

The commission's resort, in abandonment proceeding, to 1960 report of Bureau of Census for population data and to Official Guide of Railways for rail distances was not improper; reference to the railway guide was merely a convenient way of ascertaining distances set forth in an exhibit, and there is ample authority for an administrative agency's taking official notice of a Federal Census Report.—Northern Pac. Ry. Co. Abandonment and Construction, 317 I.C.C. 513 (517)*.

In considering proposed abandonment to permit construction of a State highway, the relatively small number of public witnesses appearing in opposition is not of controlling importance; obviously many train patrons were represented by intervening commuters' association or citizens' committee, which have sizable memberships. Population of the county concerned is increasing, and the commission takes official notice that it has been known as the prune capital of the world and is now rapidly developing into a "bedroom" for the city and county of San Francisco.—Southern Pac. Co. Abandonment, 317 I.C.C. 645 (654, 655)*.

Though applicant has granted licenses to three noncarrier enterprises for use of private motorcars over its Silverton, Colo., branch when rail service is not available, also to a power company for access to power lines in need of repair, there is no indication that operations conducted under the licenses were interstate in character or that equal facilities have been denied other users of the line, nor was there any showing of income derived from the licenses or extent of use of the line under such rights; such use of applicant's tracks therefore has little significance in determining whether present or future convenience and necessity permit abandonment of the branch.—Denver & R.G.W.R. Co. Abandonment, 312 I.C.C. 791 (794).

22. Rehearings and rearguments.—[Vols. 2, 19].—When the commission reopened rail abandonment proceeding for further hearing to receive railroad's financial data on current operations, and ordered that protestants be allowed to present evidence as to unsatisfactory service, it properly received applicant's rebuttal evidence following presentation of protestants' evidence although such rebuttal might go beyond scope of those orders. Moreover, plaintiff (protestant), having asserted on brief that the rebuttal fortified protestants' testimony, may not now be heard to complain that the evidence received was prejudicial.—Creston Grain & Lumber, Inc. v. United States, 214 F. Supp. 840 (845-6)*.

Section 1. (20) Issuance of certificate by commission; unlawful extension or abandonment of lines.—[Unchanged. See vol. 9, p. 7328.]

Historical note, vol. 2, p. 964.

Notes of Decisions

Volume—2. p. 1045; Volume 6—p. 4996; Volume 9—p. 7329; Volume 11—p. 9143; Volume 12—p. 10217; Volume 13—p. 10936; Volume 14—p. 11421; Volume 15—p. 1191; Volume 16—p. 12626; Volume 17—p. 13279; Volume 18—p. 14035; Volume 19—p. 15094.

The Certificate

1. In general.—[Vols. 2, 6, 9].—Sections of the statute dealing with certificates of convenience and necessity required for construction of, and operation over, extensions of rail lines do not provide for "temporary certificates"; indeed, §1(20) specifically states that "not before" a certificate is issued shall a carrier conduct operations over a track segment that constitutes an extension; and, as pointed out in 340 US 419, a certificate of convenience and necessity "is the final act or order that validates the operation." Thus, defendant's appellation of a car service order, which authorizes operation over its extension pending the commission's determination of its application for a certificate authorizing construction thereof, as a "temporary certificate" validating the operation cannot be correct.—Chicago & E. I. R. Co. v. Illinois Central R. Co., 261 F. Supp. 289 (307-8).

From and after issuance of certificate authorizing abandonment, carrier may proceed to abandon without securing further approval; however, a certificate issued by the commission is permissive, and authority granted may be exercised or not, at applicant's election.—Chicago N.S. & M. Ry. Abandonment of Entire Operation, 317 I.C.C. 363 (367, 368)*.

See also McGrody v. B & O., §13(1), n. 3.

3. Terms and conditions.—[Vols. 2, 6, 9, 11, 13, 14, 19].—Certificate and order authorizing abandonment of portion of rail line that would be innundated following construction of a large flood-control and power dam, which specified that abandonment should not be accomplished until applicant railway had commenced operation over a new line to be constructed, is supported by substantial evidence in the record, even though the commission found that revenues over the relocated line could not be predicted with any degree of certainty. The commission's holding that public convenience and necessity required relocation is supported by substantial evidence, is not arbitrary, and therefore must be sustained. Complaint dismissed.—State of California v. United States, 255 F. Supp. 607 (610)*.

Condition is imposed on authority granted Coast Line for construction of extension of line into recently reclaimed Florida area, similar to that prescribed in 320 ICC 122, requiring that the Jacksonville gateway be open to Southern Ry. System, with respect to all traffic originating on the new line.—Atlantic Coast Line R. Co. Construction, 324 I.C.C. 286 (296)*.

Notwithstanding that Central of Georgia's claim of a right to serve a new electric power plant superior to right of Georgia R. is unsupported, evidence indicates that location of the plant may have been decided through joint efforts of both carriers. Therefore, to afford Central equal opportunity to serve the plant without wasteful construction of duplicate facilities, certificate for construction of the Georgia's proposed extension from Milledgeville to the plant site is conditioned on applicants' giving Central an option to acquire trackage rights over the new line and over applicants' line between Central's connection therewith at Milledgeville and the proposed track, on such terms as may be agreed to by the carriers, or, in event of their disagreement, such terms as the commission may find after hearing to be just and reasonable, all subject to the commission's approval upon filing of appropriate applica-

tion.—Georgia R. Construction and Operation, 320 I.C.C. 25 (35, 37).

Although abandonment proceeding has been pending for 4 years, and over 5 months have elapsed since issuance of certificate conditioned on sale of all or part of the line to anyone offering to pay the net salvage value thereof, the commission is not apprised of any steps taken toward making financial arrangements to that end, or that any of protestants intends making such an offer. Considering applicant's substantial losses from continued operation and absence of any offer to indemnify it against additional loss, it would be unreasonable to defer effective date of the certificate to permit making of financial arrangements and determination of net salvage value. Under condition imposed, the price need not be definitely ascertained before offer is made, but may be determined subsequently by arbitration; however, that condition, is supplemented to provide that if applicant and any person offering to purchase all or part of the property are unable to agree on the price, amount payable shall be determined by an arbitration committee selected and compensated as outlined.—Chicago N.S. & M. Ry. Abandonment of Entire Operation, 317 I.C.C. 363 (369)*.

Employee-protective conditions, see §1(18), n. 91.

To require applicant, as a condition on abandonment of line to be displaced by a county expressway, to provide a purely local substitute bus service would not be warranted since it would be an intrastate operation within jurisdiction of the State commission. Moreover, main highways in the area are highly congested and to create additional traffic congestion by more buses would not solve the passenger transportation problem.—Southern Pac. Co. Abandonment, 317 I.C.C. 645 (655)*.

Although Rutland Ry., shortly after filing application to abandon its entire line, terminated its agreement granting trackage rights to New York Central between Norwood and Malone Junction, N.Y., Central has not applied for authority to abandon operation under such trackage rights; therefore, while Rutland is authorized to abandon operations over that segment, it is required to maintain title thereto pending future determination of whether continued operation thereover by Central is required.—Rutland Ry. Corp. Abandonment of Entire Line, 317 I.C.C. 393 (414, 424)*.

And though authority for total abandonment of remainder of the line is subject to usual condition that applicant sell any portion thereof to any responsible person offering, within 3 months from effective date of certificate, to purchase the same for operation at not less than net salvage value, it is not deemed appropriate to include provisions of applicant's agreement with the State of Vermont under which the State may designate a purchaser for operating purposes of described segments of the line. However, this does not invalidate that agreement or preclude the parties from jointly seeking someone to render railroad service in that State who will meet the commission's requirements.—Id., pp. 412, 424-5.

And though request of Boston & Maine for imposition of a condition requiring Rutland to continue to lease to it the rights-of-way underlying certain B & M tracks, to permit it to continue serving industries thereon, goes beyond confines of abandonment proceeding, under the condition imposed B & M will have some opportunity as any other person to negotiate with Rutland to secure its objectives.—Id., pp. 413-4.

But conditions requested by St. Johnsbury & L.C. R., requiring New York Central and Delaware & Hudson to join with it in through routes and rates to and from Maine, to assure it of substantially the same participation in such traffic as it now has, may not be imposed when neither of those carriers is a party to the proceeding.—Id., p. 415.

Although applicant is willing, in order to alleviate any burdens on branch-line elevators resulting from authorized abandonment, to publish an allowance on all grain trucked for movement through its main-line stations from elevators on the abandoned line, abandonment proceeding is not the proper one for determining whether such allowance should be published, and no condition in that respect is imposed.—Chicago & N.W. Ry. Co. Abandonment, 317 I.C.C. 207 (216)*.

In view of statements of record by responsible officers of applicant, giving assurance that freight rates and charges to Douglas and Bisbee, Ariz., and other points in that general area will not be affected because of any greater distances shipments may travel as result of abandonment of applicant's South line between Tucson and El Paso and routing of traffic over the North line, and that such points will not be considered branch-line stations at which arbitraries over main-line points are assessed, certificate and order will be conditioned on applicant's taking whatever steps are necessary, including institution of proceedings before the commission, to effectuate such assurances.—Southern Pac. Co. Abandonment, 312 I.C.C. 685 (688)*.

Abandonment authority is conditioned on sale of the line or any portion thereof to any responsible persons, firm, or corporation offering, within 35 days from effective date of certificate, to purchase the same at not less than net salvage value, subject to filing of appropriate application under §1(18) by any person acquiring any portion of the line.—Fort Dodge, Des Moines & Southern Ry. Co. Abandonment, 312 I.C.C. 708 (712)*.

8. Partial grant or denial.—[Vols. 2, 6, 16].—The statute clearly authorizes the commission, on application for authority to abandon a rail line, to grant only partial relief, if public interest so requires. Thus, question of partial abandonment is one which is implicit in such application, and one which the parties are bound to anticipate, unless the record shows such a misleading in the particular situation as to make it unfair for the commission to take such action. There being no such showing of record, plaintiff's objection to the commission's consideration of the issue of partial abandonment is without merit; the commission was not guilty of unfairness in considering that issue.—Creston Grain & Lumber, Inc. v. United States, 214 F. Supp. 840 (843-4)*.

10. Effective date.—[Vols. 2, 6, 9].—In view of uncertainty as to time when flooding of considered segment of line, due to completion of a dam, will render it inoperable, and to provide for continued operation for as long a period as is feasible, certificate and order authorizing abandonment will allow a 2-year period for exercise of such authority.—Northern Pac. Ry. Co. Abandonment and Construction, 317 I.C.C. 225 (228, 238)*; considering the unpredictable factors on which flooding of the area depends, to require continuance of operations for any prescribed period would be a dangerous course of action that could have disastrous consequences; it would be highly improvident and directly contrary to interest of carrier and the public to postpone effective date of abandonment until a clear and present danger develops; the segment may be abandoned at any time within the 2-year period.—Id., 317 I.C.C. 513 (516-7)*.

Whether effectiveness of certificate and order authorizing complete abandonment of applicant's railroad should be deferred pending judicial review is a matter which properly may be left to the court having jurisdiction.—Chicago N.S. & M. Ry. Abandonment of Entire Operation, 317 I.C.C. 363 (369)*.

Injunctions

16. In general.—[Vols. 2, 6, 9, 11, 14-16, 18, 19].—Injunctions are never a matter of right; the court must always weigh equitable considerations in determining whether an injunction should be granted. Mandatory injunction against abandonment of rail service on considered line should not issue when, prior to institution of court action, defendant railroad discontinued the service and filed application with the commission (which proceeding is still pending) for authority to abandon the operation. The law does not favor two proceedings being pursued to the same end with the same issues being involved between the same parties; plaintiff shipper appeared before the commission and actively protested the granting of abandonment authority; and grant of injunction sought would result in a judgment ordering the railroad to repair unsafe tunnel on the line (at substantial cost) and to resume service thereover. In view of the pending commission proceeding, the court should not take any action that would, in ef-

fect, require defendant to spend a large sum of money, which prove unnecessary if the abandonment is permitted; denied.—Asbury v. Chesapeake & O. Ry. Co., 264 F. Supp. 437 (438).

Since the exclusive remedy of a "party in interest" who may be injured by allegedly unlawful construction of rail trackage, where no application for a certificate of convenience and necessity has been made by constructing carrier, is by way of an injunction, the question of whether the challenged trackage is an "extension" or a "spur" is properly presented to the court first, rather than before the commission.—Chicago & E.I. R. Co. v. Illinois Central R. Co., 261 F. Supp. 289 (295).

Although defendant's new construction of 3.5-mile segment of trackage may afford the only existing track from which rail service can be made directly at site of considered coal mine, and though coal shipper's needs may be urgent, the track is nevertheless an unlawful extension of defendant's line, rather than a spur from the terminal of its lawfully constructed extension. And since plaintiff, by virtue of its claim to the territory, has demonstrated that it may suffer irreparable injury should injunction it seeks be denied, defendant is enjoined from taking any necessary further steps to complete construction of such extension, and from all operation of any kind thereover, unless and until it obtains the necessary certificate from the commission.—Id., pp. 299-302.

In defendant's counterclaim for injunction, fact that plaintiff's 5.9-mile track segment, constructed about 6 years earlier to serve another mine nearby, extended from lines in which it had a proprietary interest and thus, in effect, from its own lines, is not enough to permit that construction to stand as a spur rather than an extension when it extended into an area not theretofore served by plaintiff. That trackage being an unlawful extension, plaintiff cannot profit from its existence by claiming primary right to serve territory adjacent thereto; nor may it derive any benefit therefrom by constructing any new trackage to serve shippers located in the adjacent area. Accordingly, plaintiff is enjoined from any such new construction unless and until it obtains necessary authority from the commission. However, plaintiff's operation over the extension is not enjoined, as defendant failed to show that it would suffer irreparable injury if such operation is left undisturbed; furthermore, the commission investigated that construction but did not then take, and has not taken to date, any action to enjoin operations thereover.—Id., pp. 297, 302-3.

In action seeking to enjoin defendant railroad from constructing 8.5 miles of track, contending that such construction constituted an invasion of plaintiff's territory in violation of §1(18), the court has jurisdiction under §1(20) and is empowered to determine whether such construction does in fact violate §1(18), without sending the case to the commission for prior consideration.—Georgia S. & F. Ry. Co. v. Atlantic Coast Line R. Co., 250 F. Supp. 260 (262)*.

In action to enjoin and set aside the commission's order denying plaintiff authority to abandon segment of its line, sought because of destruction by fire of tunnel through which the segment runs, weight to be given the evidence and the various factors comprising public convenience and necessity are for the commission. There being substantial evidence to support the commission's findings that there is continuing need for rail service in the affected area; that abandonment would adversely affect the shipping public; that plaintiff would incur no long-run losses in its overall system; and that plaintiff is financially able to restore the tunnel, the commission's order must stand. Injunction denied.—Northwestern Pac. R. Co. v. United States, 228 F. Supp. 690 (695-6)*.

Defendant railroad's operation over coal company's private track, to serve exclusively that company's coal mine, does not constitute an extension of line within §1(18) when carrier does not serve or hold itself out to serve the general public over that track and does not expend its funds in order to operate thereover; in such circumstances, carrier is not required to obtain authority from the commission for such operation. Therefore, plaintiff railroad, al-

ready serving that and other mines in the area, is not entitled to have defendant's operation over shipper's private track enjoined because no certificate therefor had been obtained; judgment for defendant.—New York Central R. Co. v. Southern Ry. Co., 226 F. Supp. 463 (466, 471-3, 476)*.

In action to enjoin alleged abandonment by defendant railroad of a river tugboat operation without first obtaining the commission's authorization, it is for the court to decide whether railroad's action is an abandonment within §1(18); upon court determination that such action is an abandonment, it is for the commission, upon application to it, to decide the public convenience and necessity thereof if it has not passed on those questions prior to carrier's action. Railroad's failure to perform tugboat operation for which there has been no demand for some time does not of itself constitute an abandonment; it has ceased the operations but its tariff therefor is still in effect and it holds itself out to the public to perform the service. No commission approval is necessary where cessation of operations results not from railroad's volition but as result of conditions over which it has no control. Discontinuance of the tugboat operations is not an abandonment within §1(18); plaintiffs are entitled to no relief.—McGrody v. Baltimore & O. R. Co., 217 F. Supp. 252 (253-4).

In action to set aside the commission's order authorizing abandonment of only part of branch line sought to be abandoned, function of the reviewing court is limited to ascertaining whether there is warrant in the law and in the facts for the commission's action. The court cannot substitute its own view concerning what should be done for the commission's judgment on matters committed to its determination, if that has support in the record and the applicable law.—Creston Grain & Lumber, Inc. v. United States, 214 F. Supp. 840 (848)*.

Issues of whether the commission, on reopening the proceeding, could consider and rule upon "partial abandonment" and whether it properly considered "rebuttal evidence" are elements of broader question of whether plaintiff had a fair hearing. Under §1(20) the commission may grant only partial relief, if public interest so requires; and in judicial review of the commission's orders, strict rules of pleading have long been disregarded. [Citing 168 F. 131.] Plaintiff has failed to make clear to either the commission or the court the nature of its claimed prejudice on either of those issues. The record is convincing that the commission properly balanced public and private interests and arrived at a reasonable conclusion; sustained.—Id., pp. 845-8.

It being determined that the commission had jurisdiction to authorize abandonment of defendant carrier's entire operation, intrastate as well as interstate, and that issuance of certificate therefor was justified by the evidence, plaintiffs and their agents, employees, and attorneys are enjoined from interfering in any manner with carrier's right to terminate its entire operation and dispose of its property in accordance with and pursuant to the authority granted by the certificate and order.—State of Illinois v. United States, 213 F. Supp. 83 (92)*.

In issuing injunction against defandant's use of certain trackage in vicinity of complainant's plant for any purpose other than interchange with plaintiff in that proceeding, until it should be authorized by the commission to use the track otherwise, the court was adjudicating the right of a "carrier" under §1(18) and directed the injunction solely against defendant, a carrier, and against what the court deemed an extension of defendant's line. Since then complainant, a shipper seeking a switch connection with defendant's line, has acquired ownership of the track in question, and the court injunction does not apply to it. Moreover, the injunction does not foreclose any action by complainant shipper or by the commission under §1(9). However, the commission's requirement of the installation sought should not be construed as in any way affecting the outstanding court injunction.—Union Carbide Corp. v. Norfolk & W. Ry. Co., 323 I.C.C. 65 (73).

See also Whitehead Bros. Co. v. United States, §1(18), n. 60.

Trackage being constructed by Central of Georgia from a point on its Gordon-Eaton-

ton branch to site of a new electric power plant on north bank of Lake Sinclair having been found to constitute an extension of, line within meaning of §1(18-20) rather than an exempt industrial spur, and therefore subject to the commission's jurisdiction, it is admonished to discontinue construction thereof or face possibility of a suit to enjoin it from continuing such construction in violation of those provisions of the act.—Georgia R. Construction and Operation, 320 I.C.C. 25 (36, 37).

17. Proceedings for injunction.—[Vols. 2, 6, 9, 17-19].—When the trail court considered matters outside the pleadings, in granting defendant's motion to dismiss action to enjoin its new track construction for failure to state a claim, that motion must be considered as a motion for summary judgment. The motion to dismiss and accompanying affidavits were filed on date of hearing on plaintiff's motion for preliminary injunction; the parties and the court treated that hearing as limited to question of whether preliminary injunction should issue, and there was no prior indication that a summary, or final, judgment might result from it; thus, plaintiff was afforded no opportunity to present rebutting evidence and argument relevant to the issue of summary judgment. Since plaintiff-appellant had neither notice nor opportunity to be heard on the question of summary dismissal, the judgment was erroneous. Reversed and remanded.—Georgia S. & F. Ry. Co. v. Atlantic Coast Line R. Co., 373 F. 2d 493 (496-8)*.

In action seeking injunction against railroad's construction of, and operation over, segment of trackage found to be an unlawful extension of line to site of a coal mine, defendant submitted evidence that shipper desires it to serve the mine and that shipper's needs are urgent. That evidence goes not to question of whether the trackage is an extension or a spur track, the principal issue, but to question of whether public convenience and necessity would require that defendant enter the area; and Congress has left evaluation of such evidence to the commission and not to the courts.—Chicago & E.I. R. Co. v. Illinois Central R. Co., 261 F. Supp. 289 (301-2).

In action by the commission against several railroads and a rail passenger terminal company, seeking an injunction requiring three railroads to continue to use abandoned Union Station and to cease using other passenger terminals, the two broad issues are (1) whether commission approval was necessary before carriers made the changes in passenger operation in issue and (2) whether, in any event, a preliminary injunction should issue. Since answers to those questions are determinative of the commission's jurisdiction to make a decision as to public convenience and necessity, and the commission seeks the injunction, it is solely for the court to determine whether the commission has jurisdiction.—I. C. C. v. Memphis Union Station Co., 230 F. Supp. 456 (460, 461)*.

In action to enjoin defendant from constructing trackage from its present track into industry plant, without certificate from the commission, evidence clearly shows that proposed construction is in fact an extension of defendant's line into an area not previously served by it and presently served by plaintiff's line. Such construction, being unlawful until and unless defendant obtains a proper certificate from the commission, is enjoined.—New York Central R. Co. v. Norfolk & W. Ry. Co. 214 F. Supp. 549 (552-4).

24.—Parties.—[Vols. 2, 6, 9, 11, 12, 14, 15, 17-19].—Even though one defendant railroad had discontinued operating passenger trains into the Union Station some years earlier, it is a proper party in the commission's action seeking to restrain operating railroads and their subsidiary passenger station company from abandoning operations at the station without first obtaining the commission's approval. Defendant, as part owner of the passenger station company, has a present right to run trains into that station, and that right undoubtedly will be affected by outcome of the injunction litigation; its motion to dismiss complaint against it is denied.—I. C. C. v. Memphis Union Station Co., 360 F. 2d 44 (47, 53)*.

In injunction suit wherein plaintiff and defendant challenge each other's right to construct and/or operate over segments of

rail trackage, plaintiff and defendant are each a party in interest within the meaning of §1(20).—Chicago & E. I. R. Co. v. Illinois Central R. Co., 261 F. Supp. 289 (299, 307).

Injunction previously entered against carrier defendant to complaint seeking installation of a switch connection, restraining it from using certain trackage in vicinity of complainant's plant for any purpose other than interchange with intervener (plaintiff in injunction proceeding) until it should be authorized by the commission to use the track otherwise, does not apply to complainant, a shipper which has since acquired the track in question, since it was not a party to the court proceeding.—Union Carbide Corp. v. Norfolk & W. Ry. Co., 323 I.C.C. 65 (73).

27.—Presumptions and burden of proof.—[Vols. 2, 17, 19].—In action to enjoin construction of rail trackage to industry's plant, plaintiff railroads asserting that the track invades their territory (the real issue in dispute) have the burden of proof on that issue. And fact that plaintiffs have exclusively served the shipper since it constructed new facilities, in and of itself, is not sufficient to preclude the construction of trackage as an extension of defendant's line.—Chicago G. W. Ry. Co. v. Illinois Central R. Co., 275 F. Supp. 909 (914).

In action to enjoin construction of railroad tracks into newly developed area, alleging that such construction amounts to unlawful invasion of plaintiff's territory, plaintiff has the burden of proving, at least prima facie, those allegations; such allegations must be supported by ultimate facts to justify issuance of a preliminary injunction, the granting of which requires a showing of "reasonable certainty of success." Plaintiff's showing of physical presence of its main line tracks, close proximity thereof to probable location of new industrial plant, its movement of forest products from the general area, and the completed construction of its own lead track to another new plant, fails to establish even prima facie the allegations of invasion of territory.—Georgia S. & F. Ry. Co. v. Atlantic Coast Line R. Co., 250 F. Supp. 260. (263-4, 265)*.

Section 1. (21) Power of commission to require adequate facilities or extension of line; penalty.—[Unchanged. See vol. 9, p. 7332.]

Historical notes, vol. 2, p. 1053.

Notes of Decisions

Volume 2—p. 1050; Volume 6—p. 5001; Volume 9—p. 7332; Volume 15—p. 11991; Volume 16—p. 12626; Volume 18—p. 10435.

1. Interpretation.—[Vols. 2, 6].—Section 1(21) requires railroads to provide safe and adequate facilities for performance of "car service" as defined in §1(10), and gives the commission jurisdiction over abandonment and extension of carriers' lines to provide for rail service. That paragraph was enacted to enable the commission to facilitate and expedite the movement of property, and the commission has construed it as not even conferring authority to regulate operation of passenger trains. "Car service" as used in the act connotes the use to which vehicles of transportation are put, not the transportation service rendered by their means, and the commission has consistently held that it relates to vehicles used in transportation of property. Both §1(21) and §25 (the Signal Inspection Act) limit the commission's jurisdiction to operation of trains, and neither those nor any other existing statute confers any jurisdiction over railroads respecting highway gradecrossing matters. The commission therefore has no jurisdiction to require installation of protective signals, gates, or other devices at grade crossings.—Prevention of Rail-Highway Grade-Crossing Accidents, 322 I.C.C. 1 (47-8)*.

2. Commission may require car-service facilities and line extension.—[Vols. 2, 6, 9, 16].—Construction of line sought by a

group of citizens and merchants to replace branch-line segment authorized to be abandoned upon completion of a dam would be even more costly than relocation of line as proposed by the railroad and is not shown to be reasonably required by public convenience and necessity.—Northern Pac. Ry. Co. Abandonment and Construction, 317 I.C.C. 225 (237)*.

Section 1. (22) Construction, etc., of spurs, switches, etc., within State.—[Unchanged. See vol. 9, p. 7332.]

Historical notes, vol. 2, pp. 964, 1053, vol. 9, p. 7332, vol. 12, p. 10218, vol. 13, p. 10937, vol. 14, p. 11423.

Historical Notes

It is recommended that §1(22) be amended so as to include within the exemption from the commission's jurisdiction therein the acquisition and operation of spur, industrial, team, switching or side tracks located solely within one State.—Annual Report, 1963, p. 14.

It is recommended that §1(22) be amended so as expressly to include within the exemption from the commission's jurisdiction therein the construction, acquisition, operation, abandonment, and joint ownership or joint use of spur, industrial, team, switching, or side tracks, and terminals incidental thereto, whether located in one or more States.—Annual Report, 1964, p. 64.

Cross Reference

See § 13a, infra, Discontinuance or change of certain operations or services, State statutes and authorizations involved.

Notes of Decisions

Volume 2—p. 1057; Volume 6—p. 5004; Volume 9—p. 7333; Volume 11—p. 9144; Volume 12—p. 10218; Volume 13—p. 10937; Volume 14—p. 11423; Volume 15—p. 11992; Volume 17—p. 13281; Volume 18—p. 14036; Volume 19—p. 15098.

1. Construction, in general.—[Vols. 2, 6, 9, 11-15, 17, 18].—Whether a particular segment of railroad track is a line or railroad within §1(18) or is a spur, industrial, team, switching or side track within §1(22), is a mixed question of law and fact to be determined judically rather than administratively. If tracks in issue are spur, industrial, team, switching or side tracks, they are subject to valid State regulation, rather than commission regulation, and Jefferson Parish, a subdivision and agency of the State of Louisiana, may require railroad to abandon such tracks by a Parish ordinance such as that enacted; however, trackage in question is not within statutory exemption from the commission's jurisdiction and cannot be abandoned without first obtaining the commission's approval.—New Orleans Terminal Co. v. Spencer, 366 F. 2d 160 (164, 166)*.

In suit for injunction against railroad's construction and operation of a segment of track, wherein defendant also seeks injunction against plaintiff's operation over another track segment, the question of whether as a matter of law the challenged trackage is an "extension" or a "spur" as those terms are used in the act, being a mixed question of fact and law, is for final decision by the court and not the commission.—Chicago & E. I. R. Co. v. Illinois Central R. Co., 261 F. Supp. 289 (295, 306).

While Congress, in enacting the Transportation Act, 1920, did not define "extension," "spur," or "industrial" tracks, and dictionary definitions and industrial usages are of no help in ascertaining meaning of those terms, a guide to their meaning as used in §1(18-22) is furnished by context thereof and by relation of paragraphs (18) and (22) to the national railroad policy formulated by Congress, as outlined in 270 US 266. Tracks of character exempted by §1(22) are commonly constructed either to improve facilities required by shippers al-

ready served by the railroad or to supply facilities to others within same area who are similarly situated and entitled to like service; but if purpose and effect of new trackage is to extend carrier's line substantially into new territory, such trackage is an extension within §1(18) although the line be short and character of service contemplated be that commonly rendered to industries by means of spur or industrial tracks.—Georgia R. Construction and Operation, 320 I.C.C. 25 (28-9).

Whether a particular track is an "extension" or merely a "spur" or "industrial" track is a mixed question of fact and law, to be answered in each case by appraisal of the particular facts presented in light of the congressional policy; and it is well settled that a broad or liberal construction must be given the word "extension" and a narrow or limited construction to the words "spur" or industrial" tracks. Thus, the facts that only a power plant is to be served, that service will be performed by a switch engine, that no agent will be stationed at any point along the track, that no scheduled train service will be maintained, and that no express, mail, or passenger service will be furnished, do not necessarily establish existence of a spur or industrial track.—Id., pp. 28, 29.

Certificate Not Required

11. Spurs, industry, or team tracks.—[Vols. 2, 6, 9, 11-15, 17-19].—In action to enjoin construction of railroad tracks into newly developed area, alleging violation of plaintiff's territory in violation of §1(18), the lower court's almost exclusive reliance on decision in 132 F. Supp. 616 to support its decision that the new construction of defendant-appellee was a "spur, industrial, team, switching, or side" track within provisions of §1(22), and that commission authority therefor is not required under §1(18), is misplaced. The eight "tests" used in that case were distilled from former cases construing §1(22), have no statutory basis, and were developed for a different case; they are, at most, helpful factors to be considered, not binding fiats. Trial court's adoption of those tests as an exclusive, controlling list of the relevant considerations, disapproved. Reversed and remanded.—Georgia S. & F. Ry. Co. v. Atlantic Coast Line R. Co., 373 F. 2d 493 (498-500)*.

Where terminal company, part of a railroad system, is engaged in handling interstate and intrastate freight movements from, to, and through metropolitan area of New Orleans, and uses considered tracks B and C in handling such traffic movements, those tracks are not spur, industrial, team, switching or side tracks within §1(22); and terminal railroad's use of the tracks for temporary storage of cars and for occasional switching operations does not make them any the less "lines of railroad" within §1(18) since they are used substantially in the through movement of freight from shipper to consignee.—New Orleans Terminal Co. v. Spencer, 366 F. 2d 160 (165-6)*.

Link of trackage which defendant proposes to construct from point on its main line to industry-owned side track (3,888 feet in length) has the physical characteristics of a spur or industrial track as articulated in 132 F. Supp. 616, aff'd per curiam 226 F. 2d 958, concerning shipper's needs and request for installation, modest cost and the financing of construction, and the switching-service use of, and additional traffic accommodated by, such track connection. Also, record is not convincing that the track will invade plaintiffs' territory when, though plaintiffs serve the industry from its present plant location, defendant served it and its predecessor from the old plant, currently hauls cars from the new plant after plaintiffs' double switch operation, and renders similar services generally in the same mining area. It is settled law that a territory can be adjacent to or tributary to more than one carrier and served by them. Proposed track is a "spur" or "industrial" track under §1(22), rather than an "extension" within §1(18); requested injunction against construction thereof is denied.—Chicago G. W. Ry. Co. v. Illinois Central R. Co., 275 F. Supp. 909 (914-17).

While there are many factors to be considered in determining whether a given segment of trackage is a spur or an extension,

one factor (when present) is controlling, whereas all others are not. A finding that the segment extends into territory not tributory to, and not theretofore served by, the carrier, or into territory already adequately served by another carrier, compels the conclusion that it is an extension.—Chicago & E. I. R. Co. v. Illinois Central R. Co., 261 F. Supp. 289 (298).

Accordingly, although both track segments challenged possess characteristics of spurs, e. g., neither is to provide telephone, telegraph, station, or passenger service, neither is unusually long, and both were constructed to serve primarily one industry, nevertheless they are both extensions of rail lines because, at time of construction, both invaded territory not tributory to the lines of, and not theretofore served by, the constructing carrier. In addition, track segments in issue invaded territory which was being served by another railroad, and both were constructed at considerable cost.—Id., pp. 298, 299, 302.

Composite criteria for distinguishing spur tracks (which under §1(22) may be constructed without first obtaining a certificate from the commission) from an extension of line proscribed by §1(20), which were developed in 132 F. Supp. 616 and 120 F. Supp. 710, listed and discussed.—New York Central R. Co. v. Norfolk & W. Ry. Co., 214 F. Supp. 549 (553).

Since defendant does not operate as a common carrier over private track between its line and owner's coal mine to serve the track owner, and does not use its funds to maintain the track or pay for privilege of operating thereover, it is not operating any kind of road within §1(18) and need not obtain authority therefor from the commission; thus, the question of invasion of new territory (or carrier competition) is never reached in action seeking to enjoin such operation over the private track. The carrier competition test enunciated in 270 US 266 is appropriate for the court's examination only after it is established that "invading" carrier proposes to construct or operate, or is operating, some sort of road; the "new territory" question then becomes relevant in determining whether the track is within §1(18) or §1(22).—New York Central R. Co. v. Southern Ry. Co., 226 F. Supp. 463 (473)*.

Under principles laid down in 270 US 266, proposed track extending 10.2 miles from a point within yard limits of Georgia R. at Milledgeville, Ga., to a new electric power plant on north bank of Lake Sinclair is not a spur or industrial track within exemption of §1(22), since it will substantially extend applicants' line into new territory which they do not now serve.—Georgia R. Construction and Operation, 320 I.C.C. 25 (29).

On same principles, track being constructed by Central of Georgia to site of the new plant, which it does not now serve, is likewise not an exempt spur or industrial track. The nearest point served by Central is over 5 miles distant on its Gordon-Eatonton brach, and though it publishes coal rates to that point it has moved none thereto. Contention that it is ready, willing, and able to meet rail service requirements of the new plant is meaningless when the branch line is in poor condition and cannot handle coal traffic without expensive rehabilitation; until that is done its track to the new plant will be useless to itself or the power company. Effect of the new trackage is to extend its line substantially into new territory, and mere fact that its new track will be only 2.18 miles long does not distinguish it from the Georgia's proposed 10.2-mile track.—Id., pp. 33-4.

12. Street, suburban, or electric interurban railways.—[Vols. 2, 6, 9, 11, 12, 14, 15, 17, 19].—Although 288 US 1 held that the North Shore fell within exemption of §20a, which contains wording identical to the electric-railway exemption of §1(22), that decision was influenced by an estoppel rationale based on the railroad's reliance on past administrative rulings in regard to its issuance of securities, and did not bind the commission as to subsequent determination in abandonment proceeding under §1(18). Subsequent court decisions involving similar provisions in Railway Labor Act and Bankruptcy Act make clear that exemptions similar to §1(22), in other provisions of Interstate Commerce Act or in other acts, allow different interpretations, depending on purpose of the statute, the

underlying issues, and the particular facts of the case.—State of Illinois v. United States, 213 F. Supp. 83 (86-7)*.

And though 298 US 105 held that whether a railroad falls within the §1(22) exemption is a mixed question of fact and law, and that the district court has ultimate jurisdiction to determine the classification of the carrier involved, 320 US 685 held that it is the commission's duty to determine initially whether the railroad falls within its jurisdiction, observing that its special competence gives to the reviewing court the assistance of expert judgment. Those two opinions settle the scope of judicial review: while the commission's determination is not binding on the court, it must be given great weight in such a matter in which the agency's special competence is clearly recognized. The commission has upon abundant evidence correctly determined that the North Shore does not fall within the exception and is therefore subject to §1(18); the commission's conclusion sustained.—Id., pp. 88-9.

Line of former Hudson & Manhattan having been found in 312 ICC 701 not to fall within the urban or interurban electric railway exemption of §§ 5(10) and 20a(1), and it having been found in 154 ICC 603 that §§ 20a(1) and 1(22) are substantially identical, the line does not fall within exemption of §1(22).—Port Authority Trans-Hudson Corp. Acquisition and Operation, 317 I.C.C. 357 (358).

Applicant's physical characteristics remain essentially unchanged since it was found in 290 ICC 765 not to be an interurban electric railway within exemption of §1(22); while it is primarily a passenger carrier, about 14.6 percent of its total operating revenue in 1960 was derived from freight traffic, practically all interchanged with other railroads; its line is physically connected at six different points with one or more interstate carriers, and it continues to participate in over 1,000 tariffs with class I truckline railroads; other status-determining characteristics detailed in that report are still present. Supreme Court decision holding its predecessor to be an electric railway within exemption clause of §20a is not binding in instant proceeding; proposed abandonment of its entire operation is subject to §1(18).—Chicago N. S. & M. Ry. Abandonment of Entire Operation, 317 I.C.C. 363 (364-5)*.

Section 2. Special rates and rebates prohibited.—[Unchanged. See vol. 9, p. 7335.]

Amendments, see footnotes, vol. 2, p. 1061, vol. 6, p. 5008; historical note, p. 1061.

Notes of Decisions

Volume 2—p. 1063; Volume 6—p. 5008; Volume 9—p. 7335; Volume 11—p. 9145; Volume 12—p. 10219; Volume 13—p. 10938; Volume 14—p. 11423; Volume 15—p. 11993; Volume 16—p. 12627; Volume 17—p. 13281; Volume 18—p. 14036; Volume 19—p. 15099.

Interpretation and Application

15. In general.—[Vols. 2, 6, 19].—Where no actual violations of §2 are shown to result from requested vacation of requirement of order in 251 ICC 405 for maintenance of minimum differentials in ocean-rail under all-rail rates on considered traffic, mere possibility of future violations thereof as result of subsequent proposals need not be considered.—Wrought Pipe to the Southwest, 319 I.C.C. 310 (314)*.

16. Equality of treatment basis of section.—[Vols. 2, 6, 9, 11, 13, 15, 17, 19].—Assailed unit train rates on steam coal from Lynnville Mine to Hammond, Ind., based on annual volume minima and furnishing of cars by shipper or consignee, may not be found unjustly discriminatory when there is no evidence that any specific shipper or receiver, in single cars or

otherwise, at origin or destination or points grouped therewith, has any objection to them. While the tariff is conditional in its terms, it is openly published and has no collateral qualifications for any particular shipper or receiver as against others, all persons at origin and destination being treated alike under defendant's holding out, in accordance with the statute.—Natural Gas Pipeline Co. of America v. N.Y.C.R. Co., 323 I.C.C. 75 (80).

See also the Cooper-Jarrett case, EA, §41(1), n. 47.

17. Degree of uniformity or equality required.—[Vols. 2, 11].—Under prior court decisions, particularly 330 US 567 and 176 F. Supp. 411, the commission was compelled to find assailed rates on ex-barge grain discriminatory to extent that the division applicable to an ex-rail movement was lower than the charge on a like ex-barge movement, unless the railroads established a cost differential to the outbound carrier justifying a higher ex-barge charge, which the commission found they had failed to do. And, despite the variable nature of the ex-rail divisions, in determining that the lowest division accepted measured the discrimination the commission could not be concerned with the rail rate structure when the courts have prescribed that the outbound carrier's compensation on ex-barge shipments must not exceed that accepted on like ex-rail shipments. Essence of the cases cited is to require equality of treatment for the ex-barge traffic, and the "compensation accepted" by the outbound carrier as the test prescribed must be read in that light rather than in light of the rail rate structure.—Chicago, R.I. & P. R. Co. v. United States, 233 F. Supp. 381 (387)*.

And the commission's finding as to the measure of discrimination did not require rates set at level of the divisions existing before the determination of discrimination, but at any level acceptable to the railroads so long as the same measure applied to ex-barge traffic from the same port to the same destination. The "compensation" referred to in 176 F. Supp. 411 is a comparison of compensation accepted, not reasonable compensation or that which is compensatory.—Id., p. 387.

20. Prohibition of discrimination between persons.—[Vols. 2, 6, 14, 15, 17-19].—Reduced all-commodity rates on 40,000-pound minimum, restricted to loading by shipper in not over two cars, but not subject to promiscuous loading and marriage rules as are corresponding higher rates on lower minimum, do not violate §2 when, though designed to meet needs of forwarders and others similarly situated, they are available to all shippers at same location who are willing to meet the conditions attached. Failure to meet those conditions, such as inability to load 40,000 pounds in two cars, does not warrant condemning the rates as potentially discriminatory, since shipper controls the manner of loading and thereby determines whether the conditions are met; applicability of the rates therefore does not depend on carrier's efficiency or whim.—All Commodities, New York to Baltimore and Washington, 319 I.C.C. 627 (629-30)*.

Protestants' statement that 14 industries which under respondent's proposal would be closed to reciprocal switching on competitive traffic are adjacent to tracks of, or in same vicinity as, allegedly competing industries that would be open to all traffic does not establish undue prejudice or discrimination when there is no showing that conditions surrounding switching to or from the restricted industries are substantially similar to those affecting the unrestricted industries; moreover, no industry is protesting and there is no showing that any shipper would be placed at disadvantage by having to use respondent's or protestants' team tracks.—Switching at Richmond, Va., on Richmond, F. & P. R. Co., 316 I.C.C. 786 (792).

Unjust Discrimination

26. Differences in charges and collection among shippers.—[Vols. 2, 6, 9, 11, 14, 15, 17, 19].—A mere difference in rates without a showing of competition or dis-

advantage is insufficient to support a finding of unjust discrimination or undue preference or prejudice.—Motor Vehicles on Trilevel Flatcars—Chicago, 318 I.C.C. 89 (93).

Reduced alternative rates on liquefied petroleum gas in jumbo tank cars do not unduly discriminate against shippers in standard size cars from same origins merely because they may produce substantially less revenue per gross ton than standard-car shipments. The reduced rate alternate with each other and with the standard-car rates, and every shipper may acquire through lease or purchase arrangements the car most suitable to his needs at rates which reflect the lowest per-car charges. That not all shippers can use the jumbo tank-car rates does not constitute a violation of §2.—Liquefied Petroleum Gas in Jumbo Tank Cars—S.W.F.B., 319 I.C.C. 31 (38).

Respondents found it impractical, due to cost considerations, to relate the rates for jumbo cars to those for standard cars; moreover, while the jumbo-car rates are based on mileage scales, the standard-car rates are largely on a group basis and show wide variations in respect to mileages; thus, to extent there is any disharmony between them, the deficiency appears to lie with the standard-car rates. In view of the alternative provisions, all shippers are entitled to use the rates which produce the lowest charges, and those shipping the same weight are subject to the same charge; thus there can be no violation of §2.—Id., pp. 38-9.

In absence of a demonstrated cost differential, a rail carrier from a port is entitled to no more compensation on ex-barge than on ex-rail traffic from same origin territory when moving from transit at that port to same destination. Defendants have not overcome the prima facie showing of discrimination resulting from difference between present rates on ex-barge grain from named Tennessee River and lower Mississippi River ports to destinations in the South and in Arkansas and western Louisiana, and lower divisions received by them out of joint all-rail rates for movement of grain beyond same port to same destination; equal service is performed on ex-rail and ex-barge shipments moving from same elevator or mill to same destination, and defendants have not shown that their costs are substantially greater for handling transited ex-barge grain than for like shipments of ex-rail grain.—American Barge Line Co. v. Alabama G.S. R. Co., 316 I.C.C. 759 (769, 770, 771, 773)*.

Assailed ex-barge rates therefore unjustly discriminate against shippers at those ports who receive their grain by for-hire barge transportation, to extent that from the Mississippi River ports and Chattanooga they exceed the contemporary rates or lowest divisions received by the rail lines on ex-rail grain moving from same origin territory through same ports to same destinations over same lines beyond the ports, or, where the ex-rail divisions differ depending on inbound or outbound rail routing, to extent that the ex-barge rates exceeds the lowest division; from the Tennessee River ports other than Chattanooga, assailed rates are discriminatory to extent that they exceed rates reflecting the same percentages of first class as the contemporary rates or lowest divisions on ex-rail traffic from Chattanooga. And such shipper discrimination as between ex-barge and ex-rail grain is present whether the barge movement is by a certificated common carrier or under exemption of §303(b).—Id., pp. 774-5.

See also Southeastern Assn. of R. & Util. Commrs. case, §3(1), n. 67.

30. Competitive relation between shippers.—[Vol. 2].—Although 235 ICC 485 found miltiple-car rates to be lawful under §2 provided they were designed to meet competition from other modes of transport whose transportation unit is not limited to single-car loads, considered multiple-car rates on soybean cake and meal cannot be condemned as unjustly discriminatory because established to enable shippers to meet market competition; since that decision, the commission in 313 ICC 197, 315 ICC 672, and 316 ICC 117 has recognized market competition as a sound basis for establish-

ment of multiple-car rates.—Vol. Rates on Processed Meal—Midwest to Ports, 322 I.C.C. 456 (469).

A difference in carrier rates does not per se constitute unjust discrimination, and without a showing of competitive disadvantage there can be no finding of undue preference or prejudice; to create favoritism among shippers, there must be at least one who is disadvantaged ratewise in movement of his traffic, as against another who is preferred. Proposed return-haul rate on motor vehicles in bilevel cars from Atlanta to Norfolk is not shown to be unjustly discriminatory or unduly prejudicial in absence of evidence that any shipper in or near Atlanta, other than Ford, has ever shipped or desires to ship vehicles to Norfolk, or has sought establishment of rates for rail movement in bilevel equipment, or would suffer in market competition as result of the proposed rate.—Automobiles from Atlanta, Ga., to Norfolk, Va., 316 I.C.C. 99 (101-2).

Special Rate, Rebates, Drawback, or Other Device

50. **Prohibited devices and concessions, generally.**—[Vols. 2, 6, 9, 11-13, 19].—See also Iron and Steel Articles case, EA, §41(1), n. 47.

The mere possibility that carriers' practices outside the purview of their tariffs might be the source of illegal rebating does not establish that they are demanding greater or less compensation for like and contemporaneous service in connection with the transportation they hold out to perform.—All Commodities, New York to Baltimore and Washington, 319 I.C.C. 627 (630)*.

Contention that, as many shipments of meats handled by CB&Q under line-haul rates which include refrigeration move on combinations over Chicago and Illinois points, and the rates beyond are subject to separate refrigeration charges, CB&Q is thereby enabled to effectively grant a rebate to shippers by supplying ice to refrigerate shipments moving well beyond its lines, is not substantiated by evidence. While practices of carriers outside purview of their tariff publications may be the source of illegal rebating, mere possibility thereof does not establish that they are demanding a greater or less compensation for a like and contemporaneous service.—Refrigeration Allowances, Midwest, West, and Southwest, 322 I.C.C. 148 (152).

52. **Divisions of rates.**—[Vol. 2].—The mere fact that divisions received by participating carriers out of joint rates may be less than their local rates for their respective portions of the through service does not result in discrimination between shippers. The division of a joint rate is of no concern to shippers.—Rail-water, Grain in bulk, from Mo., Ill., & Ind. to Buffalo, 319 I.C.C. 123 (127)*.

53. **Loading.**—[Vol. 12].—While no shipper has been denied benefit of performing promiscuous loading of all-commodity freight, provision for extension of the privilege at carrier's option is discriminatory on its face. Under carrier loading, carrier may furnish additional cars in its managerial discretion without detriment to any shipper, and for its own convenience may load several cars casually or take time for capacity loading under normal loading provisions; but since carrier convenience respecting practical aspects of furnishing extra cars and availability of loading space may vary from day to day, exercise of managerial discretion under the optional provision would discriminate against a shipper precluded from promiscuously loading its own freight. Condonation of extension of the promiscuous loading privilege to shippers at carrier's option would permit unjust discrimination under color of law, and it is irrelevant whether such treatment would be intentional or pragmatically unavoidable.—Loading of Freight by Shippers at Eastern Origins, 321 I.C.C. 300 (305)*.

However, the rule permitting shipper promiscuous loading, minus the optional provisions, would encourage mutually beneficial loading practices without undue discrimination. Though carriers would be required to furnish additional cars at shipper's request, regardless of cost thereof or

carrier convenience, as a practical matter such loading will be available to shipper whether or not the rule is approved; and without the option the only differences in actual loading under the rule would be performance by shipper and the 15,000-pound minimum imposed for each car used.Id., p. 305.

55. Discriminations effected by published rates.—[Vol. 2].—Since it was the court, in 176 F. Supp. 411, which determined that, whether rates on grain from named Mississippi River ports to southern destinations were ex-barge or ex-rail proportionals or divisions of joint rates, charges paid by shipper must preserve intact the savings of water transportation, in attacking the commission's finding in 316 ICC 759 that the assailed rates unjustly discriminated against shippers whose grain reached those ports by for-hire barge to extent they exceeded the lowest divisions received by the respective rail lines out of joint rail rates from same origin territory to same destinations, plaintiffs in effect assail the court's conclusions, which are not under review. The commission's finding was compelled by the prior court decisions in absence of a showing of a cost differential justifying higher ex-barge rates, and is supported by the record; sustained.—Chicago, R.I. & P. R. Co. v. United States, 233 F. Supp. 381 (385, 386, 387, 388)*.

See also Wheat, Rye, and Flaxseed to Duluth and Minneapolis, §3(1), n. 67.

Proposed all-freight rate on a minimum applicable for loading in not more than two cars, which would alternate with single-car rates on lower minima, one of which is subject to promiscuous loading and marriage rules, is potentially discriminatory when under actual operating conditions applicable charges could not be ascertained before car doors have been closed.—Freight, All Kinds, N.Y. & N.J. Stations to Indianapolis, 316 I.C.C. 623 (624-5).

56. —Tariff provisions susceptible of partiality in application.—[Vols. 2, 19].—Since under plan III TOFC rates on automobiles shipper must bear cost of trailer rental during both loaded and empty return movement, which is avoided by shipment in multilevel cars, tariffs which permit substitution, at carrier's option, of service in multilevel cars would open the door to discrimination between shippers in type of car (flat or multilevel) furnished by the railroad. And while any saving resulting from such substitution in plan V (joint rail-motor) service would accrue to the railroads, which must furnish all facilities for the rail portion of the joint haul, under either plan, when rates are published on a per-carload basis, similar unlawfulness will result unless number of automobiles to be hauled in the substituted multilevel car is restricted to substantial equivalent of number which can be carried in TOFC service. Considered plan III schedules found to violate §2 extent that they contain a provision permitting respondents to substitute specially equipped rail open cars.—Motor Vehicles from Kansas City to Ark., La., and Tex., 318 I.C.C. 301 (316, 323).

Freight

70. Proportional rates.—[Vols. 2, 6, 9, 16-19].—Argument that increases authorized in rail rates on coal for rail-water movements and rail portions of rail-water-rail movements would result in discimination of type condemned in the Mechling case, 330 US 567, and the Blue Lines case, 100 F. Supp. 66, is not valid; contention was thoroughly explored and rejected in 292 ICC 23.—Increased Rates on Coal and Petroleum Coke, 316 I.C.C. 159 (176-8).

71. Switching charges.—[Vols. 2, 6, 9, 12, 14, 15, 18, 19].—Southern Ry's removal from its reciprocal switching list of five additional industries at High Point, N.C., that compete with complainants in 314 ICC 683 did not remove the unlawful discrimination therein found to exist under §2 in dissimilar treatment of shippers similarly situated, regardless of which carrier performed the line haul; Southern and its subsidiary admonished to comply with outstanding order in that case.—Absorption of Switching to or from High Point, N.C., 319 I.C.C. 522 (523-4, 527).

79. Allowances; for services or facilities furnished by shipper.—[Vols. 2, 6, 9, 11, 13, 18, 19].—That rates are published for a complete service does not prevent a carrier from offering a lesser service at a lower rate. Tariffs providing reduced unit train rates on coal, the cars to be furnished by shipper or consignee at no expense to carrier, do not, directly or indirectly, contain concealed allowances or rebates.—Natural Gas Pipeline Co. of America v. N.Y.C. R. Co., 323 I.C.C. 75 (79).

Like and Contemporaneous Service

95. In general.—[Vols. 2, 12-19].—There can be no unjust discrimination within §2 when the compared transportation is not from and to the same points as the transportation allegedly subject to unjust discrimination. Since all receivers of fine coal at Lynchburg, Va., are accorded same rate from same origins for same service, there is no violation of §2 in the fact that spreads in rates, fine under lump coal, are greater at Danville, Va., and points in the Carolinas than to Lynchburg.—Lynchburg Traffic Bureau v. Chesapeake & O. Ry. Co., 319 I.C.C. 74 (77, 81)*.

The mere fact that divisions received by participating carriers out of joint rates may be less than their local rates for their respective portions of the through service does not result in discrimination between shippers. Local rail movement of grain from Illinois and Indiana origins to Chicago differs from that under proposed joint rail-water rates to Buffalo because the transportation actually terminates there, while the joint rates contemplate movement beyond Chicago by lake. Since there is no evidence that one shipper will be charged more than another over the same route and between the same points for the same service, there is no unlawfulness within meaning of §2.—Rail-Water, Grain in Bulk, from Mo., Ill., & Ind. to Buffalo, 319 I.C.C. 123 (127, 130)*.

Multiple-car rates on soybean cake and meal from midwestern origins to southern and eastern ports for export do not unduly discriminate against protestant soybean processor when there is no indication that such service is not available to it upon request. Moreover, since before effective date of the multiple-car rates protestant has made no through rail shipments of cake or meal at either the single-car or the multiple-car rates from any of its plants in involved origin territory; its only export shipments in the recent past have been from its plants at Memphis and Norfolk, not in that territory, and in no instance was rail transportation used for the through movement; consequently protestant is not shown to be a shipper by rail of through shipments of cake or meal from any of involved origins.—Vol. Rates on Processed Meal—Midwest to Ports, 322 I.C.C. 456 (470).

Section 2 prohibits different charges for a like and contemporaneous service on a like kind of traffic under substantially similar circumstances and conditions; proposed barge-competitive seasonal, multiple-car, nontransit rates on corn, approximately 80 percent of single-car transit rates, are not discriminatory since they would not apply on a like and contemporaneous service.—Corn, Mich., Ohio, and Pa. to Augusta and Portland, Maine, 319 I.C.C. 344 (353)*.

There can be no unjust discrimination where the compared transportation is not from the same origin.—Limestone from Bessemer, Ala., to Mississippi Points, 316 I.C.C. 383 (386).

In absence of a showing that a like and contemporaneous service is performed at different rates, there is no basis for a finding of unjust discrimination. Higher rates on Paco sand than on crushed stone of similar feldspar content, obtained from same quarry as screenings used to produce Paco sand and shipped by an adjacent plant, do not violate §2 when it is not shown that the adjacent plant produces a commercial grade of feldspar, advertised and sold for its feldspar content, or that its product moves in boxcars or covered hopper cars, as is required for feldspar and Paco sand.—Copps v. Alabama G.S.R. Co., 319 I.C.C. 192 (199).

96. "Like" and "contemporaneous" construed.—[Vols. 2, 6, 9, 12, 15].—In holding that a charge to the shipper who uses for-hire barge service to a Mississippi River port which, regardless of its form, results in higher rates for the movement beyond the port than the portion of the joint rail charge received by the rail carrier for the ex-rail movement beyond the port violates §2, it is the outbound movement which brings the comparable ex-barge and ex-rail traffic within the "like and contemporaneous service" test of that section.—Chicago, R.I. & P. R. Co. v. United States, 233 F. Supp. 381 (386)*.

Section 2 is directed only to discrimination between shippers located at same points or in same communities, and involves movement of such shippers' like traffic to same destinations. If destinations of the traffic are different, the service rendered is not "like and contemporaneous," and there can be no violation of §2. Finding of a §5(2) violation in 335 US 573, premised on legality of treating all places in a particular group or district as one origin, is not controlling where the compared rates are not grouped at origin or destination but are published as specific point-to-point rates. As Mobile, Ala., and Pascagoula, Miss., are separate and distinct destinations from New Orleans, movement of grain to the first two ports at rates higher than from same origins to New Orleans is not under sufficiently similar circumstances to sustain a finding of unjust discrimination.—Standard Milling Co. v. Illinois Central R. Co., 321 I.C.C. 252 (259).

Like Kind of Traffic

99. Traffic found like or unlike.—[Vols. 2, 6, 9, 12, 16, 19].—Transportation of limestone, as compared to transportation of oystershells, does not amount to service on a like kind of traffic under substantially similar circumstances and conditions, within meaning of §2.—Limestone from Bessemer, Ala., to Mississippi Points, 316 I.C.C. 383 (386).

Substantially Similar Circumstances and Conditions

106. Dissimilarity as justification for discrimination.—[Vols. 2, 6, 9, 11, 18, 19].—Assailed unit train rates on steam coal, based on annual volume minima of 750,000 and 1,300,000 tons and furnishing of cars by shipper or consignee in sufficient numbers to constitute an entire train, involve service materially different from conventional multiple-car service in railroad-owned cars, subject to a 1,000-ton minimum. Moreover under assailed tariff consignee will incur costs of 56.9 cents per ton for furnishing the cars and providing unloading facilities that will meet the tariff requirement for tender of empty cars to defendant not later than 4 hours after loaded placement, and shipper will incur costs of 12.69 cents per ton for providing loading facilities to meet like requirement for rapid loading. These manifest differnces in service and costs plainly warrant different rate treatment and preclude a finding of violation of §2.—Natural Gas Pipeline Co. of America v. N.Y.C. R. Co., 323 I.C.C. 75 (80-1).

116. Units of shipment.—[Vols. 2, 16].—Multiple-car rates on soybean cake and meal from midwestern origins to southern and eastern ports for export are not unjustly discriminatory in their relation to single-car rates. Though no significant economies are shown to result from multiple-car operations, difference in cost of rendering the two services is not controlling on propriety of the rate spread between them. Considered rates were established to enable domestic processors of soybean cake and meal to compete more effectively in foreign markets with foreign processors, and the spread under the single-car rates is within range previously found to constitute a just and reasonable relationship.—Vol. Rates on Processed Meal—Midwest to Ports, 322 I.C.C. 456 (470).

118. Group points.—[Vols. 2, 15].—Assailed past and present rates to Oklahoma City, in transcontinental group

E-1, are not shown to be unlawful merely by comparison with a lower rate from same origin to points in group H which are within the corporate, but not the switching, limits of Oklahoma City; lines of demarcation between reasonable groups must be drawn somewhere, and there is no indication that the groups as thus drawn by defendants have resulted, or now result, in unjust discrimination to any person or locality.—Clements Food Co. of Oklahoma City v. St. Louis-S.F. Ry., 315 I.C.C. 516 (518).

Proceedings

132. Presumptions and burden of proof.—[Vol. 2].—A complainant may allege unjust discrimination violative of §2 even though the discrimination may not run against it; however, except in instances where discrimination is patent in, and encouraged by, particular schedules, allegations of unlawfulness under §2 must be supported by substantial evidence. Under the criteria of the statute, a finding of unjust discrimination may not rest upon mere speculation.—Natural Gas Pipeline Co. of America v. N.Y.C. R. Co., 323 I.C.C. 75 (80).

Section 3. Preferences; interchange of traffic; terminal facilities (1) Undue preferences or prejudices prohibited.—[Unchanged. See vol. 11, p. 9147.]

Amendments, see footnotes vol. 2., p. 1104, vol. 9, p. 7345, vol. 11, p. 9148; historical notes, vol. 2, p. 1104, vol. 9, p. 7345.

Notes of Decisions

Volume 2—p. 1106; Volume 6—p. 5022; Volume 9—p. 7345; Volume 11—p. 9148; Volume 12—p. 10221; Volume 13—p. 10939; Volume 14—p. 10425; Volume 15—p. 11995; Volume 16—p. 12629; Volume 17—p. 13284; Volume 18—p. 14040; Volume 19—p. 15106.

Construction

3. In general.—[Vols. 2, 6, 13, 14, 18, 19].—While §3(1) refers only to common carriers, 18 USC §2 makes it an offense for any person to command, induce, or cause a violation of federal law; and the Elkins Act gives federal courts jurisdiction to issue injunctions to prevent violations of the Interstate Commerce Act. Therefore, anyone who commands, induces, or causes another to violate §3(1), dealing with discrimination, is a principal offender under 18 USC §2 and is subject to the court's injuntive power.—United States v. City of Jackson, Miss., 318 F. 2d 1 (9)*.

Interpretation

11. Equality of treatment basis of section.—[Vols. 2, 6, 9, 12, 13, 16, 17, 19].—The statutory command of equality is not absolute: questions of discrimination may not be considered in a vacuum.—Tennessee Products & Chem. Corp. v. Louisville & N. R., 319 I.C.C. 497 (507).

See also the Cooper-Jarrett case, EA, §41(1), n. 47.

Relation of Other Sections

14. In general.—[Vols. 2, 6, 9].—Respondents right of independent action under §5a has no bearing on the prohibition of §3 against undue preference or prejudice in any rates or charges over which they have control.—Iron and Steel from Ill., Ind., Kansas., and Mo. to Iowa, 315 I.C.C. 403 (41).

16. —Section 1(5).—[Vols. 2, 6, 9, 16, 18, 19].—It is well settled that a rate may be within the zone of reasonableness and yet result in undue prejudice.—Fresh Meats, Ill., Ind., Ky., Ohio & Mo. to Points in Fla., 318 I.C.C. 5 (10).

17. —Section 1(6).—[Vols. 2, 6].—The prohibition in §3(1) of undue preference or advantage to "any particular description of

traffic, in any respect whatsoever," clearly contemplates just and reasonable classifications of freight.—All Commodities, New England to Chicago and St. Louis, 315 I.C.C. 419 (424)*.

Undue Preference and Prejudice Defined

31. "Undue or unreasonable preference or advantage."—[Vols, 2, 6, 19].—The controlling phrases of §3(1) are "undue or unreasonable preference or advantage" on one side and "undue or unreasonable prejudice or disadvantage" on the other. Congress has not provided a definition of these phrases, and the courts have regarded the definition thereof as a question committed largely to the sound judgment of the commission, to be determined by it in a case-by-case fashion. Such a determination involves a finding on a mixed question of law and fact in each case, and the commission's conclusion may be upheld by the court on judicial review only if there is a rational basis in law for the conclusion thus reached.—Stanislaus County v. United States, 236 F. Supp. 146 (148)*.

Section 3(1) speaks specifically of "undue" or "unreasonable" disadvantage. Though provisions of §22 authorizing a carrier to offer reduced rates on government shipments in effect authorize discrimination in favor of the world's largest shipper and against the smaller users of transportation, Congress has seen fit to accord such preferential treatment to government traffic, thus it cannot legally be "undue" or "unjust." Whether such treatment is as it should be is for Congress to decide, but though the commission and others, in seeking repeal of §22, have recognized that such preference exists, the law has not been changed in this regard, and the commission may not change it directly or indirectly. Tennessee Valley Authority, an instrumentality of the Federal government, has chosen to move its traffic at a rate which it is permitted by statute to negotiate with the carrier; therefore a complaint of violations of §3(1) in according it lower rates than other shippers will not lie; motion to dismiss for lack of jurisdiction, granted.—Tennessee Products & Chem. Corp. v. Louisville & N.R., 319 I.C.C. 497 (502-3).

The act does not compel identity of treatment for like services at different places: it prohibits only undue or unreasonable discriminations or preferences.—Grand Forks Cham. of Com. v. Great Northern Ry. Co., 321 I.C.C. 356 (364).

Prohibition in §3(1) of a rate structure which gives one locality an undue preference and subjects another to undue prejudice does not mean that the law compels identity of treatment for like services at different places; nor does it attempt to equalize opportunities among localities. Mere discrimination does not render a rate illegal under §3, as that section condemns only "any undue or unreasonable prejudice or disadvantage" to any locality or territory; and the causal connection between rate discrimination and territorial or locality injury cannot always be conclusively proven with mathematical exactness, but is a matter of inference from relevant data.—Stanislaus County v. Atchison, T. & S.F. Ry. Co., 315 I.C.C. 459 (464)*.

Character of Preferences Prohibited

36. Preference creating corresponding prejudice.—[Vols. 2, 6, 9, 12-19].—A rate preference accorded any person or point that results in substantial disadvantage to a competitor is unlawful, unless the disparity is based on a material difference in transportation conditions.—North Dakota Public Service Comm. v. Great Northern Ry., 315 I.C.C. 137 (145).

Maintenance of rates on furniture from origins in official, southern, southwestern, and w.t.l. territories to w.t.l. points on and south of so-called furniture line on lower level than that of rates concurrently maintained to points north of that line accords the former points a substantial rate advantage in competing with the latter in the same general area, which is unduly preferential and prejudicial when operating conditions and motor competition are substantially similar to points both north and south of the furniture line.—Id., p. 145.

Proposed reduced rates on fresh meats from Ohio River cities and St. Louis-East St. Louis to Florida destinations will result in injury and harm to protestant meatpackers at midwestern origins who compete for sales in Florida with firms located at the former origins; since profit margin to the packers is small, freight-rate relations are important, and as traffic to one receiver alone totals 2 million pounds a month, a considerable volume is at stake; thus, proposed reductions and continuance of present higher rates from the midwestern origins would unduly prejudice the latter.—Fresh Meats, Ill., Ind., Ky., Ohio & Mo. to Points in Fla., 318 I.C.C. 5 (11).

Furnishing of free transit to one group of shippers while imposing a transit charge against a competing group, where both groups are undertaking to ship the same article of commerce to the same markets, results in preference and prejudice when the transportation takes place under similar circumstances and conditions.—Indianapolis Board of Trade, Inc. v. Baltimore & O. R., 316 IC.C. 87 (89); however, in view of differences in competitive and other transportation conditions as between Indianapolis and Illinois points, the preference and prejudice resulting from granting of free transit on grain at latter points and not at Indianapolis is not undue.—Id., pp. 90, 92.

37. Competitive relationship between preferred and prejudiced.—[Vols. 2, 6, 9, 11-19].—There is no reasonable support for the commission's finding that plaintiffs failed to show sufficient competition between Stanislaus County and areas in San Francisco rate group to create an inference of undue prejudice. The evidence discloses, and the examiner's report points out, numerous instances of competition with points in the preferred areas not intermediate to San Francisco along existing rail lines, as well as instances of actual injury to the county in failure to attract industry, or to industries therein by imposition of higher rates. While recognizing the existence of competition, the commission apparently relied more heavily on evidence indicating that industry in Stanislaus County has grown at a faster rate than in some parts of the preferred areas. It could not reasonably conclude from this evidence that plaintiffs had not shown injury, since, but for the rate disparity, industry in the county might have grown at an even faster rate; accordingly, the finding that plaintiffs failed to establish injury must be set aside.—Stanislaus County v. United States, 236 F. Supp. 146 (151)*.

Comparison of present rates on grain and products from Buffalo and Pittsburgh to trunkline and New England territories discloses substantial and competitively disabling rate discriminations in favor of Buffalo, removal of which is a necessary preliminary to further consideration of contemplated construction of grain storage and milling facilities at Pittsburgh. Proposed reduced rates from Pittsburgh, constructed on McGraham formula, are as closely aligned with those from other origins as is possible under that formula while retaining some competive relation to Buffalo, and comparison with rates from that and other origins constitutes a prima facie showing that they are comparatively just and reasonable and not so low as to create undue preference of Pittsburgh or undue prejudice to Buffalo.—Grain from Pittsburgh, Pa., to Eastern Base Points, 322 I.C.C. 218 (222, 226-7)*.

Buffalo interests' fear that approval of the proposed Pittsburgh rates might lead to a decline in flour milling at Buffalo is speculative, also premature in view of the large deficit in flour production in the North Atlantic region, and is suspect because it runs counter to those protestants' argument that traffic moving under the proposed rates would displace flour movements from Kansas and Minnesota to Pittsburgh area and thus cause a reduction in respondents' net revenues. Moreover, in their concern about employment at Buffalo, protestants ignore an even more severe employment problem at Pittsburgh. The commission is not required to protect Buffalo against fair competition, and the present rate relationship prefers Buffalo to such a degree that Pittsburgh is not competitive.—Id., pp. 231-2.

A mere showing of disparity in rates and a general declaration of competition are

insufficient to prove undue preference or prejudice; but where the competition is so keen that any material rate difference results in a disadvantage, undue preference and prejudice results from maintenance of varying bases of rates from and to competing points which cannot be justified by differences in transportation conditions.—Iron and Steel from Ill., Ind., Kans., and Mo. to Iowa, 315 I.C.C. 403 (409-10).

Statement in 331 US 284 that it is a matter of right that regions and shippers be not prejudiced nor their competitors preferred does not overrule the oft-repeated holdings of the courts and the commission that a mere difference in rates, or in distances at the same rate, is inadequate support for a §3 finding. To establish undue prejudice there must also be evidence of forceful competition between persons or localities under the assailed rates, and that the rate adjustment has operated to the complainant's disadvantage. Complainant has failed to show that there is competition between consumers of fine coal at Lynchburg and those at Danville, or that assailed rate adjustment has injured complainant or any Lynchburg receiver, whereas defendants have shown, without contradiction, that the rates on fine coal to Danville are compelled by gas competition which is not compelling at Lynchburg. Thus there is no sound basis for a finding of undue preference or prejudice.—Lynchburg Traffic Bureau v. Chesapeake & O. Ry. Co., 319 I.C.C. 74 (81-2)*.

Without a showing of competition or disadvantage, there can be no finding of undue preference or prejudice.—Natural Gas Pipeline Co. of America v. N.Y.C. R. Co., 323 I.C.C. 75 (85); Corn, Mich., Ohio, and Pa. to Augusta and Portland, Maine, 319 I.C.C. 344 (353-4)*; however, general declarations as to competition or injury, unsupported by evidentiary facts, do not establish that a rate disparity is unduly prejudicial. Character or intensity of the competition, specific effect of the rate relation thereon, and extent to which transportation conditions are properly comparable, must be shown.—Limestone from Bessemer, Ala., to Mississippi points, 316 I.C.C. 383 (388); substantial competition between complaining parties and those alleged to be prejudiced must be shown, so that rate disparity may be said to result in disadvantage to former and advantage to latter. Complainant must show that it has been or will be injured because of the disparity.—Werthheimer Cattle Co., Inc. v. Chicago, B. & Q. R. Co. 318 I.C.C. 167 (169).

General declarations as to competition, particularly when unaccompanied by a showing of similar circumstances and conditions, are insufficient to support a finding of undue prejudice. Although some competition is shown between complainant's Paco sand from South Carolina and Del Monte sand from west coast, they move from widely separated areas of the nation, and there is no substantial evidence of competition with crushed stone products from the South; applicable tariff description and higher rates on Paco sand are therefore not unduly prejudicial.—Copps v. Alabama G.S.R. Co., 319 I.C.C. 192 (199).

A difference in carrier rates does not per se constitute unjust discrimination, and without a showing of competitive disadvantage there can be no finding of undue preference or prejudice; to create favoritism among shippers, there must be at least one who is disadvantaged ratewise in the movement of this traffic, as against another who is preferred. Proposed return-haul rate on motor vehicles in bilevel cars from Atlanta to Norfolk is not shown to be unjustly discriminatory or unduly prejudicial in absence of evidence that any shipper in or near Atlanta, other than Ford, has ever shipped or desires to ship vehicles to Norfolk, or has sought establishment of rates for rail movement in bilevel equipment, or would suffer in market competition as result of the proposed rate.—Automobiles from Atlanta, Ga., to Norfolk, Va., 316 I.C.C. 99 (101-2).

Proposed nonapplication of overflow rule to shipments of peat and humus from eastern Canada to southern United States is not shown to be unduly prejudicial to eastern shippers in competition with

shippers from British Columbia. Those protestants' claim of substantial competition from British Columbia is not sustained when it is in conflict with claim of shippers therefrom who sought lower rates to meet competition from w.t.l. and official territory producers; while rates from British Columbia are relatively lower, owing to greater distances they are actually higher; and respondents' traffic study shows that only 8 shipments moved from British Columbia to the South in same year that 148 cars moved from eastern Canada.—Peat and Humus from Canada to Southern United States, 319 I.C.C. 188 (190).

39. Commercial and economic conditions.—[Vols. 2, 6, 9, 11, 12].—Proximity of the preferred California area to San Francisco, which has a greater population and industrial density that Stanislaus County, might provide a rational basis for the commission's ultimate finding that the assailed rate disparity is not unduly prejudicial to Stanislaus County, if the greater population and industrial density gave rise to lower costs to the railroads in serving the preferred area; but the commission made no such finding, and there is no evidence in the record of any cost differential whatsoever. Greater population and industrial density alone, without some showing of its effect on territorial or operating conditions, can be no basis for rate discrimination; if such justification were allowed, it would serve only to arbitrarily perpetuate existing economic inequities. Such a result cannot be reconciled with the purposes of §3(1). The commission's order set aside and the case remanded.—Stanilaus County v. United States, 236 F. Supp. 146 (150)*.

That in 1958 railroads originated 128.3 percent more traffic than they terminated in North Dakota, whereas in w.t.l. territory as a whole only 23.1 percent more traffic was originated than terminated, indicates that inbound traffic to North Dakota needs to be encouraged rather than placed at a rate disadvantage, as was generally the result of 1959 adjustment which established relatively higher rates on furniture from official, southern, southwestern, and w.t.l. territories to North Dakota and other points north of so-called furniture line than to points on or south thereof.—North Dakota Public Service Comm. v. Great Northern Ry., 315 I.C.C. 137 (143).

And fact that from 1955 through 1958 the tonnage of furniture terminated in North Dakota by class I railroads increased, whereas it decreased to w.t.l. territory generally, and that retail sales in North Dakota increased by a greater percentage than in w.t.l. territory generally, has little significance without inclusion of 1959 data subsequent to the rate adjustment.—Id., p. 143.

40. Small shippers.—[Vols. 2, 9, 16, 19].—Defendant pipeline is not shown to have a policy of excluding traffic of other than major oil companies and pipeline owners when 50 percent of its traffic since 1954 has been consigned to independent refineries.—Denver Oil Co. v. Platte Pipe Line Co., 316 I.C.C. 599 (603-4)*.

Proposed multiple-car flat rates on grain from Kansas City and Omaha groups to Lawrenceburg, Ind., will not unduly prejudice small shippers, as the traffic is now moving and will continue to move in large lots, and small dealers will be no more adversely affected if large shipments move by rail instead of, as at present, by barge.—Grain—K.C., Omaha & Related Origins to Lawrenceburg, 315 I.C.C. 83 (86, 87).

44. Natural advantages.—[Vols. 2, 6, 0, 11, 13, 15-18].—Disadvantages due solely to geographical location constitute inadequate support for a finding of undue prejudice.—Magnet Cove Barium Corp. v. Chicago B. & Q. R. Co., 315 I.C.C. 555 (558).

Complainant at Grand Rapids, across Lake Michigan, has a geographic disadvantage compared with East Chicago, Ind., in making rail shipments to Wisconsin, and while carriers may voluntarily establish a rate to overcome such a disadvantage the commission may not require them to do so.—Grand Rapids Gypsum Co. v. Ann Arbor R. Co., 321 I.C.C. 293 (296).

46. Right to benefit of advantage of location.—[Vols. 2, 6, 9, 11, 12, 16, 18].—Although intervener's competitors at

certain Illinois and Indiana points benefit by reduction in single-factor rates on corn to the East, purpose of those reductions in single-factor rates on corn to the East, purpose of those reductions and reduced combinations on Chicago was adjustment of the rate structure on corn via Chicago, and intervener's rate disadvantage is due to its location at Milwaukee. The reduced rates are therefore not unduly prejudicial.—Corn and Corn Products from Ill. and Ind. to the East, 319 I.C.C. 568 (574).

Location of a place of business on the docks of a port or away from the docks results primarily from economic factors and not from geography of the port area; there is no natural advantage in absence at the ports of Longview and Tacoma, Wash., of such factors as congestion at the docks, high cost of property, and metropolitan congestion which affect Los Angeles area, and proposed absorption of port charges on imported lumber and plywood at interior California points to which shipments are trucked for storage and processing before rail shipment to transcontinental destinations, which was designed to make the ports of Los Angeles and Long Beach competitive with other Pacific coast ports, would not deprive the latter of any geographical advantage to which they are entitled.—Absorption—Lumber & Plywood—Pac. Coast Interior Orig., 316 I.C.C. 15 (17, 23).

49. Equalization of disadvantages.—[Vols. 2, 6, 11, 14-16, 18, 19].—The commission does not attempt to equalize, fortune, opportunities, or abilities; therefore, assuming arguendo that it has jurisdiction to determine whether there is a §3(1) violation in defendant's practice of extending to western Kentucky producers, but not to complaining Tennessee producers, §22 quotations in form of progressive rate reductions on coal to TVA's Widow's Creek, Ala., power plant, its duty would be to eliminate only such undue disadvantages as might be caused by unlawful transportation charges. It is not the sliding scale, but the level of the rates, that is controlling; complainant's opportunities are not impeded by discriminatory rates, since the lowest rate available to western Kentucky producers is substantially higher than rates available to complainants. Complainant's difficulties stem from geographical and physical property handicaps; thus, assailed §22 quotations are not shown to be unduly preferential or prejudicial.—Tennessee Products & Chem. Corp. v. Louisville & N. R., 319 I.C.C. 497 (504, 507).

51. Restriction of markets.—[Vols. 2, 6, 12, 14, 16, 17].—Proposed reduced rates of Southern Ry. on grain (but not products) in multiple-car shipments in jumbo hopper cars from Ohio and Mississippi River crossings to the South are not shown to be unduly prejudicial to midwestern millers, processors, and elevator operators, few of whom are on Southern's line. Though those interests fear that grain will bypass them and make them noncompetitive with southern mills, conditions in the Midwest and Southeast are dissimilar; southern territory is not a principal market for flour and other grain products or an attractive market for mill feed. Moreover, midwestern mills are a dominant factor in southern markets and now compete with certain southeastern mills even though later have available barge-rail rates, plus elevating transfer charges, that are lower than the proposed rates.—Grain in Multiple-Car Shipments—River Crossings to So., 318 I.C.C. 641 (689)*.

Determination of Undue Prejudice

66. What considered, generally, in determination.—[Vols. 2, 6, 9, 12, 14, 16, 17, 19].—A finding of undue preference and prejudice requires a showing (1) that a difference in level of rates exists in favor of preferred points; (2) that the rate difference is not justified by transportation conditions; (3) that a carrier or group of carriers is the common source of the rate prejudice and effectively participates in both prejudiced and preferred traffic; and (4) that prejudiced party or parties suffer actual or potential injury.—Fresh Meats, Ill., Ind., Ky., Ohio & Mo. to Points in Fla., 318 I.C.C. 5 (10).

Assuming arguendo that the commission has jurisdiction to determine whether there

is a violation of §3 in defendant's practice of extending to western Kentucky producers, but not to complaining southern Tennessee producers, §22 quotations in form of progressive rate reductions based on annual volume of coal, including southern Tennessee coal, moving to Tennessee Valley Authority's Widow's Creek power plant, the assailed quotations are not shown to be unlawful. Expansion of the Widow's Creek coal market was based in large measure on availability of western Kentucky coal, and inclusion of Tennessee coal in the volume controlling the progressive reductions from western Kentucky was to ensure complainants' participation in that market. Evidence tends to show that this result materialized; combining the volume from complainants' mines with that from western Kentucky had practical effect of enhancing complainants' ability to obtain TVA coal contracts. Level of the rates, not the sliding scale, is controlling, and claim that assailed rates work to complainants' detriment is not borne out by the facts.—Tennessee Products & Chem. Corp. v. Louisville & N.R., 319 I.C.C. 497 (504, 505, 507).

Undue prejudice results from maintenance of varying bases of rates on a commodity from competing points where the difference cannot be justified by differences in transportation conditions and the competition is so keen that any material rate difference results in a disadvantage.—Oak Flooring—Pine Bluff, Ark., to Mich., N.Y., Ohio & Pa., 315 I.C.C. 77 (78).

That establishment of a uniform level of rates on meats and packinghouse products eastbound from origins both west and east of Mississippi River will cause defendants to lose considerable revenue is no defense to maintenance of rates which are unduly prejudicial and preferential.—Cudahy Packing Co. v. Akron, C. & Y. R. Co., 318 I.C.C. 229 (247)*.

67. Differences in and comparisons of rates.—[Vols. 2, 6, 9, 11-19].—Part II, §216(d), n. 15.

Undue prejudice cannot be predicated on mere difference in rates and some evidence of competition; the record must show that the rate disparity has operated to protestants' disadvantage in marketing their products.—Wine, Pacific Coast to Western, S.W. & Central States, 321 I.C.C. 683 (709); Steel Bars, Lemont, Ill., to Iowa, Kans., Mo., Minn., & Nebr., 319 I.C.C. 292 (304); Motor Vehicles on Trilevel Flatcars—Chicago, 318 I.C.C. 89 (93); similarly, showing of difference in rates, coupled with general declaration respecting competition between receivers in same rate group or between aggrieved locality and other localities, does not establish undue preference or prejudice.—Reduced Transcontinental Lumber Rates, 1961, 318 I.C.C. 815 (846); Limestone from Bessemer, Ala., to Mississippi Points, 316 I.C.C. 383 (388-9).

See also Iron and Steel from Ill., Ind., Kans., and Mo. to Iowa, n. 37, above.

Application of local rates on ex-truck grain from Memphis to the South, higher than proportionals applicable on ex-barge grain, is not shown to unjustly discriminate against or unduly prejudice Oklahoma grain interests lacking access to barge service to Memphis when no similarity between rail movements of ex-barge and ex-truck traffic from Memphis is shown; no issue of discrimination or prejudice is raised in connection with ex-truck traffic by any grain interest located at Memphis; and actual rail movement of ex-truck grain or products beyond that river port is not established.—Southeastern Assn. of R. & Util. Commrs. v. A., T. & S.F. Ry., 321 I.C.C. 519 (549-50)*.

That assailed rates on fresh meats, minimum 21,000 pounds, from Louisville, Ky., and Columbus and Madison, Ind., to trunkline and New England territories are maintained on percentages of Chicago-New York rates under McGraham formula, which differ from percentages prescribed as maxima for motor-compelled rates on higher minima from those and other origins in 313 ICC 345, does not make the assailed rates unlawful per se, when there is no showing that complainants suffer any disadvantage or injury by reason of the difference in treatment.—Louisville Chamber of Commerce v. Ahnapee & W. Ry. Co., 318 I.C.C. 749 (750, 753, 754).

Although reduced nontransit rates on grain from country origins to Twin Cities and Twin Ports were intended for local application only, as distinguished from normal gathering rates which may be applied on traffic to destinations beyond those rate-break markets, in practice the nontransit rates apply also on shipments moving beyond at other than rail proportional rates; as no difference in transportation conditions is shown, application of the nontransit rates on traffic handled through an elevator to a water carrier, and of the higher rates when transferred direct to such carrier at same point, results in unjust discrimination in favor of the elevator.—Wheat, Rye, and Flaxseed to Duluth and Minneapolis, 315 I.C.C. 89 (92).

Adjustment of furniture rates from origins east of Rocky Mountains to w.t.l. destinations, resulting in a generally higher level to points north of than on or south of so-called furniture line drawn in w.t.l. territory in 1959, was detrimental to points north of that line. Furniture usually moves in consolidated shipments to take advantage of c.l. rates, and the various l.c.l. lots are distributed from a break-bulk point or dropped off at a point intermediate thereto. Following the 1959 adjustment shippers discontinued drop-offs en route on shipments to North Dakota to avoid paying the higher rates at drop-off points south of the furniture line; carloads are now made up of shipments solely for points north of the line, or are broken up at points south thereof for distribution at l.c.l. rates; thus, North Dakota distribution points now receive fewer pool-car shipments than formerly.—North Dakota Public Service Comm. v. Great Northern Ry., 315 I.C.C. 137 (140-1, 142).

As the l.c.l. rates, which are on the classification basis, are factors of combination rates, Fargo, the principal North Dakota distributing point, is at a competitive disadvantage with break-bulk points south of the line, such as Aberdeen, S. Dak., and its principal competitor, Minneapolis. Under the 1959 adjustment the greatest reductions in combination rates were over Minneapolis, with result that where Fargo formerly had a rate advantage it was reduced or changed to a disadvantage, and any advantage of Minneapolis was increased, so that North Dakota retail dealers, who are compelled by competition to sell at Mineapolis prices, now pay higher rates than Minnesota dealers and others on or south of the line, and must absorb the difference. In view of similarity of transportation conditions to points north and south of the line, assailed rates to the former are unduly prejudicial to extent they exceed level of rates to points on and south of the line.—Id., pp. 141-2. 144.

70. Distance.—[Vols. 2, 6, 9, 11, 13-19].—Though Oklahoma interests complain that assailed rates on grain and products to the South deprive them of a natural geographic advantage, and emphasize comparative distances, the grain-rate structure has never conformed closely to mileages; if it had, equalization of the vast number of routes over which grain and products move from country origins through storage and processing points to ultimate destinations would never have developed. Oklahoma has benefited from such liberal routing and transit provisions, and difference of 2 percent in overall circuity as between shipments from all origins and those from States adjacent to Oklahoma, which terminated in the South as flour and first had transit in Oklahoma, is insignificant. Assailed rates found not unlawful.—Southeastern Assn. of R. & Util. Commrs. v. A., T. & S.F. Ry. Co., 321 I.C.C. 519 (550-1)*.

Differences in distance from interior southwestern points and Colorado to Freeport and to Houston, Tex., are so trivial as strongly to support inclusion of Freeport in Houston port group as a means of removing undue prejudice; rate equalization has been accorded other ports, including Texas ports, whose distance disadvantages in relation to preferred ports are well in excess of those involved. However, the commission is reluctant to find in present record that no rate disparity would ever be justified.—Brazos River Harbor Nav. Dist. v. Abilene & S. Ry. Co., 319 I.C.C. 54 (67)*.

History of rate adjustments on export grain and products to Texas ports indicates that substantial differences in distance have long been and are now being generally disregarded on that traffic, especially to Houston-Galveston-Port Arthur group; in the circumstances, the difference in average distances from Oklahoma and northwestern Texas to those ports and to Corpus Christi is insufficient to warrant higher rates to latter than to former, when respondents serving Corpus Christi, together with those originating the traffic, effectively control the rate adjustment to all Texas ports. Undue prejudice to Corpus Christi in failure to establish same reduced export rates as to Galveston, Houston, Port Arthur, and Texas City ordered removed.—Export Grain from Texas to Texas Points, 319 I.C.C. 16 (28).

See also Boston & M.R. v. United States and New York Central R. Co. v. United States, n. 106a, below.

71. Cost of service.—[Vols. 2, 18, 19].—Nonapplication of reduced alternative transcontinental lumber rates and increased minima to lighterage deliveries is not shown to prefer one part of New York metropolitan area to another; such incentive rates reflect fact that cost of moving additional weight is usually negligible compared to increased revenue anticipated, whereas cost of lighterage delivery is shown to vary almost directly with weight of the load; thus application of the reduced rates to lighterage deliveries would be inconsistent with their basic purpose.—Reduced Transcontinental Lumber Rates, 1961, 318 I.C.C. 815 (846-7).

See also Stanislaus County v. U.S., n. 39, above.

73. Preference or prejudice not justified by advantages in other respects.—[Vol. 2].—That shipments have been moving from origins allegedly prejudiced despite disadvantage of relatively higher rates is not inconsistent with a finding that undue prejudice exists; nor is that conclusion affected by fact that a complaining party has certain trading advantages over competitors. A patent discrimination in rates is not to be condoned because competitive advantages wholly unrelated to the transportation service may favor the complaining shipper.—Cudahy Packing Co. v. Akron, C. & Y. R. Co., 318 I.C.C. 229 (246)*.

74. Determination not precluded by effect elsewhere or on others.—[Vols. 2, 6, 16].—Although railroads serving Houston-Galveston group are fearful of revenue losses expected if traffic is diverted to Corpus Christi by establishment of reduced rates to that port on same basis as to the former, neither possible or probable diversion of traffic from, nor adequacy of existing facilities at, ports presently handling the traffic are valid reasons for denying another port opportunity to share in the business if it can induce shippers to use its facilities.—Export Grain from Texas to Texas Points, 319 I.C.C. 16 (25).

75. Removal of preference or prejudice by carrier.—[Vols. 2, 6].—See Wheat, Rye, and Flaxseed to Duluth and Minneapolis, §15(7), n. 28.

76. Similarity of circumstances and conditions.—[Vols. 2, 6, 9, 11-13, 16-19].—Undue prejudice or preference does not exist unless transportation conditions with regard to the prejudiced and preferred points are substantially similar. While factors of more burdensome and time consuming terminal operations and of keen motor competition at certain origins, as compared with other origins, are properly to be considered in determining whether there is substantial similarity of transportation conditions in the two considered areas, mere fact of competition, or of difficult terminal operations, does not necessarily justify a rate preference or prejudice. The commission, after considering and ruling on issues of dissimilarity, found assailed rates unduly prejudicial and preferential; sustained.—Atchison, T. & S.F. Ry. Co. v. United States, 218 F. Supp. 359 (367-9, 377)*.

On reconsideration of proposed multiple-car rates on grain from Ohio and Mississippi River crossings to the South (available also from Tennessee River ports), the commission found that the proposed 240-cent minimum applicable to

movements under 346 miles would unduly prejudice the Tennessee River ports and unduly prefer the Ohio and Mississippi River ports in that resulting higher per-mile charge from the former would preclude shippers located thereat from competing with those located at the latter, although, so the commission found, there is no substantial difference in competitive transportation conditions as between the respective ports. However, purpose of the multiple-car rates was to make the railroads competitive with the dominant long-distance backhaul truck movements of grain from the Middle West to the Southeast, and there is no showing that similar long-haul truck movements exist in relation to the Tennessee River ports; on the contrary truck movements from those ports are shown to be shorter, less than 346 miles, and to be made without backhaul payloads.—Cincinnati, N.O. & T.P. Ry. Co. v. United States, 229 F. Supp. 572 (576-8)*. 8)*.

A conclusion by the commission that §3(1) has been violated must be supported by several findings, including that of discriminatory treatment under substantially similar transportation and competitive conditions. The commission's purported finding on this essential element is inadequate to support the conclusion of a violation of §3(1) and is not itself supported by substantial evidence in the record. The conclusion constitutes an abuse of discretion in that it was made despite other findings by commission that transportation conditions, as between the origin points allegedly unduly preferred and those allegedly unduly prejudiced, are in fact not similar. Conclusion that §3(1) has been violated, being invalid, must be set aside.—Id., pp. 579-80.

Apart from differences in distance which are too trivial to warrant different rate treatment, no other transportation conditions are shown whose dissimilarity would warrant assailed rate inequality between Freeport, Tex., and Houston port group on traffic to and from interior southwestern points. Existence of special facts justifying an inequality of treatment is a matter of defense to be proved by satisfactory evidence. Prior finding of undue prejudice to Freeport affirmed.—Brazos River Harbor Nav. Dist. v. Abilene & S. Ry. Co., 322 I.C.C. 529 (532)*. (532)*.

Whether disadvantage of origins west of Mississippi River in shipping meats and packinghouse products to the East at rates relatively higher than from points on and east of the river is undue depends on whether transportation conditions are similar; and existence of facts justifying inequality of treatment is a matter of defense to be proven by satisfactory evidence. Truck competition which rates east of the river were established to meet exists also from points west of the river as far as Denver, and difference in degree thereof does not justify the difference in rates; nor does fact that rate spreads sought over Dubuque, Iowa, would be less than differences in costs, since there are similar rate and cost differences as between points on and east of the Mississippi. Rates from points west of the Mississippi found unduly prejudicial and nonprejudicial bases related to the Dubuque rates prescribed.—Cudahy Packing Co. v. Akron, C. & Y. R. Co., 318 I.C.C. 229 (241, 245-6)*.

In establishing undue preference and prejudice, it must be shown that the traffic from both the preferred and the prejudiced origins moves under substantially similar circumstances and conditions. Complainant at Grand Rapids, across Lake Michigan, has a geographic disadvantage compared with East Chicago, Ind., in making rail shipments to Wisconsin, and while defendants may voluntarily establish a rate to overcome such a disadvantage, the commission may not require them to do so. Origins allegedly preferred are in w.t.l. territory, while that claimed to be prejudiced is in official territory, and the reduced w.t.l. adjustment on considered traffic was admittedly established to provide different minimum weights and in some degree to meet truck competition. Assailed rates are not shown to be unduly prejudicial.—Grand Rapids Gypsum Co. v. Ann Arbor R. Co., 321 I.C.C. 293 (296).

Preponderance of complainant's traffic from Greybull, Wyo., in mountain-Pacific

territory, is sold in official and southwestern territories, and in competing for those markets Greybull shippers are at a geographical disadvantage in relation to shippers from Belle Fourche, Wyo., in w.t.l. territory, since they must absorb the difference in charges over those on lower basis applicable from Belle Fourche and nearby points. However, it is not within the commission's power to adjust or equalize rates for the primary purpose of enabling competing shippers to market their products; assailed rates from Greybull and those from Belle Fourche reflect differences in operating conditions and are not unlawful.—Magnet Cove Barium Corp. v. Chicago, B. & Q. R. Co., 315 I.C.C. 555 (557-8).

Undue preference and prejudice must be shown by clear and convincing evidence; substantial similarity in transportation conditions, and a real disadvantage by reason of the assailed rates, must be shown.—Institute of Scrap Iron & Steel, Inc. v. Akron, C. & Y. R., 316 I.C.C. 55 (67); Lake Charles Harbor & Term. District v. Atchison, T. & S.F. Ry. Co., 315 I.C.C. 485 (489); and where circumstances and conditions are not similar, differences in them may justify the rate difference complained of, thence there may be no undue prejudice. Complainant failed to prove affirmatively that transportation conditions from compared origins are similar when distance from its origin to considered destination is 260 miles more than that from alleged preferred point.—Waters & Rodgers, Inc. v. Western Pac. R. Co., 315 I.C.C. 743 (747).

Only undue preference and prejudice is unlawful, and to establish such unlawfulness it must appear that the traffic from or to the points concerned moves under substantially similar circumstances and conditions. Reduced flat rates on coarse grains from described w.t.l. origin area to Chicago and other Lake ports for export are not unduly prejudicial to Peoria in disruption of its equalization with Chicago on through movements when truck competition from considered origins to Peoria is insignificant compared with that to Chicago.—Export Grain and Grain Prod.—WTL to Gulf-Lake Ports, 319 I.C.C. 729 (742)*

There is no undue prejudice to receivers of fine coal at Lynchburg, Va., in fact that spread in rates under lump coal is less than spreads to Danville and points in the Carolinas, when defendants have shown, without contradiction, that the reductions on fine coal to those points were compelled by competition with natural gas and that such competition is not compelling at Lynchburg.—Lynchburg Traffic Bureau v. Chesapeake & O. Ry. Co., 319 I.C.C. 74 (77, 79-80, 82)*.

In establishing undue prejudice it must appear that traffic to both the prejudiced and preferred points moves under substantially similar circumstances and conditions. Competitive forces operating to detriment of Chicago and points grouped therewith, which compelled reduction of rates on corn and products from described w.t.l. area, do not exist to any appreciable degree at complaining markets such as Kansas City and St. Louis; this lack of similarity in transportation conditions precludes a finding of undue prejudice in the reduced rates.—Corn and Corn Products, Iowa, Nebr., Minn., S. Dak. to Ill., 318 I.C.C. 291 (296-7).

That Illinois occupies a unique position as a buffer zone between eastern and western districts has frequently been recognized by the commission in considering rail rate structures and practices. Western railroads, including those with eastern termini in Illinois, have long accorded free transit of grain under line-haul rates, and in western grain-rate investigation Illinois was specifically included in the western district and propriety and desirability of permitting milling in transit without separate charge at Illinois points was clearly established. Thus, transportation circumstances and conditions in that border area are quite different from those prevailing at Indianapolis, and a finding that failure to grant free transit on grain at Indianapolis is unduly prejudicial would not be warranted.—Indianapolis Board of Trade, Inc. v. Baltimore & O. R., 316 I.C.C. 87 (89-90).

77.—What constitutes similarity or dissimilarity.—[Vols. 2, 6, 9, 12].—Mere fact of competition alone does not necessarily justify a rate preference or prejudice, since character and extent of the competition may be such as not to warrant rate disparity; the same is true with regard to difficult terminal operations.—Atchison, T. & S.F. Ry. Co. v. United States, 218 F. Supp. 359 (367)*.

Multiple-car rates on soybean cake and meal from midwestern origins to southern and eastern export do not unduly prejudice processor exporting cake and meal from plants at Memphis and Norfolk. Though respondent have not established rates on same relative basis for soybeans originated within that origin territory and processed at Memphis, nor reduced domestic rates on soybeans to Norfolk, and as a result protestant's advantage in competing in world markets, due to strategic location of those plants, has been narrowed, it uses water service for outbound movements of cake and meal and in no instance uses rail service for through movements, whereas midwestern processors obtain their soybeans by rail within that origin territory and process them at their plants in same territory for movement beyond by rail. As there is no showing that protestant proposes to alter its present method of moving soybeans inbound and cake and meal outbound, processors in the origin territory are not unduly preferred.—Vol. Rates on Processed Meal—Midwest to Ports, 322 I.C.C. 456 (471-2).

Differences in transportation conditions justify different treatment of rates. To establish unlawfulness under §3 of proposed joint rail-water rates on grain from Illinois and Indiana origins to Buffalo, it must be shown that the proposed rates and existing higher joint all-rail rates apply under substantially similar conditions; but the services beyond Chicago, by lake vessel direct under the proposed rates and by rail under rates which permit milling in transit, are obviously not performed under similar circumstances; thus there is no violation of §3.—Rail-Water, Grain in Bulk, from Mo., Ill., & Ind. to Buffalo, 319 I.C.C. 123 (130)*.

Movement of corn to Augusta, Maine, via competitive water routes in two prior years, and potential resumption of that service and its expansion to Portland and to Manchester, Conn., constitutes a transportation circumstance not present at other corn-processing destinations in Pennsylvania, New York, and New England. Lack of barge competition at latter points is due to location and is not a disability which the commission may alleviate through its control of freight rates. Proposed multiple-car rates to Augusta, Portland, and Manchester found not unduly prejudicial.—Corn, Mich., Ohio, and Pa. to Augusta and Portland, Maine, 319 I.C.C. 344 (354)*.

Where a difference in rates results from a substantial dissimilarity in transportation conditions, a finding of undue preference and prejudice is precluded. Since the usual haul of cement to North Dakota destinations is much longer than in the West generally, motor competition is practically nonexistent except from the producing point of Rapid City, S. Dak.; maintenance of prescribed western cement scale basis to that area and voluntarily-established motor-competitive scales on lower levels for shorter hauls in other parts of w.t.l. territory and in the Southwest rests on substantially unlike transportation conditions over which defendants have little influence, and does not violate §3.—United States v. Oklahoma City-Ada-Atoka Ry. Co., 319 I.C.C. 182 (184, 187)*.

Assuming, arguendo, that complainants have been injured by assessment of a charge for holding of grain cars at Grand Forks and Jamestown, N. Dak., for inspection and disposition orders, while no hold charge is assessed at rate-break markets, differences in transportation conditions justifying such treatment render any resulting prejudice not undue. Defendants have encountered increasing competition from unregulated motor carriers in movements from country origins to those markets, and such motor shipments are billed to the markets and do not go through Grand Forks or Jamestown. In retaining the free hold for inspection at the markets under the prevailing rates, defendants afford shippers a choice of

billing directly to the markets (in which case inspection is merged with delivery) or of holding their shipments at those points for inspection and subsequent disposition at other destinations; such services have enabled defendants to meet the unregulated competition which does not exist at Grand Forks or Jamestown. Thus, assailed charge does not violate §3(1).—Grand Forks Cham. of Com. v. Great Northern Ry. Co., 321 I.C.C. 356 (364).

78.—Extent of preference based on dissimilarity.—[Vol. 2].—The railroads show that they have reduced fine-coal rates below those for lump coal only to such destinations and by such amounts as is required by competition at those points between fine coal and other fuel such as natural gas. This is unquestionably a lawful ground for the difference in rates, and on this evidence and its determination that the fine-coal rates to Lynchburg are not otherwise unjust or unreasonable the commission found that there is no undue prejudice to Lynchburg in maintenance of rates to Danville and other places that are lower than the lump-coal rates by greater amounts than at Lynchburg. This conclusion is not unwarranted in fact or in law, thus is binding on the court; substained.—Lynchburg Traffic Bureau v. United States, 225 F. Supp. 874 (877)*.

80. Preference within carrier's control.—[Vols. 2, 6, 9, 11-19].—A carrier does not violate §3 by offering a lower rate than another carrier to a common point for the same distance, or the same or a lower rate for a longer distance, so long as it has no single-line rate and is not party to a joint rate to such common point from the point served by the other carrier; and even when the carrier is party to such joint rate, an order under §3 may be made against it only if it controls the joint rate. However, the "control" requirement exists only when the commission issues an "alternative order" requiring removal of discrimination and not when it uses the minimum rate power against carriers which are parties to the two rates claimed to be discriminatory.—New York Central R. Co. v. United States, 207 F. Supp. 483 (489, 490)*.

Since respondents do not control rates on grain from origins on lines of other railroads in considered origin area to Twin Cities and Twin Ports, reduced rates established by respondent are not unduly prejudicial to elevator operators at points on such other lines.—Wheat, Rye, and Flaxseed to Duluth and Minneapolis, 315 I.C.C. 89 (95); likewise, alleged prejudicial rate situation is not within defendant's control when it does not participate in allegedly preferential adjustment maintained by a different railroad.—National Sugar Mfg. Co. v. Missouri Pac. R. Co., 315 I.C.C. 244 (246).

Because nondefendant western railroads serving Illinois grant free transit on grain at points on their lines, defendants are forced by competition to do likewise, while charging for transit at Indianapolis and other official territory points east of Illinois. A substantial number of principal Illinois transit points are served by both defendants and nondefendants, and even at points served only by defendants their imposition of a transit charge would cause diversion to nondefendants, since competing processors on a nondefendant line would have advantage in bidding for grain that could be expected to divert grain at origin to elevators on that line. Thus defendants could not effectively control charges to a degree that would appreciably alleviate the prejudice alleged by Indianapolis; advantage of Illinois points is due to action of the western nondefendants, over which defendants have no control, and there is no sound basis for finding that resulting preference and prejudice is undue.—Indianapolis Board of Trade, Inc. v. Baltimore & O. R., 316 I.C.C. 87 (91-2).

There can be no undue preference or prejudice unless both the prejudicial and the preferential rates are within control of the same carrier or carriers; no defendant or defendants participating in United States factors of alleged prejudicial rates on coke from Indianapolis to Ontario destination are shown to be also participating effectively in alleged preferential rates from Buffalo and Detroit; moreover, coke produced at latter points originates at or near international boundary and the movement, except for origin switching, may be entirely in Canada; thus there is no sound basis for finding that assailed rates,

so far as the transportation takes place within United States, are unduly prejudicial.—Board of Directors for Utilities v. Canadian National Rys., 315 I.C.C. 471 (476).

Argument that there is no legal basis for a finding of undue prejudice to the port of Freeport, Tex., because none of carriers serving the preferred Houston port group, except the Missouri Pacific, also serves Freeport and there is therefore no common source of the discrimination, is without merit; see 219 ICC 151 and 313 ICC 691.—Brazos River Harbor Nav. Dist. v. Abilene & S. Ry. Co., 319 I.C.C. 54 (68)*.

Though the port of Corpus Christi, Tex., is served by three railroads which technically are not respondents to investigation, as the named respondents have generally restricted the export rates in issue to their own lines, they participate with a named respondent in domestic rates to Corpus Christi which also apply on considered export traffic. Thus they participate in determining the overall rate structure, and all of the southwestern railroads as a group effectively control the rates to the several ports in that territory.—Export Grain from Texas to Texas Points, 319 I.C.C. 16 (19).

One of respondents publishing reduced rates on meats from Ohio River crossings to Florida serves 3 of 7 midwestern origins which would be unduly prejudiced, and with its connections forms one of the most direct routes to Tampa, thus with other respondents is clearly in position to control rates from those three origins. In addition, respondents participate in joint rates from all seven prejudiced points to considered destinations, and traffic from both those and the preferred points is handled by same delivering carriers and is subject to same motor and private carrier competition. A finding of undue prejudice will lie where originating carriers are different and delivering carriers are the same; record shows that respondents effectively participate in both the preferred and the prejudiced traffic and as a group are the common source of the undue prejudice found.—Fresh Meats, Ill., Ind., Ky., Ohio & Mo. to Points in Fla., 318 I.C.C. 5 (11).

That removal of undue prejudice found to exist in reduced rates proposed by respondents under their right of independent action, as parties to ratemaking agreement under §5a, is within respondents' control is evident from their action on request of one protesting shipper to be included in the reduced adjustment.—Iron and Steel from Ill., Ind., Kans., and Mo. to Iowa, 315 I.C.C. 403 (410).

85. Participation in joint rates.—[Vols. 2, 6, 9, 11, 14, 16-19].—Since defendants Missouri Pacific and Texas & New Orleans service both Corpus Christi and Texas ports found to be unduly preferred, they and the other defendents, acting in conjunction with the originating lines, directly and effectively control assailed rates from Oklahoma, norhtern Texas, and eastern New Mexico to all of the considered ports. [See 251 ICC 137, 253 ICC 127.] Order entered requiring removal of undue prejudice to Corpus Christi.—Nueces P County Nav. Dist. No. 1 v. Atchison, T. & S.F. Ry. Co., 315 I.C.C. 155 (162).

Rates on furniture from all origins concerned to w.t.l. points north, on, and south of so-called furniture line are joint rates participated in by w.t.l. carriers generally, and those carriers as a group control the rates from w.t.l. origins and participate in through rates from the other territories; the eastern, southern, and southwestern carriers participate in the joint rates to points both north and south of the furniture line; all carriers whose participation is necessary in through rates from and to the points concerned are parties defendant, and it is within power of those respective groups to put an end to the undue prejudice found to exist in that the level of rates to points north of the furniture line exceeds that concurrently maintained on like traffic to points on or south of that line.—North Dakota Public Service Comm. v. Great Northern Ry., 315 I.C.C. 137 (145).

89. Competition with other rail carriers.—[Vols. 2, 6, 12, 19].—Defendants' granting of free transit on grain at Illinois points, to meet competition of nondefendant western railroads which do

so under authority of western grain rate case, while charging for transit at official territory points east of Illinois, found not unduly prejudicial to Indianapolis. As many principal Illinois transit points are served by both defendants and nondefendants, and same through rates apply over lines of both, defendants' imposition of a transit charge would divert traffic from their lines, since processors with choice of carriers would have incentive to buy grain from elevators on lines according free transit. Even at points served only by defendants, a transit charge would not remove the preference, since advantage of competing processors on nondefendant lines in bidding for grain could be expected to divert shipments at origin to elevators on those lines; rail competition which forced discontinuance of transit charges at such points has not diminished, and to distinguish them from other Illinois points solely because they are not served directly by nondefendants would ignore the competition at origins of the grain.—Indianapolis Board of Trade, Inc. v. Baltimore & O. R., 316 I.C.C. 87 (91-2).

90. Competition with water and/or truck carriers.—[Vols. 2, 6, 9, 11-19].—There is no substance to the commission's finding that dissimilar conditions justify the rate disparity between Stainislaus County and areas in the San Francisco rate group because competing motor carriers observe that grouping. Motor carriers are subject to the same restriction as railroads insofar as undue preference and prejudice is concerned, and to attempt to justify rate discrimination by the railroads on ground that the motor carrier discriminate simply begs the question, for discrimination by the motor carriers may well also be unlawful. Unlawful activity may not be justified by similar activity may not be justified by similar activity of one's competitors. For motor competition to rationally and legally serve as support for the commission's ultimate finding, there must be some showing that the motor rates are not themserves unlawful, but are somehow justified. The commission made no such finding, and there is no such showing in the record. The order set aside and the case remanded.—Stanislaus County v. United States, 236 F. Supp. 146 (149-50)*.

Motor competition on grain traffic to Corpus Christi, Tex., though admittedly less severe than to Houston-Galveston area, is substantial and increasing; the difference is in degree and does not justify maintenance of the prejudicial relation resulting from establishment of reduced truck-competitive export rates on grain from Oklahoma and northwestern Texas to the Houston-Galveston group but not to Corpus Christi.—Export Grain from Texas to Texas points, 319 I.C.C. 16 (25, 28).

History of the rail rate relationship between Freeport, Tex., and the Houston port group shows that motor competition has become de minimis as a defense of higher rates to Freeport. The only commodity for which that defense is now urged is grain, but if substantial motor competition for movement of grain and products from interior southwestern points to Freeport were made a condition precedent to equalization, it is unlikely that Freeport would ever become a port in any significant sense; those products do not now move into Freeport by either rail or motor carrier, and it is very unlikely they ever will until rate equalization attracts capital for building adequate grain handling and storage facilities. Existence of motor competition to the Houston group therefore does not justify the assailed disparity.—Brazos River Harbor Nav. Dist. v. Abilene & S. Ry. Co., 322 I.C.C. 529 (532-3)*.

91. Market competition. —[Vols. 2, 9, 12-19].—In establishing unit train rates on steam coal, based on annual volume minima, defendant acted lawfully to prevent further percentage decline in volume of coal delivered by it to electric generating plant at destination, as compared with natural gas. Similar annual volume rates on coal to utility companies were found not violative of §3(1) in 311 ICC 355 because of absence of objection by any coal shipper or receiver, and for same reason a like conclusion is warranted in instant case. Moreover, even different treatment of fine and lump coal has been

found not unlawful where former was faced with competition from other fuels such as natural gas; see 319 ICC 74.—Natural Gas Pipeline Co. of America v. N.Y.C. R. Co., 323 I.C.C. 75 (81, 85).

Though Oklahoma interests complain that under assailed rates on grain and products to the South their grain is excluded from southern markets, evidence fails to show that Oklahoma has suffered economically from those rates. Averages of actual rates from Oklahoma to Memphis are lower than those from allegedly preferred origins, and any difficulty of Oklahoma interests in shipping wheat and flour to the South is due at least partly to higher prices received by Oklahoma farmers. Moreover, principal movement of Oklahoma wheat is to domestic markets in Texas and Louisiana and to gulf ports for export. Assailed rates found not unlawful.—Southeastern Assn. of R. & Util. Commrs. v. A., T. & S.F. Ry. Co., 321 I.C.C. 519 (550-1)*.

Reduction of rates on corn and products from described w.t.l. area to Chicago group to meet market and unregulated truck competition is not unduly prejudicial to Kansas City, to which truck competition from those origins is negligible compared with that to Chicago. Moreover, grain tends to follow lowest transportation cost, and Chicago, traditionally a major market, has had increasing difficulty in drawing corn from those origins; some of the diversion is reasonably attributable to rate reductions to Kansas City and other southwestern gateways following 298 ICC 261. As Kansas City protestant was one of petitioners therein for relief for truck-competitive rates on coarse grains throughout western district, it cannot justly complain that Chicago and other points now faced with equally compelling competition are accorded reasonable reduced rates, merely because they do not reflect previously prescribed relations, rate graduations, or other requirements removed by that case.—Corn and Corn Products, Iowa, Nebr., Minn., S. Dak. to Ill., 318 I.C.C. 291 (294-5).

Nor is there any undue prejudice in failure to extend the reduced rates to St. Louis. The bulk of unregulated truck competition to that market originates in Illinois, not in considered area; coarse grains move southwest from St. Louis, and on such traffic it enjoys the same truck-competitive rates as Kansas City. Moreover, cost evidence indicates that the reduced rates would be noncompensatory to St. Louis.—Id., p. 296.

Proposed increased transcontinental rate from Memphis on furfural residue further processed than screened, and restriction of present transit rate to that which is only screened, would upset the competitive balance between protestant which grinds and screens such residue at Verdon, Nebr., and Pacific coast processors by disrupting the rate equalization preserved by decision in I. & S. Docket No. 7768. Proposed increase would apply on all protestant's shipments, while its Pacific coast competitors could obtain unprocessed residue from Memphis at the lower rate and reship it, after processing, at local rates which to most destinations are less than the total spread under the proposal, and would drastically curtail protestant's ability to compete on equal terms for a substantial share of the glue extender business. Even though it would apparently have a measure of rate equality to destinations in California and Oregon, only protestant is tied to an outbound rail movement, whereas its competitors already ship a large tonnage outbound by private truck, and proposed adjustment would accelerate that trend.—Transit of Furfural Residue at Various Points, 322 I.C.C. 794 (798, 801).

Though respondents' comparisons suggest that a large area of rate equalization would remain, their assumption that a rate disadvantage of 3 1/2 cents per 100 pounds should be disregarded is based on the illogical and unrealistic premise that protestant should be able to absorb a rate disadvantage of 70 cents a ton, since it previously cut its delivered price by that amount; it does not follow that because protestant makes a profit of over $2 a ton it could absorb an additional 70 cents in transportation charges and remain in business, since the record shows that any difference in delivered price would make a

difference in sales. Protestant's evidence concerning effect of the proposed adjustment on movement of the traffic is persuasive that it would favor the Pacific coast processors while seriously threatening protestant, and would therefore be unduly preferential and prejudicial in contravention of §3(1).—Id., pp. 801-2, 805.

One of the principal purposes of §3(1) was to eliminate favoritism among competitors. If carriers elect to establish rates to enable some shippers to meet commercial competition in particular markets, they must afford all shippers, similarly situated, an equal opportunity.—Oak Flooring—Pine Bluff, Ark., to Mich., N.Y., Ohio & Pa., 315 I.C.C. 77 (79). 77 (79).

All of protesting shippers have difficulty in competing at points in the East because of the substantially lower rates from Memphis which occasioned proposed reductions from Pine Bluff, Ark., and their competitive position will further deteriorate if their relationship with Pine Bluff is disturbed as proposed; threat of diversion to motor carriage differs little at any of competing origins; reduction restricted to Pine Bluff would unduly prefer shippers at that point and would subject protesting shippers to undue prejudice and disadvantage; not approved.—Id., p. 79.

94. Right to meet competition.—[Vols. 2, 6, 9, 12, 14, 16, 17]. Although 1958 reduction of bulk cement rates from Duluth-Steelton to other Minnesota points increased previously approved rate advantage over Mason City, Iowa, and though motor competition was shown from Duluth to only a few Minnesota destinations, that rate adjustment was compelled to meet a real threat of motor competition, which in several instances later materialized, that was absent from Mason City. Disruption of the prior relationship to disadvantage of Mason City was therefore justified, and resulting prejudice is not shown to be undue.—United States v. Oklahoma City-Ada-Atoka Ry. Co., 316 I.C.C. 731 (743, 756)*.

See also Boston & M. R. v. United States, §15(7), n. 25.

95. Nature and extent of competition.—[Vol. 2].—Assailed rates on wooden dowels and handle material are not unduly prejudicial by comparison with lower truck-competitive rates on certain other articles in lumber list; complainant is not in competition with shippers of articles taking the lower rates, nor is there any showing that the competitive factors affecting the assailed rates are similar to those which influenced establishment of the compared rates.—Union Fork & Hoe Co. v. Chesapeake & O. Ry. Co., 314 I.C.C. 784 (786).

96. Burden of proof.—[Vols. 2, 6, 9, 12-19].—To establish undue preference or prejudice, complainant must show that a rate disparity results in advantage to preferred points and disadvantage, or injury, to prejudiced points. In concluding that injury to the prejudiced area from a rate disparity is established by proof of existence of intensive competition and small profit margins in an industry highly dependent on transportation of its product to distant markets, the commission employed the proper test of injury; and ample evidence concerning character of the meatpacking industry supports its findings as to those factors.—Atchison, T. & S.F. Ry. Co. v. United States, 218 F. Supp. 359 (369,370)*.

The commission did not err in placing burden on defendants in its proceeding to show that dissimilar transportation conditions justify the rate disparity in issue; where an aspect of transportation conditions is one as to which railroads have peculiar knowledge, they should bear the burden of proof as to that issue. Once complainant has established a prima facie case of undue prejudice or preference, without reference to carrier competition, defendent carrier has the burden of showing that carrier competition justifies the rate disparity; railroads, as defendants, had opportunity to present evidence on motor competition and showed no lack of means to discover facts concerning amount thereof. Complaint dismissed.—Id., pp. 374-5, 377.

Before the commission can equalize export rates, there must be an adequate factual showing of (1) prejudice, and (2) prejudice which is undue resulting from a

disparity in, or a misalignment of, rates. Plaintiffs argue that to make an initial showing of prejudice, rates to a more distant port must be shown to be higher relative mileage considered than those to a nearer port, and that there is no showing of prejudice if rates per mile are not higher to the more distant port; but the court rejects such mechanical definition of prejudice. Uncontradicted testimony in the record shows that Corpus Christi, Tex., is prejudiced in that, though it has ample facilities, it cannot get cotton by rail (and very little by truck) from considered origins for export; and that this result is a direct consequence of the rail rate structure. It costs more to ship to Corpus Christi than to other Gulf ports, and per mile or "distance considered" rates do not figure in shippers' calculations of their shipping costs.—City of Galveston v. United States, 257 F. Supp. 243 (247)*.

Persons, Localities, and Particular Descriptions of Traffic

100. Persons.—[Vols. 2, 6, 9, 11, 19].—Complainants' vague and general declarations as to competition and injury fail to show that New York City receivers are unduly prejudiced by defendants' maintenance of rates on fruits and vegetables from the Southeast and Southwest to New York City stations differentially higher than to New Jersey stations in New York rate group. None of their commercial witnesses was able to show that he had been adversely affected by the disparity in marketing his products or that any competitor had benefited thereby. There is no indication that receivers at Manhattan pier stations are even remotely prejudiced by existence of lower rates on some of the traffic to other New York stations; and though a separate unloading charge is assessed at the pier stations, receivers' option of taking delivery without unloading by carrier precludes a finding of undue prejudice.—Port of New York Authority v. Aberdeen & R. R. Co., 318 I.C.C. 469 (473, 476-7)*.

Proposed round-trip rates on motor vehicles on trilevel flatcars between Chicago, St. Louis, and Kansas City are not unjustly discriminatory or unduly prejudicial because only Ford Motor Co. has assembly plants at all three points; General Motors Corp. has a plant a short distance from Chicago and could probably use the rate from that point; moreover, only Ford sought rates for rail movement in multilevel equipment over those routes, and no shipper appeared in opposition to the proposed rates.—Motor Vehicles on Trilevel Flatcars—Chicago, 318 I.C.C. 89 (92-3).

101. Status of shipper.—[Vols. 2, 6, 9, 12].—Discrimination in favor of the public is not opposed to public policy, since it benefits the public generally by relieving them of part of their burdens, and in absence of legislation on the subject such discrimination cannot be held illegal as a matter of law. Congress has specifically legislated this policy into §22, and such action is not remedial; there is therefore nothing unlawful in the Federal government securing, by virtue of §22, a lower rate than other shippers; a rate discrimination in favor of the government is an advantage to all the people, not a legal discrimination against any one of them.—Tennessee Products & Chem. Corp. v. Louisville & N.R., 319 I.C.C. 497 (503).

See also Loading of Freight by Shippers, §2, n. 53.

103. Passengers; race; tickets.—[Vols. 2, 9, 11-19].—No State may require racial segregation of intrastate or interstate transportation facilities. The question is no longer open; it is foreclosed as a litigable issue.—Bailey v. Patterson, 369 U.S. 31 (33).·[Not arising hereunder.]

Policy and practice of affording separate passenger terminal facilities according to race, enforced or authorized by state law or by any other form of state action, not only offends provisions of the statute but also violates the Fourteenth Amendment; in addition, insofar as state-imposed segregation bears upon interstate travelers, it offends the Commerce Clause. Defendants city and its officials, by maintaining signs on sidewalks adjacent to passenger terminal which indicate that any portion of those facilities are separated on the basis of race, effect racial segregation therein in violation of the Commerce Clause, federal statutes,

and the commission's regulations. And defendant carriers, thoughnot responsible for the signs, are proper parties in injunction proceeding since they utilize those terminal facilities. Injunction should be issued against carrier and noncarrier defendants.—United States v. City of Jackson, Miss., 318 F. 2d 1 (5-7, 10, 17)*.

Louisiana statutes requiring separation of passengers according to race in common carrier terminal facilities, and posting of signs therein designating those facilities for such separate use, conflict with the commission's order in 297 ICC 335, contravene provisions of §3(1), and are unconstitutional and null and void; enforcement thereof enjoined.—United States v. Lassiter, 203 F. Supp. 20 (22-3, 25).

When defendant railroad, through its ticket agent, sold plaintiffs a round-trip tour which they were led to believe was a regularly scheduled escorted tour operated by defendant travel agency engaged in conducting escorted railroad tours advertised and sold to the public by both defendants, and travel agency declined to accept plaintiffs on that tour because they were negroes but offered to accommodate them on an "independent," or non-escorted, tour departing a day earlier than the escorted tour, plaintiffs were discriminated against because of their color. Further, railroad also discriminated against plaintiffs in that it charged them more than the tariff rate for their trip, if it intended to sell them a non-escorted tour. Plaintiffs are entitled to recover compensatory and punitive damages and their costs, including attorney's fees.—Wright v. Chicago, B. & Q. R. Co., 223 F. Supp. 660 (661-2).

105. Carriers.—[Vols. 2, 6, 9, 11, 13, 17-19].—Any injury that may be suffered by connecting carriers as result of respondent's cancellation of reciprocal switching on competitive traffic to and from specified industries and team tracks at Richmond, Va., is not of type which the commission is empowered to prevent, when all connecting lines would be treated alike; moreover, the limited movement reflected in only 43 cars handled inbound by one protestant over a period of a year indicates that any loss of business would be inconsequential.—Switching at Richmond, Va., on Richmond, F. & P. R. Co., 316 I.C.C. 786 (792, 793).

106. Localities; regions; territories.—[Vols. 2, 6, 9, 11-19].—The commission's ultimate finding that assailed rate situation is unduly prejudicial to Stanislaus County, Calif., must rest upon subordinate findings of (a) disparity in rates, (b) substantial similarity of transportation conditions, and (c) resulting injury. However, the order under review merely recites the California district court's annulment of prior commission orders holding the assailed rates not unduly prejudicial, because the facts failed to justify unequal treatment; the order thereupon completely reverses such prior findings and finds in general terms that the rates in question were unduly preferential and prejudicial. Such general wording of the controlling statute falls short of being adequate.—Northern Pac. Ry. Co. v. United States, 241 F. Supp. 816 (818)*.

While there is no dispute that disparity of rates has been established, and in view of the limited record presented the court is not in position to disagree with the California court's conclusion as to injury, there is nothing in the commission's order by way of basic findings as to similarity of transportation conditions. The order relates to Stanislaus County as a blanketed entity, but there is no finding that every point in the county is prejudiced. The county has political boundaries, but there is nothing in the record submitted to show that these are congruent with boundaries determined by rate considerations, and no mention is made, positively or negatively, of pertinent supporting factors such as distance, terrain, and the like. There is nothing to support the conclusion that all points on all lines (main and branch) in the county were prejudiced or that anything but exact equality was prejudicial. Order set aside and the case remanded with direction to the commission to take additional evidence respecting similarity of transportation conditions.—Id., p. 818.

Although, when the San Francisco rate group was formed, points in the preferred California counties were intermediate to

San Francisco (to which rates were depressed by water competition) over rail routes to and from the Pacific Northwest and intermountain areas and were included in that group to avoid fourth-section departures, it is undisputed that transportation conditions have since changed, and from standpoint of intermediacy any difference between those points and points in Stanislaus County is now purely historical. There is no evidence whatsoever of any present difference with respect to intermediacy, and purely past intermediacy may not rationally serve as any support for the commission's ultimate finding that the disparity in rate treatment of the preferred area and Stanislaus County is not unduly prejudicial. Intermediacy that has long ceased to exist may not be considered justification for present-day disparity in rates as between areas otherwise similarly situated. The commission's order set aside and the case remanded.—Stanislaus County v. United States, 236 F. Supp. 146 (149)*.

Though undue prejudice to a locality is ordinarily suffered vicariously, through injury to shippers doing business therein, a locality may show undue prejudice within §3(1) by evidence other than that developed through shippers or receivers of freight. While contemplated removal of New York produce terminal from the Washington Street area may not be prompted by assailed rate disparity, both the City of New York and the favored New Jersey municipalities hope to secure the wholesale produce market for the metropolitan area for their respective districts. Relocation of the market within the next few years is highly probable, and assailed rate disparities favoring New Jersey are large enough to influence the decision; the choice should not be limited to one between New Jersey points and points which defendants, by publication of the higher rates and charges to New York City, have effectually transferred to the Boston rate group.—Port of New York Authority v. Aberdeen & R.R. Co., 321 I.C.C. 738 (751)*.

Moreover, the New Jersey legislature has recently provided by law for establishment of a Public Market Commission to finance and operate a public produce market, and if New York City should be adversely affected by the rate handicap the commission would be unable under §3(1) to undo the damage. Therefore, the powers conferred by §3(1) should be exercised so that relocation of the Washington Market can be decided in accordance with the tradition of rate equality that has existed for over a century. Assailed rates on fresh fruits and vegetables from the Southeast and Southwest to New York City stations, and on fresh fruits from Colorado and Kansas to New York City piers, higher than rates to New Jersey terminals in New York rate group, found unduly prejudicial.—Id., p. 752. [But see dissent.]

Complainant has not established that Lynchburg, Va., is unduly disadvantaged in attracting or retaining industries by maintenance of relatively lower rates on fine coal to Danville and points in the Carolinas when it is not shown that any new industry has refused to locate at Lynchburg, or that any has left that city, because of the rate situation, or that any industry was induced thereby to locate at any of the alleged preferred points.—Lynchburg Traffic Bureau v. Chesapeake & O. Ry. Co., 319 I.C.C. 74 (77-8)*.

There is no valid basis for condemning proposed reduced rates on grain and products from Pittsburgh to trunkline and New England territories when general allegations of Philadelphia interests that they are unduly low and constitute an undue preference of Pittsburgh and undue prejudice to present commonly related points are unaccompanied by substantive proof as to any specific unlawful effect, and no party located at any alleged prejudiced origin on respondents' lines appeared in opposition to the rates. The only opposition from any party in the Pittsburgh area was that of a mill operator at Fredonia, Pa., and since that mill does not use rail transportation in its distribution of flour and feed and is not located at a point on line of any respondent, any alleged discrimination between that point and Pittsburgh in outbound grain-and-products rates is not unlawful.—Grain from Pittsburgh, Pa., to Eastern Base Points, 322 I.C.C. 218 (228-9)*.

Undue prejudice in assessment of a charge for holding of grain cars for inspection and disposition orders at Grand Forks

and Jamestown, N. Dak., while no hold charge is assessed at rate-break markets, is not established by vague and general declaration of complainants' witnesses. Shippers such as country elevators and Commodity Credit Corp. can elect where to have their shipments inspected and thereby avoid payment of assailed charge, or they may bill shipments direct to Grand Forks or Jamestown, in which case inspection is merged with delivery. Grain trade interests at latter points have shown no material injury as result of assailed charge, and it may not be presumed in light of shippers' admissions that the majority of their grain shipments are inspected at those points and absence of evidence that number of shipments inspected thereat has materially decreased as result of that charge.—Grand Forks Cham. of Com. v. Great Northern Ry. Co., 321 I.C.C. 356 (363-4).

Rates on grain and products from Oklahoma to West Virginia, Maryland, Delaware, northern Virginia, and District of Columbia are not shown to be unduly prejudicial because average rate exceeds that from Kansas via same gateways for comparable distances, or because rates from Oklahoma are approximately the same for short-line as for circuitous routes. Oklahoma rates to those official-territory points are integrated with the rate structure from the west generally, and any reduction would have to be made applicable over routes via Kansas City and St. Louis or Chicago to give originating lines their long hauls, resulting in undue prejudice to competitive origin areas in Nebraska and Kansas, rates from which to the East are not in issue,—Southeastern Assn. of R. & Util. Commrs. v. A., T. & S.F. Ry., 321 I.C.C. 519 (548-9)*.

That proposed local rates on corn and products from certain Illinois and Indiana origins on New York Central to Danville, Ill., and proportionals beyond to eastern destinations will result in lower combinations over Danville than over Chicago from some origins close to Danville, from which a higher local rate applies for the longer distance to Chicago, is not unduly prejudicial, especially as Central proposes also to publish single-factor rates from those origins via Chicago in same amount as the Danville combination and on same level as from other origins on its line. And as none of respondents serves Milwaukee, and any disadvantage accruing to protestants at that point is due to their location, they are not unduly prejudiced by resulting difference in rates.—Corn and Corn Products from Ill. and Ind. to the East, 319 I.C.C. 605 (611, 617-8).

Proposed reduced eastbound transcontinental rates on lumber are not shown to be unduly prejudicial to southern producers. Even though western shippers' rate disadvantage may have been reduced percentagewise by holddowns prescribed on lumber in various general increase cases, the commission found them necessary to preserve the competitive relation between the West and the South and not unduly prejudicial to the South. Moreover, western producers must meet mill prices of other lumber producers to remain competitive, and under the reduced rates they will still have to pay upwards of $300 more for each car of lumber shipped to common markets than their southern competitors. Southern producers' difficulties in competing with western producers cannot be attributed to any transportation cause.—Reduced Transcontinental Lumber Rates, 1961, 318 I.C.C. 815 (826, 844-5).

Reduced flat and proportional rates on coarse grains from Kansas City and Omaha groups to Gulf ports for export do not unduly prefer Missouri River markets in relation to Chicago. The Chicago market is not completely removed from application of the reductions; failure of certain origin lines to equalize rates over their direct routes to Chicago merely restricts use at Chicago of Gulf ports' grain billing, and such limitation on interchange of billing does not establish undue prejudice to Chicago; from other origins where the previous rate relationship may have been changed by the reductions from the Missouri River crossings, no actual injury to Chicago interests is shown. In the circumstances, disturbance of an adjustment established to meet barge competition at the Missouri River markets is not warranted.—Export Grain and Grain

Prod.—WTL to Gulf-Lake Ports, 319 I.C.C. 729 (743-4)*.

Contention that defendants' imposition of a separate charge for transit of grain at Indianapolis, while free transit is permitted at Illinois points, has caused serious competitive handicap to Indianapolis is supported only by general statements and evidence of total amounts paid for that service in recent years; however, number of carloads of grain transited at Indianapolis not only has not declined, but increase therein in past 10 years has exceeded that at such significant Illinois points as Decatur, Springfield, and Peoria. Assailed charge found not unduly prejudicial.—Board of Trade of Indianapolis. Inc. v. Baltimore & O. R., 316 I.C.C. 87 (92).

Proposed multiple-car flat rates on grain from Kansas City and Omaha groups to Lawrenceburg, Ind., will not result in any undue prejudice to protestant handling rail-barge grain at Caruthersville, Mo.; as no transit is authorized, grain moving under proposed rates cannot be processed by protestant's competitors at St. Louis-East St. Louis; and as all-barge movement with which they are designed to compete doubtless also affects Caruthersville, no reason appears why, with recent installation of direct rail-barge transfer facilities at that point, competition over the more direct routes, all-barge or all-rail, cannot be met at compensatory rates over the route used by protestant.—Grain—K.C., Omaha & Related Origins to Lawrenceburg, 315 I.C.C. 83 (86-7).

Reduced rates on grain from certain North Dakota origins to Twin Cities and Twin Ports appear to be improperly graded, in unjustified disregard of long-established origin relations, resulting in spreads in rates from competing origins where none existed before, and therefore in undue preference and prejudice.—Wheat, Rye, and Flaxseed to Duluth and Minneapolis, 315 I.C.C. 89 (95).

When proposed reduced rates on iron and steel articles would cause a disparity to disadvantage of receivers at Sioux Falls, S. Dak., and shippers at Kokomo, Ind., and Granite City, Ill., who are in keen competition with shippers and receivers at points embraced in proposed adjustment, and such disparity is not justified by transportation standards, the proposed rates violate §3(1).—Iron and Steel from Ill., Ind., Kans., and Mo. to Iowa, 315 I.C.C. 403 (410).

106a. Ports.—[Vols. 9, 11, 12, 14-19].—If inability of Corpus Christi, Tex., to obtain export cotton traffic from considered origins results from natural disadvantage and location of that port in relation to Houston-Galveston, the commission lacks authority to equalize assailed rail rates; natural advantage which belongs to a locality does not constitute a prejudice. However, there being more to natural advantage and location than mileage differences, shorted mileage to one port does not automatically give immunity from rate equalization. To bring a rate difference within the prohibition of §3, record must show that the discrimination practiced is unjust when measured by the transportation standard; and, while mileage is important, "transportation standard" includes other transportation conditions.—City of Galveston v. United States, 257 F. Supp. 243 (248)*.

The question of mileage is not a simple one; however, the commission gave due consideration to the distance factor in determining that considered export cotton rates were unduly prejudicial to Corpus Christi when, without rejecting mileage differences computed on comparisons of short-line distances from selected origins and on a weighted average urged by Corpus Christi interests, it emphasized the docket 28300 distances (urged by Galveston interests) to give consideration to greatest mileage differences presented and, using those computations, it made specific findings. In addition, the decision pointed out that (1) those ports had been equalized on cotton for many years prior to railroads' voluntary reduction of rates to Houston, (2) rates on certain other commodities from considered origins and others are equalized, and (3) general terrain in the area is the same whether traffic moves to Corpus Christi or Houston-Galveston. The commission's ultimate conclusion is well within its broad discretion to accommodate the factors of transportation, competition

and distance; sustained.—Id., pp. 248-9.

While unlawful discrimination can be effected as readily by giving more transportation for the same price as by charging a higher price for the same transportation, the commission has never adopted a doctrinaire position that failure to bring rail charges into exact accord with differences in distance is a preference or prejudice, much less an undue one; neither has it insisted that rates to or from competing markets or ports should cover cost by precisely the same margin, Hence, fact differentials based on longer mileage and higher cost may not be an undue prejudice to a higher rated port does not mean, in and of itself, that equalization would unduly prejudice the formerly lower rated one.—New York Central R. Co. v. United States, 207 F. Supp. 483 (490)*.

The commission's past pronouncements do not so bind it that it may not lawfully adopt a policy that equalization of import rates for interior distances differing as significantly as those considered violates §3, even though, as result of equal ocean rates, this will mean that certain ports will be excluded from important categories of traffic. However, its disapproval of reduced rates on import ore from New York, the same as those from Baltimore and Philadelphia, cannot be sustained when its report contains no such general pronouncement or any sufficient reason why it departed from a construction of §3 to which it has generally adhered for over 50 years and which it has previously applied to the rates in issue. The commission must explain its conclusion with a clarity and make supporting findings with a specificity beyond those in the report; remanded.—Id., pp. 492, 496.

In resting its decision disapproving reduced export-import rates between ports of New York, Albany, Boston, and Portland and certain central territory, proposed by plaintiffs to equalize those ports with southern tier of North Atlantic ports, the commission apparently relied on the 1935 amendment to §3(1) which added "ports, port districts, etc." to the interests protected by that section. However, neither legislative history nor plain words of the amendment indicate that any change in prevailing rules respecting undue preference and prejudice or any special treatment of ports and port districts was intended. The commission erred in applying §3(1) too narrowly and in not giving due weight to interests of shippers, receivers, carriers, and inland localities; order set aside.—Boston & M. R. v. United States, 202 F. Supp. 830 (836, 838)*.

In view of the applicable law, the commission's reliance on a single subsidiary finding, i.e., the distance disadvantage of the northern tier ports, was also erroneous. The port differential was established in the first place to place all North Atlantic ports on a parity with respect to aggregate rail-ocean charges, and no consideration whatever was given to disparity in rail distances then or later; on the contrary, the "distance principle" was specifically rejected as controlling port relationships. Moreover, one purpose of the 1935 amendment was to permit all ports and carriers serving them to compete for all export and import traffic, thereby maximizing number of ports available. The commission's finding, if pressed to its logical conclusion, would result in traffic flowing only through the most distance favored port; if applied only in instant case, its decision is arbitrary and capricious.—Id., pp. 836-7.

Pursuant to §15(7), carriers may voluntarily publish rates to meet competition, within the zone of reasonableness, in which case the issue to be decided is whether proposed rates are lawful. While distance differences might be relevant insofar as they reflect differences in the cost and value of rail services to and from the northern and southern tier ports, the commission made no such cost or value findings nor does the record contain evidence from which such findings could be made. Also, the commission's findings that equalization was not necessary to enable port of New York to compete, and that it would not materially affect flow of traffic through the other three ports, contradict its ultimate conclusion of undue prejudice to the southern tier ports, and ignore plaintiffs' right to attempt to gain some of considered traffic for their lines.—Id., pp. 837-8.

Discrimination was the principal evil at which the Interstate Commerce Act was aimed; and legislative history of the 1935 amendment of §3(1) extending the prohibition of undue discrimination or prejudice to ports and port districts shows that it was intended to promote freedom of movement of export, import, and coastwise commerce through as many ports of the country as circumstances would permit, without restriction or impediment not clearly shown to be economically justified; also to afford complaining ports a forum in which to seek relief from rate adjustments which tend to deprive them of a fair opportunity to participate in the traffic.—Brazos River Harbor Nav. Dist. v. Abilene & S. Ry. Co., 319 I.C.C. 54 (65)*.

While there is abundant evidence that shippers of grain and products through Texas ports are unduly disadvantaged by defendants' failure to accord the port of Freeport rate parity with Houston, it does not appear that exporters and importers of other commodities have suffered any undue prejudice by reason of Freeport's rate handicap, and question of port prejudice must therefore be determined with reference to Freeport itself. Differences in distance from interior southwestern territory to Freeport and to the Houston group are so trivial as strongly to support inclusion of Freeport in the group; lack of substantial motor competition at Freeport is not controlling, since the most important commodities involved move predominantly by rail and do not move freely against a rate handicap; unless it is accorded rate parity the fledgling port of Freeport cannot compete and the sizable investment already made in it may be lost. Assailed class, exceptions, and commodity rates on export, import, coastwise, and intercoastal traffic between Freeport and the interior territory found unduly prejudicial to extent they exceed the corresponding rates to and from the Houston group.—Id., pp. 66, 67, 68.

That rates for export or coastwise movement of potash via gulf ports have been depressed ever the years to afford New Mexico producers opportunity to share in the world market is no justification for maintaining lower rates to one gulf port than to another; rates to the Houston group have also been influenced by the Santa Fe's desire to retain its single-line haul to that group. Nor is the disparity justified by claim that earnings under the rates from Carlsbad are so low that defendants cannot afford to extend them to Freeport; possible loss of carrier revenue is not a defense to maintenance of unduly prejudicial or preferential rates.—Id., 322 I.C.C. 529 (533)*.

Since transportation conditions as between Freeport and the Houston group are found to be substantially similar, no good reason appears for the disparity in rates, charges, rules, and transit provisions to and from the respective ports; abundant shipper testimony indicates that the combined difference in rates and transit arrangements is the cause of Freeport's inability to attract traffic. Notwithstanding equalization with the Houston group was denied the port of Beaumont, Tex., in 251 ICC 137, decision in instant case must stand on its own merits; Freeport may not be denied a rate adjustment to which it is entitled merely because Beaumont was not accorded similar relief 22 years earlier.—Id., pp. 533-4.

Only a comparatively small volume of export grain and products is moving from origins on defendant's lines in northern and central Illinois to Mobile, Ala., and Pascagoula, Miss., because of defendant's maintenance of rates 3.5 cents higher to those ports than to New Orleans, Baton Rouge, and Destrehan, La., and evidence is convincing that the two complaining ports cannot compete with the New Orleans group except at equal rates. In a rate adjustment on export traffic, the fact that distances to Mobile and Pascagoula are very slightly longer than to New Orleans, compared with average total hauls to all the ports, cannot be recognized as justification for prejudicial treatment of the complaining ports. Assailed rates found unduly prejudicial to extent they exceed the rates to the New Orleans port group.—Standard Milling Co. v. Illinois Central R. Co., 321 I.C.C. 525 (524, 260).

Where carriers experience substantial competition at both prejudiced and preferred ports, differences in intensity of such competition do not preclude a finding of violation of §3. Defendant effectively

controls the rates to all involved ports, at which barge competition is experienced to a relative degree, considering their respective size and facilities; moreover, defendant maintains the same rate level to all the ports from other stations on its lines in same origin State, and barge competition has not resulted in rail rate disparities.—Id., pp. 260, 261.

It is clear from report in 315 ICC 155 as well as from instant record that Corpus Christi cannot compete for grain traffic with other Texas ports except at equal rates. Though reduced export rates on grain and products from Oklahoma and northwestern Texas, and on coarse and sorghum grains from Oklahoma, to Galveston, Houston, and Texas City were motivated by truck competition which is more severe than to Corpus Christi, there is substantial and increasing motor competition for that traffic to latter port. Moreover, the reduced rates also apply to Port Arthur, to which there is little or no truck competition on grain. Revenue effects of possible diversion of traffic from carriers serving the Houston-Galveston group as result of reduction of rates to Corpus Christi are not a valid reason for denying it opportunity to share in the traffic. Rates under investigation found unduly prejudicial to Corpus Christi to extent that rates to latter exceed corresponding rates to the other ports.—Export Grain from Texas to Texas Points, 319 I.C.C. 16 (25, 28).

Although reduced multiple-transit rates on grain and products from northern Idaho, Oregon, and Washington to coastal terminals are compensatory and pose no threat to continued barge or truck-barge competition, on traffic from portions of that origin territory they disrupt the rate parity prescribed in 38 ICC 16 between Astoria, Oreg., and the other terminals. Movement of grain through Astoria is essential to continued successful maintenance of that port, and respondents offer no convincing reason for departing from the prescribed parity. Disruption of the reasonable and lawful rate parity results in undue prejudice to Astoria which respondents must remove by establishing multiple-transit rates which restore such parity.—Grain from Idaho, Oreg. & Wash. to Ports in Oreg. & Wash., 319 I.C.C. 534 (563)*.

There is substantial motor competition on grain from Oklahoma, eastern New Mexico, and Northern Texas to Corpus Christi, Galveston, and Houston, and such competition to Corpus Christi is at least as intense as to Galveston and Port Arthur and is increasing more rapidly than to Houston. This, together with facts that a slight difference in price of export grain at the ports will determine the port of export, and that defendants have established reduced motor-competitive rates, lower than those sought by complainant, on sorghum grains from same origin territory to all Texas ports, including Corpus Christi, warrants conclusion that differences in motor competition do not justify any rate differential in favor of Galveston, Houston, and Port Arthur. Assailed rates to Corpus Christi are unduly prejudicial to extent they exceed those to the other Texas ports.—Nueces County Nav. Dist. No. 1 v. Atchison, T. & S.F. Ry. Co., 315 I.C.C. 155 (158-9, 160, 163).

However, since competition of Corpus Christi is with the Texas ports and only to a minor extent with New Orleans, a finding of undue preference in assailed rates to New Orleans is not warranted.—Id., p. 162.

After Southern Ry. instructed southern carriers' tariff agent to equalize export-import rates between Morehead City, N.C., and points in interior southern territory with those to and from Wilmington, N.C., and Seaboard Air Line issued instructions that Wilmington differentials under Morehead City be maintained, railroads serving other South Atlantic, Virginia, and gulf ports excluded Wilmington and Morehead City from readjustment of certain export and import rates. Thus, railroads serving Morehead City and Wilmington have arbitrarily prevented those ports from enjoying rate adjustments which appear both lawful and necessary for both of them to participate in the traffic on just and reasonable bases. Exclusion of either or both of those ports from such adjustments places them under a serious handicap for which no

justification appears, and which is unduly prejudicial (citing 128 ICC 349).—City of Wilmington v. Alabama G.S. R. Co., 316 I.C.C. 709 (711, 724)*.

Considering needs of the respective ports, available port facilities, volume of traffic moving through each, needs of the shipping public, and the large number of southern territory points from and to which those ports are now equalized, equal export-import rates between the ports of Wilmington and Morehead City and considered interior points would not be unlawful in instances where the docket No. 28300 class-rate distances between such interior points and Morehead City do not exceed those between such points and Wilmington by more than 25 percent; where the difference in distances exceeds 25 percent, lawful differentials, Morehead City over Wilmington, will be those resulting from rates based on the freight traffic managers' straight and modified formulas described on p. 715.—Id., p. 725.

Although assailed rates on export shipments of bentonite clay, minimum 60,000 pounds, from Belle Fourche, Wyo., to Great Lakes ports are higher mile-for-mile than export rates to Gulf ports on 100,000 minimum, because of different terminal conditions total charges per ton for ship-side delivery are greater on shipments to the gulf than to the lake ports. As there is considerable evidence that differences in transportation charges often affect shippers' choice among competing ports, any diversion of traffic to the gulf ports was caused by reasons other than level of the assailed rates. Since there is no showing that the mile-for-mile disparity in rate levels has resulted in, or under the circumstances will cause, any injury to complainant or the Great Lakes port interests, assailed rates are not unduly prejudicial.—American Colloid Co. v. Akron, C. & Y. R. Co., 321 I.C.C. 91 (112, 114).

Assailed rates on wheat and flour from Kansas, Oklahoma, and Texas to Lake Charles, La., for export are not unduly prejudicial compared with reduced rates from same origins to Texas ports, when latter were compelled by severe motor competition not affecting the movement to Lake Charles.—Lake Charles Harbor & Term. District v. Atchison, T. & S.F. Ry. Co., 315 I.C.C. 485 (489-90).

Nonapplication of reduced transcontinental lumber rates and increased minima to lighterage deliveries is not shown to be unduly prejudicial to New York in exportation of lumber when deliveries at allegedly preferred ports are made directly to steamship piers by rail, with little increase in cost for moving the additional weight, whereas cost of lighterage delivery varies almost directly with weight of the load.—Reduced Transcontinental Lumber Rates, 1961, 318 I.C.C. 815 (846-7).

See also Iron Ore from Eastern Ports to C.F.A. Points, §15(7), n. 72.

Opposing Tennessee River port interests would not be unduly prejudiced or unjustly discriminated against by proposed reduced rates of Southern Ry. on grain in multiple-car shipments in jumbo hopper cars from Mississippi and Ohio River crossings to the South when transportation conditions involved in their receipt of grain, including fact that Southern does not serve the considered ports, are not comparable to those obtaining under the proposed rates.—Grain in Multiple-Car Shipments—River Crossings to So., 318 I.C.C. 641 (686)*.

Proposed absorption of port charges on lumber and plywood imported through Los Angeles and Long Beach, when trucked by shippers to designated interior California points for storage and processing prior to rail movement to transcontinental destinations, would not unduly prejudice north Pacific coast ports even if respondents served them, since rates and charges paid the railroads for transportation services by shippers using the California ports would not differ from those paid at the north coast ports, and they would also incur expense of trucking to the interior points. Owing to lack of the requisite facilities for storage and processing, the California ports are at present unable to compete with the north coast ports, and it is significant that there is no shipper opposition to the proposal at latter ports or elsewhere.—Absorption—Lumber & Plywood—Pac. Coast Interior Orig., 316 I.C.C. 15 (23, 25).

And though respondents serve protesting gulf ports, latter would not be adversely affected, since the proposed absorptions would not reduce cost of using the California ports below cost of using the north coast ports; there is no relation between the gulf and the Pacific coast ports respecting traffic to midcontinent points, the rate structure from the gulf ports being keyed to competition from eastern ports. Moreover, respondents offer to publish similar privileges at any port they serve, upon request therefor.—Id., pp. 23, 25, 26.

107. Group adjustments.—[Vols. 2, 6, 9, 11, 12, 14, 15, 17-19].—While longstanding rate relations should not be disturbed except for good reason, fact that proposed distance rates on liquefied petroleum gas in jumbo tank cars will disrupt origin groups and group relations observed in present rates for standard-car shipments and long maintained in connection with rates on refined petroleum products does not violate §3. Pipeline, motor, and water rates are based on mileage without regard to rail origin groupings, and existing competition from those modes forced the railroads to disturb the existing rate structure by changing it to a mileage basis. Since the proposed rates are based on docket 28300 groups and mileages, all shippers are on an equal basis distancewise, and respondents' action was necessary to allow them to remain competitive and at same time allow producers and distributors equal access to markets.—Liquefied Petroleum Gas in Jumbo Tank Cars—S.W.F.B., 319 I.C.C. 31 (39-40).

108. Effect of grouping.—[Vols. 2, 6, 9, 16, 18].—While the railroads attempt to justify the commission's finding that the rate disparity between Stanislaus County and areas included in San Francisco rate ground is not unlawful, on ground that that group is long established, many industries have presumably located in the preferred territory in reliance on the lower rates, and it would be unjust to deprive them of the advantage they have long enjoyed merely because the area they are in has ceased to be intermediate to San Francisco, no order based on such a ground could be affirmed. Conditions violative of law cannot be justified on ground that they have existed for a considerable time; that argument would lead to the conclusion, contrary to the purposes of §3(1), that any inequity of long standing has somehow been transmogrified by time into a vested right.—Stanislaus County v. United States, 236 F. Supp. 146 (151)*.

112. Commodities; particular traffic.—[Vols. 2, 6, 9, 11-17, 19].—Defendent pipeline's refusal to accept certain crude-oil shipments for transmission in its "asphalt sour steam" was not unduly prejudicial when it is not shown that competing patrons were permitted to transport oil of comparable characteristics in that stream; on the contrary, defendant's policy of excluding all crude oil exceeding certain gravity was enforced as to complainant and all others without discrimination.—Denver Oil Co. v. Platte Pipe Line Co., 316 I.C.C. 599 (603)*.

There is no discrimination against independent oil companies in fact that the major oil companies which own defendant ship their higher gravity oils with the independents' lower gravity oils. High-gravity crude oil usually brings a higher price than low-gravity, and shipper placing low-gravity oil in the steam is given a debit, while shipper of high gravity oil receives a credit; these differences in value are adjusted by amounts paid to or collected from the various shippers by company that acts as oil clearinghouse for them. Thus the differences complained of result from the price or value of the product, not from defendant's action.—Id., 319 I.C.C. 725 (727-8)*.

Rates on scrap iron or steel between points in official territory are not shown to be unduly prejudicial in relation to rates on iron ore and pig iron. Scrap iron has not been at a market disadvantage compared with those commodities, and difficulties experienced by scrap dealers in recent years are attributable, not in major degree to rates on iron ore, pig iron, or manufactured iron and steel, but to decline in steel production and resulting increased competition among scrap dealers and brokers. Transportation characteristics of the compared commodities vary widely, and there is no justification from a transportation standpoint for requiring a rigid rela-

tionship between rates on scrap and those on any of the other commodities.—Institute of Scrap Iron & Steel, Inc. v. Akron, C. & Y. R., 316 I.C.C. 55 (66, 67).

114. Units of shipment.—[Vols. 2, 6, 9, 14, 19].—Before assailed unit train rates on steam coal, based on annual volume minima, may be found unduly prejudicial or preferential under §3(1) there must be some showing that coal shippers are themselves adversely affected, and their ability and inclination to use the assailed rates should also be shown. There is no such evidence of record, nor any convincing showing that any origin, destination, or point grouped therewith is unduly preferred and that other are unduly disadvantaged. No coal shipper or receiver has objected to the assailed rates, and there is no showing that any regulated transportation agency would be injured thereby. Accordingly, a finding of violation of §3(1) is not warranted.—Natural Gas Pipeline Co. of America v. N.Y.C. R. Co., 323 I.C.C. 75 (81, 85).

116. Differentials.—[Vols. 2, 17-19].—See also Anderson-Prichard Oil Co. case, §8, n. 180.

Proposed reduced rates on packaged wines from California and adjacent States to the Midwest, the same as jumbo tank-car rates on bulk wine and 21 cents lower on three-car shipments, are not shown to unduly prejudice midwestern bottlers. There is no indication that increased volume of packaged wine moving from California to that area has displaced that which midwestern bottlers would normally sell in the area, and though a differential in favor of California packaged wine existed for many years there is no showing that such differential handicapped protestants in competing with California bottlers in sale of packaged wine in the Midwest area. While, under proposed adjustment, protestants must buy bulk shipments of 150,000 pounds to obtain same rate as accorded California shippers on 64,000-pound shipments of packaged wine, California bottlers must ship 192,000 pounds under the three-car rates to take advantage of the 21-cent differential they formerly enjoyed on a 64,000-pound minimum. Thus, no inference that the rate disparity unduly disadvantages protestants is warranted.—Wine, Pacific Coast to Western, S.W. & Central States, 321 I.C.C. 683 (710).

Prescription in 251 I.C.C. 405 of minimum differentials in ocean-rail under all-rail rates on wrought-iron or steel pipe from official territory to the Southwest was to eliminate undue preference and prejudice. However, break-bulk ocean carriers whose disabilities were a significant factor in that prescription no longer participate in the traffic, and consideration of entire record, including the changed conditions and evidence on further hearing, shows that no undue preference or prejudice will result if that differential requirement is vacated, especially as no shipper or port interest asserted unlawfulness under §3(1) at further hearing. Outstanding order vacated to extent it requires maintenance of such differential relations.—Wrought Pipe to the Southwest, 319 I.C.C. 310 (317)*.

Since outstanding rate orders prescribing market relations on grain in western district, under which Peoria, Ill., enjoyed a differential under Chicago, were vacated as to coarse grains in 298 ICC 261 in order to free carriers to make any lawful adjustments necessary to meet unregulated truck competition, Peoria is not entitled, on basis of previously prescribed relations, to continue to enjoy a differential advantage if competition or other influences dictate otherwise. Reduced rates on corn and products from described w.t.l. area to Chicago group, which are compelled by truck and market competition, are not unduly prejudicial to Peoria, since it is equalized with Chicago on such traffic, and that adjustment does not affect its relation to Chicago on movements to eastern territory or for export.—Corn and Corn Products, Iowa, Nebr., Minn., S. Dak. to Ill., 318 I.C.C. 291 (293-4).

118. Port differentials or equalization.—[Vols. 2, 6, 9, 17, 18].—Rates, §1(5), n. 500-506.

From all evidence before it, the commission was adequately justified in finding (1) that there are no appreciable differences in rail mileages to Freeport, Tex., and to the Houston port group; (2) that there is no substantial disimilarity in

transportation conditions warranting rate inequality between those ports; (3) that equalization will allow Freeport to acquire those collateral facilities which will afford it full competitive standing with the other ports; and (4) that although there has already been rate equality without apparent benefit to Freeport on many commodities other than bulk grain, grain shipments through those ports constitute the principal foundation of their business, and it is in relation to grain shipments that preference of the Houston group and prejudice against Freeport have been exercised. The commission's finding of undue prejudice to the port of Freeport, in violation of §3, is supported by substantial evidence; sustained.—Atchison, T. & S.F. Ry. Co. v. United States, 231 F. Supp. 422 (431)*.

Regulations, Practices, Services, and Facilities

135. Divisions.—[Vols. 2, 9].—The divisions of a joint rate are of no concern to shippers, since the mere fact that divisions received by participating carriers may be less than their local rates for their respective portions of the through service does not result in unlawful preference or prejudice of shippers.—Rail-Water, Grain in Bulk, from Mo., Ill., and Ind. to Buffalo, 319 I.C.C. 123 (127)*.

136. Absorption of charges.—[Vols. 2, 6, 9, 11, 12, 14, 16, 17, 19].—In absorbing crosstown switching charges on grain from the only elevator on its line in St. Louis, without absorbing switching charges from other St. Louis elevators, respondent cannot be guilty of undue prejudice. It proposes only to accord St. Louis shipper same treatment it accords shippers across the river at East St. Louis, and fact that protestants might claim carrier competition at East St. Louis as defense to a shipper's complaint of undue prejudice arising from difference in treatment respecting switching charges does not make respondent's proposal unlawful, since carriers may voluntarily do what commission could not require them to do.—Absorption of Cross-Town Switching Charges on Grain, 316 I.C.C. 633 (637-8)*.

Proposed absorption would not give the St. Louis elevator a more favorable rate position than East St. Louis elevators because, under three-way rule, shipments to latter, with later movement to St. Louis, are subject to East St. Louis rates when higher than to St. Louis; the absorption provision applies only on movements from points taking same rates to both, and would have no application in connection with the three-way rule.—Id., 319 I.C.C. 776 (780)*.

137. Allowances to shippers.—[Vols. 2, 6, 9, 11-13, 16].—Proposed refrigeration allowances do not violate §3 because allowances for ice differ in amount depending on the origin State involved. The allowances are identical to refrigeration charges applicable in each of those States, and differences therein are obviously predicated on different circumstances and conditions attending performance of the refrigeration services. Therefore, in absence of probative evidence to the contrary, the differences in treatment among the States as to quantum of the allowances are justified.—Refrigeration Allowances, Midwest, West, and Southwest, 322 I.C.C. 148 (152).

140. Car Service.—[Vols. 2, 6, 9, 11, 12, 17, 19].—Since under plan III TOFC rates on automobiles shipper must bear cost of trailer rental during both loaded and empty return movement, which is avoided by shipment in multilevel cars, tariffs which permit substitution, at carrier's option, of service in multilevel cars would open the door to undue preference or prejudice among shippers in type of car (flat or multilevel) furnished by the railroad. And while any savings from such substitution in plan V (joint rail-motor) service would accrue to the railroads, which must furnish all facilities for the rail portion of the joint haul, under either plan, when rates are published on a per-carload basis, similar unlawfulness will result unless number of automobiles to be hauled in the substituted multilevel car is restricted to substantial equivalent of number which can be carried in TOFC service. Considered plan III schedules found to violate §3(1) to extent that they contain a provision permitting respondents to substitute specially

equipped rail open cars.—Motor Vehicles from Kansas City to Ark., La., and Tex., 318 I.C.C. 301 (316, 323).

143. Receipt and delivery of freight.—[Vols. 2, 6, 11-16, 18, 19].—Non-application of reduced alternative rates on transcontinental lumber to lighterage deliveries is not unduly prejudicial or unjustly discriminatory against lighterage receivers at New York City, since service received by lighterage consignees is notably superior and much more costly to perform than team-track or private siding delivery. Moreover, waterfront receivers not only have advantage over inland receivers in respect of delivery of lumber by intercoastal water carriers, but also have opportunity to avail themselves of the lower rates by taking team track delivery as do many of their inland competitors. See 313 ICC 783, affirmed 209 F. Supp. 613, 317 F. 2d 509.—Reduced Transcontinental Lumber Rates, 1961, 318 I.C.C. 815 (846).

145. Routes and routing.—[Vols. 2, 6, 9, 12, 14-19].— Shippers' allegation that proposed routing restriction will result in undue preference and prejudice, not sustained; while lower rate would apply to Cincinnati than to Dayton, Ohio, there is no showing of competition between those markets; other commodities would continue to move over routes proposed to be canceled to brick traffic, but considered brick traffic is not shown to be competing as construction material with such other commodities.—Routing—Brick—from North Carolina to Ohio, 315 I.C.C. 645 (648).

147. Transit.—[Vols. 2, 6, 9, 11-19].—Protestant midwestern bottlers are not unduly prejudiced by respondents' failure to accord them the privilege, under jumbo tank-car rates on bulk wine, of stopping in transit for processing, partial loading or unloading, or transloading, while according those privileges to California bottlers under reduced rates on packaged wine to midwestern area. As wine packaged by protestants has been moving to destination by truck, they are not unduly burdened by theoretical necessity of paying a combination of inbound bulk plus outbound package rates that exceeds the through package rate from California subject to transloading privilege. Protestants have not shown extent to which they require stopping in transit for processing or partial loading or unloading, or that they are competitively disadvantaged in marketing their bottled wine by lack of those privileges. As California bottlers have used their transit privileges to a very limited extent, their position is not in fact enhanced thereby. Carriers are free to grant or withhold transit provided they accord uniform treatment to shippers similarly situated; shippers involved are not situated similarly.—Wine, Pacific Coast to Western, S.W. & Central States, 321 I.C.C. 683 (710-11).

Reduced flat rates on coarse grains from described w.t.l. area to Chicago for export do not unduly prejudice Peoria, Ill., by disruption of its equalization with Chicago on through movements to North Atlantic and Gulf ports; the reduced rates from origins on the North Western permit transit at Peoria without disturbing such equalization on movements beyond, and while there are other origins from which the reduced rates do not permit such transit, Peoria has not shown that it will be injured thereby.—Export Grain and Grain Prod.—WTL to Gulf-Lake Ports, 319 I.C.C. 729 (741-2)*.

Although, under proposed through proportional rate on grain from Kansas City to Omaha area with transit at Springfield, Ill., Springfield shipper, which receives hard wheat from Kansas and soft wheat from Illinois, could by substitution of billing ship soft-wheat flour to Omaha or the east at transit balances lower than under rates from Illinois origins, shipper insists that it would not use Illinois grain for shipments to the east, and in milling Kansas wheat at its Buffalo plant it is on equal basis ratewise with protestant Kansas mills. Moreover, it has barge-rail routes available for movement to Buffalo at lower charges than it would pay with substituted Illinois billing; as most of production of its Buffalo plant is sold in eastern markets, unlawful prejudice to Kansas mills is not established.—Grain from Kansas City, Mo., to Nebraska and Iowa, 318 I.C.C. 31 (33-4).

Equal transit arrangements on grain are

as a practical matter as important as competitive rates; even with equal rates on grain from Oklahoma, eastern New Mexico, and northern Texas, the port of Corpus Christi would be seriously handicapped without transit arrangements the same as those available through Houston and Galveston. Rates to Corpus Christi will therefore be unduly prejudicial to extent that transit arrangements in connection therewith are less favorable than those to Galveston, Houston, and Port Arthur.—Nueces County Nav. Dist. No. 1 v. Atchison, T. & S.F. Ry. Co., 315 I.C.C. 155 (161, 163).

While it is not clear what portion of grain traffic to Duluth for water movement beyond would have moved to or through either Duluth or Minneapolis by rail had it not been for establishment of the reduced motor-competitive nontransit rates in issue, grain generally follows the lowest transportation cost, and there has been a decrease in movement of wheat from considered origin area to Minneapolis; thus it is reasonable to conclude that the nontransit rates in connection with the water rates would cause some diversion. Moreover, there is no assurance that added revenue would result from application of transit rates on some of the traffic, since transit billing may be converted to nontransit and a refund obtained upon showing that the nontransit provisions have been complied with.—Wheat, Rye, and Flaxseed to Duluth and Minneapolis, 315 I.C.C. 89 (93).

As certain northwestern mills require transit grain in their operations, only a limited amount of which is available at Minneapolis, and the country price of the wheat reflects the nontransit rates to the markets, their supply from involved origin territory has been effectively cut off except in fringe areas, because the nontransit rates cannot be used with transit at those mills; as the flour is sold in competitive markets where differentials cannot be absorbed, the nontransit rates unduly prejudice those mills and unduly prefer competing mills in position to use them. Evidence is convincing that the restriction against transit is unlawful.—Id., pp. 94, 95.

152. Weight practices.—[Vols. 9, 11-13, 15, 16].—When during the harvest season complainant's shipments of sugar beets from Kansas origins on defendant's line and those of its competitors over the Santa Fe from western Kansas are both accepted on a 100,000-pound basis, subject to tonnage checks and subsequent adjustment of charges, at same rate level, it is not apparent how a difference in minimum weights could result in any material disadvantage to complainant.—National Sugar Mfg. Co. v. Missouri Pac. R. Co., 315 I.C.C. 245 (245-6).

160. Removal of undue prejudice.—[Vols. 2, 6, 9, 11-19].—The class-rate structure affords a standardization of rate relations, and where an assailed misalinement is shown to be unjustified recourse may be had to that structure to determine a proper basis relationship. Undue prejudice to origins west of Mississippi River and undue preference of origins on and east of the river in relatively higher rates on fresh meats and packinghouse products from the former than from the latter to official territory destinations is therefore ordered removed by establishment of rates not exceeding same percentage relation to the Docket 28300 first-class rates as that of corresponding rates from Dubuque, Iowa.—Cudahy Packing Co. v. Akron, C. & Y. R. Co., 318 I.C.C. 229 (245, 247)*.

But though same rates were previously approved for all meats and packinghouse products westbound, hanging or carcass meats cannot be loaded as heavily as other meat, and different eastbound rates are maintained on meats hung and not hung from origins on and east of the river. As the principal eastbound movement from west of the river is hanging meat, existence of those two sets of rates, in addition to the loading factor, indicates inadvisability of establishing a third set on both meats and packinghouse products unless it applies from all origins to exclusion of the other two sets. Therefore, assailed adjustment is also unduly prejudicial to extent that rates are not provided from the prejudiced origins on hanging meats, minimum 25,000

pounds, and on other than hanging, minimum 30,000 pounds, which reflect same percentage of first class as the corresponding rates on those minima from Dubuque.—Id., pp. 243, 247.

See also Anderson-Prichard Oil Corp. case, §8, n. 95.

Differences in distance from interior southwestern points and Colorado to Freeport, Tex., and to Houston are so trivial as strongly to support inclusion of Freeport in the Houston port group; therefore, in complying with order for removal of undue prejudice found to exist in rates on export, import, coastwise, and intercoastal traffic to and from Freeport, defendants may deem it desirable from standpoint of tariff simplification to treat Freeport as a port of the Houston group.—Brazos River Harbor Nav. Dist. v. Abilene & S. Ry. Co., 319 I.C.C. 54 (67)*.

Establishment of nonprejudicial export rates prescribed on grain and products from Oklahoma and northwestern Texas on same basis to Corpus Christi and other Texas ports named necessarily includes removal by the Missouri-Kansas-Texas of tariff restrictions confining application of the reduced preferential rates on coarse and sorghum grains from Oklahoma to Houston, Galveston, and Texas City to its line, which eliminate transit at Enid and force Oklahoma shippers to transit their grain at points on longer and uneconomical routes at greater expense.—Export Grain from Texas to Texas Points, 319 I.C.C. 16 (28).

See also Fresh Meats, case, §15(7), n. 60.

Although Southern Ry's removal from its reciprocal switching list of five additional industries competitive with complainants in 314 ICC 683 removed the undue prejudice therein found to exist in performance of reciprocal switching from certain industries and not for other at same point, it did not remove the unlawful discrimination found under §2 in dissimilar treatment of shippers similarly situated; Southern and its subsidiary admonished to comply with outstanding order.—Absorption of Switching to or from High Point, N.C., 319 I.C.C. 522 (527).

See also North Dakota Public Service Comm. v. Great Northern Ry., n. 85 above.

Application of higher rates on export grain from some points in Kansas and other origin States named in 291 ICC 459 to Corpus Christi, Tex., than to Galveston and Houston is not justified by establishment of equalizing proportionals from origins on line of one defendant therein and argument that order in that proceeding did not require widespread route equalization. That order required defendants to publish rates which would eliminate undue prejudice to Corpus Christi and was directed to all defendants participating in all routes over which rates therein found unduly prejudicial then applied; matter referred to Bureau of Inquiry and Compliance for investigation and appropriate action.—Nueces County Nav. Dist. No. 1 v. Atchison, T. & S.F. Ry. Co., 315 I.C.C. 155 (163).

Section 3. (1a) Export rates on farm commodities; commission's power to carry out policy.—[Unchanged. See vol. 11, p. 9158; for statute and Cross Reference, §5(b).]

Notes of Decisions

Volume 15—p. 12002; Volume 16—p. 12638.

Section 3. (2) Payment of freight as prerequisite to delivery.—[Unchanged. See vol. 9, p. 7386, vol. 11, p. 9158, vol. 15, p. 12003.]

Amendments, see footnotes, vol. 2, p. 1220, vol. 15, p. 12003; historical notes, vol. 2, p. 1221, vol. 12, p. 10229, vol. 14, p. 11432.

Notes of Decisions

Volume 2—p. 1221; Volume 6—p. 5072; Volume 9—p. 7387; Volume 11—p. 9159; Volume 12—p. 10229; Volume 13—p. 10946; Volume 14—p. 11433; Volume 15—p. 12003; Volume 16—p. 12639; Volume 17—p. 13294; Volume 18—p. 14050; Volume 19—p. 15122.

Payment of Freight Charges, Generally

3. Extension of credit, amounting to discrimination.—[Vols. 2, 6, 9, 11, 19].—When railroad had granted shippers' association credit privileges as authorized by the commission's credit regulations, mere fact that the association failed to pay its freight bills within the authorized 120-hour period, and thus took advantages which it knew other shippers did not receive, does not show acceptance or receipt of a concession or discrimination in violation of the Elkins Act. No concession or discrimination could be accepted or received unless given by the railroad; in allowing the association to ship freight and extending to it the allowable credit, the railroad was only giving what lawfully could be and was given to any shipper; record does not show that the railroad acted discriminatorily.—Continental Shippers' Ass'n v. United States, 328 F. 2d 966 (969).

14. Guaranty of charges.—[Vols. 2, 11, 14].—Tariff provided that "charges as specified, desired to be advanced, must be entered on bills of lading and payment thereof guaranteed by shipper"; thus, when defendants (original consignees) requested and accepted advance payment of inbound freight and storage charges in issue, and the charges so advanced were entered on the bill of lading covering outbound movement of the shipment from the storage point, defendants did thereby guarantee payment of all lawful charges due on shipment which was ultimately refused and abandoned to carrier.—Union Pac. Co. v. Higgins, 223 F. Supp. 396 (400, 401).

Liability for Freight Charges of Parties to Shipment

22. Consignee's liability.—[Vols. 2, 6, 9, 12, 15, 17-19].—This section and §3(3), interpreted in the light of their history, impose liability for freight charges on a diverting consignee unless he gives accurate notice of agency and the beneficial ownership of the goods. Therefore, in action to recover freight charges from consignee who diverted shipment in transit to another consignee, latter having become insolvent before the charges were paid, original consignee was liable for the charges when it failed to notify the carrier that it was not the owner of goods shipped, even though the diversion order instructed carrier to collect the charges before delivery of the shipment.—Northwestern Pac. R. Co. v. Burchwell Co., Inc., 349 F. 2d 497 (498, 501-2).

Terms of a contract under which a carrier transports goods in interstate commerce include both the bill of lading and published tariffs, and provisions thereof cannot be waived. Defendants (original consignees) by exercising dominion over considered shipment of potatoes, through diverting and consigning it to interstate point for storage, became party to the contract (uniform bill of lading) between original consignor and the carriers. And since defendants guaranteed payment of charges thereon by requesting and accepting advance payment of the inbound freight and storage charges when shipment later moved from storage, as provided in advance-payment tariff item (which under the law is part of their transportation contract with plaintiff), they are obligated to pay plaintiff all lawful charges due. Though shipment was ultimately refused and abandoned to carrier, tariff Deficit Rule does not change defendants' obligation; that rule specifically does not apply where charges have been guaranteed by shipper.—Union Pac. R. Co. v. Higgins, 223 F. Supp. 396 (400-1).

27. Erroneous representation of prepayment.—[Vols. 2, 13].—See Southern Pac. Co. v. United States, 243 F. Supp. 834 and 243 F. Supp. 839, §6(7), n. 222.

Regulations of the Commission

29 FR 12925, Sept. 15, 1964, Part 142: Extension of Credit to Shippers, §142.8 Presentation of freight bills, amended, and §142.16 Applicability to prepaid shipments, added, effective 30 days after service of order (date of service 9/10/64).

30 FR 9158, July 22, 1965, Part 142: Extension of Credit to Shippers, §§142.8 and 142.16 appearing in 29 FR 12925 having been published in error, §142.8 is amended to read as published prior thereto and §142.16 is deleted in its entirety.

31 FR 6964, May 12, 1966, Part 142: Extension of Credit to Shippers, §142.1 Carrier may extend credit to shipper, and §142.8 Presentation of freight bills, are amended to read as set forth, effective July 21, 1966.

31 FR 10076, July 26, 1966, Part 142: Extension of Credit to Shippers, effective date 31 (31 FR 6964) modified to August 29, 1966.

Section 3. (3) Liability of shipper-consignee for freight where delivery is made to another party upon instruction.—[Unchanged. See vol. 11, p. 9159.]

Notes of Decisions

Volume 17—p. 13295.

2. Construction and interpretation.—[Vol. 17].—When plaintiff railroad was not advised of beneficial ownership of goods shipped, and non-recourse clause in the bill of lading was not executed, original consignee who diverted the shipment in transit, without notifying the carrier that it was not the owner of the goods, was not relieved of liability for payment of the freight charges.—Northwestern Pac. R. Co. v. Burchwell Co., Inc., 349 F. 2d 497 (500, 501-2).

Section 3. (4) Interchange of traffic.—[Unchanged. See vol. 11, p. 9160.]

Amendment, see footnotes, vol. 2, p. 1234, vol. 11, pp. 9160, 9161; historical note p. 1234.

Notes of Decisions

Volume 2—p. 1235; Volume 6—p. 5077; Volume 9—p. 7390; Volume 11—p. 9161; Volume 12—p. 10231; Volume 13—p. 10947; Volume 14—p. 11433; Volume 15—p. 12004; Volume 16—p. 12640; Volume 17—p. 13295; Volume 18—p. 14051; Volume 19—p. 15124.

Interpretation

3. In general.—[Vols. 2, 6, 9, 14, 16, 18].—Literal meaning of §3(4) does not require that it be construed as meaning that, in order to qualify thereunder as a complainant "connecting line," a railroad must either itself make a direct connection with the discriminating carrier, or be part of a through route that includes that carrier. While "connecting lines" suggests the requirement of actual physical connection, in 284 US 288 which held that there is no warrant for limiting the meaning of that term to lines having a direct physical connection, the court rejected the contention that such term is limited to mean what the statutory language might initially suggest; there also is no warrant for limiting meaning of "connecting lines" to the lines making up a through route that already includes the discriminating carrier.—Western Pac. R. Co. v. United States, 382 U.S. 237 (242)*.

Hence, to qualify as a "connecting line," in the absence of physical connection, a carrier need only show that it participates in an established through route, making connection at the common point of interchange, all of whose participants are willing to cooperate in the arrangements necessary to eliminate the alleged discretion. Such a

construction of "connecting lines" does not interfere with the commission's functions under §15(3) to require establishment of through routes and joint rates "in the public interest," since all that is required in §3(4) situations is the elimination of discriminatory treatment; moreover, the court's opinion does no more than define the characteristics of a carrier eligible to complain.—Id., pp. 245-6. [But see dissent.]

Challenged city ordinance is invalid insofar as it requires transfer company, engaged by the railroads to transfer passengers and baggage between rail terminals in Chicago, to obtain vehicle licenses before it can operate in interstation transfer service, the city having no power to decide who can operate for the railroads between terminals, an integral part of interstate railroad transportation authorized and subject to regulation under the Interstate Commerce Act.—Railroad Transfer Service, Inc. v. Chicago, 386 U.S. 351 (358-60)*.

While other carriers were obligated to interchange freight with bankrupt railroad, they could not be forced to do so without debtor's prepayment or giving security for payment of transportation charges. Nothing in the statute prohibits, after due notification of intention to do so, a carrier's demand upon a delinquent carrier for payment of transportation charges before accepting or releasing consignments; and, except insofar as it does so expressly, the act does not override common law rights of carriers.—Southern Ry. Co. v. Flournoy, 301 F. 2d 847 (854).

Applicability

10. In general.—[Vols. 2, 6, 9, 11, 14, 16, 18].—While the term "connecting lines" suggests requirement of actual physical connection, the term "line" admits of more than a single meaning limited to the track of one railroad; it may also be interpreted reasonably to include a functional railroad unit such as the three-line route involved. Therefore, to qualify under §3(4) as a complainant "connecting line," in the absence of physical connection, railroad need only show that it participates in an established through route, making connection at the common point of interchange, all of whose participants stand willing to cooperate in arrangements necessary to eliminate the alleged discrimination. Inasmuch as the district court found that plaintiff was not eligible to complain of an alleged discrimination, but did not reach the question of whether it was entitled to relief, case is remanded to that court for further proceedings consistent with instant opinion.—Western Pac. R. Co. v. United States, 382 U.S. 237 (242, 245-6)*.

12a. To water lines.—[Vols. 11, 12, 13, 16].—See also American Barge Line Co. case, n. 43, below.

The Transportation Act of 1940, which amended the provision prohibiting rate discrimination between connecting lines by defining "connecting line" to include any common carrier by water, when read in light of the national transportation policy, was intended, inter alia, to prevent discrimination against water carriers.—Seatrain Lines, Inc. v. United States, 233 F.Supp. 199 (210-1)*.

Discrimination Between Connecting Carriers

41. In general.—[Vols. 2, 6, 9, 12-15, 17-19].—To qualify under §3(4) as a complainant "connecting line," in the absence of a physical connection, plaintiff (middle link in a three line route) need only show that it participates in an established through route, making connection at the common interchange point, all of whose participants are willing to cooperate in the arrangements necessary to eliminate the alleged discrimination. However, the remedy in §3(4) situations does not entail any particular form of relief; only elimination of discriminatory treatment is required. Relief is warranted only if it also appears that differential treatment is not justified by differences in operating conditions that substantially affect the allegedly discriminating carrier. Since the district court found that plaintiff was not a "connecting line" within meaning of the statute, but did not reach the question of whether it was entitled to

relief, case is remanded for further proceedings consistent with the court's opinion.—Western Pac. R. Co. v. United States, 382 U.S. 237 (240-1, 245-6)* [But see dissent.]

In 330 US 567, which also involved rail rates from river ports on ex-barge grain, the Court made no distinction between regulated and exempt barge traffic, and 100 F. Supp. 66, affirmed 342 US 951, specifically rejected the commission's refusal to entertain a similar complaint on ground that the barge traffic was unregulated; and in remanding instant proceeding in 176 F. Supp. 411 the district court merely directed the commission to enter an order prescribing nondiscriminatory rates on ex-barge grain, without distinguishing between regulated and unregulated traffic. Therefore, upon intervention of association representing exempt barge interests, the commission was justified in framing its finding and order so broadly as to apply to exempt for-hire transportation.—Chicago, R.I. & P. R. Co. v. United States, 233 F. Supp. 381 (386)*.

Though plaintiffs contend that application of the commission's findings to grain transportation not subject to rate regulation denies them the guarantee of due process and preservation of their inherent advantages under the national transportation policy, and it is apparent that governmental restrictions on rate changes for regulated traffic inhibit the regulated carriers from meeting competition at a compensatory level, while at same time attempting to prevent cutthroat competition, in view of the precedents the commission and the court are bound to the proposition that a distinction cannot be made in application of the commission's orders between regulated and unregulated traffic. Railroads' suggestion that the commission's restrictions jeopardize their existence is speculative, since they are free to set the division or rates charged on ex-barge and ex-rail shipments at a compensatory level.—Id., p. 386.

The commission's conclusion that Seatrain Lines did not sufficiently identify the railroads responsible for claimed rate discrimination against it is not supported by the record. The evidence points directly to the Missouri Pacific and the Rockdale, Sandow & Southern:both participate in movement of the traffic from Sandow, Tex., to midwestern interchanges with eastern railroads and also to interchange with Seatrain at Texas City, and Missouri Pacific is the long-haul carrier over both routes. Though Texas City Term. Ry. participates in the rail-water movement, there is no indication that it has any voice in or responsibility for level of the line-haul rate to Texas City; it clearly acts solely as Missouri Pacific's agent in switching cars to Seatrain. And Texas & Pacific, which participates in the rail movement to the midwestern interchanges, must be treated as part of Missouri Pacific system when latter owns 82 percent of its capital stock, both carriers have the same executive and operating officers, and proposal for their merger is pending. Seatrain has sufficiently identified Missouri Pacific and R S & S as the discriminating carriers.—Seatrain Lines, Inc. v. United States, 233 F. Supp. 199 (204-5)*.

Louisville & N.R.'s establishment of reduced rates on fine coal from mines on its lines to Krannert, Ga., over through routes with Central of Georgia, equal to Southern Ry.'s reduced rates on fine coal originated by it, did not discriminate against Southern in violation of §3(4) when L&N expressed willingness to join in such rates over the more direct L&N-Southern routes with divisions more favorable than those allowed Central but less than those accorded Southern under their joint rates on all coal. As the parties agree that divisions were not properly before the commission, Southern could not spurn L&N's offer on ground of unsatisfactory sharing of revenues; acceptance of the rates would not have precluded it from seeking prescription of other divisions by the commission. The commission's order dismissing Southern's complaint, sustained.—Southern Ry. Co. v. United States, 217 F. Supp. 159 (160, 161)*.

Section 3(4) requires equality of treatment of connecting lines, and direct physical connection with defendant is not a condition precedent to relief under §3(4). "Connecting lines" is commonly used to refer to all carriers making up a through route, and intervention of an intermediate carrier between defendant and complainant

does not make latter any less a connecting line. Equality of treatment is determined by similarity of transportation circumstances and conditions, such as fact that defendant's haul is the same in both retained and closed routes.—Atlantic Coast Line R. Co. v. Southern Ry. Co., 321 I.C.C. 283 (290, 291)*.

Section 3(4) contemplates independent carriers, capable of being objects of favor or prejudice, thus there must be at least two carriers besides the offending one, since a carrier's preference of itself in conducting its own business is not the discrimination condemned. And "connecting lines" is not limited to those having a direct physical connection: a "connection" may occur at a common point or location where interchange between the lines can be effected from a reshipping point. "Connecting lines" is also construed to include carriers making up a through route; considering criteria of 343 US 549 for determining a through route, Seatrain is a party to through routes, and thus a connecting carrier, in rail-water movement of aluminum articles from Sandow, Tex., to points in Pennsylvania and New York, but not in movement of DDT from Avon, Pa., to Texas since it and the originating carrier have no common point at which to connect.—Aluminum Articles from Sandow, Tex., to Pa. and N.Y., 319 I.C.C. 431 (440)*.

And since some of the all-rail routes on soda ash from Baton Rouge to Savannah and Port Wentworth, Ga., operate via New Orleans, and Seatrain participates in rail-water routes on soda ash that technically are via New Orleans because of location of its Belle Chasse terminus within switching limits thereof, there are common junctions for both the all-rail and rail-water routes and Seatrain is a connecting line for that reason as well as its through route participation.—Id., p. 443.

Prohibition of §3(4) against discrimination by carriers subject to Part I in rates and charges as between connecting lines includes water carriers subject to Part III; the courts have held an inbound water carrier to be a connecting carrier of an outbound railroad when it delivers grain in its port-to-port service to a river elevator or other unloading facility which has a rail connection for subsequent reshipment of the grain.—Wheat, Rye, and Flaxseed to Duluth and Minneapolis, 315 I.C.C. 89 (94).

The prohibition of discrimination between connecting lines is not restricted to routes where there is an actual physical connection between the carriers concerned, but includes those carriers which make up a through route; however, similarity of transportation conditions must be shown in order to warrant a finding of discrimination.—Atlantic Coast Line R. Co. v. Southern Ry. Co., 321 I.C.C. 314 (320)*.

Section 3(4) defines as connecting lines only carriers subject to Part I and water common carriers subject to Part III, and to extent that court decisions condemning as unlawful the application of higher charges on ex-barge than on ex-rail grain from river crossings to the South were based on discrimination against connecting lines within prohibition of §3(4) they are not controlling on lawfulness of application of local rates on ex-truck grain from Memphis higher than proportionals applicable on ex-barge or ex-rail shipments.—Southeastern Assn. of R. & Util. Commrs. v. A., T. & S.F. Ry., 321 I.C.C. 519 (542, 549)*.

Even assuming that alleged §3(4) discrimination in suspended all-rail rates from points in middle Atlantic States to Texas and Louisiana points, as to which orders granting fourth-section relief were set aside by district court, is in issue in proceeding on remand, there is no evidence that protestant Seatrain is a connecting line with respect to movement from all involved origins. Where it may be assumed that such connections exist, neither similarity of distance, costs, and resulting revenues for rail-water or rail-water-rail movement to those for all-rail movement, nor similarity of transportation circumstances and conditions to or from common points of interchange, is shown. Therefore carriers participating in the all-rail rates cannot be found to be in violation of §3(4).—Iron or Steel Articles from the East to the Southwest, 321 I.C.C. 419 (422-3)*.

No discrimination against Seatrain Lines is shown in fact that rates on candy from origins in New York, New Jersey, and Penn-

sylvania to Edgewater, N.J., and from Texas City to interior Texas destinations are higher percentages of first class than proposed reduced all-rail rate from same origins to same destinations. The rates to and from the ports were not put under investigation by order suspending the all-rail rate, and, assuming existence of a "connection" within meaning of the statute, the record does not clearly indicate which carrier or carriers are the effective cause of such possible discrimination, so that removal of any unlawfulness could be compelled. Even if the connecting carriers that control the rates were identified, a finding of discrimination would be precluded because of dissimilarity of circumstances and conditions of service over the respective routes.—Candy and Confectionery from N.J., N.Y., & Pa. to Tex., 321 I.C.C. 154 (160). [But see dissent.]

Though Seatrain claims that connecting-line discrimination in violation of §3(4) will result if the rail rate on insecticides from Texas City to Houston (which is included in the nonconcurring "joint" water-rail rate from Edgewater, N.J.) is not reduced to same level, measured by percentage relation to first class, as reduced all-rail rate from Heyden, N.J., there is no factual basis for a finding under §3(4) when no details are presented concerning carriers participating in the rates and composing the through routes, or their relation to carriers connecting with Seatrain.—Agricultural Insecticides—Heyden, N.J., to Houston, Tex., 319 I.C.C. 493 (495-6)*.

Where no actual violations of §3(4) are shown to result from requested vacation of requirement of order in 251 ICC 405 for maintenance of minimum differentials in ocean-rail under all-rail rates on considered traffic, mere possibility of future violations thereof as result of subsequent proposals need not be considered.—Wrought Pipe to the Southwest, 319 I.C.C. 310 (314)*.

Alleged shipper discrimination in lumber rates from Pacific coast to official territory as compared with those from the South to same destinations is not comparable to discrimination between connecting carriers under §3(4).—Reduced Transcontinental Lumber Rates, 1961, 318 I.C.C. 815 (819).

Though defendants are required under like circumstances to accord all connecting carriers equal treatment, it does not follow that they must give any carrier carte blanche to publish any rate it chooses, providing defendants' share of the revenue is the same as that received from other connections. Though complainant claims that defendants' charging of a higher rate when considered coal traffic is turned over to it at Chicago than when turned over to lake vessels results in discrimination prohibited by §3(4), neither the complaint nor complainant's correspondence with defendants refers to any particular rate sought, and though exhibit attached to complainant's statement of facts refers to a rate which presumably is the one sought, its reply statement admits that such rate would not enable the all-rail route to compete. Thus, in refusing to establish an all-rail rate with complainant that would yield them the same net revenue as the rail-water rate, defendants cannot be said to have acted unreasonably or in a manner unduly prejudicial to complainant.—Chicago & N.W. Ry. Co. v. Louisville & N.R. Co., 318 I.C.C. 286 (289).

Any injury that may be suffered by connecting carriers as result of respondent's cancellation of reciprocal switching on competitive traffic to and from specified industries and team tracks at Richmond, Va., is not of type the commission is empowered to prevent, when all connecting lines would be treated alike.—Switching at Richmond, Va., on Richmond, F. & P. R. Co., 316 I.C.C. 786 (792, 793).

42. In similar circumstances and conditions.—[Vols. 2, 6, 9, 11, 13, 17-19].—The Supreme Court's decision in 382 US 237 (wherein plaintiff was found to be a "connecting carrier" within meaning of the statute) plainly established as the law in plaintiff's suit to set aside the commission's report and order, which found no violation of §3(4) in defendants' refusal to establish through routes and joint rates between points on their lines and California points served by plaintiff, via Portland, Oreg., on same basis as their joint arrangement with Southern Pac. Co. through Portland, that the differential treatment of plaintiff by defendants can be justified only by dif-

ferences in operating conditions that substantially affect allegedly discriminating carriers. Accordingly, there must be something in similarity of operating conditions that would make it unfair or unjust to require alleged discriminating carrier to extend to a connecting line the same through joint arrangement that it maintains with another such line. Dissimilar operating conditions do not always affect an alleged discriminating line in such a manner as to justify the discrimination; thus dissimilar conditions between the routes involved do not, per se, justify the discrimination alleged.—Western Pac. R. Co. v. United States, 265 F. Supp. 140 (144-5)*.

Plaintiff need not show similarity to justify its claim for equality, only that defendants practice discrimination as between it and another connecting line in respect to existing joint through rate arrangements; defendants then must prove some dissimilarity in operating conditions that would substantially affect them if they were required to grant equality of treatment. Though the commission found that plaintiff's route was longer, involved more interchanges, more engine districts, higher rises and more curvature than the competing (Southern Pac.) route, the record does not show an obvious difference in operating conditions that substantially affect defendants which justify the alleged discrimination, especially when higher cost of service over plaintiff's longer route would not affect cost of service of defendants. Since the commission made no findings as to effect of operational dissimilarities on defendants or whether such effect, if any, justified the existing rate discriminations, the order is set aside and the case remanded for further commission proceedings consistent with the court's opinion.—Id., pp. 146-54.

While there admittedly are differences in transportation circumstances and conditions affecting movement of aluminum traffic from Sandow, Tex., to Cressona, Pa., over all-rail route via midwestern interchanges with eastern railroads and over rail-water-rail route via Seatrain Lines from Texas City to Edgewater, N.J., the mere fact that the two routes go in different directions from a common point of origin to reach different points of interchange, and travel different distances to reach those points, is not conclusive. The issue is whether the Sandow-Texas City rate maintained by the western railroads is discriminatory against Seatrain in violation of §3(4) when compared, in light of such differences in transportation conditions as may exist, with the reduced all-rail rate and the division thereof accruing to those same railroads for their services to the midwestern interchanges.—Seatrain Lines, Inc. v. United States, 233 F. Supp. 199 (206)*.

The essence of discrimination lies in demanding a disproportionate charge for performance of comparable services; a difference in charges must bear a reasonable relation to some difference in services rendered, and where it is not justified by a difference in services there is discrimination. The record as a whole is not persuasive that the differences in transportation conditions noted justified the difference in rate treatment, and the commission erred in finding that the relevant circumstances at the respective points of interchange were so radically different as to preclude a finding of §3(4) discrimination. Seatrain having established a prima facie case of discrimination, it was incumbent on the western railroads to show such dissimilarity of conditions as would warrant the rate treatment accorded them; this they failed to do. The commission's order on the §3(4) issue is set aside and the matter remanded.—Id., pp. 204, 206, 210, 213-4.

That Southern Ry. closed certain through routes on coal traffic moving over its and plaintiffs' lines via Atlanta from mines on Louisville & N. R. to destinations in southern Georgia beyond Macon, while continuing to accept traffic from the Central of Georgia at Macon on basis of through route joint rates, did not result in discrimination against plaintiffs. While §3(4) requires equality of treatment between connecting lines, equality of treatment involves comparable conditions and route of plaintiffs, being closed, does not compare with that of the Southern or the Central of Georgia.—Atlantic Coast Line R. Co. v. United States, 205 F. Supp. 360 (365)*.

In seeking restoration of certain through routes closed commercially by defendant's routing restrictions, complainants are not seeking prescription of the revised joint rates on cotton over any route which would require defendant to perform any greater or less service than it now performs over the retained routes; it would perform exactly the same service between the same points over both. Defendant unlawfully discriminates between its connections when, as either intermediate or destination carrier, it concurs in the joint rates over some routes and refuses to do so over other substantially similar routes through the same junction, although so far as it, the sole party causing the discrimination, is concerned, transportation conditions are identical over both the restricted and the retained routes. Such refusal has precluded complainants from participating in the cotton traffic over the restricted routes, and they are entitled to relief by establishment over the routes specified, including those embracing a carrier with which defendant does not connect, of the lowest joint rates concurrently maintained over any routes between the same points.—Atlantic Coast Line R. Co. v. Southern Ry. Co., 321 I.C.C. 314 (319-21)*.

Proposed reduced rail rates on grain in multiple-car shipments from Ohio and Mississippi River crossings to the Southeast clearly envision the nondiscriminatory treatment toward which §3(4) is directed when they apply equally on ex-barge, ex-rail, and ex-truck shipments. And while some bargeline protestants seek related reductions on ex-barge traffic from Tennessee River ports, existing rates from those ports are not in issue; even if they were, there is no substantial similarity of circumstances and conditions affecting considered all-rail traffic and barge-rail traffic which would justify equality of treatment, since the barge-rail shipments move under single-car rates with transit, whereas proposed multiple-car movements are subject to numerous restrictive provisions excluding transit and other privileges accorded under single-car rates.—Grain in Multiple-Car Shipments—River Crossings to So., 318 I.C.C. 641 (687)*.

There can be no §3(4) violation at origin, but only at a point of interchange following some prior movement. Reduced all-rail rate on DDT from Avon, Pa., to Texas does not unlawfully discriminate against Seatrain Lines when there is no common point at which it connects with the originating carrier, and use of intermediate line-haul railroads would be necessary for the traffic to reach Seatrain's terminal at Edgewater, N.J.; thus they are not connecting lines as defined in 176 F. Supp. 411. Moreover, the long hauls of the only two railroads serving the destinations from Texas City are far greater in the all-rail than in the water routes, thus the substantially similar circumstances necessary to unlawful discrimination are lacking.—Aluminium Articles from Sandow, Tex., to Pa. and N.Y., 319 I.C.C. 431 (441, 442)*.

There is likewise no evidence of discrimination against Seatrain in reduced all-rail rates on soda ash from Baton Rouge to Georgia ports or in the relatively higher interstate rate from Baton Route to New Orleans. Though some of the all-rail routes pass through New Orleans, no similarity of conditions attending interchange by the respective carriers is shown, and Seatrain does not contend that the railroads' treatment of it in switching its traffic to its Belle Chasse terminus differs from that among themselves in similar circumstances. The rates to Belle Chasse applies equally to Seatrain traffic as to that of other carriers similarly situated, and neither that rate nor the all-rail rate to Savannah violates §3(4).—Id., pp. 443, 444.

Although defendant's haul is the same in routes over which reduced joint rates on paper apply as in certain routes closed by restrictive routing provisions in its tariff, it favors one connection over another in exactly similar circumstances. That certain of the closed routes involve transfer across the city of Atlanta from one of defendant's yards to another is not a sufficiently distinguishing element, since such transfer is within defendant's operating control. Defendant's failure to establish the reduced joint rates over the closed routes listed in exhibits specified is discriminatory in violation of §3(4); such unlawfulness should be

removed by establishing over those routes the lowest joint rates concurrently maintained over any routes between the same points.—Atlantic Coast Line R. Co. v. Southern Ry. Co., 321 I.C.C. 283 (290-1)*.

There is no discrimination against Seatrain Lines in fact that rail rates on candy from New York, New Jersey, and Pennsylvania points to Edgewater, N.J., and from Texas City to interior Texas points are higher percentages of first class than reduced through all-rail rate found otherwise lawful, since there is substantial dissimilarity of circumstances and conditions in the service performed over the rail-water-rail route as compared with the all-rail route. The two service routes are parallel only in part, and the rail portion of the rail-water-rail route is in an opposite direction from the all-rail route; plainly, material differences in distance and cost would obtain.—Candy and Confectionery from N.J., N.Y., & Pa. to Tex., 321 I.C.C. 154 (160).

Proposed all-rail, nontransit, flat rates on grain in multiple-car lots from Kansas City and Omaha groups to Lawrenceburg, Ind., would not discriminate against barge lines in violation of §3(4); their application does not depend on how the grain arrived at point where tendered; a proportional from St. Louis to Lawrenceburg is open to ex-barge traffic, and there is no indication that circumstances and conditions, including relative costs and operating features, surrounding possible ex-barge movements via St. Louis would be so similar to proposed movement as to justify clearly a finding of discrimination.—Grain—K.C., Omaha & Related Origins to Lawrenceburg, 315 I.C.C. 83 (87).

43. **Difference in rates.**—[Vols. 2, 6, 9, 13-19].—Considering the whole record, Seatrain Lines has established a prima facie case of discrimination resulting from western railroads' continued maintenance of an origin port rate (Sandow, Tex., to Texas City) on aluminum articles on a relatively higher level than reduced all-rail rate, in which they participate, from Sandow to Cressona, Pa., and the division they accept out of that rate. Though the rail-water-rail route is the low-cost route, Seatrain shows that the western railroads' revenue, less cost, for the run to Texas City is 341.1 percent of fully distributed costs, while that for the run to Flinton, Ill., a representative point of interchange with eastern railroads, is only 137.2 percent of such costs; thus, on the all-rail rate the western roads earn approximately 50 percent less profit for nearly 400 percent more mileage. Seatrain also shows that the all-rail rate for the Sandow-Cressona distance earns 73 cents a car-mile, whereas the Sandow-Texas City rate earns $2.42, and that the all-rail rate is 18 percent of the corresponding Docket 28300 first-class rate, compared with 24.4 percent for the rate to Texas City.—Seatrain Lines, Inc. v. United States, 233 F. Supp. 199 (207, 209, 210)*.

The commission's report contains no citicism of Seatrain's evidence concerning those disparities in rates over costs, divisions, and relation to first-class rates, or the probative value thereof, although it has considered such evidence in many rate discirimination cases. Obviously, in light of the disabilities of water transportation, the only attraction Seatrain can offer shippers is a lower through rate, including origin and destination rail factors, made possible by lower water costs. While the commission correctly observed that a mere difference in rate levels proves nothing, in face of the overwhelming disparities shown, denial of relief on the general ground of dissimilar circumstances was not warranted; record is not persuasive that the differences noted in transportation conditions, considered in light of those disparities, justified the difference in rate treatment. The commission's overall conclusion that Seatrain had failed to prove a violation of §3(4) is not adequately supported by the evidence; its order on the §3(4) issue of discrimination is set aside and the matter remanded for further proceedings.—Id., pp. 206, 207-8, 210, 213.

In absence of a demonstrated cost differential, a rail carrier from a port is entitled to no more compensation on ex-barge than on ex-rail traffic from same origin territory when moving from transit at that port to same destination. Defendants have not

overcome the prima facie showing of discrimination resulting from difference between present rates on ex-barge grain from named Tennessee River and lower Mississippi River ports to destinations in the South and in Arkansas and western Louisiana, and lower divisions received by them out of joint all-rail rates for movement of grain from same origin territory beyond same port to same destination; equal service is performed on ex-rail and on ex-barge shipments moving beyond the port from same elevator or mill to same destination, and defendants have not established that their costs for handling transited ex-barge grain are substantially greater than on like movements of ex-rail grain.—American Barge Line Co. v. Alabama G.S. R. Co., 316 I.C.C. 759 (769, 770, 771, 773)*.

Assailed ex-barge rates unjustly discriminate against connecting for-hire bargelines to extent that, from the Mississippi River ports and Chattanooga, they exceed the contemporary rates or lowest divisions received by the rail lines for movement of grain from same origin territory beyond same port to same destination, and from Tennessee River ports other than Chattanooga, to extent they exceed rates reflecting same percentage of first class as the contemporary rate or lowest division on ex-rail traffic from Chattanooga. All of such ex-barge traffic, whether the inbound barge movement is by certificated common carrier or under exemption of §303(b), falls within the court's finding of discrimination against the connecting bargelines in 176 F. Supp. 411 (affirmed per curiam, 361 US 353), in which, as in 330 US 567, 342 US 951, and 351 US 56, exempt transportation was included or not distinguished.—Id., pp. 773-5.

Unless cost of rail handling is greater for ex-barge than for ex-rail grain, charging of higher rates on the former subjects carriers thereof to unlawful discrimination. [330 US 567 and 351 US 56.] It follows that restriction of reduced nontransit rates on grain from country origins to certain rate-break markets not to apply as factors of through combinations to destinations beyond, thereby subjecting rail connections to higher rates than are available to connecting water carriers, unlawfully discriminates against the former, since grain generally follows the lowest transportation cost and it is reasonable to conclude that some diversion from outbound rail movement would result from use of the nontransit rates in connection with water rates.—Wheat, Rye, and Flaxseed to Duluth and Minneapolis, 315 I.C.C. 89 (93, 94).

There is no violation of §3(4) in respondents' failure to publish proportional class rates to and from Edgewater, N.J., subject to same minimum weight and to same reductions on excess weight as provided in all-rail incentive class rates between official and southern territories. While protestant Seatrain is a connecting carrier in movement of rail-water traffic via Edgewater, mere difference in rate treatment does not establish discrimination within §3(4).—Incentive Class Rates—Between Official & Southern Ter., 319 I.C.C. 448 (453, 456).

Although transportation conditions on coal from mines on defendant's lines to Krannert, Ga., over its through routes with Central of Georgia are no more favorable than over routes with complainant, its failure to establish the same reduced joint rates over latter routes as over former does not constitute unjust discrimination within §3(4), when evidence is clear that it offered the same basis of reduced joint rates to complainant as to Central of Georgia.—Southern Ry. Co. v. Louisville & N. R. Co., 315 I.C.C. 175 (177-8)*.

48. Removal without designating manner.—[Vol. 2].—It is not for the court to prescribe the manner in which the rate discrimination against Seatrain Lines that it finds to exist should be eliminated. Whether proportional rates should be prescribed under §6(11)(b), as was done in 310 ICC 225, or whether some other form of relief should be granted, is left to the commission's expertise. The matter is therefore remanded for further proceedings consistent with the court's opinion.—Seatrain Lines, Inc. v. United States, 233 F. Supp. 199 (214)*.

Although defendants have not overcome the prima facie showing of discrimination against connecting bargelines resulting

from the difference between their divisions of joint all-rail rates and present rates on ex-barge grain from same origin territory when moving beyond named Tennessee and lower Mississippi River ports to same destinations in southern territory and in Arkansas and western Louisiana, the southern divisions are not in issue per se and there is no evidence of nature required by §15(6) for prescribing changes therein. Order will therefore require removal of the unjust discrimination found to exist against connecting for-hire bargelines (whether certificated or exempt), without specifying the exact method of removal.—American Barge Line Co. v. Alabama G.S. R. Co., 316 I.C.C. 759 (773)*.

Section 3. (5) Terminal facilities; use of and compensation for.—[Unchanged. See vol. 11, p. 9162.]

Amendments, see footnotes, p. 9162; historical notes, vol. 2, p. 1234, vol. 9, p. 7396, vol. 14, p. 11435.

Notes of Decisions

Volume 2—p. 1254; Volume 6—p. 5081; Volume 9—p. 7396; Volume 11—p. 9162; Volume 12—p. 10232; Volume 13—p. 10948; Volume 14—p. 11435; Volume 15—p. 12006; Volume 16—p. 12641.

3. Requirement of common use of terminals.—[Vols. 2, 6, 11-15].—In determining whether joint use by defendant of Seaboard Air Line's freight terminal facilities at Hialeah would be in public interest and should therefore be required, the commission must consider not only interests of residents of the city, but also interests of shippers using the service involved, interests of the carriers, and interest of the public in general. Defendant was recently required by approved plan for its reorganization to renovate and commence activities at its own Hialeah yard, at great expense; such action was undertaken at instigation of, and after favorable testimony by, public and semi-public officials of the area, as result of which relocation of defendant's freight operations to its Hialeah yard was found to be in public interest. It is untenable now to find that it would be in public interest to close the yard after substantial funds have been spent to renovate and open the facility.—City of Hialeah, Fla. v. Florida East Coast Ry. Co., 317 I.C.C. 34 (35, 36-7).

Effect of joint use of Seaboard's freight yard on service rendered to shippers by defendant East Coast must also be considered; the carriers now compete for the available traffic in the area, and requirement that the East Coast use Seaboard's facilities would undoubtedly be to its disadvantage. List of shippers, commodities moved, and volume of traffic handled could become known to Seaboard, who could take advantage of this information to solicit East Coast's shippers; in addition, the East Coast would be placed at Seaboard's convenience in priority of movement of cars through the yard, all of which could have detrimental effect on its ability to serve and retain its shippers.—Id., p. 37.

There is no indication that shippers are now inadequately served as result of defendant's method of operation; in absence of such a showing, and in view of distinct possibility that it would suffer substantial financial harm as result of complainant's proposed plan, defendant may not, from standpoint of public interest, be deprived of a facility important to its continued effective operation in the territory by exercise of the commission's power to require it to use Seaboard's facility. It is within complainant's province to impose restrictions on the carrier's operation to provide for safety of its citizens, so long as the restrictions do not unduly burden interstate commerce.—Id., p. 37.

5. Trackage of which common use may be required.—[Vols. 2, 6, 9, 14].—See City of Hialeah, Fla. v. Florida East Coast Ry. Co., §5(2), n. 56.

6. Conditions precedent to requirement.—[Vols. 2, 6, 13].—Although com-

plainant's proposal to require joint use by Florida East Coast of Seaboard Air Line's Hialeah freight yard and tracks leading thereto is within the commission's authority under §3(5), before it may so order the commission must find that such use would be in public interest, would be practical, and would not substantially impair ability of the carrier owning or entitled to enjoyment of the facilities to handle its own business; and in determining what is "in the public interest," as antecedent to affirmative exercise of this broad grant of power, it must consider the interests, not only of residents of the city of Hialeah, but of shippers using the service involved, the carriers, and the public in general.—City of Hialeah, Fla. v. Florida East Coast Ry. Co., 317 I.C.C. 34 (36).

Section 4. Long and short haul charges; competition with water routes. (1) Charges for long and short hauls and on through route.—[Unchanged except Sept. 27, 1962 amendment, quoted below. See vol. 18, p. 14056.]

By act of September 27, 1962, 76 Stat. 635, paragraph (1) was amended by inserting before the period at end thereof a colon and the following:

*** *And provided further,* That the provisions of this paragraph shall not apply to express companies subject to the provisions of this part, except that the exemption herein accorded express companies shall not be construed to relieve them from the operation of any other provision contained in this Act.

Amendments, see footnotes, vol. 2, pp. 1261, 1262, vol. 11, p. 9163, vol. 18, p. 14057; historical notes, vol. 2, p. 1262, vol. 9, p. 7398, vol. 11, p. 9164.

Notes of Decisions

Volume 2—p. 1265; Volume 6—p. 5088; Volume 9—p. 7399; Volume 11—p. 9164; Volume 12—p. 10233; Volume 13—p. 10949; Volume 14—p. 11436; Volume 15—p. 12007; Volume 16—p. 12642; Volume 17—p. 13298; Volume 18—p. 14057; Volume 19—p. 15129.

Constitutionality and Construction

2. Construction; rules in general.—[Vols. 2, 6, 9, 11-16, 18, 19].—Although the 1957 amendment of §4 makes that section self-operating with respect to departure in rates over circuitous routes, legislative history thereof shows that Congress intended the commission otherwise to retain the primary function of determining whether departures should be sanctioned. Tariffs involving §4 departures therefore are not self-executing, but depend on prior commission approval for their effectiveness; pending such approval, even though after expiration of the maximum suspension period authorized by §15(7), under the terms of §4, they must be viewed as unlawful.—Wirthmore Feeds, Inc. v. Baltimore & O. R. Co., 221 F. Supp. 745 (746-7).

Long-and-short-haul relief is necessary for proposed multiple-car nontransit rates on corn, minimum 500 tons, to Portland and Augusta, Maine, and Manchester, Conn., when charges thereunder would be less than those charged grain and feed interests at intermediate destinations on direct routes which receive corn in 500-ton shipments from same origins, without availing themselves of transit privileges accorded under higher single-car rates applicable thereon, resulting in violations of §4(1).—Corn, Mich., Ohio, and Pa. to Augusta and Portland, Maine, 319 I.C.C. 344 (355)*.

Amendment of §4(1) so as not to require special authorization for departures therefrom in case of circuitous routes merely relieved carriers from procedural burden of seeking fourth-section relief in such cases and had no effect on applicability of rates

already established in tariff form.—Allis-Chalmers Mfg. Co. v. Great Northern Ry. Co., 315 I.C.C. 152 (153).

5. Avoidance of unreasonable, discriminatory, or prejudicial rates, or other violations of law.—[Vols. 2, 6, 9, 14, 17, 19].—The commission's statutory authority to grant §4 relief is not a grant of arbitrary or absolute power; its exercise must be limited and conditioned on the presence in special cases of conditions and circumstances which make granting such relief legal and proper and in no wise antagonistic to other provisions of the act. (See 21 ICC 329.) Furthermore, application of all the act's prohibitions against discrimination "as a whole" furthers the purpose of Congress in enacting it; also, by hearing and determining, in a single proceeding, all charges of discrimination bearing on a §4 application, the commission would further the legislative purpose as declared in the national transportation policy.—Mechling Barge Lines v. United States, 376 U.S. 375 (383-5)*.

The commission should have consolidated the issues raised in proceeding on New York Central's application for §4 relief, in connection with proposed barge-competitive proportional rate on corn from origins on its Kankakee Belt Line to Kankakee, Ill., when reshipped to the East, and should have determined merits of appellants' contentions that considered rates violated §§1(5), 3(1), and 3(4) and the national policy. Although not saying that such a rule of consolidation is an absolute, as there would be no need therefor where other issues are not raised or where consolidation would inordinately delay the §4 proceeding, the court finds no practical reason why merits of appellants' contentions should not have been reached. To require the parties to begin anew and thus spawn several cases, all of which might have been easily disposed of in the §4 proceeding, needlessly subjects appellants' claims to the rigors of circumlocution so deadly to effective administrative and judicial processes.—Id., pp. 381-2, 386.

Granting the §4 relief was not an approval of the rates, the commission did not investigate their lawfulness, and appellants did not assail them by formal complaint; however, the claimed violations of other sections of the statute were ripe for decision when the commission reversed the examiner's denial of the §4 application because the rates to Kankakee were below out-of-pocket cost and lower than necessary to meet the barge competition. Appellants' claims of unlawfulness were not beyond the immediate §4 issues although only a proportional factor, not through charges, was attacked; mechanism of the through combination rates does not permit such easy dismemberment. Splintering of the proceeding not only would be poor administration, but would result in manifest inequities and allow potential windfalls to some carriers; moreover such splintering appears to be contrary to the commission's consistent policy in §4 proceedings.—Id., pp. 379, 382-3.

Carriers Affected

22. Motor carriers.—[Vols. 9, 16].—See New York Central R. Co. v. United States, §216(c), n. 12.

Transportation Affected

34. Joint rail-motor rates.—[Vol. 16].—Provisions of the statute are clear. Part I applies to transportation by rail or partly by rail and partly by water, and §4(1) applies to railroads and interstate water carriers; however, interstate motor carriers are subject to Part II, and "interstate commerce" under that part includes commerce that moves partly by motor vehicle and partly by rail, express, or water. Also, authority for establishment of through routes and joint rates between motor carriers and railroads is found in §216(c), and provisions of Part II form a complete, self-contained system of regulation (including protection against the evil dealt with in §4(1)) which, as shown by the language used, was created by Congress to cover all-motor, joint motor-rail, and joint motor-water rates. Therefore, since Part II provisions which deal with through motor-rail rates and routes are exclusive, motor-rail or motor-rail-motor rates are not subject to

§4. Accordingly, the commission's ruling that such rates are subject to §4, and its findings that considered TOFC rates violated §4(1), are annulled and set aside.—New York Central R. Co. v. United States, 267 F. Supp. 619 (624, 626-8, 630-2)*.

Enforcement of Long-and-Short-Haul Clause

53. Presumption as to unreasonableness; rebuttable.—[Vols. 2, 6, 9, 12, 13, 15-19].—While a higher rate to an intermediate than to a more distant point on same point is presumptively unreasonable, that presumption is rebutted when the intermediate-point rate does not exceed a basis recognized as reasonable maximum by the commission. Assailed rate on cattle to intermediate point is on basis prescribed in 165 ICC 277, plus subsequent general increases, and cannot be held to exceed a reasonable maximum.—Wertheimer Cattle Co., Inc., v. Chicago, B. & Q. R. Co., 318 I.C.C. 167 (168-9).

That assailed rates may have constituted departures from the long-and-short haul provisions raises only a prima facie presumption of unreasonableness, which may be rebutted by appropriate evidence, such as a showing that assailed rates are on same level as or below prescribed levels. Assailed rates on scrap iron are not shown to be unreasonable when they are below corresponding class rates and considerably below rates constructed on basis prescribed for movements from same origins to other destinations in same area; thus, in past they were less than reasonable maxima and no changed circumstances warranting prescription of reasonable maximum rates on lower level for the future are shown.—Hutchinson Iron & Metal, Inc., v. Baltimore & O. R. Co., 316 I.C.C. 667 (669-70).

66. Rates and fares contrasted; like in kind.—[Vols. 2, 6, 9, 11, 12, 14-16, 18, 19].—In determining whether a violation of the long-and-short-haul clause exists, like rates must be compared. Comparison of proportional with local rates would not establish such a violation.—Dairy Products from Twin Cities to Chicago, 321 I.C.C. 720 (724).

Like rates and charges must be compared in determining whether a fourth-section violation exists, and transportation services accorded transited shipments are dissimilar from those provided nontransit shipments. That multiple-car rate to an Atlantic port on a 2,000-ton shipment of soybean cake or meal processed at Chicago from soybeans originated in described midwestern territory is lower than single-car rate on a 2,000-ton shipment of cake or meal processed at Chicago from soybeans originated at Chicago and moving for a shorter distance over the same route in the same direction does not violate §4, since shipments from the more distant origin move under transit arrangements, while those from Chicago do not.—Vol. Rates on Processed Meal—Midwest to Ports, 322 I.C.C. 456 (472-3).

Export rates lower than domestic rates from intermediate points do not violate §4 when they are subject to intermediate rule whereby they apply specifically from the intermediate points and thus supersede the domestic rates.—Nueces County Nav. Dist. No. 1 v. Atchison, T. & S.F. Ry. Co., 315 I.C.C. 155 (162).

80. "Like kind of property" construed.—[Vols. 2, 13].—The prohibition of §4 is limited to transportation of "a like kind of property," and the commission has held in effect that two different kinds are involved when the same physical property is the subject of two materially different classes of service; thus, where the services differ materially, no fourth-section departure results. Restriction of reduced alternative eastbound transcontinental rates on lumber not to apply to shipments delivered by lighterage (or car float in lieu thereof) therefore does not violate §4, even though the lower rates apply over routes through New York Harbor to more distant destinations on Long Island and in New England, and charges to New York lighterage points on shipments loaded to the new minima or higher will exceed those to the farther points.—Reduced Transcontinental Lumber Rates, 1961, 318 I.C.C. 815 (840, 847).

Under Substantially Similar Circumstances and Conditions

105. Matters considered, generally.—[Vols. 2, 9, 12, 16, 19].—Although, under considered multiple-car rates, charges on a 2,000-ton transit shipment of soybean cake or meal processed at Des Moines from single-car loads of soybeans originated at Gillet Grove, Iowa, and moving from Des Moines to New Orleans in 40-car lots are lower than charges for a shorter distance over same route to New Orleans on a like shipment processed at Cedar Rapids from soybeans originated at Marathon, Iowa, the lesser charge for the longer haul applies on a 141-mile single-car movement of soybeans to the transit point and a multiple-car movement of cake and meal beyond, whereas the greater charge for the shorter haul applies on a 221-mile single-car inbound movement and a multiple-car outbound movement. Transportation services provided on the shipment from Gillet Grove are thus substantially less than those provided on that from Marathon and are consequently substantially dissimilar. In such circumstances the multiple-car rates do not violate §4.—Vol. Rates on Processed Meal—Midwest to Ports, 322 I.C.C. 456 (473-4).

Moreover, the described route from Gillet Grove via Marathon to New Orleans is not the direct route, and, even assuming that fourth-section relief were necessary and had been obtained over the direct route, carriers operating over that circuitous route may without further authorization meet the charges of carriers of same type operating over the direct route to or from competitive points.—Id., p. 474.

123. "Over the same line or route" construed.—[Vols. 2, 6, 9, 11, 14, 19].—There would be no §4 violation following restriction of considered rates to apply over routes in southern territory, including Cincinnati, although a higher rate would apply to Dayton, Ohio, which point over routes to be canceled is intermediate to Cincinnati, than rates effective to latter point. The rates would apply over different routes; and routes to Cincinnati over which lower rates applied would not pass through Dayton.—Routing—Brick—from North Carolina to Ohio, 315 I.C.C. 645 (648).

Aggregate-of-Intermediates Clause

138. When rates unlawful within meaning of clause.—[Vols. 2, 6, 9, 11, 12, 15-17, 19].—Mere fact that a published rate is violative of §4 does not give shipper the right to apply the "legal" rate; only if the rate is unreasonable has shipper established than an overcharge has occurred; and it is not within the court's competence to determine such a question.—Great Northern Ry. Co. v. United States, 312 F. 2d 901 (904).

As proposed proportional TOFC rate from Twin Cities to Chicago does not apply on traffic to points intermediate to Chicago, it is not apparent how it could result in violation of the aggregate-of-intermediates clause on shipments from points beyond Twin Cities to such intermediate points. However, if the proposed rate results in any uncorrected departures, respondents have duty to correct them promptly or apply for the necessary relief.—Dairy Products from Twin Cities to Chicago, 321 I.C.C. 720 (725).

That defendant bargeline's through rates on iron and steel articles from Pittsburgh district to Tennessee River ports exceed combinations of its rates to Paducah, Ky., plus those of other water carriers beyond does not violate the aggregate-of-intermediates clause when defendant does not participate in joint rates with other bargelines over route of movement and the compared combinations do not apply over routes of the same carriers. Also, the combination rates would be inappropriate as a reasonable maximum basis to the Tennessee ports since defendant does not voluntarily interchange the traffic, and shipper would have to pay for transfer service at Paducah in addition to the combination of local rates.—Hambrick v. American Commercial Barge Line Co., 318 I.C.C. 527 (537).

139. Determination of the aggregate-of-intermediate rates.—[Vols. 2, 6, 9, 11, 12, 14, 15, 19].—Rate factors applied under intermediate rules, see §6(7), n. 109-117.

Although Seattle was not an intermediate point on route of actual movement of Government shipments, aggregate rule in tariff publishing the through rate from origin to destinations required aggregation of rates if the separate rates via any route over which the through rate applied produced a lower charge. Seattle was an intermediate point on another authorized route, and as plaintiff appears to admit that the §22 quotation rate from origin of shipments to Seattle also applied via latter route, for purpose of determining application of the aggregate rule to considered shipments Seattle may be treated as though in fact an intermediate point on the route of movement.—Great Northern Ry. Co. v. United States, 312 F. 2d 901 (904).

Since the aggregate rule refers to separately established rates in tariffs on file with the commission, and the §22 rate to Seattle was not so filed, the aggregate rule does not permit use of that quotation in combination with the local tariff rate beyond; and provision in that quotation that shipments thereunder would be subject to "all other *** rules which in any way increase or decrease the amount to be paid" does not indicate that it was to be considered a rate on file with the commission within meaning of the aggregate rule of the through tariff; the aggregate rule as included in the quotation permitted aggregation of intermediate rates only between origin and Seattle; thus the Government may not aggregate the quotation and tariff rates as sought.—Id., p. 904.

143. Relief in special cases.—[Vols. 9, 11, 12, 16, 18, 19].—Proposed reduced rates on iron and steel bars from four Illinois origins to Houston, Tex., when added to local rates from more distant origins or to local rates to points beyond Houston, produce through rates lower than existing one-factor rates from or to such farther points; as the reduced rates are compensatory and justified by barge and market competition, aggregate-of-intermediate relief is granted.—Steel Bars, Lemont, Ill., to Iowa, Kans., Mo., Minn., and Nebr., 319 I.C.C. 292 (305).

Though proposed reduced rates on heavy iron and steel articles from official territory origins east of Illinois-Indiana border to w.t.l. destinations north and east of Missouri River are justified by compelling market competition with Chicago, some departures from the aggregate-of-intermediates clause will occur over routes through w.t.l. territory to official territory points at or near the territorial border, where the single-factor official-territory rates exceed combinations of the reduced rates to a w.t.l. point plus the w.t.l. rate beyond. As the competitive situation at the official-territory destinations is sufficiently different to warrant continuance of the present higher rate level from the involved origins, grant of relief sought is justified.—Iron and Steel from Official to W.T.L. Territory, 318 I.C.C. 449 (454, 458).

Relief from Long-and-Short-Haul Provision

165. Authority of commission to grant relief, generally.—[Vols. 2, 6, 11, 15, 17].—A grant of fourth-section relief is permissive only.—A. L. Mechling Barge Lines, Inc. v. United States, 209 F. Supp. 744 (747)*.

While narrowly, in passing upon fourth-section application, the commission was called on to determine whether applicants had made out a special case justifying long-and-short-haul discrimination, it was broadly engaged in performing its quasi-legislative function of ratemaking, involving exercise of broad discretion.—Igert v. United States, 211 F. Supp. 42 (44)*.

168. Necessity for application.—[Vols. 2, 15].—Carriers are not required to obtain the commission's permission to depart from the long-and-short-haul provisions of §4 in establishing rates over indirect routes to meet those over direct routes; lawfulness of such rates must be determined from standards set forth in other sections of the act.—Farmers Potato Distr. Co., Inc. v. Atchison, T. & S.F. Ry., 318 I.C.C. 415 (418)*.

Though petitioners request that requirement in prior report for establishment of import-export rates between interior southern-territory points and Wilmington, N.C., differentially under Morehead, N.C., be modified to except instances where it

would be necessary under §4 to observe equalized rates to or from Ohio River crossings as maxima, rates established in compliance with findings therein are not exempt from provisions of §4; either they should be published to conform with the long-and-short-haul clause, or appropriate applications for relief should be filed.—City of Wilmington v. Alabama G.S.R. Co., 319 I.C.C. 620 (625)*.

Although Camden, Ind., is intermediate to Frankfort and Crawfordsville on direct route of the Pennsylvania from Chicago, it is not located on the short tariff route to those points, and under 1957 amendment to §4 the Pennsylvania, operating over a circuitous route, may meet the rate over the short route to the farther points and apply higher rates at intermediate points without obtaining relief from the commission. Assailed rate on cattle from Chicago to Camden, which exceeded the Pennsylvania's competitive rate to the more distant points, is not shown to have exceeded a reasonable maximum.—Wertheimer Cattle Co., Inc., v. Chicago, B. & Q. R. Co., 318 I.C.C. 167 (169).

173. Burden of proof.—[Vols. 15, 16].—Contention that the commission qualified the burden of proof resting on applicant railroads to show that proposed rate approximating cost per ton for barge movement was no lower than necessary to meet existing competition nor so low as to threaten extinction of legitimate water competition, by requiring protestant bargelines to show that the competitive water route was the low-cost route before it would find that those criteria had not been met, rejected; both language of the statute and cases which have construed it make plain where the burden rests, and in reports in other proceedings the commission has clearly expressed its awareness that it is applicant, not protestant, who labors the heavy oar. Report under review shows that the commission fairly evaluated the evidence and brought to bear upon its ultimate conclusion, that a special case for relief had been presented, its expertise in the complex process of ratemaking; the commission's order sustained.—Igert v. United States, 211 F. Supp. 42 (45-6)*.

In finding that the slight differential in favor of bargelines under proposed rate was not shown to be unlawful, the commission did not construe §15a(3) to modify the strict and established proof requirements of §4; the report does not refer to §15a(3), and it may fairly be assumed that the commission deemed it unnecessary to repeat its statement in earlier report approving the present rate that it was not necessary to consider whether §15a(3) should be construed as liberalizing those accepted standards. Since the challenged finding is found in context with the bargelines' request for an arbitrary 10-percent differential in their favor without any showing of their operating costs, it appears that the commission was simply disavowing any disobedience of the national transportation policy which might result from failure to preserve the inherent advantages of water service when demonstrated by persuasive evidence.—Id., p. 46.

176. "Special cases" construed.—[Vols. 2, 6, 9, 11-19].—A special case justifying grant of fourth-section relief exists by virtue of actual and compelling competition.—A. L. Mechling Barge Lines, Inc. v. United States, 209 F. Supp. 744 (748-9)*.

Freight-forwarder competition constitutes a special case justifying permanent fourth-section relief for any-quantity commodity motor-water or motor-water-motor rates to and from inland points which, because related to overland forwarder rates, are lower than rates (including port-to-port rates) to or from intermediate points on both east and west coasts over direct intercoastal routes.—Intercoastal Any-Quantity Class and Commodity Rates, 319 I.C.C. 357 (361-2).

If reduced rates on fine coals from mines on Louisville & Nashville and Southern Ry. to Tampa and Sutton, Fla., are not approved, those carriers must forgo the traffic, since the Tampa area receivers would then satisfy their fuel requirements by arranging for unregulated water carriage of coal and imported oil; cancellation of the reduced coal rates would also pose a serious threat to northbound movement of phosphate rock. Higher rates from involved origin groups to intermediate destinations

where waterborne fuel is not a competitive factor reflect rates approved by the commission, and no shipper or receiver of coal opposes the relief sought. As the reduced rates satisfy criteria of 74 ICC 48, grant of permanent relief is warranted to preserve competitive rail relations and existing rate groups.—Coal from Southern Mines to Tampa and Sutton, Fla., 318 I.C.C. 371 (380, 385, 391).

The commission has frequently held that market competition constitutes a special case justifying fourth-section relief.—Iron and Steel from Official to W.T.L. Territory, 318 I.C.C. 449 (455).

Compelling barge competition on newsprint paper from Calhoun, Tenn., to Baton Rouge, La., and market competition on traffic from Childersburg and Coosa Pines, Ala., which conditions do not exist at intermediate points on the direct routes, constitute a special case justifying grant of fourth-section relief.—Newsprint Paper from Tenn. and Ala. to Baton Rouge, La., 315 I.C.C. 117 (118, 122)*.

Competition

187. Competition with water carriers.—[Vols. 2, 6, 9, 11-19].—Section 4 does not outlaw efforts to forestall an intensification of water competition that is already substantial. Bargeline competion for movement of iron and steel bars from Lemont, Ill., is actually in existence and will probably be intensified unless proposed rail reductions, which meet the tests of compensativeness announced in 74 ICC 48, are approved; and competing producers at other origins involved in the adjustment also have available and are using barge service. Relief granted.—Steel Bars, Lemont, Ill., to Iowa, Kans., Mo., Minn., & Nebr., 319 I.C.C. 292 (305).

Although there is no present water movement of corn to Portland and Augusta, Maine, and Manchester, Conn., substantial tonnages moved by barge to Augusta in two recent years, and only the expectation of reduced rail rates in the near future precluded continuance of that service and its extension to Portland and Manchester. Applicant railroads actually lost substantial tonnage to that competition, and shipper testimony is persuasive that there is definite possibility of restoration of the barge service if proposed rail reductions are not made. As there is no barge competition at intermediate destinations on direct routes to which shipments move under like conditions at higher charges under existing single-car rates, relief is justified for proposed multiple-car nontransit rates on corn, minimum 500 tons, to Portland, Augusta, and Manchester, restricted to the season of open navigation on New York State Barge Canal.—Corn, Mich., Ohio, and Pa. to Augusta and Portland, Maine, 319 I.C.C. 344 (355)*.

189. Rail-and-water competition.—[Vols. 2, 6, 9, 11-13, 15-19].—Grant of relief for uniform reduction of 30 cents per ton in all-rail rates on fine coal from Illinois, Indiana, and western Kentucky mines to Red Wing, Minn., is justified to meet rail-barge and rail-barge-truck competition not present at intermediate points, when under present rates respondents have lost almost all the traffic to bargelines, and cost data discussed in detail in appendix are convincing that the proposed rates are compensatory.—Bituminous Coal from Ill., Ind., & Ky. to Red Wing, Minn., 318 I.C.C. 17 (21-22).

Relief for reduced all-rail rates on plastics from Texas City and related Texas origins to New York-New Jersey area and named New England destinations is justified to meet existing water-rail competition when cost evidence shows that they are compensatory.—Plastics from Texas to the East, 319 I.C.C. 379 (381)*.

190. Market competition.—[Vols. 2, 6, 9, 11-19].—Relief for reduced rates on grain and products from Pittsburgh to Syracuse and Utica, N.Y., is justified by market competition from Buffalo; the proposed rates to those destinations are reasonably compensatory when their revenue yield exceeds out-of-pocket costs. Because of lower rates from Buffalo, competitive effect of the proposed rates at intermediate origins on the direct route to Syracuse will be minimal, and the proposed rates to Utica are only 1 cent less than those to intermediate destinations.—Grain from Pitts-

burgh, Pa., to Eastern Base Points, 322 I.C.C. 218 (233)*.

Relief sought for reduced all-rail rates on iron or steel articles from points in middle Atlantic States, as listed in appendix B to prior report, to destinations in Louisiana and Texas is grounded on market competition with producing points in w.t.l. and southern territories the same as that found in that report to exist between those producing points and origins listed in appendix A thereto. Reduced rates from the competing origins to those destinations, and effect of postwar general increases, have disrupted rate relations between the competitive origins, and respondents seek to restore the previous relationship without reducing rates at intermediate points not affected by such competition. The market competition involved meets the definition of that term in 318 ICC 449 and constitutes a special case; relief granted.—Iron or Steel Articles from the East to the Southwest, 321 I.C.C. 419 (423, 427)*.

Market competition has long been accepted as ground for fourth-section relief. Producers of iron and steel bars at other involved origins require a level of rates comparable to that approved from Lemont, Ill., in order to participate in the traffic on a competitive basis. Relief granted.—Steel Bars, Lemont, Ill., to Iowa, Kans., Mo., Minn., & Nebr., 319 I.C.C. 292 (305).

Though market competition constitutes a "special case" justifying fourth-section relief, there is little distinction between competition of markets and competition of rival railroads which serve them. There is actual and compelling market competition at w.t.l. points north and east of Missouri River on heavy iron and steel articles from origins east of Illinois-Indiana line and from Chicago, and eastern railroads must have rates competitive with w.t.l. carriers to participate in the traffic; if proposed compensatory reduced rates are not authorized, they will lose it, since w.t.l. fabricators can obtain their materials from Chicago at rates lower than the official-territory level. As the competitive situation at intermediate official-territory points is sufficiently different to warrant maintenance of the present higher rate level, grant of relief is justified.—Iron and Steel from Official to W.T.L. Territory, 318 I.C.C. 449 (455, 457, 458).

Relief to maintain on corn and products from Illinois and Indiana origins to Oneonta, N.Y., in Albany group, combination rates made on Danville, Ill., lower than rates to directly intermediate destinations in higher-rated New York City group, is justified by market competition of Danville with Chicago and Kankakee, Ill., and Milwaukee; proposed rates are reasonably compensatory and no lower than necessary to meet the competition; granted, subject to usual conditions.—Corn and Corn Products from Ill. and Ind. to the East, 319 I.C.C. 605 (618).

215. Investigation by the commission; character.—[Vols. 2, 9, 18].—In proceeding on remand from the district court, the commission is limited to matters considered by the court, whose review was limited to determination of whether procedure followed was lawful and whether the challenged fourth-section orders on their face disclosed sufficient basis for their issuance. The court stated that §4 does not contemplate determination as to whether rates charged unduly discriminate against competing water carriers; that such question must be raised by proceedings under §§ 13 and 15. Therefore, in complying with the court's order on remand, the commission is limited to issues arising under §4; is not conducting an investigation pursuant to §13 or §15; and is also precluded from considering discrimination against connecting carriers within prohibition of §3(4). Accordingly, respondents' objection to consideration of the §3(4) issue is sustained, and prescription of joint rail-water rate sought by protestant Seatrain cannot be considered.—Iron or Steel Articles from the East to the Southwest, 321 I.C.C. 419 (422)*. [But see dissent.]

However, the issue of destructive competition is properly before the commission, since §4 requires that rates for which relief is sought must be "reasonably compensatory for the service performed," and rates which do not comply with that requirement might constitute destructive competition.—Id., p. 423.

Authorization of Relief

228. Conditions annexed to grant of relief; partial authorization.—[Vols. 2, 6, 11, 15, 16, 18, 19].—In granting relief on certain iron and steel articles from official to w.t.l. territory to meet compelling market competition from Chicago, usual condition that intermediate-point rates must not be increased without commission approval is imposed; however, the usual condition that such rates shall not exceed the lowest combination of rates subject to the act (including "backup" combinations) is not imposed. Applicants must have rates competitive with w.t.l. carriers to continue participating in the traffic; if they reduce rates to that territory they will at least have supporting shippers' traffic to earn revenue, and the long-haul rates would be compensatory; if those rates cannot be reduced, applicants will lose the traffic because w.t.l. fabricators can obtain their materials from Chicago. While the lowest-combination condition has been imposed for over 50 years and intermediate-point shippers have come to rely thereon, should it develop that such shippers may be harmed they may petition for relief; the matter remains under the commission's control.—Iron and Steel from Official to W.T.L. Territory, 318 I.C.C. 449 (453, 456-9).

231. ——Modification of extent of relief "from time to time."—[Vol. 2].—The commission's grant of relief goes no further than the scope of the issues upon the particular facts before it; the matters involved remain under its control, and the proceedings may be reopened and the findings modified as circumstances may dictate.—Iron and Steel from Official to W.T.L. Territory, 318 I.C.C. 449 (458-9).

235. Relief from "operation of this section."—[Vols. 2, 17].—Since fourth-section orders are permissive, authorizing higher rates at intermediate points to extent indicated therein, reference to such orders in rate tariffs containing intermediate rules does not change application of the intermediate rules.—Sioux City Foundry & Boiler Co. v. Chicago, B. & Q. R. Co., 318 I.C.C. 13 (15).

236. Construction of general order of authorization.—[Vols. 2, 6, 9, 12, 19].—Maintenance of scale basis on superphosphate from Florida to northern-line points in Minnesota and the Dakotas on higher level than southern fertilizer scale applicable on superphosphate to other w.t.l. points comports with relief granted in 304 ICC 535 for commodity rates east of Rocky Mountains where revenue from the lower more-distant-point rates exceeds that from rates 20 percent of class 100, plus authorized increases, on a minimum of 30,000 pounds; per-car revenue on a minimum 100,000-pound shipment of superphosphate to a w.t.l. point beyond a typical northern-line point exceeds the corresponding revenue at the class 20, 30,000-pound basis.—Agsco Chemicals, Inc. v. Alabama Great Southern R. Co., 314 I.C.C. 725 (732).

Qualification on Authority of Commission

243. More distant rate reasonably compensatory.—[Vols. 2, 6, 9, 11, 12, 14, 16-19].—The commission's finding, in granting §4 relief in connection with establishment of a reduced proportional rate on corn from origins on Kankakee Belt Line to Kankakee, Ill., that the through rate was compensative does not answer the question of whether the direct effect of the below-cost proportional on Belt Line traffic is wholly at odds with the national transportation policy. There is no economic analysis, no expert testimony, no supporting data; appellants claimed throughout the proceedings that the rate structure violated the transportation policy; under the circumstances, it is not sufficient for the commission to approve such a rate simply on a finding that the through rate is reasonably compensative and no lower than necessary to meet the competition.—Mechling Barge Lines v. United States, 376 U.S. 375 (387-8)*.

Reduced rates of Louisville & Nashville and Southern Ry. on coal from mines on their lines to Tampa and Sutton, Fla., satisfy the criteria of 74 ICC 48 when they are

compensatory and not below a minimum reasonable level, and are no lower than necessary to meet unregulated private water competition.—Coal from Southern Mines to Tampa and Sutton, Fla., 318 I.C.C. 371 (386, 391).

247. ——Legitimate water competition not to be extinguished.—[Vols. 2, 6, 9, 11, 12].—Reduced rates of Louisville & Nashville and Southern Ry. on coal from mines on their lines to Tampa and Sutton, Fla., are not so low as to threaten extinction of legitimate water-carrier competition when they are compensatory and no lower than necessary to meet private water carriage, and protestant common-carrier bargelines have no reasonable expectation of sharing in the traffic even if the reduced rail rates were condemned.—Coal from Southern Mines to Tampa and Sutton, Fla., 318 I.C.C. 371 (386, 391).

255. ——Other infractions of act not to be created.—[Vols. 2, 9, 11].—District Court's holding, approving the commission's action in refusing to consider contentions made and proof offered in §4 proceeding (that proposed rate violated §§1(5), 3(1), and 3(4) and the national transportation policy) because claims of other unlawfulness were beyond the immediate §4 issues, was erroneous. Lawfulness of the rates was neither investigated by the commission, nor assailed by appellants in a formal complaint, but the commission should have passed on the questions raised when the §4 relief was granted. While only proportional factor of the rate was attacked, the proportional rate is not a separate charge but is the result of the combination rate; there is a definite tie-in that prevents dividing the elements going into the combination, and the combination rate has a real impact on shipments originating at points from which the proportional applies. Further, the rate is not "remote," as is shown by undisputed statement of traffic lost by appellant barge line since it became effective. Reversed and remanded.—Mechling Barge Lines v. United States, 376 U.S. 375 (379-83, 387-8)*.

In view of finding of undue prejudice in reduced rates for which relief is sought, and uncertainty as to manner in which applicants will elect to remove that unlawfulness, fourth-section application is denied.—Export Grain from Texas to Texas Points, 319 I.C.C. 16 (28).

260. Burden of proof; facts tending to establish or disprove compensatory character.—[Vols. 2, 6, 9, 12, 15, 16, 18, 19].—Proposed reduced rates of eastern carriers on iron and steel articles from official-territory origins east of Illinois-Indiana border to western trunkline points generally north and east of Missouri River are compensatory when unrebutted evidence shows that yields therefrom would exceed average earnings and expenses on all traffic handled by class I railroads in eastern district, on basis of average loading and length of haul.—Iron and Steel from Official to W.T.L. Territory, 318 I.C.C. 449 (458).

Reduced rates on coal from mines on Louisville & Nashville and Southern Ry. to Tampa and Sutton, Fla., are reasonably compensatory when movement can be accomplished in existing trains with very little if any additional expense, utilizing both regular coal cars and covered hopper cars which otherwise move empty southbound in connection with northbound movement of phosphate rock, and revenue received exceeds out-of-pocket costs exclusive of long-term variable costs. In addition, the Southern shows that its earnings under the reduced rates exceed its average return per ton-mile, that the reduced rates are higher than other coal rates approved from origins in same general area, and that cars used can load to 77 tons compared with 72.4-ton load used in computing costs.—Coal from Southern Mines to Tampa and Sutton, Fla., 318 I.C.C. 371 (377, 390, 391).

Reduced rate proposed on newsprint paper will more than cover out-of-pocket costs and will leave competing barge lines a slight rate edge which should be sufficient to offset any service disadvantage; thus meets the test of a "reasonably compensatory" rate for §4 purposes laid down in 74 ICC 48 as requiring that it (1) more than cover the extra and additional expenses incurred in handling the traffic, (2) be no lower than necessary to meet existing competition, (3) nor so low as to threaten extinction of legitimate competition by

undue burden on other traffic nor jeopardize the fair return contemplated by §15a.—Newsprint Paper from Tenn. and Ala. to Baton Rouge, La., 315 I.C.C. 117 (122)*.

Publication of Rates Subject to Rule 27

266. Applicability of rule, generally.—[Vols. 2, 6, 9, 16, 19].—When tariff item naming per-car rates on potatotes sought to be applied from intermediate origins was governed by reference marks explained as subjecting those rates to numbered items containing holdout rules, and, following a semicolon, "also to" specified fourth-section applications "via direct tariff routes," latter phrase clearly related only to the fourth-section applications mentioned and did not limit application of the holdout rules to the shortest tariff routes.—Farmers Potato Distr. Co., Inc. v. Atchison, T. & S.F. Ry., 315 I.C.C. 105 (107)*.

However, the bases provided by the holdout rules related the per-car rates to rates already established on cabbage from and to the considered points; thus, where one item held out a per-car rate from considered intermediate points only if tariffs specified therein provided a rate on cabbage from those origins to considered destinations, but the tariffs referred to contained no such rates at time complainant's shipments moved, no rate basis was provided from those origins and the holdout rule did not apply; similarly, since tariffs specified in item containing the other holdout rule provided rates on cabbage from the intermediate origins to only 3 of the 23 destinations involved, there was no basis for establishing the per-car rates to the other destinations.—Id., p. 108.

On reconsideration, however, per-car rates on potatoes from southern-territory origins, including Euclid, Va., to official territory destinations were subject to specified §4 application referred to in fourth-section order in effect when considered shipments moved from Portlock, Va., an intermediate official-territory point on direct routes from Euclid to destinations involved, and also to holdout rules published in southern carriers' tariff in compliance with the order, which official-territory defendants voluntarily published. Thus, to extent defendants were applicants in the §4 proceeding, they are required to maintain from Portlock rates constructed on the same basis and in the same manner (though not necessarily in the same amount) as the per-car rates from Euclid to same destinations. Failure to provide in one holdout rule the same basis for constructing per-car rates from Portlock as that used for such rates from Euclid, in violation of the §4 order, should not be allowed to defeat shipper's right to reparation.—Id., 318 I.C.C. 415 (417-8)*.

Proposed reduced rates on iron or steel articles from origins in middle Atlantic States to destinations in Louisiana and Texas appear reasonably compensatory when from representative origins to Houston, over the principal long-haul routes through St. Louis, they are about 115 to 120 percent of average out-of-pocket cost for those routes for 1959; over routes through southern region to Houston, Texas City, and New Orleans, they are 126 to 138 percent of out-of-pocket costs; and for docket No. 28300 distances plus 13 percent circuity they are about 107 to 111 percent of such costs.—Iron or Steel Articles from the East to the Southwest, 321 I.C.C. 419 (425)*.

269. Duty of carriers when rates published under rule 27.—[Vol. 2].—Assailed rates on potatoes from two Virginia origins in official territory to destinations in that territory, found unreasonable to extent they exceeded rates and charges on basis of per-car rates thereto from southern territory, including Euclid, Va., to which the origins were intermediate. The per-car rates were authorized by fourth-section order granting relief over direct routes and were subject to holdout rules in southern carriers' tariff, which official-territory defendants voluntarily published. To extent defendants participated in the §4 proceeding and used order therein in maintaining rates over their lines, they volunteered to protect the southern-territory basis; failure to provide in one holdout rule the same basis for con-

structing per-car rates from Portlock, Va., as that used for such rates from Euclid, in violation of the §4 order, should not defeat shipper's right to reparation. Reparation awarded on shipments on which per-car rates were protected over direct and circuitous routes and on those from Portlock that moved over direct routes from Euclid.—Farmers Potato Distr. Co., Inc. v. Atchison, T. & S.F. Ry., 318 I.C.C. 415 (418-20)*.

Section 4. (2) Competition of railroads with water routes; change of rates.—[Unchanged. See vol. 9, p. 7433.]

Amendments, see footnotes, vol. 2, p. 1345; historical note, vol. 2, p. 1345.

Notes of Decisions

Volume 2—p. 1345; Volume 9—p. 7433; Volume 12—p. 10242; Volume 14—p. 11440; Volume 15—p. 12016; Volume 16—p. 12651; Volume 19—p. 15143.

Section 5. (1) Pooling; division of traffic, service, or earnings.—[Unchanged. See vol. 11, p. 9176.]

Amendments, see footnotes, vol. 2, p. 1347; vol. 11, pp. 9176, 9177; historical notes, vol. 2, p. 1347, vol. 16, p. 12651.

Historical Note

The commission recommends that §5(1) be amended so as to exempt contracts, agreements, or combinations affecting transportation of household goods to which any motor common carrier may be a party with other such carrier or carriers for pooling or division of traffic, service, or earnings.—Annual Report, 1963, p. 14; renewed, Annual Report, 1964, p. 64.

Notes of Decisions

Volume 2—p. 1348; Volume 6—p. 5131; Volume 9—p. 7434; Volume 11—p. 9177; Volume 12—p. 10242; Volume 13—p. 10953; Volume 14—p. 11441; Volume 15—p. 12016; Volume 16—p. 12651; Volume 17—p. 13305; Volume 18—p. 14063; Volume 19—p. 15143.

1. Purpose.—[Vols. 2, 6, 11, 13, 14, 16-18].—Legislative history of §5(1) leaves no doubt that its purpose and need was to prohibit a well-defined type of anti-competitive arrangement which had become widespread in the railroad industry, i.e., arrangements between railroads to suspend competition by apportioning the business and dividing the pooled earnings in fixed percentages; and that such was the purpose of the statute has been noted in numerous decisions of both the courts and the commission.—Kennedy v. Long Island R. Co., 211 F. Supp. 478 (489)*.

3. Scope, in general.—[Vols. 2, 9, 11-13, 18, 19].—While §5(1) empowers the commission to exempt certain pooling arrangements from prohibition of the statute, broad sweep of the section does not encompass pools whose sole concern is labor-management relations; it deals with arrangements between competing railroads to apportion business, and has no application to payments made for strike insurance. Railroads' strike insurance plan providing daily indemnity for loss due to work stoppages designed to enforce demands of labor unions, for which each insured road pays certain annual premiums, does not violate §5(1).—Kennedy v. Long Island R. Co., 211 F. Supp. 478 (483-4, 489)*.

4a.—As to employees.—[Vols. 14, 19].—Pennsylvania R., in initiating agreement with Pullman Co. under which the Pennsylvania would provide porters and arrange for train conductors to perform functions now performed by Pullman conductors on all sleeping cars operated in service local to the Pennsylvania, as result

of which some 53 conductors and 220 porters employed by Pullman would lose their jobs, has attempted to utilize its position as a dominant shareholder of Pullman to accomplish a revision of existing pooling agreement without resort to and approval by the commission. Such circumvention of procedure prescribed by the statute would, if permitted, set a pattern whereby railroad shareholders of Pullman could nullify provisions of and benefits intended by agreements entered into by Pullman with its employees.—Brogan v. Pennsylvania R. Co., 211 F. Supp. 881 (883, 884).

The district court's orders in 64 F. Supp. 108, as result of which the railroads acquired Pullman's stock and the pooling agreement was entered into, provided that entry thereof was without prejudice to rights of Pullman's employees "under existing contracts and practices," and no subsequent order of the commission has taken away from those employees any rights they had when the court's orders were entered. The commission's orders approving the pooling arrangement require Pullman to furnish the "usual" sleeping-car service, which includes both a Pullman conductor and a Pullman porter, and division of revenues from such service contemplates local as well as joint-line service. In class suit brought by plaintiffs on behalf of the Pullman conductors, whose jobs would be permanently lost, the equities are with plaintiffs; the Pennsylvania and Pullman permanently enjoined from putting into effect the considered arrangement without the commission's approval.—Id., pp. 882, 885, 886, 887.

Since it is neither alleged nor shown that continued approval of present agreement covering pooling of Pullman service, or proposal of Pennsylvania R., found consistent with that agreement, to limit Pullman's service on its local lines to furnishing, equipping, and maintenance of sleeping cars, would result in abridgment of collective bargaining pact between Pullman Co. and employees' union or of Pullman employees' rights thereunder, that labor agreement is not relevant and hearing for its presentation is unnecessary.—Pooling of Railroad Earnings and Service, 322 I.C.C. 100 (102)*.

11. Acts constituting violations.—[Vols. 2, 6, 14, 15, 17, 19].—Principle of per se illegality is to be applied only to conduct which of necessity produces consequences violative of the statute under consideration, or which produces proscribed consequences in such an overwhelming proportion of cases that minute inquiry in every instance would be wasteful of judicial and administrative resources. Railroads' participation in considered strike insurance plan did not constitute a per se violation of §5(1).—Kennedy v. Long Island R. Co., 319 F. 2d 366 (373-4)*.

The district court's orders in 64 F. Supp. 108, which resulted in creation of the Pullman Co. as a joint subsidiary of the railroads, provide that Pullman shall supply "service" in sleeping cars; and the commission's orders approving the Uniform Service Contract covering pooling of sleeping-car service and earnings require Pullman to furnish a requesting railroad the "usual service," which includes both a Pullman conductor and a Pullman porter. Neither the court's nor the commission's orders require Pullman to supply only part of such service, or to furnish the type of partial service demanded by the Pennsylvania under its agreement with Pullman purporting to amend the Uniform Service Contract to provide that the Pennsylvania will supply porters and arrange for train conductors to perform functions of Pullman conductors on all sleeping cars operated in service local to its lines.—Brogan v. Pennsylvania R. Co., 211 F. Supp. 881 (883, 885).

The district court's orders recognized the commission's jurisdiction over contracts between carriers under §5(1), and the commission's approval of division of earnings under the Uniform Service Contract included revenues from sale of sleeping-car accommodations on cars operated in both local and joint-line service, and provided for averaging of operating expenses by cost groups which include Pullman conductors and porters; thus the changes proposed by the Pennsylvania and Pullman constitute changes in pooling of service and earnings

within contemplation of §5(1), for which the commission's approval is prerequisite. Such approval having been neither obtained nor sought, the considered arrangement between the Pennsylvania and Pullman is in violation of §5(1); the Pennsylvania and Pullman enjoined from putting such agreement into effect without approval by the commission.—Id., pp. 885-6, 887.

Proposal by motor carrier which is jointly controlled and managed with extension applicant that its corporate financial resources will be made available to applicant and will be used if deemed necessary by their common owners and directors is contrary to provisions of §5(1) which forbid division of earnings by corporate carriers without commission approval therefor.—Babcock & Lee Transp., Inc., Extension, 92 M.C.C. 521 (524).

After the commission, in 60 MCC 701, had approved applicant's pooling arrangements with certain of its carrier agents but entered a cease-and-desist order against similar arrangements with certain others, applicant filed several pooling applications which were dismissed without prejudice upon institution of a rulemaking proceeding involving determination of extent of the commission's jurisdiction over pooling agreements between household goods carriers and their carrier agents holding competitive authority; as that proceeding is still pending, there is no basis, in absence of a specific showing that applicant is willfully failing to comply with the cease-and-desist order, for finding that it is in violation of the terms thereof.—Trans-American Van Service, Inc., Extension, 89 M.C.C. 48 (50-1).

Although commonly controlled respondents, one operating purportedly under single-State proviso, have entered into agreement covering the pooling of traffic, service, and gross earnings in violation of §5(1), issue as to such violations will become moot upon rejection of the single-State respondent's statement of intent to operate in interstate commerce, since it will then be without carrier status under the act.—State Transport Co., 91 M.C.C. 373 (375).

16. Assent; carriers involved.—[Vols. 9, 12, 17, 19].—Before putting into effect proposed modification of existing Uniform Service Contract with respect to service in sleeping cars operated in local service of Pennsylvania R., both the Pennsylvania and Pullman Co. are required to obtain the formal approval of all railroads using Pullman service under that contract.—Brogan v. Pennsylvania R. C., 211 F. Supp. 881 (886).

18. Approval of arrangements by commission.—[Vols. 2, 6, 9, 11-19].—Contract between Pennsylvania R. and Pullman Co., providing for latter's furnishing of only partial sleeping-car service on its local lines, consisting of furnishing, maintaining, equipping, and supplying sleeping cars, is within contemplation of terms of Uniform Service Contract approved to implement provisions of pooling agreement approved in 276 ICC 5, and is not shown to effect such material changes in circumstraces affecting railroad sleeping-car service as would warrant hearing for purpose of reviewing propriety of continued approval of that pooling agreement.—Pooling of Railroad Earnings and Service, Pullman Co., 322 I.C.C. 100 (101-2*.

Section 5. (2) Unifications, mergers and acquisitions of control.—[Unchanged. See vol. 11, p. 9179, vol. 15, p. 12018.]

Amendments, see footnotes, vol. 6, p. 5138, vol. 11, pp. 9179-9181; historical notes, vol. 6, p. 5138, vol. 9, p. 7440, vol. 11, p. 9181, vol. 12, p. 10244, vol. 13, p. 10955, vol. 14, p. 11443, vol. 17, p. 13307. Section 213, vol. 10, p. 8081.

Cross Reference

Section 3 of the Public Law 87-527, July 10, 1962, 76 Stat. 142, provides that all power and authority granted therein to the Texas and Pacific Railway Company [to acquire securities or stock of, or property from, any other carrier, and to increase its capital stock of $75,000, 000 to not more than $100,000,000 of capital stock outstanding] shall be subject to the provisions of the Interstate Commerce Act and any Act supplemental thereto.

Historical Notes

In view of creation of the Department of Transportation by Public Law 89-670, effective April 1, 1967 (32 FR 5453), the commission and the Department of Transportation entered into a Memorandum of Agreement on April 3, 1967 (32 FR 5744, Apr. 8, 1967) for the purpose of accomplishing continuity, liaison, coordination, and support with respect to transferring from ICC to DOT personnel and functions concerned with (1) motor carrier safety matters; (2) certain pending ICC proceedings; (3) pending court cases transferred to DOT; (4) housekeeping operations for ICC personnel transferred; (5) access to, and provision of, reports and other documents, and (6) liaison and cooperation between ICC and DOT.

The commission recommends that §5(2)(a)(ii) be amended so as to conform to §1(22), as amended as concurrently recommended, and §1(18).—Annual Report, 1964, p. 64.

Notes of Decisions

Volume 11—p. 9182; Volume 12—p. 10244; Volume 13—p. 10955; Volume 14—p. 11443; Volume 15—p. 12018; Volume 16—p. 12652; Volume 17—p. 13307; Volume 18—p. 14066; Volume 19—p. 15146.

1. Constitutionality.—[Vol. 18].—One who asserts that he has been deprived of a constitutional right or privilege must show that he has been injured before he has standing in court. In action to set aside the commission's orders approving railroad merger, on ground that plaintiff members of labor executives association were deprived of their constitutional right to a hearing before the commission's record does not show how or wherein plaintiffs would be damaged by considered orders. The commission's finding that public interest did not require a hearing is authorized by statute, is supported by substantial evidence, and is not arbitrary or capricious; matters set forth in plaintiffs' letters objecting to the merger were considered; and plaintiffs did not assert facts showing any failure by the commission to comply with §5(2)(f) in determining employee-protective conditions to be imposed. Judgment for defendants.—Day v. United States, 264 F. Supp. 689 (691-3)*.

2. Construction and interpretation.—[Vols. 11-19].—Although Congress, in enacting §5(4) and the supplementary §5(5) and (6), was primarily concerned with reaching the elaborate corporate devices used to centralize control over the railroads, §5(4) is not limited to proscription of corporate and legal devices, but proscribes unauthorized control effectuated "in any other manner whatsoever." Any doubt as to scope of this phrase was removed by addition of the definition of "control" in §1(3)(b), which the Court has construed as encompassing every type of control in fact, leaving to the agency charged with enforcement the determination from the facts whether "control" exists, subject to normal standards of review. Thus, the commission may adopt §5(4) to the actualities and current practices of the industry and apply it to the extent it deems necessary to protect its jurisdiction under §5(2).—Gilbertville Trucking Co. v. United States, 371 U.S. 115 (123-5)*.

Section 5(2) provides that a transaction within its scope is to be approved if found to be consistent with public interest, and the statute entrusts the commission with the duty to decide what considerations other than those specified in §5(2)(c) shall be given weight; §5(4) is integral to success of the statutory scheme, and the commission may properly give weight to an applicant's fitness where violations of §5(4) are involved; relevance of the question of fitness to a finding of consistency with public interest is self-evident.—Id., pp. 127, 128.

To require divestiture of stock interest in order to terminate unlawful control is within the commission's power, since, with respect to a §5(4) violation, §5(7) provides that it may order any party to take such action as may be necessary, in its opinion, to prevent continuance of the violation, and where the unlawful control is the result of an acquisition divestiture may be the only effective remedy. However, as §5(7) implies, the commission's power is corrective,

not punitive; the justification for the remedy is the removal of the violation.—Id., p. 129.

The use of equitable powers to expunge a statutory violation has been fully explored in context of the antitrust laws and is in many respects applicable to §5(7). If the Court concludes that other measures will not be effective and that complete divestiture is necessary to effective relief, the Government cannot be denied that remedy because economic hardship may result; however, the Court's duty is to give complete and efficacious effect to the statutory prohibitions with as little injury as possible to interests of private parties or the general public. Thus choice of remedy is as important a decision as the initial construction of the statute and finding of a violation; the court or agency charged with this choice has a heavy responsibility to tailor the remedy to the particular facts of each case so as to best effectuate those remedial objectives.—Id., p. 130.

The provisions of §5(2) do not limit the commission's jurisdiction to grant a certificate under §207; see 355 US 141.—Sloan's Moving & Storage Co. v. United States, 208 F. Supp. 567 (573)*.

The statute provides stringent requirements for certain unifications, mergers or acquisitions of control of two or more carriers; however, §5(10) exempts from the operations of §5(2) certain small transfers. The intent of Congress in enacting the §5(10) exemption was to provide a means whereby transfer of operating rights of small motor carriers could be effected easily and without delay under such rules as the commission deemed appropriate; thus, since considered transfer is within the §5(10) exemption, it may be approved *ex parte* in accordance with the commission's transfer rules.—A. L. Root Transportation, Inc. v. United States, 280 F. Supp. 152 (155, 156)*.

Since authority granted under §5(2) is permissive, approval of a transaction cannot prejudice any rights the subject carrier's stockholders may desire to assert in the courts, and whether the authority granted is ultimately exercised is for the parties to determine.—Cleveland, C., C. & St. L. Ry. Co.—Operating Agreement, 320 I.C.C. 430 (433).

The congressional purpose in enacting present §5(2)(a) was to facilitiate voluntary merger and consolidation in the national transportation system. Congress was much concerned with survival of weak railroads and with steps that might be taken to promote carrier survival; and that §5 contemplates rail merger and unification of properties and operations as a step in continuing the enterprises is made clear by decision in 334 US 182. Provisions of §5 complementary to §5(2), such as §5(4) and (5), further emphasize the congressional preoccupation with survival of going concerns by unification of two or more carriers in a common ownership and control.—Okmulgee Northern Ry. Co. Abandonment, 320 I.C.C. 637 (639).

Instant proposal does not involve a merger or consolidation in sense contemplated by that congressional purpose: there is no consolidation of carrier interests, with consequent temporization of competition, but merely the expiration of one carrier, which due to business adversity can no longer successfully compete, and the willingness of another to move into the vacuum to the extent that some need for rail service may remain. The abandoning carrier has no interest in survival as a railroad, and while the other is interested in extending its operation to shippers it does not now reach, the extension is to occur after, and only because of, the abandonment. The proposal is therefore subject to §1(18) rather than §5(2).—Id., pp. 639-40.

Transaction which contemplates a significant change in relationship of carriers concerned, from affiliates under common control to parent and subsidiary, requires approval under §5.—Jacobs Transfer Co., Inc.—Control—Powell Transp. Co., 87 M.C.C. 737.

Antitrust laws:—[Vol. 12].—Although §5(11) does not authorize the commission to ignore the antitrust laws, there is little doubt that it is not to measure proposed railroad merger by the standard of those laws; the problem is one of accommodation

of §5(2) and the antitrust legislation. It does not matter that proposed merger might otherwise violate antitrust laws; §5(2)(b) gives the commission authority to approve merger of railroads if, having considered effects of any resulting curtailment of competition along with advantages of improved service and other matters of public interest, it makes adequate findings that such merger could be consistent with the public interest and in furtherance of the overall transportation policy. Case remanded to trial court for full review of the commission's findings and order.—Seaboard Air Line R. Co. v. United States, 382 U.S. 154 (156-7)*.

The congressional purpose in enacting §5(2) was to facilitate mergers and consolidations in the national transportation system, and in its administration the commission is not to measure proposals for all-motor consolidations by standards of the antitrust laws. However, it may not disregard the policy underlying those laws, including §7 of the Clayton Act, even though merging carriers are relieved from operation thereof by §5(11). The commission's primary task is to reconcile the objectives of preventing injurious waste and securing more efficient transportation service with the general concern of Congress that tendencies toward undue concentration in industry be curbed in incipiency. The problem is to accommodate §5(2) and the antitrust legislation.—Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122 (128-9, 130)*.

In passing on a voluntary merger, the commission must look only to standards of the Interstate Commerce Act, which in matters within its scope is the supreme law of the land; neither §5 nor any other provision of the act contains any antitrust criterion to be applied to merger proposals. Nevertheless, effect of a merger on continuance of competition, both intra- and intermodal, is an element directly related to protection of the public interest and must be considered. However, owing to development of intense competition from other transportation modes, intramodal competition has lost much of its significance in the furtherance of the national transportation policy, and in discussing the relation of antitrust laws to that policy in 361 US 173 the Supreme Court deemphasized the importance of intramodal competition.—Id., pp. 129, 166.

In accommodating §5(2) and the antitrust laws, primary emphasis must be placed on public advantages accruing from merger, such as improved and safer transportation service, lower costs, and other potential benefits that further objectives of the national policy. Absent consideration of those factors and suitable protective conditions, merger might lessen competition to an extent contravening the policy underlying the antitrust laws; but where benefits of merger, in light of conditions imposed, greatly outweigh any potential injurious effects, those laws present no bar to approval.—Impact of a proposed merger on large segments of the population must also be recognized, and the commission must weigh the conflicting interests of the various groups to determine whether the transaction will best serve the public interest as a whole.—Id., pp. 167, 206.

Authority permissive: [Vols. 12-19].—Any authority granted under §5 is entirely permissive, and the question of whether it should be exercised and any conditions imposed on approval complied with is a matter for decision by the parties.—Ringsby Truck Lines, Inc.—Control—Interstate Freight, 93 M.C.C. 528 (533); thus, if condition imposed on approval of acquisition of control is unacceptable to the parties, they have the option of not consummating the transaction.—Norris—Control—Hatcher Trucking Co., Inc., 90 M.C.C. 31 (34).

Though applicants represent that proposed purchases of portions of vendor's operating rights by different vendees are interdependent and that if either is denied, or approved with conditions objectionable to them, any authority granted will not be exercised, approval of one transaction (the other being denied) would be permissive only, and applicants therein could exercise the authority or not, at their discretion.—M & G Convoy, Inc.—Purchase—Great Lakes Forwarding Corp., 90 M.C.C. 397 (403)*.

The commission's authority under §5(2) is permissive only; it cannot force con-

summation of any approved transaction. However, fact that a transaction may conceivably not be consummated under modified terms approved does not inhibit the commission's authority to approve it on revised terms proposed by applicants.—Central Freight Lines, Inc.—Control—Alamo Exp., Inc., 90 M.C.C. 96 (101)*.

It has been the commission's consistent view that determination of the obligations of parties to a §5 agreement, and enforceability thereof, is properly for the parties themselves, or, if necessary, for the courts. The commission's function under the statute is to determine whether the transaction will be consistent with public interest and whether the terms and conditions proposed, subject to such modifications as it may require, are just and reasonable. Whether the transaction will be consummated, or consummation could be legally compelled by applicants, is not for the commission to decide.—Id., p. 100.

Contracts: [Vols. 12, 15, 17-19].—Since railroads' agreement for joint ownership and operation of Jacksonville Terminal, and guaranty of payment of refunding bonds and other financial obligations of the terminal, pertained to joint operation and control of a carrier by two or more carriers, the commission's approval of the contract and of proposed issuance of bonds was required by §5(2). Therefore, Federal, not State, standards must control in controversy between owner-railroads involving alleged breach of contract provisions pertaining to dismissal of president and general counsel of the terminal company and the selection of their successors. Validity of the contract is not challenged and, as a matter of Federal law, effective recognition should be given to the plain and positive terms thereof; Florida statutory "holdover" doctrine may not be applied so as to make a dismissal effective only when a successor has been named when the contract does not so provide.—Jacksonville Terminal Co. v. Florida East Coast Ry. Co., 363 F. 2d 216 (218-9).

See also Texas & N.O. R. Co. v. Brotherhood of Railroad Trainmen, n. 70, below.

Decision in Kent v. Civil Aeronautics Board, 204 F. 2d 263, that a private contract must yield to the paramount power of the Board to perform its duties under the statute creating it to approve mergers and transfers of certificates only upon such terms as it determines to be just and reasonable in the public interest, cited with approval.—Brotherhood of Locomotive Engineers v. Chicago & N.W. Ry. Co., 314 F. 2d 424 (430)*.

Determination of applicant's right to use a "free zone" of trackage in Chicago which is controlled by terms of a lease between predecessors of applicant and of carrier over whose tracks it is now operating, under trackage rights which it seeks to abandon in favor of arrangement with a different carrier, involves interpretation of terms of a contract, a function which the commission has consistently left for settlement by the parties involved or by the courts.—Wisconsin Central R. Co. Abandonment, 317 I.C.C. 218 (221).

Controversy between the parties as to sums due, if any, under stock-purchase contract are for settlement between the parties or by the courts and do not alter or lessen the commission's responsibility to consider the application on its merits; and possibility that the parties may never consummate the transaction if approved is likewise immaterial to consideration of whether it would be consistent with public interest.—Adley Exp. Co.—Control—McFaddin Exp., Inc., 87 M.C.C. 665 (668)*.

See also Zern—Control—William A. Kelly, Inc., n. 5, below.

Control by a noncarrier: [Vols. 11, 14, 19].—Concurrent pendency of two applications seeking authority for a noncarrier's purchase of operating rights of two carriers did not make the proposals a single transaction requiring approval under §5 when there is no evidence that either seller knew of the other's proposed sale or that they were in any way affiliated with each other or with transferee, the contracts between the parties were separate and independent of each other, and the transfer applications were filed separately and at different times. As one transaction, at time of con-

summation, was between a carrier and a noncarrier, and the other at time of consummation did not involve more than 20 vehicles, both were properly approved under §212(b); the commission's orders sustained.—Ship-by-Truck Co. v. United States, 208 F. Supp. 847 (850, 852)*.

Acquisition of stock control of Kansas City Southern and incidental indirect control of latter's carrier subsidiaries by a new noncarrier corporation, created for purpose of developing additional sources of income for the railroad through nontransportation activities, involves acquisition of control of a single established system within principle of 295 ICC 11 and therefore is not subject to §5.—Kansas City Southern Industries, Inc., Control, 317 I.C.C. 1 (3-4).

Merger of existing holding company into a new Delaware corporation is not within scope of §5(2) when, although the new company will thereby acquire control of two or more carriers, those carriers constitute a single established railroad system; decision in 295 ICC 11 is controlling.—Delaware & Hudson Co. Merger, 317 I.C.C. 177 (179-80).

Merger by applicant noncarrier corporation (which controls a motor carrier and a forwarder) of another noncarrier corporation under agreement providing for prior acquisition by the liquidating company of all assets of affiliated motor carrier (Express), including the right to use its name but excluding its certificates, certain vehicles, and $5,000 cash, and reserving Express's right to continue operations—with restriction against transfer of its ownership or certificates to other than applicant for a 5-year period—involves purchase of the motor carrier business and goodwill of Express. Under the agreement applicant would possess a substantial measure of control over Express's future operations, and, to extent they would thereby become less competitive with those of carrier already controlled by it, operations of the two carriers would be controlled in a common interest; proposed transaction thus requires prior approval under §5(2), and fact that the principal parties are both noncarriers is immaterial.—Yale Exp. System, Inc., Stock, 90 M.C.C. 241 (242-3, 244).

Transaction whereby a noncarrier corporation would merge one of its two motor-carrier subsidiaries and immediately thereafter transfer the operating rights thus acquired to a newly created subsidiary, is subject to provision of §5(2)(a) requiring authority from the commission for a noncarrier already controlling one or more carriers to acquire control of another through stock ownership "or otherwise"; "or otherwise" has been construed (37 MCC 185) to contemplate acquisition of control by merger.—Pittston Co.—Control—Brink's Armored, Inc., 87 M.C.C. 637 (640, 643).

See also Weyerhaeuser Co. Merger, n. 5, below.

Since trustees of Central Freight Lines' retirement plan, who control an intrastate carrier through stock ownership and are officers, directors, or managers thereof, are intimately associated with Central through family, executive, and employment relationships, and therefore are affiliated with it within meaning of §5(6), the intrastate carrier, upon becoming a carrier subject to Part II by virtue of operations under single-State proviso, would be under common control with Central, which requires the commission's approval under §5, the exemption of §5(10) being inapplicable because of Central's operation of over 20 vehicles in interstate commerce.—Adams—Control—Specialized Carriers, Inc., 90 M.C.C. 257 (259).

Coordinated rail-truck operations: [Vols. 11, 12, 14, 18, 19].—Intent of the statutory proscription in §5(2)(b) of approval of a transaction involving a railroad or its affiliate unless it be found that it will enable the railroad to use the acquired motor operations to public advantage in its rail operations was to surround acquisition of motor carriers by carriers engaged in other forms of transportation with special safeguards. Congress indisputably intended not only to provide for impartial regulation of all the indicated modes of transportation, but also affirmatively to foster, promote, and preserve the inherent advantages of

each; and, as an essential element of latter purpose, provision was specifically made to protect each mode from the suppression or strangulation which might follow if control thereof were allowed to fall into the hands of a competing transportation agency.—Reading Transp. Co.—Control and Merger, 93 M.C.C. 11 (18-19).

There is nothing in the statute precluding the commission, in the proper exercise of its discretion, from approving the acquisition by a railroad-affiliated motor carrier of the operations of an independent motor carrier, either with or without restrictions, depending on the particular circumstances involved. See the Pirnie case, 85 MCC 363.—Rio Grande Motor Way, Inc.—Control and Merger, 90 M.C.C. 643 (648)*.

Generally, where vendee of motor-carrier rights is a railroad or a rail affiliate, it must be found that the transaction will enable the railroad to use the motor service to public advantage in its operations and will not unduly restrain competition; however, that provision has no application to transactions where the rail parent's interest in the motor carrier subsidiary or subsidiaries was acquired before the Motor Carrier Act of 1935 became effective, or where the acquisition of control was approved in a prior proceeding. As operations involved were either under railroad control prior to that act or were acquired upon the showing of proof required by §5, and that situation would not in practical effect be changed in any way by proposed transaction between two subsidiaries of same railroad, the transaction is a change in form rather than substance and proviso of §5(2)(b) is inapplicable.—Santa Fe Trail Transp. Co.—Purchase—Santa Fe Transp. Co., 90 M.C.C. 123 (127).

Applicability of §5(2)(b) proviso to §207 applications of railroad-controlled motor carriers, see New England Transp. Co. Extension case, §206(b), n. 18; also, Rio Grande Motor Way, Inc., Extension case, §207(a), n. 35.

Exempt and nonexempt operations: [Vols. 18, 19].—See Hudson & M. R. Co. abandonment case, n. 5, below.

Findings required under §5(2): [Vols. 17-19].—Section 5(2) requires the commission to find that a proposed transaction within its scope is consistent with public interest and that the terms and conditions are just and reasonable; those broad terms comprehend a determination of whether the party applicant is making a provident and necessary investment, as well as whether its financial condition is such as to warrant the proposal.—Jacobs Transfer Co.—Control—Powell Transp. Co., 87 M.C.C. 706 (708).

Contention that examiner used the "follow the traffic" test as basis for approval of purchase of rights permitting vendee to serve new plant of one of its principal shippers is without merit; cases cited in support thereof involve convenience and necessity applications wherein new authority was sought, not §5 proceedings where the rights are already in existence and the statutory test is consistency with public interest.—Cassens Transport Co.—Purchase—Speedway Transports, Inc., 90 M.C.C. 159 (164).

Liberal construction: [Vols. 12, 14, 19].—Section 5(4) is to be construed liberally and contains broad provisions prohibiting the control of one carrier in common interest with another without the prior approval of the commission, however, such result is obtained; "control" as used in §5 means power to control, and a demonstration of existence thereof is unnecessary; nor does existence of legal control in one person prevent concurrent existence of actual control in another through acquiescense of the former in such control.—Stewart—Investigation of Control, 87 M.C.C. 681 (694).

1940 Act: [Vols. 13, 18, 19].—Amendment of §5(2) by the Transportation Act of 1940 left initiative to formulate and present specific merger plans entirely to the carriers; and in passing on a voluntary merger the commission must look only to the standards of the Interstate Commerce Act. But though neither §5 nor other provision of that act contains any antitrust criterion to be applied to such proposals, the commission may not ignore the policy under-

lying the antitrust laws; effect of a proposed merger on continuance of competition is an element directly related to protection of the public interest and must be considered. And in addition to the criteria of public interest specified in §5(2)(c) the commission may apply any other appropriate criteria, including justness and reasonableness of the merger terms as to stockholders.—Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122 (127, 128-9, 205)*.

Moreover, the commission is not restricted to consideration of the specific proposal presented by applicants, but must afford full recognition to evidence adduced by opposing parties and determine the modifications, if any, that are required to meet the public-interest test; and its authority to impose conditions on approval is not limited to those proposed or favored by any of the carriers. The broad authority expressly conferred by §5 to impose conditions is designed to further ensure full protection of the public interest.—Id., pp. 127, 130.

Legislative history of Transportation Act of 1940 clearly supports commission's interpretation of distinction between the mandatory provisions of §5(2)(f) applicable to railroad employees and wholly discretionary provisions applicable to motor carrier employees under §5(2)(c); had Congress intended to accord motor carrier employees the same protection granted railroad employees by §5(2)(f), it would not have made the provisions of that section mandatory, while, at the same time, writing the discretionary provisions contained in §5(2)(c). It is clear that §5(2)(f) consisting of only three sentences is limited to railroad employees, and in this respect, contains no ambiguities. Any attempt on our part to interpret it as embracing motor carrier employees would be a usurpation of the congressional function of legislation.—Midwest Buslines, Inc.,—Purchase—American Buslines, Inc., 97 M.C.C. 426 (436, 439).

Speculation; trafficking in certificates: [Vols. 12, 15-18].—Trafficking in operating rights can be accomplished through an option to purchase the carrier's stock as readily as through legal ownership of the rights. Operating rights and controlling stock of carriers do not represent ordinary articles of commerce to be bought and sold for a quick profit.—Lease Plan International Corp.—Control—National, 93 M.C.C. 173 (185)*.

State certificate: [Vols. 11, 14, 19].—The commission has found consistently since 1941 that a carrier operating in interstate or foreign commerce under partial exemption of former second proviso of §206(a)(1) is a carrier within meaning of §5(13) and as defined in §203(a)(14), and that transfers, leases, and mergers involving such carriers, when not exempted by provisions of §5(1), are within scope of §5(2)(a); and that conclusion applies to carriers continuing former proviso operations under "grandfather" provisions of §206(a)(7).—Caton Transfer Co., Inc.—Lease—Caton, 93 M.C.C. 416 (417, 419).

See also T.I.M.E. Freight, 97 MCC 310, §210a, n. 1.

State laws: [Vol. 2].—Although protestant contends that proposed control should not be approved because certificate would then be issued to acquired company to transport commodities beyond its corporate powers under North Carolina law, it is not the commission's function to interpret that carrier's corporate powers under State law. Control approved.—Colonial Motor Freight Line, Inc.—Control—Central, 90 M.C.C. 441 (441, 444).

Vehicles operated: [Vols. 15-19].—Purpose of the §5(10) exemption was to permit transfer of operating rights between small motor carriers as expeditiously as possible without the delay and lengthy administrative procedures involved in a §5 proceeding. The commission did not act unreasonably in finding that proposed transfer was within the §5(10) exemption when, while transferee's Annual Report listed its 26 vehicles without a breakdown showing those used in interstate and intrastate commerce, only those units used in interstate commerce are counted for purposes of §5(10); affidavits of presidents of transferor and transferee certified that aggregate number of vehicles used by both in interstate

commerce did not exceed 20; and plaintiffs presented no contrary affidavits or other evidence to show that the transaction was subject to §5 except transferee's annual report which, as subsequently shown, did not support their position. Sustained.—Chemical Leaman Tank Lines, Inc. v. United States, 251 F. Supp. 269 (272, 273-4)*.

The parties have stipulated that, when individual operating as a motor carrier under State certificate and the partial exemption of the former single-State proviso first leased part of rights of another proviso operator, he controlled less than 20 vehicles; and, the record being silent as to the number of vehicles operated by lessor at that time, there is no warrant for finding that such lease was not within the exemption of §5(10).—Caton Transfer Co., Inc.—Lease—Caton, 93 M.C.C. 416 (420).

Control by a single individual of three Canadian buslines conducting charter operations partly in United States under authority from the commission presents a situation within exemption of §5(10) and did not require the commission's prior approval under §5(2); mere availability of vehicles in excess of 20 in possession of those carriers does not warrant their inclusion for purposes of computation if they are not in fact operated for purposes of transportation subject to Part II, and, considering the extent of those carriers' operations in Canada, it cannot be found that the aggregate number of their vehicles used or held for use to and from points in the United States exceeds 20.—Eagle Bus Lines, 92 M.C.C. 793 (796).

As a general rule, jurisdiction under §212(b) or §5 can be adequately determined by computing the number of vehicles normally operated by the parties during the 6-month period preceding filing of their application, in most instances from the application itself. Ordinarily, transfer applications under §212(b) are not orally heard, and the vehicle count shown therein is a practical means for determining, where both parties are carriers subject to Part II, whether the transfer may properly be determined under §212(b) and the transfer rules. But though transferor and transferee normally operated an aggregate of not over 20 vehicles prior to filing of their application, it would be erroneous to ignore evidence at hearing that during indicated period preceding the hearing transferee normally operated 16 vehicles in interstate or foreign commerce. As no change is shown in transferor's vehicle count of 5, the total number involved exceeds 20 and the transfer is not within exemption of §5(10), but may be consummated only after approval under §5. Transfer application dismissed.—Cartwright—Purchase—El Reno Transfer & Storage Co., 93 M.C.C. 72 (77)*.

Notwithstanding finding in 87 MCC 473 that potential availability of vehicles to a carrier does not justify their inclusion in a count under §5(10) if in fact they are not and have not been owned, leased, controlled, or operated for purpose of transportation subject to Part II, and statement in 90 MCC 103 that frequency of a vehicle's use in interstate transportation has a bearing on whether it should be counted, the exemption of §5(10) does not apply if the parties normally operate over 20 vehicles in interstate commerce, even though they may not do so at any one time or on any one day. Evidence clearly establishes that during the period centering on date of purchase agreement the normal traffic demands of respondents' businesses required in the aggregate, and separately by vendee, not only the availability but the use of more than 20 vehicles; and fact that the number used by vendee in interstate operations may in some months have fallen below that mark, due to seasonal or economic reasons, does not meet the tests of §5(10) or of established precedent. The transaction was therefore subject to §5.—C&R Trucking Co.—Investigation of Control, 93 M.C.C. 669 (676-8).

Applicant (a sole proprietorship carrier) already jointly controls, through stock ownership, the two carriers which he seeks authority to control through proposed stock redemption plan. Application shows that the three carriers normally operate an aggregate of 63 vehicles in interstate commerce, but instant record does not disclose when applicant acquired his stock interest in either of the other carriers; therefore, in

absence of contrary evidence, the commission must rebuttably presume that when he acquired his joint control the number of vehicles operated by the carriers exceeded 20. Thus, his acquisition of joint control of those carriers appears not to have been exempt under §5(10), but was subject to prior commission approval, and is now continuing in violation of §5(4). Therefore, applicant should clarify the circumstances, in detail, under which his joint control was acquired.—La Cassee—Control—Interstate Exp., Inc., 97 M.C.C. 230 (233)*.

Common control of two carriers was lawfully accomplished when a son, who was then actively associated in his father's individual operations, was instrumental in incorporation of a second carrier and its purchase of operating rights at a time when no more than 20 vehicles were being operated in interstate commerce; and subsequent incorporation of the father's operations and transfer of his certificate to the corporation was for like reason exempt from §5. However, when the son subsequently acquired the voting stock of latter corporation at a time when each of the carriers operated 20 or more vehicles, his increased power to control it constituted an "acquisition of control" which required prior approval under §5.—Bringwald—Control—Bringwald Transfer, Inc., 90 M.C.C. 11 (11, 13).

In finding that control applicants together operated 21 vehicles within meaning of §5(10), examiner added to the 14 conceded by the parties to be used in interstate transportation 7 of 8 units used by acquiring carrier in its intrastate food distribution business, on theory that they were occasionally used in handling interstate traffic; however, assuming that latter vehicles were so used, which carrier has consistently denied, it is extremely doubtful that every unit but one has been so used, particularly as carrier already maintains 2 tractor-trailer units as standby equipment in its interstate operations, and 3 of the intrastate trailers are seldom used away from the base point because of their age and general state of repair.—Ward Transfer, Inc.—Control—Janssen Transfer, Inc., 90 M.C.C. 103 (105).

Frequency with which a vehicle is used in interstate transportation has more important bearing on whether it should be included in the count. Form BF-200, used by transfer applicants under §212(b), so indicates in requiring data on number of vehicles "normally operated" by applicants and their affiliates; and prior commission decisions have generally referred to vehicles normally operated (citing 60 MCC 655 and 64 MCC 121). On evidence in instant proceeding it would be contrary to sound reasoning to conclude that all but one of acquiring carrier's pieces of equipment assigned to the food distribution business were normally used in its interstate operations as well; application dismissed.—Id., p. 106.

Water carriers: [Vols. 11, 19].—See Illinois Central R. Co.—Control—John I. Hay Co., §5(16), n. 1, 13.

3. Public interest.—[Vols. 11-19].—While the commission is charged with an affirmative duty to consider, and thus in some measure to be an advocate for, the interest of the public, nothing in the statute requires it to actively promote opposition to applicants before it by hiring independent counsel or experts, though lack of confidence in reliability and adequacy of the showing made may prompt it to do so. In instant case, in addition to the commission's own concern for it, the public interest was represented by the Department of Justice, and the commission's failure to undertake, by employing counsel and experts, an adversary attack on the case made before it was not an abuse of its discretion. After extensive hearings, it found that evidence supporting the application was of such quality and credibility as to be persuasive that public interest does not require it to employ a "devil's advocate" to attempt destruction of evidence which it finds adequate and reliable.—Broth. of Maint. of Way Employees v. United States, 221 F. Supp. 19 (28)*.

In addition to the four specific criteria in §5(2)(c) for determining whether a proposed transaction will be consistent with public interest, the commission may use such other criteria as may seem appropriate. "Consistent with public interest"

has been judicially construed to mean compatible with, not contrary or hostile to, the public interest; and "public interest" is not a concept without ascertainable criteria, but has a direct relation to adequacy of the transportation of the transportation system, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities. In short, the public interest test is to be applied in light of the national transportation policy and its objectives.—Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122 (125, 130, 205)*.

Closely associated with broad issue of public interest is the overall competitive impact of proposed rail merger on the public generally. Preservation of reasonably strong rail intramodal competition, while a desirable objective, is only one of the important factors to be considered. It must also be recognized that impact of proposed merger will affect large segments of the population, including shippers, communities, security holders, employees of the carriers involved, State and local taxing authorities, and other carriers, and that those various groups, each an integral part of the public, have special and conflicting interests which the commission must balance to determine whether the transaction will best serve the public interest as a whole. It is the commission's responsibility as guardian of the public interest to determine whether the merger will, as required by the national policy, contribute to development and maintenance of a public transportation system which will meet the needs of commerce and the national defense.—Id., pp. 206, 210.

In determining the public interest, the commission has power to consider whether proposed agreement accords minority stockholders and bondholders of the subject carrier the just and reasonable treatment to which they are entitled, since an agreement which is not fair to all of the stockholders and bondholders could not be in the public interest.—Cleveland, C., C. & St. L. Ry. Co.—Operating Agreement, 320 I.C.C. 430 (438).

Under §5(2) the test of whether a transaction will be consistent with public interest does not require a clear and strong showing of public gain; "consistent with public interest" does not connote a public benefit to be derived or suggest promotion of public interest, but conveys merely the idea of compatibility, or not contrary or hostile to public interest; and the commission may not, as a condition of approval of proposed control, impose a more burdensome requirement than that imposed by the statute.—Chesapeake & O. Ry. Co.—Control—Baltimore & O. R. Co., 317 I.C.C. 216 (285)*.

In administering the provisions of §5, the commission is guided by consideration for adequate transportation service, its necessary efficiency and economy, and appropriate provision and best use of transportation facilities. Those considerations require approval of Southern Ry.'s acquisition of control of Central of Georgia when evidence shows that it will promote the public interest concerned with preservation and maintenance of an adequate transportation system.—Southern Ry. Co.—Control—Central of Georgia Ry. Co., 317 I.C.C. 557 (569)*; similarly, proposed change in control of Ann Arbor R. is approved when evidence establishes that it will promote public interest by bolstering Ann Arbor's traffic and revenues, and thereby enable it to terminate or decrease the cost-saving measures of reducing employees and curtailing service it now employs under its present control. Also, the transaction will result in more adequate, efficient, and economical transportation.—Detroit, T. & I. R. Co.—Control—Ann Arbor R. Co., 317 I.C.C. 619 (626-7)*.

The substantive finding the commission is required to make under §5(2) is not that a "clear and strong showing of public gain" has been made, but that considered transaction will be "consistent with public interest," which has been construed to mean not contrary or hostile to public interest; interests of railway employees must be considered in determining whether the transaction will be consistent with public in-

terest. Considering employees' interests as well as interests of the public concerned with continued operation of the line, proposed acquisition of properties of a bankrupt railroad by a new company will not only be consistent with public interest but will also actively promote public interest.—Georgia & F. Ry. Co.—Acquisition—Georgia & F. R., 317 I.C.C. 745 (750).

Applicant water carrier, not affiliated with any railroad, is not required to show that some affirmative benefit would flow to the public from approval of proposed purchase of motor carrier operating rights; it need only show that the transaction would be consistent with the public interest, and that phrase has been construed to mean "compatible and not contradictory or hostile" to the public interest.—TTC Corp.—Purchase—Terminal Transport Co., Inc., 97 M.C.C. 380 (403)*.

Elements of public interest detailed in 57 MCC 467 as factors to be considered in determining whether a proposed transaction involving property carriers would be consistent with public interest have equal application in a proceeding involving passenger carriers; the pivotal question is whether and to what extent existing carriers will be faced with a new competitive service as distinguished from improvement of an existing service, and, if a new service would evolve, whether benefits to the public would offset whatever detriment might fall to the public from any adverse effects on services and operations of existing competing carriers.—Carolina Scenic Stages—Purchase—Patterson, 97 M.C.C. 79 (85-6).

While the statute does not require that the commission impose conditions for protection of employees of motor carriers involved in a §5 transaction, §5(2)(c) does require that it consider all aspects of the transaction as they affect the public interest. That includes the effect on employees; and in determining whether employees adversely affected should receive compensation or protection, the commission must consider the size and financial resources of the carriers, expanding nature of the motor carrier industry, and the high degree of transferability of motor carrier employees within the industry. Therefore, after careful reconsideration following remand, although the general public interest is paramount to either that of the carrier or affected employees and not only the traveling public, but the employees as well, will benefit if the busline is permitted to operate and improve its financial condition without burdensome conditions, certain employees should be compensated for expenses incurred in moving their households.—Midwest Buslines, Inc.—Purchase—American Buslines, Inc., 97 M.C.C. 426 (439-42)*.

Applicants seeking approval of proposed transactions under §5 have burden of proving that such transactions will be consistent with public interest, which encompasses interest of competing carriers and their ability to perform and continue performing adequate transportation service for the public.—Trailways of New England, Inc.—Purchase—Interstate, 93 M.C.C. 217 (224); Reading Transp. Co.—Control and Merger, 93 M.C.C. 11 (18); Deaton Truck Line, Inc.—Purchase—Magnolia Truck Line, 87 M.C.C. 674 (680); therefore, the commission must weigh the anticipated public benefits from unification against any disadvantages which may reasonably be expected from adverse effects on existing carriers' services.—Dean Truck Line, Inc.—Purchase—Allstate Truck Line, Inc., 90 M.C.C. 819 (825, 826, 827)*; Barber Transp. Co.—Purchase—Conner, 90 M.C.C. 475 (480).

Proposed transactions which from all appearances and reasonable tests will impair or materially detract from acquiring carrier's ability to continue adequately to perform its duties as a common carrier obviously will not result in fostering of sound economic conditions in the motor-carrier industry, and their approval patently is not consistent with public interest.—Adley Exp. Co.—Control—McFaddin Exp., Inc., 87 M.C.C. 665 (670)*.

See also Kaplan Trucking Co.—Investigation of Control, n. 45 *violations of §5(4)*, below.

Valid business reasons may warrant a multiplicity of corporations in particular

circumstances, and though a multicarrier system may ultimately reach the point where addition of even a single carrier would be ipso facto inimical to public interest, the commission has no desire to substitute its business judgment or interfere in problems exclusively within the managerial discretion of those controlling applicants; where it appears possible that decisions of private management will do violence to the overall public interest which it is the commission's duty to protect, it is incumbent on those seeking authorization of the questioned common control to establish existence of sound business justifications negating any possible disadvantage to the public.—Best Transport, Inc., 88 M.C.C. 147 (155)*.

4. Interest and jurisdiction of the States.—[Vols. 11, 15].—In the transfer of an intrastate certificate, the State commission has jurisdiction to pass upon transfer of the related interstate rights, otherwise the question of a splitting of operating rights arising from a transfer of intrastate certificates could never arise; the Interstate Commerce Commission could not exercise any jurisdiction, because it has no authority to provide for a transfer of interstate operating rights based upon registration under §206(a)(1); those rights can exist only in favor of a carrier who holds intrastate certificates, and the ICC cannot order the State regulatory body to make a transfer of the intrastate certificates. [311 S.W. 2d 398.]—Daniels v. United States, 210 F. Supp. 942 (949)*.

Argument that substitution of a single out-of-State company for several contract carriers each serving a plant of supporting shipper in a different State would aggravate problems of doing business in States whose laws or policies favor domestic corporations in grant of intrastate rights lacks specificity and is not supported by evidence; there is no indication that any of carriers applicant already control has been or will be unable to obtain intrastate rights in the States involved for such reasons; mere unsupported allegations of favoritism by State regulatory agencies are not entitled to any weight. Nor is manner in which creation of numerous operating companies might facilitate compliance with other State or local requirements established by probative evidence; that possibility, alone, is insufficient justification for common control of large numbers of carriers engaged primarily in interstate operations.—Best Transport, Inc., 88 M.C.C. 147 (159-60)*.

5. Jurisdiction of the commission.—[Vols. 11-19.]—Merits or demerits and the fairness or unfairness of a proposed railroad consolidation are not, in the first instance, matters for jurisdiction or concern of Federal courts; they are matters for the expertise of the commission, and commission action thereon is then subject to review by a three-judge district court. Since proposed consolidation of Missouri Pacific and Texas & Pacific and the plan for effectuating it are the very things which congressional policy has preempted for the commission, jurisdiction over them normally and presumptively rests with it; and anything contrarily indicated by State law or State charter must give way except when clearly recognized by the Interstate Commerce Act itself. Mississippi River Fuel Corp. v. Slayton, 359 F. 2d 106 (112-3)*.

Statutory scheme of the Act makes it abundantly clear that Congress, placing great confidence in the expertise of regulatory agencies, intended to create exclusive primary jurisdiction in the commission in "control" matters; §5(11) specifically makes the commission's authority under §5 exclusive and plenary. Also, Congress twice granted private parties the right to seek injunctive relief in the courts (§1(20) and 28 USC §§2321-2325), while withholding such right with respect to §5 proceedings; when coupled with specific authority granted the commission in §5(8) to seek an injunction from a district court, this clearly shows its intent to bar suits by private litigants for injunctive relief in §5 matters. In suit seeking to enjoin defendants from further purchases of defendant railroad's stock, pending the commission's decision in complaint before it alleging violations of §5, the court must yield to the commission's primary jurisdiction; complaint dismissed.—Chicago S.S. & S.B. R. v. Monon R., 235 F. Supp. 984 (985-6, 988).

The wisdom and experience of the commission, not of the courts, must determine questions arising under §5(2) of the act.—Louisville & N. R. Co. v. United States, 244 F. Supp. 337 (342)*.

Plaintiffs' contention that the commission lacked jurisdiction to approve railroad merger in question because there was no valid shareholder vote approving the merger as required by §5(11), due to allegedly false and misleading proxy statements soliciting stockholder approval, is untenable. This point was not raised before the commission, nor in instant complaint; it was first raised when plaintiffs' brief was filed 2 years after merger was accomplished and complaint was filed. Where plaintiffs obviously had an afterthought some years after the commission's hearing, court would be loath to upset the proceeding by finding a "jurisdiction" defect; but had the point been raised earlier, the court's conclusion would be the same. Assuming, arguendo, that a valid approving shareholder vote is a prerequisite to the commission's jurisdiction under the statute, there is no merit to plaintiffs' claim that the proxy statements were false or misleading.—Fried v. United States, 212 F. Supp. 886 (892-4)*.

The commission's power to grant §5 approval for an acquisition of control is not limited to existence of a legally enforceable contract; apart from question of its approval for consummation of a contract before it, legal validity thereof is a judicial question for determination by the courts. The commission's responsibility is to determine whether, on the statutory standards, it will approve acquisition on the proposed or modified terms; it does not compel action by either the applicant or the carrier being acquired; thus, existence of a dispute as to enforceability of original stock-purchase contract did not deprive the commission of jurisdiction to approve the transaction with the modifications and conditions imposed.—Walker v. United States, 208 F. Supp. 388 (395-6)*.

In railroad's action for preliminary injunction against threatened strike, in reply to a proposed railroad merger, the court may not interfere with the commission's jurisdiction, conferred upon it by Congress, to pass upon the merger by enjoining the railroads, as requested by employees' union, from applying to the commission for approval of the merger, or from submitting the merger proposal to their stockholders.—Pennsylvania R. Co. v. Transport Workers Union, 202 F. Supp. 134 (138).

See also Texas & N.O. R. Co. v. Brotherhood of Railroad Trainmen, n. 70, below.

The statute assigns the responsibility of approving a sale of motor carrier operating rights solely to the commission; and, with its decades of experience in the field, the commission is far better equipped than the court to determine such questions. So long as the commission has not abused its discretion and its findings are supported by substantial evidence, its order denying plaintiff authority to acquire operating rights from another motor carrier must be sustained. Complaint dismissed, and temporary restraining order vacated.—C & H Transp. Co., Inc. v. United States, 249 F. Supp. 97 (98, 101)*.

If the only jurisdiction the commission has over one of the parties to a proposed merger rests on that carrier's asserted §206(a)(1) second-proviso operating rights, proof that such rights are not validly held deprives the agency of jurisdiction to entertain the merger appplication; and without a §5 application to decide, division 3 of the commission has no authority to decide a directly related §207 application for a certificate. However, applicant in considered merger proceeding, which involves its second-proviso rights, is subject to the commission's jurisdiction independent of such second-proviso rights, since it holds other certificates issued by the commission. Therefore, even if the second-proviso rights were invalid, the commission has jurisdiction of both carriers involved in proposed merger and, consequently, division 3 has authority to entertain the directly related §207 application proceeding.—Best Way Motor Freight, Inc. v. United States, 253 F. Supp. 314 (318)*.

Even though certificate covering rights purchased had been issued to complainant, vendee in the purchase proceeding, the commission had authority, after notice and full hearing, to modify and supplement its

report and order approving the purchase by imposing an employee protective condition because of vendee's failure to abide by material statements in its application to the effect that approval of proposed transaction would not adversely affect employees of vendor therein.—Baggett Transp. Co. v. United States, 206 F. Supp. 835 (839)*.

Challenged order of the commission approving joint application of two carriers, and granting authority for one applicant to purchase portion of operating rights and property of the other, is based on adequate findings and supported by substantial evidence on the record as a whole; is entirely rational and lawful. That is the limit of judicial review. The commission's order is sustained.—West Bros., Inc. v. United States, 203 F. Supp. 839 (840)*.

See also Black Ball Freight Service v. United States, 28 USC §2325, n. 45.

It is unnecessary to determine whether proposed agreement covering operation of Peoria & E. Ry. by New York Central is an operating agreement or a lease, notwithstanding that such distinction may have special significance under Illinois law, since in either capacity it falls within purview of §5 and the commission's plenary and exclusive jurisdiction thereunder to rule whether its terms are just, reasonable, and consistent with public interest. It is enough that the transaction involves an agreement among carriers, short of a complete consolidation, for operation of the Peoria by another; and the terms thereof have been bared on the record, enabling the commission to view, in light of the Federal law, the rights, privileges, duties, and obligations established thereby as between the parties and as between them and the public. By passing on the substantive features of the agreement the commission fully discharges its function under the statutory plan of Congress, and the findings leave nothing for determination under State law that affects validity of the unified operations approved.—Cleveland, C., C. & St. L. Ry. Co.—Operating Agreement, 320 I.C.C. 430 (432-3).

Proposed merger of existing railroad into a new corporation requires approval under §5 when the corporation, as a railroad and as part of the proposal, would lease and acquire trackage rights over lines of various railroads.—Boston & Maine Corp. Merger, 320 I.C.C. 290 (293-4).

Increase in a carrier's proportional ownership of stock of another carrier, already controlled through majority stock ownership, which results in ownership of the proportion of the total stock required by applicable State statutes for shareholder approval of significant corporate actions by the controlled carrier, is a transaction subject to §5. Manner in which the increase in degree of control is achieved is not determinative of jurisdiction: if the transaction accomplishes a significant increase in the power to control already held, including ability to accomplish financial transactions or operational changes with greater legal ease, it may not lawfully be accomplished without the commission's prior approval.—New York Central R. Co. and Alleghany Corp.—Control, 320 I.C.C. 284 (287).

The commission's jurisdiction under §5(2)(a) to authorize a noncarrier which controls one or more carriers to acquire control of another carrier "otherwise" than through stock ownership embraces acquisition of control by merger, including merger of an existing subsidiary; the commission's approval is therefore required for merger of a water carrier subject to Part III into parent lumber company which also controls a railroad subject to Part I.—Weyerhaeuser Co. Merger, 312 I.C.C. 778 (780-1)*; such finding is supported by holding in 353 US 151 that merger of one carrier in a system into another having closer relation to the parent noncarrier corporation involved an acquisition of control within scope of §5(2).—Id., 317 I.C.C. 434 (435)*.

Although authority is sought only for acquisition of control and merger of a water carrier subject to Part III, concurrent acquisition of assets, with a view to merger, of three affiliated noncarriers is part of the transaction, all phases of which are subject to the commission's jurisdiction under §5.—McAllister Bros., Inc.—Control and Merger, 317 I.C.C. 459 (461, 463).

See also Hart Motor Exp. case, §5(13), n. 2.

District court's ruling in 126 F. Supp. 359 that Hudson & Manhattan was an interurban electric railway within exemption of §77 of Bankruptcy Act was solely a determination as to the particular statute applicable to its reorganization, and it does not follow that such exempt status must be maintained under Interstate Commerce Act or other acts having similar exemption provisions; most pertinent to its status is its long participation in joint passenger operations with Pennsylvania R. [citing 216 ICC 745] and its continuance as a party to Pennsylvania tariffs; considering all factors, the Hudson does not fall within exemption of §5(10), and application for purchase of its railroad properties and lease of terminal tracks and facilities by new corporation created in reorganization to conduct its railroad operations must be considered in the merits.—Hudson & M.R. Co. Trustee Abandonment, 312 I.C.C. 701 (702-4)*.

The commission has broad power to impose restrictions in connection with exercise of its jurisdiction under §5, and in appropriate circumstances it may order canceled, as a condition precedent to approval of a transaction, the dormant authority of a vendee or controlling carrier as well as that of a vendor or controlled carrier.—Atlanta Motor Lines—Control—Atlanta-Asheville Motor, 93 M.C.C. 160 (162, 164, 165).

Transfer of vendor's license as a broker of household-goods transportation is within the commission's jurisdiction under §5 as an incident of purchase transaction, just as are purchases of State certificates or other properties of a vendor.—Shamrock Van Lines, Inc.—Purchase—Reely, 93 M.C.C. 455 (461).

In passing on an application subject to §5, the commission's jurisdiction extends to the entire transaction and all its aspects must be examined. Canadian holding company which seeks authority to acquire stock control of a Canadian carrier which holds authority from the commission for certain operations in United States also has pending applications for acquisition of control of two other Canadian carriers, which have been approved by the provincial regulatory authorities, but consummation of which is contingent on approval of instant application. Although the commission has no doubt as to complete propriety of those two transactions, their financing and their effect on operations and financial structure of acquired carrier in instant transaction (which are not of record) are matters properly for consideration in instant proceeding; examination thereof would not be an intrusion on Canadian domain, but would merely amount to a recognition and weighing of existing facts.—Canadian Ntl. Transp.—Control—Husband International, 93 M.C.C. 80 (82).

Pendency in Congress of legislation to specifically exempt vendee, an agency of the States of Missouri and Illinois created by compact approved by Congress to coordinate development (including transportation facilities) of St. Louis metropolitan area, from provisions of the act would have no bearing on the commission's jurisdiction, prior to passage thereof, over proposed purchase of motor-carrier operating rights.—Bi-State Development Agency—Purchase—Vandalia Bus Line, 93 M.C.C. 579 (581).

Therefore, since the commission's jurisdiction extends to all phases of a transaction presented for its approval, and the agency's agreements to purchase operating rights and/or properties of some 15 carrier and noncarrier companies, including local intrastate buslines, are all interdependent and would collectively become a nullity unless each should be approved and consummated, they are treated as a single transaction covering carrier operating rights not specifically excluded, along with the properties specifically identified, also properties of all the noncarriers involved, notwithstanding only two are affiliated with one or more of the carriers.—Id., p. 583.

Increase in a carrier's proportionate stock ownership in another carrier which it already controls as majority stockholder, resulting in the degree of stock ownership required by applicable State law for approval of certain corporate transactions, is an acquisition of further control over which the commission has jurisdiction under §5.

Since under Texas law amendments to articles of incorporation and certain actions by business corporations require affirmative vote of two-thirds of the corporation's outstanding stock, while other transactions require approval of four-fifths of the outstanding shares entitled to vote, proposed purchase, by carrier owning a majority of stock of a carrier incorporated in Texas, of all remaining shares of stock outstanding, to enable it to accomplish operational, financial, and management transactions with greater ease, is within scope of §5(2)(a) and requires the commission's prior approval.—Bekins Van & Storage Co. (Calif.)—Control—Bekins (Tex.), 93 M.C.C. 335 (338-9).

Even though acquired carrier's present controlling stockholder may have been lawfully in actual control of it before he acquired its voting stock, his relationship to that carrier changed materially when he did so, thus assuring himself of legal power to control; prior to that time his exercise of control was at sufference of the legal owner of the stock, and the stock transaction accomplished a significant increase in his power to control the carrier, thus constituting an "acquisition of control" within scope of §5(2).—Bringwald—Control—Bringwald Transfer, Inc., 90 M.C.C. 11 (13).

Though individual applicant who controls one carrier is not shown to exercise any present control over a second to whose stockholders he is related by marriage, upon purchase of 35 percent of latter's outstanding stock his holdings would exceed separate holdings of either of its two remaining stockholders and his power to control it would be no less than that of any other person; by virtue of his stockholdings and the family relationship he would participate in control of, and be affiliated with, that carrier. As construed in §5(6), such affiliation does not mean that acquired carrier need be managed solely or even principally in the interest of carrier he now controls; "managed in the interest of such other carrier" means in any material degree; thus his express intention to abstain from participation in acquired carrier's management has no bearing on the question of jurisdiction, and proposed transaction requires prior approval under §5.—Norris—Control—Hatcher Trucking Co., Inc., 90 M.C.C. 31 (32, 33).

Since agreement covering sale of Zern's individual carrier properties to a corporate carrier and acquisition by Zern of latter's capital stock, and agreement for sale of real property by the corporation's present stockholders to Zern's noncarrier affiliate, are interdependent, consummation of the first being a condition precedent to consummation of the second, the commission's jurisdiction under §5 is not limited to purchase of Zern's properties; such jurisdiction extends to the entire transaction and to all "properties" covered thereby, not alone to purchase of interstate operating rights; this is true even though terms of the entire transaction are embraced in more than one agreement and part of the transaction would be effected between noncarriers. Thus the commission's jurisdiction extends also to purchase of the real estate by Zern's affiliate.—Zern—Control—William A. Kelly, Inc., 90 M.C.C. 25 (28).

And since Zern would acquire control of all the operating rights and properties involved and is obviously the real party in interest, the transaction is one whereby he, having control of a carrier (his individual operations), seeks to acquire control of another carrier, within purview of §5(2)(a)(i); it follows that his participation in the transaction as an individual is subject to the commission's jurisdiction under §5. The commission is justified, in order to appraise the true nature of the transaction and to permit proper exercise of statutory regulatory authority, in disregarding the corporate entity of the acquired carrier and considering latter as the seller and Zern as the purchaser in the proceeding.—Id., pp. 28-9.

Noncarrier affiliate of acquiring carrier, which concurrently seeks authority to acquire stock control of acquiring carrier and through it indirect control of six subsidiaries including acquired carrier, by a separate agreement would acquire stock control of acquired carrier's present parent company and thereby indirect control of latter's three noncarrier subsidiaries. Since

consummation of the second agreement is dependent on consummation of acquiring carrier's control of acquired carrier, the transaction in entirety is subject to the commission's jurisdiction, and the noncarrier affiliate's participation in the transaction is subject to §5(2) whether or not it acquires control of the acquiring carrier.—Mason & Dixon Lines, Inc.—Control—Silver Fleet, 90 M.C.C. 829 (833-4, 849).

While purchase only of intrastate rights is not subject to §5, to assume that such is the case because the contract refers only to intrastate rights would open the door for evasion of requirements of §5. If intent of the parties is for vendee to take over interstate operations conducted by vendor under single-State exemption proviso, including removal of vendor as a competitor, the transaction is subject to §5 and no part thereof, including transfer of the intrastate rights, may lawfully be accomplished without prior commission approval. See 39 MCC 652.—Midwest Motor Exp., Inc.—Purchase—Daniel, 90 M.C.C. 591 (593).

There is no merit to contention that liquidating carrier's intrastate operations are outside the commission's jurisdiction and not material to the issue in merger proceeding. Although the State has exclusive power to regulate intrastate commerce by motor carrier on its highways, in passing on an acquisition under §5 the commission's jurisdiction extends to the entire transaction and it has an obligation to examine every facet thereof. There is no intrusion into the State's domain, but merely a recognition and weighing of existing facts.—Reading Transp. Co.—Control and Merger, 93 M.C.C. 11 (17).

Where vendor is a carrier as defined in the act by virtue of both certificates from the commission and benefits of single-State proviso, the commission's jurisdiction encompasses all phases of the transaction, including routes over which it is contended that little or no service has been performed under the proviso, and also the question of whether public convenience and necessity require operations thereover by vendee, especially where the intrastate certificates underlying the proviso filings stand unrevoked.—United Truck Lines, Inc.—Purchase—United Freight Lines, 90 M.C.C. 337 (343).

Jurisdiction of proposed control transaction depends on a finding that the companies to be acquired are "carriers" within meaning of §5, as defined in §203, or will become such concurrently with consummation. One of involved companies is in fact such a carrier although its operations under former §206(a)(1) proviso were instituted and are being conducted under an unauthorized and therefore unlawful common control; another is not yet a carrier, but has submitted a statement, supported by a State certificate, of its intention to engage in proviso operations upon consummation of the transaction. Therefore, although the rights and obligations of persons who may qualify for "grandfather" rights under new §206(a)(7), which replaced the proviso, have not yet been clearly defined, jurisdiction should be presumed and all questions as to whether the two companies are entitled to certificates of registration should be reserved for determination on applications to be filed by them under §206(a)(7).—Brown—Control—United Expressways, Inc., 90 M.C.C. 765 (767-8)*.

That the 1962 act amending §206(a) recognized the inherent value of single-State operations instituted under the former second proviso of §206(a)(1) and continued under the "grandfather" provisions of §206(a)(7) is apparent from the specific provisions therein that rights covering such operations may be transferred. The commission has jurisdiction under §5(2) to determine whether a proposed purchase of such single-State operating rights by a multi-State vendee will be consistent with public interest, and if it so finds it is required by law to issue an order approving the transaction. And although the multi-State vendee would not be eligible to receive any "grandfather" certificate of registration to which the single-State vendor might be entitled, it may seek to continue such operations in a related §207

application for a certificate.—Ohio Southern Exp., Inc.—Purchase—Vermilion Truck Line, 97 M.C.C. 93 (99-100)*.

While in earlier cases under former §213 and also §5(2) jurisdiction was asserted over transactions involving only a change in form of existing control of motor carriers, such as from indirect to direct control through elimination of an intermediate company as stock owner, soundness of that view was placed in doubt by holding in 295 ICC 11 that acquisition of control of New York Central system by a noncarrier corporation which at the time controlled no other carriers did not require prior approval when at time of acquisition the various railroads involved were recognized as a single established system.—Transcontinental Bus System, Inc.—Control—American, 87 M.C.C. 795 (797-8).

Therefore, application for authority to acquire direct in lieu of indirect control of 3 carriers, and sole instead of majority stock control of 2 others, all members of same bus system, is dismissed when applicant is not only already a member of the "single established system" but already controls the system; at most, if the transactions constitute an "acquisition of control" at all, it is an acquisition of control of a single established system, which under views expressed in case cited requires no authority under §5.—Id., p. 798.

6. Corporate simplification.—[Vols. 11-19].—The purpose of §5 is to facilitate mergers and consolidations of carriers in the national transportation system; language thereof expresses the clear desire of Congress that the transportation industry proceed toward an integrated system through substantial corporate simplification; effect of §5 is to permit the lawful accomplishment of transactions which would otherwise be unlawful.—Ship-By-Truck Co. v. United States, 208 F. Supp. 847 (850)*.

Santa Fe's proposed merger of three wholly owned subsidiary railroads merely entails simplification of its multicorporate structure, resulting in more efficient use of facilities and manpower through consolidation of all accounting procedures and elimination of duplicative functions. Such corporate simplification and unification of operations will strengthen the financial structure of the surviving carrier without affecting the quality or quantity of train service. Despite resultant disadvantages to the city of Galveston, Tex., through loss of one subsidiary's general offices at that point, and to certain employees through consolidation of office and administrative personnel, the overall advantages outweigh the disadvantages and the transaction is consistent with public interest.—Atchison, T. & S.F. Ry. Co. Merger, 324 I.C.C. 254 (258-9).

Merger of electric railway into its parent railroad, proposed as a further step in railroad's recently undertaken program of corporate simplification, approved when it will provide single corporate ownership, will afford more efficient utilization of facilities and equipment, and contribute to a more economical system operation.—Southern Pac. Co. Merger, 327 I.C.C. 38 (42-3)*.

While proposed transaction between two motor subsidiaries of same railroad would not result in merger of the affiliated corporations, it would be in consonance to a substantial degree with the commission's policy of encouraging unification of commonly controlled carriers in interest of economy, efficiency, and corporate simplification, since it would unify all of the property-carrier operations and facilities in vendee, leaving vendor to concentrate on the completely dissimilar passenger operations. Economies and efficiences in administration and operation can normally be expected from unification of similar operations formerly under common control, such savings and improvements enuring to the benefit of both the carrier and the shipping public.—Santa Fe Trail Transp. Co.—Purchase—Santa Fe Transp. Co., 90 M.C.C. 123 (129).

Although common control of vendee with two other carriers is approved as consistent with public interest, the controlling individuals are admonished, for reasons of economy in operations, to simplify their maze of corporate structures, particularly in area of their interest in motor carriers.—Southern Tier Stages, Inc.—Purchase—Capital Bus Co., 93 M.C.C. 793 (798-9).

Applicant already controls 3 intrastate carriers, 2 of which transport garments and the third general commodities, a terminal company, and two carriers which were conducting operations under the former single-State proviso, and by proposed transaction would bring two additional carriers under his control, one a carrier of garments and the other of general commodities, which includes authority to transport garments. However, though the present situation of multiple companies and carriers under common control is uneconomical, confusing to the shipping public, and undesirable from a regulatory standpoint, the acquisition of control is approved in view of applicant's declared intention to present a plan for unification; but applicant will be expected to present a proposal for corporate simplification at the earliest practicable date.—Brown—Control—United Expressways, Inc., 90 M.C.C. 765 (768, 770)*.

Although acquiring carrier desires to maintain acquired carrier as a separate entity in order to preserve the name it has built up as a small boat transporter, and because an entirely different and specially trained group of employees are required to handle its traffic as opposed to those who handle general dry freight, acquiring carrier already has separate divisions handling its refrigerated freight and its heavy hauling, apart from its general-commodity traffic, and separate employees are trained for each one; such a division, which could preserve its name, would also be possible for acquired carrier's boat traffic. In accordance with the commission's policy of encouraging corporate simplificiation, acquiring carrier should seek merger authority as soon as anticipated tax savings are realized.—Long Transp. Co.—Control—Marine Transit, Inc., 90 M.C.C. 261 (267-8).

Though continued separate maintenance of commonly controlled vendees, each serving a separate operating division of contracting shipper, is approved when for all practical purposes each carrier is an integral part of the division it serves and service performed is akin to primate carriage by the shipper, many carriers operate successfully through local divisions within a unified system and it is not apparent how such an arrangement would interfere with shipper's desire to maintain a proper transportation cost distribution among its various divisions; vendees should give further consideration to unification of their properties on such basis.—Dyer-O'Hare Hauling Co.—Purchase—Merchants Transfer, 87 M.C.C. 768 (772).

While noncarrier, in prior proceeding in which its control of two motor carriers was authorized, signified intention to unify their armored-car operations and the report therein indicated that prompt application for that purpose was expected, manner and form of such unification was not specified; working out of a plan to be submitted for approval was left to management of the companies concerned. Proposed plan whereby all the armored-car rights and properties would be consolidated into a new subsidiary, although its format is susceptible to controversial claims, is a step toward the corporate simplification long favored by the commission.—Pittston Co.—Control—Brink's Armored, Inc., 87 M.C.C. 637 (643-4).

Under the chronology of events, applicant's argument that the control previously authorized be considered an intermediate step in the final unification plan proposed is well taken, and failure to institute and realize certain economies in the brief period between consummation of control and filing of instant application should not deter approval. Prior finding that control would result in a more economical, efficient, and improved service is equally applicable to proposed unification, if not more so, considering that it will eliminate duplicative operations between the carriers involved. Approved.—Id., pp. 644, 651.

Approval of continued control of applicant, a new company concurren[1] granted certificate for transportation of cement, by one established interstate cement carrier and by persons controlling another will not contravene commission's policy of encouraging corporate simplification; creation of applicant does not approach the proliferation of multiple carrier corporations frowned on in 88 MCC 147; con-

sidering absence of duplications in authority of applicant and its affiliates, as well as beneficial aspects of unification of the diverse experience of those two carriers in a single corporate carrier, continuance of such control will be consistent with public interest.—Southern Bulk Haulers, Inc., 88 M.C.C. 299 (306-7).

Approval of continued control by a corporate carrier, which already controls another carrier, of an intrastate carrier which will become an interstate carrier upon issuance of certificate will not contravene the commission's policy of corporate simplification as enunicated in the Best case (88 MCC 147); resulting number of commonly controlled carriers does not approach the numbers and complexity of corporations there considered; separation of acquired carrier's specialized cement operations from general-commodity services of its affiliates is consistent with public interest.—Baggett Bulk Transport, Inc., 88 M.C.C. 403 (412).

An unnecessary multiplicity of corporate units under common control is generally expensive and undesirable in absence of bona fide tax or legal advantages, and necessarily leads to increased administrative burdens and added regulatory problems, contrary to public interest. Proposed transaction whereby a noncarrier company already controlling 3 carriers and 19 noncarriers would acquire control of 2 additional carriers and 1 noncarrier, and all would be commonly controlled with numerous carrier and noncarrier companies controlled by the O'Neill interests, presents a situation like that considered in 82 MCC 407, 88 MCC 147, wherein authority was denied for a transaction that would add several new carriers to the O'Neill system. Applicants have indicated no intention of merging any of the many carriers and other corporations involved, and in absence of substantial evidence tending to overcome the objectionable features of the multicorporate complex discussed in the case cited, any further transactions seeking to add more carriers to the existing system must be denied.—Lease Plan International Corp.—Control—National, 93 M.C.C. 173 (185)*.

Though the policy of discouraging corporate multiplicity has never been applied through consistent denial of transactions proposing addition of more carriers under common control, the practice of creating separate carrier entities to conduct interstate motor operations, of which applicant's proposal to add 8 new corporate interstate contract carriers to an existing portfolio of 12 is the extreme example to date, appears to be gaining favor; this recent explosion in number of commonly controlled carriers, as well as the increased administrative and regulatory problems resulting, warrant reappraisal of the often expressed but seldom implemented policy of encouraging corporate simplification.—Best Transport, Inc., 88 M.C.C. 147 (153)*.

Approval of instant proposal without regard to the number of carriers which as a result would be controlled or managed in a common interest would ignore the practicalities of economic regulation; commission supervision of accounting practices, contract terms, and rate schedles, as well as performance of its other regulatory functions, would be further complicated by fragmentation of what is essentially a single business enterprise into multiple carrier units; approval would hinder any effective coordination of those and other related matters, and resulting corporate complex would be a continuing source of confusion, inaccurate statistical data, and possibly questionable operating practices. Therefore, consideration must be given to the total number of carriers to be operated under common control.—Id., p. 154.

However, it does not follow that the number of carriers under common control is the sole criterion of consistency with public interest; each case must be decided in light of all surrounding facts and circumstances, and while a multicarrier system may ultimately reach the point where addition of even a single carrier would be ipso facto inimical to public interest, it is unnecessary at this time to place an arbitrary limitation on the number which may properly be operated under common control. Valid business reasons may warrant a multiplicity of corporations in particular circumstances,

and the commission has no desire to interfere in problems exclusively within the managerial discretion of those controlling applicants; but where it appears possible that decisions of private management will do violence to the overall public interest, existence of sound business justifications must be established.—Id., p. 154-5.

Numerous other nationwide motor carriers operate successfully through local divisions without resort to use of multiple corporations, and no valid reason appears why this cannot be accomplished in considered operations. In addition, an affiliated service company will perform many of the managerial functions of the new concerns, and in view of this de facto centralization it cannot be found that proposed creation of separate carrier units will lead to any greater operating efficiency or result in any better transportation service than if those operations were unified in a single carrier already under applicants' control. Evidence supports conclusion that shipper's transportation requirements can be met as well by a single carrier entity capable of providing coordinated services to its various plan s; control application denied.—Id., pp. 156-7, 60.

The complex of passenger-carrier and other corporations of which vendee is a part is essentially the same as that involved in a prior proceeding in which the parties were admonished to consider unification of operations of the several corporations in interest of corporate simplification and elimination of duplications; and while vendee as an intrastate carrier is already under common control with the various interstate carriers within the complex, and proposed purchase would not add to the number of affiliated companies, it would nevertheless add to the number of interstate carriers and aggravate the possibilities of duplicate services by separate carriers under common control. In view of the increased opportunities for wasteful, discriminatory, or unfair competitive practices that would arise from approval of the transaction in its present form, it cannot be found consistent with public interest and must be denied.—Ocean Drive Tours—Purchase—Carll, 97 M.C.C. 20 (25).

Assuming that the parties desire to preserve vendee's separate entity in connection with its intrastate racetrack and charter operations, a more acceptable situation would result from its acquisition of vendor's similar intrastate rights, for which no authority from the commission would be required, and acquisition by one of its interstate affiliates of vendor's certificated interstate charter rights, thus eliminating the objectionable feature of possible additional duplicate services under common control; such a proposal would of course require consideration on the merits in its entirety.—Id., p. 25.

There being no justifiable reason therefor, continuance of survivor, a new company created to effect proposed merger, in the chain of control is contrary to the commission's policy of corporate simplification. While diversity of interest of three Transcontinental Bus System members seeking to acquire control of survivor in concurrent merger of a fourth system carrier presents impediments to division among them of liquidating carrier's extensively duplicative rights, and such duplications do not warrant denial of the applications, continued maintenance of those duplicating operations under common control is entirely unsatisfactory. Approval is conditioned on concellation of rights specified, and applicants will be expected to take appropriate steps to eliminate remaining duplications, preferably through elimination of corporate survivor in the merger.—Continental Tenn. Lines, Inc.—Control—Tennessee Coach, 87 M.C.C. 775 (780-1).

7. Competition.—[Vols. 11-19].—Effect on competition of railroad control of water carrier, see Illinois Central case, §5(16), n. 15.

The Transportation Act of 1920, in fostering and encouraging railroad mergers into fewer systems on a nationwide scale, recognized that preservation of maximum competition among railroads was no longer essential to protection of the public interest; and the 1940 amendment of §5(2), authorizing the commission to approve voluntary mergers, deleted requirement of the 1920 act as to preservation of competition; moreover, the Supreme Court ob-

served in 270 US 266 that excessive competition between rail carriers may well result in serious injury to shippers and the public generally. Nevertheless, effect of a proposed merger on continuance of competition, both intra- and intermodal, is directly related to protection of the public interest and must be considered.—Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122 (126, 127, 129)*.

But while preservation of reasonably strong intramodal rail competition is a desirable objective in development and maintenance of an adequate transportation system, it is only one of important factors to be considered in determining whether, overall, a particular transaction will be consistent with public interest. Railroads no longer enjoy a monopoly of intercity freight traffic, and, due to increasing intensity of competition from other modes, intramodal competition has gradually lost much of its significance as a factor in furtherance of the national transportation policy. Proposed merger of Atlantic Coast Line into Seaboard Air Line will eliminate such competition on only 13.7 percent of their combined competitive traffic, which in turn represents but 1.2 percent of total intercity traffic moving by all modes in the southern region; such a moderate curtailment of competition will not be inconsistent with the public interest.—Id., pp. 166, 210-11.

Though during course of hearing on control application all opposing carriers save New York Central withdrew their opposition, and Central withdrew after hearings were closed, effect of proposed transaction on operations of Central and other carriers is an issue to be considered.—Chesapeake & O. Ry. Co.—Control—Baltimore & O. R. Co., 317 I.C.C. 261 (280)*.

Since the Ann Arbor and the Wabash, which now controls it, are directly competitive, latter's principal effort naturally tends more to preservation of its east-west traffic via Chicago gateway than to improvement of Ann Arbor's car-ferry operations, whereas applicant will undoubtedly have more incentive to better the Ann Arbor's service under its control, since that carrier is a logical extension of its own line. That applicant's competitive position will be strenghened respecting other railroads does not in itself require denial of the transaction.—Detroit, T. & I. R. Co.—Control—Ann Arbor R. Co., 317 I.C.C. 619 (627)*.

Although acquisition of control of Central of Georgia by Southern Ry., to which its lines are chiefly complementary, may result in some lessening of competition between them to extent they serve common points, adequate competition will remain. Central, as a relatively small independent carrier, is at disadvantage in competing with larger railroad systems which offer services far beyond its limited territory; circuity of its routes between major cities make it vulnerable to truck competition on short-haul traffic between points served by it, and necessity for interchanging long-haul traffic handicaps it in competing with motor carriers for traffic to points outside its territory; thus, in enabling it to compete more effectively for available traffic within its area, proposed control will intensify rather than lessen competition.—Southern Ry. Co.—Control—Central of Georgia Ry. Co., 317 I.C.C. 557 (561-2)*.

While in some circumstances it may be preferable to keep independent a bridge carrier on which a number of competing lines depend as a connection for an important part of their traffic, there is grave doubt that Central could long survive as an independent carrier without substantial impairment of its ability to render adequate service to shippers dependent on it; moreover, alternative routes are available to major cities served by it, and, with conditions imposed for preservation of existing routes, there will be no substantial adverse effect on other competing railroads.—Id., p. 569.

See also Southern Pac. Co. Merger case, n. 60 *Railroads* below.

Since vendee has recently been authorized to extend its substituted motor-for-rail service, previously centralized in midwestern States, to the Los Angeles area, which it may now serve for the first time in common with vendor (its motor affiliate) and its parent railroad, the changed competitive situation—whether actual or still

potential—opposed by protestants already exists; and, since operations under unified rights cannot lawfully exceed scope of those permissible under the rights in separate ownership, proposed unification of vendor's rights with those now held by vendee would have little or no effect on existing competitive situation.—Santa Fe Trail Transp. Co.—Purchase—Santa Fe Transp. Co., 90 M.C.C. 123 (128).

That some readjustment in competitive relations of the carriers will result from intensification effort by acquired carrier under more efficient and affluent management is to be expected in a §5 transaction, and anticipated improvement in efficiency and economy of operations, enuring to benefit of the shipping public utilizing services of the carrier involved, is an important element in the factors supporting the required finding of consistency with public interest. As acquired carrier's future operations will be confined within scope of those portions of its authority shown to have been actively utilized in the past, protestants should not be adversely affected.—Ashworth Transfer, Inc.—Control—Hawkes Transp. Co., 87 M.C.C. 653 (662)*.

The commission's policy of according protection to existing carriers who have made large investments to improve their service, to the end that they might obtain all the traffic they can handle adequately, efficiently, and economically, applies in §5 proceedings where a new competitive service would result from approval and where there is a complete lack of evidence of need for such service. However, it is not the objective of that policy to frustrate the growth of competition, nor does it dictate denial of a purchase application where there has been no large investment in service improvements and there is no lack of evidence of public need for the improved service proposed by vendee.—Carolina Scenic Stages—Purchase—Patterson, 97 M.C.C. 79 (88-9).

Although vendee has neither equipment for nor experience in transportation of bulk cement, it intends to use acquired building-materials rights to perform such service if it finds public need therefor—which need is indicated by vendor's past performance of that service, and protestants urge that vendee's entry into the area will cause them to lose cement and mortar shipments. However, no protestant showed that it had handled any specific cement traffic or offered any evidence to show amount of traffic that would be affected. Mere apprehension, unsupported by particulars as to the traffic involved and its relation to a protestant's total traffic, cannot be given much weight in determining whether a transaction would be consistent with public interest.—Steel Transp. Co., Inc.—Purchase—Barry Transport, 93 M.C.C. 773 (776, 777).

Where protestants have failed to show with some particularity how much traffic they would lose or how their operations would be harmed, the commission has generally accorded little weight to their mere apprehension that their services would be adversely affected by approval of purchase; and though vendee would solicit traffic more vigorously and be a more potent competitor than vendor, there is no indication the protestant, a nationwide household-goods carrier, would be adversely affected to any material extent by a competitor's purchase of vendor's furniture rights from one origin, or that it would be unable to meet vendee's additional competition without impairment of its services. Purchase authorized—North American Van Lines—Purchase—Fort Smith Furniture, 90 M.C.C. 629 (634).

Protestants' mere apprehension of injury or traffic diversion does not warrant denial of a §5 application; thus, purchase may properly be approved when protestants did not show in any significant degree how they would be harmed, or identify any traffic they would lose as a result of approval of the transaction.—Knox Motor Service, Inc.—Purchase—K & A Truck Lines, Inc., 93 M.C.C. 26 (32); Cassens Transport Co.—Purchase—Speedway Transports, Inc., 90 M.C.C. 159 (164-5); C & H Transp. Co., Inc.—Purchase—Gulf Southwestern Transp., 90 M.C.C. 636 (641); also, denial of purchase or cancellation of a portion of the rights involved, based on protestants' apprehensions of loss of traffic or disrup-

tion of existing competitive pattern, is not warranted.—United Transp. Co. of Rhode Island—Purchase—McCormick, 90 M.C.C. 201 (204).

Though acquired carrier is actively engaged in transporting class A and B explosives under its unrestricted general-commodity rights, protestant transporting like traffic in same territory has not encountered any competition from it. Protestant's mere apprehension that, following the acquisition of control, acquiring carrier might divert to acquired carrier traffic of that type which it has been interchanging with protestant does not warrant requiring exception of that class of commodity from acquired carrier's rights as a condition on approval.—Gillette Motor Transport, Inc.—Control—Voss, 93 M.C.C. 265 (270)*.

While acquiring and acquired carriers interchanged no traffic prior to former's temporary control, past interchange is only one element in assessing effect of a transaction on competing carriers and by itself is not controlling of the ultimate determination. Some changes in acquired carrier's service may reasonably be expected but, with the conditions imposed, proposed control will not result in such a "new competitive service" as to require denial. As both carriers have been interlining with other carriers into each other's territory, competitive impact of their operations under common control will be significantly less than if they had not done so; and it is noteworthy that, as shown by data in their latest annual reports, protestants' operations in general have approved appreciably despite improvement in acquired carrier's operations under temporary control, and none have been affected adversely to any material degree. Control approved.—Branch Motor Exp. Co.—Control—Morgan Trucking Co., 93 M.C.C. 244 (259-60).

Past interchange constitutes only one element in appraisal of likely effects of a transaction on operations and services of existing carriers, and is not in itself controlling. Lack of interchange between applicants or with other carriers operating in the territory does not of itself create a presumption of harm to existing carriers. The pivotal questions are, whether and to what extent existing carriers will be faced with a new competitive service rather than an improvement of an existing service, and, if it be found that a new service would evolve, whether compensatory public benefits would offset the detriment to the public that might result from any adverse effects on services and operations of existing carriers.—Mason & Dixon Lines, Inc.—Control—Silver Fleet, 90 M.C.C. 829 (843).

Acquiring and acquired carriers have continuously maintained an interline relation for at least 12 years, and latter's improved service under former's temporary control has resulted in substantial compensatory benefits without any serious adverse effect on protestants, who in general are aggressive and efficiently operated carriers, with firmly established positions in their respective areas, and well able to meet any intensified competition successfully so long as they maintain a high level of service. While expansion of applicants' interline arrangement under common control may have caused some realignment of interchange arrangements among other carriers, it appears that protestants have been able to readjust to any such changes without serious impairment to their services or revenues. Control approved.—Id., pp. 844, 846-7.

Approval of proposed control will neither so materially affect protestants adversely as to endanger their services nor result in service differing materially from that now provided under separate control. Only 3 of 9 opposing carriers offered evidence as to traffic that could be diverted, and evidence of only one could be considered significant; at best, that carrier's exhibits show that a maximum of some 10 percent of its revenue was derived from shipments which applicants could handle but in all likelihood would be unable to lure in substantial amount, some being traffic acquired carrier can handle under rights found to be active, but only so circuitously as to render such operations largely noncompetitive. Moreover, as that protestant has no heavy-hauling rights, it must be

presumed that none of its shipments involved use of special equipment, whereas applicants are substantially limited to transportation of heavy or bulky articles, and it is improbable that a carrier of protestant's size would be severely affected by the relatively small operation under acquiring carrier's control, part of which is already directly competitive. Approved.—Aero Trucking, Inc.—Control—Friedman Transfer, 93 M.C.C. 342 (351-2).

Expected increase in volume of acquired carrier's small-boat traffic after unification would come principally from private carriage and expansion of the industry, and proposed control should not seriously interfere with ability of protestant, primarily a large boat hauler, to continue to provide service; shipper testimony indicates need for both carriers to ensure sufficient competition and equipment to service a rapidly growing industry.—Long Transp. Co.—Control—Marine Transit, Inc., 90 M.C.C. 261 (265).

The commission has found in numerous §207 proceedings that carriers already operating, which have made large investments to improve service, should normally be accorded the right to transport all traffic that they can handle adequately, efficiently, and economically; there is no reason for application of a different rule where a transaction proposed under §5 would result in a new competitive service and there is a complete lack of evidence of need therefor. Public interest requires that carriers already in the territory be protected, and it is immaterial from a practical standpoint whether the attemp to invade the territory is made through an application under §207 or one under §5.—Bowman Transp., Inc.—Purchase—A. W. Hawkins, Inc., 90 M.C.C. 303 (327).

Although exact tonnage and revenue that would be diverted as result of proposed purchase cannot be determined until some time after consummation or after lapse of a reasonable time under temporary authority, and a showing of actual tonnage handled by vendee under vendor's rights for only 1 month is insufficient for a clear cut appraisal of effect of its temporary operations on protestants, protestants have set forth the anticipated tonnage and revenue that would be subject to diversion, and vendee would undoubtedly be in position to divert a substantial volume; that some protestants are financially sound, long-distance haulers and are experiencing growth in business is insufficient to warrant approval of the transaction.—Id., pp. 325, 326.

Since evidence clearly shows that vendor's past operations under the single-State exemption proviso have been inadequate to support issuance of the certificate requested by vendee and since the evidence, otherwise, fails to establish that public convenience and necessity require continuance by vendee of vendor's former operations, protestants' failure to show wherein they would be adversely affected by grant of the authority sought is not controlling of issues in purchase, and related §207, application proceeding. Both application denied.—Joyce Trucking Co.—Purchase—Selig, 97 M.C.C. 1 (6-9).

Even though acquiring carrier has already in another proceeding obtained the shorter route which was the purpose of proposed acquisition of control, exercise of its option to purchase acquired carrier's stock would effectively eliminate possibility of a competitive service resulting from acquisition of that carrier's rights by an independent operator; such a benefit to acquiring carrier does not outweigh its unlawful effectuation of common control of acquired carrier, and fact that protestants have not shown how they would be adversely affected is not controlling where applicant has failed to meet its burden of proof. Control authority denied.—Jones Truck Lines, Inc.—Control—Smock Transp. Co., 90 M.C.C. 759 (762, 763).

Diversion of traffic by more aggressive carrier: [Vols. 16, 17, 19].—The commission's finding that Chesapeake & Ohio's control of Baltimore & Ohio would not cause any undue diversion of traffic from New York Central was not inadequate because it failed to determine specifically how much traffic would be diverted; it was not required to engage in speculation and guesswork to come up with a precise percentage calculation. It was sufficient that the commission carefully reviewed the

testimony of Central's witnesses, gave its reasons why it found their estimates unreliable, and reviewed the evidence supportive of its conclusion that the claimed diversion would not be undue.—Broth. of Maint. of Way Employees v. United States, 221 F. Supp. 19 (25-6)*.

Moreover, contrary to plaintiffs' contention, the commission's conclusion did not ignore effect of the proposed control on other railroads, since it stated that approval would not result in any undue diversion of traffic from Central "or other rail carriers." In addition to its right to rely on its own expertise and judgment, it had substantial evidence before it from which to draw that conclusion; and, while not controlling, it is significant that no railroad has joined plaintiffs in seeking to set aside its order of approval; if such approval were prejudicial to interests of other railroads, their self-interest might be expected to urge them to join in the attack on it. The commission's order sustained.—Id., pp. 26, 31.

Reason most heavily relied on by the commission as basis for denial of plaintiff's purchase application, that approval would result in diversion of traffic from protestants (in commission proceeding) and cause competitive harm, is not adequately supported by evidence of record. Protestants' testimony on competitive harm is speculative and inconclusive, and supporting shippers' testimony does not justify a finding of substantial evidence to support a conclusion. In any event, amount of traffic which would be diverted is not clear, and does not appear in either the testimony or the report; therefore, since protestants completely failed to show in a substantial way the effect which plaintiff's operation under the purchase rights would have on their operation, the court is left with no other alternative than to find that the evidence does not afford substantial basis in fact for the conclusion drawn therefrom. Case remanded to the commission for further hearing on the question of competition and diversion of traffic.—Interstate Motor Freight System v. United States, 243 F. Supp. 868 (871, 872-3)*.

The area of traffic diversion deals in uncertainties and imponderables; it is impossible to predict with certainty the consist of traffic potentially available to solicitation of the merged rail company or of competing carriers, or the success of competitors' attempts to influence routing of traffic. Shippers' right to control routing and retaliatory power of competing carriers both tend to minimize diversionary effects of a merger; and diversion in the volume predicted rarely occurs. Applicants' estimates of diversion from other railroads are somewhat understated because of speculative nature of assumptions on which based, and interveners' estimates of diversion from their lines may be somewhat overstated; however, it is clear that overall diversion would be substantial and might seriously endanger operations of several carriers in absence of special protective conditions. Routing and gateway conditions imposed will minimize such adverse effects by preserving existing interchanges, and also by creating new reprisal routes that will enhance interveners' retaliatory powers.—Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122 (168-80, 208)*.

Although Buffalo is now an open gateway, and all east-west lines but New York Central terminate at that gateway and have no affiliated connection on the other side, upon approval of the Pennsylvania's control of Lehigh Valley and of pending Norfolk & Western transactions all lines operating into that gateway, except Erie-Lackawanna from the east and Chesapeake & Ohio and Grand Trunk from the west, would have such connections with affiliates. However, while some traffic of other carriers would thus become vulnerable to diversion as result of instant transaction, extent thereof cannot be determined; approval is therefore made subject to standard conditions for preservation of through routes, etc., prescribed in 275 ICC 455.—Pennsylvania R. Co.—Control—Lehigh Valley R. Co., 317 I.C.C. 139 (146-7, 151).

However beneficial Chesapeake & Ohio's control of Baltimore & Ohio may be, there is no basis for assumption that a unified system of overwhelming financial strength will develop in the near future, or that New

York Central's position in the railroad industry will deteriorate appreciably as result thereof. Central is physically the largest railroad in the East, second in production of freight revenues, and not significantly smaller than a unified C & O-B & O system; mere existence or possibility of joint C &O-B & O routes would not pose a serious threat to Central, since other factors even more significant than alternative routes directly affect routing of traffic. Moreover, there are important traffic areas wherein C & O is unable to influence routing for its own benefit, and it would be unreasonable to conclude that it could substitute B & O for Central when it has been unable to achieve that result for itself.—Chesapeake & O. Ry. Co.—Control—Baltimore & O. R. Co., 317 I.C.C. 261 (281-2)*.

It is improbable that shippers on Central's sidings would divert traffic to C & O or B & O team tracks; shipper witnesses testified that as a matter of policy they give the line haul to the carrier on whose sidings they are located, and generally allocate national account traffic among the competing railroads; it is doubtful that even a virgorous joint effort by C & O and B & O could significantly change that policy. Imposition of conditions requiring maintenance of existing routes and gateways and permitting reopening of the proceeding if such conditions fail to their purpose should adequately protect Central from all except ordinary solicitation.—Id., p. 282-3.

Careful consideration of Central's and C & O-B & O's estimates of traffic diversion, their background material, and other information of record, including effect of the transaction on the nation's railroads and in turn on the public, warrants conclusion that no undue amount of traffic will be diverted from Central or other railroads. Although Central is not at present well able to absorb any substantial loss of traffic, prospective benefits to the public from proposed control outweigh any harm to Central, and prospective loss of revenues by it is not such as to require disapproval.—Id., pp. 265, 282-3.

Vendor has not been a competitive factor on traffic moving to or from points in its Ohio irregular-route territory, which is abundantly served by other motor carriers, and vendee's "massive temporary authority movements," in absence of any evidence that they constitute newly generated traffic, must be deemed to have been diverted from protestants and other established carriers; this conclusion is bolstered by testimony of several shippers that substantial traffic has been diverted to vendee's temporary operations. Protestants' increased revenues and profits are not necessarily indicative of lack of adverse effects, since it is easily possible in case of a large carrier that a portion of its services may suffer competitive injury while another portion becomes so profitable as to offset the loss. Authority for purchase of vendor's dormant irregular-route rights, denied.—Ohio Southern Exp., Inc.—Purchase—Vermilion Truck Line, 97 M.C.C. 93 (101)*.

On reconsideration, however, in view of vendee's extensive operations under temporary authority and supporting shippers' expressed need for continuance of its improved service under the unified rights, record is convincing that substantial compensatory benefits have resulted to the shipping public, without adverse effects on protestants' operations and services. Protestants are strong, aggressive, and firmly established carriers, and are well able to meet successfully any intensified competition resulting from proposed transaction so long as they maintain a high level of service; moreover, during period of vendee's operation under vendor's regular- and irregular-route rights, each protestant's gross revenues and net income increased and operating ratios of all but one decreased. Authorizing operations under the unified rights will enable vendee to provide need service to shippers it now serves without any apparent serious impact on service of other carriers. Accordingly, applications should be approved; prior findings modified in part.—Id., 101 M.C.C. 444 (445, 450-1)*.

While protestants fear that proposed purchase would result in loss of traffic to them, denial of §5 application is not warranted on mere showing that vendee would be in competition with existing carriers; protestants

must show with particularity how much traffic they would lose and to what degree they would be harmed by approval of the transaction. It is to be expected that competing carriers may be affected by any unification of rights of two carriers; however a new single-line service by vendee would not necessarily make intolerable inroads into traffic of protestants who are well established competitors and authorized to serve extensive lines and areas. Protestants failed to show any specific traffic that would be diverted, or that proposed unification would so affect them financially that they would be unable to provide service required of them; approved.—Deaton Truck Line, Inc.—Purchase—Lavender, 97 M.C.C. 256 (259-60, 268)*; for similar reasons, proposed purchase of bankrupt vendor's operating rights is approved.—National Transp. Co.—Purchase—Hartford Transp. Co., 97 M.C.C. 206 (213-4)*.

While vendee's operations may be larger than those of vendor under the purchase rights, and conduct of latter operations by vendee may be more aggressive, some change in the competitive situation is axiomatic in most §5 proceedings; that result does not of itself create a new carrier service. Competition already exists in the purchase territory, and as protestants have long served the area and are able to provide an attractive service, such potential diversion would not adversely affect their operations to any material degree.—Gordons Transports, Inc.—Purchase—Hayes Freight Lines, 90 M.C.C. 351 (360, 361).

Protestants provide service on uncrated furniture from New York City to points in eastern seaboard area similar to that vendee would render under combination of its existing and purchase rights, and while none of them presented cogent facts to show that their operations would be substantially affected, their fears of diversion are not groundless. Vendee is one of the largest household-good carriers, holding nationwide authority, and would use services of its agents, including vendor, to solicit the traffic it seeks to acquire by the purchase. Vendee's proposed service will differ considerably from that conducted by vendor during the comparatively short period it operated under the involved rights, and protestants have demonstrated that they are willing and able to meet all demands for service on the traffic available, but are financially unable to compete with the new and unrequired services of a substantial and aggressive competitor which dwarfs their combined resources. Comparison of the slight benefit to the public with the adverse effect on protestants warrants conclusion that approval of the transaction would not further healthy competition or serve the public interest. Denied.—North American Van Lines, Inc.—Purchase—Hagerstown Motor, 93 M.C.C. 125 (131).

Purchase by carrier with transcontinental rights via St. Louis of routes to Chicago would not only confront the numerous carriers in vendor's territory with more aggressive competition by a much larger and financially stronger carrier, but would also create a new long-line service westward from Chicago. That protestants have not shown precisely the traffic and revenues they would lose, and that the long-distance operators among them are large carriers with substantial resources and facilities, are not controlling; vendee has not been a substantial competitor on transcontinental traffic to and from Chicago and points intermediate to St. Louis, and evidence of local carriers in vendor's territory as to their traffic which would be vulnerable to vendee's competition is more than conjectural. As no public witnesses supported the transaction and there is no showing of any deficiency in existing services, it cannot be found that resulting public benefits would outweigh any adverse effects on existing carriers. Denied.—T.I.M.E. Freight, Inc.—Purchase—M.C. Slater, Inc., 90 M.C.C. 702 (705-8).

Monopoly: [Vols. 13-15, 17-19].—Proposed merger of Atlantic Coast Line into Seaboard Air Line will not create a potential monopoly, although it will eliminate competition between them in a 6-State area and will leave survivor with more than 54 percent of the total railroad mileage therein (as well as in 8-State area including mileage of affiliated Louisville &

Nashville), as compared with 34 percent for its closest rival, Southern Ry. System, and will give survivor about 81 percent of the total mileage in Florida. Of applicants' total competitive traffic, 19.7 percent of the tonnage would remain competitive with other railroads, and rail competition would be eliminated on about 13.7 percent, after the merger. Outside of Florida, there would be only 17 small communities, where both applicants now have agents, that would be without competitive rail service after the merger; and, at most, the resulting rail monopoly in portions of Florida would merely supplant applicants' present duopoly, which has long existed without appreciable adverse effects on the shipping public.—Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122 (163-5, 212)*.

The percentage of total railroad mileage operated by the merged company is not alone a suitable criterion for determining sufficiency of rail competition that would remain; nor can competitive consequences of the merger on shippers and communities be measured simply by the number of common points at which competition between applicants would be eliminated. Impact of the merger will be felt throughout the South, and in evaluating its competitive effects the service provided by all rail carriers, also the sum of all competitive transportation facilities available in that broad area, must be considered. While there will be significant reduction of rail competition in Florida, the overall reduction in the southeastern States as a whole, viewed in light of service provided by competing railroads, large and small, at all major industrial cities and between most major gateways, will be relatively moderate; and elimination of rail competition at a number of smaller cities and counties will not affect the overall picture.—Id., pp. 165-6.

The essentially monopolistic services of other types of public utility companies, under strict regulation by Federal and State agencies, are generally efficient and reasonably priced despite absence of competition; while there is no exact comparability between railroads and public utilities generally, it must be recognized that railroads are subject to equally stringent regulation in the public interest at both Federal and State levels; it is therefore unrealistic to insist that intramodal rail competition must be preserved at all times, at all places, and under all circumstances. For that reason and the other considerations discussed, as well as the increasingly strong competition railroads today encounter from other modes of transport, it is concluded that ample competitive rail service will remain throughout most of the affected area, and that such reduction in competition as will result from proposed merger will have no appreciably injurious effect on shippers and communities.—Id., p. 167. [But see dissent.]

Notwithstanding vendee's dominant position in the local bus industry in area involved, proposed purchase would not foster monopolistic conditions through elimination of a competitor, since vendor is no longer an active carrier, its certificates having been seized by Internal Revenue Service of tax deficiencies.—Public Serv. Coordinated Transport—Purchase—Royal Blue, 97 M.C.C. 56 (64).

If proposed purchase by a Trailways associate of vendor's operating rights between Boston and Portland, Maine, via Portsmouth, N.H., were disapproved, Greyhound would be the sole long-distance motor carrier of passengers entitled to operate over the more direct route between Boston and Portland. Before that reduction in competition is countenanced, evidence to justify it should be convincing; and where the public is using the admittedly good service of vendee and Greyhound, only a strong showing of insufficient traffic to support two bus operations over that route would justify removal of the spur to better service that competition affords. Purchase approved.—Trailways of New England, Inc.—Purchase—Interstate, 93 M.C.C. 217 (225-6).

New and different service: [Vols. 16-19].—To the extent that a new competitive service may evolve from approval of a §5 transaction, the issue is the degree to which compensatory public benefits would offset any detriment to existing carriers. Though vendee, in transporting under temporary

authority traffic susceptible of handling in van-type equipment, is mostly engaged in operations entirely different from those conducted by vendor, protestant (claiming diversion of such traffic) failed to refute validity of shipper's complaints regarding equipment shortages and numerous failures to obtain desired some-day delivery, whereas vendee's interline service has been satisfactory in those respects; moreover, it offered no evidence as to revenues involved or extent to which their loss would affect its systemwide operations or impair its ability to meet its carrier obligations. Protestants in general are aggressive and efficiently operated carriers with firmly established positions in their areas, and should be well able to meet any intensified competition resulting from vendee's operations, to the extent authorized, on a permanent basis.—Sierra Distributing—Purchase—F. T. S. Transport System, 97 M.C.C. 294 (303, 304, 305).

Vendee has interlined freight in the past with one carrier whose rights connect with those to be purchased, and its proposal to expand that interline operation and enter into interchange agreements with other carriers is insufficient to characterize the operation as a new service; with exception of some limited diversion from two of them, protestants have presented little evidence to show how they would be affected; the transaction poses no serious threat to existing carriers, and will result in improved service to an area which has demonstrated need therefor; no restrictions on the acquired rights are warranted.—Houck Transport Co.—Purchase—Cohee, 90 M.C.C. 154 (158).

A pivotal question in §5 proceeding is whether and to what extent existing carriers will be faced with a new competitive service, and, where a new service is involved, whether compensatory public benefits would offset the detriment to the public that would result from any adverse effect on services and operations of existing competing carriers. Although a new competitive service would result from proposed merger, preponderance of shipper evidence shows a definite need for continuance of survivor's service under the combined rights, and protestants have not show how they could fill the void created by a termination of that service. Moreover, protestants are all strong, aggressive carriers, firmly established in their territories, and despite survivor's more than 2 years' operation of the combined rights under temporary authority, protestants' traffic and financial stability have grown steadily, enabling them readily to withstand any additional adjustments necessary to meet survivor's competition. Merger approved.—Bowman Transp., Inc.—Control and Merger, 93 M.C.C. 133 (136, 137, 138, 139).

The vendee was able to extend its sizeable northern operations into the Norfolk, Va. area by interlining with vendor, and for the first time commence and operate a new competitive service which theretofore had not been faced by existing common carriers providing either single-line or connecting-line service in that area. While presently the volume of this new competitive service is not large, if proposed the transaction were approved, there is good reason to believe that the vendee would end up in transporting a substantial volume of traffic so that the resulting operation could not be looked on as a substitution or an improvement on an existing service but would be, in substance, an extension of vendee's service into the area by means of its securing new operating authority.—Great Coastal Exp., Inc.—Purchase—Price Transfer, 97 M.C.C. 271 (290-1)*.

While two supporting shippers expressed satisfaction with the overnight service the vendee is presently providing them by interlining with vendor, it cannot be inferred that existing carriers are not ready, willing and able to provide equally good service because there was no evidence that the shippers were either aware of or dissatisfied with the service of the substantial and established carriers already in the area which are providing adequate transportation and which would be substantially hurt by the proposed service. While the amount of traffic that would be diverted by vendee's new operation is problematical and not subject to exact determination, there were no new sources of traffic shown, and it must

be concluded that such diversion would be substantial. Because approval of the transaction would disrupt the competitive balance and have a harmful effect on the existing carriers, the transaction is disapproved.—Id., p. 292.

When acquired carrier's operations at points in Virigina and eastern North Carolina, in connection with its East-South Service, and throughout its southern territory in connection with intra-South service, have been so sporadic or limited as to have little or no competitive significance, it would be inconsistent with public interest, in absence of any showing of need therefor, to approve the transaction on a basis permitting revitalization of those portions of its rights under acquiring carrier's control. Existing carriers, whose services have not been shown to be inadequate, are entitled to protection from what would be for all practical purposes a new competitive service in those areas; approval of control is therefore conditioned on cancellation of those portions of its rights.—Branch Motor Exp. Co.—Control—Morgan Trucking Co., 93 M.C.C. 244 (258).

Applicants' contention that the 87 shipments transported by vendee during 9 months of temporary authority are indicative of future operations, and that no-one can speculate regarding future frequency of service, is beyond the realm of plausibility. Vendee, a nationwide household-goods carrier, is no stranger to the commission, which is entitled to, and must, consider its method of operation; it operates an extremely large fleet of vehicles, advertises nationally, has 675 agents in 650 principal cities throughout the country, some 90 to 95 percent of whom will solicit traffic under the rights involved, operates equipment in roving service, and maintains central control and supervision over the operation. Vendee's use of the rights would bear little resemblance to vendor's limited service thereunder and would in all practical effect be a new competitive service for which no public need has been shown. Benefits accruing to the public from the transaction would be more than offset by the adverse effect on protestants, and would not promote stability and sound economic conditions in the industry. Denied.—Aero Mayflower Transit Co., Inc.—Purchase—Walls, 93 M.C.C. 369 (377).

While a carrier has every right to build up all or any part of its operations, even though it anticipates subsequent disposition thereof, vendor did not exercise its rights between Louisville and Tennessee points until 4 years after it acquired them, or less than a year before filing of purchase application, and its reactivation of the dormant rights confronted existing carriers with a new competitive service. As vendee has not been a competitive factor on Louisville-Memphis traffic for about 10 years, its institution of single-line service between those points after purchase would compound the competitive impact on existing services. Since the Louisville-Memphis traffic is highly competitive, and no public demand for additional service is shown, intrusion of new and aggressive competition would impede protestants in their efforts to maintain and improve their present level of service and solve problems of their present imbalance of traffic. Condition imposed against service by vendee between Memphis and Louisville.—Dean Truck Line, Inc.—Purchase—Allstate Truck Line, Inc., 90 M.C.C. 819 (825, 827)*.

Even according full weight to applicants' evidence relating to vendor's resources and to service provided under its authority to serve the four southwestern States in issue, the record does not establish that its operations to or from those States could be categorized other than as extremely limited and of no competitive significance, and the same applies to vendee's operations involving those States during the period of temporary unification to which the evidence relates. As evidence of vendor's service at points in the four States involved solely on-line operations, with no evidence of interline movements with vendee or any other carrier, it follows that transportation by vendee of shipments between those States and points in its existing authorized territory would be a new competitive service not previously encountered by existing carriers. Condition previously imposed on purchase approval, requiring cancellation

of rights for those four States, affirmed.—Von Der Ahe Van Lines, Inc.—Lease and Purchase—Bee-Line, 93 M.C.C. 498 (507)*.

Vendee's service from eastern Ohio and western Pennsylania to 5 eastern or southern States and District of Columbia after purchase of vendors' dormant heavy-hauling rights would not only be new from standpoint of substituting a single-line for a joint-line service, but would involve transportation of large volumes of iron and steel from steel mills, which it is doubtful vendors ever handled, in direct competition with protestant. Moreover, vendee anticipates earning some 40 times what vendors earned under the rights, and the percentage representing transportation to the eastern area would be substantial and might well be at protestant's expense; and though vendee could serve other shippers in the general Ohio-Pennsylvania area only somewhat circuitously, there, too, traffic might be diverted. Applicants have not shown that service by protestant and other iron-and-steel haulers is unsatisfactory, and they, particularly protestant which has shown that it moves a large volume of traffic subject to diversion, are entitled to protection from what would amount to an entirely new competitive service. Denied.—Aero Trucking, Inc.—Purchase—Kreitz, 93 M.C.C. 115 (122).

See also Hove Truck Line—Purchase—Maurer, n. 48 *single-line*, below.

A principal purpose of proposed purchase by vendee which can already render single-line service between Los Angeles and Cincinnati and Atlanta via St. Louis is to gain direct access to the important gateway and traffic-producing center of Chicago, and to institute a new and faster single-line service out of Chicago for both local and long-distance traffic. Such service would be substantially different from that provided by vendor singly or through interline, and would tend to foreclose certain local carriers from traffic which vendee has been interlining with them. As vendor has not been a substantial competitor on general-commodity traffic between Chicago and St. Louis, nor vendee on movements between Chicago and points intermediate to St. Louis, on one hand, and California-Arizona on the other, and no deficiency in existing services is shown, purchase is denied.—T.I.M.E. Freight, Inc.—Purchase—M. C. Slater, Inc., 90 M.C.C. 702 (705-8).

Passenger service: [Vol. 14].—Proposed purchase of certificate authorizing charter operations from Atlantic City area would have no serious adverse effect on protestant authorized to conduct special operations in same general territory in door-to-door service restricted to transportation of not over 8 passengers in one vehicle. As charter service contemplates transportation of travel groups assembled by someone other than the carrier, who as a body contract for exclusive use of the equipment for duration of a particular trip or tour, whereas special operations contemplate transportation of groups assembled by carrier through sale of individual tickets covering a trip or tour arranged by it, and protestant's operations are further distinguishable by their door-to-door character and limitation as to number of persons carried per vehicle, the respective charter and special operations are noncompetitive. Denied on other grounds.—Ocean Drive Tours—Purchase—Carll, 97 M.C.C. 20 (23).

Even where an operating right is not totally dormant, the commission's policy, in approving a transaction which would permit a new competitive service clearly detrimental to operations of a protestant already supplying that service, is to condition approval so as to protect that protestant. As protestant renders a vital commuter service in area of Somerville, N.J., and its routes therein are the very axis of its operations, whereas vendor rendered only limited service, a restriction against passengers boarding eastbound or alighting westbound at points between North Plainfield and New York City will effectively preclude vendee's establishment of a new local commuter service and thus protect protestant in substantial measure, without causing undue hardship to most of vendor's patrons or impairing vendee's service west thereof where protestant's routes are not duplicative of the acquired rights.—Public Serv. Coordinated Transport—Purchase—Royal Blue, 97 M.C.C. 56 (62-3).

Vendee's proposed service under vendor's rights between Hilton Head Island, S.C., and Savannah, Ga., affording through bus connections beyond Savannah on the south and Charleston on the north, is not a new service but a substitute for a presently active competitor, modified to make available to the public improvements which existing carriers are either unwilling or unable to make. Protestant has a firmly established operation widely used and appreciated by the island's developers, the native residents, and newcomers to the planned community now being built. The area he serves has already undergone substantial economic changes due to the island's development and stands on the threshhold of further commercial improvement; and though vendee's competition would doubtless have more telling impact than vendor's, it does not appear that the result would be an impairment of existing service. Purchase approved.—Carolina Scenic Stages—Purchase—Patterson, 97 M.C.C. 79 (88).

Reinstitution of dormant operations: [Vols. 16-19].—Where there is no evidence of past operations under particular rights, the commission has consistently held that protestants are entitled to protection against transfer thereof, by either purchase or control, and resultant resumption of service by the buyer, unless a public need is shown therefor.—Mitchell Bros. Truck Lines—Control—Empire Transport, 93 M.C.C. 38 (44).

Fact that acquired carrier is a small carrier serving a rural area is of no consequence where service is being provided by other carriers, or where no effort is made to show public need for revitalization of dormant rights; and fact that acquiring carrier is a substantial carrier, with an intent to transport any and all traffic authorized by acquired carrier's certificate that it can obtain, must be weighed against evidence that protestants are presently providing such service. And, applicants having shown no need for the dormant operations, any approval would require cancellation of dormant portions of the rights.—Id., pp. 43-4.

Evidence of service under vendor's rights since filing of purchase application is insufficient to refute an inference of dormancy, since that service was dependent chiefly on traffic transported under a leasing arrangement whereby vendee provided the entire service to exclusion of any participation by vendor. In the circumstances, protestants are entitled to protection in absence of complaints by shipper witnesses or expressions of need for the service proposed. The deciding factor is lack of public need for a new service, not whether protestants have shown the degree of adverse effect upon themselves.—R. L. Jeffries Trucking Co., Inc.—Purchase—Eck Miller, 97 M.C.C. 151 (171).

Where no operations are being conducted under rights to be purchased, and insufficient evidence of need for revitalization of operations thereunder has been adduced, other carriers which have continued to provide the service are entitled to protection from reestablishment of operations under such rights in competition with them—Belyea Truck Co.—Purchase—Ferguson Trucking Co., 90 M.C.C. 139 (150)*: interruption in a carrier's service as to any particular traffic tends to result in other carriers expanding their operations to take up the void created; and if a stronger and more aggressive carrier were permitted to institute operations under the dormant rights, this would tend to cut into the efforts of carriers who have expended time and money to expand their operations, as it can be presumed that any established and agressive carrier will be able, through active solicitation, to revitalize operations and take business from other qualified carriers.—C & H Transp. Co., Inc.—Purchase—Ferguson Trucking, 93 M.C.C. 741 (748-9)*.

Theory underlying principle that acquisition of dormant operating rights and resumption of service thereunder may be approved only on a clear showing of need for such service is that service so instituted would likely be a new competitive service from which other carriers who have expended their funds and energies to provide continuous service are entitled to

protection, unless it is shown that they have been deficient in some major respect in serving the shipping public. As vendor's rights have been dormant for at least a year, vendee's use of them would be an entirely new service, and as no evidence of shipper dissatisfaction with existing services is presented, purchase application is denied.—Deaton Truck Line, Inc.—Purchase—Magnolia Truck Line, 87 M.C.C. 674 (679).

As acquired carrier's irregular-route operations in Scranton, Pa., northern New Jersey, and Hudson Valley areas, including the highly populated and important shipping center of New York City and its environs, have been too sporadic or limited to be of any real competitive significance, it would be inconsistent with public interest, in absence of any showing of need therefor, to permit revitalization of those portions of its rights under acquiring carrier's control. Existing carriers, whose services have not been shown to be inadequate, are entitled to protection from what for all practical purposes would be a new competitive service in those areas.—Accelerated Transport-Pony Exp., Inc.—Control—Downing, 87 M.C.C. 711 (722).

And since acquired carrier's operations over its regular routes between Hartford, Conn., and Lancaster, Pa., have been virtually with closed doors between Trenton and its authorized points north of New York City, reactivation of its service at points on those routes in the New York City-northern New Jersey area would be tantamount to a new competitive service and would be inconsistent with public interest when no inadequacy in existing service need for additional service is shown. Control authority is therefore conditioned on modification of both the regular and irregular-route rights as indicated.—Id., pp. 722-4.

Any lawful charter operations under vendor's rights from Annapolis, Md., have been of no competitive significance; protestants serving the area can provide additional service as needed and are entitled to protection from what for all practical purposes would be a new competitive service; approval of purchase without cancellation of authority from Annapolis would be inconsistent with public interest.—Didlake—Purchase—Johnson, 87 M.C.C. 742 (745).

While protesting common carriers failed to show the extent to which their operations would be adversely affected by vendee's reinstitution of service under vendor's dormant contract-carrier rights, it can hardly be argued that the loss of even a small amount of traffic would be other than disadvantageous to them. Moreover, since applicants have failed to establish that a distinct need exists for vendee's service under the dormant rights, protestants do not have the burden of making such a showing of adverse effect. Purchase approval is therefore conditioned on cancellation of the dormant rights.—H. Prang Trucking Co., Inc.—Purchase—Hyer Trucking, 93 M.C.C. 695 (702, 703).

That protestants have not specified the traffic and revenues they would lose from a vendee's resumption of service under vendor's dormant rights is not controlling where applicants have failed to show that approval of the transaction would be consistent with public interest. Applicants in control proceeding have failed to meet that burden with respect to certain classes of commodities usually excepted from general-commodity authority; there is not a scintilla of shipper evidence that existing services in the area are inadequate to meet all needs for the specialized transportation involved, which acquired carrier has failed to provide under its unrestricted general commodity rights, apparently because other carriers' services have been adequate and satisfactory. It would be inconsistent with public interest to subject services of those carriers to impairment by acquired carrier's added competition under acquiring carrier's control. Approval conditioned on exception of those commodity classes from its general-commodity rights.—Gillette Motor Transport, Inc.—Control—Voss, 90 M.C.C. 663 (669)*.

Although little or no operations have been conducted from western Connecticut area to New Jersey area under vendor's rights, active and continuous operations have been conducted thereunder in reverse

direction; considering all factors and evidence of record, including fact that restriction to one-way operation after purchase would foster wasteful and uneconomic transportation, vendee should be authorized to provide service from the Connecticut area. While protestants might lose some traffic to a two-way operation by vendee, it is not shown that any such loss would be so adverse to their interests as to affect their future service; such possible loss does not warrant disapproval of that part of purchase transaction when it otherwise is consistent with public interest.—Hudson Transp. Co.—Purchase—Hillside Freight Lines, Inc., 87 M.C.C. 759 (764-5, 767).

Single-line service: [Vols. 16-19].—Mere replacement of a two-line service with a single-line service following unification is not sufficient change to constitute a new competitive service for which need must be shown.—Shamrock Van Lines, Inc.—Purchase—Reely, 93 M.C.C. 455 (461).

Acquisition of existing operating rights and rendition of single-line service by vendee, where there has been interchange between applicant carriers, would not result in a completely new service nor enlarge geographical scope of such operations or amount to an additional service in the sense that a through service would be established where none previously existed. While some adjustment of competitors' operations might result from proposed purchase, there is no showing that protestants would lose any substantial portion of their traffic, particularly in view of the more restrictive nature of the commodity rights to be transferred; protestants are substantial carriers and have not shown that such diversion as might occur would impair their ability to serve the public. Purchase approved.—Home Transp. Co., Inc.—Purchase—Chattanooga Transfer, 97 M.C.C. 173 (188).

As vendee has participated for several years in interline transportation of considered class of commodities to, from, or through vendor's territory, its single-line operations following consummation would not be a new service in the sense that protestants have not been faced with the competition (even after excluding shipments interlined by applicants after purchase negotiations began); rather, it would be a continuance, albeit with some intensification and under single ownership, of a service to which protestants have become accustomed. Moreover, when protestants admit that rail rate reductions and depressed business conditions may have contributed to their decrease in tonnage and revenues and that they did not segregate their competitive from noncompetitive movements of traffic, whereas applicants have shown that the unified service approved would differ only slightly from their former two-line service, it is difficult to perceive any additional competitive impact on protestants from vendee's single-line service.—Superior Trucking Co.—Purchase—Arthur Morgan Trucking, 93 M.C.C. 64 (69)*.

Record shows that vendor has performed transportation under his operating rights continuously and to a degree commensurate with his abilities and demands for his service, and that vendor and vendee have interchanged a substantial amount of traffic at an authorized off-route point; thus, single-line service which would result from unification of the rights would not be a wholly new service. Proposed transaction will enable vendee to provide better service to the public, with greater economy, by substituting single-line for present joint-line service; and such single-line service will not be new competition to existing carriers except to extent it might be more attractive to some shippers; approved.—Deaton Truck Line, Inc.—Purchase—Lavender, 97 M.C.C. 256 (257-8, 268)*.

That vendor has interlined with vendee and other carriers for years, and that most of its service was so conducted, is a prime factor in considering effect of purchase on competing carriers. Where substantial interline has occurred for a long period, it may be said that, in the main, competing carriers have adjusted to vendor's method of operation and that approval of purchase would cause little impairment to their existing operations. Applicants' argument that protestants have not shown that their service or financial position would be adversely

affected by sale of vendor's New York proviso rights to a multiple-State operator is well taken, except as to one whose operations were adversely affected by loss of interline business for movement over vendor's Buffalo-Jamestown routes, cancellation of which will be required.—Dorn's Transp., Inc.—Purchase—Mayberry Motor Freight, 90 M.C.C. 269 (278-9).

In view of the service vendors are shown to have provided through interline with vendee and others, and the fact that vendee has long been a competitive factor on a multiple-line basis in transportation of involved overlapping classes of machinery and heavy commodities from, through, and to vendors' territory, its single-line operations following purchase would not constitute new and different competition for protestants, who would continue to have an operating advantage because of circuity of vendee's operations via required gateways. As protestants failed to show with any particularity the amount of traffic they might reasonably expect to lose or effect thereof on their total operations, there is little likelihood they would be seriously affected or that vendee's through service would have any materially enhanced competitive impact on their operations. Purchase approved.—Home Transp. Co., Inc.—Purchase—Clarkson, 93 M.C.C. 509 (521)*.

Inasmuch as, following purchase consummation, vendee's route between Duluth, Minn., and Fargo, N. Dak., via the Twin Cities, would be 55 percent more circuitous than protestant's route, the proposed single-line operation will not present any serious competitive threat to protestant's service, particularly since protestant's traffic between those points barely amounts to one trailer load per day.—Hart Motor Exp., Inc.—Purchase—Lake Superior Motor Frt., 90 M.C.C. 653 (655).

When, for 2 years prior to a 6 months' cessation of vendor's service immediately preceding assumption of its operations by vendee under temporary authority, vendee and vendor conducted joint-line operations over their respective routes in competition with Greyhound, and vendor for all practical purposes operated as a member of Trailways system, purchase of vendor's rights by a Trailways associate involves continuance of an old service under more favorable auspices rather than institution of a new one. Therefore, criteria normally applied to establishment of a new service are not appropriate, and questions concerning public demand or need therefor are not germane to the issues.—Trailways of New England, Inc.—Purchase—Interstate, 93 M.C.C. 217 (224).

Though "public interest" as used in §5 comprehends interest of competing carriers, applicants' coordinated through service did not adversely affect Greyhound's ability to render adequate service; on the contrary, its net income increased during period in which vendee commenced temporary operation over vendor's routes, and it offered no concrete evidence that its traffic or revenue had declined as result thereof. Greyhound is a large carrier and should be able to meet any increased competition by vendee under the unified rights; its mere apprehension that it may lose traffic in the densely populated and highly industrialized New England area involved does not warrant denial of purchase application.—Id., p. 225.

That Trailways System acknowledged "destructive competition" in that area in a 1956 agreement with Greyhound and other buslines, that vendor's president and sole stockholder admitted that the volume of traffic did not justify two competitive carriers, and that vendor and its predecessor conducted unprofitable operations, while meriting consideration along with all other factors, do not overcome the demonstrated facts that vendee is now performing a profitable and improved service and that Greyhound's operating results have also improved. Moreover, the 1956 contract covered a period prior to instant record, and recitals therein concerning traffic conditions have never been accepted by the commission as proved. Where the public is using the admittedly good service of both vendee and Greyhound, only a strong showing of insufficient traffic to support the two operations over the same routes would warrant removal of the spur to better service that competition affords; no such showing has been made. Purchase approved.—Id., pp. 225, 226.

In considering effect on protestants of establishment of a single-line service by vendee in lieu of prior separate services it is proper to consider the past record of interline with all carriers. While vendor's interline service at Providence under its rights between that point and Massachusetts and Connecticut was somewhat inconsequential, vendee is already authorized to serve a number of points in those States directly, has served others through interline, and thus is already competitive with protestants in that territory. Protestants have not shown any specific traffic they would lose or how they would be harmed by vendee's single-line service; moreover, although vendee had operated such service under temporary authority for only about 3 months at time of hearing, it is pertinent that protestants made no effort to analyze its effect on their operations. Imposition of a tacking restriction on the acquired rights is not warranted.—Berman's Motor Exp., Inc.—Purchase—Lang Storage & Trans., 90 M.C.C. 807 (814).

When survivors and liquidating carrier have interchanged with each other for many years, approval of merger would merely replace a joint-line by a single-line service, which would be an improved rather than a new service. To extent that applicants have for so long interchanged traffic moving in and out of territories they now separately serve, existing carriers must be deemed to have adjusted to their combined competition. Furthermore, protestants have not presented convincing evidence of any adverse effects on them; approved.—Jones Motor Co., Inc.—Control—Mundy Motor Lines, 90 M.C.C. 899 (909).

That vendee's service under temporary authority has shown an increasing percentage of single-line Michigan-St. Louis traffic, compared with local traffic of each applicant under their complimentary rights, could be the result not only of vendee's attempt to build up traffic under the unified rights, but also of numerous other factors including attraction of new business by improved service. Some dislocations and changes in service are to be expected where vendee is stronger and better financed than vendor, and vendee is not shown to have concentrated on such through traffic to detriment of its own or vendor's separately authorized service. As remaining protestant is a strong carrier which should be able to compete with vendee's single-line service and retain its present Michigan-St. Louis traffic, the transaction would not upset competitive balance in the areas involved; approved.—Michigan Exp., Inc.—Purchase—Chicago-St. Louis Exp., Inc., 90 M.C.C. 671 (677)*.

To the extent that proposed merger contemplates a single-line rather than joint-line service by way of St. Paul, Minn., evidence overwhelmingly establishes that applicants have interlined substantial traffic at that point and that existing carriers have been faced with, and adjusted to, the competition of their joint-line service; thus, approval of that part of the transaction should cause little impairment to services of competing carriers.—Murphy Motor Freight Lines, Inc.—Control and Merger, 90 M.C.C. 535 (534).

However, a different situation is presented regarding institution of direct single-line service via Montevideo and the Westbrook area in Minnesota to Chicago. Since no interchange by applicants, either between themselves or with other carriers, through those points is disclosed, approval would permit institution of a new service which might impair existing carriers' operations and for which no need is shown; appropriate restriction is imposed to preclude such service.—Id., pp. 543, 544.

Prior to filing of purchase application applicants interchanged no traffic with each other, and vendor and protestants competed with vendee for California interline traffic to and from points in Utah. Purchase of vendor's interstate rights and continuance of single-line service vendee has been performing under temporary authority would result in permanent establishment of a service differing substantially from that previously performed by vendor, and, by depriving some protestants of their only available independent connection for service in that territory, would be seriously disruptive of the competitive situation. While protestants may not have shown in detail the traffic they would lose, vendee would

clearly acquire a competitive advantage and would divert substantial tonnage on which protestants are dependent; it would not be fostering sound transportation conditions to subject them to the potential additional competition which protestant would be able to provide. Denied.—Illinois-California Exp., Inc.—Purchase—Salt Lake-Kanab, 97 M.C.C. 38 (48).

Since applicants performed only sporadic or insignificant interline service during 16 months preceding grant of temporary authority, vendee's single-line service between points served by it in the South and points on vendor's routes north of Baltimore would be a new and different service, and it would undoubtedly be in position to divert considerable traffic from protestants. Vendee's entry into New York and Philadelphia areas would likely disrupt the competitive balance with harmful effect on competing carriers and without compensatory benefits to the public. Denied.—Bowman Transp., Inc.—Purchase—A. W. Hawkins, Inc., 90 M.C.C. 303 (325, 326, 327).

As vendor and vendee have not interchanged any appreciable amount of traffic, vendee's institution of a single-line, single-ownership operation between Chicago and Nebraska points served by vendor, including Omaha, would be a new competitive service, similar to that conducted under temporary authority in a prior proceeding involving same protestants, which was found to have proved a destructive competitive practice. It is reasonable to conclude that increased traffic which vendee would gain by instant transaction would make further inroads on traffic of protestants, who are rendering adequate service, most of them with unsatisfactory operating ratios, and would not be in interest of adequate motor service in the area. Denied.—Barber Transp. Co.—Purchase—Conners, 90 M.C.C. 475 (480, 481).

Although vendee has apparently not participated in movement of traffic between Salt Lake City and California points under temporary lease of vendor's rights between the former and a point in Arizona, it could provide a single-line service between Los Angeles and Salt Lake City if purchase of vendor's irregular-route rights and conversion to regular-route were approved without restriction, and undoubtedly would do so if there were sufficient demand. As any such service by vendee would be a new competitive operation for which no need is shown, tacking restriction is imposed to preclude it.—Consolidated Copperstate Lines—Purchase—Nielsen, 90 M.C.C. 483 (489).

Even if law violations manifested by vendee's unauthorized lease of vendor's operating rights between St. Louis and Tulsa were condoned, purchase thereof could not be approved when it would enable vendee to solicit for single-line movement all automobile traffic now moving in joint-line service from Kenosha, Wis., to Tulsa and thus disturb the competitive balance in the territory; while adverse effect on existing carriers cannot be foretold exactly, their loss of traffic would be substantial and, also, would represent an important part of tonnage on which one protestant relies for efficient operation. Evidence to support purchase does not outweigh objections arising from both the law violations and the substantial improvement in vendee's competitive position which would result, to deteriment of other carriers; denied.—Stewart—Investigation of Control, 87 M.C.C. 681 (698).

Transcontinental traffic: [Vols. 16-19].—Protestants' fears that approval of purchase by one railroad subsidiary of another's general-commodity rights for routes in California, together with grant since the hearing of vendee's applications for additional rights in western States, would result in establishment of a new competitive transcontinental operation, are groundless; vendee's present rights, including those recently acquired, contain sufficient safeguards against such service.—Santa Fe Trail Transp. Co.—Purchase—Santa Fe Transp. Co., 90 M.C.C. 123 (130).

See also T.I.M.E. Freight, Inc., purchase case under *New and different service,* above.

7a. Agreement not to compete.—[Vols. 12, 13, 17-19].—Payment of a specific sum for a promise not to compete has been held

to be part of the purchase price, and agreement to pay $48,000 over a 5-year period to acquired carrier's four stockholders or their estates, nominally for agreement not to compete, must be so considered. Although, in such cases, approval has sometimes been conditioned to require that payments cease on death of the persons so contracting, and one of original sellers is now deceased and age and general health of the others are likely to foreclose their active competition in the future regardless of contract, the commission is reluctant to change the terms of the contract if the total expenditure by acquiring carrier can be found not improvident; and while proposed price of $15,000 for acquired carrier's stock appears somewhat high, when thus increased, it is not unreasonably so.—Aero Trucking, Inc.—Control—Friedman Transfer, 93 M.C.C. 342 (347, 352).

8. Price to be paid.—[Vols. 11-19].—See also Port Authority Trans-Hudson Corp. Acquisition, §1(18), n. 78.

Proposed exchange ratio for common stock of merging railroads is based on a multiplicity of factors reflecting their respective contributions to the merged enterprise; but under principle of 334 US 182 earnings of the properties are controlling, rather than physical values, and book value and market prices are entitled to far less weight in computing exchange ratio than earning power. Approval of proposed merger plan, including the exchange ratio, by overwhelming majority of stockholders of each carrier indicates that all directly affected had full opportunity to evaluate fairness thereof in light of their respective interests. Proposed ratio was arrived at after extensive arms-length bargining based on analyses by carriers' staffs and independent firms; applicants properly considered adjustments of reported earnings and net income to eliminate abnormal circumstances involving their operations of financial positions, and divided estimated savings equally between them. Proposed exchange ratios for common and preferred are just and reasonable.—Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122 (143, 190, 192-3)*.

Considering the Lehigh Valley's critical financial condition and fact that its improvement appears to be directly tied in with economies that can be effected under the Pennsylvania's control, exchange ratio of 1 share of Pennsylvania's stock for 2-3/8 shares of Lehigh's publicly owned stock, based primarily on 1960 market values, is not unjust or unreasonable; none of Lehigh's public stockholders have intervened in opposition thereto, and, though some of them may be in no position to voice objection, they are not obligated to accept the Pennsylvania's offer. Position of contingent-interest bondholders will not be worsened, since they have received no interest payments for past 3 years, and their position should become stronger and their prospects for interest payments should be materially enhanced if Lehigh's financial condition is improved as a result of the proposal.—Pennsylvania R. Co.—Control—Lehigh Valley R. Co., 317 I.C.C. 139 (143, 150, 151).

Although the Ann Arbor's stock is not listed and there have been no recent sales from which market value can be ascertained, proposed price of $41.40 per share is fair and reasonable in view of carrier's preferred-stock dividend record, capitalization of earnings, value of its physical properties, and prospects for improvement in both carriers' earnings through the transaction.—Detroit, T. & I. R. Co.—Control—Ann Arbor R. Co., 317 I.C.C. 619 (622)*.

In fixing exchange ratio of 1 share of Chesapeake & Ohio common stock for each share of Baltimore & Ohio preferred or each 1-3/4 share of B & O common as consideration for C & O's acquisition of control of B & O, the carriers considered dividend records of all three issues, financial structure and earnings trends of both railroads and B & O's credit rating, and advisability of offering B & O stockholders a small premium over current market value of their stock. Proposal is unlike merger in which minority stockholders are bound by will of the majority, and as a majority of stockholders of both carriers as well as their managements approved the exchange

offer, that ratio may be found just and reasonable. And C & O's agreement to accrue for assenting B & O stockholders for at least 1 year the difference between dividends received by them and what they would have received as C & O stockholders pending consummation will not jeopardize rights of C & O stockholders or unduly burden C & O in view of its general financial position and short duration of the accrual period.—Chesapeake & O. Ry. Co.—Control—Baltimore & O. R. Co., 317 I.C.C. 261 (266, 267, 292-3)*.

Prices which Southern Ry. proposes to pay the Frisco for majority of common and preferred stock of Central of Georgia were arrived at by arm's-length bargaining and represent the average amount per share paid by the Frisco on the open market over a period of years. While those prices (which Southern is willing, and will be required, to pay also for shares of minority stockholders) appear somewhat high from standpoint of recent earnings, considering economies to be expected from unified control and fact that the stockholders' book equity is over twice the total amount which Southern might be required to pay, the proposed consideration may be approved as just and reasonable.—Southern Ry. Co.—Control—Central of Georgia Ry. Co., 317 I.C.C. 557 (558-9)*.

Southern proposes to finance the stock purchase by issuance and sale of bonds; as its 1960 income available for fixed charges was 3.55 times such charges, and, on basis of increased income anticipated from its control of Central fixed charges resulting from a bond issue approximating the price for all Central's stock would be covered 3.44 times, the increase in its total fixed charges under the proposal would not be unduly burdensome or contrary to public interest. However, as Southern proposes immediate issue of only enough bonds to cover the purchase from Frisco, and has not shown that it would be feasible so to finance the transaction without sale of its bonds on reasonable terms, final approval is withheld pending its making of necessary financial arrangements to acquire all of Central's stock.—Id., pp. 559-60.

Proposed price of $5,001 for initial-movement driveaway and truckaway rights from one Ohio county to points in United States, also Ohio intrastate rights, and $335,182, being 125 percent of depreciated book value and about $53,000 more than appraised value, for tangible property, is not unreasonable.—E. L. Transport Co.—Purchase—Dealers Transport Co., 87 M.C.C. 785 (786, 787).

Proposed price for acquired carrier's stock may be approved when total price-to-earnings ratio would be less than 4 to 1. While acquiring carrier's estimates may be somewhat optimistic, even with lower than projected earnings the price-to-earnings ratio would not be unduly high, considering the complementary nature of acquired carrier's territory and its substantial tax-loss-carry-forward credit, as well as economies and improvements that could be effected under the proposed control.—Tamiami Trail Tours, Inc.—Control and Merger, 90 M.C.C. 449 (452-3)*.

While control authority is conditioned on cancellation of portions of acquired carrier's operating rights, and the parties are free to adjust the price for its stock downward accordingly, proposed consideration of $300,000, even if not so adjusted, appears reasonable consideri g actual and proposed operating economies and acquired carrier's past operating revenues.—Accelerated Transport-Pony Exp., Inc.—Control—Downing, 87 M.C.C. 711 (724).

Liquidating carrier's net worth, excluding intangibles, as of assumed merger date justifies proposed price of $2,400,000 for its stock; considering allowable appraisals, no intangible property would be recorded on survivor's books, and survivor can easily carry the fixed charges incurred since its proposed note for $2,100,00 to finance the stock purchase will be guaranteed by three affiliated carriers authorized to control it, all of which are financially stable companies and able to bear their share of its obligation to pay the balance due on the note at maturity.—Continental Tenn. Lines, Inc.—Control—Tennessee Coach, 87 M.C.C. 775 (783).

Although individual control applicants have aggregate net worth substantially exceeding the price they would pay for acquired carrier's stock, they lack sufficient liquid assets to consummate the transaction and have therefore arranged to borrow the initial payment from an equipment-leasing company which they control through 90-percent stock ownership, to be repaid, with interest at 3 percent, in five annual installments. On basis of acquired carrier's past operations, they should derive sufficient funds from its future operations to enable them to meet such payments; proposed purchase price is therefore reasonable, and under the circumstances the proposed method of financing is unobjectionable.—West Bros., Inc.—Investigation of Control, 97 M.C.C. 125 (131).

On further consideration, proposed price of $835,000 for passenger operating rights and certain property, of which $531,000 would represent intangibles after assignment of $244,000 to buses and $60,000 to terminals and agencies, found not unreasonable; although cost of the rights to vendor was only $38,000, cost to an affiliate from which the rights were acquired many years before was $355,000; also, the values for buses and terminals were established by independent and qualified appraisers, as required by applicable regulations. Considering vendee's sound financial condition and operating history, relationship of the purchase rights to its operations, value of the properties, and estimated economies resulting from the purchase, proposed financing would not unduly burden vendee.—Hudson Transit Lines, Inc.—Purchase—Inter-City Transp., 97 M.C.C. 524 (528-9)*.

Price of $23,194,740 paid for operating rights and property of some 15 local bus companies serving St. Louis is adequately supported when value of physical assets acquired from those and certain noncarrier companies exceeds that amount by $1,218,110.—Bi-State Development Agency—purchase—Vandalia Bus Line, 93 M.C.C. 579 (589-90).

Although price proposed for acquired carrier's stock appears somewhat high, it was arrived at through independent estimates of market value of its operating equipment and other tangible property by several of acquiring carrier's personnel who are familar with such equipment, supported by acquiring carrier's experience in keeping the equipment in repair while operated under its temporary control. While such estimates are ordinarily not acceptable unless substantiated by testimony of qualified and disinterested witnesses, and the equipment appraisal substantially exceeds its recorded value, independent appraisals normally tend to find that the tangible property has more value than the depreciated value shown on carrier's books, and the commission has recently been inclined to give weight to such apprisals when bona fide efforts have been made to arrive at fair and realistic values. However, applicant is warned that any subsequent merger application should contain an independent appraisal substantiating those estimates before survivor will be permitted to record the larger figure in its accounts. Mitchell Bros. Truck Lines—Control—Empire Transport, 93 M.C.C. 38 (41).

Giving weight to the estimated market value of the equipment, the amount of $3,438 assignable to intangible aspects of the transaction can be found reasonable; and resulting fixed charges of approximately $30,000 spread over a 10-year period and resulting from an interest rate of 7.18 percent on the unpaid balance of the purchase price would not be unreasonable, since it appears that acquiring carrier could pay such fixed charges from earnings without jeopardizing its ability to continue service to the public, and also considering that it could choose to accelerate the deferred payments so as to pay off the balance in about 5 years. Denied on other grounds.—Id., pp. 41-2.

While applicants' presentation with respect to the reasonableness of the purchase price allocated to equipment involved is somewhat vague, record is convincing that total purchase price for the operating rights and equipment was arrived at after "arm's-length" bargaining and, giving due consideration to vendee's estimate that it would have reduced its deficit by about $1,800 for the previous 9-month period had operations been conducted under the uni-

fied rights, the agreed purchase price of $31,500 is found to be reasonable.—Hove Truck Line—Purchase—Maurer, 97 M.C.C. 361 (368).

As no appraisal of vehicles included in purchase was presented at hearing, approval is subject to condition that price thereof be their appraised value, but not more than their estimated value of $15,000; and, upon consummation, vendee may not enter the acquired equipment on its books in excess of contemporaneous book value unless it files copies of appraisals prepared by independent and qualified appraisers as to the market value thereof, supported by a statement of their qualifications and standards used.—Tallant Transfer, Inc.—Purchase—Guest Trucking Co., 93 M.C.C. 712 (714).

Appraised values of physical property included in purchase may be given weight when properly supported. Purchase price does not appear excessive when amount assigned to equipment was supported by appraisals made by two duly qualified appraisers of 17 and 30 years' experience, respectively, which were not discredited on cross-examination.—Arkansas-Best Freight System, Inc.—Purchase—Fine, 90 M.C.C. 858 (862-3).

Financial data furnished indicate that survivor would be able to pay proposed cash price of $167,000 for liquidating carrier's stock and still be able to meet its obligations upon consummation of merger; and resulting small decrease in its working capital would not impair its ability to operate. Both depreciation funds and net earnings are appropriately used to pay long-term debt as it comes due and purchase prices involved in instant and other approved transactions. Though all planned changes have been effected under temporary control and resulting savings have not met expectations, the purchase price would still be recovered in less than 12 years even if no further improvement in earnings is realized. Opening of such major cities as Richmond, Washington, and Baltimore to survivor's services to and from western Pennsylvania and Ohio further supports conclusion that proposed price is reasonable; however, as survivor will receive less authority than was intended, owing to cancellation or restriction of certain of liquidating carrier's rights, the parties are free to adjust the price downward without further authority.—Helm's Exp., Inc.—Control and Merger, 93 M.C.C. 142 (151-2).

All parts of a transaction subject to §5 must be considered, and in determining reasonableness of the purchase price all expenditures appurtenant thereto must be examined. Acquiring carrier's commitment to pay $48,000 over a 5-year period to acquired carrier's four stockholders or their estates, nominally for agreement not to compete, must be considered part of the price for its stock; and though $58,000 maximum indebtedness that would remain a liability of that carrier is not part of such price, it must be considered in determining reasonableness thereof because of its direct bearing on value of the stock. But though proposed price of $15,000, increased by the $48,000, seems high when acquiring carrier must immediately inject substantial cash into the company to provide equipment and working capital, it is not unreasonably so, and resulting obligations incurred should not prove too burdensome. However, no formula is provided for reduction of acquired carrier's liabilities to $58,000 as of consummation date, and, to protect interest of its general creditors, its present stockholders will be expected to subordinate their claims to those of the general creditors.—Aero Trucking, Inc.—Control—Freidman Transfer, 93 M.C.C. 342 (347, 352-3).

Though protestants urge impropriety of indirectly burdening acquiring carrier with a debt incurred by acquired carrier on behalf of its former stockholder and its contract to employ him for 5 years, the employment contract has expired and both obligations are reflected in acquired carrier's net worth and in turn in the price payable for its capital stock. As applicants' estimate of improvement in acquired carrier's operations as result of proposed control has been amply borne out by results of operations under acquiring carrier's temporary management, whereby its former deficit was converted to a substantial net profit, proposed price is reasonable.—Branch Motor

Exp. Co.—Control—Morgan Trucking Co., 93 M.C.C. 244 (247-8, 260-1).

Survivor's estimate of cach flow and debt payoff for the 5 years following consummation of meger, resulting in a total increase in net income for that period of $1,176,672 after income taxes, appears not unreasonable, and consideration of the $78,000 salary agreed to be paid liquidating carrier's stockholder over a 2 1/2-year period as part of the purchase price would not materially affect the estimated cash flow. Though survivor's intangible property account would be increased by $579,068 upon consummation, considering the permanent nature of the operating rights involved, development, business knowledge, use of the business to be acquired, and value to survivor of the addition to its system, proposed total price of $328,000 for liquidating carrier's stock is reasonable, and the unified operations should generate enough funds to enable survivor to service its long-term debt, recoup the amount paid for intangibles within about 6 1/2 years, and earn a fair return on its investment.—Youngstown Cartage Co.—Control Co.—Control and Merger, 93 M.C.C. 318 (329-30).

Based on pro forma balance sheet, had proposed transaction been consummated as of the date shown, net assets vendee would acquire from the three affiliated vendors would approximately equal stated $1,500,000 value of the no-par-value capital stock it would issue to vendors in payment for their operating rights, together with certain property of one vendor; on that basis, value of the stock to be issued appears reasonable. In the light of vendors' profitable operations, and the facts that vendee's capitalization of $1,500,000 will be represented solely by stock and that it will have a working capital position of over $1 million, the transaction is reasonable from a financial standpoint.—Anchor Motor Freight, Inc.—Purchase—Anchor Motor Freight, 93 M.C.C. 778 (781).

Proposed price of $25,000 for vendor's special-commodity rights is reasonable when vendor owes vendee $6,624 represented by a note which would be applied toward the down payment of $10,000, leaving only $3,375 to be paid in cash at consummation; such outlay would have no appreciable effect on vendee's current position.—Pre-Fab Transit Co.—Purchase—Hagan, 90 M.C.C. 65 (69).

Protestants' contention that vendor's successive sales of portions of its operating rights resulted in its receiving over twice the amount it paid for all its rights, thus constituting trafficking in certificates, ignores the growth of its service which was the basis for increased value of its rights; in view of estimated earnings under the portion involved, proposed price therefor is not excessive.—Cassens Transport Co.—Purchase—Speedway Transports, Inc., 90 M.C.C. 159 (165).

Payment of interest on principal not due cannot be justified. Though stock purchase contract provides that interest at 6 percent will be payable on full amount of the price from date of agreement to date of closing, such payment would tend to make the total price payable for liquidating carrier's stock excessive. Interest should be computed only from date of the commission's final approval of the transaction; approval is therefore conditioned on the parties' filing of a verified copy of an amended stock purchase agreement.—Atlas Van-Lines, Inc.—Control and Merger, 93 M.C.C. 570 (575-6).

Question of vendee's ability to pay agreed price when demanded is not a decisive factor, considering that purchase is a transaction between two commonly controlled, wholly owned subsidiaries; it is unlikely that the common rail parent would require one of its corporate arms to insist on payment from another under circumstances which might cause financial embarrassment to the latter. However, though agreement provides that the consideration is payable on demand, in whole or in part, after 1 year from consummation, no maximum period for full retirement of the indebtedness is provided; approval is therefore conditioned to require retirement of the obligation within 5 years from consummation date.--Santa Fe Trail Transp. Co.—Purchase—Santa Fe Transp. Co., 90 M.C.C. 123 (130).

Determination of reasonableness of the purchase price under §5 is dependent on

elements other than the bare book value of physical properties. Proposed price of $2,060,000 in cash for acquired carrier's parent company and its four subsidiaries (including acquired carrier) was determined at arm's length and does not exceed that proposed 5 years earlier in another transaction involving the same properties. Considering appraisals of values of the companies admitted into the record as the best evidence available, also savings and operating efficiencies already effected under temporary management of acquired carrier, and resulting improvement in its operating ratio and net income, the proposed price is not excessive.—Mason & Dixon Lines, Inc.—Control—Silver Fleet, 90 M.C.C. 829 (849-50).

As vendor's operating rights in Kansas City-Dallas-Denver triangle are practically dormant insofar as they authorize operations to and from Kansas and from points in vendee's eastern territory and no real need for vendee's reinstitution of such service is shown, under the commission's usual policy those rights would have to be canceled prior to consummation if purchase were otherwise approved. Also, the parties have agreed to restriction of the purchase rights to preclude vendee's rendition of service between points in the Texas-Oklahoma area involved and St. Louis or Chicago and points east thereof, thus further diminishing their value. Considering the further circumstance that applicants admit they have no concrete evidence to support their estimate of an increase of $5 to $10 million annually in vendee's revenues after purchase, proposed price of $1 million is too high to be sanctioned. Denied.—Buckingham Freight Lines—Purchase—Riss Co., Inc., 93 M.C.C. 754 (757, 761-2).

Proposed price of $2,550,000 for acquired carrier's stock is not shown to be reasonable when acquiring carrier's appraisal of fair market value of equipment and terminals at $1,402,892, or $651,427 more than net book value, is not supported by evidence submitted; and its valuation of acquired carrier's operating rights at $2,100,000, or 147 times its 1959 net income after taxes, is based on estimates of savings and increase in operating revenues under its control which are overly optimistic and lack substantial support in the record.—Red Ball Motor Freight, Inc.—Control—Couch Motor, 87 M.C.C. 627 (630-2, 634).

Commissions or fees: While payment of a reasonable finder's fee is not objectionable, unless the "finder" engages in the business of trafficking in operating rights, the amount and basis for such fee are terms of the transaction which the commission must consider and approve. Though individual who acquired option to purchase acquired carriers' stock is stated to have endeavored for several years to find a buyer for the stock, and to have obtained assistance of a firm of investment bankers, with which he agreed to share the proceeds of sale of his option, the amount agreed to be paid him for the option represents almost 10 percent of the base price approved as reasonable for purchase of the stock. As the commission has previously approved finders' fees not exceeding 5 percent of the total purchase price, approval of instant transaction is conditioned on payment for the stock option of not over 5 percent of the purchase price as adjusted under terms of the contract.—Lease Plan International Corp.—Control—National, 93 M.C.C. 203 (207)*.

Commission of $10,000 to broker who brought acquiring carrier and selling stockholders of acquired carrier together, which would be paid in equal proportion by carrier and the selling stockholders, does not appear unreasonable.—Accelerated Transport-Pony Exp., Inc.—Control—Downing, 87 M.C.C. 711 (714).

In absence of any cogent facts relating to services actually performed, in justification of higher amount proposed to be paid as a brokerage or finder's fee, examiner's limitation of the fee to an amount not exceeding 5 percent of the purchase price was proper.—Subler Transfer, Inc.—Purchase—Zanghi, 90 M.C.C. 911 (913).

Earning capacity: [Vols. 16, 19].—Based on the computation that vendor's operating rights would net vendee $1,715 per year, thereby allowing the purchase price of $3,000 to be recouped in less than 2 years,

proposed transaction would be a provident one for vendee, from a financial viewpoint. However, proposed purchase was not shown to be consistent with public interest; denied.—Great Coastal Exp., Inc.—Purchase—Price Transfer, 97 M.C.C. 271 (284-5, 291-3)*.

Although, based on vendee's April 1961 balance sheet and payment of reduced purchase price of $40,000, it would still have been overcapitalized by $44,031 and its debt-equity ratio would have remained an unfavorable 71.79 percent, its projected net income from the unified operations, since proved by 7 months' actual operations, would enable it readily to meet both the lowered monthly payments required and its other existing obligations, with result that the overcapitalization should be of relatively short duration. Vendee has been meeting the $500 monthly payments under lease, as well as its other obligations, without apparent adverse financial effect and should find even less burdensome the $333.33 monthly payments required by the supplemental contract. The adjusted price may properly be approved as not unreasonable.—Denver-Limon-Burlington Transfer—Purchase—Kansas Interm., 93 M.C.C. 210 (213)*.

Proposed purchase may be approved when vendee has sufficient funds to pay agreed purchase price, which appears reasonable, and to conduct operations under the rights involved. Vendee's intrastate operations in the area have been successful, and its pro forma income statement indicates that if it had conducted interstate operations during the previous year its net income would have increased sufficiently to enable it to recoup the purchase price in less than 2 years.—Southern Tier Stages, Inc.—Purchase—Capitol Bus Co., 93 M.C.C. 793 (799).

Employment agreements: [Vols. 13, 16-19].—Vendee's agreement to hire vendor's president in an administrative capacity for 3 years at an annual salary of $5,200 is a genuine employment agreement and not a device for indirectly increasing the purchase price, when vendee would be entitled to expect him to work full time and he fully understands that he is to receive no salary if he is not in a position to work.—Sanborn's Motor Exp., Inc.—Purchase—Bemis Exp., Inc., 93 M.C.C. 728 (731-2).

Agreement to employ liquidating carrier's controlling stockholder as a consultant for 5 years at an annual salary of $20,000 provided no specific duties for him and left to his discretion the time he should devote to survivor's affairs; that such payments are the same as he received from liquidating carrier is not decisive, since as its majority stockholder he controlled the salaries it paid. Moreover, though any services to be performed have been rendered impossible by his death, under the agreement payments will continue to his estate; the agreement is therefore an indirect means of increasing the purchase price for carrier's stock; however, even as thus increased proposed price is not excessive.—McAllister Bros., Inc.—Control and Merger, 317 I.C.C. 459 (462, 463, 465).

But though agreement to employ liquidating carrier's president as an executive of survivor for 10 years at a salary of $32,700, approximately the same as his present salary, is a true employment contract not requiring approval as part of the purchase price, since his services will aid survivor inretaining and developing traffic, provision that in event of termination of his employment for any reason, including death, payments of $15,000 will be made to him or his personal representative for each remaining year may not be approved; merger authority is therefore conditioned on termination of payments with termination of his employment for any reason.—Id., pp. 462, 463.

Revised employment agreement under which vendee's son would manage contract carrier operation acquired by his mother as sole legatee, at an annual salary of $2,400, the term to expire within 2 years from date of consummation but with either party having right to terminate on 1 month's notice in writing, approved.—McNichol—Purchase—McNichol, 90 M.C.C. 429 (430-1)*.

Vendee's agreement to employ vendor's president as a vice-president in charge of a portion of the purchased operations at $10,000 a year for a 10-year period, and to employ two other members of his family as

his assistants at annual salaries of $3,000 for 5 years, clearly is not a genuine employment agreement but an indirect means of increasing the purchase price when it fails to indicate just what services would be required of them or what proportion of their time would be allotted to vendee, as opposed to the considerable rights to be retained by their carrier (vendor), and further provides that, in event of death of any of them, the agreed salaries would be paid to their estates for the balance of the term. However, in view of denial on other grounds, a finding as to whether such increased purchase price would be in the public interest is unnecessary.—Mitchell Transport, Inc.—Purchase—John Schutt, Jr., Inc., 97 M.C.C. 10 (14, 18).

Survivor's agreement to employ liquidating carrier's sole stockholder in an advisory capacity, or his wife if he should be unable to serve, for 2 1/2 years from commencement of temporary authority operations at a salary of $600 a week is not a true employment contract but part of the terms and conditions of the transaction, and a provision for termination by either party on 30 days' notice would not change that conclusion; more important are the duties to be performed, qualifications and experience of the employee, time required to be devoted to the duties, and the compensation. While the contract provides that the stockholder and his wife shall not compete with survivor for 2 1/2 years following consummation of merger, it does not require them to devote full time to its affairs or detail the duties they would perform, and the compensation appears excessive when their respective salaries while working full time for liquidating carrier were $200 and $100 a week. Proposed compensation is thus a means of indirectly increasing the purchase price of liquidating carrier's stock and must be considered in determining reasonableness thereof.—Youngstown Cartage Co.—Control and Merger, 93 M.C.C. 318 (328-9).

8a. Minority stockholders' rights.—[Vols. 12, 14-18].—Holders of Class B stock of Missouri Pacific are entitled to vote separately, as a class, on proposed plan of consolidation of MoPac and Texas & Pacific when that plan is clearly included in §D(3) of MoPac's Articles of Association which provides that four kinds of corporate change shall not be effected without assent of a majority of both Class A and Class B stockholders. Under §5(11) a carrier's authority to merge or consolidate, with commission approval, is conditioned on assent of majority of its stockholders, unless a different vote is required by applicable State law; and Missouri statute governing the proposal, and requiring affirmative vote of at least two-thirds of all outstanding voting shares, provides that articles of incorporation shall control when they require "a greater portion of the shares, or of any class or series thereof." Accordingly, Missouri law must be applied in considered consolidation, and that law requires application of the articles of association, which in turn requires majority assent of stockholders on a separate class-vote basis.—Levin v. Mississippi River Fuel Corp., 386 U.S. 162 (167-70)*.

When passing on a voluntary merger the commission is required to use only those standards established by the act, and dissenting stockholders are not entitled to any premium solely by reason of their dissent. Apart from meeting the test of public interest, merger terms, as to stockholders, must be found to be just and reasonable; however, Congress has not provided that minority stockholders, dissatisfied with proposed railroad merger, may block it or compel retirement of their capital as is often permitted in case of private corporations. [Citing 334 US 182.] The Commission, in approving railroad merger in question, did exactly what the statute requires and used standards established thereby. Its report clearly dealt with allegations of dissenting stockholders that the stock exchange ratio was unfair; it applied statutory standards in its examination of the exchange ratio, and its findings are supported by substantial evidence; sustained.—Fried v. United States, 212 F. Supp. 886 (890-2)*.

In proceedings involving of merger properties of carriers subject to the act, the commission has the duty of safeguarding the rights of minority stockholders, especially where there has been no arms'

length bargaining or the merger terms have been imposed by a management whose interests are adverse to that of the minority.—Ryder System, Inc.—Control—Southern-Plaza Exp., Inc., 90 M.C.C. 87 (91)*.

Considering that control agreement previously approved specifically provided that acquiring company would on closing date or within 30 days thereafter purchase for $32.50 each any unredeemed shares of acquired company's common stock outstanding on date specified, and that obligation to pay that price at closing would not be affected by any change in acquired company's financial condition, including insolvency, reduced price of $20 a share fixed by merger agreement executed only a few months after the closing date may not be considered just and equitable, and little weight can be given applicants' protestations that interim adverse operating results of acquired company's carrier subsidiary warrant finding that price just and reasonable. Proper protection of minority interests requires that they be afforded opportunity to sell any common stock issued on or before the specified date at the price provided by the control agreement.—Id., pp. 91-2.

As to any common stock outstanding which was not issued on or before that date and which does not represent subsequently converted preferred, the class of sellers would be fairly protected by requirement that they be paid not less than cost to the seller but not exceeding $32.50 a share. Present holders of the remaining preferred stock, including those who have elected to receive debentures and those holding common stock representing converted preferred, would be adequately protected by requirement that they receive $21.20 per share of common, which is equivalent to the $26.50 call price for the preferred under the control agreement. Any resulting increase in the total purchase price would be so moderate as not to affect the prior finding of reasonableness thereof. Merger approval conditioned accordingly.—Id., pp. 92, 94.

The commission has a duty to safeguard the rights of minority stockholders, especially in absence of arms-length bargaining or when merger terms are imposed by a management whose interests are adverse to that of its minority stockholders; therefore, in considering proposed merger of a motor carrier by corporation owning approximately 91 percent of its stock, it is incumbent on the commission to affix a value to the minority shareholdings.—Pittston Co.—Control—Brink's Armored, Inc., 87 M.C.C. 637 (644).

Value to be placed on minority shares in mergers and consolidations depends largely on exercise of informed and unbiased judgment, not on mere mathematical computation. Comparative evaluation of both stocks involved is germane to any exchange of stock in a unification plan; moreover, services performed by liquidating company, an armored-car carrier, are unique and so unlike those of property carriers generally that determinative weight cannot be given to comparisons with nonspecialized carriers. In assigning a value to the stock of interveners in opposition, it must be recognized that they are unwilling sellers who with their forebears have owned the stock for some 100 years, and that over that time the carrier has maintained a growth paralleling that of the American economy and presumably could continue to do so, since even in recent recession years its earnings increased.—Id., pp. 645-7.

A value derived by averaging the products of per-share earnings of the stock for the 5 years immediately preceding filing of application, multiplied by Dow-Jones Industrial price earnings ratio for the same years, will be just and reasonable to all concerned as a basis for effectuating the merger. Most recent 5-year earnings record is probably more indicative of the company's present and future earnings trend than one covering years further back, and use of average tends to flatten out cyclical influences; similarly, Dow-Jones ratio for the same period is a yardstick of the financial community's appraisal of all factors theoretically determining market price for stocks of a cross-section of American companies.—Id., p. 647.

Under this approach, just and reasonable per-share value for liquidating carrier's

stock, to be used as a basis for conversion into survivor's common stock, or, as agreed to by it, for payment in cash at minority stockholders' option, determined.—Id., pp. 647-8.

8b. Credit and financial structure considered.—[Vols. 12, 14-19].—Baltimore & Ohio's precarious financial condition has been accumulating over the years, and at beginning of 1962 its current liabilities exceeded current assets by $24,000,000; any earnings in next few years will be consumed by urgent requirements for improvements and maintenance and for servicing its long-term debt; all temporary expedients to effect economies appear to have been exhausted, and record clearly shows its complete inability to improve its financial condition by itself and the necessity for injection of new credit from outside. Chesapeake & Ohio has financial strength to assist B & O through its credit standing, by purchase of properties and securities or by guarantee of its debts; legitimate interests of B & O's creditors and equity holders will be served by C & O Control.—Chesapeake & O. Ry. Co.—Control—Baltimore & O. R. Co., 317 I.C.C. 261 (279-80, 291)*.

Estimated annual savings from coordination of facilities under C & O control appear generally attainable and should occur in the relatively near future; and while several years may pass before substantial savings from proposed rehabilitation program are realized, restoration and modernization of B & O's properties should strengthen its overall financial condition by enabling it to compete more effectively with other forms of carriage; elimination of unnecessary expenses through pooling of equipment, etc., will greatly enhance its capacity to increase earnings; all factors together strongly support conclusion that its financial condition will ultimately be strengthened under proposed control.—Id., pp. 278, 279.

Before entering into proposed transaction C & O was fully aware of B & O's urgent needs and considered effect on its own financial position of the large expenditures required to rehabilitate B & O's properties; it would be wholly unrealistic for it to invest so substantially in B & O stock unless it fully intended to supply the financial support necessary for that carrier's rehabilitation; thus its own economic self-interest, together with its agreement with B & O to merge as soon as possible, afford the best possible assurance of its rendering the assistance required.—Id., p. 280.

While both Seaboard Air Line and Atlantice Coast Line have enjoyed moderate prosperity in recent years, are in relatively healthy financial condition, and have impressive earnings records, their rate of return has not been significantly high and their net income has gradually declined. Coast Line's long-term debt materially exceeds Seaboard's and, while its net working capital exceeds Seaboard's by $10.9 million, its cash position would be seriously depleted by its rapidly maturing obligations but for steps taken to refinance the most imminent; Seaboard, with its lesser annual amounts of maturing obligations and overall substantial margin for contingencies, is in better condition to meet future obligations. Pro forma balance sheet of the merged company indicates that a favorable debt-equity ratio would be maintained after the merger. Resulting increase in fixed charges will not jeopardize rights of the merged company's security holders or in any manner impose an undue financial burden on it.—Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122 (146-9, 212)*.

While proposed transaction would result in overcapitalization of vendee (new corporation which would be a wholly owned subsidiary of financially strong water carrier) by $6 million, that overcapitalization is not considered a bar to approval because it represents a note to the parent water carrier whose financial strength would not be jeopardized; vendee would have a favorable long-term debt ratio, a low operating ratio, and the annual earnings of vendor motor carriers exceed $1 million, all indicative that the overcapitalization would be of short duration.—TTC Corp.—Purchase—Terminal Transport Co., Inc., 97 M.C.C. 380 (384, 404)*.

Vendees' borrowing of $50,000 from the Small Business Administration, to finance

proposed purchase transaction and buy additional equipment, had the effect of increasing their capitalizable assets (working capital and carrier operating property) from $90,228 to $136,227 so that, even after their long-term debt was increased by the $50,000 loan, their capitalization and debt-equity ratio remained favorable. With a projected annual income of $79,780 after depreciation expenses, but before taxes, sufficient funds should be available for payment of their long-term debt; thus vendees' financial posture presents no problem to consummation of proposed transaction.—Hove Truck Line—Purchase—Maurer, 97 M.C.C. 361 (366-8).

Notwithstanding doubts previously expressed that survivor would be able to service its outstanding obligations, much less the increase resulting from proposed transaction, it has been operating profitably under temporary lease authority and its financial situation is steadily improving. As liquidating carrier's stockholders, owing to their ages and other considerations, are reluctant to take back their business and have agreed to sell their stock at a greatly reduced price, to accept a reduction in their salaries, and to defer survivor's payment for the stock until its large obligations have been paid, denial would lessen survivor's ability to meet its obligations during the next 3 crucial years while placing liquidating carrier's future operations in doubt. In the circumstances, proposed merger may be approved.—Sullivan Lines, Inc.—Control and Merger, 93 M.C.C. 4 (7)*.

Since vendee is actually an agency of the States of Missouri and Illinois, its capitalization of $26,500,000 founded entirely on long-term debt is not objectionable. Its financial structure, which was sound at the outset, has shown material improvement since consummation of purchase, and, while its total revenues for the following 9 months were not as high as expected, its expenses were $1,100,000 less than anticipated and some $2,000,000 less than would probably have been incurred by the 15 vendors operating independently. On the facts submitted, anticipated net earnings appear adequate to service and meet bond retirement requirements, even without elimination of local and State taxes through future legislation, and warrant finding that it has capacity to meet its commitments.—Bi-State Development Agency—Purchase—Vandalia Bus Line, 93 M.C.C. 579 (590-2).

While survivor's overcapitalization of $398,805 upon consummation of merger, resulting principally from issuance of a $250,000 note as evidence of the consideration for liquidating carrier's stock, is undesirable, such overcapitalization would be temporary and would be eliminated within a reasonable time as payments are made on the note; denial on that ground is therefore not warranted, provided survivor is precluded from declaring or paying dividends until the overcapitalization is eliminated; merger approval conditioned accordingly.—Youngstown Cartage Co.—Control and Merger, 93 M.C.C. 318 (330).

In §5 transactions the commission is primarily concerned, in discharging its duty to foster sound economic conditions in transportation, with effect that the terms and conditions thereof would have on the motor carriers involved, and authority has been withheld where it appeared that a carrier vendee or a holding company seeking to acquire control of two or more carriers did not have the financial resources to meet the obligations incurred, and it has also been held that possession of sufficient resources by the acquiring company's stockholders was not a satisfactory substitute for financial stability of the company itself.—Mason & Dixon Lines, Inc.—Control—Silver Fleet, 90 M.C.C. 829 (851).

Under modified control transaction approved, Crown (acquiring carrier's noncarrier affiliate) is not authorized to acquire control of any motor carrier, but is limited to acquisition of control of another holding company (acquired carrier's present parent) and latter's three noncarrier subsidiaries. Acquiring carrier and its present carrier subsidiary are in sound financial condition, acquired carrier is undergoing rapid rehabilitation, and none of the carriers would incur any additional obligation as result of Crown's acquisition of control of the non-

carrier companies; that transaction would be financed by borrowing, and Crown has been assured that the loan will be available. Based on the combined resources of Crown and its subsidiaries and affiliates, it appears that any advances to it to assist in meeting its obligations can be effected without impairing ability of the motor carriers in the system to serve the public; however, approval is conditioned to provide that none of the funds required by Crown to meet cash payment of the consideration shall be borrowed from any of the carriers.—Id., p. 851.

On basis of revised purchase transaction, ratio of vendee's long-term debt to total long-term debt and stockholders' equity would be 69.1 instead of 79.8 percent as of assumed consummation date, working capital would exceed $400,000 instead of a deficit of $279,999, and unencumbered physical property available as collateral for proposed bank loan of $1,050,000 would cover that amount by a wide margin even at net book value; although overcapitalization of $330,811 would still be substantial, it should be reduced in an orderly manner within a reasonable time and does not require denial in view of improvements in vendee's financial structure.—Oregon-Nevada California Fast Frt.—Purchase—Coast-Lee, 90 M.C.C. 45 (48)*.

Although vendee would be required to meet $1,177,316 long-term debt during the first year, $417,525 of that amount is owed to two sons of its controlling stockholder, who are beneficial owners of 70 percent of its outstanding capital stock of which he is trustee; they are willing to defer payment of those obligations in whole or in part, and no condition to that effect need be imposed, since it would be to their interest to permit vendee to defer payment should circumstances so require; record affords sufficient basis for finding that vendee should be able to consummate the purchase and meet its debt requirements without undue difficulty; approved.—Id., p. 48.

Although on basis of giving-effect balance sheet acquiring carrier would be overcapitalized by $523,856 after stock issue proposed to finance acquisition of control of another carrier, the deficiency in capitalizable assets is due mainly to failure to include leasehold improvements and would be eliminated if title to the property were acquired; the overcapitalization therefore does not warrant disapproval. Approximately 90 percent of the capitalization will be represented by stock and only 2 percent by debt, and in view of that favorable ratio and acquiring carrier's favorable working capital position, together with acquired carrier's profitable operations under its temporary management, denial of the transaction on financial grounds would be unreasonable. Proposed acquisition of control approved.—R. E. Short, Inc.—Control and Merger, 90 M.C.C. 80 (84)*.

Acquiring carrier is financially capable of consummating proposed control transaction when issuance of notes for deferred portion of stock purchase price will leave it with a favorable 38.7-percent debt-equity ratio, its projected earnings and cash depreciation recovery from its property division alone are more than enough to cover its fixed obligations, and combined earnings from its passenger and property divisions far exceed those requirements. Moreover, acquired carrier is closely held by one family, has an excellent capital structure, and its overall earnings have been good over a period of years; though little if any call on applicant's passenger revenues should be necessary, those earnings will be available as part of its general surplus.—Tamiami Trail Tours, Inc.—Control and Merger, 90 M.C.C. 449 (453-4)*.

Although survivor, a new company created for purpose of proposed merger, would on assumed consummation date have considerable cash and on basis of liquidating carrier's net income could anticipate $253,263 from earnings and depreciation charges to use toward its debt during the first year, it would be unable to pay off $2,100,000 note to be issued to finance the transaction within its 1-year term without guarantee thereof by three affiliates authorized to control it; however, latter are financially stable companies, are not overcapitalized and have favorable debt-equity ratios, and are each able to bear its share of the obligation assumed; resulting overcapitalization of survivor by $267,052 and

debt-equity ratio of 87.7 percent do not require denial; merger approved.—Continental Tenn. Lines, Inc.—Control—Tennesee Coach, 87 M.C.C. 775 (782).

Issuance by vendee in payment for vendor's operating rights and properties, in addition to $37,000 to be paid to a third party for a terminal now used by vendor, of capital stock having market value equal to vendor's net worth appears reasonable; shares issuable as of assumed consummation date would have book value of $36,407, for which vendee would receive net tangible assets of $93,954, plus operating rights valued at $40,000, which latter amount, on basis of vendor's earning record alone, should be recouped within 5 years. Issuance of the additional stock will not change vendee's control and will leave it with substantial excess of capitalizable assets over capitalization, a favorable ratio of total long-term debt to total long-term debt plus stockholders' equity, and ample working capital.—Overnite Transp. Co.—Purchase—Hill City Transfer, Inc., 90 M.C.C. 749 (754).

Although purchase price would be somewhat reduced under modified plan, vendee's giving-effect balance sheet would still reflect an unfavorable financial condition, with overcapitalization of $61,100 and a highly undesirable debt-equity ratio of 88.5 percent, and its working capital of $61,100, based on vendor's monthly average operating expenses of $160,000, would still be inadequate. Denied.—Azusa Transp. Co.—Purchase—Azusa Transfer Co., 93 M.C.C. 365 (367)*.

Applicant's balance sheets strongly indicate that both before and after consummation of proposed transaction, its current liabilities would substantially exceed its current assets and that its capitalization, including long-term debts, would exceed its capitalizable assets by an amount inconsistent with sound financing; in addition, its operating ratio is high. While applicant's controlling stockholders and family associates could improve its unfavorable debt-equity ratio by investing in additional stock instead of advancing funds on open account, they have submitted no proposals to do so. A financial structure which may reasonably be expected to provide stability and continuity of operation is an initial and primary requirement for approval of a §5 transaction; and, where capital acquisition is not a problem, a new corporation proposing to operate in a new territory should be conservatively capitalized; proposed transaction disapproved.—West Shore Transfer, Inc.—Purchase—Freer Motor Transfer, 97 M.C.C. 786 (789-90).

Approval of proposed merger by a new company of a carrier holding both truckaway and driveaway authority and sale of the driveaway rights to an affiliate, subject to elimination of dormant or duplicative rights and other restrictions found necessary, would leave a mere skeletal operation for survivor-vendor; in addition it would commence operations deeply in debt, and its ability to pay long-term obligations at rate of $96,875 a year out of funds generated by operations would be doubtful. Its position would be further worsened if, as appears likely, it were required to seek an additional cash advance from its parent carrier to meet a $250,000 payment due within 20 days after approval of the transaction. And proposal that applicants evidence advances to it by a non-interest-bearing promissory note due in 5 or 10 years, or invest $475,000 in its capital stock, would ease but not completely shore up the shaky foundation of what would be a fourth operating company in same chain of control. Denied, without prejudice to a revised proposal meeting objections outlined.—Dealers Transit, Inc.—Purchase—Industrial Transit, Inc., 90 M.C.C. 873 (883-4).

Under merger agreement survivor would pay for liquidating carrier's stock an amount equal to cost of its acquisition by survivor's stockholders, including a balance of $35,571 owed a former stockholder of liquidating carrier. However, operations of both applicants have been largely unprofitable, and assumption of its stockholders' obligation would aggravate survivor's burden of debt. Even giving full weight to estimated economies, it does not appear that sufficient funds would be available to service its long-term debt, of which $85,689 would be due within 1 year from assumed

consummation date, and no funds would be available to add to its inadequate working capital for orderly operations. Thus it is not shown that the merger would foster a sound financial structure for the two carriers; denied, without prejudice to filing of a revised plan designed to strengthen survivor's financial condition.—Gene Adams Refrigerated Trucking Service, Inc.—Control, 90 M.C.C. 687 (689, 690-1)*.

On basis of newly submitted financial data, survivor was overcapitalized as of assumed consummation date by $678,510, and following merger such overcapitalization would be increased; also, survivor's ratio of long-term debt to combined debt and equity of 96.4 percent would be highly unfavorable. Moreover, analysis of financial statements for a recent 6-month period shows a deficit from combined operations; even with adjustment to reflect depreciation charges, earnings from the first year at current level of operations would not be enough to service long-term debt due within 1 year, and survivor would be required to use major portion of its working capital, leaving it insufficient funds for day-to-day operations.—Johnson Freight Lines Co., Inc.—Merger, 87 M.C.C. 747 (750, 751)*.

While transactions wherein working capital was insufficient to meet one month's average operating expenses have been approved, and many operating carriers could not meet that test, fact that cash provided by operations will not be enough to service existing debt emphasizes working capital requirements of the carrier, which must be considered along with other financial data to determine financial soundness of the transaction; and willingness of bank which is survivor's largest creditor to extend terms of notes now owing the bank or to extend it additional credit is no substitute for present financial fitness warranting proposed expansion. Denied, without prejudice to submission of a revised transaction, with evidence that by providing additional equity capital or liquidating indebtedness, or both, survivor's financial condition would be improved to extent warranting approval.—Id., pp. 751, 752.

Acquisition of a motor-carrier corporation through purchase of its capital stock under an arrangement whereby the carrier would be obligated to pay all or part of the purchase price is contrary to sound financial practice and not in best interest of the industry and the public.—Red Ball Motor Freight, Inc.—Control—Couch Motor, 87 M.C.C. 627 (633).

Consummation of stock purchase on terms proposed would leave acquiring carrier with excess of current assets over current liabilities equivalent to only 5 days' operating expenses and would result in its overcapitalization by $1,227,623, which would continue for some time; it would be required to pay interest in excess of $115,000 within 1 year, and payments on its long-term obligations in each of next 4 years would amount to over $250,000, plus interest; should the average annual rate of increase in its revenues and operating ratio during the past 5 years continue through the next 5, its net income would steadily diminish over the 5-year period and, except for the first 2 years, would be insufficient to meet payments on its long-term obligations, so that it would have to use either acquired carrier's earnings or a portion of its charges to depreciation.—Id., p. 632-3.

Funds provided through charges to depreciation are providently used only for purpose of increasing, replacing, or maintaining carrier operating property. Therefore, any use by acquiring carrier of funds provided through charges to depreciation, or earnings of acquired carrier other than those paid to it in form of dividends, in paying for the stock would be an improvident use of such funds.—Id., p. 633.

Though acquiring carrier represents that it has a "line of credit" from a bank and that resources of affiliated realty and equipment companies are available to it, funds to finance a new terminal were advanced to the realty company, indicating that the line of credit extends to acquiring carrier only because the funds provided are used by the realty company to acquire facilities which are then leased to it; as the realty and equipment companies are affiliated with it only because they are controlled by its principal stockholders, and it has no control over those companies or use of their resources, such resources must be con-

sidered those of acquiring carrier's stockholders. However, possession of additional resources by controlling stockholders of a vendee carrier is no substitute for financial stability of the carrier itself. Control authority denied.—Id., p. 633.

9. Reduction of tax payments; taxes generally.—[Vols. 11-14, 16-19].—A tax saving lawfully obtained is a proper objective in §5(2) proceedings. If lumber company's proposed merger of subsidiary water carrier were disapproved, it would receive $280,000 taxable interest income in each of next 3 years from loans to the subsidiary for modernization of vessels, without any offsetting tax benefit to latter, and total tax costs unnecessarily imposed on the parties for the 3-year period would amount to at least $1,633,920; in a marginal industry like the coastwise trade unnecessary tax costs might doom the water carrier enterprise. Merger approved.—Weyerhaeuser Co. Merger, 317 I.C.C. 434 (436-7, 438)*.

Hypothetical savings in Federal income taxes as result of creation of 5 carrier corporations, each to serve a single plant of supporting shipper, are not alone adequate reason for approving creation of such a large number of commonly controlled carriers; to hold otherwise would encourage formation of limitless numbers of corporate carriers through which one person might provide interstate transportation services, contrary to public interest. While tax savings lawfully attained are proper business objectives entitled to consideration, any tax benefits which conceivably could accrue to applicants and their supporting shipper are substantially outweighed by the harmful effects which the resulting number of contract-carrier units would have on both the transportation industry and the general public.—Best Transport, Inc., 88 M.C.C. 147 (157)*.

Continuance of acquired carrier as a separate entity for 2 years following consummation, in order to take advantage of a tax carry-forward credit that would be lost by immediate merger, may properly be authorized when duplication of operating rights under the transaction as approved will not be excessive. However, in consonance with the commission's policy of discouraging common control of duplicative authorities, the parties will be expected to seek unification of the properties at end of the 2-year period.—Southwest Frt. Lines, Inc.—Control—Direct Transports, 93 M.C.C. 439 (450).

Applicants contend that acquiring carrier would incur a larger income tax liability if $48,000 contracted to be paid the selling stockholders (nominally for an agreement not to compete for 5 years) were to be treated as part of the purchase price, since it must then be considered a capital investment and therefore would have to come from acquiring carrier's net income; however, it must be presumed that the Internal Revenue Service will make its own examination of the facts regardless of the commission's findings.—Aero Trucking, Inc.—Control—Friedman Transfer, 93 M.C.C. 342 (347).

Though acquiring carrier does not object to ultimate merger of acquired carrier, it desires to defer that step until full advantage has been taken of that carrier's tax loss carry-forward of about $50,000. Therefore, in view of the relatively minor duplications in the carriers' operating rights, acquisition of stock control is authorized with admonition that steps be taken, subject to prior approval, to effect merger as soon as it appears practical.—Id., p. 353.

Although continuance of acquired carrier as a separate entity pending utilization of a tax loss carry-forward is justified, acquiring carrier is admonished to seek merger authority when the tax savings have been realized.—Long Transp. Co.—Control—Marine Transit, Inc., 90 M.C.C. 261 (267, 268); Tamiami Trail Tours, Inc. Control and Merger, 90 M.C.C. 449 (452, 454)*; Watkins Motor Lines, Inc.—Control and Merger, 90 M.C.C. 567 (588).

While continuance under common control of separate carrier entities with substantially duplicative operations has sometimes been approved for tax purposes where there was a clear intention of the parties subsequently to merge the operations, acquired carrier's possession of substantial tax credits is an asset without value to acquiring carrier in view of former's operating losses which apparently will con-

tinue; moreover, considering acquired carrier's large deficit net worth, it is unlikely that acquiring carrier would seek a merger whereby it would become liable for that carrier's outstanding obligations. Control authority denied.—Adley Exp. Co.—Control—McFaddin Exp., Inc., 87 M.C.C. 665 (672-3)*.

10. Corporate and operating status of vendor.—[Vols. 11-19].—See also n. 48 *Discontinued operations,* below.

The [former] second proviso of §206(a) must be construed in light of other pertinent provisions of the act which declare the national transportation policy particularly §5(4), and it was a proper application of the statute for the Commission to consider prior illegal control in a §5(2) proceeding involving merger of a purported proviso carrier, since illegal control of such a carrier by a multi-state carrier, beginning almost simultaneously with formation of the carrier and extending up to point of sale to carrier seeking §5 authorization, means that the purported proviso carrier was not "lawfully engaged in operation" as such, and is thus disqualified from carrier status.—Hart v. I.C.C. 226 F. Supp. 635 (639-40, 641)*.

Even though vendor no longer has tangible property to conduct motor carrier operations under the rights involved, it is still the record holder of such rights, as evidenced by outstanding certificates in its name; this, without more, constitutes it the owner and a carrier within meaning of §5(2)(a)(i), and fact that Internal Revenue Service has seized those rights for certain tax deficiencies, acquiring a limited possessory interest therein which it proposes to sell to vendee, does not affect vendor's status for purposes of purchase transaction. As §6339a(2) of Internal Revenue Code of 1954 provides that an IRS sale transfers all right, title, and interest of the party deliquent to and in the property sold, IRS merely acquired the power to assign the right to vendor's certificates to vendee subject to the commission's approval; the transaction is therefore subject to §5.—Public Serv. Coordinated Transport—Purchase—Royal Blue, 97 M.C.C. 56 (59-60).

Carrier status under Part II of vendors operating under single-State exemption proviso depends on facts existing at the date operations are discontinued, or taken over by a vendee, as result of the purchase contract.—Midwest Motor Exp., Inc.—Purchase—Daniel, 90 M.C.C. 590 (592).

11.—Of vendee.—[Vols. 11-16, 18, 19].—Motion to dismiss purchase application on ground that vendee is not a functioning corporation because, though it was incorporated by the minimum three stockholders required by Alabama law, its stock ownership has since been concentrated in one person, overruled. In passing on proposed purchase, the commission is not concerned with vendee's corporate authority, but only with whether the transaction is consistent with the public interest and the policy declared in the act; whether the resulting operations by vendee would be ultra vires is a matter beyond the commission's jurisdiction, and diversity of stock ownership in vendee has no bearing on the issues before it.—Bowman Transp., Inc.—Purchase—A. W. Hawkins, Inc., 90 M.C.C. 303 (305-6).

While the purchase agreement was executed by vendor and vendee carrier only, which would obligate latter for payment of the entire purchase price, it is evident from pro forma balance sheets submitted that the operating rights involved would be owned by vendee while vendee's wholly owned subsidiary equipment company would acquire ownership of operating equipment embraced in the transaction. And entire purport of the method of financing the transaction is conclusive that, as between vendee and its subsidiary, it is contemplated that each would be liable for proportionate shares of the purchase price allocated to the rights and to the equipment; the Small Business Administration advanced the necessary funds to the two companies as a unit. Therefore, noting practice of the two companies of transferring funds to each other whenever necessary, and notwithstanding the general policy of considering financial fitness of an acquiring carrier on its own merits, individual corporate structures are disregarded and the

two companies are considered as a single entity with respect to issue of financial fitness.—Hove Truck Line—Purchase—Maurer, 97 M.C.C. 361 (365-6).

15. Routes, rights, transferred, retained, combined.—[Vols. 11-19].—Although purchase proposal, as modified to exclude certain dormant operating rights, contemplates that vendee would acquire only vendor's rights between the Carolinas and a radial area around Akron, Ohio, with vendor presumably retaining rights between the Akron radius and Augusta and Savannah, Ga., latter cities are adjacent to the South Carolina border and should properly be included in the purchase; vendor has performed regular and extensive service under that portion of its rights, and their acquisition by vendee would not create a new competitive service.—Pilot Freight Carriers, Inc.—Purchase—Bison Fast Freight, 90 M.C.C. 709 (719).

Alternate routes: [Vols. 12-17].—Whether sale of a right to operate over one route and retention by the seller of right to operate over a different route between the same termini would be consistent with public interest is for determination on the evidence, with due consideration of the effect which an additional competitor would have on existing carriers in light of available and potential traffic in the territory.—Lang and Givens—Purchase—T.I.M.E., Inc., 90 M.C.C. 195 (198).

Combination of routes: [Vols. 12, 13, 19].—See §208(a), n. 31.

Commercial zones: [Vols. 15, 17, 18].—Although vendor is not shown to have transported any traffic from Whiting, Ind., to Iowa points, Whiting and its commercial zone are entirely within the commercial zone of Chicago, which vendor has actively served, and a finding of dormancy as to Whiting would be of no consequence, since the right to serve Chicago embraces all points in its commercial zone and there is no basis for restricting the Chicago rights vendee would acquire. Moreover, even though purchase application is amended to eliminate all rights found to be dormant, vendor would in no event be permitted to transfer its rights from Chicago and retain its duplicative rights from Whiting.—Kroblin Refrigerated Xpress, Inc.—Purchase—Davis, 93 M.C.C. 356 (360-1).

Common control and management: [Vols. 13, 14, 17, 19].—The commission's concern with continued maintenance of separate but duplicating operations under common control is based on fact that such operations afford opportunity for unfair competition and undue preferences between shippers and consignees as to rates and practices, contrary to public interest and the declared policy of the act. Where substantial portions of acquired carrier's rights are dormant and its active rights are almost wholly duplicated servicewise by those of acquiring carrier, and no tax considerations are involved, approval of acquisition of control alone would not be warranted; however, denial is without prejudice to amendment or refiling of application to seek merger authority concurrently with acquisition of control.—Mitchell Bros. Truck Lines—Control—Empire Transport, 93 M.C.C. 38 (45, 46).

Since reduction of vendee's president's stock interest from majority to joint control would leave vendee still under common control of management with another carrier of which he is president and a 34-percent stockholder, and latter's operating rights are completely duplicated by those proposed to be purchased, the objectionable aspect of duplicating operations by carriers under common control would still be present. Denied.—Azusa Transp. Co.—Purchase—Azusa Transfer Co., 93 M.C.C. 365 (367)*.

The commission's consistent policy against common control of competitive operations is based on the resulting uneconomical operations and opportunity for unjust discriminations and undue preference between shippers and consignees as to rates and practices. Acquired carrier's operating rights are duplicated in every material respect by those of acquiring carrier, and latter has taken the immovable position that under no circumstances would it acquiesce in a merger with the former, now or in future. Even assuming that a condition on approval requiring acquired

carrier to publish rate identical with those of acquiring carrier would eliminate opportunity for discriminatory practices, there would still remain, ordinarily, the objectionable uneconomical maintenance of commonly controlled companies providing essentially the same services. In addition, acquired carrier's operating rights have been dormant for over 2 1/2 years, and the circumstances preclude any early reactivation of its operations. Proposed control would therefore be inconsistent with public interest; denied.—Adley Exp. Co.—Control—McFaddin Exp., Inc., 93 M.C.C. 378 (382, 383)*.

While the commission has generally withheld authority for a transaction that would result in creation, preservation, or extension of duplicate operations by separate motor carriers under common control, which operations would otherwise be competitive, this policy may be departed from in recognition of tax advantages accruing from deferment of unification.—Watkins Motor Lines, Inc.—Control and Merger, 90 M.C.C. 567 (588).

Inasmuch as prior report found that transaction which would result in common control of acquiring carrier with another conducting substantially duplicative or competitive operations would be inconsistent with public interest, approval of proposed modified transaction is with understanding that, as represented by acquiring carrier, the appropriate parties will within 30 days from consummation date file §5 application for transfer to it of either the affiliate's capital stock or its operating rights.—R. E. Short, Inc.—Control and Merger, 90 M.C.C. 80 (85)*.

In addition to questions of efficiency and economy, maintenance under common control of separate entities authorized to engage in substantially duplicative operations affords opportunity for unfair competition and unjust discrimination and preferences between shippers and consignees as to rates and practices, contrary to public interest and the declared policy of the Act.—Accelerated Transport-Pony Exp., Inc.—Control—Downing, 87 M.C.C. 711 (724).

The usual objections to holding of duplicative operating rights under common control are absent where two commonly controlled contract carriers would as result of approved purchases each serve a separate operating division, one based at Chicago and the other at St. Louis, of a single contracting shipper which completely controls routing of the traffic; relation of each carrier entity to the shipper division it serves is such that it is for all practical purposes an integral part thereof, and service rendered is akin to private carriage by the shipper; under such circumstances continued separate maintenance of vendees does not require denial.—Dyer-O'Hare Hauling Co.—Purchase—Merchants Transfer, 87 M.C.C. 768 (772).

Circuitous routes: [Vol. 15].—That combination of two or more grants of operating authority may result in circuitous routing does not in itself require denial of purchase applications; each case must be determined on its own merits. Where approval would result simply in replacement of a lawfully instituted and maintained joint-line service with a more economical single-line service, with no disruption or transformation of vendor's local and other operations, no public benefit would be gained by denial on ground of resulting circuity.—Shamrock Van Lines, Inc.—Purchase—Reely, 93 M.C.C. 455 (461). [But see dissent.]

Dividing a route, territory: [Vols. 12-16, 19].—Purchase by one vendee of vendor's secondary-movement automobile-hauling rights between points in New York, New Jersey, and Pennsylvania, and by a second vendee of vendor's similar rights in other States, including the right to operate between points in territory acquired by the first vendee and points in Ohio, Connecticut, and Massachusettes, would be a division along clear-cut geographical lines and would not necessarily require cancellation of the radial authority.—M & G Convoy, Inc.—Purchase—Great Lakes Forwarding Corp., 90 M.C.C. 397 (402)*.

Originally proposed divisions of vendor's routes between New York City area and the Catskills at points in New Jersey south of Hohokus were undesirably complicated and

could not be sanctioned. However, the basic intent is to transfer to vendee only vendor's mountain resort traffic, while preserving intact its extensive short-haul commuter operations between New York City and adjacent New Jersey and, as suggested in the prior report, applicants' purpose could be accomplished simply by dividing vendor's Mountain Division routes at indicated intersections in Hohokus and Ridgewood, together with concurrent revocation of those segments left unusable as result of such division. On further consideration, since the revised agreement and amended applications substantially adopt the suggested route divisions and simplify and conform to prior objections, proposed transaction is approved.—Hudson Transit Lines, Inc.—Purchase—Inter-City Transp., 97 M.C.C. 524 (525-7, 530)*.

Although theoretically vendor's nonradial Mercer description rights between points in 8 States might be divided for transfer to separate carriers into as many rights as there are combinations of States in the territory served, proposed division thereof, for sale to 3 vendees, into 4 separate rights, 2 radial and 2 nonradial, would result in a grotesque situation little resembling the operation authorized to be performed by vendor, and would not be in public interest. Division of irregular-route nonradial authority should be along clear-cut geographical lines, eliminating the right to operate between the separate geographical divisions.—Belyea Truck Co.—Purchase—Ferguson Trucking Co., 90 MC.C. 139 (149)*.

Proposed division of territorial rights is also objectionable because it would permit duplications of service by the several vendees; considering objectionable split of territory involved in two of proposed purchases and dormancy of principal portion of operations involved in one of them, those applications are denied, and sale to the third vendee of all of vendor's rights, except certain heavy-commodity rights authorized to be purchased by a fourth, is approved, conditioned on cancellation of those found to be dormant.—Id., pp. 149-50.

A §5 transaction should not be used as a vehicle for creation of new operating rights by means of unnatural divisions of existing rights which would have little effect on vendor's remaining service. Vendor's automobile-hauling rights from St. Louis County, Mo., to 8 States were granted for service to all shippers in the county and, in absence of compelling reasons in the public interest, the right to serve the limited number of automobile shippers in that county should be preserved as a unit. As vendee would purchase vendor's rights to 4 of the 8 States only insofar as they authorize service to one shipper (Chrysler), and vendor, under its retained rights, would continue to render the identical service it is now performing, except for Chrysler, approval would result in creation of a new duplicative service without substantial diminution of vendor's present service, and might well be taken to mean that further divisions in future, through sale of right to serve other shippers, would also be approved.—Cassens Transport Co.—Purchase—Dealers Transit, Inc., 93 M.C.C. 768 (770).

However, automobile haulers have sometimes been granted rights to serve specific shippers because of the specialized nature of the service performed, and the fact that a single trailer will normally transport automobiles from a single plant site to one or more dealers in any one movement. Since the only other automobile shipper now located in St. Louis County is Ford Motor Co., further subdivision of vendor's rights may be prevented by permitting vendee to purchase the portion it desires and restricting vendor's retained rights from that county to traffic moving from the Ford plant.—Id., p. 770.

Proposed separation of the secondary-movement rights of another vendor from the corresponding initial-movement rights and sale of a minute portion thereof to vendee presents an even more aggravated situation; the secondary authorities are integrally related to the initial authority and both should be preserved as a unit. Division of irregular-route nonradial authority should be along clear-cut geographical

lines, eliminating the right to operate between the separate geographical divisions; approval of divisions such as proposed would authorize numerous carriers to operate within an area granted for a complete service by one. Theoretically, vendor's rights could be divided for sale to separate carriers into as many rights as there are combinations to points in the authorized area, but the result would be a grotesque situation bearing no resemblance to the operations authorized to be performed by vendor; such a split of the secondary rights would be inconsistent with public interest and may not be approved.—Id., pp. 770-1.

While it is questionable whether certain transfer proceedings (which may have resulted in unlawful common control of carriers involved) required formal approval under §5 in light of holding in 356 US 412 that a motor carrier may divide its operations into two (and presumably more) carriers without seeking such approval, so long as control of the multiple carriers remains in same hand as that of the single carrier, that decision does not excuse failure to present full, complete, and accurate information in the appurtenant applications, nor is it dispositive of question raised by division of radial rights to overcome the short-hauling prohibition.—Brown—Investigation of Control, 93 M.C.C. 662 (666-7).

Divisions of a particular regular route may be made only at points authorized to be served by the dividing carrier. After sale of vendor's route between Jacksontown and Columbus, Ohio, and between West Jefferson, Ohio, and Fort Wayne, Ind., with retention of the segment between Columbus and West Jefferson, vendor would not be able to use the retained segment, as it proposes, in combination with its retained route between Jacksontown and Lima, Ohio, because Columbus is not an authorized point of service on the latter route. Vendee requires the right to serve Columbus to tie in with its existing operations between that point and other Ohio points, and as vendor can serve Columbus only via the routes it would sell to vendee, once it has disposed of that authority it would no longer have any right to serve Columbus.—W. L. Mead, Inc.—Purchase—Burnside Motor Freight Lines, 97 M.C.C. 134 (137-9).

Likewise, if vendor's Lima-Chicago route were divided at Fort Wayne as proposed, its use of the retained Fort Wayne-Chicago portion would be impractical, since, owing to service restrictions, it would have no usable through route whereby it could join its retained operations in Ohio with either retained route in Indiana diverging from and through Fort Wayne. That point is not an authorized service point on vendor's retained route between Chicago and Willshire, Ohio, via South Bend, Ind., and may not be used in the manner proposed, even for the limited purpose of joinder.—Id., pp. 139-140.

Also, because of service restrictions on other Ohio routes included in purchase, vendee's operations between Columbus and Springfield and Dayton, Ohio, would be substantially more circuitous than it anticipated, and it is doubtful that they could be economically performed. Moreoever, even if the proposed divisions of routes could be otherwise found consistent with public interest, both vendor and vendee would be authorized to operate between Columbus and several of the same Ohio points over different routes, thus to that extent creating two competitive motor carrier services out of the one now existing, and applicants have failed to show public need for such additional service. Denied.—Id., pp. 139, 140.

Under proposed division of operating rights vendor would retain all authority to serve St. Louis, including transportation of involved commodities westbound to Missouri, points in St. Louis-East St. Louis commercial zone, while selling authority to transport same commodities to all other points in Missouri, and would keep eastbound authority from St. Louis to Kokomo, Ind. It would also retain authority for a wide variety of commodities, some of which overlap those included in the rights to be sold, from St. Louis to all points in Indiana. This manner of dividing the rights, together with the limited evidence of its past operations, indicates that St. Louis is of signal import-

ance to it respecting traffic and revenues, and that it would be parting with little. Selection of an important industrial center for retention is just as undesirable as carving out a single origin for sale; such unconventional division of rights, which would not materially affect vendor's service, would tend to change the character of service now rendered, create confusion among shippers, and result in wasteful and inefficient use of transportation facilities. Denied.—Ringle Exp., Inc.—Purchase—Contract Carriers, Inc., 93 M.C.C. 468 (472).

Duplicate operating rights: [Vols. 12-19].—See also *Common control and management,* above.

While the incidental charter rights which under §208(c) automatically accure to a regular-route passenger carrier, but impose no obligation to provide charter service, do not "duplicate" certificated charter rights arising out of a proceeding under §206(a)(1) or §207(a), the issue in purchase proceeding, regardless of the nature of the operating rights involved, is whether duplicating services or operations which would otherwise be competitive may be performed under common control. Vendee's afffiliate may, at its discretion, provide the identical charter service which vendee would be obligated to provide under the certificate it would purchase, except for possibility that former's incidental rights might be construed not to embrace all origins within the 10-mile radius of Atlantic City authorized by the certificate. Though the scope and frequency thereof are not shown, the affiliate has been providing charter service in Atlantic City area, and, considering the population centers authorized to be served under vendor's certificate, the potential duplication of service, with resulting possibility of discriminatory or unfair competitive practices, is substantial. Denied.—Ocean Drive Tours—Purchase—Carll, 97 M.C.C. 20 (24).

Notwithstanding the general undesirability, for reasons discussed in 35 MCC 521, of permitting duplicate operations under common control, transactions resulting in such situations may in certain circumstances be approved; advisability of permitting such operations must be determined from facts attending each application.—Plains Motor Exp., Inc.—Purchase—C & G Truck Line, Inc., 90 MCC 1 (3)*.

Exception to the general policy against approval of duplicate operations under common control is warranted where duplication of service as between vendee of general-commodity rights and its affiliated special-commodity carrier would not only be limited commoditywise but would also be fairly limited territorially; the only large points both would serve are Kansas City and Topeka, and none of numerous carriers operating between those points opposed the application. Moreover, since it is doubtful if vendor could resume service were application denied, and shippers and consignees would be adversely affected by cessation thereof, any problems resulting from such limited duplications are clearly outweighed by advantages to the public of unrestricted approval.—Id., pp. 3-4.

In authorizing purchase of specific-commodity rights from Davenport, Iowa, to Illinois and between Moline, Ill., radial area and Wisconsin, no restriction need be imposed on vendor's retained general-commodity rights between points in the Tri-Cities commercial zone, since the duplication between latter authority and that to be transferred is insignificant.—Knox Motor Service, Inc.—Purchase—K & A Truck Lines, Inc., 93 M.C.C. 26 (33).

Acquired carrier's irregular-route general-commodity authority is partially duplicated by specific-commodity authority of carrier applicant now controls, and though it does not appear that operations actually conducted would be competitive in absence of common control or management, and practices discussed in 35 MCC 521 as to be guarded against might not result immediately, there is no assurance that the situation would remain static. Opportunity for objectionable practices would exist so long as the affiliated carriers continue to hold duplicative rights; that applicant considers proposed stock purchase merely an investment is insufficient reason for departure from principle of case cited; condition which will eliminate the duplication of

authority imposed.—Norris—Control—Hatcher Trucking Co., Inc., 90 M.C.C. 31 (33-4).

Since rights to be purchased by one vendee are partially duplicative of its existing authority, approval is conditioned to provide that such duplications be eliminated upon consummation.—M & G Convoy, Inc.—Purchase—Great Lakes Forwarding Corp., 90 M.C.C. 397 (403)*; and since certain rights described in another of vendor's certificates, to be acquired by a second vendee, duplicate a portion of those authorized to be acquired by the first vendee, approval of the second purchase is conditioned on their cancellation, since vendor has but one operating authority regardless of how many times it may be repeated in the same or separate certificates.—Id., 90 M.C.C. 693 (699)*.

Considering scope of their systemwide operations, duplications in acquiring and acquired carriers' rights between a few points in North Carolina and Tennessee are of minor consequence, particularly in view of tax benefits that would be realized under common control and fact that merger of the rights is contemplated thereafter.—Mason & Dixon Lines, Inc.—Control—Silver Fleet, 90 M.C.C. 829 (848); similarly, in view of acquiring carrier's expressed intent to seek appropriate merger authority, such minor duplication as would exist between the commonly controlled rights after cancellation of acquired carrier's dormant rights is not sufficient to warrant denial of control application.—Ashworth Transfer, Inc.—Control—Hawkes Transp. Co., 87 M.C.C. 653 (661)*.

Although acquired carrier's radial authority between La Grange and other Georgia points is to some extent duplicated by acquiring carrier's nonradial authority as to points within 50-mile radius of Atlanta, any traffic former originated within 50 miles of Atlanta would have to move through La Grange, and under its radial rights it could not handle any traffic between points in that area even via the base point; and duplications between its rights and acquiring carrier's regular routes exist only to a limited extent in western portion of Georgia. Considering tax benefits resulting from deferment of merger, those duplications do not warrant denial of control authority.—Watkins Motor Lines, Inc.—Control and Merger, 90 M.C.C. 567 (588).

Though disapproval of merger of a member of Transcontinental Bus System by a new company and acquisition of joint control of latter by Continental Tennessee, Virginia Stages, and Smoky Mountain Stages (all members of the same system) is not justified by duplications in their operating rights, continuance of such duplicative operations under common control is highly unsatisfactory. While Virginia Stages' acquisition of liquidating carrier's rights east of Knoxville, and Smoky Mountain's acquisition of the rights between Knoxville, Chattanooga, and Atlanta, would be an equitable division, there is some question as to latter's ability to finance such a purchase; and to require cancellation of duplications as between liquidating carrier and Continental Tennessee would destroy rights actively in use and of considerable financial value. However, no need is shown for continuance of Continental's rights between McMinnville and Sparta, Tenn., and approval is conditioned on their cancellation.—Continental Tenn. Lines, Inc.—Control—Tennessee Coach, 87 M.C.C. 775 (780).

See also National City Lines control case, under *Initial and secondary movements,* below; Accelerated Transport-Pony Exp. case, n. 45 *Conditions imposed,* blow; and Snyder Bros. Motor Freight case, n. 110 *Intrastate operating rights,* below.

Extinguished rights: [Vols. 12-14, 16, 18, 19].—Transfer of dormant rights, in absence of a showing of genuine need for their reactivation and no matter what the cause of dormancy, would not foster sound economic conditions among the existing carriers in the affected territory and would not be consistent with public interest. Where liquidating carrier has provided no service at intermediate points on a portion of its principal route and the small local carrier serving those points would be materially harmed by any diversion of traffic, and no shipper need for survivor's reactivation of service to those points is

shown, applicants have failed to meet their burden of proof. Therefore, merger approval is conditioned to preclude service at those points.—Murphy Motor Freight Lines, Inc.—Control and Merger, 90 M.C.C. 535 (541, 542).

While specific-commodity, irregular-route carriers need not show service to every authorized point, to avoid a finding of dormancy service shown must embrace a representative number of points throughout the authorized territory. Vendor is not shown to have transported any traffic from 8 authorized origins, and, so far as origination of traffic concerned, it clearly has not conducted territorial operations. Accordingly, with exception of one included in Chicago commercial zone, which vendor has actively served, rights from those points must be considered dormant. and their transfer to vendee cannot be sanctioned in absence of a clear showing of public need for their revitalization.—Kroblin Refrigerated Express, Inc.—Purchase—Davis, 93 M.C.C. 356 (360).

For a substantial period acquired carrier, as a corporate entity, has had no employees, terminals, or equipment, and its operating rights have been dormant for over 2 1/2 years. That it was under acquiring carrier's temporary management at inception of the dormancy does not alter applicants' burden of proof or the findings that must be made in face of the dormancy found to exist; reasons for discontinuing operations are not controlling in § 5 proceedings. Not only have applicants not shown that proposed control would enable them to meet a presently unmet transportation need, but it would be almost impossible to reactivate the dormant operations; acquiring carrier does not contend that it would attempt to do so, maintaining, on the contrary, that pending tax and creditors' claims would preclude any active operations by acquired carrier under its control at the present time. The commission has previously found that it would be inconsistent with public interest to permit a carrier to purchase dormant operating rights to hold for possible institution of operations at some future time, and fact that control alone is sought does not alter that conclusion. Denied.—Adley Exp. Co.—Control—McFaddin Exp., Inc., 93 M.C.C. 378 (383-4)*.

Since certain of liquidating carrier's general-commodity radial rights are totally divorced from and outside of the irregular-route territory wherein it is shown to have rendered substantial service to representative points, and as most of the insignificant number of shipments handled to such radial points were transported after execution of merger agreement, cancellation of those rights is an appropriate condition on approval in absence of a showing of need for their reactivation.—Jones Motor Co., Inc.—Control—Mundy Motor Lines, 90 M.C.C. 899 (907).

See also Chemical Leaman Tank Lines, Inc. v. United States, §212(b), n. 10.

Initial and secondary movements: [Vols. 14-18].—The right to transport automotive equipment in initial movements authorizes a service different from transportation in secondary movements, and evidence clearly shows that proposed sale of secondary-movement rights and retention of initial-movement rights between the same points would be consistent with public interest. Vendor's increasing operating deficits, due to increased rail competition, demonstrate need for substantial reductions in expenses; sale of the secondary-movement authority would permit savings in its overhead expenses without substantially increasing vendee's overhead costs. Vendor desires to retain initial-movement rights so that it can immediately furnish service in event shipper curtails its use of rail service; while operating rights which have served no public need for some time should be revoked, such revocation is not a necessary condition on approval of proposed purchase.—E. & L. Transport Co.—Purchase—Dealers Transport Co., 87 M.C.C. 785 (789).

The examiner, in describing rights of one of acquired carrier's subsidiaries recommended to be canceled as dormant, apparently did not intend to include its secondary driveaway authority between all points included in its authority for initial movements between points in some 44 States; its abstract of secondary shipments

shows service to or from some of those States, and statements elsewhere in examiner's report suggest that inclusion of the secondary rights was inadvertent. As record suffices to establish that the carrier's service under that authority has been adequate and continuous, cancellation thereof is not required as a condition on approval of control. Also, as cancellation of certain initial driveaway authority as recommended would destroy the carrier's right to continue secondary service to and from Utah and Idaho which its abstract shows it has been rendering consistently with the infrequent and sporadic demand therefor, the secondary authority is modified to authorize service to Idaho and Utah as well as other States included in the initial authority to be retained.—National City Lines, Inc.—Control—Automobile Carriers, 93 M.C.C. 683 (689).

Duplications in service of acquired carrier and its two carrier subsidiaries are wholly in secondary movements and largely in driveaway service. As secondary authority is usually granted as auxiliary to initial-movement authority to permit the carrier to furnish a complete service, and an automobile carrier's service is largely for one shipper from any one origin, duplications in that type of authority do not opose the usual problems and their elimination has not been required in control cases involving such carriers.—Id., p. 691.

See also Cassens Transport Co. purchase case, under *Dividing a route, territory,* above.

After acquisition of truckaway and driveway rights by a new carrier through merger and sale of all the driveway rights to an affiliate, elimination of duplications between the rights as held by liquidating carrier and those presently held by vendee and two other affiliates would require cancellation of a substantial portion of vendor's retained initial truckaway authority, also of substantial portions of vendee's acquired initial driveaway authority, and both the rights sold and retained would necessarily be further restricted against combination of initial and secondary movements and against interline of traffic among the four affiliates, as indicated, to preclude institution of service not previously provided by liquidating carrier individually or in conjunction with the others; the bulk of liquidating carrier's active operating rights would thus pass to vendee, leaving a mere skeletal operation for vendor-survivor. Authority for merger and purchase denied.—Dealers Transit, Inc.—Purchase—Industrial Transit, Inc., 90 M.C.C. 873 (883).

Intrastate operating rights: [Vols. 14-19].—Restriction in vendor's Ohio regular-route certificate, under which it conducted interstate operations, against service at points intermediate to Vermilion and Berlin Heights implies that service may be performed at all other intermediate points on its regular routes. Operations authorized to be performed by multi-State vendee will therefore include the right to serve all intermediate points other than those at which service is specifically restricted in vendor's intrastate certificate. Vendee may thus tack its existing rights with those acquired at any service point on vendor's former routes which is within vendee's authorized 25-mile area surrounding Akron, including a portion of Cleveland.—Ohio Southern Exp., Inc.—Purchase Vermilion Truck Line, 97 M.C.C. 93 (102)*.

Separation of interstate from intrastate rights is generally undesirable in public interest, not only because of possible future competitive interstate operations which could be instituted by holder of the intrastate certificate under single-State proviso, but also because such segregation of rights often results in separate operations failing to provide adequate and efficient service to the shipping public or satisfactory operating results to the carriers.—U.S. Van Lines, Inc.—Purchase—Holien, 90 M.C.C. 657 (661).

Some months prior to filing of purchase application vendor sold his duplicative intrastate rights to one of his sons and thereafter took no active part in operations except to maintain insurance and tariff participation, all shipments being transported with vehicles owned and drivers employed by the son, who registered the intrastate rights for interstate operation; moreover,

vendor testified that he ceased all carrier activities about a month before execution of purchase contract; thus, reinstitution of operations by vendee would be an additional interstate operation, which cannot be found consistent with public interest when several hundred authorized carriers are now providing the points involved with satisfactory service; denied. [See 65 MCC 590.]—Wilson Freight Forwarding Co.—Purchase—Hammel, 90 M.C.C. 41 (42-3, 44).

Although separation of interstate and intrastate rights is a frequent problem in proceedings before the commission, that problem must be dealt with in each case on the basis of evidence of record therein. As a rule, separation of duplicate interstate and intrastate operating rights is undesirable, and transactions involving their separation will not be approved unless conditioned in such a manner as to preclude creation of a competitive operation through registration of the intrastate rights under the second proviso of §206(a)(1). Purchase approved, subject to condition that vendee also acquire vendor's intrastate rights at no increase in the consideration.—Arkansas-Best Freight System, Inc.—Purchase—Bradsher, 87 M.C.C. 754 (756-8)*.

Off-route points: [Vols. 11-19].—Service at off-route points is not normally as active as service to or from on-route points, since the very nature of off-route point service connotes a sporadic and infrequent service which is available to shippers and receivers upon demand; the record reflects operations by vendor over regular routes and sporadically to and from off-route points; its rights to serve certain named off-route points cannot be considered dormant.—Gordons Transports, Inc.—Purchase—Hayes Freight Lines, 90 M.C.C. 351 (359, 360).

Regular- and irregular-route operations: [Vols. 12-19].—The commission's finding that plaintiff (vendee in purchase proceeding) would use the irregular-route authority sought to be purchased for the purpose of linking two of its regular routes, contrary to established commission policies, is rendered insubstantial by statement in the order denying plaintiff's petition to convert irregular part of the purchase rights to regular routes that granting that authority "would not materially affect the outstanding decision" on the purchase application; thus, the commission virtually admitted that this factor was not substantial in reaching its primary decision denying the purchase transaction. Order of the commission set aside as to that finding.—Interstate Motor Freight System v. United States, 243 F. Supp. 868 (870, 872, 873)*.

Since regular route proposed to be sold to irregular-route carrier does not lend itself to regularly scheduled service but rather to a call-on-demand truckload type of service, and although vendee and vendor have been interchanging nonlocal traffic at an authorized off-route point common to both the purchase route and another regular route which vendor will retain and over which he has been moving that traffic to or from Memphis, Tenn., a terminus of both the purchase and retained regular routes, transfer and continued description of considered authority in regular route terms is not shown to be in the public interest. Therefore, incidental to approval of proposed purchase transaction, rights to be acquired should be redescribed in irregular-route terms so as to authorize service between Memphis and the Mississippi points specified.—Deaton Truck Line, Inc.—Purchase—Lavender, 97 M.C.C. 256 (257-8, 259)*.

Vendee can perform service under purchased irregular-route rights in Illinois without converting it to regular-route, and such operation in combination with its existing regular-route authority will not be objectionable provided that in each instance some authorized service point common to both authorities is used as a gateway; purchase approval therefore contemplates that vendee will maintain the separate character of the regular- and irregular-route services.—Chicago Kansas City Freight Line, Inc.—Purchase—Capitol, 97 M.C.C. 68 (76-7).

Through service by vendee between Louisville and Memphis after purchase would involve a joinder of its regular-route rights and irregular-route rights acquired from vendor at a point in either of two

Kentucky counties, and conduct of such operations so as to preserve the radial character of the portion conducted under vendor's rights does not appear feasible. The type of operation envisaged, and the nature of the two termini as important industrial points in that geographical area, compel conclusion that vendee would conduct a single-line operation between them indistinguishable from competitors' regular-route operations. Restriction imposed in prior report against rendition of such service will ensure preservation of the lawful character of operations under vendor's rights; affirmed.—Dean Truck Line, Inc.—Purchase—AllState Truck Line, Inc., 93 M.C.C. 649 (651-2)*.

Purport of cases involving unification of regular- and irregular-route operating rights is that where such authorities are combined it is the nature of the irregular-route service which must be maintained; this is necessarily so because, although an irregular-route carrier is not permitted to provide a regular-route service, a regular-route carrier, so long as it provides reasonably adequate service at authorized points on its routes, is not required to operate on a fixed schedule and is not restricted against performance of a call-on-demand, truckload type of service.—Motor Common Carriers of Property—Routes and Services, 88 M.C.C. 415 (435).

The indicia of whether regular-route operations have been performed, as set forth in 47 MCC 23, are (1) predetermined plan of operation, (2) movement of particular type of traffic, (3) solicitation of particular traffic and holding out of a particular service, (4) terminals devoted to or designed for expeditious handling of certain traffic, (5) habitual use of fixed routes, (6) fixed termini, (7) marked periodicity of service, and (8) observance of definite schedules or their equivalent. However, no general rule has been propounded by which the regular- or irregular-route character of all motor carrier operations can be determined, nor is any of the indicia standing alone necessarily conclusive.—Consolidated Copperstate Lines—Purchase—Nielsen, 90 M.C.C. 483 (487).

While there are some indicia of regular-route operations in vendee's service under temporary authority, considering all factors, including the paucity of highways, vendee has striven to maintain the irregular-route nature of vendor's rights in light of the principles enunciated. However, conversion of the irregular-route authority to regular-route as requested will eliminate any existing uncertainty and may properly be authorized.—Id., pp. 487, 488.

Vendee should be able to preserve the true nature of acquired irregular-route general-commodity rights although it would as intermediate carrier interchange traffic with regular-route carriers; each of its regular-route connections is an independent carrier over which it has no control, and it would be dependent on originating carriers' routing for all freight it would handle as connecting carrier; moreover, one of the regular-route carriers involved is a small one-man operation unlikely to handle large or frequent interline movements. Vendee is not equipped for expeditious assembly of many small shipments or distribution of a steady volume of l.t.l. shipments of miscellaneous merchandise, and it does not appear that the operation described would be of sufficient magnitude to take on a pattern of territorial inflexibility or regularity of service sufficient to convert the irregular-route to regular-route operation. Purchase approved.—Houck Transport Co.—Purchase—Cohee, 90 M.C.C. 154 (157).

Since liquidating carrier was unable to distinguish between service rendered over its regular routes between South Dakota points and described Minnesota area from that rendered to and from the same points over its irregular routes, the duplication occasioned by the overlapping warrants cancellation of its irregular-route authority to serve points also authorized on its regular routes.—Murphy Motor Freight Lines, Inc.—Control and Merger, 90 M.C.C. 535 (537-8).

Although vendee is willing that purchase of regular route between Memphis and Hernando, Miss., be restricted to preclude single-line service between Memphis and

Atlanta, to remove objection to use of its intermediate irregular-route authority to bridge a gap between that route and its regular route serving Atlanta, one of its primary objectives is to obtain single-line general-commodity authority, in lieu of its limited-commodity authority, between Memphis and Birmingham; considering importance of those points as traffic and business centers, coupled with fact that vendee has been handling only truckloads between them, it appears inevitable that it would convert its irregular-route rights between Hernando and a 65-mile radial area based on Birmingham into regular-route operations, especially as there is some indication that it has already done so in its existing operations. Denied for that and other reasons.—Deaton Truck Line, Inc.—Purchase—Magnolia Truck Line, 87 M.C.C. 674 (678-9).

See also Schuster's Exp., Inc.—Purchase—Stankovich & Roberts, n. 48 *Routes,* below.

Restriction of services: see n. 110 *restrictions,* below.

Single- and two-line services: [Vols. 11-19].—Liquidating carrier has conducted a substantial and continuous operation under its east-west regular-route rights, particularly between Richmond and Fredericksburg, Va., the District of Columbia, Batlimore, and Hagerstown, Md., and Conshohocken and Philadelphia, Pa., including Philadelphia commercial zone, on the one hand, and Bedford, Pa., and points west thereof, on the other; and temporary authority survivor has used those rights to provide improved service, for continuance of which a number of shippers at hearing expressed unanimous desire. Although applicants did not interline with each other, they participated in substantial movements to and from points on liquidating carrier's east-west routes and points served by survivor west of Bedford; therefore, in absence of any injury to protestants or any objection to transfer of the east-west routes, continuance of survivor's improved single-line service would be consistent with public interest.—Helm's Exp., Inc.—Control and Merger, 93 M.C.C. 142 (149).

But approval of transfer of liquidating carrier's irregular-route rights, other than those for the Washington and Philadelphia commercial zones, would be contrary to public interest when operations thereunder were negligible, especially considering size of the traffic centers included; approval of merger is therefore conditioned on cancellation of those dormant rights. Also, liquidating carrier did not use its regular-route rights in operations between Hagerstown, Baltimore, and points south thereof, on the one hand, and, on the other, Conshohocken, the Philadelphia commercial zone, and Shippensburg, Pa., nor, through interline at those points, between points in its southern territory and survivor's authorized points in eastern Pennsylvania and New Jersey-New York-New England area. As reactivation of those rights for either local or through service would constitute a new service deterimental to protestants, for which no need is shown, approval is further conditioned to restrict the right to serve Shippensburg and Conshohocken to traffic moving to or from Bedford or points west thereof.—Id., pp. 149-50.

Split routes: [Vols. 11-19].—A motor carrier has but one operating right over any particular highway between two specified terminal points, regardless of the number of times the particular route may be described or repeated in separate paragraphs of carrier's certificates. Therefore, a carrier may not "split" a route, i.e., sell and retain operating authority between two specified points which necessitates the use of all or substantial portions of the same highway between those points, unless evidence is presented to show that the public convenience and necessity require both operations.—W. L. Mead, Inc.—Purchase—Burnside Motor Freight Lines, 97 M.C.C. 134 (137).

Vendor's regular-route authority between Binghamton and Ithaca, N.Y., embraces segments of New York Highways 17 and 17-C, separated by the Susquehanna River, between Binghamton and Owego. As vendor now renders passenger service to communities along both those segments, it has two separate rights over different highways

and sale of the Binghamton-Ithaca route via Highway 17-C, while continuing to provide service between Binghamton and Owego over Highway 17, will not enlarge existing services and thus will not be an objectionable split. However, to preclude vendee's operation over the Highway 17 segment, approval is conditioned on cancellation of the right therefor from the authority sold.—Southern Tier Stages, Inc.—Purchase—Capital Bus Co., 93 MCC 793 (799).

Although the commission has frequently stated that a carrier has but one right to use a given highway no matter how many times it is mentioned in the carrier's certificate or certificates, the controlling consideration has always been the statutory test of whether approval of the transaction would be consistent with public interest. Proposals to sell certificated interstate rights in a State and retain intrastate rights between the same points have generally been disapproved, or approved subject to a condition precluding the seller or a successor from rendering duplicate service under the single-State proviso; otherwise, a buyer of operating rights would be deprived of the full benefit of the seller's goodwill and going concern value growing out of its exercise of the interstate authority, and the buyer and other carriers could be confronted with a new competitive interstate service growing out of a former single operation by the seller.—Central Motor Exp., Inc.—Purchase—Skaggs Transfer, 90 M.C.C. 332 (334)*.

But when vendor's interstate and intrastate rights over the same highway in Kentucky are each so restricted that after sale of the certificated interstate rights it could not serve the same points to or from Louisville as vendee, and could not by sale of its retained intrastate certificate place another person in position to institute proviso operations between any two points vendee would be serving under the interstate certificate acquired from vendor, the sum total of services authorized and provided would be precisely the same as vendor is now authorized to provide, and the resulting split is unobjectionable.—Id., pp. 334-5.

Approval of purchase of rights to transport specified articles from Davenport, Iowa, to described Illinois area and between Moline, Ill., and points within 10 miles thereof and described Wisconsin area is conditioned on restriction of vendor's retained rights against transportation of certain articles within those descriptions between the Moline area and the described Illinois and Wisconsin areas, to prevent an objectionable split and duplicate operations by vendor and vendee.—Knox Motor Service, Inc.—Purchase—K & A Truck Lines, Inc., 93 M.C.C. 26 (333).

A carrier has but one right to operate over a given route, even if it is repeated in the same or separate certificates for mechanical convenience. Under principle of 25 MCC 558, which has been consistently followed, that it would not promote sound economic conditions in the motor carrier industry if "route splitting" were permitted at will, it would be inconsistent with public interest to sanction the sale by one vendor of its passenger rights between St. Louis and Collinsville, Ill., while continuing to provide restricted operations over the same highways. Authority denied for proposed purchase from that vendor.—Bi-State Development Agency—Purchase—Vandalia Bus Line, 93 M.C.C. 579 (596).

Proposed sale of vendor's operating rights for transportation of general and specific commodities within Kansas City-Dallas-Denver triangle area and retention of its general-commodity authority to continue serving the same general territory in Oklahoma, Texas, and Colorado to and from St. Louis in conjunction with other rights not included in the sale would result in a "split" of authority, since the parties would serve identical points and operate over same highways in large areas of Texas and Oklahoma.—Buckingham Freight Lines—Purchase—Riss & Co., Inc., 93 M.C.C. 754 (757, 762).

17. Disposition, retention, of commodity rights.—[Vols. 12-19].—The commission has consistently found that a carrier has only one right to operate, regardless of the number of times it may be repeated in one or more certificates, and, if that right is sold, the selling carrier may not continue to transport the same commodities between the same points authorized to be served

thereunder. Since it is common knowledge that roofing and roofing materials are sold by chain retail and mail-order department stores, vendee's retained right to transport commodities dealt in by such stores from Chicago to four States would to that extent duplicate the rights it would transfer to vendee for transportation of roofing and materials from and to the same points. Purchase approval is therefore conditioned on modification of vendor's retained rights to preclude transportation of those commodities from Chicago to the States involved.—Seuring Transit, Inc.—Purchase—Fullerton Motor Truck, 97 M.C.C. 241 (247).

Vendor holding certificate authority to transport five fungible commodities, including cement, in dump trucks, proposes to sell only its authority to haul cement and retain other authorities; however, nature of the certificate suggests that it was granted on a showing of convenience and necessity for a complete service on specified bulk commodities in dump trucks and, aside from other undesirable aspects of separation, applicants failed to indicate why the division would be on a clean-cut basis. Applicants further seek removal of the dump-truck restriction because hauling cement in dump trucks is now uneconomical; but, while replacement of dump trucks by pneumatically equipped tank-type vehicles may be a natural and normal development consistent with needs of the cement industry, the commission may not enlarge existing rights in a §5 proceeding to purchase them when the proper course is to seek a §207 certificate. Use to which vendee intends to put the cement authority is not that authorized in vendor's certificate; denied.—Mitchell Transport, Inc.—Purchase—John Schutt, Jr., Inc., 97 M.C.C. 10 (18-9).

Division of vendor's rights in same nonradial area by sale of authority to transport building and construction materials and retention of authority to transport equipment, materials, and supplies used in conduct of grocery and food business houses, when moving to or from warehouses, plants, or other facilities of retail food stores, would not result in transportation of same commodities by both vendor and vendee in same territory, since the retained rights entail transportation of a distinctly different line of commodities between limited origins and destinations. It is not the practice of food business houses to merchandise building materials, and such materials would surely comprise a negligible part of traffic to and from warehouses for use in conduct of their trade. Purchase approved.—Steel Transp. Co., Inc.—Purchase—Barry Transports, 93 M.C.C. 773 (777).

No matter how many times the right to transport a particular commodity or class of commodities between the same points, over either regular or irregular routes, may be described in a carrier's certificate, it has but one right to transport that traffic, and proposed sale of one such duplicative right and retention of the other has often been found basis for denial or imposition of a restriction to preclude multiple services. But where both rights are to be sold, or retained by acquired carrier in a control transaction, the traffic that could have moved under either description should be considered as evidence, to the extent shown, that both rights have been utilized.—Aero Trucking, Inc.—Control—Friedman Transfer, 93 M.C.C. 342 (349-50).

Therefore, since acquired carrier may handle certain shipments between areas of Ohio and Pennsylvania under either its authority to transport steel and steel articles or that for heavy and bulky articles and those requiring specialized handling or rigging, in appraising scope of past operations under its rights movements of steel and steel articles which would require specialized handling, or could be called heavy or bulky articles, are considered as moving under either of those rights when they were moved within geographic limits of the two authorities. So considered, those rights are not dormant; but as no movements are shown under acquired carrier's rights to transport household goods and merchants' stock in trade or store fixtures purchased at auctions or bankruptcy sales, latter rights are dormant and cancellation thereof is required.—Id., pp. 349, 350.

The purpose of broad grants of authority, as for building or construction materials and supplies, is to enable the recipient to

perform a complete service. Proposed severance, from vendor's rights of that category, of authority to transport cement and a few similar commodities would nullify the commission's intent in granting those rights to vendor's predecessors, by preventing it from providing a complete service, and would lead the way to further divisions of the rights in future, with eventual result that numerous carriers would be authorized to operate to and from the areas involved, each rendering a limited service. To eliminate vendor's retention of any duplicative rights, applicants propose only that certain of its certificates be modified to exclude transportation of the involved commodities, and give no consideration to other authorizing transportation of cement and road construction materials between portions of same areas; their failure to provide for modification of those certificates is a further illustration of the objectionable division.—K-Lines, Inc.—Purchase—Consolidated Freightways, 93 M.C.C. 720 (723-4).

Under proposed division of rights, vendor would retain general-commodity authority over an extensive network of regular routes in much of same territory that vendee would serve under the purchased irregular-route rights; and as many of the general-commodity rights do not exclude bulk commodities, it would be difficult, if not impossible, to determine the extent to which it could continue bulk transportation of cement in States involved after consummation. Also, while most of vendor's regular-route rights exclude bulk commodities, it would retain authority to transport cement in sacks, which alone would permit it to compete extensively with vendee's operations under the purchased rights unless all of its certificates for general-commodity operations in the area were modified to exclude such service. In view of the number of certificates involved and complexities resulting from the transaction, any attempt to modify vendor's rights to preclude rendition of duplicative service would be impracticable and contrary to public interest. Denied.—Id., p. 723.

Though vendee's exhibit of shipments transported under vendor's rights during temporary authority shows only two shipments of steel, additional shipments were transported immediately prior to hearing, and it intends to solicit that traffic upon grant of permanent authority. Its solicitation of steel traffic has been hampered by its reluctance to make a large investment in additional flat-bed equipment which might not be required if purchase were denied, and it has obtained commitments for use of its service by two large steel companies which formerly employed vendor. Vendor's past transportation of such traffic, together with testimony of supporting shippers, establishes need for that service by vendee.—Sierra Distributing—Purchase—F.T.S. Transport System, 97 M.C.C. 294 (303, 305-6); but though vendee has been supporting soap company's "house" carrier on intrastate traffic for 22 years, and it would be a convenience to that shipper to have the same carrier also handle a portion of its interstate traffic, this amounts to little more than preference and falls far short of showing need or necessity.—Id., pp. 303, 305.

Although vendor proposes to retain his specific authority to transport bananas from Baltimore, while selling his right to transport groceries (which includes bananas) from Baltimore to some of same points, he has but one right for the same commodity to and from the same points, regardless of how many times it may be mentioned in his authority. Since Baltimore is the only origin concerned, and vendor was only recently granted his authority for bananas on a separate and distinct showing of need for transportation thereof to a much larger destination area than vendee would acquire, restriction precluding vendee from serving Baltimore as an origin for transportation of bananas, thus leaving intact vendor's separately described right, is preferable to restricting the rights sold to "groceries (except bananas)." However, that conclusion would not necessarily follow if vendor held only "grocery" rights from which he sought to carve out and sell the right to transport bananas.—Subler Transfer, Inc.—Purchase—Zanghi, 90 M.C.C. 911 (916-7).

Sale of Vendor's "Mercer description" rights, restricted against pipestringing, and

retention of authority to transport similar commodities distinguished by an intended-use test, such as "sulphur field" commodities and those used in connection with drilling of water wells, may properly be approved when the split results in a duplication in territory but not in service.—See 75 MCC 135.—Hill & Hill Truck Line, Inc.—Purchase—Hunsaker Trucking, 93 M.C.C. 490 (495).

Since under their separate authorities liquidating carrier now has, and upon consummation of merger survivor will have, a single operating right to transport refrigerated products, meats, and meat products and byproducts between the same points, the parties proposed to exclude those commodities from sale of liquidating carrier's general-commodity rights to a third carrier, to extent that the same points would be served by survivor under its present authority. Such a commodity and territorial restriction would result in a common carrier of general commodities offering and providing less than a completed service; denied, without prejudice to a revised proposal under which vendee would purchase the operating rights directly from liquidating carrier, or would purchase all of survivor's rights to transport the same commodities between the same points.—Gene Adams Refrigerated Trucking Service, Inc.—Control, 90 M.C.C. 687 (691, 692)*.

While the commission is generally averse to retention, by a seller of general-commodity authority, of right to continue transporting specified commodities, it has occasionally approved separation from general-commodity rights of distinct types of service such as rights to transport household goods or bulk petroleum products. Not only does instant vendor hold separate authority to transport "refrigerated products," but such transportation involves a distinct type of service generally recognized in grouping carriers. Vendee does not operate or desire to operate mechanically refrigerated or temperature-controlled vehicles or desire to supply refrigeration in any way, whereas vendor would continue providing such specialized service. Approval of purchase of vendor's general-commodity authority is therefore conditioned on modification thereof to except "articles moving under refrigeration."—Tiger Exp., Inc.—Purchase—Gene Adams Refrigerated, 93 M.C.C. 432 (436-7)*.

Considering the myriad commodities capable of movement under the generic description "general commodities," any attempt in a §5 proceeding to cancel those commodities which a carrier had not transported, or had not handled in sufficient quantities to be a competitive treat to any particular carrier, would be an insurmountable task, and resulting certificates acquired by purchasing carriers would eventually become mere commodity lists. The commission has frequently refused to pulverize a general-commodity certificate by cancelling individual commodities, except under unusual circumstances; cancellation of acquired carrier's authority for textiles would not be warranted when there is no showing that it has ever refused to transport that traffic or that its operations to and from the areas involved have not been commensurated with its resources and the traffic available to it.—Watkins Motor Lines, Inc.—Control and Merger, 90 M.C.C. 567 (583-4).

Since applicants have stipulated to a restriction of liquidating carriers' general-commodity rights against transportation of household goods, and the evidence does not disclose any such service by them over an extended period, nor any public need for revitalization of such operations by survivor, merger approval is conditioned accordingly.—Murphy Motor Freight Lines, Inc.—Control and Merger, 90 M.C.C. 535 (537, 545).

There appears to be no reason for imposition of a bulk-commodity restriction on one of acquired carrier's general-commodity certificates, or for broadening restriction in another against transportation of "liquid commodities, in bulk, in tank vehicles" to read "commodities in bulk," in absence of evidence that failure to do so would adversely affect competing carriers. However, as it appears that that carrier owns no tank vehicles and has not engaged in transportation of bulk liquids, to protect protestant and other competing carriers approval of control is conditioned on restric-

tion of the first-mentioned certificate to exclude liquid commodities, in bulk, in tank vehicles.—Atlanta Motor Lines—Control—Atlanta-Ashville Motor, 93 M.C.C. 160 (165-6).

Principle that a carrier holding general-commodity authority should not be expected to show that it has transported each and every commodity embraced therein is not pertinent as to classes of commodities usually excepted from that authority, such as bulk commodities, household goods, heavy commodities, and class A and B explosives, all of which involve services in specialized fields of transportation for which general-commodity carriers are normally not equipped, and each of which alone is important enough to support carriers who have invested large sums for appropriate equipment and other facilities. No less should be expected of applicants in showing a vendor's past exercise of its rights to transport those commodities or the need for their revitalization by a vendee than would be required of specialized carriers involved in a transfer of like rights.—Gillette Motor Transport, Inc.—Control—Voss, 90 M.C.C. 663 (665, 669)*.

Though acquired carrier's general-commodity rights for certain routes contain no exceptions, evidence of its lack of special equipment and its past transportation of only a few shipments within each of four specific classes, most of which did not require special equipment, warrants conclusion that such rights are dormant as to those classes; and that conclusion is not overcome by the mere indication that it may have held out a service to the public on those commodities. In absence of any shipper evidence indicating that existing services in the area are inadequate to meet all needs for the specialized transportation involved, control authority is conditioned on exclusion from acquired carrier's general-commodity rights the four classes of commodities listed.—Id., pp. 666-7, 669.

Dangerous explosives, household goods, bulk commodities, and commodities requiring special equipment are not of type normally included in the generic class of general commodities, and that some of them may be transported in same vehicle with general commodities is not controlling; thus, whether authority to transport those classes under unrestricted general-commodity rights may survive a transfer of control must be determined on evidence as to past utilization. As acquired carrier is actively engaged in transporting class A and B explosives in t.l. and l.t.l. quantities, though not in large volume, and is equipped to do so, that portion of its authority is not dormant; condition previously imposed requiring exception thereof from the general-commodity rights is eliminated. But since any movement shown of articles of the other three classes could have been performed under authority containing all the usual restrictions, conditioning of control approval on exception of those classes from considered general-commodity rights is affirmed.—Id., 93 M.C.C. 265 (270)*.

Although vendor's general-commodity rights do not except household goods, its abstract shows no shipments thereof, and purchase of those rights is therefore conditioned on exception of household goods therefrom. Also, stipulation between purchaser of the general-commodity rights and purchaser of vendor's rights for chemicals and similar commodities, which would further restrict the general-commodity rights to exclude acids and chemicals, is acceptable as eliminating duplications; purchase approved accordingly.—Berman's Motor Exp., Inc.—Purchase—Lang Storage & Trans., 90 M.C.C. 807 (813, 816).

Although there is no evidence that vendor has transported dry chemicals in bulk, it has transported large amounts in containers, and restriction of purchase of its bulk rights to handling of such commodities in liquid form in tank vehicles is not warranted, particularly as it is not shown that protestants will be harmed if the rights remain intact in vendee. Dry bulk transportation is highly specialized, is required by relatively few shippers, and requires extensive facilities for loading, unloading, and storage, which tends to retard its use by shippers and receivers. If the rights were restricted as proposed and shippers then decided to ship dry chemicals in bulk,

vendee would be deprived of a large portion and perhaps all of the dry chemical container traffic which vendor now enjoys; so to restrict a highly specialized service on a special class of commodities would be undesirable in public interest.—Id., p. 815.

Proposed splitting off from vendor's general-commodity rights of authority to transport bulk liquids in tank trucks may not be approved, although the bulk-commodity service bears no relation to vendor's normal general-commodity operations and is directly complementary to vendee's bulk operations, when vendor conducted no bulk-liquid operations prior to purported lease of equipment from vendee (now found to constitute an unauthorized lease of vendor's operating rights), since which time all such traffic has been under the control and influence of vendee. Vendee's service under those rights would be a specialized service distinctly different from any provided by vendor, for which no public need is established; denied.—Tank Lines, Inc.—Purchase—S & N Freight Line, Inc., 90 M.C.C. 381 (386)*.

As vendees have agreed that commodities in bulk, in tank vehicles, be excepted from any general-commodity authority acquired in their respective purchases, and "commodities in bulk" embraces movement in tank vehicles, the only general-commodity authority of vendor not already so limited will be restricted to exclude "commodities in bulk."—National Transp. Co.—Purchase—Hartford Transp. Co., 97 M.C.C. 206 (214-5)*; also, when vendors have not been transporting liquid asphalt, in bulk, in tank vehicles, under their authority to transport asphalt and vendee is agreeable to a restriction precluding rendition of such service, purchase approval is conditioned accordingly.—H. Prang Trucking Co., Inc.—Purchase—Hyer Trucking, 93 M.C.C. 695 (702); and since survivor has no tank or hopper type equipment, has never handled bulk commodities requiring such equipment, and is willing to accept a restriction on acquired rights against transportation of building materials, in bulk, in hopper type vehicles, merger approval is conditioned accordingly.—Youngstown Cartage Co.—Control and Merger, 93 M.C.C. 318 (331).

Vendors' operating rights authorize transportation of the usual class of commodities embraced in heavy-hauler certificates, and it would be contrary to orderly regilation to exclude aircraft and missiles therefrom, as urged by one protestant, leaving in the purchaser rights to transport the other commodities.—Aero Trucking, Inc.—Purchase—Kreitz, 93 M.C.C. 115 (120, 121); however, in accordance with vendee's stipulation with one protestant, approval of purchase of vendor's heavy-hauling rights is conditioned on restriction thereof against transportation of steam shovels, cranes, and certain types of construction and moving machinery from Benton Harbor, Mich., to points in four States.—C & H Transp. Co., Inc.—Purchase—Gulf Southwestern Transp., 90 M.C.C. 636 (641).

As vendors are not shown to have transported any trailers "designed to be drawn by passenger automobiles" under their permits as automobile haulers, and vendee has stipulated willingness to accept a restriction against transportation thereof, purchase approval is conditioned accordingly.—Anchor Motor Freight, Inc.—Purchase—Anchor Motor Freight, 93 M.C.C. 778 (781).

While vendee's proposed purchase of all driveaway rights to be acquired by affiliated vendor through proposed merger presents no problem as to section of certificate authorizing only such rights, separation of driveaway from truckaway rights in section authorizing both in the same territory would be objectionable. The commission has consistently viewed with disfavor the creation of two independent and competitive operations out of a single operating right; and fact that both operations would be under same ultimate control does not alter the situation materially, since there would be nothing to prevent future sale of the rights of one or both to persons independent of vendor or vendee or their affiliates. Moreover, though much of the objectionable split is eliminated by exclusion of rights found to be dormant, the bulk of liquidating carrier's active rights would accrue to vendee through the purchase, and it is highly doubtful whether under those circumstances vendor would be able to meet its obligations under the

merger contract. Denied.—Dealers Transit, Inc.—Purchase—Industrial Transit, Inc., 90 M.C.C. 873 (882).

Though acquiring carrier's area of regular-route general-commodity operations partially duplicates acquired carrier's irregular-route authority for small boats, boat shippers are particular as to type of equipment used and method of securing or nesting them for shipment, and it is doubtful that they would tender such traffic to a general-commodity carrier without crating, which would make such transportation uneconomical and prohibitive in cost. In view of the highly specialized nature of acquired carrier's authority, the area of duplication is not substantial enough to warrant restricting acquiring carrier's general-commodity authority against transportation of boats.—Long Transp. Co.—Control—Marine Transit, Inc., 90 M.C.C. 261 (267).

As no operations are shown under vendor's irregular-route authority for agricultural commodities, purchase approval is conditioned on cancellation of such rights.—Gordons Transports, Inc.—Purchase—Hayes Freight Lines, 90 M.C.C. 351 (360).

45. Control.—[Vols. 11-19].—Common control of motor carriers and forwarders, see §411, n. 2.

While the order of the commission in issue, on its face, only purports to grant Southern Ry. the right to acquire the stock, and thus the control, of Central of Georgia Ry., viewing the language of the report on which it is based, that order authorized the Central to surrender its yards and facilities which resulted in termination of employment of certain of the Central's employees.—Switchmen's Union v. Central of Georgia Ry. Co., 341 F. 2d 213 (215-6)*; Brotherhood of Railway & Steam. Clerks v. Southern Ry. Co., 341 F. 2d 217 (218-9).

In considering Chesapeake & Ohio's application to acquire control of Baltimore & Ohio the commission was bound to consider whether it would be consistent with the present policy of Congress as expressed by the Transportation Act of 1940, whether it would be detrimental to or inconsistent with the public interest, the interest of labor, and whether overall desirable ends would be served. The commission's report finding the proposed affiliation consistent with public interest states that it took into consideration all the matters required by §5(2)(c) and concluded from the evidence that all the criteria necessary for its approval had been satisfied. The commission's action was not arbitrary, capricious, or an abuse of its discretion, and its findings are supported by substantial evidence on the whole record; order of approval sustained and temporary restraining order dissolved.—Broth. of Maint. of Way Employees v. United States, 221 F. Supp. 19 (23-24, 30)*.

The commission's original report makes clear that the main basis for denial of control application was its general policy against the splitoff of interstate from corresponding intrastate rights, and that the unlawful control therein found was not considered so serious a violation as to bar approval of control if it could otherwise be found consistent with public interest. The commission is as well if not better equipped than the court to decide whether or not to apply the general policy against splitoffs, or to apply the one recognized exception, i.e., that applications resulting in approval of splitoffs would not be automatically denied where the parties before the commission were not responsible for the splitoff. Having considered the admonition in 371 US 115 that its function in cases of unlawful control is to correct, not to punish, and having found that the parties before it had not been responsible for the splitoff and that the proposed control was a possible step toward permanent reunification of a significant part of acquired carrier's severed rights, which would be an improvement on the status quo, the commission's final action in approving such control cannot be said not to have a rational basis. The order sustained.—Alamo Exp., Inc. v. United States, 239 F. Supp. 694 (698-9)*.

In an acquisition-of-control transaction, the applicant is the party who proposes to acquire; the carrier being acquired is not a party, and the unique limitations as to a mutually acceptable voluntary merger do not apply. The commission's responsibility is not that of a court sitting to enforce a

contract, but is to determine whether, on the statutory standards relating to public interest, it will approve acquisition on the proposed or modified terms, and it has the power and the duty to impose such terms, conditions, and modifications as it finds just and reasonable; its order, therefore, is permissive only.—Walker v. United States, 208 F. Supp. 388 (395)*.

Though percentage of stock ownership in a carrier, alone, does not necessarily establish control, a relatively small percentage of the total outstanding stock may be sufficient to create power to control, particularly when the owner thereof holds the largest single block of shares and the remainder are widely diffused.—Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122 (195)*.

Effectuation of control over a carrier as result of the carrier's acquisition of its own stock is a transaction within scope of §5(2); and increase in a carrier's proportionate ownership of stock of a carrier already controlled through majority stock ownership, which results in ownership of a proportion of the total stock required by applicable State statute for approval of certain corporate actions of the controlled carrier, constitutes an acquisition of further control over which the commission has jurisdiction under §5. The test of whether a change in kind or degree of existing control constitutes an "acquisition" within §5 is whether it accomplishes a significant increase in power of the controlling party over the controlled, such as an increased voice in management, or the ability to accomplish financial transactions or operational changes with greater legal ease.—New York Central R. Co. and Alleghany Corp.—Control, 320 I.C.C. 271 (274).

Since Pittsburgh & Lake Erie's stock purchase program and consequent reduction in its outstanding capital stock will increase New York Central's proportionate ownership thereof to over two-thirds of the total shares, and considering provisions of Pennsylvania and Ohio laws requiring approval of not less than two-thirds of the Pittsburgh's stockholders for consummation of corporate mergers, leases, purchases, and charter amendments, the increase in Central's proportionate holdings constitutes an acquisition within terms of that test. As the purchase and retirement of the Pittsburgh's stock will not unduly impair its capital or adversely affect its ability to serve the public, and the increase in Central's proportionate ownership will strengthen affiliation of the two carriers with each other and with Alleghany Corp. (which controls Central), the transaction is approved.—Id., pp. 273, 274-5.

Control, within meaning of the act, is defined to be the power or authority to manage, direct, superintend, restrict, govern, administer, or oversee; and an affirmative demonstration of this power to dominate or influence is not necessary.—Illinois Central R. Co.—Control—John I. Hay Co., 317 I.C.C. 39 (52).

Where two railroads, through a wholly owned subsidiary, seek to acquire stock control of a competing bargeline, finding is warranted that it would be under their complete domination and control and that insofar as its overall policies are concerned it would not be independent, when directors of the existing subsidiary, which through liquidation would acquire and operate the water carrier properties, hold and would continue to hold director and officer positions with the railroads; the bargeline's present key officers and personnel, if retained, would be subject to domination by such railroad board of directors; and even if neutral directors could be elected it would be unreasonable to assume that the railroads would permit selection of any officer or director who would not be amenable to their control.—Id., pp. 52-3.

Baltimore & Ohio's properties are in poor physical condition and need rehabilitation so that its operating expenses can be reduced and its earnings increased; unless major improvements are undertaken immediately, its ability to compete with other railroads and other transportation modes will be seriously jeopardized. Failure of B & O to survive would deal a heavy blow to the shipping public in the 13 States and District of Columbia it now serves, and would compound inconveni-

ence of travelers by eliminating its already greatly curtailed passenger service. Chesapeake & Ohio, if authorized to control B & O, is able and willing to provide the financial assistance needed to restore its properties to essential standards; approval will result in financial strenthening of B & O and permit it to make improvements necessary to provide adequately the transportation service reasonably to be expected of it.—Chesapeake & O. Ry. Co.—Control—Baltimore & O. R. Co., 317 I.C.C. 261 (290-1)*.

Under C & O Control Substantial savings in expenses can be effected in the near future through use of joint facilities and personnel and pooling of equipment; proposed rehabilitation program will permit B & O to offer improved service and enable it and C & O to compete more effectively with private and for-hire motor carriers and bargelines; as result of the affiliation B & O will eventually become a stronger railroad and efficiency and economy of its operations will be increased. The transaction will also enable C & O to diversify both in traffic and territory so as to remain financially sound; as B & O has more merchandise traffic, serves major industrial cities and ports not served by C & O, and its coal traffic is more complementary than competitive, affiliation will create new opportunities for C & O, as well as enabling it to invest its surplus funds in a carrier that has potentiality for future growth. The transaction will be beneficial to the public; approved.—Id., pp. 283, 291, 293.

Approval of acquisition of direct control of the Lehigh Valley by the Pennsylvania is warranted when estimated savings thereunder offer the only feasible method available for alleviating the Lehigh's precarious financial condition; control by the Pennsylvania is necessary to protect its investment in the Lehigh, and contemplated economies can be accomplished more readily under single management of both railroad properties. Although full coordination, further improvements in service, and additional economies could be realized by merger of the two carriers, proposed control will result in improved service to the public; and between eastern points and Buffalo, where the Pennsylvania and the Lehigh now compete, the more direct routes available via the Lehigh will attract additional traffic, thereby further enhancing its financial condition.—Pennsylvania R. Co.—Control—Lehigh Valley R. Co., 317 I.C.C. 139 (149).

Control of the Ann Arbor by a member of the Pennsylvania system to which its lines are complementary instead of directly competitive will promote public interest by bolstering its traffic and revenues, will have a favorable effect on transportation service through improvement of its ferry fleet, and will result in more adequate, efficient, and economical transportation. It is unlikely to change in control could have any adverse effect on any realinement of major railroads involved in pending merger and acquisition cases; rather, the transaction should strengthen abilities of both applicant and the Ann Arbor to withstand the increased competition which could result from those proceedings. Approved.—Detroit, T. & I. R. Co.—Control—Ann Arbor R. Co., 317 I.C.C. 619 (626, 627)*.

Pennsylvania R. directly or through a subsidiary holding company owns a majority of capital stock of both the Wabash and applicant Detroit, T. & I. R., and shares control of latter with the Wabash; though applicant and the Wabash are independently operated and neither is the alter ego of the other or of the Pennsylvania, neither is independent of the Pennsylvania's ultimate control, and it is unlikely that either would have entered negotiations for transfer of stock control of Ann Arbor R. from the Wabash to applicant except at parent carrier's direction. Proposed transaction is not one entered into at arm's length by two entirely independent carriers, but is designed to strengthen the Pennsylvania system by rearranging the Ann Arbor's corporate ties and increasing its attractiveness to shippers. Such a transaction, though involving units of same carrier system, is subject to the commission's approval, even though joinder of the Pennsylvania as the real party in interest is not required.—Id., 320 I.C.C. 325 (327-8)*.

Control of Central of Georgia by Southern Ry., to which Central's lines are predominantly complementary, will permit substantial economies through more efficient use of equipment, consolidation of yards, and coordination of schedules; such economies will redound to benefit of the public in improved services and establishment of lower rates. Central is a marginal carrier whose earnings have been declining, and control by Southern will strengthen it financially, enable it to modernize its facilities, and afford it Southern's cooperation in attracting new industries to its lines; as it is a small carrier compared to its railroad competitors, it will be enabled to compete more effectively for traffic moving in its territory. Proposed control will promote public interest in preservation of an adequate transportation system; approved.—Southern Ry. Co.—Control—Central of Georgia Ry. Co., 317 I.C.C. 557 (560, 569)*.

Acquisition by Seaboard Air Line of joint stock control, with Atlantic Coast Line and Richmond, F. & P.R., of Richmond Term. Ry., thereby enabling it to discontinue use of its Main Street station for passenger traffic and to use instead Terminal's Board Street station, located in a less congested section of Richmond and with better public transportation and parking facilities, approved; proposed transactions will improve transportation service to the public by concentrating all north-south passenger service in one station, eliminating one trainstop in Richmond, will eliminate interference with and delay to freight service and yard movements between Hermitage Yard and Main Street station occasioned by switching and inspection of passenger-train equipment, and will provide Seaboard's passengers with a more convenient terminal.—Seaboard Air Line R. Co. Control, 312 I.C.C. 803 (804, 808)*.

In determining the question of control, the commission is warranted in disregarding corporate forms and viewing the substance of the situation in order to prevent defeat of the regulatory purposes of the act. Generally, "control" is defined to be the power or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee, and is frequently considered synonymous with management. There are different types of control, such as absolute control, joint control, direct or indirect control, and actual as distinguished from legal control. Existence of legal control in one person does not preclude concurrent existence of actual control by another through acquiescence of, or a management contract with, the former; and where power of control exists, the fact that such power has not actually been exercised does not alter the situation. Further, though family relationship alone does not show control or power to control, it is a factor to be considered.—Abramowitz—Investigation of Operations, 94 M.C.C. 213 (218, 219).

As the individual who controls applicant concurrently granted contract-carrier permit also controls another contract carrier which, in embraced proceeding, applicant seeks authority to control, the control sought was actually existent when applicant was operating purportedly as a private carrier. No cash or stock exchange would be involved, since applicant's president already controls both parties to the finance transaction, and there is no duplication of authorities involved; approval of continuance of existing control is in the public interest.—Petroleum Marketing Co., Inc., 94 M.C.C. 782 (783, 788).

The term "control," as used in §5, includes the power to control and its demonstrative existence need not be shown.—Southern Tier Stages, Inc.—Purchase—Capitol Bus Co., 93 M.C.C. 793 (798); control or management of two or more carriers can be accomplished through affiliation between the carriers themselves or between persons affiliated with such carriers. And once such affiliation is established the conclusive presumption of §5(5) applies, namely, that the control or management of one in common interest with another has been accomplished.—Nigro Freight Lines, Inc.—Purchase—Coady Trucking Co., 90 M.C.C. 113 (119); Stewart—Investigation of Control, 87 M.C.C. 681 (694); similarly, definitions of "control" in §1(3)(b) and §5(4) make it practically synonymous with power to con-

trol, and §5(4) is violated when power to control is obtained, even without affirmative demonstration thereof.—Thurston Motor Lines, Inc.—Purchase—Union Storage, 90 M.C.C. 595 (597, 598)*.

When neither vendor's present nor its prior controlling stockholder could have financed his purchase of its stock without vendee's controlling stockholder's guarantee of the bank loans to each, vendee's stockholder, either personally or through his direct power to control vendee, held virtual power of life or death over vendor during considered period, as he could have terminated its operations by (1) refusing to continue his guarantee of the notes upon expiration of any 90-day period, (2) causing vendee to withhold the interline traffic which was the major part of vendor's business, or (3) causing vendee to seek judgment on the past-due interline account owned it by vendor. While an interline debt between carriers is not of itself evidence of a relationship involving control, it may become so when the creditor permits the debt to accrue far beyond debtor's ability to pay it; vendee's stockholder had power to control or manage applicants in a common interest in notwithstanding it was not exercised.—Id., pp. 597, 598.

Elimination of vendee's president as its majority stockholder would not terminate its affiliation with another carrier of which he is also president and owner of 34 percent of its stock, since he and another purchaser of vendee's stock would each own 45 percent thereof and would have power jointly to control it, so that vendee and the other carrier would still be controlled or managed in common interest within meaning of §5.—Azusa Transp. Co.—Purchase—Azusa Transfer Co., 93 M.C.C. 365 (367)*.

Although to a minor degree there are stockholdings in both respondent single-State and multiple-State carriers by persons closely related or affiliated with each other, no single person or group of affiliated persons directly associated with either carrier and also having direct or indirect interests in the other has power to control the latter; purchases of stock in both by the various affiliated persons appear to have stemmed from a desire to invest, not to manage. Moreover, in view of utter dissimilarity of operations of the two carriers, there is no logical reason why the involved persons should desire to control them in a common interest, since there appears to be no advantage in operation or solicitation to be gained by common control.—Pedler—Control—All States Freight, Inc., 90 M.C.C. 491 (496-7).

Whether common control exists is a question of fact which must be determined by the special circumstances in each case; but management of one carrier in interest of another, even though unlawful, does not necessarily imply harm or detriment. Acquired carrier's difficulties are partly due to fact that its corresponding intrastate rights are under long-term leases to two other carriers; and though acquiring carrier has filed application to acquire control of one of the lessee-carriers and indicates intent to reunify, through merger, that portion of the leased intrastate rights with acquired interstate rights, there is no present assurance that it will succeed in acquiring the lessee-carrier. Moreover, reversionary interest in those leased rights is not now in acquired carrier but in one of its former stockholders; what disposition latter may make of the intrastate rights on exporation of the leases, or what effect the §206(a) revision may have on the proviso operations, cannot now be determined. Considered transaction does not meet objections stated in 65 MCC 775 to a prior proposal to transfer the interstate rights; denied.—Central Freight Lines, Inc.—Control—Inland Motor, 90 M.C.C. 777 (787, 788-9)*.

On reconsideration, however, since none of the parties to proposed control transaction were responsible for the severance of acquired carrier's interstate rights from the corresponding intrastate rights through long-term leases of the intrastate rights granted many years before, and none of them had any connection with such separation of those rights, decision in 80 MCC 511, rather than that in 65 MCC 775, is dispositive of control transaction under consideration. Moreover, approval of the control is a step toward possible permanent reunification of a significant part of the

severed rights, and thus would be an improvement over the *status quo;* approved.—Id., 97 M.C.C. 249 (251, 253-4, 255)*.

Following exchange of stock between noncarrier applicant LPI and stockholders of the various carrier and noncarrier companies now controlled by it, the O'Neills, through ownership of a majority of its stock, were in control of LPI and through it controlled those corporations. As control constitutes the strongest form of affiliation, it follows that under provisions of §5(5) the common control or management of the O'Neill companies named in Appendix B and the LPI companies named in Appendix A must be conclusively presumed to have continued following the exchange of stock with LPI to the extent that it existed prior thereto.—Lease Plan International Corp.—Control—National, 93 M.C.C. 173 (183)*.

Effectuation of the LPI transaction was a joint effort of the Mecklers (LPI's present largest stockholders) and the O'Neills, and, considering that they have jointly participated in ventures involving control of motor carriers over a period of some 14 years, it is reasonable to conclude that they are affiliated within meaning of §5(6). That affiliation, viewed in light of fact that the affiliated groups presently own close to a majority of LPI's stock, and the dominance reposed in Meckler as president and chairman of the board, warrants, conclusion that Meckler and the O'Neills are persons in control of LPI within meaning of §5, which conclusion is strengthened by consideration of their long experience in management of carriers and noncarrier leasing companies and of the reliance that would normally be placed on such experience by other stockholders interested in enhancing value of their investments in LPI. The circumstance that the O'Neills have reduced their stockholdings in LPI to less than a majority does not alter that conclusion or make inapplicable the conclusive presumption of §5(5) that any carrier controlled by the two groups, or either of them, would be controlled in common interest with carriers controlled by LPI.—Id., pp. 183-4.

But in view of the O'Neills' divestiture of their stock interest in LPI subsequent to the prior report, finding is now warranted that acquired carrier will be controlled independently of carriers controlled by the O'Neill group, thereby removing the principal objections to the proposed acquisition of control by LPI, and the transaction may properly be approved.—Id., 93 M.C.C. 203 (205-6)*.

Although one vendor is a subsidiary of a holding company which controls numerous local transit companies throughout the country and an interstate property carrier, and that vendor's president was one of organizers of a corporation formed to manage vendee's transit system on a fee basis, utilizing services of himself and 10 other of vendor's key officials, so that purchase would place vendee under management of persons affiliated with another carrier, vendee is an agency created by compact of two States and its ultimate control rests with 10 commissioners representing those States, assisted by an executive director who with his staff would exercise general supervision over its various facilities and properties. In the circumstances, a finding that vendee would be controlled or managed in common interest with carriers controlled by the holding company, or that it would fail to exercise direction and control over the involved motor carrier operations, is not warranted. However, that finding does not constitute approval of any such common control within §5, or of transfer of carrier responsibility to the management company.—Bi-State Development Agency—Purchase—Vandalia Bus Line, 93 M.C.C. 579 (586-7).

Though applicant already holds majority stock control of a Texas carrier under authority from the commission, it has experienced difficulty in operating that carrier as an integral part of its system owing to unwillingness of minority stockholders to put new equity capital into the business or to permit it to buy new shares which would dilute their holdings. Applicant is unwilling to lend the Texas carrier additional funds because its objectives are frustrated by the minority stockholders, and, if the situation is not corrected, further expansion and growth of the Texas carrier will be limited by its earnings, because, with its existing

debt load, it cannot borrow from outside sources. Purchase of all remaining shares outstanding, and operation of the Texas carrier as a wholly owned subsidiary, will enable applicant to accomplish operational, financial, and management transactions with greater ease under Texas law and may properly be approved.—Bekins Van & Storage Co. (Calif.)—Control—Bekins (Tex.), 93 M.C.C. 335 (337-8).

Approval of control of a small-boat carrier by a substantial general-commodity carrier is warranted when a number of shippers testified that they maintained fleets of trucks to effect deliveries because existing service was insufficient or unreliable, but preferred common carriage if sufficiently available; several had used acquired carrier's more limited service in the past, and considered that its recently expanded service had improved under acquiring carrier's temporary control. Evidence supports finding that continuance of such service is needed and would be consistent with public interest.—Long Transp. Co.—Control—Marine Transit, Inc., 90 M.C.C. 261 (265).

Although acquired carrier's 1962 operations under its general-commodity authority consisted to a substantial degree—58 percent of shipments shown in its abstract—of t.l. movements of meats and packinghouse products, the remainder consisted mainly of t.l. shipments of general commodities, and it served a representative number of points in its authorized territory other than Kansas. Under acquiring carrier's management it should be able to perform a more efficient and economical service to the shipping public, and protestants have not shown that their operations would be adversely affected thereby. Control approved.—Southwest Frt. Lines, Inc.—Control—Direct Transports, 93 M.C.C. 439 (447, 450).

Improved trend in acquired carrier's operating results during 12 months under acquiring carrier's control warrants finding that continued operation under such control would meet a public need, except with respect to those portions of its authority under which little or no past operations are shown. Conditional authority granted.—Accelerated Transport-Pony Exp., Inc.—Control—Downing, 87 M.C.C. 711 (716).

Control of carrier whose operations are complementary to its own would assure acquiring carrier of an open way to Savannah and Atlanta, where interline with some 85 carriers for two-line service to a substantial portion of the country would be possible, thus avoiding the danger of its being "bottled up" in Florida. Acquired carrier has experienced serious financial difficulties over a period of years and its resources are exhausted, while applicant is a well-financed carrier with a fairly good earnings record in its property division. Considering the strategic location of authorized territories, past interline, and the distinct probability that proposed control can rehabilitate acquired carrier, approval is warranted.—Tamiami Trail Tours, Inc.—Control and Merger, 90 M.C.C. 499 (454)*.

Approval of joint stock control by three members of Transcontinental Bus System of a new company created to effect concurrently authorized merger of another system carrier, with acquiring carriers' guarantee of a note to be issued by acquired carrier to finance merger, is justified by latter's potential value to those carriers in view of the essential nature of its operating rights as a link between those of its stockholders.—Continental Tenn. Lines, Inc.—Control—Tennessee Coach, 87 M.C.C. 775 (783).

Change in form of existing control, see Transcontinental Bus System case, n. 5, above.

An acquisition-of-control transaction may be proposed under § 5 unilaterally; existence of a contract between applicants and the carriers, or stockholders of the carriers, which they seek to control is not determinative of the result. Opponents of a proposed acquisition of control sometimes present counterproposals, and all are heard and decided is a consolidated proceeding; the public interest is the prime consideration, and in reaching its determination the commission must have regard for all alternative transactions seriously proposed by the parties.—Central Freight Lines,

Inc.—Control—Alamo Exp., Inc., 90 M.C.C. 96 (101)*.

In instant proceeding the commission has refrained from taking any position concerning enforceability of the contracts between the parties, including legal effect on obligations of parties to the initial contracts of acquiring carrier's assignment to its controlling stockholder of its contract to purchase stock of an involved noncarrier; in conformity with its view that such a determination is for the parties themselves or the courts, it accepts applicants' allegation that the contracts could be consummated on the modified basis proposed. Consummation of the transaction partly by carrier applicant and partly by its stockholder as assignee would be consistent with public interest, and terms proposed are just and reasonable; whether the transaction will be consummated, or consummation could be legally compelled by applicants, is not for the commission to decide.—Id., p. 100.

Applications of two distinct groups of individuals, each for authority to purchase up to 50 percent of passenger carrier's outstanding capital stock (from time to time as it becomes available), present no transaction for commission approval. Instead they contemplate actions that may be taken at some indefinite future date, and fail to indicate whether carrier's independent stockholders are required to give either of the groups, or other independent stockholders, first refusal when, or if, they desire to dispose of their stock and, for those reasons, should be dismissed. However, while both groups disclaim control or power to control the carrier, circumstances indicate otherwise; the two groups jointly own 71.4 percent of carrier's stock and, thus, have acquired control of the carrier (unwittingly or otherwise) in violation of §5(4); accordingly, the applications are denied.—Capitani—Control—North Boulevard Transp. Co., 97 M.C.C. 479 (482-4).

Under §5 it is unlawful for any person to effectuate control or management in a common interest of any two or more carriers, however such result is attained, without the commission's prior approval; and where proposed arrangement is clearly within purview of §5(2)(a) it must first be determined that such common control will be consistent with the public interest. In determining whether applicants' proposals would be consistent with the public interest, the resulting number of carriers which would be controlled and managed in common interest cannot be disregarded; to do so would ignore the practicalities of economic regulation and would invite a plethora of similar applications.—Best Transport, Inc., 88 M.C.C. 147 (153-4)*.

While total number of carriers to be operated under common control must be considered, it does not follow that that is the sole criterion; in the past, the number of carriers so operated, without more, has never been considered adequate grounds for withholding approval. It is unnecessary at this time to place an arbitrary limit on number of carriers which may properly be operated under common control; each transaction must be assessed in light of all surrounding facts and circumstances, and each case decided on its own merits.—Id., pp. 154-5; valid business reasons may warrant a multiplicity of corporations in particular circumstances, but it is encumbent on persons seeking authority for enlargement of an already complex system of commonly controlled carriers to establish sound business justifications negating any possible disadvantage to the public; as the number of such carriers expands, applicant logically is required to show more substantial reasons for formation of additional carrier entities than might otherwise be necessary.—Id., pp. 155-6.

Considering historical development of control applicants' present complex of contract carriers, multiplicity of which has been adversely criticized in previous reports, their largely unsupported assertions as to benefits and advantages of maintenance of additional carrier units to serve individual plants of supporting shipper do not justify approval. Rendition of purported contract-carrier service by vast numbers of commonly controlled carriers immeasurably compounds the commission's problem of policing activities of subject carriers so as to preserve essential distinctions between common and contract car-

riage; proposed system of multiple contract carriers will complicate regulation and increase administrative problems and should not be condoned.—Id., pp. 156, 159. [But see dissent.]

Manner in which numerous operating companies would allegedly facilitate compliance with State and other local requirements is not established, and such possibility does not alone warrant authorizing common control of large numbers of carriers engaged primarily in interstate commerce; no need is shown for performance of a complete interstate and intrastate service by a single carrier from each of shipper's plants; possibility of dividing intrastate and interstate operations among separate entities, if necessary or desirable, thus exists.—Id., p. 160; and neither possibility of future labor difficulties nor shipper's threat of engaging in private carriage warrants approval of applicants' proposals; evidence justifies conclusion that shipper's reasonable transportation needs can be as well met by a single carrier capable of providing coordinated services to the plants involved. Denied.—Id., p. 160.

In view of pendency of proceedings seeking to pass control of two of acquiring carrier's existing carrier subsidiaries to the sons of its controlling stockholder, and fact that neither those carriers nor the sons are parties to instant proceeding, also fact that operating rights of carrier sought to be acquired are in an area far removed from any of acquiring carrier's routes though in same general territory as those of the carriers it would transfer to the sons, any present approval of proposed control might well result in two carrier systems controlled by the father which would be geographically separated but joined by another carrier system controlled by the sons; and acquiring carrier's willingness that acquired carrier ultimately be also controlled by the sons is of little moment in present posture of those other applications, which were initially denied.—Ringsby Truck Lines, Inc.—Control—Interstate Freight, 93 M.C.C. 528 (533-4).

Moreover, approval would not only add another corporate unit to acquiring carrier's complex of subsidiaries, in contravention of the commission's policy of encouraging corporate simplification, but would also result in several instances in overlapping of operating authorities which could lead to confusion and undesirable operating practices. Therefore, and depending to some extent upon decision on pending petition for reconsideration of the proposed acquisitions by the sons, instant application is denied without prejudice to submission of a new or amended application for merger of acquired carrier into one of those that would be acquired by the sons. No inference should be drawn from this suggestion as to the commission's opinions on the merits of any such proposal, but, if it is made, it should be done in contemplation of elimination of the various problems, including duplications of authority, corporate complexity, and financial ability of the acquiring parties.—Id., p. 534.

Where acquired carrier's operating rights are largely dormant and no need is shown for reactivation thereof under acquiring carrier's control, and its active rights are almost wholly duplicated servicewise by those of acquiring carrier, the bringing under common control of such duplicative operations should not be authorized unless merger is to follow. And though temporary deferment of merger has been permitted to enable acquired carrier to take advantage of a tax-carry-forward credit that would be lost by merger, acquired carrier in instant case has no tax credit to protect. Preservation of goodwill is not alone sufficient cause for deferring merger, and no valid reason for delay exists; control application denied, without prejudice to amendment or refiling to seek authority for concurrent merger.—Mitchell Bros. Truck Lines—Control—Empire Transport, 93 M.C.C. 38 (43-4, 45, 46).

The commission has frequently withheld approval of transactions resulting in creation, preservation, or extension of duplicate operations by motor carriers under common control, which operations would otherwise be competitive with each other. Certain of acquired carrier's operating rights are dormant and cancellation thereof would be required if proposed control were

approved; its remaining rights are substantially duplicated as to both commodities and territory by those of acquiring carriers, and modification of rights of either carrier does not appear practical. Record does not warrant a different conclusion from that in cases cited; denied.—Dallas & Mavis Forwarding Co., Inc.—Control—Emerson, 93 M.C.C. 563 (566-7).

Control authority denied when acquiring carrier's management under temporary authority has not resulted in profitable operations for acquired carrier, whose revenues have declined to virtually nothing and whose operating deficit has continued; increase in former's revenues during same period is not shown to have been at latter's expense or to have resulted from diversion of traffic from it. More important is the adverse effect shown on acquiring carrier's own profitable operations; during temporary control it has incurred significant and increasing losses, and its management's attribution of such losses to its association with acquired carrier is not refuted; little likelihood appears that it can convert latter's operations into a profitable undertaking, and continuance of control would place an undue financial burden on it and result in improvident utilization of its capital.—Adley Exp. Co.—Control—McFaddin Exp., Inc., 87 M.C.C. 665 (670, 671-2, 673)*.

And although further hearing establishes that acquiring carrier's financial position would no longer be jeopardized by consummation of the transaction, approval of control would still be inconsistent with public interest because acquired carrier's operating rights are not only competitively duplicated by those of acquiring carrier, but have been dormant for over 2-1/2 years, and acquiring carrier is unwilling to consider a merger with acquired carrier at any time.—Id., 93 M.C.C. 378 (379, 383-4)*.

The sole evidence presented to show consistency with public interest of proposed control of a new Alabama corporation in common with seven existing carriers all controlled by the same interests is assertion that the new company was incorporated in Alabama to encourage issuance to it of intrastate operating authority; such considerations afford no basis for approval of proposed control (citing 88 MCC 147). Denied.—Schwerman Trucking Co. of Ala., Inc., 88 M.C.C. 495 (499).

Acquiring and acquired carriers and a third are already controlled or managed in common interest as result of authorized transactions; thus, their executives and employees may be directed to use their skill and efficiency in endeavor to rehabilitate acquired carrier, and common use of such personnel would be lawful; if estimated increases in acquired carrier's revenues and net income are realizable, they can be attained without acquiring carrier assuming personal liability of acquired carrier's stockholder as consideration for his stock, and without its making an investment exceeding $200,000 and adding to its burden of long-term debt. Control authority denied.—Jacobs Transfer Co., Inc.—Control—Powell Transp. Co., 87 M.C.C. 706 (709).

Conditions imposed: [Vols. 17-19].—Protection of employees, see n. 70, below.

In view of expressed willingness of Southern Ry. To purchase Central of Georgia's stock from minority stockholders at same prices per share that it has agreed to pay the Frisco, approval of its acquisition of control of Central is conditioned to require that within 30 days from consummation date it shall offer, by notice mailed to each stockholder, to purchase on those terms any and all stock offered it within 90 days from mailing of such notice.—Southern Ry. Co.—Control—Central of Georgia Ry. Co., 317 I.C.C. 557 (558, 570)*.

Control by subisidary railroad of three small railroads and their subsidiaries through purchase of capital stock and in turn by parent railroad and noncarrier holding company through that acquisition, and acquisition by another railroad of one of the acquired railroads through purchase of its capital stock from the subsidiary, approved, subject to conditions for maintenance of existing routes and channels of trade, for protection of employees, and for the filing by noncarrier of annual reports and of such special reports as may be required in the future.—Texas & Pac.

Ry. Co.—Control—Kansas, O. & G. Ry. Co., 324 I.C.C. 309 (310-11, 321-24)*.

While control of Baltimore & Ohio by Chesapeake & Ohio is unlikely seriously to affect ability of other carriers to provide adequate service to the public, it is important that protection be provided for shippers and competing railroads to ensure maintenance of existing routes and channels of trade; approval is therefore made subject to conditions prescribed in 275 ICC 455, plus additional condition to preclude closing of any route with any carrier on account of C & O's control of B & O; those conditions also provide for retention of jurisdiction by the commission for reopening upon application by any interested party for modification of the routes preservation conditions if those imposed fail of their purpose.—Chesapeake & O. Ry. Co.—Control—Baltimore & O. R. Co., 317 I.C.C. 261 (282, 283, 284)*.

But requested conditions that, so far as is within their control, C & O and B & O preserve present rate relations between Baltimore and Newport News, and that they give recognition to importance of Baltimore to the combined system, except insofar as they are included in the conditions for preservation of routes and channels of trade, are not matters within scope of the proceeding. And even though the carriers intend to merge at some future time, the commission cannot indirectly require them to do so by imposing a condition on control approval; nor is such condition shown to be necessary to make the transaction consistent with public interest.—Id., pp. 289-90.

Though approval of the Pennsylvania's control of the Wabash in 247 ICC 365 was conditioned on holding by independent trusts of all stock of Lehigh Valley owned by the Pennsylvania or its subsidaries, that condition was predicated on finding that record therein did not permit determination of whether Pennsylvania's indirect control of Lehigh Valley could be approved, and was expressly designed to suspend its power of control until the matter could be given proper consideration. Proceeding in which the Pennsylvania seeks authority to acquire all of Lehigh's stock, and thereby control it directly, presents occasion for such consideration; Termination of the voting trusteeships has been justified, and approval thereof does not require reopening of the Wabash control case or any change in the findings there made.—Pennsylvania R. Co.—Control—Lehigh Valley R. Co., 317 I.C.C. 139 (148, 149-50).

However, since Pennsylvania's control of Lehigh could result in diversion, to an undeterminable extent, of some traffic of other railroads using Buffalo, N.Y., gateway, approval is made subject to standard routing conditions prescribed in 275 ICC 455.—Id., p. 151.

Although applicants are willing to accept a condition on approval of proposed control of duplicative operations that merger application be filed within 30 days from consummation, and the commission has broad discretion to impose condition on §5 transactions, permissive approval of a transaction under authority of §5(2)(b), subject to condition that after consummation a new and different application be filed, could give rise to administrative problems that should be avoided in absence of more compelling circumstances than those present. While, where immediate merger would cause harmship or difficulty, the commission has permitted delay thereof until the situation would be relieved, merger was not in such cases imposed as a condition on approval, and notwithstanding action taken in 90 MCC 80, that practice should not be extended to situations where, as in instant case, no valid reason exists for delay. Control application denied without prejudice to amendment or refiling to seek authority for concurrent merger.—Mitchell Bros. Truck Lines—Control—Empire Transport, 93 M.C.C. 38 (45-6).

Although acquired carrier transported no shipments from four origins under its 37-State authority for small boats, that authority was barely a year old at time of hearing; its stockholders lacked adequate funds to develop the business; of those origins, shipper at one was negotiating to use its service, acquiring carrier served another under temporary authority, and cancellation of authority for a third would be ineffectual since it is within commercial zone

of a point authorized in another certificate. Considering also that service requirements of the traffic are limited, highly specialized, and seasonal, that the authority was granted in midseason of one year and transfer sought before onset of the next season, and that the carrier actively solicited and held out to perform all service authorized, considered rights should not be found dormant so soon after they were found to be required by public convenience and necessity. Acquired carrier has operated commensurately with its resources, and condition canceling the four origin points as dormant should not be imposed.—Long Transp. Co.—Control—Marine Transit, Inc., 90 M.C.C. 261 (266).

As a condition on approval of proposed control, cancellation of acquiring carrier's dormant authority to transport carpets, rugs, yarn, latex, and textile machinery and parts over a regular route between Atlanta and Rabun Gap, Ga., is required, to eliminate duplication of acquired carrier's authority under its lead certificate to transport general commodities over a route between Atlanta and Asheville, serving Rabun as intermediate point; cancellation of acquired carrier's duplicative and dormant irregular-route authority for the aforesaid specific commodities is also required since no need is shown for its reactivation. In addition, as acquired carrier has not engaged in transportation of bulk liquids, the general-commodity authority in its lead certificate is required to be restricted to exclude bulk liquids in tank vehicles, to protect protestant specializing in such transportation.—Atlanta Motor Lines—Control—Atlanta-Asheville Motor, 93 M.C.C. 160 (161, 164, 166).

Evidence of acquired carrier's operation under its unrestricted general-commodity rights for certain routes warrants conclusion that those rights are dormant as to household goods as defined by the commission, commodities in bulk, and those requiring special equipment. And while none of protestants has shown that it would be materially harmed if acquired carrier were permitted, following consummation of control transaction, to retain and utilize its rights to transport those classes, principle of 80 MCC 511 is controlling. As applicants have failed to show any shipper need for revitalization of those dormant rights under acquiring carrier's control, approval is conditioned on modification of the considered general-commodity rights to exclude those categories.—Gillette Motor Transport, Inc.—Control—Voss, 90 M.C.C. 663 (667-8, 669)*; Id., 93 M.C.C. 265 (270)*.

Although interstate operations of a Texas carrier under single-State proviso would in some respects be directly competitive to those of interstate carrier with which it is commonly controlled, and its separate existence as an operating carrier does not appear justified in view of its close relation to the interstate carrier and the relatively limited scope of their operations, the facts presented do not require imposition on approval of continuance of the common control of a requirement that the proviso carrier's interstate operations shall not duplicate those of its affiliate; however, the parties should consider merger of the two carriers at the earliest possible date.—Adams—Control—Specialized Carriers, Inc., 90 M.C.C. 257 (259).

In approving applicant Central's acquisition of control of a carrier and affiliated noncarrier, with acquisition of stock of a second noncarrier by Central's controlling stockholder as its assignee, it was recognized that Central might, assuming consummation on basis of the assignment, continue to have a contingent liability as primary obligor under the initial contracts calling for its purchase of stock of all three companies, which contracts are binding on its so long as they remain outstanding although, before terms thereof may be given effect, the commission's approval is required; for this reason surety bond was required to protect Central from all future contingencies. Should it be true, as the court suggests, that Central would have no contingent liability in event of consummation on basis of the terms approved, the surety bond would be unnecessary.—Central Freight Lines, Inc.—Control—Alamo Exp., Inc., 90 M.C.C. 96 (102)*.

Authority for continued control of a newly authorized cement carrier is conditioned on prior request by two general-commodity affiliates for modification of their certificates to exclude cement and lime.—Baggett Bulk Transport, Inc., 88 M.C.C. 403 (413).

Although applicant, who controls one carrier, may be authorized to continue managing a carrier owned by members of his family, terms and conditions under which the common management will be conducted in future are not clearly stated, and the arrangement apparently rests largely on mutual confidence arising from the family relationship. Control authority is accordingly conditioned on applicant's entering into a written management agreement with the carrier for not over 5 years, at a nominal compensation of $1 a month, subject to termination at option of either party on 30 days' notice to the other and to the commission.—Murphy—Control—E. L. Murphy Trucking Co., 90 M.C.C. 771 (775).

In accord with the commission's practice of not approving transaction which would result in creation, preservation, or extension of duplicating operations by separate motor carriers under common control, except in unusual circumstances, approval of control is conditioned on cancellation of acquired carrier's rights between two named points which duplicates that of acquiring carrier. However, since applicants were not responsible for prior separation of acquired carrier's intrastate from its interstate rights, cancellation of any duplicate operating rights created as result of such separation is not required; nor, under the substantiality test, is there any basis for a finding of dormancy as to portions of acquired carrier's rights.—Central Freight Lines, Inc.—Control—Inland Motor, 97 M.C.C. 249 (254-5)*.

Although question of whether authority granted should be exercised and any conditions imposed thereon complied with is a matter for decision by the parties, only conditions which can be met at or before consummation are usually imposed.—Ringsby Truck Lines, Inc.—Control—Interstate Freight, 93 M.C.C. 528 (533).

As acquired carrier apparently never transported household goods during the 18 months for which all of its traffic is of record, and none of its traffic is shown to have consisted of merchants' stock in trade or fixtures which had been purchased at auctions or bankruptcy sales, its specific rights for those commodities are dormant and are required to be canceled as a condition on control approval.—Aero Trucking, Inc.—Control—Friedman Transfer, 93 M.C.C. 342 (349); similarly, approval of control is conditioned on cancellation from authority held by a carrier commonly controlled with acquired carrier of its duplicative rights to transport specified commodities between points in Georgia.—Tamiami Trail Tours, Inc.—Control and Merger, 90 M.C.C. 449 (454-5)*.

Since acquired carrier's operations between King City, Mo., base area and points in Kansas, other than Kansas City, have consisted predominantly of unauthorized cross-haul movements between points in its radial territory and must therefore be considered virtually dormant, it would be inconsistant with public interest, in absence of any evidence of need for revitalization thereof under acquiring carrier's control, to approve the transaction without requiring cancellation of that portion of acquired carrier's irregular-route rights; and as it admits it has not exercised its rights to transport household goods, and acquiring carrier indicates that its authority to transport coal and emigrant movables would not be utilized, those rights are also required to be canceled. Also, in absence of evidence that it has transported any commodities usually excepted from general-commodity authority under certain regular-route rights, approval is further conditioned on restriction of its present broad authority to embrace the usual exceptions.—Southwest Frt. Lines, Inc.—Control—Direct Transports, 93 M.C.C. 439 (449-50).

Although acquired carrier's authority is partially duplicated by that of carrier applicant already controls, and no extenuating circumstances are shown to warrant departure from principle of 35 MCC 521, where continued maintenance of the separate corporation is justified cancellation of the duplicating rights of one or

other of the commonly controlled carriers may be required; and such condition may concern corporations which are not parties to the proceeding. Therefore, since applicant is the moving party, it is appropriate that condition requiring cancellation of the duplicative rights be imposed on authority of the carrier he now controls, particularly since, insofar as area of duplication is concerned, it holds the lesser authority. If such condition is not acceptable, the parties have option of not consummating the transaction.—Norris—Control—Hatcher Trucking Co., Inc., 90 M.C.C. 31 (34).

In absence of evidence to overcome the conclusion of dormancy as to those portions of acquired carrier's irregular-route rights under which no operations are shown, it cannot be found that reactivation thereof under acquiring carrier's control would be consistent with public interest; control authority is therefore conditioned on cancellation of its operating rights other than those specified.—Ashworth Transfer, Inc.—Control—Hawkes Transp. Co., 87 M.C.C. 653 (661)*.

Conditioning of control authority on cancellation of described portions of acquired carrier's irregular- and regular-route rights, under which operations have been substantially dormant, practically eliminates any question of preservation of duplicative operations by separate carriers under common control. Acquiring carrier desires to maintain the separate entities until completion of payments under the stock-purchase contract, which would defer merger for at least 7 years without any clear indication that it would be sought at that time; the substantial duplications in the carriers' operating rights, together with deferment of merger for such a lengthy and indefinite period, would require denial of control application in entirety if that condition were not imposed.—Accelerated Transport-Pony Exp., Inc.—Control—Downing, 87 M.C.C. 711 (724, 725).

Other than stock ownership: [Vol. 19].—Whether control or management of two carriers in a common interest has been accomplished cannot be determined according to a set formula, or by reason of stock ownership alone. It can be accomplished through the relationship of the carriers and their officers, directors, and stockholders, their operating practices, and other circumstances bearing on the degree of the relationship. Where the relationship of the persons controlling one carrier amounts to affiliation, as defined in §5(6), with persons purported to control another carrier, there arises a conclusive presumption under §5(5) that control or management of the carriers in a common interest has been accomplished.—Southern Tier Stages, Inc.—Purchase—Capital Bus Co., 93 M.C.C. 793 (797); Kaplan Trucking Co.—Control—Thomas Boyd, Inc., 90 M.C.C. 419 (424)*.

Persons who participated as principals in effectuation of unlawful common control of two carriers are long experienced in matters pertaining to motor transportation and are not new to §5 proceedings; there can be no mitigating circumstances which would allay the seriousness of a violation purposely conceived to evade a proceeding under §5, as was purchase of the second carrier's stock by the son of one of the brothers who control the first. Application by the father of the second carrier's stockholder for authority to control that carrier through service as its vice-president and member of its board of directors is therefore denied.—Ship-By-Truck Co. v. Crouch Bros., Inc., 93 M.C.C. 89 (90, 103).

On reconsideration, authority is granted for control through management by son, who controls two common carriers, of contract carrier rights acquired by his mother as sole legatee of estate of her deceased husband on the basis of revised terms presented, including a revised employment agreement limited to 2 years, and elimination of certain objectionable dual operation features.—McNichol—Purchase—McNichol, 90 M.C.C. 429 (430-31)*.

Though family relationships do not of themselves establish common control or management, or power to control or manage, they are factors to be considered in light of other evidence. The question of whether common control or management exists in such a case is one of fact and must

be determined by the special circumstances of each case.—Helm's Exp., Inc.—Purchase—Keystone Transfer Co., Inc., 90 M.C.C. 679 (683-4).

President and principal stockholder of carrier sought to be acquired (to which certificate have been granted but not yet issued) is also vice president of acquiring carrier (whose president and principal stockholder is his father) and actively manages operations of both; thus, acquiring carrier's control of acquired carrier has already been effected through the son's management; in addition, a third carrier which former lawfully acquired control of in an earlier proceeding is operated in common interest with it. The close family relationship between the father and son who respectively direct the financial and operational aspects of the enterprise penetrates all operations of the three carriers and compels conclusion that the two have effectuated common control of those carriers.—Colonial Motor Freight Line, Inc.—Control—Central, 90 M.C.C. 441 (442-3).

However, there is no obstacle to continuance of such control; there is no evidence of bad faith or connivance on part of individual applicants, and the three carriers do not compete, as acquired carrier operates a bulk service exclusively and the other two are general-commodity carriers whose operations are complementary. No protestant has shown that it could be hurt by joining of either acquired carrier with acquiring carrier and common operation of all three would not alter the situation. Control through management and resulting common control, approved.—Id., pp. 443-4.

Although applicant, who controls one carrier through stock ownership, unlawfully acquired control of a second owned by members of his family when he participated in management thereof, the record leaves no doubt that the operating and financial affairs of the second carrier were in serious condition and that applicant acted in an effort to rescue a family controled business. As a result that carrier has been provided with more efficient management and financing required for its rehabilitation; in the circumstances, applicant's continued management of that carrier under common control with his own may be found consistent with public interest.—Murphy—Control—E. L. Murphy Trucking Co., 90 M.C.C. 771 (774, 775).

See also Weyerhaeuser Co. Merger, n. 5, above.

Violations of §5(4): [Vol. 19].—While it is not unusual for independent carriers to share terminal facilities, repetitions of such practices throughout the systems of carriers controlled by brothers who are also stockholders and directors of a family corporation which owns the terminals makes their alleged independence suspect; and when those practices are supplemented by further day-to-day practices integrating business, equipment, and managerial policies, the commission is justified in concluding that the carriers are in fact being managed and controlled in a common interest. Since §5(4) proscribes control effectuated in any manner whatsoever without commission approval, the commission was within its statutory authority in finding that such unauthorized common control violated the act. Judicial review of this conclusion is limited to consideration of whether it has a rational basis and is supported by substantial evidence; the commission's finding is warranted by the evidence; sustained.—Gilbertville Trucking Co. v. United States, 371 U.S. 115 (120, 125, 126)*.

The commission is charged by §5(7) with choosing the proper remedy for the violation; and the challenged order of divestiture was within scope of its power; therefore, judicial review is limited to ascertaining whether the commission made an allowable judgment in its choice of remedy. Prerequisite to such review is evidence that a judgment was in fact made, that the parties were heard on the issue, and that the proper standards were applied; no such procedure was followed.—Id., p. 130.

Evidence shows the violation arose, not only from acquisition of a carrier, but also from subsequent practices that could conceivably be discontinued without

divestiture. Without inplying that divestiture would be unwarranted after proper treatment of the issue, mitigating circumstances of record indicate that a doubt can be raised, and that a remand to the commission is not purely academic for sake of procedural regularity. When the commission has exercised its judgment and issued its considered opinion, the remedy chosen will be ripe for review; district court's judgment reversed in part and the case remanded for further proceedings.—Id., pp. 130-1.

In action for breach of contract for joint ownership and management of defendant railroad terminal company, which contract had been approved by the commission, there is more than a merely colorable contention that conduct complained of violates §5(4); defendants' "freezing" of terminal company's management contrary to the approved plan amounts to entering into a transaction to accomplish or effectuate control or management of the company in a manner different from that authorized by §5(2).—Florida East Coast Ry. Co. v. Jacksonville Terminal Co., 328 F. 2d 720 (722-3)*.

See also McFaddin Express, Inc. v. Adley Corporation, 363 F. 2d 546, 28 USC §1331, n. 4.

Evidence was sufficient to justify jury's verdict that appellant, a stockholder in motor-carrier teansferor, and also a practitioner before the commission, conspired to defraud the United States and to commit offenses against the United States by causing material false statements and representations to be made in connection with an application on form BMC-76 to transfer a portion of the carrier's rights and by effectuating its control and management in a common interest with another motor carrier operated by another of transferor's stockholders without obtaining the commission's approval, in violation of §5(4). There was evidence to justify the jury's inference that appellant was inextricably intertwined in the entire project of passing transferor's rights into control of the other carrier from the time he learned of latter's need therefor through his representation of a third carrier; his conviction under 18 USC §1001, on all three counts of the indictment, affirmed.—United States v. Polin, 323 F. 2d 549 (553-54, 558-60).

The [former] second proviso of §206(a) must be construed in light of other pertinent provisions of the act, particularly §5(4), and it was proper for the commission to consider prior illegal control of acquired single-State carrier in a §5(2) proceeding. Evidence showing that individual controlling a multistate carrier financed acquisition of the intrastate carrier's stock by its present owner, and showing a pattern of participation by him in its subsequent management, in addition to financial control which itself showed power to exercise control, together with lack of participation in management and general ignorance of its operations by its stock owner, amply support the commission's conclusions that illegal common control of the two carriers was effected prior to acquired carrier's filing of its BMC-75 statement, that its second-proviso status was therefore void from the beginning, and that the transaction was not within scope of §5. The commission's order dismissing the §5 application, sustained.—Hart v. I.C.C., 226 F. Supp. 635 (639, 641-2)*.

Increase in New York Central's majority stock ownership of Indiana Harbor Belt from 60 to 79.8 percent, thereby giving it more than the two-thirds' majority voting power required to accomplish certain transactions under Indiana law, was unlawfully accomplished without the commission's prior approval; even though the increased degree of control is subject to reduction to 51 percent by reason of stock-purchase option granted the Milwaukee, the minority stockholder, unless and until that option is exercised the increased power to control will remain with Central. However, since the violation occurred through an honest misunderstanding of the law, and application was filed promptly when the question of jurisdiction was raised, denial on that ground is not warranted.—New York Central R. Co. and Allghany Corp.—Control, 321 I.C.C. 284 (287, 288).

Paper company (subsidiary of a timber company already controlling three short-

line railroads) acquired option to purchase 27.2 percent of outstanding of a fourth short railroad, on understanding that it would offer to buy the remainder at the same price, and after purchasing the stock deposited it with a bank as voting trustee, concedely to avoid provisions of §5. To find that those provisions can so easily be avoided by such a device would render §5 meaningless: transactions could be fully accomplished for all practical purposes, leaving for commission consideration, as in instant case, merely the discharge of the trustee. Placing of voting stock in the hands of a trustee does not necessarily divest beneficial owner of the power to control: trustee is not shown to have participated in control or management of the carrier, and fact that no carrier officer, director, or employee receives remuneration from the timber company, or its subsidiaries, has little bearing on its power to control the rail carrier, which is dependent for 80 percent of its traffic and 85 percent of its revenues on the paper company, the beneficial owner of 94.7 percent of its capital stock.—Georgia-Pacific Corp.—Control, 320 I.C.C. 115 (117-9).

Control of acquired carrier in common interest with the other railroads controlled by applicants was thus accomplished in violation of §5(4), and the voting trust did not end the violation, since both the carrier and the trustee, in its management, were under domination of the beneficial owner of the stock. In proceeding wherein timber company's acquisition of the third carrier was approved, applicants were admonished thereafter to observe the requirements of the act, and where the law is again violated, in face of such a warning, denial would ordinarily be warranted. However, inasmuch as report in that case was served only a few days before expiration of the option, all the carriers are largely dependent on applicants' traffic, and continuance of control appears otherwise consistent with public interest, the law violation is again overlooked and the transaction approved, but without condoning the methods used in effort to evade the commission's jurisdiction.—Id., p. 120.

No unlawful common control of merger applicants is indicated by (1) their refusal to permit Florida East Coast, after its employees went on strike, to use Jacksonville terminal jointly owned by it with applicants and Southern Ry. for interchange of cars; (2) their alleged obstruction of East Coast's attempt as a stockholder to remove the terminal company's president and general counsel for participating in such action; and (3) resignation from East Coast's directorate of Seaboard's president, thereby forcing like action by presidents of Coast Line and Southern pursuant to the commission's order that each might serve on its board only so long as all three served. None of those facts prove concerted action by applicants to injure East Coast since it is not unreasonable to assume that they would have so acted independently, regardless of the pending merger; and, even if substantiated, they would not establish violation of §5(4).—Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122 (136-8)*.

Contention that Chesapeake & Ohio already unlawfully controls Baltimore & Ohio through ownership of some 23 percent of latter's common stock ignores fact that B & O's preferred and common stocks are both entitled to vote; C & O's ownership of both kinds of shares amounts to a little less than 19 percent of all outstanding B & O stock and does not give it control of the carrier, since New York Central and its subsidiaries, together with Alleghany Corp. which controls it, own a little more than 20 percent, and other individual stockholders or their nominees own a larger percentage of B & O's voting stock than either Central or C & O.—Chesapeake & O. Ry. Co.—Control—Baltimore & O. R. Co., 317 I.C.C. 261 (284)*.

See also Goldsmith v. St. Louis-S.F. Ry. Co., §8, n. 221.

When individual who with his brothers jointly controlled vendee, and had participated in equipment-leasing arrangements with vendor and its controlling stockholder both before and after its bankruptcy, made a loan to that stockholder secured by his

stock, it appears likely, from his knowledge of the stockholder's past dealings, that he anticipated the latter's default; and while he may have made the loan partly to secure future business from vendor's customers, it is reasonable to infer that he was even then planning to acquire its properties. His subsequent sale of the stock to his son for the mere assumption of the stockholder's note on liberal terms is further confirmation of his intent that the shares should not fall into storage hands; and within three months he and his brothers caused vendee to purchase vendor's remaining stock and moved to purchase its operating rights.—R. L. Jeffries Trucking Co., Inc.—Purchase—Eck Miller, 97 M.C.C. 151 (167-8).

The sequence of events whereby the brothers arranged to involve vendee in vendor's affairs, effect the transfers of its stock, revive its dormant operations through a questionable lease-interchange arrangement, and ultimately acquire its operating rights compels conclusion that the two carriers have been controlled in common interest in violation of §5(4). The son who acquired the majority stock interest was inexperienced in motor carrier operations and in no position to act adversely to interests of his father and uncles, and there is little doubt that they exercised a strong measure of control over its affairs; and as the father was aware that vendee could not acquire legal title to the controlling shares without the commission's prior approval, and apparently was also aware of the difficulty of obtaining such approval in view of vendor's lack of operations during receivership, he obviously chose to evade regulatory action in order to revive its operations.—Id., pp. 168, 170.

In selection of a remedy the commission's concern must be directed to termination of the unlawful control and prevention of a resumption thereof; proposed partial cancellation of vendor's rights would not effect such termination. Though respondents may face difficulty if required to sell vendor's stock in view of the finding of dormancy of its rights, that is the risk they have incurred as result of their unlawful acts; moreover, any losses to them should be minimal if, as represented, the value of the physical properties involved far exceeds the price paid for the stock. Considering the entanglement of the son of one brother and the persistence and willfulness of the violation, the only effective remedy is total divestiture by respondents of vendor's stock.—Id., p. 171.

When carrier A's principal stockholder acquired his controlling interest on recommendation of carrier B's president, who lent him $5,000 to aid in the stock purchase, and A's day-to-day operations under his management were conducted from a terminal owned by B and by B's officers and employees for little or no remuneration, unlawful common control of the two carriers was effected even though B received no direct benefits from A's operations; and proposed acquisition of A's stock by two sons of B's principal stockholder would continue the common control, since both are employed by B and would continue such employment until A's operations are sufficient to require their full attention, during which time A's operations would be conducted by B in same manner as before. The proposed control may nevertheless be approved when there is no showing of any intent or preconceived plan of the parties to violate the act. Therefore, since consummation of the approved transaction would terminate the violation, entry of a cease-and-desist order is unnecessary unless applicants fail to consummate the stock purchase.—West Bros., Inc.—Investigation of Control, 97 M.C.C. 125 (127, 129, 130, 132).

The Crouch brothers, who control carrier A operating between Chicago and the St. Joseph and Kansas City gateways, have long sought to acquire the rights of carrier B giving access to interior Kansas points, but withdrew their §5 applications for fear of "too much opposition," and instead adopted the device of placing B's stock in hands of the son of one of them—for all practical purposes in hands of the Crouch interests. This dubious course sidestepped inquiry by the commission and competing carriers into the nature and scope of B's operations and effect that

conduct thereof under new ownership would have on competing carriers and the public dependent on them for adequate and efficient service. Considering those factors together with the closely knit business interests of the Crouch brothers, there is sufficient warrant, without more, for finding that the procedure followed was deliberately conceived to give the Crouch interests control of B while avoiding problems involved in prosecuting the §5 applications to finality, resulting in common control of the two carriers in violation of §5(4).—Ship-By-Truck Co. v. Crouch Bros., Inc., 93 M.C.C. 89 (101).

Only B's irregular-route rights have any particular value to A, and it was the understanding of the parties at time of the stock transfer and since that B's former proprietor would continue to conduct its regular-route operations, which was done under a purported vehicle-leasing arrangement. His former operations were predominantly under those rights, with little activity under the irregular-route rights, and it would be naive to assume that the parties did not recognize that this factor, coupled with strong opposition from competing carriers, would greatly lessen their chances for successful prosecution of the §5 applications. That A sold equipment to B at book value, gave it supplies without charge, and provided some 80 percent of the interline traffic which formed its principal tonnage, together with other facts recited, are but manifestations of the common control unlawfully accomplished.—Id., pp. 99-100, 101, 102.

There can be no mitigating circumstances which would allay the seriousness of a violation resulting from a transaction purposely conceived to evade §5 procedures, and the parties have offered no evidence that continuance of the common control would serve any overriding public purpose not adequately served by existing carriers. While the commission's power to require termination of a §5(4) violation is remedial, not punitive, the instant violation occurred solely as result of the Crouch brothers' acquisition of control of B through intervention of the son of one of them as purchaser of its stock, and, apart from the highly implausible possibility of termination of their interest in A, the only effective remedy is divestiture by the son of his stock ownership of B; entry of order requiring such divestiture is therefore justified. [See 371 US 115.]—Id., pp. 102, 103.

As vendee was incorporated as a wholly owned subsidiary of an intrastate carrier controlled through majority stock ownership by Schreiber and Cowan, and its stock was transferred to Cowan's nephew in mistaken attempt to eliminate common control, it is evident that the stock is held for benefit of the intrastate carrier, which admittedly controls vendee. Also, Schreiber individually and, with his wife, indirectly through a corporate structural maze owns sufficient shares of a second interstate carrier to exercise control, and Cowan owns 98 percent of the capital stock of a third. The business and other relations between those individuals and corporations show that they are affiliated, resulting in a conclusive presumption that common control of the carriers involved has been effected, in violation of §5(4). However, as there was no apparent willful intent to violate the act, and it is doubtful that the parties were even aware that a violation had occurred, continuance of such common control may be approved.—Southern Tier Stages, Inc.—Purchase—Capitol Bus Co., 93 M.C.C. 793 (797, 798).

The commission adheres to its conclusion in 90 MCC 759 that termination of option agreement between acquired carrier's stockholder and acquiring carrier would not terminate the unlawful common control therein found, and that termination of the violation would require such stockholder to divest himself of the stock to a person not affiliated with him or with acquiring carrier or its officers, directors, or stockholders. The facts permit of no other finding than that his role was to preserve acquired carrier's economic existence for acquiring carrier's benefit until the time was right to effect an open unification; to hold otherwise would ignore the true relationship between the moving parties, exemplified by viewing together the substantial sum advanced by acquiring

carrier for purpose of his acquisition of the stock and the additional acts of cooperation between the carriers disclosed and hearing in instant investigation. The unlawful control continued at least until acquired carrier was adjudged a bankrupt and a trustee appointed to wind up its estate. Moreover, the bankruptcy proceeding does not provide full assurance that the unlawful control will not be reinstated; cease-and-desist order entered.—Jones Truck Lines, Inc.—Investigation of Control, 97 M.C.C. 225 (228-9).

That vendee unlawfully assumed control and management of vendor's operation is apparent from fact that filing of purchase application was postponed pending build-up, under its sponsorship, of operations under vendor's dormant rights, and a concerted effort was made to contrive an exhibit that would withstand the charge of dormancy. Vendee began to deliver shipments into vendor's territory, on its own billing and with its own equipment, and made all collections. Though vendor maintained no records, and had no knowledge of nor exercised any control over the movements, forged freight bills were prepared purporting to show that it performed the service. While testimony of participants in those machinations differed greatly as to whether they were performed under supervision of vendee's stockholder or of practitioner who prepared the false exhibit, the evidence as a whole reveals a flagrant violation of §5(4). Applicant-respondents by their failure to except to examiner's adverse report, their petition to permit the report to become effective, and their termination of the agreement and the temporary operations, have acceded to the findings of unlawful common control. Cease-and-desist order entered against all respondents.—Calore Exp. Co., Inc.—Purchase—T. W. Waterman Co., Inc., 93 M.C.C. 291 (295, 296).

After denial of defendant's application to purchase all of Choctaw's operating rights, defendent's president, a close friend of Choctaw's president, approved sale of its intrastate rights to complainant, following which Choctaw lapsed into inactivity for 2 years. Thereafter, it ostensibly resumed operations, principally under an arrangement amounting to a lease of its rights by defendant, retained defendant's financial officer to handle various financial matters for it, hired a person recommended by defendant's president as its manager, and moved into defendant's terminal and used latter's facilities without charge. During all this time Choctaw's president showed little interest in and complete unfamiliarity with its management. While certain details of the relations between the parties are disputed, a determination thereof most favorable to respondents would serve only to break the continuity of the unlawful control; in view of omissions in the record of salient facts peculiarly within respondent's knowledge, other evidence is convincing that Choctaw was under defendant's control following reactivation of its interstate operations.—Jimmy Stein Motor Frt. Lines, Inc. v. Mercury Frt., 93 M.C.C. 635 (638-40, 641).

And since termination of the unlawful common control was in response to the commission's field investigation rather than the voluntary act of the parties, the long-continued nature of the violation, the close friendship of the presidents of the two carriers, and the demonstrated disinterest of Choctaw's president in its operation make advisable the entry of a cease-and-desist order enjoining resumption of such violation; order entered against Choctaw, its president, and its manager.—Id., p. 642.

As record does not disclose when applicant acquired his present stock interest in either of the two carriers which he seeks to acquire control of, and application shows that aggregate number of vehicles operated in interstate commerce by him, as sole proprietorship, and the acquired carriers exceeds the §5(10) exemption, the commission must rebuttably presume that such was the case when he acquired joint control of the two carriers and that such acquisition was and continues to be, in violation of §5(4). Applicant should therefore, within 60 days from service in instant proceeding, clarify the circumstances under which he acquired and consummated his existing joint control, in detail, including his application for

approval to continue such common control of the carriers involved. Otherwise, it may be necessary to institute appropriate §5(7) proceedings.—La Casse—Control—Interstate Exp., Inc., 97 M.C.C. 230 (233-4)*.

Though both groups of applicants seeking to acquire control of the same carrier disclaim control or power to control the carrier, despite jointly owning 71.4 percent of its stock, their disavowal of mutual interest is betrayed by the joint arrangement for purchasing remain-stock shares and their agreement that each group would acquire no more than 50 percent of carrier's stock. Test is whether legal or economic relationships between the groups are such as to make it reasonable to believe that it would be to their best interest to exert control, not whether either group standing alone controls or has power to control. It is apparent that their interest would best be served by controlling activities of the carrier and that two groups, unwittingly or otherwise, have acquired joint control thereof in violation of §5(4). Therefore, respective groups are admonished to promptly apply for authority to continue such joint control or, in the alternative, to decide which group is to control the carrier, and immediately file appropriate application.—Capitani—Control—North Boulevard Transp. Co., 97 M.C.C. 479 (483).

Existence of adequate basis for institution of investigation under §5(7) of possible unlawful common control of certain carriers is demonstrated by the parties' several petitions and offer of settlement, which would have effect of undoing all the questionable acts and transactions in issue; nevertheless, various cogent reasons, legal and otherwise, indicate advisability of grant of the petitions and acceptance of the offer of settlement, which would have the same result as would be accomplished after a long and difficult hearing. However, such action is limited to the particular situation at hand and is not to be construed as establishing a precedent for solution of all matters involving possible violations of the act; and, while the offer of settlement is responsive to all feasible relief desired by interveners, their opportunity to obtain further relief, should terms of the order not be complied with, is not foreclosed by its acceptance. Moreover, to assure total divorcement of individual respondent from the carriers unlawfully controlled, entry of cease-and-desist order will prohibit him from acquiring their control in future.—Brown—Investigation of Control, 93 M.C.C. 662 (666, 667-8).

While one of vendee partners, manager of its operations, served as vendor's agent in latter's Pennsylvania area and in that capacity solicited traffic for movement under the rights vendee would now acquire and arranged for transportation thereof by owner-operators, there is no showing that he controlled vendor or its operating policies, or that vendee partnership received any benefits, direct or indirect, from the agency relationship. While the arrangement might be viewed as suspect, the record does not support a finding that vendee had assumed control of vendor in violation of §5(4) prior to institution of temporary authority operations.—Bowser and Campbell—Purchase—Motorway Corp., 97 M.C.C. 192 (198).

When vendee assumed the duties of temporary manager of vendor under authority from the commission, it undertook to do whatever was necessary to preserve and protect vendor's carrier properties and assure performance of an adequate and continuous service to the public, and to that end its principal officers and 3 of its 4 directors assumed like positions with vendor. And when it become evident that vendor's financial condition was worse than had been represented and it faced immediate receivership or bankruptcy, vendee, acting in what it considered to be the best interest of vendor and the public, recommended that its affairs be liquidated. This recommendation was approved by vendor's stockholders, and in the circumstances did not constitute an abuse of vendee's managerial control, but was rather an understandable and very likely necessary step. And though continuance in office of the common officers and directors after termination of such temporary control was a direct violation of §5(4), it does not bar approval of vendee's purchase of vendor's

rights in absence of any showing that it did not act in good faith in continuing that relationship concurrently with exercise of temporary authority in the purchase proceeding.—National Transp. Co.—Purchase—Hartford Transp. Co., 97 M.C.C. 206 (210-11)*.

The commission's power to terminate unauthorized common control of carriers in violation of §5(4) is corrective, not punitive; it is charged with choosing an appropriate remedy, molded to the facts of the case, applying proper standards, and justification for the remedy is termination of the violation. Thus, while an order of divestiture is within the commission's power, in some cases another and less drastic remedy may effectively prevent continuance of the violation.—L. Nelson & Sons Transp. Co.—Investigation of Control, 93 M.C.C. 22 (23)*.

Though three brothers unlawfully control carriers A, B, and C in common interest, there is little actual duplication in A's limited-commodity and B's general-commodity operations, and cancellation of A's certificate, whereupon it would cease to be a carrier subject to the act and the violation would be terminated as to it, would apparently not inconvenience the shipping public. The operations of B and C are complementary, and if the two brothers controlling C divest themselves of any interest in B they may lawfully continue in control of C and the third brother may lawfully retain B's stock. Therefore, in lieu of divestiture, carrier A should seek revocation of its certificate and, to assure that practices integrating the management and operations of B and C do not develop, the brothers controlling C should submit a plan of operation showing that it will not be controlled, managed, or operated in common interest with B unless appropriate authority is first obtained.—Id., pp. 23-4. [But see dissent.]

Although Hershey and his former wife each own slightly over 21 percent of vendee's stock, neither is an officer or director of vendee, which is controlled and managed by its other stockholders; and though Hershey is a minority stockholder of a common carrier bargeline and is active in its affairs, he does not control its operations; moreover, vendee's operations, except for transportation of pipe, are not competitive with those of the bargeline. Since Hershey and his former wife have no financial interests in common that would motivate other shareholders to join with them to dictate vendee's affairs in interest of the bargeline, a finding that the two carriers are controlled or managed in a common interest in violation of §5(4) is not warranted; however, approval of purchase should not be construed as sanctioning acquisition by Hershey and his former wife of their interests in vendee, or the common control of vendee and the bargeline.—Hill & Hill Truck Line, Inc.—Purchase—Hunsaker Trucking, 93 M.C.C. 490 (491-3).

Although common control of a corporate carrier controlled by individual applicant and individual operations of his father, in which he was actively associated, as well as control of the father's corporate successor, was lawfully accomplished under exemption of §5(10), applicant's subsequent acquisition of voting stock of latter corporation at a time when each of the carriers operated 20 or more vehicles was an acquisition of control in violation of §5(4) because of his enhanced power to control that carrier. However, since the parties acted on advice of counsel and after being informed by commission's district supervisor that prior approval was unnecessary, the violation was not an intentional attempt to circumvent the law and continuance of control may properly be approved.—Bringwald—Control—Bringwald Transfer, Inc., 90 M.C.C. 11 (13).

Although deceased vendor's son, who already controlled two carriers, took possession of vendor's operations as executor and managed them for his mother, vendor's widow and sole legatee, in violation of §5(4), his assumption of the operations occurred at a time when he did not have legal advice as to necessity for the commission's prior approval, and denial of his control application solely because of the law violation is not warranted.—McNichol—Purchase—McNichol, 90 M.C.C. 134 (136)*.

Participation by applicant, who controls one carrier through stock ownership, in management of a second whose stock was owned by his father and brother resulted in control of the two carriers in common interest in violation of §5(4) by virtue of applicant's affiliation with the second carrier's stockholders through their family relationship and interrelated business interests. Without applicant's guarantee, that carrier would have been unable to secure financing required for its rehabilitation; moreover, on the father's death applicant would become voting trustee for 50 percent of its stock, which the father placed in trust for applicant's children, apparently as inducement to applicant to assist the carrier. However, since the facts show that applicant acted in an effort to rescue a family controlled carrier which was in precarious condition, and his continued management appears consistent with public interest, the §5(4) violation does not require denial of control application.—Murphy—Control—E. L. Murphy Trucking Co., 90 M.C.C. 771 (774).

Although the wife of vendee's president acquired all vendor's stock through inheritance from its sole stockholder upon his death between initial and further hearings, no formal motion was made at further hearing to have her substituted as the party controlling vendor. Since she owns 49.27 percent of vendee's capital stock and is its secretary-treasurer, a member of its board of directors, and wife of its president, she is affiliated with vendee within §5(6) and her acquisition of vendor's stock without the commission's prior approval violated §5(4). However, considering that vendee was leasing vendor's rights under temporary authority at time of such acquisition, and that the acquisition was through inheritance, the unlawfulness does not bar approval of proposed purchase, which will terminate the violation.—Von Der Ahe Van Lines, Inc.—Lease and Purchase—Bee-Line, 90 M.C.C. 888 (897)*.

Though the question of possible unlawful control of conversion applicant in common interest with another carrier is not relevant in a proceeding under §212(c), if such unlawful common control exists, applicant and its affiliate should take steps promptly to terminate it, or seek commission approval of transaction whereby common control was affected.—Holwick, Inc., Conversion, 92 M.C.C. 724 (726).

Record amply demonstrates that extension applicant is controlled in common interest with two other carriers without appropriate authority from the commission. Corporate structures involved reveal joint control and management of applicant and one of those carriers, the principal stockholder, president, general manager, and board of directors being the same for each; that affiliate avers that its corporate financial resources will be made available to applicant and will be used if deemed necessary by their common owners and directors; and operations of the three corporations are viewed by their respective supervisory personnel and officers as being one transportation operation, including sharing of terminal and maintenance facilities. In the circumstances, applicant should not receive operating authority sought until the involved parties have applied for and received approval of the existing common control.—Babcock & Lee Transp., Inc., Extension, 92 M.C.C. 521 (524).

While corporation operating as an interstate carrier under former single-State exemption prior to its repeal, and since then under "grandfather" provisions of §206(a)(7), undoubtedly is and has been commonly controlled or managed with a partnership consisting of the two sons of its controlling stockholder, and from which it leases one of its State certificates, no §5(4) violation is involved, since the partnership has never achieved carrier status and no person controlling either is shown to be in control of or affiliated with any other carrier. Caton Transfer Co., Inc.—Lease—Canton, 83 M.C.C. 416 (420).

When one carrier which applicant indirectly controls commenced operations under single-State proviso, another which he directly controls has been conducting proviso operations for several years; though the latter was then operating over 20 vehicles in interstate commerce, the commission's approval of resulting common control of interstate carriers was

not sought or obtained. However, as applicant's failure to apply for approval at the time the first-mentioned carrier instituted proviso operations was apparently predicated on incorrect legal advice and was not a willful violation of §5(4), the law violation itself would not bar approval of continuance of such control and the proposed acquisition of control of two additional proviso carriers. —Brown—Control—United Expressways, Inc., 90 M.C.C. 546 551-2)*.

Although common control of a single-State and a multiple-State carrier was effected in violation of §5(4), the violation was not deliberate and has been discontinued by voluntary acts of the parties. As they have shown their good faith by cooperating with the Commission in the past, and now have benefit of the examiner's and the commission's report to guide their future conduct, it is unnecessary to enter a "desist" order in the investigation, thereby continuing the proceeding; respondents have shown a desire to comply with the law and should be permitted to show their good faith without such an order. However, since the parties remain in a position which could lead to a resumption of the unlawful common control, they should consider unification of the carriers, with request for issuance of a certificate in substitution for the proviso operation of the single-State carrier.—Freeport Fast Freight, Inc., and Liberty Trucking Co.—Pooling, 90 M.C.C. 510 (513)*.

Respondent holding authority between St. Louis and certain Illinois points and respondent holding only Illinois intrastate authority are commonly controlled in violation of §5(4) when the president of one supervises operations of both carriers, and they operate the same equipment and together perform what is for all practical purposes a single truckline service; however, such violation will terminate with rejection, because of its affiliation with a multiple-State carrier, of single-State carrier's statement of intent to operate under second proviso of §206(a)(1), since it will then lack carrier status under the act.—State Transport Co.—Investigation of Operations, 91 M.C.C. 373 (375).

While none of the various facts may alone warrant finding that vendee controlled vendor in common interest with itself in violation of §5(4), and that such control was perpetrated to revitalize vendor's dormant rights under single-State proviso in order to support their transfer and issuance of a certificate to vendee, collectively they permit of no other conclusions. The parties will be expected to terminate the unlawful common control upon termination of vendee's temporary authority, as provided in order denying purchase application, otherwise consideration will be given to institution of investigation under §5(7).—Lombard Bros., Inc.—Purchase—Millis, 90 M.C.C. 604 (611)*.

Individual who before he acquired stock vendee, a multiple-State carrier, was closely associated with one of its principal stockholders, together with members of his family who controlled vendor and another single-State carrier, were affiliated with each other by virtue of the family relationship and their business dealings individually and through the three carriers, as result of which the two single-State carriers were controlled in common interest with vendee from inception of their proviso operations. Vendor admittedly interlines 98 percent of its traffic with vendee, and no intrastate traffic or interline with other interstate carriers is shown; it leases equipment at a nominal rental from an affiliate of vendee, and they use the same terminal facilities; it receives 20 cents per 100 pounds for delivery of all traffic interlined, regardless of distance, and for some years its pickup operations were performed under vendee's control.—Nigro Freight Lines, Inc.—Purchase—Coady Trucking Co., 90 M.C.C. 113 (116-8, 120).

Although stock of the second single-State carrier, which conducts proviso operations under similar arrangements with vendee, was transferred to its present owner of record shortly after institution of investigation, such transfer had no practical effect on actual control or management of that carrier or its operations and relationship to vendor and vendee; as the present owner lacks transportation

experience and purchased the stock as an investment, conclusion is warranted that he was merely an accommodation purchaser.—Id., pp. 118-9.

Proviso operations of the two single-State carriers have therefore been unlawful from their inception; however, changes in ownership, management, and operating practices of the three carriers which would render them independent of each other, so that future proviso operations would be lawful, are of doubtful feasibility. Therefore, since the commission's authority to require persons found to be violating §5(4) to take such action as it deems necessary to terminate the violation is clear, in lieu of requiring divestiture, order in embraced investigation proceeding will require that the two single-State carriers discontinue all operations in interstate or foreign commerce.—Id., pp. 120, 121.

Although vendee's controlling stockholder had power to control applicants in a common interest by virtue of his financial relations with vendor's stockholders and vendor's interline debt to vendee, there were none of the usual relationships involved in §5(4) violations, such as joint operating facilities, common employees, etc.; even in their interline relations, vendee gave vendor only 9 percent of its interline tonnage moving to the area concerned, compared with 91 percent delivered to vendor's competitors, and testimony of vendor's president that he solicited offers from other interests in his efforts to find a purchaser for its properties is uncontradicted. The complete absence of any evidence demonstrating an exercise of the power of control found to exist warrants conclusion that proposed purchase may properly be approved if otherwise consistent with public interest.—Thurston Motor Lines, Inc.—Purchase—Union Storage, 90 M.C.C. 595 (599)*.

Pursuant to agreement by Watkins (original control applicant's majority stockholder) to purchase acquired carrier's stock, the stock, endorsed in blank by its former holder, is held in escrow, with the escrow agent obligated to release it when and as directed by Watkins or his designee. Nevertheless, neither Watkins, his designee, nor original applicant has ever attempted, either before, during, or since his temporary control of acquired carrier, to control or influence its operations in any way. Since Watkins' alternatives of directing delivery of the stock to either the second or the original control applicant, or to former holder, each depend on the commission's determination of the two applications, he is not free to make any independent disposition thereof; nor does it appear to have been so intended, since original stock-purchase contract referred to necessary prior commission approval. Evidence does not warrant a finding that control or management of acquired carrier in common interest with original applicant was unlawfully effected prior to grant of temporary authority, or has existed since termination thereof.—Watkins Motor Lines, Inc.—Control and Merger, 90 M.C.C. 567 (587-8).

Actions of noncarrier affiliate of acquiring carrier, in consolidating acquired carrier's general offices, terminals, and traffic and accounting functions with its own, in interest of economies and efficiency of operation, were not incompatible with authority granted under §210a(b) to assume temporary control through management, and therefore did not violate §5(4).—Mason & Dixon Lines, Inc.—Control—Silver Fleet, 90 M.C.C. 829 (848).

Continuance of applicant's unlawfully acquired control of two additional carriers is not required by public interest; considered transaction was the third consummated by him in violation of §5(4), and despite opportunity afforded by §210a(b) for temporary operation of motor carriers in financial distress, he waited at least a year thereafter before filing instant application; his continued control is unlikely to result in carriers' economic benefit, as their deficits are continuing, their resources are inadequate to meet debt service requirements, and there is no evidence of applicant's ability as guarantor to meet their contingent liability or to advance them additional funds. Applicant should promptly dispose of stock of the two

carriers to some unaffiliated person and advise the commission within 60 days in writing, under oath, of action taken; otherwise, consideration will be given to institution of a proceeding under §5(7) to require such divestiture.—Seattle Transfer & Stor. Co.—Control—Mountain Road, 90 M.C.C. 15 (18-19).

Acquired carrier's principal stockholder was without motor carrier experience when he acquired its stock and, but for solicitation and collection of accounts, depended on acquiring carrier's employees for conduct of its operations; that fact, together with evidence of financial and other assistance provided to acquired carrier by acquiring carrier, and understanding between individual respondents that acquired carrier's stockholder would recoup his investment with interest as soon as acquiring carrier's control of carrier which had leased acquired carrier's intrastate rights was approved, all support conclusion that, at time of the stock acquisition, acquired carrier's stockholder and acquiring carrier, its president, and its principal stockholder were affiliated with each other within §5(6); that control or power to control or manage the two carriers in common interest was thereby effected and continued until grant of temporary authority; and that the individual respondents participated in the unlawful control.—Central Freight Lines, Inc.—Control—Inland Motor, 90 M.C.C. 777 (787-8)*.

Considering that acquiring carrier is aggressive and well-managed and has engaged in operations for a number of years, that its officers are experienced and familiar with motor carrier proceedings and requirements of the act, and that it and its officers have been represented by competent counsel, a finding that the effectuation of unlawful common control was not willful would not be justified. Respondents' arguments that they had not intended to involve acquiring carrier in acquired carrier's affairs to such an extent, but that their action was necessary to protect its interests and that the situation was caused by the unexpected delay in final disposition of the other control proceeding, are insufficient to relieve them of their responsibility. However, those factors, when considered with acquired carrier's insolvency and its lack of adequate facilities, personnel, and management to conduct efficient operations, support finding that the violations were not so severe as to warrant finding acquiring carrier unfit to assume control, or to bar approval of control application if otherwise consistent with public interest.—Id., p. 788.

On reconsideration of prior denial, based on previous separation of acquired carrier's intrastate and interstate rights which created two rights, where formerly only one existed, separation of the rights was dictated several years earlier by carrier's then controlling stockholder through long-term leases of its intrastate rights to two other carriers; and, as none of the parties to proposed control transaction were responsible for the creation of two interstate rights in place of one, they should not be penalized. [Citing 80 MCC 511.] Individual (now deceased) responsible for separating the rights and severed his connection with acquired carrier and, as neither his estate nor the lessees were applicants, approval of the control would not benefit any of them; also, there is no showing that either the persons in control of acquired carrier both before and after sale of its stock to present holder, or the acquiring carrier, conspired to effect separation of its rights. Moreover, approval is a step toward possible permanent reunifying of a significant part of the severed rights, and would thus be an improvement over the *status quo;* approved.—Id., 97. M.C.C. 249 (253-4)*.

Surviving carrier in proposed merger and liquidating carrier's sole stockholder are affiliated within §5(6) because of their long association and history of business dealings; record is replete with instances where survivor's managers directed liquidating carrier's affairs, including its personnel, while it was ostensibly controlled by its stockholder, and where its service was performed with survivor's vehicles; also, any evidence pointing to separate operation is completely overcome by other evidence that operations of the two carriers were

managed in a common interest through the same employees or agents. And purported interchange arrangement whereby joint-line movements were controlled throughout by surviving carrier is further indication of unlawful common control. Such unlawful activities by persons long acquainted with the law and the commission's requirements should not be blessed by approval of proposed merger; application denied and termination of the §5(4) violation, by requiring divestiture of liquidating carrier's stock by its sole stockholder, ordered.—Kaplan Trucking Co.—Control—Thomas Boyd, Inc., 90 M.C.C. 419 (423-5, 428)*.

The facts are incontrovertible that survivor also acquired control of another carrier and operated it in common interest in violation of §5(4) for a period of years. However, stock of that carrier was sold to an independent purchaser, and there is no reason to suppose that such transaction was not a bona fide transfer of ownership; and some 2 years later survivor's interchange arrangements with carrier in violation of commission's leasing rules were terminated. Investigation is therefor discontinued as to the carrier thus unlawfully acquired, but the carriers are reminded that, should they resume joint-line operations, investigation will be reinstituted if they fail to comply fully with the leasing rules and scrupulously maintain their operations separately and independently.—Id., pp. 425-6.

While it is clearly within the commission's power under §5(7) to require a divestiture of unlawful control, that section just as clearly implies that such power is basically corrective, not punitive. Justification for the choice of remedy is termination of the violation, and the commission is thus charged with the duty of giving complete and efficacious effect to the provisions of the statute, while at same time paying heed to effect of its actions on the private parties involved. However, under the transportation policy enunciated in the act, the commission bears the responsibility of tailoring its actions to best carry out the remedial legislation it is called on to administer, and its overriding concern is therefore protection of the public interest; hence, in considering evidence bearing on the choice of remedy for a §5(4) violation, any doubts regarding conflict with private interests must be resolved in favor of the general welfare.—Kaplan Trucking Co.—Investigation of Control, 93 M.C.C. 167 (169, 171)*.

Appropriateness of divestiture as a remedy for unlawful control of carrier Boyd in common interest with carrier KTC must be considered against the background facts that KTC's equipment, personnel, and funds were used in conduct of Boyd's purported operations, and that efforts of Dilla, Boyd's stockholder, were designed to give impression of separate control or to circumvent the investigation. Between the extremes of divestiture and grant of KTC's control application, the only alternative remedy would be one similar to that required in 93 MCC 22, which by cancellation of authority of one of the carriers would create a viable operation free of the unlawful control; but to require cancellation of rights in instant case would be more drastic than to require stock divestiture by Dilla. Any remedy that would deprive Boyd of use of KTC's equipment and personnel would confront Dilla with alternatives of embarking on an expensive venture in carrier operations, which he has indicated his unwillingness to do, or of drastically curtailing Boyd's service, which would amount to the commission's sanctioning a serious diminution or deterioration of service in contravention of the paramount public interest.—Id., pp. 169-70.

Moreover, Dilla participated in the unlawful common control despite his knowledge of the statutory prohibitions, which may reasonably be imputed to him because of his status as a long-time practitioner before the commission and his prior participation in §5 proceedings. His close past association with KTC must also be recognized: he not only handles its tariff matters and represented it in its "grandfather" proceeding, but also sold it certain operating rights under circumstances resembling those of his acquisition of Boyd's stock and subsequent

attempt to sell it to KCT. The administrative and enforcement problems that would be presented, under such circumstances, by operation of Boyd as an independent carrier under Dilla's ownership cannot be ignored; the choice of remedy is necessarily influenced by considerations of simplicity, relative ease of administration, and certainty. In concluding that the appropriate remedy is to require Dilla to divest himself of all stock interest in Boyd, the commission is mindful that it may somewhat restrict Dilla's bargaining power, but the available alternative might well have more drastic consequences to the transportation industry and the public.—Id., pp. 170-1.

Survivor and both liquidating carriers were unlawfully controlled in common interest when they operated and held themselves out openly as a system and were bound together by close family relationship of their majority stockholders. Survivor collected all freight revenues and divided them and allocated expenses with little regard for accuracy; furnished vehicles, terminal facilities, and office equipment and supplies; and provided the system with complete accounting services, solicited its freight, and handled all claims against it. It was the practice for survivor's secretary-treasurer to approve salaries and expense accounts of liquidating carriers' employees; its safety director could require discharge of their employees for violation of regulations; and liquidating carriers' president and majority stockholder had little to do with their operations, but depended largely on his brothers who were survivor's majority stockholders and managerial officials.—Buckingham Transp., Inc.—Control and Merger, 90 M.C.C. 731 (739)*.

Liquidating carriers were under unlawful common control with survivor at the time their present majority stockholder acquired control; as he was affiliated with survivor and his borthers who controlled it, within meaning of §5(6), that transaction was accomplished in violation of §5(4), the portion thereof presented under §212(b) and the transfer rules having been approved in error. Discernment of a hiatus of 2 or 3 months in the unlawful control, as found by the examiners, requires antecedent premise that the two carriers achieved a status independent of survivor because their controlling stockholder became independent of that carrier and of his brothers; and that would strain credulity. To the contrary, the facts point to a continuing affiliation of the two carriers with survivor; the §5(4) violation, accomplished in 1953, has since continued without interruption.—Id., pp. 739-40.

Although as result of a merger subsequent to filing of instant application survivor has come under different majority control and its name has twice been changed, proposed merger involves the same three carriers that were respondents in investigation proceeding; survivor's former majority stockholders remain as its employees and members of its board of directors, and they, together with liquidating carriers' majority stockholder and other members of their family, retain about 20 percent of its outstanding stock. Though applicant contend that it would be inequitable to penalize the party now holding stock control by denying instant application, the fact remains that the unlawful control found to exist prior to the intervening merger has not been terminated; principals to that transaction, including survivor's present controlling stockholder, were fully cognizant of pendency of the investigation and of the finding of unlawful control made in the transfer case, yet took no steps to terminate the violation, which has been continued by those now in control.—Id., p. 740.

Despite shipper support for continuance of the system's present service, the fact that such service was instituted and has been rendered for years under a violation of §5 may not be overlooked. Evidence is convincing that the violation, and particularly the continuance, constitutes a flagrant disregard for regulation and the law by persons fully cognizant of their legal obligations, aggravated by their ignoring of the admonition given in 1953 to terminate it. Such conduct is indefensible and cannot be too strongly condemned.—Id., pp. 741-2; however, as order instituting

investigation failed to name any individuals as respondents, the cease-and-desist order is not directed to the individuals involved; nevertheless, they will be expected to take such steps as may be necessary to terminate the law violation.—Id., 93 M.C.C. 306 (311)*.

Record establishes that individual respondent, who owned 25 percent of stock of carrier A (the remainder being held by his brothers and sister) and was its president when, without prior authority, he acquired sole control of carrier B, unlawfully exercised control of both in common interest and has not relinquished his power to do so. Though he resigned as A's president shortly before institution of investigation, he continued as its director and stockholder, and its current president (his borther) and its general manager, serving without compensation, are salaried employees of equipment company which he controls and which shares A's office, and would naturally look for direction to the person controlling the business that pays their salaries. Thus, by virture of the continuing close relationship between those individuals and companies, respondent remains in position to control A.—Holdcroft—Investigation of Control, 90 M.C.C. 407 (411).

And though respondent purportedly sold carrier B's stock to his employee, with understanding that he would repurchase it after final determination in investigation and control proceedings, he has admittedly remained in control of B; further fact that the employee agreed to pay only one-fifth of the price respondent paid for the stock about a year earlier and, although signing a note, has apparently paid nothing for it to date warrants conclusion that respondent has at all times retained control not only of the corporation but also over the disposition of its stock, using the employee merely as a repository.—Id., p. 411.

Since no proof is adduced of any public benefit to be derived from respondent's continued control of carrier B which would mitigate the law violation, control authority is denied and respondent ordered to take, and report to the commission within time specified, such action as is required to divest himself of all his interest in B, direct or indirect, to persons not affiliated with him or in any way connected with or under the control or influence of either of the carriers, the equipment company, or any corporation or individual affiliated therewith; otherwise, supplemental action will be taken under §5.—Id., p. 412.

Under proposed plan for divestiture of unlawfully acquired carrier, its sole stockholder, as an initial step, would sell to the public 50,000 of the 250,000 shares of new capital stock he would receive an exchange for its outstanding stock; remainder would be placed with a bank under a voting trust, and he would dispose of all shares over a period of about 15 years. However, during that period he would continue to participate in management and realize financial benefits from continued ownership of the stock, and it is unlikely that the bank or directors elected by it would be free of his influence. Complete divestiture is required to terminate unlawful common control of that carrier and another, and continuance thereof may not be sanctioned without a showing and finding, as required by statute, that it would be consistent with public interest. Authority for proposed stock issued denied.—U.S.A.C. Transport, Inc., Stock, 90 M.C.C. 445 (447-8).

Willfulness of unlawful common control of vendee and two connecting carriers, resulting from relationship described in appendix, is demonstrated by the deceptive practice used to conceal the relationship and fact that shipments in the connecting carriers' territories were transported with vendee's vehicles and employees. While such violation was voluntarily terminated by withdrawal of one connection's proviso statement and revocation of the other's certificate, this was not done until after purchase application was filed and the parties apprised by a commission order that vendee's fitness was challenged, thus endangering approval of that application. As civil action to enjoin the unlawful control and criminal actions against vendee for other violations were pending in district court prior to filing of purchase application, conclusion is warranted that

the §5(4) violation was terminated to avoid criminal conviction or to safeguard approval of purchase and not through desire to comply with the applicable law.—Cooper's Exp., Inc.—Purchase —Ferguson Motor Transp. 90 M.C.C. 613 (617-8).

Considering acquiring carrier's prior efforts over an extended period to acquire the operating rights of carrier it now seeks to control, in order to obtain a shorter route between Memphis and St. Louis, its uncertainty concerning outcome of then-pending merger application whereby it acquired such a route, the fact that acquired carrier's sole stockholder was its employee immediately prior to his purchase of the stock and concurrent grant of stock-purchase option to acquiring carrier, together with facts that its down-payment under the option was used to effectuate his stock purchase and that such funds (constituting about 31 percent of total price now proposed) are not refundable to acquiring carrier, conclusion is inescapable that it was the real party in interest in the initial stock purchase, with its former employee serving as an accommodation purchaser or "straw party" to preserve availability of the rights to it, all resulting in common control and management of the two carriers in violation of §5(4).—Jones Truck Lines, Inc.—Control—Smock Transp. Co., 90 M.C.C. 759 (762).

While transactions have been approved notwithstanding involvement of a §5(4) violation, where there were mitigating circumstances or overriding considerations of public interest, the commission has adhered to its position in the Gilbertville case, 196 F. Supp. 351, where such circumstances were absent and the violations were shown to be flagrant. The mere desire to place acquired carrier in safe hands pending disposition of the merger proceeding does not mitigate the action of parties in the instant case, especially as acquiring carrier was familiar with requirements of §5, nor does elimination of a potential competitive operation constitute an overriding consideration of public interest. Control authority denied.—Id., p. 763.

Since the violation resulted from the combined actions of acquiring carrier and acquired carrier's stockholder, and termination of the option agreement would not end it, that stockholder's divestiture of his stock ownership to a person or persons not affiliated with him or with acquiring carrier or its officers, directors, or stockholders is necessary. Although he is not a party to control application and therefore no order or divestiture may be directed to him in instant proceeding, the parties are admonished to take appropriate steps to terminate the violation, or supplemental action will be initiated under §5.—Id., pp. 763-4.

Though personal loans by the Ashworth brothers, acquiring carrier's stockholders, to acquired carrier's stockholders enabled latter carrier to continue operating, provided a substantial portion of its revenues, and assured continuance of their interline service, the initial relation between the carriers was primarily for convenience, efficiency, and economy of their joint-line service, and the Ashworths at all times anticipated that the loans would be repaid. However, when acquired carrier's stockholders, in consideration of the Ashworths' cancellation of the indebtedness, endorsed and delivered their stock to the Ashworths, who surrendered the notes for the loans, the Ashworths did have power to control acquired carrier, whether exercised or not, and the transaction was therefore consummated in violation of §5(4).—Ashworth Transfer, Inc.—Control—Hawkes Transp. Co., 87 M.C.C. 653 (658-9)*.

While such unlawful actions are not condoned, there is no showing that the Ashworths had any desire or intent deliverately to violate the act or that they were aware of doing so; furthermore, the violation was terminated some 2 months later when temporary control authority was granted; the control may therefore be approved.—Id., p. 659. [But see dissent.]

Peter Stewart, who is president of Stewart Co., a family noncarrier company of which his brother Waldo is treasurer, set up a trust for his children, which acquired control of Haulers, a carrier, whose president,

Johnson is also one of the trustees. Considering Waldo's control of convoy, a carrier, the family and business relationship between the Stewart brothers, and the interlocking business and professional affiliations disclosed between them, Stewart Co., and Johnson, conclusion is warranted that Peter has power to influence Johnson's decisions and through him the manner in which Haulers is administered by the trust; that Peter and Waldo are affiliated; and that consequently control and management of Haulers and Convoy in common interest has been effectuated and is continuing, in violation of §5(4).—Stewart—Investigation of Control, 87 M.C.C. 681 (685-7, 694).

Respondents named will be expected to take such steps, within the time provided, as will result in either (1) a divestiture by the trust of the operating rights of Haulers, or (2) the appointment or election of a successor to Johnson as trustee of the trust and as president of Haulers who is neither associated nor affiliated, directly or otherwise, with any of the respondents; however, if they elect to follow the second alternative, further requirement that any interest of Stewart Co. in a Ford Motor Co. franchise, held by the trust and operated as a division of Haulers, be terminated is not necessary to accomplish termination of described unlawful control.—Id., pp. 686, 695.

Since an unauthorized lease by one carrier of the operating rights of another is expressly forbidden by §5(4), willful acquiescence by a certificate holder in unlawful lease of its operating rights by a connecting carrier is itself a clear indication that the unlawful lessor is being controlled or managed in common interest with the unlawful lessee. Even where the rights of the purported connecting carrier-lessor are wholly dormant, its collaboration in meeting the placarding and inspection requirements of the interchange regulations is a transportation activity which is clearly controlled and managed in interest of the originating carrier.—Id., p. 696-7.

In purported interchange arrangement between Haulers and its connection Speedway, found to constitute an unlawful lease by latter of Haulers' operating rights, it is not the fact of interchange but lack of it that gives rise to violation of the "control and management" provisions of §5; following 87 MCC 497, finding is warranted that control and management of Haulers in common interest with Speedway, manifested by the unlawful lease of operating rights, has been accomplished in violation of §5(4); order entered requiring Speedway to relinquish control over Haulers' operations and Haulers to assume that degree of direction and control of operations under its certificate which is the duty of every common carrier.—Id., pp. 697, 698.

46.—By a noncarrier.—[Vols. 12-19].—See also Schwartz v. Bowman, §5(3), n. 10.

While holding company which now controls Atlantic Coast Line through ownership of some 35 percent of its outstanding stock will, under approved stock exchange ratio, acquire only 15.2 percent of total outstanding stock of surviving company after merger of Coast Line into Seaboard Air Line, it will own nearly four times as many shares as the next largest single block, and the remainder will be widely diffused. This, together with its prospective representation by 4 of 26 directors of the merged company, plus fact that the long-standing interrelationship between it, Coast Line, and Louisville & Nashville (controlled by Coast Line) will be perpetuated within the merged company, warrants conclusion that it will acquire power of control over that carrier; to hold otherwise would ignore the realities of intercorporate relations and historical associations.—Seaboard Air Line R. Co. —Merger—Atlantic Coast Line, 320 I.C.C. 122 (194-5)*.

Banking and trust company which in various fiduciary capacities holds 55.3 percent of stock of Coast Line's parent holding company, 5.5 percent of Coast Line's common stock, and 0.6 percent of Seaboard's, will under the proposed exchange hold 2.7 percent of stock of the merged company in various representative capacities; this, together with its indirect interest through the holding company, will give it voting power over about 17.9

percent of the outstanding stock, and it will have two representatives on the merged company's board of directors. As its voting strength would thus be greater than the holding company's, it would be highly inconsistent to hold that it would not also have power to exercise control. That another corporate layer intervenes between it and the merged company would not make it less a "person" within meaning of §5(2)(a); the trust company, a noncarrier, will acquire indirect power to control the merged carrier, within purview of §5(2).—Id., pp. 195-7.

48. Purchase.—[Vols. 11-19].—In action to set aside the commission's order approving proposed purchase of operating rights, record before the commission clearly showed that considered certificate was not dormant. Also, while vendor granted vendee an option to purchase the rights within 2 months after he acquired them, there is no evidence that vendee influenced vendor's acquisition of the certificate or his decision to grant it the purchase option. No legitimate inference may be drawn from evidence of record that existence of the option in some manner tainted the interline operations of vendor and vendee, that vendor held the certificate merely for purpose of speculative barter and sale, or that proposed sale constituted trafficking in operating rights. Sustained.—Alabama Highway Exp., Inc. v. United States, 241 F. Supp. 290 (295-6)*.

Short-line railroad's request that survivor in Seaboard-Coast Line merger be required to sell or lease to it a connecting Coast Line branch, because it fears adverse effects of possible abandonment thereof, is premature. Request to acquire the branch should be made when and if abandonment authority is sought.—Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122 (179)*.

Sale by Lehigh Coal & Nav. Co. to Reading Co. of Lehigh & S. R. System, which connects with Reading's lines, will benefit both parties; Lehigh's management desires to dispose of its railroad interests in favor of investment in other types of property, and Reading considers acquisition of the line indispensable to continuance of important through routes in which it participates; approved.—Reading Co.—Purchase—Lehigh & S. R. System, 317 I.C.C. 633 (638).

Under a plan of reorganization designed to enable it better to issue securities, when necessary, as part of a program for diversification of its activities and acquisition of additional noncarrier interests when opportunity is favorable, Greyhound Corp. proposes to become a holding company by transferring all its carrier and closely related noncarrier properties to vendee, a wholly owned subsidiary now engaged in special tour operations, whose name would be changed to include "Greyhound" and whose officers and directors would be replaced by those of Greyhound. As both companies would emerge from the reorganization in sound financial condition, purchase is approved.—California Parlor Car Tours Co.—Purchase—Greyhound, 93 M.C.C. 392 (394-5).

As both vendors have had the disabilities of providing service under authorities limited as to both commodities and points of service, it is understandable that their operations have been somewhat sporadic, with incomplete coverage of all points and concentration at larger centers. Vendee, a successful carrier, has been serving the areas covered by the purchase rights for almost a year under temporary authority and is financially able to continue that service on a permanent basis, and those rights fit in well with its existing authority. Both purchases approved.—Little Audrey's Transp. Co., Inc.—Purchase—Refrigerated, 90 M.C.C. 743 (747).

Purchase of operating rights of three vendors should not be approved when no substantial interstate operations by two of them prior to the purchase negotiations are shown, and vendee's purported lease and interchange arrangement with the third was a mere fiction and clearly in violation of the commission's leasing rules, amounting to an unlawful lease of that vendor's operating rights. Considering vendee's long experiences as a carrier and its prior familiarity with §5 proceedings, any possible benefit which might flow from approval would not counterbalance, much

less outweigh, the objections arising from the law violations and the dormancy of rights of two of the vendors. Denied.—American Red Ball Transit Co., Inc.—Purchase—Fallon, 90 M.C.C. 515 (518-21)*.

As the only activity shown under vendor's charter rights from Anne Arundel County, Md., consisted of trips originating within the 10-mile radius of Glen Burnie which constitutes vendee's origin area, purchase conditioned on cancellation of the dormant portion of vendor's rights would not extend vendee's rights to any material degree; in absence of any real benefit to vendee or the public, vendee should not be permitted to expend funds, nor vendor to receive payment, for what would amount to merely an elimination of operating rights without material expansion of vendee's existing authority. Denied.—Didlake—Purchase—Johnson, 87 M.C.C. 742 (745-6).

Conditions imposed.—[Vol. 19].—The commission did not act arbitrarily or capriciously when it required that, as a condition precedent to consummation of approved purchase transaction, vendor's regular-route authority be redescribed in irregular-route terms; such redescription is within the commission's power under §5(2) to impose terms and conditions which it finds just and reasonable. At the time of approval of a §5(2) application, the commission has the power to impose any condition on certificate to be issued vendee which it deems useful in protecting competition or for any other statutory purpose [340 US 419]; and, undeniably, the commission has authority to classify common carrier service as regular and irregular route. Sustained.—Alabama Highway Exp., Inc. v. United States, 241 F. Supp. 290 (294-5, 296)*.

Although in some railroad acquisitions the commission has accepted traffic conditions stipulated by the parties respecting divisions, such acceptance is not a precedent for imposition of such conditions in absence of agreement between the parties. While the commission has power to prescribe requested condition concerning divisions of any new rates established by vendee railroad with intervener, in view of its power under §15 to prescribe divisions and the small proportion of intervener's traffic involved it is unnecessary to prescribe the basis of divisions of future rates. Standard traffic conditions imposed, coupled with commission's powers under §15, will adequately protect intervener from any undue adverse effect of the transaction.—Georgia & F. Ry. Co.—Acquisition—Georgia & F. R., 317 I.C.C. 745 (749).

Incorporation of applicant, to be formed to purchase motor carrier operating rights and property, was delayed to avoid issues raised in 87 MCC 551 concerning the validity of issuing qualifying shares to a parent company without the commission's prior approval; accordingly, approval of proposed transaction is conditioned on submission of certified copies, properly executed, of applicant's articles of incorporation, bylaws, and the resolution of its board of directors authorizing the purchase, prior to exercise of authority granted.—TTC Corp.—Purchase—Terminal Transport Co., Inc., 97 M.C.C. 380 (383, 404-5)*.

When vendor concededly has not shown that it conducted any operations under its general-commodity rights in Chattanooga area and no need for reactivation thereof is shown, those rights are dormant and should be canceled as a condition on purchase approval. And since it has not handled any traffic to or from the small portion of Mississippi authorized to be served under its right to transport machinery, equipment, and supplies used in operation and maintenance of industrial plants between Chattanooga and points within 175 miles thereof, its right to serve Mississippi should likewise be canceled. Since heavy-commodity authority is often stated in terms of statewide origins and destinations, and vendee now holds limited authority to serve Mississippi and is seeking to buy Mississippi-Texas rights in another proceeding, the latter condition will prevent reactivation of that dormant portion of vendor's rights into a potentially substantial operation, and is in public interest as a

means of preserving the competitive balance in the area.—Home Transp. Co., Inc.—Purchase—Chattanooga Transfer, 97 M.C.C. 173 (184-5, 187-8).

Since vendor's route between Derry and Chester, N.H., is disconnected from its other operations and from those of vendee and other Trailways System members, purchase approval is conditioned on cancellation of that operating right.—Trailways of New England, Inc.—Purchase—Interstate, 93 M.C.C. 217 (226).

Although, in proposal of bi-State agency to purchase operating rights of local inter- and intrastate buslines in St. Louis area, no mention is made of irregular-route charter rights of one vendor, and another has specifically excluded its charter rights for purpose of selling them to a third party, purchase of those irregular-route rights is approved subject to their concurrent cancellation, all such operations having become dormant.—Bi-State Development Agency—Purchase—Vandalia Bus Line, 93 M.C.C. 579 (593).

Since applicants admit and the record confirms that vendors have conducted no operations under their rights to transport livestock, fertilizers and materials, and general commodities (other than those embraced in their rights for machinery and heavy commodities), purchase approval is conditioned on cancellation of those rights.—Home Transp. Co., Inc.—Purchase—Clarkson, 93 M.C.C. 509 (518)*.

In view of disapproval in 50 MCC 70 of attempt to cut out or segregate particular portions of "Mercer" oilfield authority because it would destroy the selling carrier's ability to render the complete service contemplated by such authority, it follows that where a carrier is proposing to sell its Mercer authority the part relating to stringing of main or trunk pipelines should not be canceled for dormancy as a condition of approval, unless there is strong evidence that the selling carrier has abandoned such authority, or the acquiring carrier disclaims any desire to engage in pipestringing operations. Major pipestringing jobs are available only as pipelines are being constructed, and there has been little such construction in territory involved during the 2 years preceding hearing; weighing all factors, cancellation of vendor's pipestringing authority should not be required as a condition on purchase of its Mercer rights.—J. H. Rose Truck Lines, Inc.—Purchase—Stanton Transp. Co., 90 M.C.C. 284 (290-1).

Requested restriction on purchase of vendor's heavy or cumbersome commodity rights between points in Texas and New Mexico against transportation of commodities used in connection with pipeline stringing, dismantling, or servicing is not necessary to protect protestants' interests; it does not appear that without it their revenues and services would be materially impaired.—Belyea Truck Co.—Purchase—Ferguson Trucking Co., 90 M.C.C. 139 (146, 148)*.

But authority for purchase by another vendee or vendor's Mercer description rights is conditioned on restriction against transportation commodities which because of size or weight require use of special equipment, between points in Texas and New Mexico; in view of rights now held by both vendees, such restriction does not violate the spirit and concept of the Mercer case (74 MCC 459); however, no need appears for similar restriction between points in other States embraced in such authority.—Id., p. 150-1.

Condition on temporary authority requiring vendee to lease all vendor's operating rights and properties, to exclusion of its noncarrier affiliate, was prompted by the commission's then policy against sanctioning creation or maintenance of separate corporations to hold title to physical property to be leased to an operating affiliate. However, in view of reconsideration of that policy in 80 MCC 573, which found that such separate holding of operating rights and physical property should not bar approval of a transaction otherwise consistent with the public interest, purchase approval will authorize vendee to carry out its original intention that its affiliate acquire vendor's physical properties. But since vendee's carrier funds have been expended through lease rentals for acquisition of the

properties, approval is conditioned on a showing that the affiliate has paid it not less than the fair market value of such property as of date of consummation.—Michigan Exp., Inc.—Purchase—Chicago-St. Louis Exp., Inc., 90 M.C.C. 671 (677)*.

The commission is obligated under §5 to determine what terms would be just and reasonable and would make the transaction consistent with public interest; its act in approving purchase on condition of cancellation of certain dormant operating rights for whose reactivation no need is shown, and on restriction of both the rights to be transferred and those to be retained by vendor to prevent an objectionable split and consequent duplicate operations by vendor and vendee, is in fulfillment of that obligation. It is a grant of authority purely permissive in nature, setting out the terms under which the transaction can be found consistent with public interest; alternative to conditional approval would be outright denial of the application as submitted.—Knox Motor Service, Inc.—Purchase—K & A Truck Lines, Inc., 93 M.C.C. 26 (32, 33).

Since vendor's regular-route authority between New York City and Philadelphia is dormant insofar as it permits a local transportation service and no need is shown for revitalization of such service by vendee, purchase thereof is conditioned on elimination all authority to transport shipments whose origin and destination are both east of Ohio-Pennsylvania State line; and since that condition renders useless vendor's irregular-route rights in the same area, cancellation of those rights in toto is required. Also, to eliminate objectionable dual-operating possibilities, one of vendee's contract-carrier permits, which it no longer needs, is required to be cancelled.—Emsley Truck Rentals, Inc.—Purchase—Foodway Exp., Inc., 90 M.C.C. 414 (415-6, 417).

See also McNichol—Purchase—McNichol, §210, n. 3.

Considering that even an irregular-route common carrier with unlimited authority both as to commodities transported and number os shippers served is required only to show that it has rendered substantial service to a representative number of points within its authorized territory to support a finding of continuous operation, and that vendor's authority covers contract carriage over irregular routes of a distinct class of commodities for limited shippers, there is no warrant for finding that any of his authority, other than that stipulated by the parties, is dormant and should be canceled as a condition on approval of purchase.—George L. Hooker, Inc.—Purchase—Ramey, 90 M.C.C. 792 (796).

Since vendee, in related §207 proceeding, is granted authority for two regular routes between Knoxville, Tenn., and points in involved southwestern North Carolina area, which with his existing regular-route rights will authorize operations entirely overlapping the one-way irregular-route authority authorized to be purchased, approval is conditioned on cancellation of the purchased certificate coincidentally with consummation.—Cope—Purchase—Hill and Burdick, 90 M.C.C. 71 (78)*.

Authority granted two affiliated contract carriers for purchase of additional rights, which will enable each to provide a complete service for a separate operating division of contracting shipper, is conditioned on restriction to service for that shipper, whose transportation needs are the sole support for approving reinstitution of vendors' former service for same shipper in transportation of grocery store commodities and bakery goods and supplies.—Dyer-O'Hare Hauling Co.—Purchase—Merchants Transfer, 87 M.C.C. 768 (773).

While the commission was formerly averse to approving application under §5 which might result in divorcement of certificated operations from underlying intrastate rights, recommended condition on purchase of multi-State rights by a single-State carrier, to preclude future separation of its present intrastate authority from interstate authority concurrently granted it under §207, is no longer necessary. With repeal of the former second proviso of §206(a)(1) and expiration of the "grandfather" period for requesting certificates of registration based on former

proviso operations, carriers may no longer use their intrastate certificates as basis for interstate operations, but must now prove before the State authorities that public convenience and necessity require performance of operations in interstate or foreign commerce. Thus the danger of third persons instituting competitive interstate operations by virtue of acquisition of the intrastate rights has been completely eliminated.—Dodds Truck Line, Inc.—Purchase—Strain, 93 M.C.C. 229 (233, 238).

While vendor agreed to accept a condition on sale of its interstate rights restricting its retained intrastate rights against their use to institute duplicative operations under the second proviso of §206(a)(1), that proviso was repealed subsequent to the hearing; as vendor can no longer claim benefit of that exemption, imposition of such a condition is unnecessary.—Helm's Exp., Inc.—Purchase—Keystone Transfer Co., Inc., 90 M.C.C. 679(686).

See also Sierra Distributing case, under "*Grandfather" rights,* below.

Although applicants by letter requested that purchase approval be conditioned on cancellation of vendor's rights for transportation of frozen fruits, berries, and vegetables to three Minnesota points, no explanation or justification therefor is given; as vendor's abstract of shipments shows transportation of frozen vegetables from points in its authorized origin territory to those destinations, imposition of the condition, which would diminish utility of the rights, is not shown to be consistent with public interest.—Little Audrey's Transp. Co., Inc.—Purchase—Refrigerated, 90 M.C.C. 743 (747-8).

Conditioning of approval of sale of certificated interstate rights and retention of corresponding intrastate rights to preclude the seller from rendering duplicate service under the single-State proviso is in recognition (1) that a buyer of operating rights is entitled to full benefits of the seller's goodwill and going concern value growing out of its exercise of the interstate authority, which would not be true if it or a successor could continue substantially the same interstate service under the proviso; and (2) that the buyer and other carriers are entitled to protection from what would be tantamount to a new competitive interstate service growing out of a former single operation by the Seller.—Central Motor Exp., Inc.—Purchase—Skaggs Transfer, 90 M.C.C. 332 (334)*.

But where the proviso operation has been conducted for some time and its continuance by the seller would not result in performance of an interstate service between any two or more points authorized to be served by vendee under the interstate certificate sold; where but for imposition of such a condition it would be entitled to continue to claim benefit of the proviso, and could not through sale of its retained intrastate certificate place another person in position to institute proviso operations between any two points vendee could serve under the acquired interstate rights; and where the sum total of services authorized and provided would be precisely the same as vendor is now authorized to provide, it should not be denied the right to continue the proviso operations by imposition of a restriction.—Id., pp. 335, 336.

Thought vendor's interstate and intrastate certificates authorize use of same highways between Louisville and Buffalo, Ky., via Elizabethtown, the intrastate rights are restricted to overhead service between Louisville and Buffalo, and the interstate rights sold authorize service only between Louisville and Elizabethtown, on one hand, and points south of Buffalo, on the other; thus the parties could not serve Louisville to or from any common point. In the circumstances it would be incongruous to require vendor, as a directly related matter, to establish that public convenience and necessity require continuance of its operations between Louisville and Buffalo; elimination of condition requiring it to discontinue all interstate operations between those points, and precluding it or any affiliate from instituting proviso operations over the involved highways, is warranted.—Id., pp. 333, 336.

Since evidence is not clear as to scope of vendor's retained intrastate rights in

Wyoming and South Dakota, or whether either of such rights could be utilized to perform interstate proviso operations in competition with the interstate rights vendee would acquire, approval of purchase of the latter is conditioned to provide that neither vendor nor any affiliate shall use the retained intrastate rights, to extent they duplicate the interstate rights sold, as basis for proviso operations.—C & H Transp. Co., Inc.—Purchase—Tomlin Transp. Co., 90 M.C.C. 251 (255).

In transaction involving sale of interstate rights only, and retention of duplicative Arkansas intrastate rights by estate of decreased certificate holder, a condition precluding the administrator or any heir, or any affiliate of them, from instituting interstate operations under single-State proviso would not be adequate to forestall creation of a competitive operation; however, denial is not required when purchase is otherwise in public interest and vendee, which has engaged in substantial interline operations with vendor for some time, is the logical purchaser; approval conditioned to require that vendee also acquire the intrastate rights at no increase in price.—Arkansas-Best Freight System, Inc.—Purchase—Bradsher, 87 M.C.C. 754 (757-8)*.

Denial; effect: [Vols. 12, 16, 17, 19].—Vendor, a small carrier with a largely rural service area in Kansas, has been providing a needed general-commodity service to the shipping public, but is in adverse and critical financial condition owing to prolonged deficit operations; if purchase were denied, it is extremely doubtful whether it could resume operations, and cessation of its service would adversely affect shippers and consignees in the area; any problems resulting from the limited duplications, commoditywise and territorially, in operations by vendee's affiliate are therefore outweighed by advantages to the public from unrestricted approval.—Plains Motor Exp., Inc.—Purchase—C & G Truck Line, Inc., 90 M.C.C. 1 (3-4)*.

See also Georgia & F. Ry. Co. purchase case, n. 110 *Bankruptcy involved*, below.

Whether failure to approve proposed purchase would result in destruction of service previously performed by vendor and presently by vendee under temporary authority is questionable; rights involved are valuable and it is inconceivable that vendor would cease operations entirely or surrender them for cancellation upon denial.—Bowman Transp., Inc.—Purchase—A. W. Hawkins, Inc., 90 M.C.C. 303 (325).

Discontinued operations: [Vols. 12-17, 19].—Where there has been no service under operating authority proposed to be sold, or where only limited service has been rendered over a substantial period, approval opening the way to reinstitution of service will be consistent with public interest only upon a clear showing of need therefor. Public witness testimony offered to establish need for proposed service under vendor's dormant rights lacks conviction when only two witnesses had made an interstate bus trip in recent years and a number were unaware of vendor's present limited service. Most of the public interest shown was concerned with intrastate travel or with improvement in inbound express freight service used for occasional emergencies, and there is little indication that the area involved would generate any significant increase in traffic in the foreseeable future. Therefore, in view of abundance of existing service in the area, purchase is denied.—Carolina Scenic States—Purchase—Patterson, 97 M.C.C. 79 (90-91).

Any buildup of a carrier's operations to refute an inference of dormancy must be free from the control, influence, and domination of a prospective purchaser. Since the carriers involved have unlawfully controlled and managed in a common interest for several years, evidence of vendor's operations cannot be considered as showing public need for continuance thereof; moreover, most of the service shown under vendor's rights was dependent on traffic transported under a leasing arrangement whereby vendee provided the entire service, frequently preparing the freight bills, to the exclusion of any

participation by vendee. Thus, absent any shipper testimony of need therefor, protestants are entitled to protection from additional competition of the new service proposed, though the degree of adverse effect on them may not have been shown. Purchase denied.—R. L. Jeffries Trucking Co., Inc.—Purchase—Eck Miller, 97 M.C.C. 151 (170-1).

See also Calore Exp. Co. case, §5(2), n. 45 *Violations of* §5(4).

Review of entire record compels conclusion that vendor's single-State proviso rights, particularly for irregular routes, were dormant prior to inauguration of its interline arrangement with vendee, and it is uncontroverted that almost immediately thereafter the pattern of its operations changed dramatically. There is ample evidence that the parties recognized reactivation of vendor's dormant rights to be a necessary preliminary to approval of purchase, and that vendee assumed the burden of building them up so as to present a picture of active operations throughout vendor's entire territory. Collectively, the facts show that vendee unlawfully assumed control of vendor's operations in order to revitalize the dormant proviso rights; those operations therefore do not merit consideration in absence of overriding evidence of public need for the service; and vendee's control so permeated vendor's entire operation as to destroy lawfulness of the regular-route service rendered during the period. Denied.—Lombard Bros., Inc.—Purchase—Millis, 90 M.C.C. 604 (609, 611)*.

Even if purchase of vendor's interstate rights could otherwise be approved, it discontinued serving Utah points other than Salt Lake City and Kanab at time it sold its Utah intrastate rights to a third carrier, and its practice of interlining other Utah traffic with that carrier has been continued by vendee under temporary authority. In absence of any service at considered Utah points by either vendor or vendee for over 2 years, authority to conduct such operations under vendor's interstate rights must be considered dormant. Also, there is no showing that vendor has competed for traffic moving between California and its authorized Arizona territory, and interline operations allegedly performed some 4 years past are too remote to be considered, even if proven. Thus, vendee's single-line service under temporary authority has been an entirely new service for which no public need is shown. Purchase denied.—Illinois-California Exp., Inc.—Salt Lake-Kanab, 97 M.C.C. 38 (47-8).

Transfer of dormant operating rights under §5 may be approved as consistent with public interest only on a showing of need for service that would be reestablished thereunder; mere desire of vendee to establish service under vendor's rights, unsupported by evidence that such service would be of benefit to the public in area involved is insufficient to support the required findings; vendee failed to show that its reinstitution of service would meet a public need not fulfilled by other carriers; denied.—West Nebraska Exp., Inc.—Purchase—Forsstrom, 87 M.C.C. 733 (736); Deaton Truck Line, Inc.—Purchase—Magnolia Truck Line, 87 M.C.C. 674 (679-80); general pattern of vendor's household-goods has been radial in nature, and so limited as to justify finding that its rights are, in effect, dormant. Vendee's proposed use would little resemble vendor's limited service and would constitute a new competitive service for which no public need is shown; denied.—U.S. Van Lines, Inc.—Purchase—Holien, 90 M.C.C. 657 (660-1).

That proposed purchase involves dormant contract-carrier, rather than common-carrier, authority does not warrant approval in absence of evidence showing a need for resumption of the service; evidence indicates only a preference by the one supporting shipper, which vendor formerly served as a contract carrier, for the service proposed by vendee, and as that shipper seems to have transacted its business satisfactorily without once using vendor's service during the 13 months preceding hearing, no need appears for reinstitution by vendee. Denied.—H. C. Gabler, Inc.—Purchase—Logan, 90 M.C.C. 436 (439, 440).

Though under the rights he proposes to sell vendor is authorized to transport

specified classes of commodities between points in areas embracing many States and from those areas to numerous additional States, the limited operation actually conducted was for the most part one-way, primarily from Kansas City area. Maintenance of effective tariffs is no substitute for actual performance of operations required by a vendor's certificate, even where negligible operations are accompanied by advertising and solicitation on a limited basis; to find that vendor held out to perform a complete service would be inconsistent with the evidence. Approval of purchase would be justified only by a showing that vendee's proposed service would meet some need not presently being met by existing carriers, but vendee's use of the rights would bear little resemblance to vendor's limited service and would amount to a new competitive service for which no need has been shown. Denied.—Aero Mayflower Transit Co., Inc.—Purchase—Walls, 93 M.C.C. 369 (376, 377).

While the commission is inclined to be more lenient in permitting transfers of dormant rights when they involve a limited class of special commodities, as opposed to regular-route general-commodity rights, that does not apply to cases where no service at all by holder of the rights is shown, or there is no evidence of an attempt by the holder to render the service authorized. And though purchase of dormant rights may be approved where competent shipper testimony shows public need for a revitalized service thereunder, the burden of making such a showing is on applicants.—C & H Transp. Co., Inc.—Purchase—Ferguson Trucking, 93 M.C.C. 741 (748, 750)*.

Contrary to applicants' contentions, considerable operations under temporary authority are not the best evidence of need for continuance of service on a limited class of special commodities; and, without other evidence, such temporary service alone does not establish public need. Testimony of only two additional shippers was presented at the further hearing and, while they testified that vendee's service to Arizona would benefit them, there is no evidence as to whether they knew of or had tried to find other carriers authorized to perform that service. Moreover, vendee handled only six shipments for those shippers under its temporary authority, and their mere desire for single-line service between Ohio and Arizona on a few shipments of heavy and cumbersome articles is insufficient to establish public need for vendee's revitalization of vendor's dormant rights.—Id., pp. 749-50.

Vendors' heavy-hauling rights between Berks County, Pa., and points in six States, and District of Columbia are dormant with exception of rights to and from Ohio, and purchase of latter alone would not be justified at the proposed price; moreover, vendee is already authorized to haul heavy or bulky commodities between eastern Ohio and all points in Pennsylvania. Since vendee's primary interest is in transportation of iron and steel to vendors' eastern area, which would not be permissible under the limited authority that could be granted, it appears best at present for vendors' Ohio rights to remain with their other active and inactive authority; denied, without prejudice to the parties renegotiating their contract with a view to vendee's purchasing the Ohio rights alone or with such other authority of vendors as may not be dormant.—Aero Trucking, Inc.—Purchase—Kreitz, 93 M.C.C. 115 (123).

All automobile traffic transported by applicants in the immediate past from Kenosha, Wis., to California was that of one shipper, which, though apparently satisfied with applicants' actual service, eliminated them upon institution of piggyback service by a competitor in collaboration with a railroad, and there is no showing that shipper is now interested in any service that could be performed under the unified rights, nor does it appear that any future operations by vendee under those rights would meet any requirements for service that would not be available from the competitor. No other evidence is presented to show that service under the unified rights would be required in future; vendee's representation that changes in State laws permitting longer trailers might bring back highway transportation of automobiles is

too remote a possibility for serious consideration.—Highway Transport Co.—Purchase—Dallas & Mavis, 90 M.C.C. 724 (729).

While it is true that applicants, through no fault of their own, now find their joint-line arrangement unless because of shipper action, allocation of traffic is a shipper prerogative, and a plight such as applicants' could befall any carrier and is a risk that must be assumed. In absence of any evidence that public interest would be fostered or that any part of the public would benefit by vendee's acquisition of "bare" operating rights, it can only be concluded that applicants have failed to meet their burden of showing that the transaction would be consistent with public interest; denied.—Id., p. 729.

Where vendor discontinued operations under former single-State proviso about 4 months prior to vendee's temporary lease of his intrastate rights, and proof of his past interstate operations prior to that date falls far short of meeting the evidentiary requirements for issuance of a certificate to vendee, purchase application must be denied in absence of any showing of shipper need for vendee's reinstitution of the service, since any substantial interruption of one carrier's service tends to result in expansion of other facilities to meet shippers' continuing needs, and thus to cause overcrowding if the suspended service is resumed.—Joyce Trucking Co.—Purchase—Selig, 97 M.C.C. 1(8).

Although vendor holds a registration certificate authorizing transportation of general commodities within South Carolina to and from points in a two-county base area, no evidence was offered to show transportation of any commodities other than textiles, and the 42 shipments of textiles listed for a 5-month period are not shown to have moved in interstate or foreign commerce. The commission is required, in resolving whether the proposed purchase is consistent with public interest, to find that active operations in interstate or foreign commerce are being performed under the operating rights evidenced by the registration certificate, or, if none are being conducted, that reactivation of the interstate operations would be consistent with public interst; there are no provisions in the recent amendments to §206(a) which alter this requirement. Applicants have failed to meet their burden of showing that approval of purchase would be in public interest; denied.—Piedmont Motor Lines, Inc.—Purchase—Spartan Exp., Inc., 97 M.C.C. 49 (52, 53).

Since a purchaser's reinstitution of service under inactive or dormant rights is in practical effect little different from its institution of a new service, it has consistently been found that transfer of such dormant rights may properly be found consistent with public interest only on a clear showing that the acquiring carrier's service will meet a public need not being met by existing carriers. Argument that the chaotic state of vendor's records is responsible for lack of freight bills covering service under its Ohio irregular-route rights is not convincing in view of abundant evidence of service under its regular-route rights. Area involved is abundantly served by other motor carriers, and need for a broad new service expressed by supporting shippers is mostly a matter of preference arising from minor dissatisfactions. Conclusion is warranted that vendor was not a competitive factor as to traffic moving to or from points in its irregular-route territory, and authority for purchase of that portion of its rights is therefore denied.—Ohio Southern Exp., Inc.—Purchase—Vermilion Truck Line, 97 M.C.C. 93 (101)*.

On reconsideration, however, evidence of vendee's extensive operations under vendor's regular- and irregular-route rights, pursuant to temporary authority, and supporting shippers' expressed need for continuance of its improved service under the unified rights, warrant conclusion that substantial compensatory benefits have resulted to the shipping public, without adverse effects on protestants' operations and services. Also, protestants are strong, firmly established carriers, and are well able to meet successfully any intensified competition resulting from the transaction so long as they maintain a high level of service; and authorizing operations under

the unified rights will enable vendee to provide needed service to shippers it now serves without serious impact on service of other carriers. Accordingly, proposed purchase should be approved; prior findings modified in part.—Id., 101 M.C.C. 444 (449-51)*.

Most of vendor's traffic came from two carriers that interchanged Norfolk, Va., traffic with it at a point near Newport News; vendee transported traffic from New York City to the interchange point where the trailers were turned over to vendor who delivered the lading in Norfolk and returned the trailers to vendee at point of interchange; the other connecting carrier hauled trailer loads of traffic received at Richmond to Newport News from which, under similar interline arrangements, vendor delivered the shipments to Norfolk; and both interline arrangements continued, using connecting carriers' equipment and drivers, after vendor lost its equipment and employees in financial setbacks. In the circumstances of record, despite vendor's nongeneration of traffic of its own, those interline movements of traffic, together with other interline movements that vendor participated in, are sufficient to preclude a finding that vendor's rights are dormant. However, in view of very limited use of vendor's rights and no showing of available new traffic, vendee's operations into Norfolk would disturb the competitive balance and is not shown to be needed; denied.—Great Coastal Exp., Inc.—Purchase—Price Transfer, 97 M.C.C. 271 (288-91)*.

Revitalization of vendor's rights between considered points was not affected under vendee's domination through their lease-and-interchange arrangement; vendor's limited service at some past time did not preclude it from instituting a complete service later, even for purpose of sale. At time of purchase negotiations vendee had an extension application pending for most of the authority it seeks to purchase, and its petition for reconsideration thereof was not decided until shortly before filing of purchase application; during the negotiation period there was no certainty that the extension would be denied and that vendee would purchase the involved rights; moreover, vendor is shown to have interchanged with other carriers, in some instances leasing their equipment. However, since vendor performed only truckaway of passenger automobiles and parts under considered rights, approval is conditioned on cancellation of the remainder, which are dormant.—Cassens Transport Co.—Purchase—Speedway Transports, Inc., 90 M.C.C. 159 (164).

Although vendor, because of substantial competition in intrastate commerce, ceased local bus operations between Albany and Schenectady, N.Y., over a year before filing of purchase application, it has continued to participate in through interstate service over that route. Purchase of those rights by vendee which now operates between those points in intrastate commerce would increase its revenues without increased expense and would enable it to serve a more substantial destination territory than under its existing specific charter-operation rights; approved.—Schenectady Transp. Corp.—Purchase—Interstate Busses, 90 M.C.C. 623 (627).

While it is not shown that vendor transported shipments originating in some areas and points of her authorized territory, those areas were served as destinations; and though no transportation of prefabricated or dismantled buildings is shown from certain authorized origin points, those points are embraced in the overall representative areas where active service is shown; considering nature of the rights and commodities involved, a condition canceling any of the purchase rights is not warranted.—Pre-Fab Transit Co.—Purchase—Hagan, 90 M.C.C. 65 (70).

Though lack of any evidence to show active and continuous service under vendors' rights prior to grant of temporary authority creates presumption that the operations were dormant, such presumption does not mean that the rights may not be transferred, provided the transfer can be found consistent with public interest, giving considerable weight to traffic needs of the territory and to possible adverse effect of institution of a new or revitalized operation on other existing

carriers.—Ashworth Transfer, Inc.—Purchase—Willcoxon and Fowkes, 90 M.C.C. 107 (110)*.

Testimony of shipper witnesses, considered as a whole, adequately supports finding that, irrespective of evidence concerning vendee's operations under the temporarily unified rights, there is need for service within scope of vendors' authority which is not being met by other carriers. Collectively, shippers have sporadic but immediate needs for service at almost any point in the various States involved, dependent on placement of orders or successful bids; they cannot use regular-route carriers since pickup and delivery usually must be made at off-route jobsites, and interline is undesirable because their shipments are normally of irregular size or shape, require special handling in loading and unloading,or present other problems which can best be met by specialized heavy haulers. Purchase approved.—Id., p. 110.

Although vendor did not exercise its rights between Louisville and Tennessee points until 4 years after it acquired them, or less than a year before filing of purchase application, there is substantial evidence that service by vendee between Louisville, on one hand, and points on its regular routes (except Memphis) and points in vendor's irregular-route territory, on the other, would meet a public need. As shippers in the area would for the first time receive an effective service within scope of vendor's rights, the compensatory public benefits outweigh any adverse effect on existing services, and purchase may be approved. However, as there is no showing that a new competitive service by vendee between Louisville and Memphis would meet any public demand that cannot be or is not being met by existing carriers, restriction is imposed against its performance of service between those points.—Dean Truck Line, Inc.—Purchase—Allstate Truck Line, Inc., 90 M.C.C. 819 (826-7)*.

Though vendor's other operations are shown to have been generally active, considering the often sporadic nature of transportation of "Mercer description" commodities, no service whatever is shown under its nonradial rights in a 5-State area or between Georgia and a 5-State radial territory, and no evidence is presented warranting reinstitution of service under vendee's ownership; approval is therefore conditioned on cancellation of those dormant rights.—Hill & Hill Truck Line, Inc.—Purchase—Hunsaker Trucking, 93 M.C.C. 490 (495).

Though vendor's operations under its heavy and cumbersome commodity rights between points in Texas and New Mexico were limited, a service was performed; in view of specialized type of service authorized, such operations would necessarily be sporadic and cannot be expected to have the same degree of regularity as those of a carrier in a less specialized field; considered rights are not dormant and their purchase may properly be approved.—Belyea Truck Co.—Purchase—Ferguson Trucking Co., 90 M.C.C. 139 (148)*; however, applicants' self-serving statement that vendor conducted operations under its Mercer description rights between points in New Mexico and Oklahoma, Texas and Arizona, and Texas and Utah, and under its heavy-commodity rights between Texas and Arizona, is insufficient, in absence of Corroborative evidence, to preclude a finding that those rights are dormant. Thus, since no need is shown for revitalization of service thereunder, those rights are required to canceled, as a condition on purchase approval.—Id., p. 150.

See also Kroblin Refrigerated Xpress purchase case, n. 105, below.

Although vendor has performed no service in stringing or picking up of pipe in connection with main or trunk pipelines in Wyoming, Colorado, and Utah, considering the almost complete lack of demand for such service in that area for many months, and particularly the specialized and sporadic nature of that service, vendor's oilfield authority should remain intact; vendee's holding of the complete authority on a standby basis will not adversely affect protestants, who likewise hold such authority on a standby basis so far as that area is concerned.—C & H Transp. Co., Inc.—Purchase—Tomlin Transp. Co., 90 M.C.C. 251 (255).

Considering the highly specialized nature of bulk transportation and the limited number of shippers and receivers that normally would have need for transportation of bulk chemicals, even in a highly industrialized area, vendor's bulk operations in local service have been conducted to extent of its resources and inability and cannot be considered dormant. Its operation with tank trailers owned by the shippers is of little significance, particularly since it made inspections and the equipment came under its exclusive control as carrier-lessee.—Berman's Motor Exp., Inc.—Purchase—Lang Storage & Trans., 90 M.C.C. 807 (814).

Although no service is shown to have been performed under rights described in one paragraph of vendor's certificate, that authority complements that described in the preceding paragraph, and commodities of the types included (glass containers and related articles) do not require frequent and steady transportation. Restriction of those rights against transportation of the commodities in bulk, together with certain territorial restrictions, will obviate necessity for their cancellation. However, certain other rights under which no service whatsoever has been performed should be canceled as a condition on purchase approval, in absence of any showing of shipper need for service under those rights.—Bowser and Campbell—Purchase—Motorway Corp., 97 M.C.C. 192 (197, 200).

And restriction of certain portions of the acquired rights to preclude service from Gas City, Ind., to Clarion, Pa., and points within 5 miles thereof and from latter area to Gas City and points in Ohio and Lower Peninsula of Michigan will not be an unwarranted pulverization of operating rights in view of the paucity of vendor's operations between those points and fact that one protestant, which maintains a terminal at Clarion, now handles some 95 percent of all motor carrier traffic of glass plant at that point and derives a large part of its revenues from traffic moving to Clarion from other areas. As diversion of that traffic to vendee could materially injure that protestant, and the glass company evinced no real need for vendee's service between Clarion and the areas in question, vendee's reactivation of those rights would be inconsistent with public interest in absence of a showing of overriding public need.—Id., pp. 200-1.

Although vendor's certificates were seized by Internal Revenue Service and its operations ceased in February 1963, no operation are shown under certain of its rights in New Jersey since September 1954, and under certain other rights since April 1962. In view of the extended lapses in operations under those rights and absence of showing of any public need for reactivation thereof by vendee, purchase approval is conditioned on cancellation of those rights.—Public Serv. Coordinated Transport—Purchase—Royal Blue, 97 M.C.C. 56 (60-2).

As vendor holds four State certificates, all combined in a single §206(a)(7) "grandfather" application, it is appropriate to consider portions of its rights separately under §5 from standpoint of dormancy and, if dormant, public need for and competitive results of reactivation. While it would not be proper or reasonable to examine each of the numerous authorized commodities and points of service individually, it is reasonable to consider broad commodity and area units; thus, vendor's operations under each of its State certificates are considered as a unit. Vendor's past operations under two of its certificates prior to its involuntary cessation of all operations upon seizure of its assets by Internal Revenue Service, and vendee's subsequent temporary-authority operations thereunder, warrant approval of purchase of those rights as active or responsive to a public need. But vendee's operations under temporary lease of the other two certificates represent a new competitive service, for which only shipper preference, rather than a public need, is shown; those rights are therefore exluded from purchase approval.—Sierra Distributing—Purchase—F.T.S. Transport System, 97 M.C.C. 294 (296, 305-6).

Where the operating rights to be sold cover irregular-route transportation of a

limited class of commodities from two closely located origins to the same destination States, vendor's operation therein should be appraised on basis of a single integrated operation. So considered, evidence of shipments transported to points in the four destination States involved shows a fairly representative and active coverage of the areas wherein they are located, except as to Michigan. The fact that only 7 shipments moved to that State, and that of the 5 points served 4 are in the Upper Peninsula and only one in the vast Lower Peninsula, compels finding that vendor's service thereto was virtually dormant. Accordingly, as no public need is shown for revitalization of that portion of the rights by vendee, purchase approval is conditioned on cancellation of the authority to serve Michigan.—Seuring Transit, Inc. Purchase—Fullerton Motor Truck, 97 M.C.C. 241 (246).

Other than shipments handled under an unlawful leasing arrangement, which therefore may not be considered, there i no evidence of any service by vendor to or from Charleston and Parkersburg, W. Va., prior to purchase agreement. Vendor's subsequent reactivation of those rights and commencement of interline of a substantial volume of traffic with vendee was clearly an endeavor to eliminate or mitigate the issue of dormancy. As evidence otherwise, including that of supporting shippers, fails to show any need for service under the dormant West Virginia rights that cannot be met by existing carriers, approval of that portion of purchase would be inconsistent with public interest.—Pilot Freight Carriers, Inc.—Purchase—Biso Fast Freight, 90 M.C.C. 709 (718).

Vendor's maintenance of tariffs and insurance covering his authority, and his holding out to handle traffic for movement under those rights, are not sufficient to preclude a finding that, side for transportation of farm machinery and equipment from West Bend, Wis., to points in two States, his rights have long been dormant. The reason for carrier's failure to conduct operations under its authority is entitled to little weight in determining whether proposed §5 transaction, and reactivation of service by the purchaser, would be consistent with the public interest. Approval conditioned on cancellation of the dormant rights—Hove Truck Line—Purchase—Maurer, 97 M.C.C. 361 (363, 368, 371-2).

As all but 32 of some 900 interstate shipments shown in vendor's abstract covering a period of approximately 5 1/2 months moved between Buffalo and Wayne County, N.Y., authority to serve other New York counties is clearly dormant; and transportation of 26 shipments, mostly food products, between Buffalo and New York City does not show a general-commodity operation, Approval of purchase of vendor's general-commodity rights should therefore be conditioned on cancellation of all portions thereof exempt authority between Buffalo and Wayne County.—Tiger Exp., Inc.—Purchase—Gene Adams Refrigerated, 93 M.C.C. 432 (435)*.

Considering the evidence as a whole, no need is shown for resumpion of operations by vendee under those portions of the purchase rights found to be dormant; the area is abundantly served by other motor carriers, including protestants, and the need expressed for new service is a matter of preference arising from minor dissatisfactions. Shippers are not entitled to additional service by a preferred carrier where existing service is shown to be adequate. Approval is therefore conditioned on cancellation of the dormant rights.—Knox Motor Service, Inc.—Purchase—K & A Truck Lines, Inc., 93 M.C.C. 26 (31).

While contract-carrier services differ materially from those of a common carrier, purchase of dormant contract-carrier rights should not be approved unless the evidence as a whole warrants finding that, in light of the §209(b) criteria, the transaction would be consistent with the public interest. And applying the principles set forth in 368 US 81, it is incumbent on purchase applicants to establish a distince need of shippers for service under the dormant portion of vendor's rights, if acquisition thereof and institution of operations thereunder is to be found consistent with the public interest.

Mere desire of shippers to have service under such rights available in the event that a need therefor may arise at some uncertain future time does not justify finding that transfer of dormant portion of vendor's rights would be consistent with public interest.—H. Prang Trucking Co., Inc.—Purchase—Hyer Trucking, 93 M.C.C. 695 (698-700).

Vendors have not transported any traffic under their authority for felt base carpeting for several years, and have not transported shipments of roofing and related articles from and to points in Massachusetts, Rhode Island, or the District of Columbia since about a year prior to filing of purchase application; and though supporting shippers indicate that they might or could use vendee's service for such movements, their evidence falls far short of establishing a distinct need for service under those rights. Therefore, purchase approval is conditioned on cancellation of dormant portions of vendors' rights.—Id., pp. 701-2.

While there is evidence that vendor was conducting some operations under its household-goods rights between its Texas base area and Arizona and New Mexico prior to execution of purchase agreement, it must be presumed from lack of any evidence of operations prior to that date between the base area and four other southwestern States that such rights are dormant. While testimony of shipper witnesses was vague, speculative, and general and therefore entitled to no weight, and testimony of supporting motor carriers failed to establish an absolute need for operation by vendee under vendor's rights, they have used vendee's service under the unified rights during temporary authority and have found it entirely satisfactory, and continued availability of that service would be of substantial benefit to them in handling of traffic to and from New Mexico and Arizona. Purchase approved, conditioned on cancellation of the dormant rights.—Von Der Ahe Van Lines, Inc.—Lease and Purchase—Bee-Line, 90 M.C.C. 888 (895, 896)*.

Although vendor's operations have been confined to transportation of feed between Sioux City, Iowa, and Mitchell, S. Dak., a less strict view of its past activity under its feed rights should be taken when territory authorized and nature of the commodity are considered; as the remainder of its authority is unquestionably dormant, approval is conditioned on cancellation of all the purchase rights except those for feed between points in Iowa and South Dakota points within 100 miles of, and including, Mitchell.—Willers, Inc.—Purchase—Kelly, 90 M.C.C. 21 (23).

Though vendor's authorized area includes New York City, Philadelphia, and various densely populated intermediate points which usually generate a large volume of traffic of the type authorized, the last shipment shown as having moved locally between such points occurred over 15 months before application was filed; thus, vendor's rights insofar as they authorize local service and, considering complete absence of evidence of need therefor, revitalization by vendee of such local, noninterline service would not be in the public interest. Approval of purchase is therefore conditioned on modification of vendor's regular-route rights by eliminating therefrom all authority to transport shipments where both the origin and destination points are east of the Pennsylvania-Ohio State line.—Emsley Truck Rentals, Inc.—Purchase—Foodway Exp., Inc., 90 M.C.C. 414 (416, 417-8).

Though abstracts of shipments handled by vendor prior to assignment for creditors, and subsequently by prior vendee-applicant and by instant vendee under temporary authority, warrant a finding of active and continuous operation under vendor's rights between New Jersey area and areas in New York and in eastern Pennsylvania south of Easton-Pottsville-Harrisburg line, also to western Connecticut area, prior to temporary lease by present vendee no substantial service is shown from the Connecticut area or to or from Pennsylvania north of described line. As all supporting shippers have available reasonably adequate single-line service to and from latter Pennsylvania area, and merely desire continuance of vendee's service, no need therefor can be found, and purchase approval is conditioned on cancellation of that portion of vendor's authority.—Hudson Transp. Co.—Purchase—Hillside

Freight Lines, Inc., 87 M.C.C. 759 (764-6, 767).

However, while vendee's temporary service from the Connecticut to the New Jersey area would not of itself warrant approval of purchase of rights therefor, supporting shippers' testimony generally indicates dissatisfaction with existing interline service because of delays, and vendee's service, to extent used, has been more expeditious. Considering that to authorize a one-way operation to Connecticut without opportunity to develop return-haul traffic would result in wasteful operations and not foster sound and economic transportation, vendee should be authorized to provide service from as well as to that area.—Id., pp. 766-7.

Dual operations: [Vols. 12, 14, 16, 18, 19].—Although vendee common carrier filed related application for conversion of dormant contract carrier authority it seeks to purchase, it has option to consummate the transaction or not, if conversion is not approved; and since it serves same shipper that vendor formerly served as a contract carrier, and only that shipper supported the §207 application, common ownership and control of vendor's contract-carrier and vendee's common-carrier rights would be inconsistent with provisions of §210; therefore, the §5 application could be approved only on the basis that a certificate (in substitution for vendor's permit) issue to vendee for the purchase rights. Accordingly, as burden of proof under §207 was not met, both applications are denied.—H. C. Gabler Inc.—Purchase—Logan, 90 M.C.C. 436 (439-40).

Proposed purchase would enable vendee to serve the same shippers and consignees within the same territory in transportation of the same commodities as both a common and a contract carrier, which cannot be sanctioned under the commission's policy; and though vendee has applied under §207 for issuance of a certificate in lieu of its existing contract-carrier authority, the record fails to justify such a conversion despite the commission's favoring of a more liberal approach in cases directly related to a §5 transaction. However, since a substantial part of vendee's existing rights is duplicated by the common-carrier authority it would acquire from vendor, the transaction may properly be approved, subject to a condition requiring cancellation of vendee's contract-carrier authority prior to or concurrently with consummation.—Bowser and Campbell—Purchase—Motorway Corp., 97 M.C.C. 192 (201-3).

Exempt operations: [Vol. 15].—Although vendor's rights to transport fresh fruit and vegetables have become dormant, their inclusion in purchase is approved, since vendee may transport those commodities when nonexempt commodities are not included in the same vehicle.—Little Audry's Transp. Co., Inc.—Purchase—Refrigerated, 90 M.C.C. 743 (747).

Expedited, improved service: [Vols. 12, 13, 18, 19].—Purchase of passenger rights between Hilton Head Island, S.C., and Savannah, Ga., will be consistent with public interest when present service, as described by public witnesses who use and need it, is adequate only in sense that some vehicle equipped to carry passengers passes daily between the Island and Savannah. Measured by ordinary standards, existing service is primitive; in terms of equipment, facilities, firm schedules, connections with other carriers, and passenger comforts, it lacks even common features ordinarily found and expected in modern buslines; it represents minimal investment, and improvement is unlikely present competitive and financial circumstances. Vendee's proposed operation of one round trip 6 days a week with modern equipment, between the island and established bus terminal in Savannah, thus affording through bus service in connection with other carriers beyond Savannah on the south and Charleston on the north, will meet a public need. Approved.—Carolina Scenic Stages—Purchase—Patterson, 97 M.C.C. 79 (87-8, 89).

Protestants have not shown that they would be seriously affected by approval of purchase application as amended to eliminate dormant rights from 7 origins to Iowa, and, since approval would result in better balance of vendee's operations by

enabling it to backhaul traffic into Iowa and maintain or even improve its existing service to the public, benefits from approval of the modified transaction outweigh the minor adverse effects that may befall protestants.—Kroblin Refrigerated Xpress, Inc.—Purchase—Davis, 93 M.C.C. 356 (361).

Purchase by bi-State agency of operating rights of 14 buslines serving St. Louis and surrounding Missouri-Illlinois area, designed to eliminate uneconomic duplications, improve routing and downtown St. Louis terminal facilities, replace remaining streetcar with bus service, and halt decline in use of mass transportation service, thereby reducing traffic congestion, approved. Proposed unified transit system and inauguration of an area-wide zone fare structure and transfer privileges, with establishment of through local and express service, is the first and most important step of a plan for long-term improvement of the transportation situation in the St. Louis area; vendee has already effected numerous economies through consolidation of facilities, rearrangement of routes, centralization of management, etc., and passengers are benefiting through elimination of fare inequities and establishment of monthly passes and improved, coordinated service.—Bi-State Development Agency—Purchase—Vandalia Bus Line, 93 M.C.C. 579 (592).

Extension of operation: [Vols. 12, 19].—See also Okmulgee Northern Ry Co. Abandonment, §1(18), n. 1.

Request that survivor in Seaboard-Coast Line merger to be required to transfer to Southern Ry. a continuous line from Jacksonville to Tampa, denied, since it would authorize an unwarranted invasion of territory now adequately served by applicants, but never by Southern, without any public need for additional service. Florida East Coast's request that a 150-mile segment extending through Miami be transferred to it is likewise denied when no resulting public benefits are shown; present service over the segment is adequate, improvements can be expected, and survivor should be allowed reasonable opportunity to continue providing the necessary service to that important and growing area; moreover, in view of East Coast's current difficulties it would be imprudent to entrust to it additional obligations which it perhaps could not fulfill. Such denial is not inconsistent with conditions granting trackage rights over portions of survivor's lines, which are imposed in the general public interest, whereas Southern's and East Coast's requests are primarily for their own benefit.—Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122 (187, 209)*.

But since one of merger applicants' duplicative lines between Jacksonville and an industrial area about 10 miles distant may no longer be needed after merger, to preserve competitive service to that area survivor will be required to transfer that line to Southern or grant it trackage rights thereover. As the line is in Southern's general service area, such transfer would not constitute an unjustifiable invasion of survivor's territory.—Id., p. 184.

"Grandfather" rights involved: [Vols. 13, 19].—That purchase proceeding involves operating rights covered by a certificate of registration issued in a "grandfather" proceeding under §106(a)(7), rather than rights embraced in a certificate of convenience and necessity, requires no different approach in carrying out the mandate of the provisions of §5. The principal issue in a §5 proceeding for transfer of claimed or certificated "grandfather" rights is consistency of the transaction with public interest, and determination thereof requires inquiry into the nature and scope of operations conducted by vendor in the past and by vendee under temporary authority, as well as appraisal of any adverse effects that consummation would have on operations of existing carrier.—Sierra Distributing—Purchase—F.T.S. Transport System, 97 M.C.C. 294 (299-300).

Vendor's rights under four State certificates were combined in a single "grandfather" application, and issuance in that proceeding of a certificate of registration was made contingent on approval of instant purchase application, then pending. As

operations under two of the State certificates are found to be dormant and vendee's reactivation therof is not shown to be responsive to a public need, approval of purchase of rights covered by the other two is conditioned on dismissal of the "grandfather" application as to the rights thus excluded from purchase authority.—Id., pp. 296, 306.

Industry ownership: [Vols. 17, 19].—Vendee's parent company is controlled by two noncarrier corporations that manufacture and ship textiles, the only traffic vendor is shown to have transported, and there is no showing that vendee's operations under vendor's rights would not depend to a substantial extent on the textile operations of the parent companies. A common carrier owes a duty of indiscriminate service to all shippers, but such common control with large shippers opens the door to favoritism, preference, and discrimination among shippers and to unfair competitive practices. Vendee has failed to meet its burden of showing that the proposed operations would be in public interest; denied.—Piedmont Motor Lines, Inc.—Purchase—Spartan Exp., Inc., 97 M.C.C. 49 (52-3). [But see separate statement.]

Interchange: [Vol. 19].—See also Houck Transport Co. case, n. 15 *Regular- and irregular-route operations,* above.

A carrier has the right to build up all or any portion of its operations even though it may anticipate disposition of part or all of its authority, so long as the augmentation is free from the control, influence, or domination of the prospective purchaser. Although vendor commenced operations under single-State proviso and entered into interstate express service with vendee only a few months before grant of temporary authority, in absence of any contention that its proviso operations were under vendee's control or management, or any evidence of collusion between them, conclusion is warranted that they instituted a bona fide interline operation and continued it until vendee assumed lawful control of vendor through management, under temporary authority. Shipper evidence is convincing that vendee's express service under the unified rights will fulfill a need in the public interest Purchase approved.—Mistletoe Exp. Service—Purchase—Central News Exp., Inc., 90 M.C.C. 797 (802).

Intrastate operating rights: [Vols. 12, 14, 15, 17, 19].—The commission's finding, one basis for its denial of plaintiff's purchase application, that a substantial duplicate authority had already been created by vendor's sale of its intrastate rights to another carrier, over which routes latter had filed notice of intention to conduct interstate operations, is not supported by substantial evidence. Though the commission's report stated that "substantially the same routes" were covered by the intrastate rights previously sold, it is apparent from the record that there was no authority under the intrastate certificate to provide service between termini of the interstate rights plaintiff sought to purchase; however, the interstate rights in issue allow such service. Thus, there is a prima facie showing that there is no substantial duplication of rights, and that finding of the commission must be set aside.—Interstate Motor Freight System v. United States, 243 F. Supp. 868 (870, 872)*.

Although both vendee and vendor hold registration certificates authorizing general-commodity interstate operations within South Carolina, each to and from a different two-county base area, vendor is not shown to have actively exercised its interstate rights, and, though it has conducted active intrastate operations in transportation of textiles and the State commission has approved transfer of the underlying intrastate rights, applicants have not shown any public need for reactivation of vendor's dormant interstate rights by vendee. The existing situation should not be aggravated by approval of proposed purchase; denied.—Piedmont Motor Lines, Inc.—Purchase—Spartan Exp., Inc., 97 M.C.C. 49 (52, 53).

Vendor sold its interstate rights to vendee approximately one month after it disposed of its Utah intrastate rights to another carrier, at which time it also surrendered its intrastate traffic and terminals in southern Utah, and the intrastate purchaser promptly filed a BMC-75 statement

supported by the intrastate certificate thus acquired. Before doing so, that purchaser was already authorized to conduct interstate operations between Salt Lake City and other Utah points, and acquisition of vendor's intrastate rights enabled it to operate between Salt Lake City and all points along vendor's routes in southern Utah. Even if those rights were restricted to preclude its interchanging traffic at latter points with any carrier other than vendee of the interstate rights, it could still compete with vendee for overhead traffic through interline with other carriers at Salt Lake City and other Utah points while operating over the same routes, presenting a situation strikingly similar to that condemned as inconsistent with public interest in 45 MCC 463.—Illinois-California Exp., Inc.—Purchase—Salt Lake-Kanab, 97 M.C.C. 38 (46-7).

It seems highly likely that vendor expected the purchaser of the intrastate rights to register them, and that sale of its interstate and intrastate rights to separate purchasers was designed to obtain a maximum purchase price. As vendor still holds authority to resume local service under the interstate rights, regardless of the actual operations performed by the parties the transaction resulted in creation of duplicative rights. In absence of a showing, after appropriate notice and opportunity for hearing, that public convenience and necessity require the additional operation, the commission has consistently withheld approval in similar situations and has emphasized its disapproval of the use of various devices for such purpose. Purchase authority denied.—Id., p. 47.

Although investigation is discontinued as to respondent single-State carrier, since commencement of the proceeding it has sold a portion of its State certificate to another proviso operator. In light of the commission's assertion of jurisdiction under §5 over transactions between proviso or registered carriers, the parties are admonished to reexamine that transaction and, if an unlawful situation exists, to take all steps necessary to terminate the violation.—Caton Transfer, Co., Inc.—Lease—Caton, 93 M.C.C. 416 (420-1).

See also Mistletoe Exp. Service purchase case, §206(a)(6)(7), n. 2.

Purchase of vendor's interstate and intrastate operating rights within Montana, with issuance of vendee of certificate for the intrastate routes to extent they are complementary to its own, may be approved when unification would enable it to render a more efficient and economical service and continuance of vendor's proviso operations in combination with its own service will meet a public need; supporting shippers desire such service by vendee because of advantage of single-line over joint-line handling of shipments, benefit of having more than one carrier available, seasonal use of commodities as in building construction, and satisfaction with its service under temporary authority.—United Truck Lines, Inc.—Purchase—United Freight Lines, 90 M.C.C. 337 (346-7).

See also Arkansas-Best Freight System, Inc.—Purchase—Bradsher, under *Conditions imposed*, above.

Although vendor has conducted substantial operations in New York State under single-State proviso, and has interlined with various carriers at points such as Albany, Syracuse, Buffalo, and Rochester, its service has been predominantly east-west via Buffalo, Syracuse, and Albany; north-south traffic interlined at Albany for movement between points on its Buffalo-Utica and Rochester-Plattsburgh routes and points south of New York-New Jersey line and in Connecticut and Massachusetts has consisted primarily of inbound shipments, and no real shipper need for service from intermediate points on those routes is shown. Therefore, consistent with principles of 65 MCC 312, purchase of its proviso rights by carrier operating in New England and Middle Atlantic States is conditioned on cancellation of certain rights utilized only in a limited manner, and restriction of others against vendee's use thereof to perform operations not previously conducted to a significant degree.—Dorn's Transp., Inc.—Purchase—Mayberry Motor Freight, 90 M.C.C. 296 (277-9).

Operating economy; increased revenue: [Vols. 12, 14, 16, 17, 19].—In its exercise of vendor's general-commodity rights under temporary authority, vendee, through elimination of interchange, has achieved reduction of operating expenses, better control of shipments, relief of congestion at its terminal, and a speedup of its service into vendor's territory; also, purchase is expected to result in substantial increase in its revenues. Considering those benefits and the fact that vendor has been ordered dissolved by the courts, approval is clearly consistent with public interest.—Berman's Motor Exp., Inc.—Purchase—Lang Storage & Trans., 90 M.C.C. 807 (812).

Economies and efficiencies in administration and operation, through elimination of unnecessary duplicative facilities and personnel, can normally be expected from unification of similar operations formerly under common control, with resulting benefit to the carrier and the shipping public. Although no detailed study was presented of actual results anticipated from one railroad subsidiary's purchase of property operating rights of another, thus concentrating all the motor freight operations in one and the passenger operations in the other, and absence of such study may affect weight to be accorded applicants' evidence on that issue, it does not warrant conclusion that they have failed to meet their burden of proof in that regard. Purchase approved.—Santa Fe Trail Transp. Co.—Purchase—Santa Fe Transp. Co., 90 M.C.C. 123 (129).

Operating rights: [Vols. 14-16, 18, 19].—Proceedings under §5 are for authority to transfer existing and active operating rights; and the commission, in a §5 proceeding, may not enlarge such rights when the proper course is to seek a certificate of convenience and necessity. Therefore, even though progession from dump trucks to tank-type vehicles with pneumatic devices is a natural and normal development consistent with needs of the cement industry, purchase authority must be disapproved when applicants seek to convert vendor's restricted authority to transport cement in dump trucks to an unrestricted authority to transport cement.—Mitchell Transport, Inc.—Purchase—John Schutt, Jr., Inc., 97 M.C.C. 10 (19).

Where the operating rights involved are already in existence and are described by appropriate certificates, no new service would be created by their purchase.—Gordons Transports, Inc.—Purchase—Hayes Freight Lines, 90 M.C.C. 351 (360).

Vendee's plan to lease a segment of the rights it seeks to purchase for a 5-year period to another Trailways system carrier holding duplicate authority, instead of operating under them itself, makes a mockery of the legislative design; such proposal presents an acquisition request based on an alleged public need, while simultaneously planning to bury the same rights in a 5-year limbo, during which time the alleged need is to be filled by an existing carrier already serving the route. Notwithstanding that the proposed lease is subject to commission approval and would stand or fall on the record supporting it, the inherent inconsistency of vendee's project as it affects the instant purchase transaction is plain. The commission has previously looked with disfavor on similar proposals, and no departure from that policy is warranted by the evidence. Denied.—Carolina Scenic Stages—Purchase—Patterson, 97 M.C.C. 79 (91).

Public interest: [Vols. 14, 19].—Since Georgia & F. R. or its predecessors have been in receivership almost continuously for nearly 50 years and prospects of its continued operation as an independent carrier are becoming more and more unlikely, purchase of its properties by a new subsidiary of Southern Ry. will promote public interest in continued operation thereof to furnish an essential transportation service with improved efficiency; and greater stability provided by Southern's operation, with its proven ability to attract industry, will enhance prospects for industrial growth along the line. Purchase approved.—Georgia & F. Ry. Co.—Acquisition—Georgia & F. R., 317 I.C.C. 745 (747-8, 750).

In determining whether purchase of operating rights of vendor whose certi-

ficates have been seized by Internal Revenue Service for tax deficiencies should be approved, the overall public interest, including effects on employees and on competition, as well as the concern of riders who want and need adequate service, must be considered. Viewed from standpoint of the traveling public, denial would be contrary to that public interest; the competitive position would not be improved, since there is no likelihood of vendor's remaining viable, and its employees would not be benefited. Vendee is the only bidder for vendor's rights that is able both to meet the high bidder requirement of Internal Revenue Code and to consummate the purchase and conduct operations thereunder. By continuing an existing service it would clearly serve the public interest, and approval of the transaction, subject to indicated modifications of vendor's rights, would be consistent therewith.—Public Serv. Coordinated Transport—Purchase—Royal Blue, 97 M.C.C. 56 (64-5). [But see dissent.]

When both vendee and vendor have been active carriers within their respective authorities, although vendor had become financially prostrate after suffering severe losses for several years preceding grant of temporary authority to vendee, unification of their wholly complementary operations might well be favored as the best means of preserving vendor's rights and properties and maintaining its service to the public. Since the only remaining protestant is a strong carrier which should be able to compete with vendee's single-line service and retain its present traffic between the same areas, the transaction would not upset the competitive balance in the territory involved and would be consistent with public interest. Approved.—Michigan Exp., Inc.—Purchase—Chicago-St. Louis Exp., Inc., 90 M.C.C. 671 (675, 677)*.

Purchase by carrier operating between New England and New York points of "grandfather" rights for complementary irregular routes in New York and conversion thereof to regular routes is approved when, unless the transaction is consummated, vendor's operations might well cease owing to its president's poor health and its precarious financial condition; approval will assure continuance of service applicants have been rendering to the public and will permit economies through elimination of interchange.—Inland Exp., Inc.—Purchase—Frontier Dispatch, Inc., 93 M.C.C. 50 (53).

Proposed purchase cannot be found consistent with public interest when, although vendee is not found unfit to acquire the rights, and the record is not conclusive that vendor's rights are dormant, approval of the transaction would result in a new and additional competitive service; in such circumstances, ultimate issue in determining consistency with public interest is whether benefits accruing to the public would outweigh possible harmful effects on carriers serving area involved. There is no showing that existing transportation services in the area are inadequate or unsatisfactory and, should application be denied, it can be assumed that arrangements would be made for continuance of vendor's limited service; applicants failed to make sufficient showing that benefits would accrue to the public from approval of proposed purchase. Evidence is conclusive that resulting unfavorable impact on existing carriers and the public is not outweighed by any benefits which would accrue to the public; denied.—Great Coastal Exp., Inc.—Purchase—Price Transfer, 97 M.C.C. 271 (285-6, 287-92)*.

Routes: [Vol. 19].—Purchase of vendor's regular-route authority between principal points in Connecticut and Rhode Island by vendee holding regular-route authority between principal points in four other States and Connecticut (distinct from those of vendee) and certain irregular-route rights in Connecticut, denied. Since gaps between the purchase routes and vendee's Connecticut routes could be "bridged" by use of its irregular routes in that State, apparent value of the purchase rights to vendee would be service to and from Rhode Island industrial centers. It would follow, on unification, that vendee's service between its regular-route points and those in Rhode Island acquired from vendor would result in unlawful conversion of the irregular-route rights used as a "bridge";

notwithstanding vendee's contention that it would maintain the separate natures of the different authorities, conversion of the irregular-route operations cannot be avoided.—Schuster's Exp., Inc.—Purchase—Stankovich & Roberts, 97 M.C.C. 485 (486, 488-8).

Since competition of private cars and sedan-service operators has severely curtailed the volume of bus travel between New York City area and Catskill Mountains resorts, vendor proposed to sell its Mountain Division routes and certain property to its sole interstate busline competitor; and prior report recognized that the only way to preserve service of applicants would be by consolidation into one carrier. However, originally proposed divisions of vendor's routes, designed to preserve intact its extensive commuter operations into New York City, could not be approved because both carriers' already complex rights would thereby become more complicated. Under revised plan of dividing vendor's routes and revoking unusable segments, vendor's commuter operations would be preserved and its related §207 application, being unnecessary, would be withdrawn; applicants' revised agreement resolves indicated problems and conforms to prior objections; purchase approved.—Hudson Transit Lines, Inc.—Purchase—Inter-City Transp., 97 M.C.C. 524 (525-7, 530)*.

Primary purpose of proposed purchase is to obtain a more direct route between Boston and Portsmouth, N.H., and thereby enable vendee to provide a direct through bus service between Boston and Portland, Maine, in lieu of its previous joint-line service with vendor. Proximity of that route to its existing somewhat circuitous route between those termini need not preclude approval; the two routes are basically dissimilar, one connecting large cities while the other serves a host of smaller communities. Both traverse a densely populated and highly industrialized area, but the more direct route has far less congestion, and passengers, particularly those traveling long distances, usually try to avoid a bus route through congested areas. Routes involved also have important feeder value, and operation over the more direct route, including fast turnpikes, will make vendor's service more attractive and more competitive with Greyhound. Approved.—Trailways of New England, Inc.—Purchase—Interstate, 93 M.C.C. 217 (223-4).

Since vendor's authority to serve 10 northeastern States is both radial and nonradial, it is reasonable that a large portion of its total service would take place in that area. However, during the 18-month period covered by its exhibits it has served points in all of the 23 States it is authorized to serve, and has both solicited and handled traffic outside the pattern—between New York-New Jersey and points in the other 21 States—to which protestants desire future operations to be confined. No valid reason appears for thus decimating the authority, especially as protestants submitted no evidence of any injury they would sustain; purchase approved.—Security Van Lines, Inc.—Purchase—Community & Johnson, 93 M.C.C. 399 (402).

Single-line service: [Vols. 12, 14, 16-19].—Vendor and vendee have never interlined traffic with each other or with other carriers moving into each other's territory and, since vendee is primarily interested in instituting through service under the unified rights, there is no doubt that a new service could evolve after unification. Evidence is convincing that public benefits, if any, that would result from authorizing such new service to points in three States would not offset adverse effects which competing carriers would sustain; also, there is no evidence of need for such service to points in two other States; therefore, approval is conditioned to preclude vendee's instituting a through service, by unifying the purchase rights with those it now holds, from West Bend, Wis., to points in those States. However, approval is not so conditioned with respect to single-line service to points in five other States, in view of evidence of shipper need for the service together with showing as to vendee's service under temporary authority, and the lack of evidence of detrimental effect on com-

peting carriers.—Hove Truck Line—Purchase—Maurer, 97 M.C.C. 361 (369-71).

Where applicants have been active competitors for traffic moving between their respective territories through interline with carriers other than themselves, vendee's proposed single-line service would not be a "new" service for which proof of public need must be adduced before the transaction may be approved. Although vendee and vendor did not interline traffic with each other, it is undisputed that they interlined with other carriers a substantial volume moving to or from points in each other's territory, and supporting shippers and receivers voiced need for continuance of single-line service being provided by vendee under temporary authority, primarily to eliminate former delays in pickup and delivery, damage to lading in interline movements, and difficulty in tracing shipments. Purchase approved.—Helm's Exp., Inc.—Purchase—Keystone Transfer, Inc., 90 M.C.C. 679 (684-5).

A number of 30 shipper witnesses who supported proposed purchase testified that service between Michigan points and St. Louis or beyond had been inadequate in various respects prior to vendee's temporary authority; others indicated that vendee's solicitation for its single-line service had generated new traffic. Service advantages and benefits those shippers would derive from continuance of the unified service on a permanent basis are factors to be considered in determining consistency of the transaction with public interest. As other evidence shows that applicants' interline operations between Michigan and St. Louis prior to filing of application were substantial and of competitive significance, and that the transaction would not disrupt the competitive balance in the areas involved, purchase is approved.—Michigan Exp., Inc.—Purchase—Chicago-St. Louis Exp., Inc., 90 M.C.C. 671 (676, 677)*.

Shippers supporting purchase by one vendee of vendor's Mercer authority between Washington-Oregon and Utah-Montana-Wyoming areas seek assurance of continued service into the Pacific Northwest in view of anticipated expansion in exploratory drilling for oil and gas in that area, with resulting increased need for motor service of type involved. Those supporting purchase by another vendee of vendor's Mercer rights in other western States desire proposed single-line service on l.t.l. shipments; at least one has been unable to secure satisfactory single-line service or jobsite deliveries on such traffic; and service for two shippers would be 245 miles less circuitous than vendee's present service. Direct public benefits from both transactions outweigh any foreseeable adverse financial effects on protestants, who are sound and substantial carriers. Both purchases approved.—J. H. Rose Truck Line, Inc.—Purchase—Stanton Transp. Co., 90 M.C.C. 284 (291).

Though vendee's expressed purpose in purchase of vendor's authority to transport uncrated furniture is to connect those rights with its own at a point in Pennsylvania to perform a more direct service than it now may, particularly between New York City and eastern seaboard points, it appears that applicants have never interlined with each other, and only rarely with other carriers, into each other's territory; thus what is contemplated is clearly a new service unlike that previously performed by the parties. Analysis of supporting shippers' evidence fails to disclose a real need for vendee's proposed single-line service; they did not avail themselves of its service under temporary authority, and, while they find existing services faulty in some respects, their transportation needs have nevertheless been adequately met. Applicants have failed to sustain their burden of proof; denied.—North American Van Lines, Inc.—Purchase—Hagerstown Motor, 93 M.C.C. 125 (129-30, 132).

Protestant by single-line and vendee by interline are already providing the service desired by the two supporting shippers, neither of whom expressed any dissatisfaction with either. That they have occasionally found it difficult to obtain a carrier with equipment available when shipments are ready to move is a deficiency that would not necessarily be cured if vendee were to

institute the single-line service proposed; it is not unusual for the shipping public to experience occasional delays due to temporary equipment shortages at the shipping point, and this factor, standing almost alone, does not establish need for vendee's single-line service, which would require reactivation of vendors' dormant rights. Denial will leave still available to those shippers the joint-line service that vendee has been providing in conjunction with another carrier.—Aero Trucking, Inc.—Purchase—Kreitz, 93 M.C.C. 115 (122).

Vendee's extensive route system permits single-line service between Los Angeles and Cincinnati and Atlanta through St. Louis, and acquisition of vendor's routes to Chicago would give it direct access to that important gateway and traffic-producing center. Object of purchase is extension of service by a much larger and financially stronger carrier than vendor under a certificate that has been only partially exercised, with creation of a new long-line service westward out of Chicago. However, no shipper witnesses were presented in support of application, and there is no evidence that existing services, local or long-distance, are deficient in any respect; thus it cannot be found that resulting public benefits would outweigh any adverse effects on other established carriers. Denied.—T.I.M.E. Freight, Inc.—Purchase—M. C. Slater, Inc., 90 M.C.C. 702 (705, 707).

Approval of transactions resulting in a new single-line service contemplate past interchange of a substantial volume of traffic between applicants at a common point, or through interline movement, without adverse effect on existing carriers, and a showing of some need for the service. Though vendee proposes to inaugurate a single-line service between the East and South, applicants performed only sporadic or insignificant interline service during the 16 months preceding grant of temporary authority; vendee's entrance into New York and Philadelphia areas would be a new and different service which would disrupt the existing competitive balance without compensatory benefits to the public, and would not foster sound economic conditions in the industry. Denied.—Bowman Transp., Inc.—Purchase—A. W. Hawkins, Inc., 90 M.C.C. 303 (325, 326, 327).

As vendor has operated primarily a local peddle service from Sioux City and Omaha to small towns in Nebraska, and evidence of its service between those cities is not impressive, nor has it interchanged any appreciable amount of traffic with vendee, latter's proposed single-line service between Chicago and Omaha via Sioux City goes beyond mere elimination of interchange and would be a new competitive service. Such through service is now available between all major points involved, including more direct routes, and no shipper has expressed need or preference for vendee's proposed service; denied.—Barber Transp. Co.—Purchase—Conner, 90 M.C.C. 475 (480).

Even if purchase of route between Hernando, Miss., and Memphis were restricted to preclude single-line service between Atlanta and Memphis, thereby removing objection to vendee's use of its intermediate irregular-route authority to bridge the gap between that route and its regular route serving Atlanta, it would use a 24-mile segment, previously used only sporadically by the owners, to gain direct access to Memphis for its general-commodity operations and thereby serve a large Alabama area containing important cities, and on numerous specified commodities to or from other southern States, all at expense of numerous established carriers whose service is in no way shown to be inadequate. Approval on that basis would be a dereliction in the commission's duty under the national transportation policy. Denied.—Deaton Truck Line, Inc.—Purchase—Magnolia Truck Line, 87 M.C.C. 674 (678, 680).

Speculation: Protestants' argument that vendor's controlling stockholder and his associates have been trafficking in vendor's operating rights is adequately refuted by fact that he waited for more than 5 years after he acquired control thereof before contracting to sell them to vendee, notwith-

standing that the same money offer for the rights had been made much earlier by one protestant.—Helm's Exp., Inc.—Purchase—Keystone Transfer Co., Inc., 90 M.C.C. 679 (684).

See also Kaplan Trucking Co. control case, n. 110 *Violation of act,* below.

Strong system: [Vol. 13].—Under §5(2)(c) the commission must give weight to effect of a transaction on adequate service to the public. As result of proposed purchase the public would benefit from vendee's many years of experience as a substantial bus operator; it not only operates many vehicles of its own, but can call on its parent carrier and other members of Trailways System for additional equipment when needed. During temporary authority it has improved its terminal facilities, expanded and improved schedules, and bettered connections with local carriers to permit through operations between New Hampshire and points in southern New England and beyond via Boston. Its operations have become profitable since commencement of unified operations under temporary authority, and as a member of a large and prosperous bus system it will replace a carrier which was financially unable to provide adequate service to the traveling public.—Trailways of New England, Inc.—Purchase—Interstate, 93 M.C.C. 217 (224-5).

Violation of act: [Vols. 13-15, 19].—It is settled policy of the commission that transfer of authority will not be granted (in purchase proceeding) where the two carriers have been guilty of violating the control provisions of the statute unless some overriding public need for the service is shown; and that policy was sustained by the Supreme Court in 371 US 115.—Lombard Bros., Inc. v. United States, 226 F. Supp. 905 (908)*.

In action to set aside orders in consolidated §5 proceedings, on ground that the commission did not consider and rule on plaintiffs' contention that vendee in purchase case had completed the purchase and had assumed control of vendor's operation without necessary prior commission approval, the only commission treatment of that contention was the examiner's statement in rejecting it (adopted by the commission) and the statement in the report that "Contentions of the parties not discussed herein have been considered and have been found to be without merit." In view of evidence referred to in plaintiffs' opening brief, their contention was not given adequate treatment. Question raised by plaintiffs, both before the commission and in court, involves a possible violation of §5(4); and, where such a violation is shown, the commission usually disapproves an application which would, in effect, sanctions the unlawful act. Thus, the question was substantial enough to require administrative findings in sufficient detail to permit intelligent court review; proceedings remanded for findings and conclusions supporting disposition of the contention in the purchase proceeding.—Best Way Motor Freight, Inc. v. United States, 253 F. Supp. 314 (320)*.

The commission's jurisdiction in §5 matters extends to the entire transaction, including all operating rights and other properties involved, and no part of such a transaction lawfully may be consummated without prior approval. While evidence indicates that vendee's subsidiary equipment company (which would acquire vendor's operating equipment) has already acquired the physical property without prior approval, record is convincing that the parties did not realize that such approval was required. In any event, since the record does not warrant finding that the violation was flagrant or that the commission's authority was flouted, the partial consummation does not require denial of proposed purchase transaction.—Hove Truck Line—Purchase—Maurer, 97 M.C.C. 361 (365-6).

When negotiations began for purchase by bi-State agency of operating rights and/or properties of some 15 interstate and intrastate buslines, the mass transit situation in St. Louis area was in a downward spiral, and in addition the entire plan for an agency-controlled, area-wide bus system was encountering strong opposition. Therefore, in view of the agency's commitment

under a bond indenture to take over the carrier properties by a fixed date, the imminent expiration of the purchase agreements shortly thereafter, it felt that it had no alternative but to go forward with the purchases in order to implement the plan under the two-State compact. Also, because of its status as an agency of the States and grant of temporary authority based on exigencies of the situation, including its need to acquire title to the properties at an early date, vendee believed that its position was understood and appreciated by the commission and that it had some sanction to proceed with its plans. Considering those mitigating circumstances, while the unauthorized consummation in violation of §5(4) is not condoned, disapproval of the transaction, which otherwise appears in public interest, is not warranted.—Bi-State Development Agency—Purchase—Vandalia Bus Line, 93 M.C.C. 579 (584).

Although persons indirectly controlling vendee have effected unauthorized common control of two interstate carriers which they individually control, and issuance of certificate granted vendee was made contingent on approval of resulting common control with those carriers, there was no apparent intent on part of the individuals concerned willfully to violate the act, and it is doubtful that they were even aware that a violation had occurred. In the circumstances, approval of proposed purchase and resulting common control need not be withheld when it appears otherwise consistent with public interest.—Southern Tier Stages, Inc.—Purchase—Capitol Bus Co., 93 M.C.C. 793 (794, 798).

Although no part of a transaction subject to §5 may lawfully be consummated without the commission's prior approval, vendee's unauthorized acquisition of vendor's intrastate rights does not require a purchase application, considering its inability to obtain temporary authority from the State for operation of those rights. However, approval of the transaction, based on recognition of benefits to the shipping public, should not be regarded as condoning such unlawful action.—Arkansas-Best Freight System, Inc.—Purchase—Fine, 90 M.C.C. 858 (863).

Whether the purchase application may be approved depends partly on a favorable finding in concurrent §5(7) control investigation that applicants-respondents have not knowingly conspired to violate applicable provisions of the act. Thus, it being found that common control of applicant carriers was willfully effected in violation of §5(4), evidence of vendor's operations during a 2-year period while under such unlawful control should not be considered a manifestation of public need for continuance thereof by vendee; to do so would in effect constitute a reward for the §5(4) violation, at the expense of law-abiding carriers and the public interest. Denied.—R. L. Jeffries Trucking Co., Inc.—Purchase—Eck Miller, 97 M.C.C. 151 (166, 168-70).

Respondents' transfer agreement was immediately consummated when vendee, 2 days after date thereof, commenced transporting for contracting shipper under a purported equipment lease to vendor, without execution of any formal agreement or payment of any rental, and assumed liability to shipper; vendor's bills of lading were generally issued after performance by vendee, with payment by shipper on vendee's invoices; and vendee paid balance of the purchase price out of revenues from such operations. The parties did not apply for commission approval at time of the agreement; though vendee was shortly granted 30 days' temporary authority for indentical operations, after expiration thereof it continued to perform the service under color of vendor's permits, dealing directly with shipper; and transfer application was not filed until over 2 years after consummation. As the transaction is found to have been subject to §5 at time of consummation, such consummation violated §5(4); respondents should take immediate steps to terminate the continuing violation and advise the commission thereof.—C&R Trucking Co.—Investigation of Control, 93 M.C.C. 669 (674, 678).

Vendee's use of vendor's "grandfather" rights under §206(a)(7) between Louisville

and Brandenburg, Ky., area in combination with its own rights from points within 5 miles of Brandenburg to numerous States would present many tacking possibilities for which no public need is shown. Moreover, its past "interline" with vendor under its own authority from Doe Run, Ky., in that area not only amounted to an unlawful lease of vendor's rights, but also involved movement of shipments from an unauthorized interchange point, since "Doe Run" is not a community properly known by that name, has no commercial zone, and is not the name of the highway intersection where vendee located its terminal. Therefore, even if evidence of need for proposed service would support a grant of certificate to it for continuance of operations under vendor's rights, public interest, on balance, requires disapproval of purchase in view of unlawfulness of its use of those rights prior to grant of temporary authority.—Liquid Transporters, Inc.—Purchase—Black, 93 M.C.C. 423 (428-31).

See also Be-Mac Transport Co.—Purchase—Nix, n. 110 *Fitness of applicants*, below.

That vendee under temporary authority has increased its tonnage and earnings and that shippers have received a service more suitable to their individual needs do not overcome the lack of fitness shown by vendee's long and varied record of flagrant violations of the act and commission regulations which continued up to day of further hearing. Moreover, some of supporting shippers desire continuance of vendee's service to points it could not lawfully serve, and none would be left without service upon denial, since vendee now competes with 68 motor carriers operating between areas served under its and vendor's authorities. In view of vendee's demonstrated record of noncompliance over the years, it should not be permitted to expand its service as proposed, and vendor should be released from terms of its agreement with vendee and left free to find another purchaser. Denied.—Cooper's Exp., Inc.—Purchase—Ferguson Motor Transp., 90 M.C.C. 613 (618-9).

Even if transportation of shipments to and from New Mexico (which vendee is not authorized to serve), under vendee's authority between Louisiana and Colorado and vendor's authority between Beckham County, Okla., and New Mexico, had been performed through a bona fide interchange in Beckham County instead of under a false and fictious vehicle lease arrangement, it would still be unlawful because it involved a proscribed cross-haul in vendee's radial territory. Such unlawful activity was willful and knowing, and applicants have presented no evidence that approval of purchase despite the violations would serve a greater public interest. Denied.—United States Van Lines, Inc.—Purchase—Bell, 90 M.C.C. 362 (365).

Proposed purchase of vendor's intrastate rights and interstate operations under single-State proviso was unlawfully consummated by transfer of the State certificate and discontinuance of operations by vendor, and the record fails to explain or justify such action. Considering also the lack of any evidence justifying vendee's continuance of the former proviso operations, application is denied.—Midwest Motor Exp., Inc.—Purchase—Daniel, 90 M.C.C. 590 (592, 593, 594).

Arrangement whereby vendee holding one-way authority for bulk commodities leased tank trucks to vendor, a general-commodity carrier which had never handled bulk liquids, and the service thereafter conducted purportedly by vendor was clearly an adjunct of vendee's bulk operations, constituted an unauthorized lease of a portion of vendor's general-commodity authority. In absence of a showing of public need for continuance of such service by vendee, and in line with the commission's increasing strictness in disposing of applications for approval of transactions already unlawfully accomplished, authority for purchase of vendor's liquid-commodity rights is denied.—Tank Lines, Inc.—Purchase—S & N Freight Line, Inc., 90 M.C.C. 381 (385, 386-7)*.

Water carriers: [Vols. 12, 17, 19].—Purchase by a wholly owned subsidiary of a

water carrier incorporation of which was delayed until after approval to avoid issue raised in 87 MCC 551 concerning issuance of stock to parent company without commission approval) of operating rights and property of a motor carrier, which in turn owns all the capital stock of another motor carrier, shown to be consistent with public interest. Resulting overcapitalization of vendee by $6 million, represented by note to parent water carrier, not considered a bar to aprpoval when record indicates that it would be of short duration; approved.—TTC Corp.—Purchase—Terminal Transport Co., Inc., 97 M.C.C. 380 (384, 403-4)*.

50. Leases.—[Vols. 11-19].—Approval of Reading Co.'s purchase of Lehigh & S. R. System, now under lease to Jersey Central, necessarily embraces also the contemplated lease of the properties by the latter from the Reading for 35 years from date of order, with the rental to be paid to the Lehigh so long as lease to the Jersey Central continues. While the record contains a description of the terms of the basic lease, a copy thereof is not of record. Approval is therefore subject to condition that a certified copy of the basic lease be furnished prior to consummation of purchase, and that, in event of termination of the lease of all or part of the line before expiration of the 35-year period, written notice thereof be filed by Jersey Central and the Reading at least 30 days prior to such termination.—Reading Co.—Purchase—Lehigh & S. R. System, 317 I.C.C. 633 (639-40).

See also St. Louis S. W. Ry. Co. v. City of Tyler, Texas, 28 UCS §1331, n. 1.

Chronological examination of various transactions whereby an individual and his corporate successor leased certain intrastate operating rights used as basis of interstate operations under former single-State proviso and "grandfather" provisions of §206(a)(7), also of transactions whereby a partnership composed of his two sons acquired other intrastate rights and leased them to the corporation, discloses that, with exception of initial lease which apparently was within exemption of §5(10), none of such transactions involved any carrier but the corporation or its individual predecessor, the partnership never having achieved carrier status. Consequently, the corporation's continued lease of the partnership's certificate is not subject to §5; application dismissed.—Caton Transfer Co., Inc.—Lease—Caton, 93 M.C.C. 416 (420).

Agreement constitutes an attempt to lease described operating rights and is not an agreement for the division of revenues; under §5(2) of the act, such agreements must be approved and authorized by the commission. Since the agreement was not submitted for approval, attempted lease was unlawful; but the lease could not have been approved in any event, because it contemplated independent operation by two carriers without there being in force a separate and distinct certificate or permit authorizing such operations.—Ayres v. Northern Tank Lines, 95 M.C.C. 468 (470).

See also Carolina Scenic Stages purchase case, n. 48 *Operating rights,* above.

In providing service for meat packinghouse on shipments from Milwaukee to New York City, contract-carrier applicant then under its own authority to Rochelle Park, N.J., where, purportedly as shipper's agent, it turns shipments over to another contract carrier for delivery to New York City under a one-way trip lease of its vehicles, its driver acting as connecting carrier's "agent," for the Rochell Park-New York City portion of the haul. It is clear that described trip leasing of applicant's equipment is a mere paper arrangement and, since the connecting carrier exercises no control over the equipment or the portation performed ostensibly under its authority, amounts to an improper lease of latter's operating rights in violation the act; such operations should be discontinued.—Connell Transport Co. Extension, 91 M.C.C. 113 (116-7, 120).

A genuine lease of equipment without dominion by lessee over the physical operations performed therewith is a legal impossibility. Vendor's "lease" of equipment from vendee in described three-line operation was merely a paper agreement so far as it was concerned and in essence constituted

a lease of its operating rights by vendee in violation of §5(4). Vendee, as a carrier for over 40 years and no stranger to §5 proceedings, should have known that its lease and purported interline with vendor was a mere fiction and a clear violation of the leasing regulations. The parties are admonished to terminate the unlawful lease arrangement, failing which consideration will be given to an investigation under §5(7).—American Red Ball Transit Co., Inc.—Purchase—Fallon, 90 M.C.C. 515 (520, 521)*.

Under joint coach charter tariff issued by vendee holding charter authority from Glen Burnie, Md., to cover operations with vendor holding authority from Anne Arundel County, vendee performed charter movements from Annapolis in that county, in which it furnished all transportation facilities and received all the revenue, and vendor received no income and furnished no part of the service. As those trips were wholly under vendee's dominion and control, and vendor had no control over any portion of the movements purported to originate under his operating rights, such arrangement was an unauthorized lease of vendor's rights in violation of §5(4). Applicants are admonished to terminate any such unlawful operations under the joint tariff.—Didlake—Purchase—Johnson, 87 M.C.C. 742 (744).

The regulations for lease and interchange of vehicles in no way affect the basic proposition that a motor carrier receiving traffic from another through interchange of vehicles with drivers must have and exercise control over operation of such equipment while in its possession. A mere paper agreement purporting to vest control in a connecting carrier is not enough; the carrier under whose rights the interchanged equipment is operated must in fact control the service to the same extent as if it were the owner of the vehicle, and must control the vehicle to the extent necessary to assume full responsibility to the shipper, the public, and the commission. A carrier's failure so to exercise full and effective control over the portion of the transportation performed under its rights may amount to an unauthorized lease of those rights in violation of §5(4).—Dealers Transit, Inc.—Control and Merger, 93 M.C.C. 611 (619).

When vendee made arrangements for interline of traffic with vendor, handled all paperwork concerning actual movements, and provided all equipment, with drivers paid by it, paying vendor $25 for each load moving under his rights, and there is no showing that vendor participated in arrangements for, or paid for, vehicle inspections, nor is it affirmatively shown that he even knew a vehicle was moving under his rights until the movement was completed, or performed any service in connection therewith, or treated drivers as his own employees, conclusion is warranted that vendor's claimed bulk operations were commenced and continued under vendee's direction and control. Such operations amounted to an unlawful lease of that portion of vendor's rights by vendee.—Liquid Transporters, Inc.—Purchase—Black, 93 M.C.C. 423 (427-8, 429).

Arrangement whereby vendee holding one-way authority for bulk commodities leased tank trucks to vendor, a general-commodity carrier which had never handled bulk liquids, and thereafter generated all such traffic, controlled the transportation, and retained at least 85 percent of the revenues therefrom, constituted an unauthorized lease, in violation of §5(4), of that portion of vendor's general-commodity authority covering transportation of liquids in bulk, regardless of whether there was full compliance with the equipment-leasing regulations; such service was unrelated to vendor's normal operations but directly complementary to vendee's bulk operations, and was clearly conducted as an adjunct of the latter, thus enabling vendee to solicit traffic for its tank trucks which would otherwise move empty or not at all, with vendor serving primarily as a conduit of revenues owing to vendee for its service and retaining 15 percent or less thereof as compensation for lease of its rights.—Tank Lines, Inc.—Purchase—S &

N Freight Lines, Inc., 90 M.C.C. 381 (384-5)*.

Where interchange of vehicles between merger applicants was conducted in violation of requirement of the commission's leasing rules for transfer of control and responsibility for the movement from one carrier to the other, and movements were controlled throughout by survivor, the purported interchange arrangement was a mere fiction and amounted to an unlawful lease by survivor of liquidating carrier's operating rights.—Kaplan Trucking Co.—Control—Thomas Boyd, Inc., 90 M.C.C. 419 (425).

Under purported lease-and-interchange arrangement between respondents Speedway and Haulers, former pays all costs and expenses incurred in operating the "interchanged" equipment, except wages of a part-time employee of Haulers at St. Louis, and assumes complete responsibility for operations performed from St. Louis to Tulsa under color of Haulers' rights; Haulers has no terminals, employs no personnel other than its agents at St. Louis and Tulsa, and leases all its equipment to Speedway; moreover, it not only pays nothing for equipment trip-leased from Speedway, but actually receives a percentage of the revenue for permitting latter as ostensible trip-lessor to operate over its route; there is thus no lease of equipment and considered arrangement is essentially an unauthorized lease of Haulers' operating rights in violation of §5(4).—Stewart—Investigation of Control, 87 M.C.C. 681 (695-6).

As the lease by one carrier of the operating rights of another is expressly prohibited by §5(4) unless entered into with the commission's approval, in the absence of such approval such a lease is without force or effect as a conveyance; and the willful acquiescence by a certificate holder in an unlawful lease of its operating rights to another carrier is a clear indication that the unlawful lessor is being controlled or managed in a common interest with the unlawful lessee of its rights.—Id., pp. 696, 697.

52. Mergers.—[Vols. 11-19].—Section 5(4) is integral to success of the regulatory scheme, and to approve a merger in face of a §5(4) violation may encourage others to present the commission with a fait accompli or avoid its jurisdiction altogether, which would seriously hinder, if not defeat, administration of the statute in the public interest. This additional interest in proper administration of the statute places a heavier burden on the applicant than may be the case for other regulatory violations, and mere lack of willfulness or alleged innocense need not suffice. The commission's rule that a §5(4) violation may alone bar approval of a merger is not automatic and may give way to a clear showing of public interest in approval; however, appellants made no clear showing of public interest such as public need for the merged service or for larger consolidated carriers; the commission's order denying merger of carriers unlawfully brought under common control, affirmed.—Gilbertville Trucking Co. v. United States, 317 U.S. 115 (128-9)*.

When the District Court set aside and remanded the commission's decision and order, which approved proposed railroad merger subject to routing and gateway conditions, because it concluded that the commission's analysis of competitive effects of the merger was fatally defective, the court did not reach the ultimate question of whether the merger would be consistent with the public interest despite the foreseeable injury to competition. Whether the commission acted within statutory limits on its discretion and based its findings on substantial evidence are questions for the trail court; judgment vacated and case remanded for full review of the administrative order and findings.—Seaboard Air Line R. Co. v. United States, 382 U.S. 154 (155-7)*.

Statutory requirement that the commission find the conditions of a merger to be just and reasonable makes it the commission's duty to protect both the public and private interests and to withhold approval of such a transaction, otherwise in the public interest, unless it can find that the consideration, terms, and conditions thereof are just and reasonable to the parties and the holders of their securities.

Combining that general principle with the express authority in §5(2)(d) to require merging railroads to include other railroads "upon equitable terms" would empower the commission, if so advised, to base the acquisition price of a railroad which it required to be included, in approving proposed merger of two other railroads, upon a value not adversely affected by the merger itself.—Oscar Gruss & Son v. United States, 261 F. Supp. 386 (390)*.

But the commission is under no mandate to protect against all diversion of traffic as a condition to approval of a merger, as plaintiffs in action to enjoin consummation of approved railroad merger seem to think; it is concerned with diversion only as that question bears on the "public interest," and that concept directly relates to adequacy of transportation service, to its essential conditions of economy and efficiency, and to provision and best use of transportation facilities, with investor interest considered as an element only insofar as protection thereof will serve to attain those goals. Thus, determination of the degree of protection to be afforded is vested in the agency charged with responsibility for the transportation system, subject only to the usual limited judicial review. Complaint dismissed.—Id., pp. 390, 395.

See also Pennsylvania R. Co. v. Transport Workers Union, n. 70 below.

Although the commission accepted the examiner's findings in North Western-Great Western merger proceeding that (1) the merger would divert substantial traffic from plaintiff railroad, (2) public interest required that plaintiff be protected against that diversion, and (3) the NW-GW should arrange for direct improved interchanges with other roads for plaintiff, it refused to accept his findings with respect to the extent of the diversion, the necessity for protection of plaintiff against diversion, and the propriety of his recommended conditions regarding plaintiff's access to an industrial park and its direct interchange with NW-GW. While it is obligated to give weight to a trial examiner's findings, the commission is not required to accept them; similarly, were the court primarily concerned with which had exercised the better judgment, it would have to accept the commission's findings and conclusions. However, in action to enjoin the merger, the court must determine whether the commission's findings are adequate, are supported by substantial evidence, and are in accordance with the law.—Soo Line R. Co. v. United States, 280 F. Supp. 907 (914-17)*.

The findings relating to diversion are not adequate; range of possible diversion was too broad and the commission made inadequate findings as to extent to which diversion would impair plaintiff's ability to serve the public; thus, there is a lack of basic or essential findings required to support the order. While the task of determining potential diversion is a difficult and complex one, it is the commission's responsibility to determine, as precisely as it can, extent to which the NW-GW merger will divert traffic from plaintiff and the extent to which the public interest requires that plaintiff be protected against such diversion. Having done that, the commission must determine the conditions it will impose to give the necessary protection and such conditions should be as definite as practicable. The court recognizes the difficulty in making such determinations; however, when that is not done, judicial review is impossible. Merger in issue should not be permitted to proceed pending further commission action; matter remanded to the commission for expedited proceedings not inconsistent with the court's opinion.—Id., pp. 917-21.

Proposed merger of electric railway into parent railroad, approved, when it will provide single corporate ownership, will afford more efficient utilization of facilities, equipment, and manpower as well as contributing to a more economical system operation, and will result in tax savings, elimination of separate books of accounts, reports, computations of divisions, security and leasing arrangements. Furthermore, the merger is not opposed and, upon consummation thereof, all issues raised in

embraced complaint proceeding involving alleged violations of provisions of the act pertaining to pooling, tariffs, and routing (i.e., methods employed by the railroad to relieve congestion in Los Angeles area) will be rendered moot.—Southern Pac. Co. Merger, 327 I.C.C. 38 (43, 47)*.

Santa Fe's proposed merger of three wholly owned subsidiaries, including Gulf, C. & S. F. Ry., will permit consolidation of all accounting procedures, elimination of duplicative functions, and more efficient utilization of facilities and manpower, thereby strengthening Santa Fe's financial structure, without change in the quality or quantity of rail service. While the city and port of Galveston, Tex., form an important link between rail and water transportation in interstate commerce, of which Gulf Ry. is an integral part, and the commission is mindful of efforts of Galveston's citizens in organizing the Gulf and establishing its headquarters there and that maintenance thereof is important to the local employment situation and the civic life of the area, and there is no doubt that removal of Gulf's general offices as result of the merger will cause hardship to a number of its employees and their families and will also to some extent adversely affect business conditions in Galveston, the overall benefits to the public clearly outweigh those disadvantages and the transaction is consistent with public interest.—Atchison, T. & S. F. Ry. Co. Merger, 324 I.C.C. 254 (258-9).

See also Chicago & N.W. Ry. Co. v. Brotherhood of Locomotive Engineers, §5(11), n. 2.

Proposed merger of Boston & Maine into a new Delaware corporation for purpose of removing difficulties due to its present anachronistic corporate structure as a corporation of four States, approved. Conflicts, ambiguities, and doubts as to application of corporate laws of those States pertaining to railroads have over the years cost the railroad appreciable expenditures and have delayed or prevented actions deemed prudent and desirable; the more modern general business corporation acts of the States do not apply to railroads. Advantages accruing from substitution of the new corporation include broader corporate powers, perpetual corporate existence, greater ease in changing number of directors and holding shareholders' meetings, and preventing of escheat of dividends unclaimed by shareholders, thus securing them as property of the corporation.—Boston & Maine Corp. Merger, 320 I.C.C. 290 (293, 297).

But as application does not contain copies of leases or trackage-rights agreements covering operation over lines of other railroads, or a summary of their terms, effective date of authorization order is deferred for 35 days to permit filing, as a condition on approval, of a copy or summary of each such lease or agreement, prior to consummation.—Id., p. 293.

Proposed merger of Atlantic Coast Line into Seaboard Air Line will meet objectives of §5 and the national transportation policy by eliminating wasteful transport and promoting survivor's potential for rendering efficient and economical service. It will benefit the shipping public and communities generally, and will make a significant contribution to economic and industrial development of the southeastern States through promotion of new industrial sites, improvements in port termini facilities, and stabilization of employment through greater financial stability of the merged company. Shippers will benefit directly from improvements in service and reduction of shipping costs by means indicated, and anticipated savings should ultimately bring about a reduction in cost of rail service. Even though some of expected benefits cannot be particularized, it is axiomatic that elimination of wasteful and unnecessary facilities eventually redounds to benefit of the public generally.—Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122 (160-1, 206-7)*.

Notwithstanding applicants' relative prosperity in recent years, net income of both has been declining since 1955, and problem of excess plant capacity is closely associated with declining revenues and increased operating costs; ACL is now

operating its line at only 25 percent of full capacity. Because of those and other factors, particularly accelerated growth of external competition and constantly increasing operating expenses of railroads generally, strengthening of applicants to enable them effectively to combat the vigorous competition now confronting them is necessary and can best be accomplished by combining their resources into a single corporate entity that can eliminate duplicative services and facilities, reduce costs, and maximize the use of its railroad properties, thereby increasing overall efficiency of its operations.—Id., pp. 153, 210-11.

Applicants' estimated savings from the merger discussed. Many of the savings they anticipate may be somewhat exaggerated, being dependent on future elimination of duplicative services and facilities, and are conjectural; however they appear fairly realistic and generally attainable, with certain exceptions. While the total expected savings would be affected by any major change in economic conditions, despite that possibility and the possibility of unforeseen expenses the total annual savings should approximate $20 million.—Id., pp. 155-9.

In addition to the standard conditions for preservation of existing through routes, the merged company is required to maintain applicants' existing freight-train schedules. Also, since its ability to divert traffic at various interchange points could work serious harm to a number of competing railroads, special protective conditions are imposed, including opening of Jacksonville gateway to Southern system carriers on a reciprocal basis, grant of certain trackage rights in Georgia to a Southern subsidiary, and establishment of new interchanges with Norfolk Southern. The new through routes thus made available between Florida and the North and between Florida and Montgomery and Birmingham, Ala., will benefit not only those carriers, but will create new reprisal routes for other railroad competitors, thus enhancing their retaliatory powers in competing for Florida traffic.—Id., pp. 181-5, 208.

While it has not been the commission's practice to impose conditions requiring sale of lines or grant of trackage rights to competing carriers, those imposed are justified in public interest, not only because they afford relief to carriers that might otherwise be adversely affected, but also because they will create more balanced competition among railroads in the southeastern seaboard area and thus benefit the public generally. However, requests of Southern and Florida East Coast that survivor be required to transfer certain lines to them by sale or long-term lease are denied when they would to a large extent require dismemberment of the merged company's lines, interfere with its planned economies, constitute an invasion of territory now adequately served by applicants, deprive survivor of substantial revenues, and in general frustrate the overall objectives of merger, all to detriment of the public interest.—Id., pp. 184, 186-7.

Pursuant to §5(2)(d), jurisdiction is retained for 5 years from consummation to permit certain railroads to petition for inclusion in the merger. This condition, which will require the merged company to negotiate in good faith any proposal presented to it, is designed for protection of financially weak railroads which could be adversely affected and is therefore restricted to the nine designated, to apply only so long as they remain unaffiliated with a trunkline other than applicants. Benefits of the condition should not be extended to carriers which are, and will continue to be, parts of Southern Ry. system, or to carriers outside applicants' operating territory. Also, jurisdictional time limit should not be extended to permit Georgia R. to file its petition after expiration of its lease with Coast Line and Louisville & Nashville; 5 years should be enough time for its owners to evaluate effects of the merger, and fact that the lease does not expire until 1980 does not bar its petition before that time since the lease could be mutually revised or canceled.—Id., pp. 185-6.

Merger into Lehigh Coal & Nav. Co. of properties of Nesquehoning Valley R. and

Tresckow R. for sale to Reading Co. as part of Lehigh & S. R. System, approved.—Reading Co.—Purchase—Lehigh & S. R. System, 317 I.C.C. 633 (636-7).

Proposed merger of two water carriers, which will enable survivor to render service through New York State canal system to and from points on Great Lakes as far west as Detroit and Toledo, thus complementing its present authority to serve the greater part of Atlantic coast, will afford the public a more complete service and may properly be approved, notwithstanding prior unlawful partial consummation through survivor's acquisition of liquidating carrier's preferred stock.—McAllister Bros., Inc.—Control and Merger, 317 I.C.C. 459 (461, 465).

Proposed merger of intercoastal water carrier into parent lumber company and operation as a separate division thereof will not create any greater opportunities for favoritism, discrimination, or unfair competitive practices than its present operation as a wholly owned subsidiary. As Part III contains no provisions comparable to commodities clause of §1(8) or securities requirements of §20a, and survivor's accounting and reporting to the commission will be limited to its water carrier division, effects of any complications in its dealings with the commission resulting from the combined carrier-noncarrier operation will be outweighed by public interest in preserving a necessary intercoastal water service. Approved.—Weyerhaeuser Co. Merger, 317 I.C.C. 434 (438, 439)*.

See also Delaware & Hudson Co. Merger, n. 2 *Control by a noncarrier*, above; and §20a(1), n. 6.

In proceedings involving merger of properties of carriers subject to the act, the commission must pass upon and approve all capital liabilities which the surviving company will assume or discharge as a result of the merger, and has the duty of safeguarding the rights of the minority stockholders.—Ryder System, Inc.—Control—Southern-Plaza Exp., Inc., 90 M.C.C. 87 (91)*.

Neither survivor nor liquidating company performs any carrier service to the public, and proposed merger and survivor's issuance of debentures and assumption of certain obligations will have no direct effect on its carrier subsidiaries except to substitute it for the liquidating company as terminal lessor to latter's carrier subsidiary. In addition to direct control of that carrier, advantages accruing from merger include the right under commission's accounting rules to record the liquidating company's properties at fair market value instead of book value, which will strengthen survivor's credit position, reduce income taxes somewhat through increases in depreciation expense, and provide corresponding gain in net working capital; thus merger should enure to benefit of all the carrier subsidiaries through strengthening of the parent company. Approved, as modified respecting price to be paid for minority stock interests.—Id., pp. 90, 94.

Approval of merger by noncarrier company of a subsidiary armored-car carrier, preliminary to unification of its operating rights and armored-car rights of another subsidiary in a new company, is subject to express condition that minority stockholders of the liquidating carrier may elect to be paid in cash for their stock at price fixed by the commission, or to exchange it for stock of the noncarrier on basis outlined.—Pittston Co.—Control—Brink's Armored, Inc., 87 M.C.C. 637 (652).

See also Fried v. United States, n. 8a, above.

There is no merit to protestants' contention, that "grandfather" rights under §206(a)(7) are personal to the party filing application for certificated rights and, therefore, not transferable in proposed merger transaction. Just as similar contentions were rejected in connection with "grandfather" rights under the 1935 Motor Carrier Act, and also in connection with the 1958 amendment, protestants' contention is rejected.—T.I.M.E. Freight, Inc.—Merger, 97 M.C.C. 310 (317-19)*.

Although liquidating carrier's authority, portions of which are restricted to handling of forwarder traffic, generally duplicates survivor's existing authority, merger would give survivor several more direct routes and

also extend its operations from New York City into New England. Because of their ages and new developments in the forwarder industry, liquidating carrier's stockholders are reluctant to take back their business and to borrow and invest money for resumption of operations highly competitive to survivor's; thus denial would serve only to curtail survivor's present operations while placing future operations under liquidating carrier's authority in doubt. Merger approved.—Sullivan Lines, Inc.—Control and Merger, 93 M.C.C. 4 (7)*.

Merger by carrier operating between Chicago and eastern seaboard points of subsidiary operating routes radiating from Muncie, Ind., to St. Louis, Chicago, Detroit, Buffalo, and Cincinnati, and immediately subsequent merger of survivor into a new company, will enable latter to furnish expedited single-line service between New England, St. Louis, and intermediate points without necessity of interchange and rehandling of freight at Cleveland, and thereby provide the public with improved service without materially altering the general competitive situation in the combined territory; approved.—All States Freight, Inc.—Merger, 90 M.C.C. 51 (56).

Although deferment of merger for 2 years, to permit recovery of tax-loss-carryforward credits which would be lost under immediate merger, was found unobjectionable per se, prior report authorized only acquisition of control, because of undesirability of granting authority for merger so far in advance of consummation; most of such tax benefits have now been realized and survivor desires to merge its subsidiary; merger will result in enhanced economy and efficiency and will be in consonance with the commission's policy of encouraging corporate simplification; approved.—Quinn Freight Lines, Inc.—Control and Merger, 90 M.C.C. 60 (63)*.

Most of supporting shippers and freight receivers have utilized applicants' services for years, and, while their reasons for favoring unification would not necessarily support authorization of themselves, they lend support to finding that public interest would be served by approval of merger insofar as it pertains to establishment of an improved service, particularly when considered with all other factors such as the avowed intention of those shippers not to divert traffic from existing carriers.—Murphy Motor Freight Lines, Inc.—Control and Merger, 90 M.C.C. 535 (543).

See also Midwest Transfer Co. of Ill. case, n. 110 *Temporary authority,* below.

The commission has no power under §5 to force one carrier into an undesirable merger with another.—Adley Exp. Co.—Control—McFaddin Exp., Inc., 93 M.C.C. 378 (383)*; to consider a merger, as distinguished from an acquisition of control, which has not been initiated by the carriers involved.—Central Freight Lines, Inc.—Control—Alamo Exp., Inc., 90 M.C.C. 96 (101, note)*; or to require carriers to merge, either directly or indirectly through imposition of a condition on a control transaction.—Chesapeake & O. Ry. Co.—Control—Baltimore & O. R. Co., 317 I.C.C. 261 (290)*.

Condition on authority for control of duplicative operations, see Mitchell Bros. Truck Lines control case, and Accelerated Transport-Pony Exp. case, n. 45 *Conditions imposed,* above.

See also Garrett Freightlines, Inc., n. 110 *Restrictions,* below.

Merger by railroad subsidiary of an independent motor carrier may not be approved when, though latter's regular routes parallel the rail line for 51 miles and for 25 miles generally parallel lines of another affiliated railroad, for 50 miles they neither parallel nor correspond to rail routes of either, and service at points along that portion could not be tied in so as to provide an auxiliary and supplemental service to either railroad. Similarly, liquidating carrier's radial irregular-route rights do not lend themselves to a rail-auxiliary service; railroad service is not oriented to such operations, and as those rights embrace far more territory than is encompassed by the rail lines, some counties and many points in others are so far from the rail lines and stations that they bear no direct relation to the

train service.—Reading Transp. Co.—Control and Merger, 93 M.C.C. 11 (20).

To sanction the scope of operations applied for would undo in a single action the long line of precedents carrying out the congressional mandate to preserve the inherent advantages of each mode of transportation, and would eradicate the various measures developed to ensure compliance with the legislative will. Applicants do not pretend that they would limit the traffic to that of the railroad, or claim that the resulting operations would not exceed those usually performed in station-to-station service. To adopt their theory of "area of economic penetration" would open the floodgates to invasion by the railroads into the realm of general transportation to every point in United States, contrary to intent of Congress and best interests of the motor carrier industry. The commission's duty is to carry out the statutory command, not to legislate by administrative process. Denied.—Id., pp. 20-1.

The commission's holding in 295 ICC 11 that merger of properties of two of numerous carriers comprising a single established system requires approval under §5 was sustained in 353 US 151.—Transcontinental Bus System, Inc.—Control—American, 87 M.C.C. 795 (797, note 4).

Notwithstanding strong shipper support for continuance by survivor of the coordinated service which it and liquidating carriers have been providing as a system, the commission may not properly overlook the fact that such service was instituted and has now been rendered for years as result of a flagrant violation of §5(4); denial of merger authority will not leave shippers without adequate and efficient service between the points involved.—Buckingham Transp., Inc.—Control and Merger, 90 M.C.C. 731 (741-2)*; in addition to service offered by other carriers, it is entirely possible for applicants, through joint-line arrangements as nonaffiliated carriers, to continue rendering substantially the same service as they have performed under unlawful common control, and there is no clear showing of public interest in approval, such as an overriding public need for the merged service or for larger carriers.—Id., 93 M.C.C. 306 (310)*.

A §5(4) violation may alone bar approval of a merger unless it clearly appears that public interest will best be served by such approval. Also, as stated in the *Gilbertville Trucking* case, 317 US 115, the additional interest in proper administration of the statute places a heavier burden on applicants than may be the case for other regulatory violations, and mere lack of willfulness or alleged innocence need not suffice; applicants have not sustained that burden. Evidence is convincing that the violation, and particularly its continuance, show a flagrant disregard for regulation and the law by persons fully cognizant of their legal obligations, aggravated by their ignoring prior admonition to terminate such violation; such conduct is indefensible.—Id., pp. 309-10.

Recent change in stock ownership and management of survivor does not compel a different result; it remains the same corporate entity, and the practices which constitute unauthorized control have continued. To permit a change in corporate ownership or management to become a controlling factor in proposed merger would be tantamount to granting corporate carriers a measure of immunity from the law and from the commission's regulations. Denied.—Id., pp. 310-1.

Inasmuch as proposed merger would perpetuate common control of applicants already effected in violation of §5(4), approval thereof requires a positive showing that continuance of such control would be consistent with the public interest. Applicants failed to meet that burden by showing only the advanced age of liquidating carrier's stockholder and his desire to disassociate himself from the carrier, plus the fact that survivor would benefit from a single-line service to and from Baltimore; without more, the evidence does not support a finding that any overriding public interest would be served or that survivor would provide a service that is not furnished by existing carriers or is beyond their capacity. Moreover, principles involved do not lack knowledge or experience in the law or the commission's

requirements and, on that basis, the past violations should not be blessed by approval of proposed transaction; denied.—Kaplan Trucking Co.—Control—Thomas Boyd, Inc., 90 M.C.C. 419 (427)*.

55. Operating agreements. [Vols. 11-19].—Federal, not state, standards are controlling on whether president and general counsel of Jacksonville Terminal Co. were properly dismissed pursuant to agreement by five railroads for joint ownership and operation of Terminal which had been approved by the commission, as required by §5(2), and which provided for dismissal upon written request of any one owner-line and selection of a successor only by unanimous approval of all owner-lines. While physical activities of Terminal Co. are localized within Florida, it provides an essential link in the movement of equipment and freight over interstate rail lines and, on matters so directly related to effective operation of an important instrumentality of interstate commerce, federal standards must control. The contract's validity is not challenged, its terms are plain and positive, and the law should give effect thereto. District Court's order directing recalcitrant 50 percent of owner-lines to join in effecting prompt dismissal of those officers as demanded by the other owner-lines, affirmed.—Jacksonville Terminal Co. v. Florida East Coast Ry. Co., 363 F. 2d 216 (219-21).

See also Illinois Central R. Co. v. Norfolk & W. R. Co., n. 56, below.

Subject to certain conditions concerning handling of intercompany accounts, terms of proposed 10-year extension of agreement covering operation of Peoria & E. Ry. by New York Central may be approved as not unfair to interests of minority stockholders or bondholders. Through the Peoria's line is an integral part of Central's system, it is dependent on that system, and extent each depends on the other cannot be determined on the record; however, as Central controls the Peoria through both majority stock ownership and majority representation on its board of directors, and has vast experience in its operation, it should be able to provide adequately for all the Peoria's cash needs; and as it has assumed operation of the Peoria, it is responsible for the costs related thereto. In the past, Central has been responsible for continued operation of the Peoria, and no reason appears for believing that continuance of the existing relationship will not be materially beneficial to all parties concerned.—Cleveland, C., C. & St. L. Ry. Co.—Operating Agreement, 320 I.C.C. 430 (437-8).

Per diem charges incurred by the Peoria under Central's operation are not shown to be unreasonable; in fact, it receives preferred treatment as result of the relationship, since it is required to accept only cars for which it has a need, thus precluding possibility that some of the charges incurred relate to unwanted cars remaining on its line. Nor does it appear that it is treated unfairly in matter of locomotive rentals, since rentals paid to Central for extra power equipment depend on numerous factors, including greater average age of its equipment than Central's, idle time due to necessity for repairs, and length and speed of trains to be moved; there is no indication that past rental charges were inequitable or that unnecessary power equipment is being used.—Id., pp. 433-4.

Proposed operating agreements covering joint use by Texas & New Orleans and terminal association composed of railroads serving Corpus Christi, Tex., of certain present and proposed tracks of Nueces County Navigation District No. 1, joint use of Texas Mexican's yard south of the ship channel, and joint use of certain trackage of other association members, all as part of a substitute route proposed in lieu of line concurrently authorized to be abandoned, for purpose of allowing Texas & New Orleans to continue serving the south side of the port area both as an individual carrier and as a member of the association, approved.—Texas & N.O. R. Co. Abandonment, 317 I.C.C. 245 (248-50, 251).

Though applicant authorized to acquire and operate line of successor of Hudson & Manhattan states that it is informed that

vendor's joint service agreement with the Pennsylvania has been terminated by latter, the commission has received no application for such discontinuance and has not otherwise been informed thereof. However, as applicant intends to open negotiations with the Pennsylvania for continuance of the joint service, it is advised that any such renegotiated agreement should be submitted for the commission's approval prior to its consummation.—Port Authority Trans-Hudson Corp. Acquisition and Operation, 317 I.C.C. 357 (359).

56. Operation under trackage rights.—[Vols. 11-19].—See also Feather River Ry. Co. case, §1(18), n. 75.

Though original applications of seven railroads (appellants) for authority to construct new trackage connecting their lines with Chicago Port District tracks did not request commission authority to operate over tracks within the port, they obviously sought approval of the entire plan of operations proposed, including activity within the port as well as an unexecuted agreement covering the lease of port facilities which was attached as an exhibit. Proposed lease was before the commission throughout the entire proceeding, appellees were intervening parties and, when their objection to introduction of the unexecuted agreement was overruled, present evidence on the matter; at every stage of the proceeding, appellants' operations within the Port District were considered an integral part of the overall plan submitted. Therefore, approval of supplemental applications for authority to operate within the port and a new proposed lease (deleting objectionable exclusive right of operation clause) as a part of the whole plan, without further hearing requested by appellees, did not deprive appellees of due process of law.—Illinois Central R. Co. v. Norfolk & W. R. Co., 385 U.S. 57 (62-4, 70-3)*.

Furthermore, appellees were invited and refused to participate in negotiation of the contract; had ample opportunity and did present their evidence as to reasonableness of the charges for use of port facilities; were, and are, in nowise bound by the contract; and considering the insignificance of changes (removal of the exclusive right of operation clause and a more favorable formula for determining annual rental to be charges by the Port District) in the final agreement executed compared with the former ones proposed, the court concludes that appellees were not entitled to another hearing. The commission's action was proper under the circumstances and is substantially supported on the record as a whole. Judgment of the lower court reversed and the case is remanded with directions to sustain the commission's orders.—Id., pp. 74-5.

In the commission's action against several railroads and a rail passenger terminal company, seeking an injunction requiring three railroads to continue to use abandoned Union Station and to cease using other passenger terminals, the court concludes that defendant Louisville & N. R.'s institution of passenger operations at Illinois Central's terminal by use of latter's lead and terminal tracks, constitutes an acquisition of trackage rights and not a mere relocation. At least some of the tracks at Union Station are found to constitute a "line of railroad" within §1(18), and the court concludes that some of the tracks at Illinois Central terminal are likewise a "railroad line" within §5(2). Accordingly, prior commission approval thereof not having been obtained, L&N has acquired trackage rights over or joint use of a line of railroad in violation of §5(2) and (4); defendants required to cease their violations.—I. C. C. v. Memphis Union Station Co., 230 F. Supp. 456 (467, 468)*.

Fact that the commission had approved joint-trackage agreement between plaintiff and defendant railroads has no significant bearing on question of whether federal jurisdiction exists in action for an injunction to restrain defendant from preventing complainant's movement of trains, with its own crews and power, over segment of former's main line track in order to serve industry plant. While the joint-trackage arrangement could not legally be undertaken without commission approval, that approval was permissive only; no mandatory order of the commission is involved.

There is no interference with plaintiff's statutory obligations; illegality of defendant's acts, if any, arises from breach of contract not a statutory violation; complaint dismissed for want of federal jurisdiction.—Chicago & N. W. Ry. Co. v. Toledo, P. & W. R. Co., 217 F. Supp. 64 (68-70)*.

Authority granted applicant short line for acquisition of trackage rights over a 2.13-mile segment of a branch of Pennsylvania R. between connection with authorized extension of applicant's line and a construction spur it is authorized to acquire, to enable it to reach a new coal cleaning plant from mines on its line. Although the Pennsylvania, if it acquired the spur, could serve the new plant by interchange with applicant, in order to provide such service for the volume of coal traffic anticipated it would have to incur even greater expenditures for track improvements and construction than the outlay required for applicant's proposal, as well as increased expenses for maintenance, motive power, and labor, whereas both the Pennsylvania and intervener New York Central will benefit from applicant's proposed operation.—Cambria & I. R. Co. Construction and Acquisition, 320 I.C.C. 43 (45, 48, 50)*.

Authority granted North Western for acquisition of trackage rights over Burlington's line between Seward and Lincoln, Nebr., for movement of overhead traffic in lieu of applicant's Platte River-Seward line concurrently authorized to be abandoned; even before washouts compelled discontinuance of use of latter line there was no certainty of successful movement of bridge traffic thereover owing to its deteriorated condition, and such traffic is now moving under service orders, and under trackage rights will continue to move, efficiently over the Burlington's line at far less cost than losses from the abandoned line.—Chicago & N.W. Ry. Co. Trackage Rights, 317 I.C.C. 350 (355).

It was only prudent for applicant to seek a more favorable arrangement for trackage rights in Chicago area, looking toward expiration of its contractual relations with B. & O.C.T., when it became aware that latter was unlikely to offer it terms which it considered fair; and the 1958 offer of B. & O.C.T. should be used for comparison with agreements executed by applicant with Indiana Harbor Belt and Illinois Central, since that proposal contained the terms under which it could negotiate with B. & O.C.T. and was the cause of its seeking a more equitable agreement; to disregard that offer and consider only B. & O.C.T.'s last proposal to meet terms of the Central-Harbor Belt agreements would in effect make applicant a captive lessee of B. & O.C.T., releasable only upon latter's consent, which would be neither fair nor equitable, considering applicant's deficit operations and profitable operations of B. & O.C.T. in recent years.—Wisconsin Central R. Co. Abandonment, 317 I.C.C. 218 (220, 221).

Services required of either B. & O.C.T. or Illinois Central and Harbor Belt in moving applicant's trains into Chicago and providing terminal facilities are generally comparable; operations under the agreements with Central and Belt would presently or ultimately permit savings over any proposal of B. & O.C.T., and applicant would not be restricted to exclusive use of their facilities; since no construction or extension of lines is required, those lessors could increase their income substantially with little increase in out-of-pocket costs. Those agreements also appear equitable in that income to lessors and costs to applicant are predicated primarily on amount of service rendered, in contrast to large fixed rentals under B. & O.C.T.'s proposals; revenue loss to latter will not materially impair its ability to serve the public; acquisition of trackage rights and concurrent abandonment of operation over B. & O.C.T. tracks, authorized.—Id., pp. 220-2.

Lack of information concerning value of the trackage and other properties involved does not bar approval of the proposal. The commission has not adopted any exclusive formula for determining reasonableness of proposed rental for use by one railroad of tracks and services of another; "just and reasonable" as used in §5(2)(b) have been held to imply the application of good judg-

ment and fairness or common sense; such agreements generally may be considered "just and reasonable" within meaning of the statute where facts of record disclose that nonaffiliated railroads after bargaining at arms length have entered into trackage rights agreements under which adequate service will be continued to the public, all parties to the agreements will benefit financially, and any former lessor's ability to serve the public will not be materially impaired.—Id., p. 222. [But see dissent.]

Condition on Seaboard-Coast Line merger, requiring survivor to open its Jacksonville, Fla., gateway to Southern Ry. and affiliates on a reciprocal basis for all through traffic originating or terminating on survivor's lines in Florida, should obviate necessity of Southern's canceling its present trackage agreements with Coast Line for operation over latter's line between Hardeeville, S.C., and Jacksonville via Savannah, Ga. However, to allow Southern time to evaluate effects of the merger on it, it is granted a 1-year option to effect such cancellation. And since those trackage rights are restricted against Southern's handling of traffic purely local to that segment, the through-route condition is restricted likewise.—Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122 (181-2, 183)*.

In view of Central of Georgia's recent affiliation with Southern, grant of trackage rights sought by it between Savannah and Jacksonville is unnecessary; and though it seeks trackage rights over survivor's line between Albany, Ga., and Jacksonville in order to obtain a continuous route from Birmingham and Montgomery, Ala., Southern's system line from Tifton, Ga., to Jacksonville is more direct. Condition imposed requires survivor to grant Central a 1-year option from date of consummation of merger to acquire trackage rights over its line between Albany and Tifton, subject to approval of terms thereof by the commission. Should Central find it more advantageous to operate single-line service between Jacksonville and Birmingham-Montgomery, it will be expected to make the necessary trackage arrangements with Southern.—Id., p. 183.

Proposals whereby Central of Georgia and Savannah & Atlanta will establish a single route between Savannah and Waynesboro, Ga., through use of portions of their existing parallel routes, involving abandonment of other portions, grant to each other of trackage rights over their respective portions of proposed route, and construction of connecting tracks, will result in continuance of present operations of both applicants and allow them to participate in substantial annual savings; approved and authorized.—Central of Georgia Ry. Co. Abandonment, 317 I.C.C. 184 (185, 189).

Though protestant Georgia R. contends that, since the Savannah & Atlanta receives the same divisions for the 10-mile haul from Port Wentworth to Savannah for interchange with Central as it does for the 130-mile haul to Camak for interchange with the Georiga, it would have incentive to interchange with Central at Savannah and so prejudice the Camak interchange and the direct route with the Georgia between Savannah and Atlanta, only unrouted traffic would be open to such treatment, and S. & A. is not shown to have discriminated between its connections in the past. Importance of those gateways was recognized in 282 ICC 39, wherein Central's control of S. & A. was conditioned on preservation of existing through routes, and imposition of more restrictive conditions in instant proceeding is not warranted; conditions prescribed in that case incorporated by reference.—Id., pp. 188-9.

Acquisition by the North Western and the Milwaukee of trackage rights over lines owned or operated by Indiana Harbor Belt, approved when agreement between the parties provides for adequate service to the public and all will benefit financially. The trackage rights, which are for bridge movements only, will provide direct connections between lessees and major railroads serving Chicago area and by eliminating intermediate switching by the Belt will permit more efficient and economical operation; any reduction in use of the Belt's switching facilities would be offset by prospective development of additional traffic by lessors, with increased net income for the

Belt under the agreement; acquired rights will be a major factor in enabling North Western and Milwaukee to establish rates at levels capable of attracting traffic in significant volume.—Chicago, M. St. P. & P. R. Co. Trackage Rights, 317 I.C.C. 14 (17-8)*.

Acquisition by Seaboard Air Line of trackage rights over tracks of Richmond Term. Ry. and joint use of latter's Broad Street station, as part of plan for concentrating its north-south passenger operations in one station at Richmond, found consistent with public interest.—Seaboard Air Line R. Co. Control, 312 I.C.C. 803 (806)*.

Agreement of Bangor & Aroostook and Aroostook Valley covering use of latter's Skyway switch between Washburn, Maine, and industrial park in Presque Isle, Maine, under which AV, for a monthly car fee, would handle all loaded and empty cars of B&A moving to or from the industrial park, fails to meet requirements of a trackage agreement subject to §5(2)(a)(ii), since, though it purports to grant trackage rights, by its very terms it deprives B&A of the right to operate over the Skyward switch; proposed terms and conditions appear more applicable to a traffic or agency agreement. Moreover, in view of provision that neither party shall refer to the Skyway switch in its tariffs or indicate therein the existence of an interchange between them at Washburn, any operation conducted under the agreement would be of doubtful legality under §6(7). Denied.—Bangor & A. R. Co. Trackage Rights, 320 I.C.C. 403 (404-5).

Complainant municipality's proposal that defendant be required to utilize Seaboard Air Line's main line as means of access to its own Hialeah yard, as alternative to requiring joint use of Seaboard's Hialeah freight terminal facilities, asks the commission to order the granting of trackage rights without concurrence of the parties to the transaction. Since that proposal is not directly related to joint use of Seaboard's terminal facilities, and the commission has no power to compel a carrier to grant trackage rights over its line to another, that portion of the complaint seeking such relief is dismissed.—City of Hialeah, Fla. v. Florida East Coast Ry. Co., 317 I.C.C. 34 (36).

60. Affiliates, subsidiaries, holding companies.—[Vols. 11-17, 19].—While close family relationship, alone, would not necessarily justify a finding of affiliation, it is to be considered along with the conduct of the parties involved. Actions of Reuben Jeffries, one of three brothers who jointly control vendee, in effecting transfer of 55 percent of vendor's stock (held as security for his loan to its former president) to his son who had virtually no experience in motor carrier operations and was subject to the father's influence, under the terms described, indicate that he had no intention of allowing the shares to fall into strange hands. Also, 17 days later, vendor's receivership was terminated and its remaining stock was sold to vendee. The son was in no position to act adversely to the interests of his father and uncles and, considering sequence of events whereby the three brothers effected transfer of vendor's stock in part to the son and in part to vendee, there is little doubt they exercised a strong measure of control over vendor's affairs which, as stated in 80 MCC 59, establishes affiliation.—R. L. Jeffries Trucking Co., Inc.—Purchase—Eck Miller, 97 M.C.C. 151 (168-8, 170).

Individual who acquired stock control of a multiple-State carrier, his brother who controlled one single-State carrier, and his son and two daughters who controlled a second, were affiliated with each other within meaning of §5(6), not only by the family relationships, giving rise to an unrebutted presumption of affiliation, but also by their business dealings with each other and with the multiple-State carrier. Evidence of the business dealings of those individuals and carriers with individual who acquired stock control of the second single-State carrier as an accommodation purchaser, and of all the multiple-State carrier, its officers, directors, and stockholders, also clearly establishes that they were affiliated within §5(6).—Nigro Freight Lines.—Purchase—Coady Trucking Co., 90 M.C.C. 113 (116-9, 120).

Dilla, liquidating carrier's sole stockholder, and the survivor in proposed merger are affiliated within §5(6) when Dilla has long been associated with survivor in his capacity as a practitioner, having represented it in its "grandfather" proceeding as well as in numerous rate matters and purchase acquisitions, and in other business dealings including handling its tariff matters; such conclusion is supported by prior transaction wherein Dilla acquired operating rights and contracted to sell them to survivor barely a year later, and by his assertion of his advanced age of 74 as reason for wishing to dispose of liquidating carrier, although he did not hesitate to acquire it at 73.—Kaplan Trucking Co.—Control—Thomas Boyd, Inc., 90 M.C.C. 419 (423, 424)*.

Motor carriers: See also Bi-State Development Agency purchase case, n. 45, above.

Although both groups of applicants seeking authority to purchase additional stock of the same carrier claim that there is no affiliation between them, or between them and any of the carrier's independent stockholders, and the commission has no reason to doubt that such case is true, the question remains whether either group, or both jointly, controls or has the power to control the carrier. Record does not disclose the names of carrier's officers and directors, but it is reasonable to assume that the two groups, jointly owning 71.4 percent of its stock, dominate the slate of officers and the board of directors, and have the predominate voice in its affairs, in contrast to independent stockholders who own only 28.6 percent of the stock, collectively. Moreover, the groups' disavowal of mutual interest is betrayed by their joint agreement for alternately pruchasing stock of independent holders (each group to acquire no more than 50 percent of carrier's stock); such arrangement indicates that independent holders have little voice in carrier's affairs and operation and little, if any, say in disposition of their stock.—Capitani—Control—North Boulevard Transp. Co., 97 M.C.C. 479 (483).

Noncarriers: There are no provisions in the act which prevent a carrier from acquiring noncarrier enterprises, so long as the acquisitions are made without issuance of securities or assumption of obligation or liability on securities of some other person. Nor are there any provisions which prohibit any carrier or persons controlling a carrier from organizing separate noncarrier corporations to which a part or all of the properties of the operating carrier, except interstate operating rights, may be transferred; no prior approval by the commission is required for such transactions. And the commission has on occasion exercised its discretionary powers to permit motor carriers to be controlled and dominated by persons and financial interests which simultaneously control and dominate the affairs of noncarrier companies.—Greyhound Corp. Stock, 90 M.C.C. 215 (221-2).

Railroads: Although Atlantic Coast Line's stock control of Louisville & N. R., which has existed since 1902, will pass to survivor in aprpoved merger with Seaboard Air Line, public interest does not require divestiture thereof by Coast Line or the merged company. Throughout their relationship L&N has operated under separate management, unhampered by Coast Line influence, and after the merger it will continue to be operated under independent management. Even if the merged company should favor L&N in allocating interchange traffic, it is unlikely there would be material diversion of traffic now moving over lines competitive with L&N, since it operates outside the merging carriers' competitive area; and conditions imposed provide for new through routes that will enhance ability of L&N's competitive to compete with the merged company. Moreover, divestiture by the merged company could result in acquisition of control of L&N by another railroad and create a competitive imbalance in other areas that could cause serious harm to small competitors.—Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122 (188-9)*.

See also Texas & Pac. Ry. Co.—Control—Kansas, O. & G. Ry. Co. case, n. 45 *Conditions,* above.

Protestant claims that proposed merger of electric railway into its parent railroad would remove existing competition between them because, since lines of parent parallel the subsidiary's to a great extent in the Los Angeles area, shippers would lose their choice of two carriers; however, inasmuch as the subsidiary has served principally as a feeder line for parent railroad since latter acquired ownership of all its capital stock, it does not appear that any significant amount of competition exists between the two carriers.—Southern Pac. Co. Merger, 327 I.C.C. 38 (40)*.

70. Employees.—[Vols. 11-19].—The commission's power to authorize railroad mergers would be completely ineffective if it lacked authority to adjust work realignments through fair compensation, since under Railway Labor Act it is possible for either party to block any change in working conditions by refusing to agree to a change and refusing to arbitrate. Decisions in 308 US 225, 339 US 142, and 366 US 169 support the view that Congress intended the commission to have jurisdiction to precribe the method for resolving labor problems arising directly out of approved mergers; to hold otherwise would ignore the plain language of §5(11).—Brotherhood of Locomotive Engineers v. Chicago & N.W. Ry. Co., 314 F. 2d 424 (430-1)*.

And it was unnecessary for the commission, in approving stipulated agreement for protection of employees, to make a finding that it was exercising a right to modify existing collective bargaining agreements under Railway Labor Act. At express invitation of the carriers and employees it adopted the method agreed on by them for solving any labor dispute arising from displacement of employees as result of authorized merger; and its report and order show that it considered that agreement to have satisfied its obligation to protect employees so affected. There was thus no occasion for it to take any further action with respect to specifying the conditions; the stipulated agreement became part of the conditions which §5(2)(f) requires it to impose.—Id., pp. 432-3.

In effect the stipulation provides substantially the same machinery for arbitration as does §7 of Railway Labor Act, and the commission has many times provided for compulsory arbitration to settle labor disputes arising out of mergers where the parties have been unable to agree. When one of the parties selects arbitration as a means of settling the dispute, under such a provision, it is then mandatory on the other (312 F. 2d 264); both appellee railroad and the employees are bound by their voluntary agreement, approved by the commission and made part of the §5(2)(f) conditions, to arbitrate merger labor disputes; and the Railway Labor Act fosters no overriding policy or purpose which would deny enforcement of an agreement to arbitrate.—Id., p. 433.

Lower court erred in denying defendant railroads' motion for summary judgment on basis of res judicata (and ordering parties to submit the dispute to arbitration) in severance-pay suit brought by railroad employees who were involuntarily retired at age 65 without severance pay pursuant to 1962 union contract, which was based on that court's holding that 1962 contract was invalid insofar as it abrogated any rights to severance pay derived from employee-protective conditions imposed in 1961 commission decision authorizing the railroads to abandon certain trackage. The difference between claims in instant case and those in earlier lawsuit between the same parties, wherein this court held that involuntary retirement provisions in the 1962 labor contract were valid and binding on plaintiffs, 323 F. 2d 219, affirming 211 F. Supp. 379, is insufficient to avoid the bar of res judicata. While the first case was based on a violation of the Railway Labor Act, and theory of this suit is that the 1962 contract contravenes the 1961 commission decision, reliance on different statutes does not render plaintiffs' claims different "causes of action" for purposes of res judicata. Reversed and remanded for entry

of summary judgment.—Clemens v. Central R. Co. of New Jersey, 399 F. 2d 825 (826-8)*.

Neither the commission nor the employee-protective conditions, imposed in connection with approval of Southern Ry.'s purchase of the capital stock of Atlantic & E.C. Ry. define "employee"; however, as used in that context by Congress and the commission, "employee" surely does not include principal managers of a railroad who ordinarily are in a position to protect themselves from the consequences of a consolidation. Thus, Atlantic's "Chief Engineer," although discharged after Southern's assumption of control, is not entitled to benefits of the employee-protective conditions when his position was listed in Atlantic's annual reports as a general officer; he served as advisor to his father (the General Manager and controlling stockholder of the small family owned railroad in which he also held stock) and technical administrator with authority to execute the company budget and procure maintenance materials, and to supervise over 1/3 of the railroad's employees; also, he was not a union member and his position was not covered by any collective bargaining agreement. Lower court's judgment in favor of appellee, reversed.—Edwards v. Southern Ry. Co., 376 F. 2d 665 (667-9)*.

Section 5(2)(f) prescribes the maximum protection to which employees are entitled as a condition to the commission's approval of a §5 transaction; but Congress did not intend §5(2)(f) to delimit the maximum protection employees could obtain, and the strictures of the Norris-LaGuardia Act need not be raised to accommodate the obvious intention of §5(2)(f). While representatives of carrier employees are among the interested parties to a transaction under §5, and a new labor contract may be one of the ingredients of such a transaction, it does not follow that any right of the carrier to unilaterally create one of the contracts which may be necessary to completion thereof, and thereupon to bind a third party to it, may be read into the commission's authority to "approve" a §5 transaction.—Texas & N.O. R. Co. v. Brotherhood of Railroad Trainmen, 307 F. 2d 151 (157-8, 159)*.

However, relying on the commission's plenary power under §5(11), the courts have held that in certain circumstances, when carriers have been faced with contract demands which would be contrary to public interest in effectuation of a §5 transaction, a carrier may be relieved of such demands by the commission. Although situation therein differs considerably from that under consideration, decision in 334 US 182 may indicate that, after due notice and hearing, the commission would have jurisdiction to determine whether defendant union's demands are contrary to public interest in effectuation of approved §5 transaction involving railroads' abandonment of certain tracks and institution of new methods of operation necessitated by construction of new bridge at Corpus Christi, Tex. If differences between unions and railroads prove irreconcilable, and the question is properly presented to the commission, it may determine its jurisdiction vel non to find whether certain union demands are contrary to the public interest.—Id., pp. 161-2.

The commission's order declining to reopen §5 proceeding for clarification of arbitration clause of Oklahoma conditions imposed in order of authorization, stating that disputes as to application of such conditions are properly for settlement in manner set forth therein, or by the courts, merely meant that disputes were to be settled by arbitration, if that is what the party having the right to do so selected, or if not, by the courts; it was not an effort by the commission to change the original provision, which gave either party an option to choose arbitration, to something else.—New Orleans & N.E. R. Co. v. Bozeman, 312 F. 2d 264 (266, 268)*.

Provision in question (§8 of Oklahoma conditions), that a dispute as to effect of the acquisition on employees "may be referred, by either party, to an arbitration committee for consideration and determination," plainly means that either party has an absolute right to make an election, binding on the other, to refer the dispute to arbitra-

tion; it would be meaningless to provide that appellees may refer the dispute to arbitration if such election could be defeated by appellant's refusal to acquiesce; such is the teaching of the Supreme Court's decision in 353 US 30.—Id., pp. 267, 268.

Appellees made their election, whereupon arbitration became mandatory on the other party; there is no prohibition in the statute against giving this effect to the commission's order. Appellees' representatives expressly called on the railroad's representative in charge of the matter to meet for purpose of setting up arbitration if the company did not change its view as to granting of appellees' requests for protection of certain employees; those requests were not granted, and the company's representative refused to submit the matter to arbitration. This constituted a flat denial of appellees' right to insist on arbitration, and they had every right to rely on such refusal as an anticipatory breach of the agreement to arbitrate, without necessity of their taking any other preliminary steps toward setting up an arbitration panel.—Id., pp. 267, 268.

As to appellant's contention that arbitration cannot be imposed on parties without their prior agreement, appellant voluntarily elected to proceed with the acquisition under the commission's order; it could accept the authorization to purchase the facility with the conditions stated in the order, or it could reject it. Having accepted the conditions by accepting the authorization in the order, it is bound by those conditions in same manner as if it were a private contract entered into between the parties themselves.—Id., p. 268.

Since the commission's report and order authorizing Southern Ry. to acquire the stock, and thus the control, of Central of Georgia Ry. permitted considered consolidation and coordination of yards and facilities, the Central's subsequent transfer of its employees in certain yards to the Southern's payroll did not violate union contract provisions prohibiting unilateral action changing the agreements affecting rates of pay, rules, or working conditions without notice and an opportunity to negotiate with respect thereto; the railroad neither purports to nor suggests intention to make a change in such agreements. If the railroad's conduct violates existing agreements, relief would be by grievance procedures under the Railway Labor Act; such violation would not entitle the unions to file suit for injunction or damages until the dispute had been fully processed and disposed of.—Switchmen's Union v. Central of Georgia Ry. Co., 341 F. 2d 213 (216-7)*; Brotherhood of Railway Steam. Clerks v. Southern Ry. Co., 341 F. 2d 217 (218-9).

However, since the order in issue has been remanded by the Supreme Court in another case to the commission for further consideration of the employee protective conditions imposed, and appellants' rights may be determined by action hereafter taken by the commission pursuant thereto, it would be premature for the court to make final disposition of instant appeal until full effect has been given to the Supreme Court's mandate.—Id., Switchmen's Union case, p. 217; Brotherhood of Railway & Steam. Clerks case, p. 219.

Plaintiffs, employees of one of applicants in proposed railroad merger, are entitled to protection under §5(2)(f): and, in passing on the proposed transaction, the commission treated them as interested parties (though they had not filed a protest) and took steps to protect them by subjecting the merger approval to the same employee-protective conditions as were imposed in the Central of Georgia case, 317 ICC 557, and adding thereto sections 4, 5, and 9 of the Washington Job Protection Agreement. Complaint does not specify how or in what way plaintiffs have been injured; and plaintiffs did not set forth facts showing any failure on the commission's part to comply with requirements of §5(2)(f) which prohibit employees being placed in "a worse position" with respect to their employment as a result of the merger. Orders of the commission sustained.—Day v. United States, 264 F. Supp. 689 (691, 692-3)*.

In action to set aside that part of the commission's order approving railroad merger which relates to extension of employee-protective benefits to railroad employees engaged in operation of Atlanta Joint Terminals, the commission's decision

that (even though AJT is a separate unincorporated association and is a common carrier within §13(a)) employees of AJT were entitled to protection under §5(2)(f) as employees of the railroad if, in fact, their employment was adversely affected as result of or in anticipation of the merger, did not constitute an error of law; nor was the commission's action arbitrary, capricious, or an abuse of discretion. Therefore, the findings of the commission being supported by substantial evidence, the court is not authorized to disturb the commission's decision; complaint dismissed.—Louisville & N. R. Co. v. United States, 244 F. Supp. 337 (338-9, 341, 342)*.

Though unification of railroads and consolidation of their operations inevitably entails some loss of employees' jobs, the congressional policy recognizes that accomplishment of economies through such unifications is essential to saving the national transportation system; and recognition of impact thereof on employees prompted Congress to require that no railroad mergers or affiliations be approved without provision for protection of displaced employees. However, notwithstanding some immediate hurt to railroad employees, they and all other members of the public will in the long run find more and better opportunities if the country's total economic health is protected. In this situation it cannot be said that the conditions imposed by the commission on Chesapeake & Ohio's control of Baltimore & Ohio do not adequately protect employees' rights.—Broth. of Maint. of Way Employees v. United States, 221 F. Supp. 19 (29)*.

The first sentence of §5(2)(f) is not ambiguous; to be protected, an employee need only be a railroad employee and be affected by rail transaction in issue. Moreover, even though language in the statute might be ambiguous, public policy on which it is based leads to the conclusion that employees of railroad merger applicants and of protected railroads alike are to be protected from effects of the merger. Plaintiff (intervener in the North Western and Great Western merger proceeding) should be protected from diversion resulting from that merger because it is in the public interest to maintain it as a viable railroad, and it cannot be contended that it is not as important to protect plaintiff's employees. The commission may on remand impose conditions which will fully offset traffic diverted to NW-GW and, thus, protect plaintiff's employees from job loss; if so, employee-protective conditions will not be necessary; however, if it finds that those employees will be directly and adversely affected, it must impose protective conditions for their benefit.—Soo Line R. Co. v. United States, 280 F. Supp. 907 (922-6)*.

Section 5(2)(f) commands protection of all employees "affected" by a transaction, and the guardianship does not depend on their employer's role therein. Although employees furloughed as result of Seaboard Air Line's discontinuance of joint use of Chesapeake & Ohio's passenger station (incidental to its acquisition of joint use of another station) were governed solely by their contract with Chesapeake, their engagement and control by Cheaspeake alone was an arrangement merely by convenience of the two railroads and did not alter the truth that they were Seaboard's employees as well, since all personnel at the station served either or both of the companies as the occasion demanded. The act is concerned with personal welfare of the employees and deals with realities of the transaction: with so immediate a relation between them and Seaboard, it is hypertechnical to say that plaintiffs were not "employees affected" within the first provision of §5(2)(f). No other prerequisite to enjoyment of the security of the act is exacted; plaintiffs' right to protection is undeniable.—Railway Labor Executives' Assn. v. United States, 216 F. Supp. 101 (102-3)*.

Section 5(2)(f) is quite free from ambiguity, and its protection is not limited to employees of a carrier "involved" in the transaction. Even if it were, plaintiffs must prevail: although not a party to the control proceeding, Chesapeake was deeply and unavoidably involved in the transaction; owing to its interrelation with Seaboard under arrangement for joint use of its

station, it became involved when Seaboard sought to leave there. Any difficulty in providing for protection of railroad employees whose employer is not a party before the commission can be overcome by requiring the applicant carrier to see to the protection directly or through agreement with the employer-carrier and the employees, as permitted by the last sentence of §5(2)(f). To the extent that they deny plaintiffs their right to protection, the commission's orders are set aside and the proceeding remanded with instructions that plaintiffs be treated as coming within the ambit of §5(2)(f).—Id., pp. 103-4.

In action by former employee of Atlantic & E.C. Ry. to recover damages on basis of the provisions for protection of employees imposed as a condition of the commission's approval of Southern Ry. Co.'s purchase of Atlantic's capital stock, plaintiff must show that he was an employee of the railroad within meaning of the "Oklahoma conditions." Plaintiff who was employed by Atlantic as a freight agent (from which position he was removed) and also as Chief Mechanical Engineer (which position was consolidated with that of other employees under titles of Train Master and General Foreman) was a railroad "employee," and not an officer thereof, within meaning of the employee protective conditions; plaintiff is entitled to recover damages when, but for the acquisition of control, he would have continued to hold both of the positions from which he was involuntarily removed by defendant.—Edwards v. Southern Ry. Co., 258 F. Supp. 212 (216-7).

And car inspector, admittedly an employee of Atlantic within the "Oklahoma" conditions, is entitled to recover damages sought when, due to defendant's changes in methods of inspecting cars following the acquisition, his position was abolished. Despite defendant's insistence that the changes were made for economic reasons, the fact remains that plaintiff is unemployed as a result of Southern's acquisition of Atlantic; thus, when a plaintiff finds himself in an adverse position due to changes which would not have resulted but for the acquisition, the acquiring party should be liable.—Taylor v. Southern Ry. Co., 258 F. Supp. 257 (261-2)*; likewise, the employee protective conditions apply in favor of railroad machinist, doing general machine work, whose position was abolished as result of defendant's changes in the method of repair and machine shop operations.—Kehoe v. Southern Ry. Co., 258 F. Supp. 245 (249-50).

Similarly, diesel mechanic helper whose position was abolished is entitled to benefits provided by the "Oklahoma" conditions. That plaintiff subsequently obtained a new position with Atlantic on his own initiative (from which he was discharged for insubordination) is of no relevance to question of application of the employee protective conditions; defendant did not provide him with the new position upon his discharge from his former one and, even with the new position, plaintiff remained in a worse position and thereby is entitled to relief. Relevancy of the nature of plaintiff's second position, and of his discharge, would go only to the question of mitigation of damages.—Sheppard v. Southern Ry. Co., 258 F. Supp. 217 (222-3)*.

And car accountant whose duties consisted of keeping record of all cars interchanged to and operated over Atlantic's line, and who had no supervisory authority over other employees of the railroad, was an "employee," not an officer, of the railroad within meaning of the "Oklahoma" conditions. Both the statute and those protective conditions were specifically designed to alleviate the situation in which plaintiff found himself when his job was abolished after the acquisition; defendant railroad will not be allowed to defeat the clear intent of the law by guise and indirection.—Edwards v. Southern Ry. Co., 258 F. Supp. 125 (128-30).

Agreement between railroad and employees' union concerning protection for employees pursuant to railroad's abandonment of portion of its line, which was entered into after entry of the commission's order and certificate permitting the abandonment, is a legal and enforceable contract and is binding on plaintiff employees as members of the signatory unions.

While it is within the commission's discretion as to whether to impose employee-protective conditions in railroad abandonment proceedings, the Burlington conditions included in the commission's order provided for negotiation and settlement in event dispute or controversy should arise with respect thereto. Since the matter in controversy involves employee-protective benefits (and does not affect the general public regarding operation of rail lines), it is properly the subject of a negotiated contract between the railroad and the unions. Suit to have the agreement declared null and void, dismissed.—Flaherty v. Kansas, O. & G. R. Co., 252 F. Supp. 736 (737-41, 743).

Wording of §5(2)(f), if read in a vacuum, lends some credence to defendant's contention that the four years specified therein describes time during which railroad employees must have been affected by a transaction approved by the commission, and not the period for which they are to receive benefits of employee-protective conditions imposed; however, in light of the Congressional Record and cases which have construed the section, it is apparent that the 4-year provision describes the period during which, under normal circumstances, the employees are to receive pay. That provision was meant to partially compensate discharged employees by paying them the equivalent of four years' salary and to compensate retained employees, which includes those on furlough, for any reduction in salary; therefore, in assessing the extent of employee-protective benefits, a definite distinction should be drawn between discharged employees and those merely on furlough, the former usually being entitled to full four years' benefits and latter being entitled to pay for work actually lost.—Swacker v. Southern Ry. Co., 240 F. Supp. 51 (57-8)*.

Twenty-five of subsidiary railroad's car laborers, furloughed before defendant acquired subsidiary's stock and not in anticipation thereof, and who would have been paid only when recalled for work (assuming no stock acquisition), are entitled to benefits of protective conditions set forth in the commission's order approving the acquisition only when they should have been recalled by the subsidiary (which retained its separate corporate identity) and were not because of the acquisition of control by defendant. Therefore, those employees are to be paid for certain work on subsidiary's cars which was done by defendant's employees after the acquisition; repair work in question would have been done in subsidiary's shop by its employees had there been no acquisition, but was diverted by defendant to its shop.—Id., pp. 56, 58.

However, plaintiffs are not entitled to benefits for work done by independent contractors in rebuilding and repairing cars purchased by the subsidiary, and also work done in connection with scrapping of retired cars; decision to have that work done by independent contractors was for management, and subsidiary could, and probably would, have made the same decision even if there had been no acquisition. Likewise, subsidiary's decision to increase rental of cars from parent road was one for management which could have been made without the acquisition; and, while the employees were affected by that decision, the stock transaction was not the proximate cause thereof. Even though the increased rental might be a result of the transaction, it would not be such a result as would give rise to any benefits to subsidiary's employees.—Id., pp. 59-60.

And, since there was no co-ordination of the separate railroad facilities within meaning of the protective conditions imposed, subsidiary's "maintenance of ways and structures" employees who were furloughed prior to the stock acquisition are not entitled to employee benefits. Their jobs were diminished as result of use of modern track and maintenance equipment; no work has been removed from subsidiary's lines, but rather the same amount of work is being done with modern machines and fewer men. Record is clear that displacement of these employees was due to internal technological improvements, rather than to a claimed consolidation of facilities.—Id., pp. 61-2.

The commission, pursuant to its statutory authority to determine what arrangements for protection of railroad employees are fair and reasonable, imposed conditions for protection of employees adversely affected by railroad merger authorized in 295 ICC 457, but did not undertake to determine or fix rights of individual employees or employee groups; provisions made therein by the commission for arbitration are mandatory and not permissive. Since the employees are required to resort to arbitration, and the arbitration procedure by which the parties are bound is that provided for in the implementing agreements between plaintiff and labor union representing the employees, the court lacks jurisdiction to adjudicate employees' claims.—Louisville & N. R. Co. v. Cantrell, 215 F. Supp. 229 (232-3, 240)*.

And union which executed implementing agreements with plaintiff was the "duly authorized representative" of two groups of employees separated from service because of the merger, although the agreements were not entered into until more than 2 years after those employees were separated; those agreements are binding upon the employees with respect to method of arbitration to be followed to the same degree and in the same respects as similar agreements entered into with respect to, but prior to separation of, other groups of employees.—Id., pp. 233-40.

In action by railroad employees claiming benefits under employee-protection conditions, imposed by the commission in approving Southern Ry.'s acquisition of defendant, and union's action for mandatory injunction to compel railroad to arbitrate employee claims as provided in the merger agreement, union is not entitled to summary judgment as a matter of law. Contested clause (clause 8 of the Oklahoma conditions) of the conditions imposed provides that certain disputes may be referred to an arbitration committee, but does not say arbitration is compulsory; it is meant to provide a voluntarily procedure for settling disputes, and defendant railroad prefers not to arbitrate but to have employees' claims considered by the court. The court needs more complete development of facts and law surrounding disputes in issue; cases consolidated and referred to special master.—Swacker v. Interstate R. Co., 32 F.R.D. 234 (237-8).

Congress has conferred on the commission authority to decide what consideration should be given to effect of contemplated railroad merger on job security of employees of the railroads. While effect on employees' job security is a question of profoundly important economic and social policy and is of grave concern to the employees, that question is for the commission, not the court, to decide.—Pennsylvania R. Co. v. Transport Workers Union, 202 F. Supp. 134 (138).

Injunction against strike threatened by employees' union after announcement of merger proposal, pending resort to procedures under Railway Labor Act, will not be conditioned on plaintiff's not discharging any employees; record does not indicate that furloughs of employees have been effected or are planned in anticipation of the merger.—Id., pp. 138-9.

When railroads and union had entered into a "stipulation" for protection of railroad employees, which was based on the Washington Job Protection Agreement and was authorized by the commission as part of its order approving plaintiff's acquisition of properties of another railroad, the parties are required to follow procedures prescribed by the stipulation, not by the Railway Labor Act, in carrying out proposed rail yard coordination and consolidation of plaintiff's existing yard with its newly acquired yard.—Chicago & N. W. Ry. Co. v. Brotherhood of Locomotive Engineers, 202 F. Supp. 277 (279-80, 283, 285)*.

In considering interests of vendor's employees who might be affected by purchase transaction, although no mention was made of them in approval thereof, the commission could, and did, rely on sworn statements in the application that vendee would employ all of vendor's employees in its determination that proposed transaction was in the public interest. When vendee failed to abide by those material state-

ments, after notice and full hearing the commission could, apart from inadvertence and fraud, modify and supplement its order by imposing an employee protective condition, even though certificate covering the purchase rights had been issued.—Baggett Transp. Co. v. United States, 206 F. Supp. 835 (838-9, 842)*.

Agreement which plaintiff, collective bargaining representative of motor carrier's employees, and the carrier entered into subsequent to their new labor-management agreement settling a prolonged strike of the employees, in which the union and the carrier agreed to release all claims against each other as of date thereof, was a part of the strike settlement and covered claims "arising out of the strike and activities relating thereto." That agreement was not a waiver of the employees' claims for protection against losses resulting from the carrier's sale of two routes to other carriers. And offers of employment by purchasing carrier to vendor's striking employees, rejected because they afforded no seniority protection, did not have the effect of defeating those employees' right to protection in connection with the sale; such offers were inadequate.—Amalgamated Ass'n of Street, Elec. Ry., etc. v. United States, 221 F. Supp. 958 (960-1)*.

Accordingly, the commission's reliance on those grounds for denying imposition of conditions for protection of adversely affected employees, when it approved the sale, was erroneous; its order must be set aside. What measure of relief, if any, should be provided to considered employees is reserved to the commission, subject to judicial review; however, if any particular measure of relief is one which ordinarily be granted to railroad workers similarly situated, the commission should not deny it to vendor's employees without reasoned explanation of such denial. Remanded for further proceedings not inconsistent with the court's opinion.—Id., p. 961.

Although Santa Fe's proposed merger of three wholly owned subsidiaries, including Gulf, C. & S. F. Ry., and removal of Gulf's general offices at Galveston, Tex., will undoubtedly cause hardship to a number of employees and their families, protective conditions embodied in Santa Fe's existing agreement with Brotherhood representing railway clerks, station employees, etc., fall within purview of the last sentence of §5(2)(f) and will apply to employees of all three subsidiaries who are members of that Brotherhood specifically covered by the agreement's terms. And impact of the merger on employees not specifically covered by terms of that agreement will be substantially softened by imposition of the Southern-Central conditions described in 317 ICC 557, as supplemented and clarified in 317 ICC 729 and 320 ICC 377, including §§ 4, 5, and 9 of the Washington Job Agreement, which are included as appropriate ingredients of a fair and equitable arrangement to protect interests of the affected employees. Moreover, any employee not covered by the clerks' agreement may elect to accept the protection provided thereby or that imposed by the Southern-Central conditions.—Atchison, T. & S.F. Ry. Co. Merger, 324 I.C.C. 254 (255, 258, 259, 261).

But it is deemed inadvisable at this time to depart from the Southern-Central conditions by imposing recommended special condition concerning fringe benefits. There is no language in those conditions or the reports wherein they were developed that would deprive an affected employee of the fringe benefits attached to his previous employment. The Southern-Central conditions provide fringe benefits for an affected employee under the same conditions and so long as such benefits continue to be accorded other employees on his home road, and, as used in that provision, "home road" is broad enough to include the carrier on whose rolls the employee was carried prior to filling of merger application, as well as the surviving carrier in the merger transaction.—Id., p. 260.

Following determination in 216 F. Supp. 101 that employees of Chesapeake & Ohio at its Richmond, Va., Main Street Station formerly operated jointly with Seaboard Air Line are affected by Seaboard's withdrawal from that arrangement and acquisition of control of a different passenger station and

are entitled to benefits of §5(2)(f), the same protection is prescribed for such employees as was prescribed in 312 ICC 803 for Seaboard employees who might be affected. Costs incident to the conditions imposed should be borne by Seaboard as the carrier that will benefit directly from the transaction approved, and it should be afforded appropriate notice of adverse effect on any of Chesapeake's employees and have access to such records of that carrier as may be necessary to determine its ultimate liability.—Seaboard Air Line R. Co. Control, 320 I.C.C. 52*.

The commission is not required by statute to impose "attrition" conditions which would freeze jobs and wages of employees who might be affected by an approved transaction (366 US 169); and to impose them under the "fair and equitable" provision of §5(2)(f) would be inconsistent with public interest: conditions calculated to preserve unneeded jobs unduly restrict carriers in establishing economical operations, are wasteful, and conflict with objectives of the national policy. Imposition of conditions set out in appendix II on Southern Ry.'s acquisition of control of Central of Georgia, which conform substantially to the New Orleans conditions (382 ICC 271), with modification respecting arbitration of disputes, will more than meet minimum requirements of §5(2)(f) and, in view of savings from reduction of forces made possible by the transaction, will not be unduly onerous or endanger the carriers' ability to perform their common-carrier obligations.—Southern Ry. Co.—Control—Central of Georgia Ry. Co., 317 I.C.C. 557 (564, 565, 568)*.

However, carriers have sometimes refused to submit disputed claims to arbitration, thus forcing employees into expensive court proceedings; also, a carrier might refuse to accept arbitration procedures set forth for the settlement of disputes and require employees to invoke provisions of §13 of the Washington Agreement, which could involve protracted delay. Fairness and equity therefore require adoption of a condition making mandatory the submission to arbitration of disputes not settled by agreement between carrier and employee. However, proposed provision placing the burden first on the employee to establish a prima facie case, then on carrier to prove that claimed injury is not due to the transaction, would complicate the task of an arbitration committee and is unnecessary.—Id., pp. 566-7.

No protection need be provided for employees of the Frisco at its Birmingham yard used jointly by Central, since they are not subject to control of either Southern or Central, and, as Illinois Central also uses that yard, it is doubtful if any effect on Frisco employees could be separated from such use or from effect of changes in traffic patterns and the like. Moreover, Frisco is a party to the transaction only in capacity of beneficial owner of Central's stock, and Southern's purchase thereof will not affect Frisco's railroad operations; therefore, its employees will not be "affected" within meaning of §5(2)(f). The act does not require protection of employees of a carrier neither an applicant nor involved in the transaction within meaning of the statute.—Id., p. 567.

For many years labor conditions imposed under §5(2)(f) have included a provision for arbitration of disputes; that imposed in instant case differs only in spelling out what judicially has been found implicit in previously imposed provisions, i.e., the obligation of either party to submit to arbitration when the other elects to follow such procedure. No modification of arbitration provision imposed in prior report is warranted. However, on petition of affected carriers, the general scope of the protection intended to be provided is clarified for the guidance of arbitrators.—Id., 317 I.C.C. 729 (730, 731)*.

If an employee is dismissed or displaced for reasons not connected with the transaction, he is not entitled to benefit of the protective conditions: there must be a reasonably direct, or proximate, causal relation between the transaction and the injury sustained. But it is definitely intended that the protection afforded be available to all employees dismissed or displaced in

course of a chain reaction resulting from exercise of seniority rights by one whose job is abolished or whose work is transferred from acquired to acquiring carrier; such "secondary results" are within scope of the conditions. And if a dispute arises between the carrier and an employee as to whether a claimed injury resulted from the transaction, the carrier is bound to submit the matter to arbitration; a board of arbitrators can fairly decide the issue presented.—Id., pp. 730-1.

Under the conditions imposed, an employee would be entitled to benefits if adversely affected by a coordination of operations of the acquiring and acquired carriers, or by shifting of functions from one to the other; but while management decisions must be made with consciousness of those conditions, it is not intended that changes such as replacement of wornout equipment with maintenance-free equipment would give rise to a valid claim. Effect of subsequent internal technological improvements by either carrier, even if made possible by improved financial circumstances partly attributable to the unification of control, is too indirect to be considered a result of the transaction, and it is not intended that employees affected by such internal improvements be entitled to benefits of the conditions.—Id., p. 732. [But see dissent.]

While the conditions imposed apply only to "employees" of the carriers involved, they are not limited to persons in a pay status on consummation date; if a person possess status of an employee of either carrier when the transaction is consummated, he is entitled to protection provided he shows that he has been deprived of employment or displaced as result of or in anticipation of the transaction. And though the carriers contend that incorporation of the New Orleans conditions is not justified by the circumstances, the commission cannot be assured that the transaction will be consummated promptly or that all coordinations will be effected immediately thereafter. The conditions set forth in the prior report are just and reasonable and no modification thereof is warranted, but they should be construed in light of the foregoing remarks.—Id., pp. 732-3.

Although employee-protective conditions prescribed in 317 ICC 557, as set forth in appendix II thereto, are fair and equitable, it was not the commission's intention to limit protection afforded affected employees to those provisions, but to afford them protection of all provisions of the Washington Agreement of May 21, 1936, not specifically modified by the provisions of appendix II. Except by such modifications, the commission has never superseded that agreement as a private contract; and it follows that, after the protection of the appendix II conditions expires, all applicable terms of the Washington Agreement continue in effect. This clarification of the prescribed labor conditions applies equally to subsequent orders prescribing the same conditions by reference.—Id., 320 I.C.C. 377*. [But see dissents.]

Although merger of Atlantic Coast Line into Seaboard Air Line will have substantial adverse effect on many railroad employees and their families, those effects appear unlikely to be as severe as represented by intervener labor association, and neither alone nor in combination with other possible adverse effects of merger do they outweigh the many public benefits that will undeniably flow from unification; approved merger should in the long run provide greater job security and more stable employment conditions for employees of the merged company (citing 221 F. Supp. 19). Imposition of protective conditions set out in appendix II to 317 ICC 557, which provide for application of provisions of the Washington Job Protective Agreement and for mandatory arbitration of carrier-employee disputes not settled by agreement, will more than meet the minimum requirements of §5(2)(f) for a fair and equitable arrangement.—Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122 (200, 203, 204-5)*.

But decision in 366 US 169 makes it indisputably clear that the commission has no mandate to impose attrition conditions, the cost of which would be prohibitive, for employee protection. Conditions requiring the retention of unnecessary employees positions would be inconsistent with public interest or sound business policy; they

would unduly restrict carriers in establishment of more economical operations and would conflict with objectives of the national transportation policy. Imposition of the requested conditions would not be justified.—Id., pp. 201-2; and finding in 317 ICC 261 that a protective condition to safeguard against payment of inflated prices for homes or leases of homes in areas to which employees might be transferred would be unduly burdensome and difficult to administer applies with equal force to instant proceeding.—Id., p. 203.

Nor is it necessary to decide whether the commission has authority to extend the prescribed conditions to employees of carriers other than applicants. While under certain circumstances protective benefits may be provided for employees regardless of whether their employer is a carrier directly involved in the transaction, any determination of whether employees are "affected" within meaning of §5(2)(f) must depend on their relationship or proximity to the transaction, which in turn hinges on closeness of the relationship or affiliation between the carrier or carriers directly involved and those outside the transaction whose employees are adversely affected. As no such circumstances have been presented, no basis appears for extending protection to affected employees of carriers not directly involved in the merger.—Id., pp. 203-4. [But see dissent.]

That consummation of Chesapeake & Ohio's control of Baltimore & Ohio will cause substantial hardship to a number of employees and their families and to some extent adversely affect business conditions in their communities does not require denial of application. In the long run, such affiliation will provide more job security; over the past decade B & O's financial condition has resulted in frequent and extended furloughs for many employees, and under C & O control its ability to render an efficient transportation service on a sound financial basis will unquestionably be strengthened. Advantages accruing to C & O, B & O, and ultimately the general public outweigh adverse employee effects which unification will entail. It would not be in public interest or compatible with the national policy to deny the authority sought in order to prevent modernization of B & O's facilities and possible incidental loss of jobs.—Chsapeake & O. Ry. Co.—Control—Baltimore & O. R. Co., 317 I.C.C. 261 (285-6)*.

Assuming that the commission has power to impose "attrition conditions" for protection of employees adversely affected by a program of economies resulting from a transaction, it is not required by statute to do so, and such action would not be consistent with public interest. Conditions calculated to preserve unneeded jobs would unduly restrict applicants in establishment of more economical operations, would be wasteful, and would conflict with objectives of the national policy; imposition of such conditions on C & O's control of B & O is not warranted.—Id., p. 287.

Other requested conditions, providing protection against payment of inflated prices for new homes, defining 1 month's pay as the daily rate multiplied by 30, and providing that an employee would not forfeit his dismissal allowance by refusal to accept a job requiring a change of residence, are not required for protection contemplated by the statute. Such conditions would broaden scope of protection hitherto provided by the commission and would increase cost to the carriers; the provision against payment of inflated prices for new houses would place an onerous and unfair burden on the carriers and would be too complex and controversial to administer. Nor should protection be afforded employees of carriers other than those involved in the transaction proposed.—Id., pp. 286, 287-8.

But the commission is not precluded from providing protection for employees affected by proposed capital investment program; §5(2)(f) requires that employees be protected against a worsening of their employment position as a result of the transaction, and the commission may not by interpretation narrow the scope of that protection; whether adverse effects suffered by particular employees result from the transaction is a question of fact which can be determined from the circumstances of the particular case and must be left for deter-

mination by arbitration in case of dispute.—Id., pp. 288-9.

Protection afforded by the New Orleans conditions (282 ICC 271), as modified by the Southern Control case (Finance Docket No. 21400, decided Nov. 7, 1962), more than meet the minimum requirements of §5(2)(f); imposition of those conditions will provide a fair and equitable arrangement for protection of employees of C & O, B & O., and any of their subsidiaries. The New Orleans conditions afford protection to employees who may be adversely affected only after elapse of a substantial time from authorization of the transaction, and modification thereof in the Southern Control case makes mandatory the submission to binding arbitration of disputes not settled by agreement between the carrier and the employee. In addition, to extent that the Washington Job Protection Agreement becomes applicable its terms and conditions will apply.—Id., pp. 288, 289.

Since any adverse effect on carriers' employees as result of the Milwaukee's and the North Western's acquisition of trackage rights over lines of Indiana Harbor Belt may be related to new traffic to be developed for single-line movement and may not be realized for a substantial time subsequent to date of order of approval, imposition of New Orleans conditions (282 ICC 271) is warranted so that the period of protection will commence with consummation rather than with date of order.—Chicago, M., St., P. & P. R. Co. Trackage Rights, 317 I.C.C. 14 (19)*.

Any possible adverse effect on employees of control of the Ann Arbor by applicant instead of the Wabash does not warrant denial, since it would neither be of such magnitude nor the disadvantages be so severe as to outweigh benefits expected to enure to remaining employees and the public. Future of all Ann Arbor's employees is far from bright unless present downward trend of its traffic and revenues can be arrested; decline in number of its employees in recent years, and likelihood of future cost-saving measures, all without protective conditions, if Ann Arbor is not permitted to improve its position by affiliation with applicant, cannot be ignored.—Detroit, T. & I. R. Co.—Control—Ann Arbor R. Co., 317 I.C.C. 619 (624)*.

Imposition of requested "attrition" conditions, which are calculated to preserve unneeded jobs, cannot be justified, since they would unduly restrict the carriers in establishment of more economical operations, would be wasteful, and would conflict with economic objectives of the national transportation policy. Imposition of the New Orleans conditions (282 ICC 271), as modified in 317 ICC 557, will provide full and adequate protection respecting fringe benefits, as well as mandatory arbitration procedures.—Id., pp. 624-5.

And there is sound basis for affording the same protection to employees of the Wabash. Upon consummation of the transaction applicant intends to cause Ann Arbor to terminate arrangement under which the Wabash for a fee performed Ann Arbor's accounting and to arrange for performance of those functions by applicant, entailing hiring of some 42 new employees by applicant and possible displacement of a like number of Wabash employees. Considering common affiliation of applicant, Ann Arbor, and Wabash as members of a railroad system dominated by the Pennsylvania, transfer of Ann Arbor's accounting supervisory and traffic functions to applicant could only occur through action of all the carriers concerned, at the direction of the Pennsylvania; under those circumstances, all employees adversely affected thereby entitled to protective conditions.—Id., 320 I.C.C. 325 (326, 327, 328)*.

Interests of railway employees must be considered in determining whether a transaction is consistent with public interest. Proposed acquisition of bankrupt railroad's properties by a new subsidiary of Southern Ry. and control thereof by three other Southern subsidiaries will promote public interest when, though some 80 or more employees will be adversely affected, failure of the transaction might result in all losing their jobs, since it appears certain that if the transaction is not consummated the receiver will be unable long to continue operations. However, considering past his-

tory of the involved operations and resultant risks applicants are taking in acquiring the properties and assuming obligation to operate them, it is unlikely that the transaction will be consummated if the recommended Oklahoma conditions, as modified to require arbitration of disputes, are imposed. As the commission has no power to require consummation, if it is to be accomplished it must be on terms acceptable to applicants.—Georgia & F. Ry. Co.—Acquisition—Georgia & F. R., 317 I.C.C. 745 (749, 750, 752).

If a transaction is approved, the commission must provide as a minimum the full protection required by §5(2)(f); however, the statute does not require inclusion of a provision for arbitration of disputes. Applicants are willing to accept conditions prescribed in 261 ICC 672, which conform substantially to language of the statute, and a committee representing acquired carrier's employees is agreeable to accepting those terms. Under the unusual circumstances, the conditions proposed by applicants constitute a fair and equitable arrangement and are imposed; such conditions will not interfere with or prevail over any protective agreement that may be entered into by the carriers and the employees' duly authorized representatives.—Id., pp. 751-3.

Since certain economies planned in connection with the Pennsylvania's acquisition of control of the Lehigh Valley cannot be accomplished before some 5 years after approval, imposition of the Burlington conditions, which are limited to a 4-year period, would afford no protection to employees whose jobs may be affected during the fifth year; therefore; the New Orleans conditions (282 ICC 271) are imposed for protection of employees of both carriers.—Pennsylvania R. Co.—Control—Lehigh Valley R. Co., 317 I.C.C. 139 (148-9).

Oklahoma conditions (257 ICC 177) imposed on authority for further control of one carrrier by another and indirectly by latter's parent holding company.—New York Central R. Co. and Alleghany Corp.—Control, 320 I.C.C. 271 (272); on authority granted New York Central to increase its proportionate stock ownership of Indiana Harbor Belt from 60 to 79.8 percent.—New York Central R. Co. and Alleghany Corp.—Control, 320 I.C.C. 284; on authority for 10-year extension of agreement covering operation of Peoria & E. Ry. by the New York Central.—Cleveland, C., C. & St. L. Ry. Co.—Operating Agreement, 320 I.C.C. 430 (438); on authority for Central of Georgia and Savannah & Atlanta to acquire trackage rights over portions of each other's parallel lines between Savannah and Waynesboro, Ga., and abandon certain other portions, for purpose of establishing a single route.—Central of Georgia Ry. Co. Abandonment, 317 I.C.C. 184 (190); and on approval of purchase of railroad properties and related merger therewith of two short lines.—Reading Co.—Purchase—Lehigh & S. R. System, 317 I.C.C. 633 (639).

Approval of merger of Boston & Maine into a new corporation is subject to employee protective conditions set forth in article I of appendix II to the Central of Georgia case, 317 ICC 557.—Boston & Maine Corp. Merger, 320 I.C.C. 290 (298); likewise, approval of control of short-line railroad is conditioned on observance of those conditions.—Georgia-Pacific Corp.—Control, 320 I.C.C. 115 (120); and authority granted for acquisition of trackage rights is subject to the same employee-protective conditions.—Cambria & I. R. Co. Construction and Acquisition, 320 I.C.C. 43 (51)*.

Neither the commission's duty under the Bankruptcy Act to formulate a plan of reorganization compatible with public interest, nor its authority under §5(2)(f) of Interstate Commerce Act to determine a "fair and equitable arrangement" for protection of employees' interests in consolidation, merger, or acquisition-of-control proceedings, constitutes a divisible and qualified power which may be nullified by a stipulation between employee representatives and other parties to reorganization proceeding as to protective conditions to be imposed on acquisition of control of the reorganized company under plan approved by the commission.—Florida East Coast Ry. Co. Reorganization, 312 I.C.C. 744 (746)*.

Properly construed, the stipulation was not an agreement pertaining to protection of employee interests by "any carrier or

carriers by railroad" and "representatives of its or their employees' within contemplation of §5(2)(f); protective provision of the stipulated draft plan of reorganization dealt only with relations between the debtor railroad and its employees and did not purport to be an agreement by the reorganized company which is to be the product of, and is not a party to, the plan; no employment relationship and no contractual privity as to such relationship exists between the parties to the stipulation, and such parties do not include all who will have an interest in the reorganized company; while they can bind themselves, they may not legally bind the reorganized company.—Id., p. 747.

While conditions imposed by order approving a modified reorganization plan will afford affected employees, as a minimum, the protection therein prescribed, such conditions will not prevent the making of agreements between employee representatives and management of the reorganized company when established.—Id., p. 747.

National Labor Relations Board having determined that vendee's labor contract with one union precludes it from giving recognition to labor contract claims of a different union representing vendor's employees, latter union seeks imposition on purchase approval of employee protective conditions under §5(2)(c)(4) paralleling those imposed for railroad employees under §5(2)(f). However, interest of affected employees has no significance where, vendor's certificates having been seized by Internal Revenue Service for tax deficiencies, it would not remain an active entity even if purchase application were denied, and any employees it had prior to the seizure would not be employed by it thereafter.—Public Serv. Coordinated Transport—Purchase—Royal Blue, 97 M.C.C. 56 (63).

Liquidating carrier was on verge of insolvency when survivor assumed temporary control of its operations, and if that authority had not been granted it is likely that many more drivers than the two who appeared at hearing would have lost their employment. While survivor is financially able to consummate proposed merger, its condition is not sufficiently affluent to warrant an undue drain on its resources. Dismissal of the two protesting drivers was due to lack of need for their services, and it does not appear that they were unfairly treated or have been adversely affected to an extent warranting award of compensation; question of their seniority rights is for negotiation with the employer. As no other employee of either carrier, or representative thereof, requested imposition of protective conditions, none are imposed, but jurisdiction is reserved for 2 years from consummation date to make such additional findings and impose such conditions as may be necessary to protect employees' interests; consummation of the transaction will be considered acceptance by applicants of such reservation of jurisdiction.—Helm's Exp., Inc.—Control and Merger, 93 M.C.C. 142 (150-1).

Although purchase of operating rights of some 15 local buslines in St. Louis area by a new bi-State agency, with elimination of duplicate facilities and services, resulted in a slight decrease in total number of employees, this has been offset by increase wages and other benefits. No bus drivers were deprived of employment, and maintenance and other employees who were laid off and have not been recalled will receive first call as vacancies occur; benefits to employees generally outweigh the adverse effects on the few temporarily deprived of employment; transaction approved.—Bi-State Development Agency—Purchase—Vandalia Bus Line, 93 M.C.C. 579 (592-3).

The only evidence relative to effect of proposed purchase on the carriers' employees indicates that vendee will employ vendor's drivers, but that the combined office force can be reduced by one; however, no employees or employee representatives made any representations, and in absence of more definite evidence concerning an adverse effect on employee interests protective condition recommended by examiner is not imposed.—United Transp. Co. of Rhode Island—Purchase—McCormick, 90 M.C.C. 201 (205).

While §5(2)(f), making mandatory the imposition of conditions for protection of railroad employees, is not applicable in motor-

carrier proceedings, the act as a whole, and particularly requirement of §5(2)(c) that employee interests be considered in passing on proposed transactions, indicates a clear congressional intent that fair and equitable treatment be accorded motor-carrier employees. But though in some instances jurisdiction has been reserved to permit the parties voluntarily to consider conditions (4) to (9) of the Oklahoma formula and Burlington conditions imposed in rail abandonment proceedings, the commission has never imposed those conditions where only motor-carrier employees were involved; argument that there is no justification for denying motor-carrier employees the same protection as railroad employees is without merit; protection afforded employees of carriers in §5 proceedings is not subject to any fixed rule or formula but is to be determined on the circumstances in each case.—Midwest Buslines, Inc.—Purchase—American Buslines, Inc., 90 M.C.C. 173 (186-7)*.

Vendor has been in financial difficulty for a number of years, and at time of hearing and signing of purchase contracts its situation had worsened materially because of a strike of its employees; its sale of portions of its operating rights followed the traditional course of carriers in financial distress which wish to remain in operation, and did not constitute a mere strike-breaking effort because of its affiliation with vendees; it follows that all employees affected were free to accept vendees' offers of employment.—Id., p. 185.

While most of the affected employees incurred expenses in moving out of their home districts, §5(2)(c) does not require that they be held harmless whatever the circumstances. A balance must be struck between interests of the carrier, the employees, and the public and to insure only that the employees receive fair and equitable treatment. It would not be an equitable adjustment of the parties' interest to so burden vendor, a carrier with a history of financial distress seeking to recover from effects of a prolonged strike, by granting damages claimed; however, the commission's findings should not be construed as opposing in all instances imposition of protective conditions for motor-carrier employees similar to the Oklahoma formula and Burlington conditions, or as favoring limiting such protection to severance pay; such issues should be determined by circumstances in each proceeding.—Id., p. 188.

And on reconsideration following remand, while employee union claims that returning drivers are entitled to protection against any reduction in wages following the strike, the commission cannot find that any reduction of wages resulted from the transaction approved; rather, lesser wages of certain employees following the strike resulted from their own choice not to accept employment paying more than they were then earning. Labor conditions heretofore adopted by the commission, whether for rail or motor carrier employees, have not and should not protect employees against the consequences of their own choice in refusing to make a change of residence.—Id., 97 M.C.C. 426 (439)*.

However, record shows that 22 drivers have been adversely affected by the transaction to the extent of expenses incurred in moving their households, consisting of loss of pay while moving, temporary maintenance of two households, and increased rents and utility costs. Therefore, while financial impact on vendor is not clear, and notwithstanding its precarious financial condition shown of record, after careful further consideration of all the facts and circumstances, and in light of the court's opinion, the commission believes that a portion of the benefits and economies which vendor reasonably might expect to achieve through sale of the operations involved should be used to compensate those 22 adversely affected employees, in form of a lump-sum payment approximately equal to costs incurred in moving their households as outlined. Accordingly, prior findings are modified and supplemented by imposition of the condition set forth.—Id., pp. 441-2.

The act as a whole makes clear the congressional intent that employees of motor carriers involved in §5 transactions be accorded fair and equitable treatment, and in

complying with requirement of §5(2)(c)(4) that weight be given interests of affected employees the commission, in cases where there was doubt as to what effect consummation would have on employees and prescription of specific protective conditions was not feasible, has reserved jurisdiction for varying periods from date of consummation to impose any conditions that might be found necessary and appropriate. And where it was definitely shown that certain employees would be adversely affected, conditions spelling out the protection deemed reasonable under the circumstances have been prescribed.—Watkins Motor Lines, Inc.—Control and Merger, 90 M.C.C. 567 (574, 575).

Although, at about time that acquiring carrier assumed temporary control of acquired carrier, latter's Atlanta terminal employees became employees of company organized by former to provide delivery service for both in that area, acquiring carrier shortly thereafter removed its breakbulk point to La Grange, Ga., utilizing acquired carrier's facilities at that point, with result that 21 of those employees lost their jobs. As combination of terminal facilities to effect operating economies is usually one of the initial steps in a consolidation and frequently entails a reduction in personnel, and as there is no indication that the considered loss of employment was brought about by a general economic trend or a decline in acquired carrier's traffic, conclusion is warranted that those employees were adversely affected as direct result of the temporary control, and provisions of §5(2)(c)(4) are applicable. In the circumstances, contention that those persons were not "carrier" employees is untenable.—Id., pp. 575-6.

The affected employees should therefore be accorded protection to extent that any of them failed to find full-time employment following their discharge. Condition imposed on control authority that any employee separated from his position on or after date specified should receive severance pay, at his average monthly rate, for the period not exceeding 3 months during which he remained unemployed following the separation, subject to reduction by any amounts received in other employment or under any employment insurance law. Any dispute concerning such protection may be settled by arbitration.—Id., p. 576.

However, questions concerning contractual obligations of the parties under their union agreement and as to whether the employees are entitled thereunder to complete reinstatement are matters to be determined by the parties or by the courts, and condition imposed is not to be construed as a ruling on validity of the union agreement or as an attempt to influence the union's pending suit in the district court.—Id., p. 576.

In approval of merger by a new company of a member of a member of the Trailways System, a group of independent bus operators, and acquisition of control of survivor by three other system carriers, with cancellation of certain duplicating rights of one of latter carriers, jurisdiction is reserved for 3 years from consummation date to make additional findings and, also, to impose such conditions as may be found necessary with respect to employees of liquidating carrier, survivor, and the acquiring carrier, if, on petition by them or their representatives within that period, it is shown that conditions of their employment, or their incidental interests, are adversely affected as a result of consummation of the transactions.—Continental Tenn. Lines, Inc.—Control—Tennessee Coach, 87 M.C.C. 775 (783-4).

Applications; Proceedings

100. Parties.—[Vols. 12-19].—See also Best Way Motor Freight, Inc. v. United States, n. 5, above.

An application for approval of a proposed control transaction must be presented by the carrier seeking to acquire control of another carrier; when so presented, the commission's jurisdiction is invoked and, unless the application is dismissed by applicant, it is mandatory for the commission to determine the application on its merits.—Black Ball Freight Service v. United States, 223 F. Supp. 191 (197)*.

Although the purchase agreement was executed by vendee and vendor carriers only, the record discloses that vendee would acquire the operating rights while its wholly-owned subsidiary equipment company would acquire ownership of the operating equipment embraced in the transaction and, also, that they contemplated that each would be liable for proportionate shares of the purchase price allocated to the operating rights and the equipment. On the peculiar facts in instant case, individual corporate structures of the two companies may be disregarded, the two may be considered as a single entity with respect to financial fitness, and, proposed transaction being otherwise consistent with public interest, vendee's subsidiary equipment company may be authorized to acquire the physical properties involved.—Hove Truck Line—Purchase—Maurer, 97 M.C.C. 361 (362, 365-6).

Since Meckler, who with his family owns 24.66 percent of applicant noncarrier's stock, and the O'Neills, who own 20.81 percent, are found to be affiliated persons in control of applicant, and proposed transaction would result in control of acquired carrier in common interest with carriers already controlled by applicant and the O'Neills, Meckler was properly joined, and the O'Neills should have been joined, as parties applicant for control, through the transaction, of the properties involved.—Lease Plan International Corp.—Control—National, 93 M.C.C. 173 (183-4)*.

Under terms of transaction involving purchase of Zern's individual carrier properties by a corporate carrier, acquisition by Zern of latter's stock, and purchase by Zern's noncarrier affiliate of real estate owned by the corporation's present stockholders, Zern would acquire control of all the operating rights and properties involved and is the real party in interest. The transaction is one in which Zern, having control of a carrier (his individual operations), seeks to acquire control of another carrier, within purview of §5(2)(a)(i); it follows that Zern, individually, is a necessary party applicant to acquire control of the carrier and that his participation in the transaction is subject to the commission's jurisdiction under §5. The commission is justified, in order to appraise the true nature of the transaction and to permit proper exercise of a statutory regulatory authority, in disregarding the corporate entity of the acquired carrier; Zern is, in fact, the purchaser in the proceeding and the corporate carrier the seller.—Zern—Control—William A. Kelly, Inc., 90 M.C.C. 25 (28-9).

Although Hudson Corp., which under Hudson & Manhattan's reorganization plan will acquire its real estate holdings, will remain a carrier by virtue of its ownership of certain terminal facilities and trackage below Hudson Terminal buildings, and will control Hudson Tubes, a new subsidiary created to acquire the railroad line and conduct operations, including lease of those terminal facilities, no single stockholder or group of stockholders would control Hudson Crop. and therefore none need become parties applicant under §5.—Hudson & M.R. Co. Trustee Abandonment, 312 I.C.C. 701 (704, 705)*.

Failure of two noncarrier corporations which jointly control vendee's parent company to join as applicants for authority to control the purchased rights is insufficient alone to preclude consideration of purchase application on its merits; accordingly, any order entered would not be unlawful. As those two companies are engaged primarily in manufacturing and have no interest in any interstate carrier other than vendee, and their income from transportation is but a small portion of their overall revenues, it would not be necessary to subject them to the accounting, reporting, and securities provisions of the act under §5(3); therefore they are not necessary parties applicant.—Piedmont Motor Lines, Inc.—Purchase—Spartan Exp., Inc., 97 M.C.C. 49 (50).

Since each of two individuals who together own a majority of outstanding stock of an intrastate passenger carrier (which concedely controls vendee) also controls an interstate carrier, they are necessary parties applicant for authority to acquire control of certain of vendor's operations through proposed purchase of a portion of

its rights. However, since nephew of one of them, who is vendee's sole stockholder of record and a minority stockholder in vendee's parent company, and another minority stockholder of latter, have only a nominal interest in vendee or its parent, and it does not appear that through their family or business relationships with the other applicants they could exercise control over vendee when it becomes a regulated carrier, control application is dismissed as to them.—Southern Tier Stages, Inc.—Purchase—Capitol Bus Co., 93 M.C.C. 793 (794-5, 798).

When vendee's parent company is a railroad subject to Part I, its joinder in purchase application is not required.—Northern Pacific Transport Co.—Purchase—Stark, 90 M.C.C. 206 (207); similarly, since carriers which directly and indirectly control acquiring carrier through stock ownership are already subject to the commission's jurisdiction, there is no need for them to obtain authority for indirect control of acquired carrier, and their application for such authority is dismissed.—Gillette Motor Transport, Inc.—Control—Voss, 90 M.C.C. 663*.

Since liquidating carrier's 10 principal stockholders, who would be directors of survivor, a new company created to succeed it, were found in 80 MCC 808 not to have power to control it through stock ownership, and the same conclusion would be equally applicable to the new company, control and merger application is dismissed as to such individual applicants.—All States Freight, Inc.—Merger, 90 M.C.C. 51 (53-4).

Rule 1.240(c)(2) of Rules of Practice clearly permits participation at oral hearing of those protestants who failed seasonably to file protests.—Hart Motor Exp., Inc.—Control and Merger, 90 M.C.C. 527 (531)*; and status of a protestant which makes an appearance at the hearing is not affected by its failure to present any evidence, although such failure might affect the value of its protest in reaching a decision. To extent that counsel for all of the joint protestants cross-examined applicants' witnesses, the protestant offering no evidence must be considered as having participated in the proceeding.—Knox Motor Service, Inc.—Purchase—K & A Truck Lines, Inc., 93 M.C.C. 26 (32).

See also Walker v. United States, §16(6), n. 1.

Rules 1.40 and 1.240(c)(3) of Rules of Practice relating to protests were prescribed to provide prospective opponents an opportunity to present their objections promptly and with sufficient definiteness so that applicant and the commission would be reasonably apprised of their interest and the nature of their opposition. Protest which fails to indicate what effect the transaction might have on protestant or the public, and is so incomplete that protestant's carrier status can be established only by taking official notice of certificates issued it, fails to meet the minimum requirements of Rule 1.40.—Schenectady Transp. Corp.—Purchase—Interstate Busses, 90 M.C.C. 623 (624).

—*Intervention.*—Under rule 1.72(e) of the Rules of Practice, leave to intervene will not be granted except on averments reasonably pertinent to, and not unreasonably broadening, the issues already presented. While travel bureau's agency contract with vendor busline is among the assets which would be transferred under proposed purchase, the commission's jurisdiction under §5 is permissive only as to the transaction; therefore, since any dispute concerning the travel bureau's interest should be decided between the parties or in the courts, its request for leave to intervene and participate as a party in the purchase proceeding is denied.—Hudson Transit Lines, Inc.—Purchase—Inter-City Transp., 97 M.C.C. 105 (107)*.

Although offering circular referred to by petitioner describing himself as survivor's largest stockholder unconnected with management did not state that its application to acquire liquidating carriers had been denied and that the matter was then pending on petition for reconsideration, the commission's action and status of the proceeding were matters of public record, and the circular did contain an admonition that the pending transactions might never be approved and consummated. Even petitioner's counsel acknowledges his belief that the

circular constituted a fair disclosure to prospective investors in survivor's stock. But though petitioner was thus given sufficient notice of possibility of an adverse decision by the commission, he is permitted to intervene because he has a substantial interest in the proceedings and his intervention will not unduly broaden the issues or encumber the proceedings.—Buckingham Transp., Inc.—Control and Merger, 93 M.C.C. 306 (309)*.

See also Seaboard Air Line R. Co. Trackage Rights, §1(19), n. 11.

105. Applications.—[Vols. 14-19].—Control application having been presented by carrier seeking authority to acquire control of another carrier, the commission is required by statute to determine the application on its merits, in absence of dismissal thereof by applicant. Failure of acquired carrier to provide competent witnesses with respect to information about itself does not require the commission to dismiss the application, nor permit it to refuse to decide the matter on its merits.—Black Ball Freight Service v. United States, 223 F. Supp. 191 (197)*.

See also Baggett Transp. Co. v. United States, n. 115, below.

By disposing of Chesapeake & Ohio's application to control Baltimore & Ohio without waiting for completion of hearings on pending merger applications of other eastern railroads, or by refusing to consolidate all pending applications for disposition in one decision, the commission did not abuse its discretion or jeopardize public interest. Whether hearings should be consolidated is a matter committed to discretion of the administrative agency, and the commission's decision adequately explains its reasons for exercise of that discretion. To attempt to consider problems of all railroads in the northeastern quadrant of the United States together, as plaintiffs urge, would be but a return to a policy that after long frustration was found to be unwise (see discussion on pp. 22-23). The commission is satisfied that approval of the C & O-B & O affiliation will be a definite step forward in solving that problem, and it is not the court's function to substitute its judgment for that of the commission.—Broth. of Maint. of Way Employees v. United States, 221 F. Supp. 19 (29-30)*.

Inasmuch as lumber company which formerly owned Feather River Ry. has been dissolved and its assets acquired by its parent corporation, which thus acquired direct control of the railway, the parent company should consider filing appropriate application for authority for the change in its form of control.—Feather River Ry. Co. Abandonment, Acquisition, 320 I.C.C. 417 (420, Note 3)*.

Although application seeking trackage rights, which should have been filed under §5(2), was filed as part of application under §1(18) for authority to construct, acquire, and operate lines of railroad, all information normally required for determination of a trackage rights application under §5(2) is available and appropriate notice has been given in accordance with that section and rules governing applications thereunder; accordingly, that application will be considered on its merits under §5(2).—Cambria & I. R. Co. Construction and Acquisition, 317 I.C.C. 685 (686)*.

See also Okmulgee Northern Ry. Co. Extension case, §1(19), n. 1.

While the commission has power to consolidate proceedings in which issues are similar or closely related, or to postpone a particular decision when public interest so requires, consolidation of Chesapeake & Ohio's application to control Baltimore & Ohio with two pending proceedings for merger of other eastern railroads is not warranted; in contrast to the complete integration of railroads through merger, C & O's proposal involves only acquisition of controlling stock interest, after which B & O will continue to operate as a separate carrier without change of identity or integration of its operations or facilities; before those carriers can effect a merger, another application must be filed, and approval of control will not foreclose the commission's opportunity to consider lawfulness of such merger, nor will it prevent interested parties from objecting thereto when application is presented.—Chesapeake & O. Ry.

Co.—Control—Baltimore & O. R. Co., 317 I.C.C. 261 (265, 266)*.

Moreover, consolidation even for decision purposes would result in delays causing immediate serious injury to B & O and ultimately to the general public, and consolidation of the evidentiary records would entail even longer delays. Possibilities respecting the commission's action in the merger cases and results thereof are too remote and unpredictable to warrant withholding in instant proceeding, particularly in view of present status of those cases and B & O's poor physical and financial condition. Established need for expedited action in the control proceeding overrides any possible benefits which could accrue through consolidation, with resulting delay; public interest requires decision at the present time. However, without prejudging the issue, additional question of whether the merger proceedings should be consolidated will be held in abeyance.—Id., pp. 265-6.

Although additional operating rights were issued to vendor subsequent to filing of purchase application, which rights substantially duplicate those involved in proposed purchase, no effort was made to amend the application to include them, and prescribed publication of the application in the Federal Register made no mention of them. Inclusion of those rights in the transaction would materially broaden the scope of the application without warrant, and they should be canceled concurrently with consummation of the transaction as approved.—Bowser and Campbell—Purchase—Motorway Corp., 97 M.C.C. 192 (201).

In urging that vendor's dormant operating rights be not canceled as a condition on purchase approval but be left with vendor, and agreeing to reduce the purchase price by a specified amount, applicants in effect seek to amend their application to eliminate all the involved rights that are found to be dormant. In so doing they have not broadened the issues, protestants have not been prejudiced, and acceptance of the amendment will not require further publication in the Federal Register. In the circumstances, the application is considered as amended.—Kroblin Refrigerated Xpress, Inc.—Purchase—Davis, 93 M.C.C. 356 (361).

The commission has allowed amendment of a control applicatin to also seek merger authority, subject to publication in the Federal Register and to the right of any interested person to submit objections thereto, where the amendment was accompanied by current data and other appropriate evidence to support approval of a merger; however, instant request is unaccompanied by any additional data relative to results of a merger. Amendment disallowed, without prejudice to subsequent filing of a merger application.—Ashworth Transfer, Inc.—Control—Hawkes Transp. Co., 87 M.C.C. 653 (657)*.

In view of questions raised in §207 proceeding concerning possible unlawful common control of applicant Canadian carriers and carriers subject to the act, and fact that upon receipt of authority from the commission one applicant would be commonly controlled with a certificated carrier within meaning of §5, both applicants are required to file application for approval of any such control, and issuance of certificates to both is withheld pending approval of any common control that may require it under §5(2).—Overland Exp. Extension, 92 M.C.C. 757 (766-7).

Applications of two distinct groups (who now jointly own 71.4 percent of carrier's stock) for authority to acquire control of the same carrier, through purchase by each of up to 50 percent of carrier's outstanding capital stock, present no transactions for commission approval; instead, they contemplate actions which may be taken at an indefinite future date, and fail to indicate what will be required of independent stockholders if, and when, they desire to dispose of their stock. Although for those reasons the applications may be dismissed, there are more compelling reasons for denying them since, while both groups disclaim control or power to control the carrier, as well as any affiliation between themselves or with the independent stockholders, the question remains whether either group, or both groups jointly, already control the carrier.—Capitani—Control—North Boulevard Transp. Co., 97 M.C.C. 479 (482-3).

Liquidating carrier's certificate having become a nullity upon vacation of transfer order for fraudulent misrepresentation and concealment in the proceeding under §212(b), it is no longer a carrier and control-and-merger application no longer represents a transaction subject to §5; dismissed.—Kowalsky's Exp. Service—Control and Merger, 93 M.C.C. 272 (278-9).

Examiner correctly concluded that purchase applicants submitted a false application and at hearing offered false evidence in support thereof, and applicants did not except to such finding but filed affidavits attesting to termination of both the agreement and the temporary authority operations. In absence of objection those affidavits are incorporated in the record and considered as a petition for dismissal of the application; accedence to dismissal will be consistent with public interest.—Calore Exp. Co., Inc.—Purchase—T. W. Waterman Co., Inc., 93 M.C.C. 291 (295, 297).

Although question of whether the application should be denied or dismissed is of only technical importance, the transaction being found inconsistent with public interest, vendor's lack of any lawful carrier status from inception of its operations under color of single-State exemption warrants dismissal for lack of jurisdiction under §5(2).—Nigro Freight Lines, Inc.—Purchase—Coady Trucking Co., 90 M.C.C. 113 (121); similarly, since liquidating carrier's single-State operations were controlled and managed by individual controlling a multistate carrier both before and after filing of its BMC-75 statement, its proviso operations were unlawful from their inception, it lacks carrier status, and its purported rights are not properly the subject of a §5 application. That survivor was not a party to the unlawful proviso operations is immaterial; merger application dismissed.—Hart Motor Exp., Inc.—Control and Merger, 90 M.C.C. 527 (534)*.

While applicants' failure to answer affirmatively the question in application form relating to their control or affiliation was undoubtedly due to their opinion that the facts later disclosed did not create such a status, their failure to give any answer at all to the question concerning a direct or indirect financial relationship and to furnish the relevant details, regardless of their belief that the inquiry was not applicable to their situation, represents a type of equivocation that impedes the commission in its duty to ascertain the true facts respecting transactions presented for its consideration under §5. Such omissions in preparation of an application deserve the strongest censure, and approval of the transaction should not be construed as condoning applicants' failure to furnish the information in question instead of leaving it for development at the hearing.—Thurston Motor Lines, Inc.—Purchase—Union Storage, 90 M.C.C. 595 (600)*.

110. Scope of issues.—[Vols. 12-19].—Purchase proceeding and investigation of unlawful common control of vendee and vendor are not the proper forum for consideration of charges of improper conduct on part of applicants' counsel or of impropriety of participation by another practitioner in effectuation of the unlawful control. Record referred to the commission's vice chairman for consideration and appropriate action as to both practitioners.—Calore Exp. Co., Inc.—Purchase—T. W. Waterman Co., Inc., 93 M.C.C. 291 (295-6, 298).

Affiliation with a railroad: [Vol. 19].—Proviso of §5(2)(b) in respect of proof required of a railroad acquiring control of a motor carrier is inapplicable to acquisition of control of a railroad-subsidiary motor carrier by a new Delaware corporation authorized to merge the parent railroad for purpose of removing difficulties due to railroad's present incorporation in four States.—Boston & Maine Corp. Merger, 320 I.C.C. 290 (293, 294).

Failure of a railroad wholly owned by one of two noncarrier companies which indirectly control vendee to submit evidence prerequisite to making of findings under proviso of §5(2)(b) does not require denial of purchase application, since it is not an operating carrier, but merely owns some 15 miles of roadbed and rights-of-way which it leases to Southern Ry., a railroad subject to Part I, which as exclusive operator of the property owns all rails, crossties, and

rolling stock operated thereover, and all improvements revert to Southern upon termination of the lease. Denied on other grounds.—Piedmont Motor Lines, Inc.—Purchase—Spartan Exp., Inc., 97 M.C.C. 49 (50).

Where acquiring motor carrier is a railroad affiliate, the question of whether the railroad would be able to use the acquired motor operations to public advantage in its rail operations without unduly restraining competition is a necessary preliminary inquiry which must be affirmatively resolved before the transaction can qualify for approval with such restrictions as will assure that the resulting operations will be so used; absent such a finding, consideration of whether or to what extent the restrictions merit relaxation is rendered moot.—Reading Transp. Co.—Control and Merger, 93 M.C.C. 11 (18).

Where a railroad or its affiliate is the applicant for acquisition of motor-carrier properties, it must be found, in addition to finding that the transaction will be consistent with public interest (which includes effect on adequate transportation service to the public), that it will enable the railroad to use the motor service to public advantage in its operations and will not unduly restrain competition.—Northern Pacific Transport Co.—Purchase—Stark, 90 M.C.C. 206 (208).

Purchase by railroad subsidiary of operating rights between Gardiner, Mont., and points in Yellowstone National Park will be in public interest when no other carriers besides vendor and vendee maintain freight-handling facilities at Gardiner; they are the only motor common carriers that can interchange outside the park; vendee does not serve the park through interline or otherwise through any gateway but Gardiner; and denial would necessitate cessation of operations by vendor, thus depriving the public of an established transportation service via the only year-route entrance to the park, whereas approval will enable vendee and its rail parent to continue their historical service to and from points within the park without necessity of interchange at Gardiner.—Id., p. 208.

The railroad would be enabled to afford the public more efficient service, without undue restraint of competition; vendee has been moving traffic into the park for years in interline service, and under arrangements worked out by park officials to prevent congestion of park roads during the tourist season, it has transported l.t.l. shipments into the park under temporary authority for interchange with protestant for delivery at points within the park.—Id., p. 209.

The intent of Congress in the proviso of §5(2)(b) [formerly §213], as set forth in 1 MCC 101 and amplified in 40 MCC 457, was to protect independent motor carrier operations and preserve healthful competition between rail and truck services by providing that acquisition of motor operations by a railroad or its affiliate should enable the railroad to use the motor service to public advantage in its rail operations without undue restraint on existing competition; and an affirmative finding to that effect is necessary before consideration can be given the question of whether there are special circumstances warranting approval of such an acquisition without the usual restrictions imposed where railroads are involved.—Canadian Natl. Transp.—Control—Husband International, 93 M.C.C. 80 (86).

Although the primary purpose of proposed acquisition by Canadian holding company, itself controlled by a railroad owned and subsidized by the Canadian government and conducting or controlling certain railroad operations in United States, of control of Canadian motor carrier operating partly in United States is for the railroad to further expand its control over the motor carrier industry in Canada, which apparently is entirely proper and approved by the Canadian authorities, the fact remains that the railroad would for the first time extend such control to include a motor carrier system authorized to operate a short distance into United States territory. Since the transaction would expose United States motor carriers to competition of a motor carrier system affiliated with a rail system conducting operations subject to

Part I, the former are no less entitled to protection of the statute because the rail and affiliated motor systems also operate in a neighboring country and the proposed motor extension into United States territory would be but a small segment of the operations involved.—Id., pp. 81, 87.

The evidence is entirely inadequate to support the finding required by §5(2)(b); therefore, the parties' contentions relative to need for continuance of all-motor service by acquired carrier need not be considered. Even were the situation otherwise, approval without rail-auxiliary restrictions would still not justified when there is an abundance of motor carriers available to meet shipper needs for service to and from Detroit gateway and testimony shows only a preference of certain shippers for continuance of acquired carrier's single-line service to and from the two Canadian provinces involved. And assuming that restrictive approval were warranted, no purpose would be served thereby, since the railroad and the holding company have indicated clearly that they have no desire or use for such authority. Application denied.—Id., pp. 87, 88.

See also Burlington Truck Lines, Inc.—Purchase—H.B. Green Transp., n. 126, below.

Antitrust act violations: [Vols. 12, 14, 17].—That the commission's jurisdiction arises under §5 and not under the antitrust laws does not mean that it should not consider matters relating to restraint of competition and monopolistic tendencies which are specifically the object of those laws.—Pittston Co.—Control—Brink's Armored, Inc., 87 M.C.C. 637 (650).

Notwithstanding vendee's dominant position in the local bus industry in area involved, proposed purchase, with conditions imposed requiring cancellation or restriction of substantial portions of vendor's rights, would not so increase vendee's competitive strength as to violate the antitrust laws but for the specific exemption therefrom in §5(11). Since vendor is no longer an active carrier, due to seizure of its rights by Internal Revenue Service, there would be no fostering of monopolistic conditions by elimination of a competitor, and vendee already operates, though with closed doors, over the only route where competition is shown to exist. Moreover, in considering the antitrust aspects of such cases, the inherent though limited monopolistic nature of the passenger bus industry—which reflects its public utility characteristics—must be considered. Vendee is the only bidder for vendor's rights which is able to meet the high bidder requirement of Internal Revenue Code and to consummate the transaction and conduct operations thereunder; by continuing an existing service it would clearly serve public interest.—Public Serv. Coordinated Transport—Purchase—Royal Blue, 97 M.C.C. 56 (64).

Bankruptcy involved: [Vols. 13, 14, 16, 17, 19].—In conformance with decree of bankruptcy court, public sale of properties of Georgia & F. R. was held, at which Southern Ry. was the only bidder. Considering that the Georgia and its predecessors, but for a period of about 2 years, have been in receivership continuously since 1915, and that there appears to be no other purchaser for the entire line, the receiver's announced intention to seek total liquidation of the Georgia if proposed sale is not consummated may be taken at face value. Purchase of the properties by a new Southern subsidiary as its designee will therefore serve public interest in continued operation of the line.—Georgia & F. Ry. Co.—Acquisition—Georgia & F. R., 317 I.C.C. 745 (747, 750).

As vendor has been adjudicated a bankrupt since entering into purchase agreement and by order of the court the trustee has been authorized and directed to assume the agreement between applicants, consideration of the transaction is on that basis.—C & H Transp. Co., Inc.—Purchase—Gulf Southwestern Transp., 90 M.C.C. 636 (638).

While denial of control application, because continued operation of acquired carrier would place an undue and possibly insupportable financial burden on acquiring carrier, may result in former's bankruptcy and demise, with adverse effect on its creditors, employees, and stockholders, the commission's responsibility extends to

consideration of all ramifications of the transaction, and possible demise of one carrier, though unfortunate, must give way to possible demise or impairment of service of two carriers, particularly where the second is a major transportation artery in the affected area.—Adley Exp. Co.—Control—McFaddin Exp., Inc., 87 M.C.C. 665 (673)*.

Brokers' licenses: Holding of dual carrier and broker authority in same territory, though generally undesirable, has been sanctioned in case of carriers of special commodities, such as household goods. Vendee's operation as a broker of household-goods transportation would be restricted to Missoula, Mont., and would add to its ability to arrange for economical transportation from an area of low population density; transfer of vendor's brokerage license as an incident of purchase of her household-goods operating rights is therefore approved.—Shamrock Van Lines, Inc.—Purchase—Reely, 93 M.C.C. 455 (461).

Certificate under §1(18): [Vols. 12, 15].—Motion to dismiss merger application for failure of applicants to apply for authority to abandon certain lines as contemplated by the merger plan, denied. Even though abandonment of duplicating lines is one long-range objective of the merger, the proposed abandonments are neither essential to consummation of the merger nor directly in issue in proceeding thereon.—Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122 (135)*; and, since authorization to abandon any particular line would be dependent on considerations of public need and other factors not before the commission in merger proceeding, extent that claimed savings could be achieved from future abandonments cannot be determined.—Id., pp. 154-5.

Certificate under §207: [Vols. 12-19].—Under the commission's Organization Minutes, division 1 has responsibility for determining applications under §207, and division 3 can consider only those §207 applications which are "directly related" to §5 applications for purchases, consolidations, etc. Division 3 correctly dismissed plaintiff's §207 application to continue operations performed by acquired carrier purportedly under single-State proviso after it found that, since that carrier had no lawful status as an interstate carrier under the proviso, the transaction was not within the scope of §5(2); without a §5(2) application to decide, division 3 would exceed its responsibility if it decided a §207 application.—Hart v. I.C.C., 226 F. Supp. 635 (643)*.

The statute should not be read to require the commission to decide a §207 application not properly before it. Its position is consistent with long-standing policy, announced in 38 MCC 547, as to consideration in §5 proceedings of related matters of public convenience and necessity, and plaintiff's §207 application, in stating that the authority is requested "to substitute for the registered rights," shows their awareness thereof. The direct relation between the two applications is readily apparent; plaintiffs conceded as much in their petition for reconsideration, and they have presented no reasons why this long-standing commission practice, which appears to be a reasonable implementation of the statute, should be overturned. The commission's action sustained.—Id., p. 644.

The nature and extent of past contract-carrier operations to be converted, whether proposed operations would be those of a common carrier, and whether the public support is sufficient to sustain applicant's burden of proof are the criteria to be considered in deciding conversion applications directly related to §5 applications. Vendor's contract-carrier operations have been continuous, vendee is presently providing similar service as a common carrier in the same territory, proposed service is not unique, and supporting evidence is sufficient. Issuance of certificate in lieu of vendor's permit authorized upon consummation of purchase.—Ruan Transport Corp.—Purchase—Hillside Transit Co., Inc., 90 M.C.C. 523 (525).

See also H. C. Gabler case, n. 48 *Dual operations,* above.

—The principles of the *Elliott* case, 38 MCC 547, formerly applicable in §5 proceedings involving proviso operations are equally applicable in §5 proceedings in-

volving "grandfather" operating rights arising under §206(a)(7); and a certificate of convenience and necessity covering the operations of liquidating single-State carrier may be granted to surviving multiple-State carrier, based on evidence of the former's past operations, in the event proposed §5 transaction is found to be consistent with the public interest.—T.I.M.E. Freight, Inc.—Merger, 97 M.C.C. 310 (323-5, 328).

Since vendee seeks a certificate under §207 covering the same operations it has been performing under the former single-State proviso of §206(a)(1) and more recently under the "grandfather" provisions of §206(a)(7B), because after consummation of purchase it would no longer be a single-State carrier, the §207 application presents a matter not only directly related to but inseparable from the proposed §5 transaction; and if latter application is denied the §207 application must also be denied, as there would then be no transaction to which the §207 matter could be directly related. Therefore, since applicants have not met their burden of proving that proposed purchase would be consistent with public interest, it is unnecessary to decide whether the operations for which certificate is sought became unlawful when vendee instituted intrastate operations in another State, or other questions concerning effect thereof on its "grandfather" filing or the weight to be given evidence relating to its certificate application.—Prichard Transfer, Inc.—Purchase—Weiss, 93 M.C.C. 535 (539-40).

See also Snyder Bros. Motor Freight case, under *Intrastate operating rights,* below.

At hearing, purchase applicants introduced a proposed amendment to vendee's §207 application for interstate authority corresponding to acquired intrastate authority which formed basis of vendor's "grandfather" operations under §206(a)(7), stipulating with protestants that in event of approval of the transaction the involved rights could not be tacked with vendee's existing authority to perform through service between specified areas. In receiving the stipulation in evidence, the hearing examiner forewarned the parties that this did not signify that he would recommend the restrictions or that the commission would adopt them, whereupon one of protestants' attorneys stated his understanding that, should the examiner recommend approval without the restrictions, there would be no prejudice to protestants having the proceedings reopened for further hearing; the examiner then accepted the restrictive amendment and protestants withdrew. Although the examiner recommended approval of the applications without the stipulated restrictions, in recognition of the apparent misunderstanding which prompted protestants to withdraw, and in order to achieve administrative finality, further hearing is denied and the matter determined on the existing record.—Tallant Transfer, Inc.—Purchase—Guest Trucking Co., 93 M.C.C. 712 (715-6).

Since long-continued lawful operations under single-State proviso are an established basis for finding that public convenience and necessity require their continuance, legality of liquidating carrier's past proviso operations is a most important element in support of survivor's certificate application, and contention that applicants were not apprised that the question would be raised at hearing on proposed merger is without substance.—Hart Motor Exp., Inc.—Control and Merger, 90 M.C.C. 527 (531-2)*.

As vendee holds irregular-route authority for nearly all points served by vendor under single-State proviso, purpose of related §207 application seems to be to authorize service over regular routes. As no evidence of past operations or shipper need for service is submitted in support of such a grant, and no justification is presented for unlawful consummation of the purchase, both applications are denied.—Midwest Motor Exp., Inc.—Purchase—Daniel, 90 M.C.C. 590 (593-4).

As vendor has no properties or franchises under its pending §207 extension application that may be acquired under §5, applicants' request that vendee be authorized to acquire vendor's interest in such application is denied; however, if approved purchase is consummated, vendee may seek leave to be substituted as appli-

cant in the extension proceeding.—Little Audrey's Transp. Co., Inc.—Purchase—Refrigerated, 90 M.C.C. 743 (744).

Contracts: [Vols. 12, 14-19].—Applicants agreement with appellee Milne Truck Lines, by which he obtained a 90-day option to purchase certain of its interstate operating rights, was not a "bona fide offer to purchase" within terms of Milne's prior contract with appelle Burch to operate under those rights and which gave Burch the "first option to acquire" them on same basis as a bona fide purchase offer received by Milne which he was willing to accept. An offer to sell is a continuing offer which; when accepted within its terms by optionee, ripens into a mutually binding contract, specifically enforceable; but option does not bind optionee before the time he accepts the offer, and before there is an acceptance there can be no agreement. Option agreement with appellant could not ripen into a "bona fide offer to purchase" because, by its specific terms, it was not effective or operative until cancellation of the Burch agreement; thus it could not have actuated the Burch option. However, the Burch agreement was effectively canceled by Milne; appellant, having exercised his option, is entitled to enforcement.—Plavec v. Burch, 310 F. 2d 337 (338-9)*.

It is seriously doubtful whether a seller in a contract expressly subject to the commission's approval may even question validity thereof or propriety of its consummation. Plaintiff made a contract to sell all his interest in the companies involved, and, whatever rights pending State court litigation may accord him in avoiding its fulfillment, he may not contend before the commission that the contract he made was illegal. Existence of a dispute between the parties as to enforceability of the original contract did not deprive the commission of jurisdiction to approve resulting control, with modifications and conditions imposed, or make such grant of approval erroneous.—Walker v. United States, 208 F. Supp. 388 (394, 395)*.

In approving carrier Central's acquisition of control of a carrier and one noncarrier and acquisition of a second noncarrier by Callan (Central's controlling stockholder) as assignee of its rights under the original contract, and in authorizing in related finance proceeding Central's issuance (upon receipt of the funds from Callan) of a note to plaintiff to complete payment for his stock in the second noncarrier, the commission, by recognizing the assignment and imposition on Callan of all actual liability for Central's obligation to purchase plaintiff's stock, has approved consummation of the original contract; approval given is in no way limited by fact that Central's acquisition of plaintiff's stock is momentary and simultaneous with its ultimate acquisition by Callan.—Id., pp. 393, 396.

However, while the commission's determination, which is sustained by the court, is categorical and binding on the parties and all court adjudicating the controversy growing out of the contracts, neither the commission nor the court has undertaken to determine any other issue concerning the interpretation or enforceability of the contracts; the function of the reviewing court in that regard is no greater than that of the commission; such matters are left for determination by the courts in the normal way.—Id., p. 396.

Conclusion that acquiring carrier's commitment to pay $48,000 over a 5-year period to acquired carrier's stockholders or their estates, nominally for agreement not to compete, must be considered part of the purchase price for their stock does not change terms of the contract between the parties.—Aero Trucking, Inc.—Control—Friedman Transfer, 93 M.C.C. 342 (347).

Control within §5 provisions: [Vols. 12-19].—While vendor and carrier controlled by the brother-in-law of its controlling stockholder may have under unlawful common control following latter's acquisition of its stock, purchase proceeding is not an investigation to determine that question either on commission's own motion or on complaint by protestants as provided by §5(7); question of vendor's control is collateral to issue to be determined, namely, whether vendee's assumption of vendor's operations would be consistent with public interest. It is not claimed that vendee was in any manner connected with

either carrier, and it has conducted lawful operations as lessee of vendor's rights under temporary authority; moreover, approval and consummation of purchase will end all questions as to prior unlawful control. Also, there is no merit to protestants' inferential argument that vendor's operations under that stockholder's control were unlawful and should be discounted.—Helm's Exp., Inc.—Purchase—Keystone Transfer Co., Inc., 90 M.C.C. 679 (684).

While survivor's purchase of its 49-percent stock interest in liquidating carrier was approved about 10 years earlier, with the finding that latter would not thereby be controlled or affiliated with former within meaning of §5(6), the question of present control by survivor was raised for the first time in protestant's exceptions. Even considering possibility that common control may have resulted since the decision in the prior control case, this was a matter as to which the hearing afforded ample opportunity for developing all the facts; since this was not done, there was no error in failure of the prior report in instant case to find that survivor had unlawfully assumed control of liquidating carrier. Moreover, consummation of approved merger will terminate any unlawful control that might possibly exist.—Rio Grande Motor Way, Inc.—Control and Merger, 90 M.C.C. 643 (649)*.

Vendee, following inauguration of its interline arrangement with vendor, assumed virtually the entire burden of building up vendor's dormant irregular-route operations under single-State proviso, and while none of the various facts may alone warrant conclusion that it controlled vendor in common interest with itself in violation of §5(4), and that such control was perpetrated to revitalize vendor's dormant rights in order to support their transfer and issuance of a certificate to vendee, collectively they permit of no other conclusion; and vendee's control so permeated vendor's entire operation as to destroy lawfulness of the regular-route service rendered during the period. As there is no overriding evidence of public need for service under vendor's rights, purchase is denied.—Lombard Bros., Inc.—Purchase—Millis, 90 M.C.C. 604 (611)*.

Dual operation: [Vols. 12-14, 17-19].—In view of provisions of §210, transactions under §5 which result in holding of dual authority by a carrier or by carriers under common control may be approved only if such dual operations can be found consistent with public interest and the national transportation policy; such finding can be made where, by appropriate restrictions on the rights, the opportunity for discriminatory practices, or other objectionable aspects, can be removed or minimized.—McNichol—Purchase—McNichol, 90 M.C.C. 134 (137)*.

Fitness of applicants: [Vols. 17-19].—The statute entrusts the commission with deciding what considerations other than those specified in §5(2)(c) shall be given weight and, as in case of original applications for certificate, the commission has chosen to give weight to an applicant's fitness; integral to a determination of fitness is the applicant's willingness and ability to fulfill its obligations to the commission, which considerations may be demonstrated by past or continuing violations of commission regulations; relevance thereof to a finding of consistency with public interest is self-evident.—Gilbertville Trucking Co. v. United States, 371 U.S. 115 (127-8)*.

While violations of the act are facts to be considered in determining fitness of an applicant-vendee, they are not an absolute bar to approval of a transaction otherwise consistent with public interest. There is no exact formula for making such a determination; each case must be decided on the facts presented, giving consideration to such factors as the nature and extent of the past violations, their effect on regulation, mitigating circumstances, and whether the carrier's past conduct reflects a flagrant and persistent disregard of provisions of the act. Continuance in office of common officers and directors after termination of vendee's authorized temporary control of vendor through management, though not condoned, does not warrant a general finding of unfitness in absence of any evidence that vendee has persistently flouted the law, did

not act in good faith in continuing its relationship with vendor, or that its attitude is contemptuous of the commission's authority.—National Transp. Co.—Purchase—Hartford Transp. Co., 97 M.C.C. 206 (211)*.

See also White's Delivery Service, Transferee, §212(b), n. 10.

While no bar to approval of proposed purchase of operating rights because of lack of fitness of vendee is found, record is conclusive that it deserves censure for the disregard for laws and the commission's regulations which it has shown. A number of unusual circumstances were present (including vendor's loss of equipment and employees after interchange operations with vendee were begun), and some corrective action was taken after conferences with the commission's district personnel, but it is clear that an interchange operation was set up for through movement of traffice by vendee with minimum participation by vendor. Interchange point selected, instead of being in the area where the two carrier's operating rights overlapped, was actually outside vendor's authorized service area; moreover, their leasing arrangements, being a mere paper agreement, must be regarded as a lease of vendor's operating rights in violation of §5(4). However, the commission has taken no enforcement action against vendee for alleged violations; and no finding of violations is reached.—Great Coastal Exp., Inc.—Purchase—Price Transfer, 97 M.C.C. 271 (277, 285-7)*.

Although actions of acquiring carrier and its officers in effecting unauthorized common control of acquired carrier must be deemed willful, their arguments that they had no intended to involve it in acquired carrier's affairs to the extent shown, but that their actions were necessary to protect its interests and that the situation was caused by unexpected delays in final disposition of proceeding in which acquiring carrier sought to control a carrier to which acquired carrier's intrastate rights were leased, together with acquired carrier's insolvency and lack of adequate facilities, personnel, and management to conduct efficient operations, support conclusion that the violation was not so severe as to warrant finding acquiring carrier unfit to continue in control if otherwise consistent with public interest.—Central Freight Lines, Inc.—Control—Inland Motor, 90 M.C.C. 777 (788)*.

Though determination of legality of tacking of vendor's regular- and irregular-route intrastate rights is unnecessary to determination of purchase application in view of disapproval of purchase of the irregular-route rights, vendee is not shown to be unfit to acquire the regular-route rights because of alleged unlawful tacking. Vendor's State certificates are unrestricted on their face and vendee's operations under temporary authority were conducted at least under claim of right.—Ohio Southern Exp., Inc.—Purchase—Vermilion Truck Line, 97 M.C.C. 93 (101-2)*.

Although examiner found in investigation proceeding that vendee in instant purchase proceeding had performed unauthorized transportation and exercised control of two other carriers in lease and interchange arrangements contrary to provisions of §206(a), and the circumstances described in the examiner's report appear serious, decision in instant proceedings need not be deferred pending final decision in the investigation, which is an entirely separate and unrelated proceeding. Moreover, evidence in instant proceeding does not indicate violation of the lease-and-interchange regulations of type found in other cases, and the presumption of lawful conduct must tip the scales in vendee's favor.—Home Transp. Co., Inc.—Purchase—Chattanooga Transfer, 97 M.C.C. 173 (188-9).

The act does not expressly require a finding of fitness to be made in §5 proceedings; rather, a showing of fitness is part of applicants' burden of showing the transaction to be consistent with public interest. Applicants must make a prima facie showing of fitness, but unless some error in that showing or some other fact indicating unfitness is brought out by another party on cross-examination vendee's fitness may be accepted. Ordinarily, to warrant a finding of unfitness on vendee's part, an unauthorized part operation or improper practice must have been willful and fla-

grant; protestants' mere questioning of lawfulness of vendee's past interline arrangements falls far short of showing facts to create a valid doubt.—Security Van Lines, Inc.—Purchase—Community & Johnson, 93 M.C.C. 399 (403).

Unlawful shipments imputed to acquired carrier prior to temporary control authority do not reflect on acquiring carrier, and although latter transported a few questionable shipments in early days of temporary control, they were similar to those transported by acquired carrier, as to which there is some uncertainty, and it does not appear that acquiring carrier continued that type of activity. Nor does finding in investigation proceeding that acquiring carrier had engaged in widespread unauthorized operations necessitate a finding of unfitness, since there was no finding therein, nor is there any affirmative indication, that such unauthorized operations were conducted in willful disregard of its certificate.—Mitchell Bros. Truck Lines—Control—Empire Transport, 93 M.C.C. 38 (43).

Applicants have provided adequate indicia that vendee can take in stride the relatively small extension in the general area of its operations represented by proposed purchase; more detailed proof of fitness based on day-to-day activities has not been required, for in respect of transactions in ordinary course of business an interstate carrier, absent proof to the contrary, is entitled to a presumption of right conduct.—Lang and Givens—Purchase—T.I.M.E., Inc., 90 M.C.C. 195 (199).

Past violations of the act, though properly to be considered in determining fitness of an acquiring party applicant in a §5 proceeding, are not an absolute bar to approval if the transaction otherwise is shown to be consistent with public interest and the applicant appears to be making a sincere effort to comply with all applicable rules and regulations; there is no inflexible formula to be followed in ascertaining an applicant's fitness; each case must be decided on its own particular facts.—Pirkle—Purchase—P & A Refrigerated Exp., Inc., 90 M.C.C. 36 (38).

That vendee was found fit to receive additional authority in other proceedings decided in same year purchase application was filed, though entitled to consideration, in no way alters findings required to be made in instant proceeding; it is evident that vendee has been guilty of numerous violations of the commission's regulations; however, evidence of record shows that it is making a determined and largely successful effort to comply. Therefore, since vendee's past violations are not shown to have either willful or flagrant, and proposed purchase transaction is otherwise consistent with public interest, denial on ground of unfitness is not warranted.—Id., pp. 38, 39.

Allegations as to acquiring carrier's unfitness apparently concern unlawful lease arrangements shortly after it took over acquired carrier's operations under temporary authority, and latter's witness testified that this was being rectified and that inspections required by leasing regulations would be made in future. While any past violations are not condoned and applicants are admonished to comply strictly with the regulations, evidence does not warrant a general finding of unfitness such as would bar approval of control.—Long Transp. Co.—Control—Marine Transit, Inc., 90 M.C.C. 261 (266).

Fitness of a prospective purchaser under §5 is important in resolving whether the transaction would be consistent with public interest. Though fitness of vendee and carrier controlling it was the subject of recent investigation proceedings in which they were found to have violated or to be in noncompliance with various of the commissions safety regulations, and cease and desist orders were entered against them, those violations, while serious in nature, do not warrant disapproval of purchase. In view of the prompt corrective measures taken by both carriers respecting most of the violations, the nature of those remaining, and their excellent records in complying with other safety regulations, a finding of unfitness would be justified only if they should refuse to abide by terms of the cease-and-desist orders.—Trailways of New England, Inc.—Purchase—Interstate, 93 M.C.C. 217 (226-7).

While the commission cannot be absolutely certain at this time that vendee and its parent company will comply with

those orders, the sanctions, including fines and revocation of operating rights, which can be imposed for failure to comply provide an adequate guarantee that they will do so. Moreover, in view of vendee's temporary authority granted prior to institution of the investigations and extended indefinitely by provisions of Administrative Procedure Act, Little benefit would be gained by withholding purchase approval until the cease-and-desist orders are withdrawn. However, the parties will be expected to abide by those orders in conduct of operations under the acquired rights, and, if authority granted is exercised, vendee's acceptance of certificate to be issued will be deemed to constitute agreement that the cease-and-desist order shall apply thereto in same manner as to certificates now held by it.—Id., pp. 227-8.

Vendee is found financially fit and able to consummate proposed purchase of operating rights and properties when its latest balance indicates a good financial condition; it states that anticipated earnings from present operations would have accrued sufficiently over the period required for processing the application to meet the cash requirements, but if not, its stockholders will furnish such funds as may be necessary; and, in addition, an analysis of its income statement for preceding year is convincing that its cash flow for the current year should be ample to pay the purchase price of $327,000 in cash while concurrently meeting its other obligations. However, based on other grounds, the application must be denied.—Mitchell Transport, Inc.—Purchase—John Schutt, Jr., Inc., 97 M.C.C. 10 (17-18).

Although the commission has generally held that possession of adequate resources by stockholders of an acquiring carrier is no substitute for its own financial ability to meet its obligations, exception may be made where the stockholders quarantee its obligations and show a clear ability to do so; however, such assurances by carrier stockholders must not impair their own ability to perform authorized service to the public. While merger survivor would be unable alone to pay off promissory note to be issued to finance proposed stock purchase within its 1-year term, the three system carriers authorized to jointly control it and to guarantee the note are each able to bear its share of such obligation; merger approved.—Continental Tenn. Lines, Inc.—Control—Tennesee Coach, 87 M.C.C. 775 (782).

Survivor's financial condition following proposed merger would not be sufficiently strong to warrant approval when resulting overcapitalization would be unfavorable, ability to service its outstanding debt is also questionable when results of its most recent financial statements are considered, and its debt-equity ratio would be highly undesirable. Letter from bank which is survivor's largest creditor, to effect that it would be willing both to extend terms of notes now owing the bank and to extend additional credit to the company, while helpful, is not an adequate substitute for present financial fitness warranting the proposed expansion. Denied, without prejudice to submission of a revised transaction, with evidence that by providing additional equity capital or liquidating indebtedness, or both, survivor's financial condition would be improved to an extent justifying approval.—Johnson Freight Lines Co., Inc.—Merger, 87 M.C.C. 747 (751, 752)*.

Since purchase approval in prior report rendered some 2 years earlier is affirmed, and no clear evidence of unfitness was adduced on further hearing, to defer approval on reconsideration unless and until pending proceedings in which vendee's fitness is in issue are terminated favorably to it, with possible lenghty extension of temporary authority as to dormant rights during such deferral, would be unwarranted and inconsistent with public interest.—C & H Transp. Co., Inc.—Purchase—Ferguson Trucking, 93 M.C.C. 741 (751)*.

While vendee's violation of §220(a) and the commission's regulations thereunder was terminated by its filing of a contract and schedule of minimum rates covering certain bulk transportation, its prior noncompliance is properly to be considered in connection with the issue of fitness raised by its application to purchase additional contract-carrier rights.—C&R Trucking Co.—Investigation of Control, 93 M.C.C. 669 (672).

Although grant of authority to one of two control applicants and consequent dismissal of prior application of the other to control same carrier renders question of the earlier applicant's unlawful control of that carrier practically moot, the issue must be determined insofar as it might reflect on the general fitness of that applicant and its controlling stockholder.—Watkins Motor Lines, Inc.—Control and Merger, 90 M. C. C. 567 (586).

Examiner correctly found that vendee had assumed control and management of vendor's operation in violation of §5(4), that vendee's temporary authority application under §210a(b) was fraudulent, and that in the §5 proceeding applicants submitted a false application and at hearing offered false evidence in support thereof. Applicant-respondents did not except to those findings, but filed affidavits attesting to termination of both the purchase agreement and the temporary authority operations, and though such affidavits are considered as a petition for dismissal of the application, which is granted as consistent with public interest, such action should not be taken as meaning that the commission does not fully subscribe to the examiner's further finding that applicant-respondents' clearly demonstrated unfitness would warrant denial of the §5 application if it were considered on the merits.—Calore Exp. Co., Inc.—Purchase—T.W. Waterman Co., Inc., 93 M.C.C. 291 (296,297).

Proof of acquiring carrier's fitness is a prime requisite to approval of a transaction under §5. Under a separate agreement, survivor in proposed merger leases its equipment with drivers to liquidating carrier from origin to destination, but on the record as made there is ample reason to doubt that liquidating carrier exercises any control over survivor's equipment and drivers while they are operating in former's territory. While, because of paucity of evidence as to the exact method of handling the alleged interline shipments, it cannot be found that the leasing arrangement was clearly an unlawful lease of liquidating carrier's operating rights in violation of §5(4), cross-examination of applicants' witnesses was piercing enough to rebut any presumption that the purported interline arrangement was lawful. Applicants have failed to bear their burden of proof as to survivor's fitness; denied.—Dealers Transit, Inc.—Control and Merger, 93 M.C.C. 611 (618-20).

The lack of candor and perhaps deliberate evasion indicated by testimony of vendee's executive vice-president and vendor's general manager concerning purported interchange, and vendee's subsequent conviction of seeking to evade regulation by a false and fictitious vehicle-lease arrangement, demonstrate vendee's unfitness to consummate proposed purchase; both parties are long experienced in the motor carrier field, are well acquainted with the law and the commission's regulations, and their unlawful activity was admitted to be willful and knowing. Denied. United States Van Lines, Inc.—Purchase—Bell, 90 M.C.C. 362 (365).

There is no fixed formula to be followed in determining an applicant's fitness; each case must be decided on its own facts, with consideration of such factors as the nature and extent of past violations, effect thereof on regulation, any mitigating circumstances, and whether applicant's past conduct indicates a flagrant and persistent disregard of law.—Cooper's Exp., Inc.—Purchase—Ferguson Motor Transp., 90 M.C.C. 613 (615).

Applicants offered no evidence to rebut, explain, or mitigate the evidence offered to show hundreds of past unauthorized movements by vendee; vendee was twice convicted and fined for unauthorized operations, also for violations of regulations, and further criminal proceedings against it are now pending; between initial and further hearings on purchase application inspections revealed numerous violations of safety regulations, and vendee's representatives were distinctly uncooperative with commission inspectors. Also, court action is still pending to enjoin vendee's unlawful control with two connecting carriers; and though the unlawfulness has been ended by voluntary termination of the connections' interstate rights, conclusion is warranted from all the facts that this was done to avoid criminal conviction or to safeguard approval of purchase, and not because of an earnest desire to comply with applicable law.—Id., pp. 616-8.

That vendee's tonnage and earnings have increased under temporary authority and

shippers have received a more satisfactory service does not overcome the showing of its unfitness. Examiner's recommendation of approval, to be held in abeyance for 1 year to permit vendee to demonstrate its fitness, which would allow it to continue the expanded operations under temporary authority in advance of tangible proof that it is fit to conduct them, must be rejected in view of its record of flagrant violations over the years and up to time of hearing. Vendee's fitness must be determined on the record as made, not on what it might be at some uncertain future date; approval on the evidence presented would make a mockery of enforcement provisions of the act and regulations promulgated thereunder, and an affidavit by vendee that it had placed its operations in compliance would be practically worthless. Until vendee has shown in actual practice that it will comply with terms of its authority and with safety and other regulations, it should not be permitted to expand its service as proposed. Denied.—Id., pp. 618-9.

Under §5, the fitness of the acquiring party applicant is always an important issue which must be resolved, and though denial is not necessarily required where premature consummation has occurred in violation of §5(4) if there is positive proof that public interest would best be served by approval, such applications have been denied where the accomplished fact was presented for approval and the law violation could properly be characterized as flagrant. Under the national policy the commission is concerned with obedience to and respect for the law; faithful compliance with the law would not be encouraged by approval of purchase by vendee which has been using the purchase rights under an unlawful leasing arrangement although, as a carrier for over 40 years and no stranger to §5 proceedings, it should have been aware that such arrangement was a clear violation of the leasing regulations; denied.—American Red Ball Transit Co., Inc.—Purchase—Fallon, 90 M.C.C. 515 (520-1)*; for like reasons, approval of continuance of control already effected in violation of §5(4) is denied.—Holdcroft—Investigation of Control, 90 M.C.C. 407 (412).

Fitness of an applicant for authority to extend its operations under §5 through acquisition of additional operating rights is one of the most important considerations in determining whether the proposed transaction would be consistent with public interest. When applicants have been interchanging traffic at a point which vendee not only has no authority to serve but does not even claim a color of right to serve, vendee is unfit to conduct the operations it seeks to purchase; denied.—Be-Mac Transport Co., Inc.—Purchase—Nix, 87 M.C.C. 737 (741).

In view of vendee's unauthorized lease of vendor's operating rights over a considerable period under purported lease-and-interchange arrangement, together with the unlawful common control and management of vendor manifested thereby, vendee is not shown to be fit to acquire and conduct any portion of the operating rights sought to be transferred; purchase application denied.—Stewart—Investigation of Control, 87 M.C.C. 681 (696, 697, 698).

"Grandfather" applications: [Vols. 12, 19]. —See also Brown—Control—United Expressways, n. 5, above.

Applicants may well be correct in their interpretation of §206 (a)(7) as precluding the commission, when considering issuance of a certificate of registration in a "grandfather" proceeding, from looking beyond the underlying State certificate to ascertain the scope of authority to be granted. However, the commission is not thus proscribed in a proceeding under §5 for the transfer of claimed or certificated "grandfather" rights; such a proceeding is not one for determination of the scope of authority to which vendor is entitled under the "grandfather" provisions, that being a matter properly for determination in vendor's "grandfather" proceeding. The principle issue in the §5 proceeding is consistency of the transaction with public interest, and determination thereof requires inquiry into the nature and scope of operations conducted by vendor in the past and by vendee under temporary authority, as well as appraisal of any adverse effects that consummation would have on operations of existing carriers.—Sierra Distributing—Purchase—F.T.S. Transport System, 97 M.C.C. 294 (299).

That registered rights, rather than rights embraced in a certificate of convenience and

necessity, are involved requires no different approach in carrying out the mandate of the provisions of §5. Denial of purchase application would not affect the scope of authority to which vendor is entitled under the "grandfather" clause; similarly, approval subject to a condition that vendee acquire less authority than is described in the State certificate would not abrogate the "grandfather" provisions, since any authority granted under §5 is purely permissive, and applicants may choose whether or not to exercise that authority.—Id., p. 300.

Since vendor was engaged in lawful operations in interstate or foreign commerce under the single-State proviso of §206(a)(1) before its repeal, and has since operated under "grandfather" provisions of §206(a)(7), it is a motor carrier subject to Part II and within meaning of §5; and since "carrier," as used in paragraph (7), is interpreted to mean a motor carrier subject to Part II and therefore not to preclude a single-State operation thereunder by a motor carrier affiliated with a multistate carrier of another mode, upon consummation of purchase of all vendor's California operating rights vendee, a California corporation commonly controlled with a multistate water carrier subject to Part III, will be entitled to receive any certificate of registration issued as result of vendor's pending "grandfather" application, and its application for a certificate under §207 (a) is therefore dismissed.—Security Transp. Co.—Purchase—Security Truck Line, 93 M.C.C. 385 (389, 390-1).

Since upon consummation of purchase of its intrastate rights vendor would no longer hold "grandfather" rights under §206(a)(7), approval is conditioned upon withdrawal of its application for confirmation of those rights.—Tallant Transfer, Inc.—Purchase—Guest Trucking Co., 93 M.C.C. 712 (714).

Most of vendor's operations in interstate commerce in Virginia are now conducted under the "grandfather" clause of §206(a)(7B), and upon consummation of approved purchase vendee will be entitled to continue such operations pending issuance of certificate authorized under §207(a). However, under the "grandfather" clause, if the transaction is not consummated by February 12, 1963, vendor must file application under §206(a)(7B) for a certificate of registration by that date in order to preserve its right to operate in interstate commerce and its right to a certificate of registration, pending consummation of purchase.—Overnite Transp. Co.—Purchase—Hill City Transfer, Inc., 90 M.C.C. 749 (755).

Intrastate operating rights: [Vols. 12-15, 17-19].—Vendor's intrastate certificate, used as basis of "grandfather" operations under §206(a)(7), must be interpreted in light of policy established by the issuing State. As Kentucky permits a regular-route carrier to serve off-route points within 3 miles of an authorized service point unless such point is specifically authorized to be served by another such carrier, vendor apparently could lawfully serve plant site within 3 miles of an authorized point on his route for purpose of interchange, when there is no evidence that other Kentucky carriers may serve that point under specific authority.—Liquid Transporters, Inc.—Purchase—Black, 93 M.C.C. 423 (428).

Vendor's sale of its regular-route rights in Ohio and retention of its Ohio irregular-route rights "to and from" Mount Vernon should not be approved when operations to and from Mount Vernon can be conducted under the regular-route rights and vendor could possibly compete for traffic that vendee could also handle. Vendor has pending a "grandfather" application for registration certificate under §206(a)(7), and if such certificate covering the irregular-route authority were issued and an interstate certificate issued vendee for the regular routes there would likely be a duplication of interstate rights, resulting in two operations in place of one. However, it is neither necessary nor desirable that purchase application be denied or held in abeyance pending decision in the "grandfather" proceeding; instead, approval of purchase and issuance of certificate to vendee is conditioned on vendor's withdrawal of its "grandfather" application. Such condition is necessary to finding that public convenience and necessity require vendee's operation over the regular routes, and vendor must decide whether to gain approval of purchase by forgoing the irregular-route authority.—Snyder Bros. Motor Freight, Inc.—Purchase—Mosholder, 93 M.C.C. 653 (657-8).

See also Central Motor Exp. case, n. 48 *Conditions imposed*, above.

Only matters in issue determined: [Vols. 14-17, 19].—Whether acquiring carrier provided bona fide management under temporary authority, whether it absorbed acquiring carrier's traffic, and whether or to what extent the latter misrepresented its financial position to the former, are not matters requiring resolution by the commission, and even if those issues could be resolved one way or the other they would have no bearing on final determination of control application. The parties' longstanding controversy is a matter for the courts to decide if they cannot otherwise resolve the controverted matters.—Adley Exp. Co.—Control—McFaddin Exp., Inc., 93 M.C.C. 378 (382)*; and termination of expense of litigating that controversy is not a matter requiring serious consideration in determining whether the proposed control would be consistent with public interest.—Id., p. 382.

Purchase and control: [Vols. 12, 17, 19].—Issue raised respecting vendee's relationship with, and possible unlawful control of, a carrier not a party to purchase proceeding is not appropriate for determination in that proceeding. Vendee has applied under §5 for authority to purchase that carrier's operating rights, and there is no warrant for prejudging the issues relative thereto.—Seuring Transit, Inc. —Purchase—Fullerton Motor Truck, 97 M.C.C. 241 (247-8).

Purchase of equipment: [Vols. 13, 15, 16, 18, 19].—Purchase of vehicles is part of the same transaction as purchase of vendor's operating rights and likewise requires the commission's approval.—Tallant Transfer, Inc.—Purchase—Guest Trucking Co., 93 M.C.C. 712 (714).

Vendee's unauthorized acquisition of vendor's equipment, following grant of temporary authority, violated §5(4) even though it resulted from an honest mistake of vendee's president. However, without condoning such action, purchase is approved when it is otherwise consistent with public interest.—Von Der Ahe Van Lines, Inc.—Lease and Purchase —Bee-Line, 90 M.C.C. 888 (896-7)*.

Rates: [Vols. 13, 14, 18, 19].—Although respondent complains that establishment of joint TOFC rates over certain through routes existing at time of merger, in compliance with condition imposed on merger approval, would result in uneconomical transportation at rate level proposed by petitioner, such results can probably be prevented by adjustments in either the rates or divisions; otherwise, the matter may be brought before the commission in another proceeding.—Rates, TOFC, between Midwest & South—Louisville & N.R., 318 I.C.C. 40 (44).

Requested conditions on control approval, that carriers be required, to extent of their power, to preserve present rate relations between the ports of Baltimore and Newport News, and that they give recognition to importance of Baltimore to the combined system, are not matters which should be considered in such a proceeding.—Chesapeake & O. Ry. Co.—Control—Baltimore & O.R. Co., 317 I.C.C. 261 (289, 290)*.

Regular, irregular routes: [Vols. 12, 14, 17, 19].—Conversion of vendor's irregular-route authority between Salt Lake City and Page, Ariz., to regular-route would eliminate any existing uncertainty respecting type of service performed, and public witnesses supporting related conversion application all indicated a need for regular-route service. Testimony shows there is no regular-route single-line service between Salt Lake City and major Texas points on vendee's routes between Texas and California and existing service between Salt Lake City and Arizona points has not been entirely satisfactory. Vendee's through service under vendor's rights has met a public need and should be continued; moreover, evidence does not show that such conversion, restricted against through service between Salt Lake City and California, will provide vendee with any competitive advantage.—Consolidated Copperstate Lines—Purchase—Nielsen, 90 M.C.C. 483 (488).

Restrictions upon operating rights and services: [Vols. 12, 14-19].—Although vendee is willing that the combines rights after purchase be restricted against single-line service to and from points in five States, which would be competitive with protestants' services, much of vendor's authority is already restricted against joinder with its other rights for through service; moreover, proposed further

restriction of service in portions of the authorized territory to traffic interchanged with other carriers would make any certificate issued therefor susceptible of different interpretations, a result not in the public interest. However, application is denied on other grounds.—R.L. Jeffries Trucking Co., Inc.—Purchase—Eck Miller, 97 M.C.C. 151 (166).

Tacking restrictions are not imposed in absence of a showing that nonimposition would have a materially adverse effect on operations of competing carriers. As protestants have made no such showing, imposition of a restriction to prevent vendee's tacking of purchased rights with its existing rights to provide through single-line service on the commodities involved is not warranted.—Seuring Transit, Inc.—Purchase—Fullerton Motor Truck, 97 M.C.C. 241 (247).

In view of their close working arrangement, vendee's offer to accept restrictions on interstate rights it seeks to purchase and also, on behalf of non-party purchaser of vendor's intrastate rights, on any registration certificate issued therefor, so as to preclude objectionable duplication of interstate operations, may be considered notwithstanding exclusion as evidence of the intrastate purchaser's letter to the commission offering to accept such restrictions. The commission may impose restrictions on acquired operating rights on its own motion where appropriate, and, because of the permissive character of authority granted under §5, conditions have sometimes been imposed on carriers not parties to the proceeding. Vendee is aware that its purchase of the interstate rights could not be consummated unless purchaser of the intrastate rights requests such a restriction, and is already dividing traffic with latter along the lines contemplated.—Illinois-California Exp., Inc.—Purchase—Salt Lake-Kanab, 97 M.C.C. 38 (46).

As the only traffic handled by vendor under irregular-route authority which one vendee would purchase, and by that vendee under temporary managerial control of vendor, was overhead traffic moving between points in vendee's southern New England territory and points in Pennsylvania, New Jersey, and New York, and vendee is agreeable to restriction of such rights to traffic moving between points in vendor's territory and points in Massachusetts, Rhode Island, and Connecticut, restriction is imposed accordingly. Also, as vendor rendered only limited service between points in Rockland County, N.Y., and four Connecticut counties, the involved rights are further restricted to prohibit such service by vendee. —National Transp. Co.—Purchase—Hartford Transp. Co., 97 M.C.C. 206 (214, 215)*.

Restrictions against tacking are generally not favored, and are imposed only if protesting carriers demonstrate that failure to do so will have materially adverse effect on their operations. Imposition of a no-tacking restriction is not warranted merely to maintain the presale, relative competitive positions of the parties.—Public Serv. Coordinated Transport —Purchase—Royal Blue, 97 M.C.C. 56 (61).

And although protestant has routes between Somerville, N.J., and New York City identical to those of vendor for over half the distance and closely parallel for the remainder, and it renders primarily a commuter service whereas vendor rendered service under through schedules to and from Pennsylvania, a restriction against vendee's operation of schedules which do not extend west of Clinton, N.J., would not be practical. However, since protestant renders a vital commuter service in the Somerville area, and vendor's service at that point and points east thereof was on a limited scale, imposition of a restriction against passengers boarding eastbound or alighting westbound at points between North Plainfield and New York City would effectively prevent vendee's establishment of a new local commuter service without impairing its service west thereof where protestant's routes are not duplicative of those acquired. —Id., pp. 62-3.

To restrict purchase of operating rights giving vendee a more direct route between Boston and Portsmouth, N.H., to preclude service between Boston, Newburyport, and points intermediate thereto, on one hand, and, on the other, Portsmouth and points in Maine would not only vitiate the purchase but would remove utility of operations long conducted by vendor jointly with vendee in competition with protestant Greyhound, and should not be imposed in absence of a clear showing by Greyhound that material impairment of its revenues and service would other-

wise result.—Trailways of New England, Inc. —Purchase—Interstate, 93 M.C.C. 217 (226).

Restrictions against rendition of through service by tacking of unified rights should not be imposed in absence of a showing that non-imposition thereof would have a materially adverse effect on operations of competing carriers. Notwithstanding that survivor has for some time been performing through service between points in its own territory and liquidating carrier's under temporary authority, protestants' evidence shows that their revenues have increased despite that fact, whereas liquidating carrier was in serious financial difficulties when survivor instituted the temporary operations and it is doubtful if it could continue the service provided under its rights if merger were disapproved. As supporting shippers strongly favor continuance of the unified service, public benefits reasonably to be expected from merger far outweigh any possible disadvantages to competing carriers; therefore, no tacking restriction is imposed.—Youngstown Cartage Co.—Control and Merger, 93 M.C.C. 318 (327-8).

Though Perth Amboy is the only point in Middlesex County, N.J., which vendors have ever served under their contract-carrier rights from that county, and plants of both supporting shippers are located there, the plant of one extends into an adjoining township and future plant expansion could well require vendee to provide service at other Middlesex County points in order to continue serving that shipper. Furthermore, since service under vendor's rights can only be performed for a limited number of shippers, public interest would not be served by restricting vendee's future operations thereunder to service only at Perth Amboy.—H. Prang Trucking Co., Inc.—Purchase—Hyer Trucking, 93 M.C.C. 695 (702).

Tacking restrictions are undesirable and should usually be limited to those cases where protestants show serious potential harm if they are not imposed; and restrictions agreed on by the parties as a condition of protestants' withdrawal without offering evidence have been rejected where their imposition was not shown to be consistent with public interest, noting that protestants withdrew in such instances at their peril; nor is the commission bound to impose stipulated conditions because the proposal purports to amend a related §207 application. Nevertheless, tacking restrictions are lawfully imposed in proper circumstances.—Tallant Transfer, Inc.—Purchase—Guest Trucking Co., 93 M.C.C. 712 (717).

Applicants proposed tacking restrictions on interstate authority sought by vendee, in lieu of acquired "grandfather" rights under §206(a)(7), on basis of consultations with the many protestants, and it is clear that protestants intended to show adverse effect on them of the combined operations, that applicants must have feared their ability to do so, that, as the proposal came near the end of applicants' case, they did not offer the restrictions to avoid time and expense of presenting their evidence, and that the restrictions would result in no substantial diminution of applicants' existing interline service. Imposition of the restrictions stipulated, which prompted protestants' withdrawal from the hearing, will give applicants no cause to complain, since they proposed the amendment of the §207 application themselves; however, as one supporting shipper for which applicants have handled substantial traffic testified to need for single-line movements of furniture from North Wilkesboro, N.C., to destinations in Maryland, Delaware, and the District of Columbia, the restrictions imposed will not extend to such movements.—Id., pp. 717-8.

Although vendor's Virginia intrastate authority, the basis of its "grandfather" operations under §206(a)(7B), is restricted against transportation of freight originating in Lynchburg and destined to Richmond, or vice versa, that restriction is not included in certificate authorized to be issued to vendee; since the commission construes "originating" and "destined" as not including traffic interchanged at those points, such restriction would not apply to traffic moving in interstate commerce. But restrictions against transportation between other named points, which are not limited to traffic "originating" at or "destined" to those points, are retained, insofar as such transportation could be performed as part of a longer interline movement in interstate commerce.—Overnite Transp. Co.—Purchase—Hill City Transfer, Inc., 90 M.C.C. 749 (753).

See also Evans purchase case, under *Routing practices*, below.

Since interstate shipments between points on vendor's routes between Buffalo and Utica and points south of New York-New Jersey boundary, and between points on its Rochester-Plattsburgh routes and points south of the New Jersey line and in Connecticut and Massachusetts, have been primarily inbound, and shippers have shown no real need for southbound service from such points, sale of its New York proviso rights to vendee operating in New England and Middle Atlantic States is conditioned on restriction against vendee's transportation of traffic originating at intermediate points on the Rochester-Plattsburgh routes and in area generally between Utica and Buffalo when destined to points south of the New Jersey line or New York commercial zone via Utica or Albany, and from intermediate points on the Rochester-Plattsburgh routes to vendee's service points in Connecticut and Massachusetts.—Dorn's Transp., Inc.—Purchase—Mayberry Motor Freight, 90 M.C.C. 269 (277-8, 279).

However, restrictions on operating rights generally create undesirable operating complications and should not be imposed unless the record conclusively shows them to be necessary in public interest. Though vendee under temporary authority may not have consistently observed proper gateways in operating to and from part of vendor's territory, the record does not definitely show this; accordingly, restrictions to assure such observance are not imposed, but vendee will be expected to limit its operations to the authority granted. —Id., p. 279.

It is generally commission policy to require opposing carriers to show that nonimposition of a tacking restriction will have a materially adverse effect on their operations, and, even though a vendee is agreeable to imposition of a restriction to satisfy protestants' objections, that alone does not necessarily warrant such imposition, the final criterion being whether it is necessary in the public interest. But where a vendee seeks a certificate under §207 to continue interstate operations theretofore conducted by it under the former single-State proviso, authority is granted in terms of an interstate service coextensive with the authorized intrastate service, or for operations, including restrictions, as actually conducted in interstate or foreign commerce under the proviso.—Dodds Truck Line, Inc.—Purchase—Strain, 93 M.C.C. 229 (236, 239).

At opening of hearing, vendee's counsel specifically indicated that authority sought in the related §207 application was not to be broader than operations which it could conduct under the proviso, and though no mention was then made of a restriction on the acquired authority, vendee's president testified in course of hearing that his company had no desire, following consummation, to tack the §207 authority with that purchased, to provide through service from St. Louis to Springfield and Rolla, Mo., and that it would accept a restriction precluding such service; protestants are entitled to rely on that representation. As applicants are not shown to have interlined any traffic between St. Louis and Springfield or Rolla and supporting shippers are not concerned with such movements, it is reasonable to conclude that other carriers in the area have been providing satisfactory service between those points, and to authorize vendee to institute such service would tend to disrupt the competitive balance without compensatory public benefits and would be inimical to the public interest generally. On balance, a restriction against such tacking is warranted and is imposed.—Id., p. 239.

No justification is shown for restricting heavy-hauling rights authorized to be purchased to protect protestants transporting aircraft, missiles, pipe, and related commodities. Even if vendor had not moved any such traffic (as it did occasionally), it would not be sound regulation to atomize its operating rights by excluding those specialized classes of commodities from a broad but standard commodity description which would otherwise include them.—Superior Trucking Co.—Purchase—Arthur Morgan Trucking, 93 M.C.C. 64 (69-70)*.

Protestant's contention that acquired automobile carriers' authority from one origin should be limited to traffic moving on government bills of lading is entirely without merit; such a restriction would result in service in nature of contract carriage. And additional restrictions requested on interline of second-

ary movements by acquired carriers are unwarranted and unnecessary, since they would restrict those carriers from that which they might perform with any other carrier, and continuance of the present interline situation would be no more than could be done if their operations were merged.—National City Lines, Inc.—Control—Automobile Carriers, 93 M.C.C. 683 (688-691).

Inasmuch as protestants withdrew their opposition to proposed purchase upon applicants' agreement to accept a restriction on acquired rights to preclude pipestringing service, and such restriction would not materially affect transportation service in area involved, approval is conditioned accordingly.—Hill & Hill Truck Line, Inc.—Purchase—Hunsaker Trucking, 93 M.C.C. 490 (495).

See also Consolidated Copperstate Lines case, §212(a), n. 30.

When two motor carriers withdrew their opposition upon vendee's stipulation to accept a restriction on acquired rights against transportation of bulk petroleum and products, and abstracts of representative shipments showing only one shipment of lubricating oil indicate that vendor has not emphasized transportation of that class of commodity, to accede to the stipulation would not be contrary to public interest, and purchase approval is conditioned accordingly.—Northern Pacific Transport Co.—Purchase—Stark, 90 M.C.C. 206 (210).

Vendor's transportation of chemicals from Providence, R.I., to points in Connecticut and Massachusetts is not shown to have been of such essentially local character as to require a restriction against tacking of those rights with vendee's existing rights between Providence and New York and New Jersey. Imposition of such a restriction does not rest on whether public convenience and necessity has been shown for vendee's through service, but on whether protestants have shown that nonimposition would have a materially adverse effect on their operations; their evidence does not support such a finding, and imposition of a tacking restriction is not warranted.—Berman's Motor Exp., Inc.—Purchase—Lang Storage & Trans., 90 M.C.C. 807 (814-5).

It is undesirable in public interest to place restrictions on authority for a highly specialized service on a special class of commodities such as would restrict ability of the vendee thereof to furnish a complete service to the industry it serves or limit its service with respect to the type of vehicle to be used. Where there is no evidence that protestants would be harmed if vendor's bulk-commodity rights were to remain intact in vendee, proposed restriction to handling of such commodities in liquid form in tank vehicles is not warranted. —Id., p. 815.

Authority for purchase of rights for truckaway of motor vehicles, mainly in secondary movements, from New York City and nearby New Jersey points to destinations in 3 to 27 States and the District of Columbia (depending on the certificate), is conditioned against their tacking with vendee's existing rights, to preclude institution of a new competitive operation that would adversely affect other carriers.—M & G Convoy, Inc.—Purchase—Great Lakes Forwarding Corp., 90 M.C.C. 693 (698)*.

Since vendee's service between Louisville and Memphis under the unified rights would be a new competitive service which would adversely affect existing carriers without any offsetting advantages to the public, a restriction prohibiting such service should be imposed. And though it is not conceded that a restriction prohibiting service at a municipality does not also include the commercial zone thereof, to eliminate doubts expressed by protestants the restriction is imposed against handling of traffic between Memphis and Louisville or their commercial zones.—Dean Truck Line, Inc.—Purchase—Allstate Truck Line, Inc., 90 M.C.C. 819 (827)*.

Restrictions on operating rights generally create undesirable operating conditions and should not be imposed unless the record conclusively shows that they are necessary in public interest.—Long Transp. Co.—Control —Marine Transit, Inc., 90 M.C.C. 261 (267); thus, a restriction against joinder of operating rights for purposes of providing through service should be imposed only if carriers requesting it show that nonimposition would have a materially adverse effect on their operations. —Garrett Freightlines, Inc.—Control and Merger, 87 M.C.C. 619 (625-6)*; imposition of restriction against tacking, urged by protes-

tants, is not warranted by the record.—Bowman Transp., Inc.—Purchase—A.W. Hawkins, Inc., 90 M.C.C. 303 (326); however, protestants have made a showing justifying imposition of a restriction against tacking of regular route granted, in lieu of vendor's irregular routes, between Page, Ariz., and Salt Lake City with vendee's existing routes, for purpose of serving California points on traffic moving to or from Salt Lake City.—Consolidated Copperstate Lines—Purchase—Nielsen. 90 M.C.C. 483 (489, 490).

Restrictions against tacking of acquired rights with acquiring carrier's existing rights should be imposed only on a showing by proponents thereof that nonimposition would have a materially adverse effect on their operations. Neither vendor nor vendee has been a serious competitive factor on traffic between Georgia and Akron, Ohio radial area, whereas protestant, a small carrier compared to vendee, has established that it transports substantial tonnage between and through those areas and that its continued existence depends on retention and expansion of its volume of such traffic; protestant has thus shown that nonimposition of a restriction would materially affect it adversely, endangering its ability to continue meeting its common carrier obligations. Restriction imposed against tacking of any of acquired rights with any of vendee's existing rights.—Pilot Freight Carriers, Inc.—Purchase—Bison Fast Freight, 90 M.C.C. 709 (722).

Since the commission necessarily is not bound by agreement between the parties, or by stipulation among counsel, to restrict service under the authority involved in a proceeding, refusal to impose the restriction in whole or in part would not constitute a broadening of the issues.—Lang and Givens—Purchase—T.I.M.E., Inc., 90 M.C.C. 195 (198).

Since purchase route between Hobbs, N. Mex., and Brownfield, Tex., is directly competitive with vendor's retained route between same termini, and by joinder with its existing routes vendee will also be competitive on traffic to and from Lubbock, Tex., approval is conditioned on restriction precluding vendee from serving Hobbs on traffic from, to, or through Lubbock and Brownfield, and originally proposed by applicants; restriction against traffic to or from latter points, only, would be only partially effective and would not provide the full protection to which the several carriers now operating in the territory are entitled.—Id., p. 199.

Protestant has shown adequate reason for imposition of restriction on service of survivor in merger which would preclude its transportation of shipments originating in Oregon and Washington west or south of Spokane, and in Spokane, and moving to Kalispell, Great Falls, and other Montana points on U.S. Highway 2 (Hi-Line) between Coram and Glasgow. Liquidating carriers have not been participating in such traffic, whereas protestant, a relatively small carrier, has augmented its facilities at considerable expense to provide service to the Hi-Line points and would be vulnerable to survivor's competition as a large carrier with attractive long-haul, single-line service. Thus protestant's ability to serve the smaller points would be lessened, to disadvantage of the public in the area; economy of that area will not sustain more than one carrier's service at the small points.—Garrett Freightlines, Inc.—Control and Merger, 87 M.C.C. 619 (625, 626)*.

However, survivor's local authority from Spokane to Kalispell should not be disturbed, since its service would be essentially no different from that now provided by liquidating carriers under common control. Restriction imposed will not affect survivor's authority to transport traffic between Portland and Great Falls through southern Idaho, or to provide local service between Spokane and Kalispell. —Id., pp. 625, 626.

Auxiliary, supplemental to other serviced, see NTP, n. 10 Restrictions.

Revocation, suspension, abandonment: [Vols. 12-14, 17-19].—The commission's finding, starting with its original report in control proceeding and continuing through its third and final report, that acquired carrier's self-conducted operations were not dormant appears to be supported by substantial evidence, and the mere presence of power of control over it by acquiring carrier does not negate such finding as a matter of law.—Alamo Exp., Inc. v. United States, 239 F. Supp. 694 (699)*.

There is no merit to argument that dorman-

cy should not be considered as a basis for cancellation of any portion of vendor's authority because it would tend to lessen the recovery of Internal Revenue Service, which had seized vendor's certificates for tax deficiencies. Under §6339(a)(2) of Internal Revenue Code of 1954, IRS acquired only such interest as vendor held in the rights, and, to extent that vendor's rights were dormant at time of seizure, they had already lost their transferability and value.—Public Serv. Coordinated Transport—Purchase—Royal Blue, 97 M.C.C. 56 (60).

It is normal for an irregular-route carrier to render only limited and sporadic service to some points, since such rights are used primarily for performance of a call-on-demand service; for this reason its operations must be evaluated over a longer than usual time, and a showing of service to every origin and destination area cannot be expected. To support a finding that its authority has been used actively and is not dormant, such a carrier need only show that it has rendered continuous and substantial service at a representative number of points in its authorized area. This test of substantiality is elastic, depending on the character of the area served in terms of population and industry, the nature of the traffic authorized, whether the rights are radial or nonradial, and whether the carrier's financial and material capabilities have been used as far as practicable.—Home Transp. Co., Inc.—Purchase—Chattanooga Transfer, 97 M.C.C. 173 (185, 187).

In ascertaining the scope of vendor's past operation under its right to transport machinery, equipment, and supplies used in operation and maintenance of industrial plants between Chattanooga and points within 175 miles thereof, the commission takes cognizance of the specialized and restrictive nature of the service authorized. While a substantial portion of its shipments moved to and from Chattanooga, as would normally be expected, the evidence shows in large measure that it has performed a sufficiently representative service, except to or from the small Mississippi area embraced in its authority, and that its call-on-demand service has been commensurate with its resources and facilities.—Id., pp. 185, 186, 187.

Moreover, a vendor is free to stimulate the use of its rights to make them more readily marketable, and it is only when the buyer influences such efforts that the commission will refuse to give weight to such increased activity; it must be clear that the buildup of the operations was free from control and domination by the purchaser. Vendee's joint handling of traffic with vendor to midwestern States preceded inception of the purchase negotiations, continued for a substantial period after initial negotiations ceased, and is attributable to the fact that it provided a practical route which eliminated circuity of vendee's single-line operations via Atlanta and East Point, Ga., gateways. Inception and continuance of the joint-line service was not related to any plan to facilitate approval of proposed purchase, and such movements may be given due consideration in resolving the issue of dormancy.—Id., pp. 186-7.

Since acquired carrier's use of its radial irregular-route authority reveals little or no service at Kansas points, other than Kansas City, which did not involve unauthorized cross-hauling, and evidence of such movements may not be considered in determining substantiality of its past service, its operations to Kansas points must be deemed to have been of such little competitive significance as to render them virtually dormant.—Southwest Frt. Lines, Inc.—Control—Direct Transports, 93 M.C.C. 439 (449).

That a preponderance of shipments of building and construction materials listed in vendor's abstract originated in Chicago is natural, since that is the largest city in the northern Illinois-northwestern Indiana territory served; and though no shipments to the Chicago area from other points in its territory are shown, it has been transporting building materials between a number of points in its territory. Since its authority is nonradial within a territorial boundary, the only question is whether substantial service to a representative number of points, involving a reasonably broad spectrum of authorized commodities, is established. It would be unfair to select, out of a nonradial service area, a single point and analyze operations to and from that point in a case where it was not, and upon approval would not be, the beginning or end of every

movement. No finding of general dormancy of vendor's rights is proper.—Steel Transp. Co., Inc.—Purchase—Barry Transports, 93 M.C.C. 773 (775-6).

In appraising substantiality of acquired carrier's past operations, interlined traffic is considered as having moved over its own line for the maximum distance permissible, since actual points of interchange are not shown; and that no interline movements to or from Wisconsin are shown is relatively insignificant in view of its active participation as an interline carrier otherwise, about one-seventh of its total shipments consisting of such traffic. Considering the specialized irregular-route nature of its operating rights, the number of shipments shown to each of the areas involved successfully rebuts any contention of dormancy.—Aero Trucking, Inc.—Control—Friedman Transfer, 93 M.C.C. 342 (350-1).

Abstracts of shipments submitted for acquired automobile carriers were designated as merely representative, but even a resume of all shipments, showing service as to both commodities and origin or destination points, would not warrant any further cancellation of their operating rights beyond that recommended by the examiner. It is generally required that service be shown as to each portion of a carrier's authority for it to be considered active and continuous, whether the transaction involves purchase, control, or merger; and where no need or reason is shown for revitalization of dormant rights by the acquiring party, particularly where protestants show that they would be adversely affected, cancellation of the dormant portion is required as a condition on approval. However, this is a flexible standard that varies with nature of the commodity transported, and under the test of substantiality irregular-route carriers of highly specialized commodities are not held to precisely the same standards as regular-route carriers of general commodities. —National City Lines, Inc.—Control—Automobile Carriers, 93 M.C.C. 683 (690).

Automobile carriers are highly specialized, usually providing service to a single shipper under any particular portion of their authority, sometimes subject to establishment or disestablishment of assembly plants at various locations, their status in that respect closely resembling that of a contract carrier; also, secondary authority is frequently granted at same time and as auxiliary to initial authority in order to enable the carrier to furnish a complete service. Examiner apparently concentrated on elimination of authorities never used and unlikely to be used, which were obtained in anticipation of plants or traffic that failed to materialize; and further cancellation based on limited traffic as to some origins or as to certain types of motor vehicles within the commodity classification is not warranted. —Id., p. 690.

Prior to May 28, 1960, vendor's authorized route between Jacksonville and Wilmington, N.C., was under lease to another carrier which operated one weekly trip thereover, and there is no showing that lessee ever transported any interstate passengers over the route or that the lease was submitted to and approved by the commission. On those facts, vendor's rights were dormant before that date, aside from fact that any interstate operations thereunder by lessee would have been unlawful. And though, after termination of the lease, vendor conducted one weekly round trip between those termini and a daily service between Wilmington and Southport, N.C., it reinstituted and continued such minimal operations, despite substantial losses, solely to meet the issue of dormancy and at a time when it was committed to sell the rights to vendee under an option which it considered binding. Whatever weight might be accorded evidence of that skeletal operation is discounted by the prior commitment to sell to vendee, and, under the circumstances, the involved rights must be found to have remained dormant after their return to vendor. —Carolina Scenic Stages—Purchase—Patterson, 97 M.C.C. 79 (89-90).

Although all but 15 of 243 movements shown in liquidating carrier's abstract of shipments were of exempt bulk commodities and included movements to or from points not authorized by its certificate, the minimal amount of service subject to regulation does not imply dormancy of the rights involved. While reasoning and conclusions in motor carrier cases involving transfer of dormant rights are applicable to water carrier cases, differences in nature of motor and water oper-

ations must be recognized; irregular character of the barge business and large number of exempt commodities which water carriers may normally transport must be considered. In the circumstances, the limited service rendered under liquidating carrier's rights does not require denial of proposed merger.—McAllister Bros., Inc.—Control and Merger, 317, I.C.C. 459 (464).

The commission has found, in proceedings specifically seeking revocation of operating rights on ground of dormancy, that where a carrier holds out to the public to provide the authorized service on demand, but there is no demand, the mere fact that it has not actually performed service is insufficient to warrant revocation of its authority. The only traffic within scope of acquiring carrier's authority to transport latex and other specified commodities is presently being transported by protestant, and shippers' satisfaction with protestant's service, coupled with dearth of other trafffic falling within scope of those rights, is largely responsible for their dormancy. As there is no showing that acquiring carrier is unable or unwilling, or has failed to hold itself out, to provide the service authorized by that certificate, there is no warrant for requiring revocation thereof as a condition on approval of control transaction.—Atlanta Motor Lines—Control—Atlanta-Asheville Motor, 93 M.C.C. 160 (164-5).

But while there is no showing that acquired carrier does not hold out to provide service under its duplicating authority, different treatment is accorded to attempted transfers of operating rights that are dormant due to lack of demand for the service. In §5 proceedings the commission has consistently found, in transactions involving acquisitions of control as well as in purchases, mergers, and consolidations, that where the rights sought to be acquired are shown to be dormant, for whatever reason, it is incumbent on applicants to show that the carrier proposing to acquire them would meet some transportation need not being met by existing carriers. In instant case no such showing has been made, and the coincidence that acquiring carrier already holds identical authority only supports the finding that it would be inconsistent with public interest to permit acquired carrier to retain its dormant authority in event of consummation of the transaction.—Id., p. 165.

Conditioning of purchase approval on cancellation of certain dormant operating rights for whose reactivation no need is shown is in no sense a prescriptive revocation of rights by the commission. Any cancellation of operating rights would be from those which vendor, under the purchase contract submitted, has agreed to convey, not from those stipulated for retention; and it would result entirely from applicants' voluntary action in consummating the transaction on the modified terms and conditions approved. Proceeding on that basis is consonant with all pertinent provisions of the act.—Knox Motor Service, Inc.—Purchase—K & A Truck Lines, Inc., 93 M.C.C. 26 (31, 32-3).

See also Long Transp. Co.—Control, n. 45 *Conditions imposed*,above.

In appraising the substantiality of vendors' past operations under their rights to transport machinery and commodities requiring specialized handling or rigging because of size or weight, the highly specialized nature of that service must be borne in mind; little repetitive or continuous traffic would move under such rights, and it is normal for a number of shipments to move between limited points during one period, and for no shipments to move between those points during a subsequent period. Such operations must be evaluated over a longer than usual time, and it cannot be expected that a full range of authorized commodities will have moved from every origin to every destination area. Under principles established or reaffirmed in cases cited, vendors are required to show only that they have rendered substantial service in transportation of a representative number of authorized commodities to a representative number of points in their authorized territory and have not abandoned service, in whole or in part, as to either commodity or territory.—Home Transp. Co., Inc.—Purchase—Clarkson, 93 M.C.C. 509 (519)*.

That vendors' movements of textile and related machinery and parts to and from points in the Carolinas were numerous and continuous is confirmed by protestant's tabulation of applicants' traffic exhibits; they also handled 131 such shipments to and from 13

scattered points in Virginia and 34 to or from 4 points in Alabama. While 62 of the Virginia, and all but 2 of the Alabama, shipments were transported about a year or more prior to the purchase agreement, in view of the specialized service provided and existence of later movements such traffic is not too remote in time to be considered as supporting evidence showing continuity and a general pattern of operations over a long period within the 4-State area.—Id., p. 519.

Exhibits also show that under their heavy hauling rights vendors transported 76 shipments of machinery and commodities requiring specialized handling or rigging, 51 prior to commencement of negotiations. Although 20 of latter shipments represented a nonrecurring movement of miscellaneous machinery to a South Carolina doll factory during a single month and may or may not have included textile machinery, and, except for one shipment originating in Alabama and one destined to Virginia, the remaining 31 all moved from midwestern or eastern origins to the Carolinas, such traffic, together with their transportation of textile and related machinery, some of which required special handling, constituted substantial service in transportation of a representative assortment of authorized commodities to a representative number of points in the 4-State area. Consequently there is no basis for limiting the rights to be transferred to textile and related machinery.—Id., pp. 519-20.

If carrier A's certificate were canceled it would cease to be a carrier as defined in the act and would no longer be unlawfully controlled or managed in common interest with carrier B, as found in 80 MCC 257. A's operations are confined to a limited class of commodities in the textile field and there are not very many origin-destination combinations common to its authority and B's general-commodity authority; thus, revocation of A's certificate would not eliminate a substantial, potential, independently controlled competitor of B. Since several protestants operate in area served by A and the textile market in that area is declining, it does not appear that the public would be inconvenienced or the public interest adversely affected by A's abandonment of service as one means of eliminating the §5(4) violation.—L. Nelson & Sons Transp. Co.—Investigation of Control, 93 M.C.C. 22 (23)*.

Vendors' heavy-hauling rights between points in Berks County, Pa., and West Virginia, Virginia, and District of Columbia are dormant when in 2½ years they transported only two shipments to latter area and none in reverse direction. No service was provided to or from Rhode Island, and though vendors handled 26 shipments to Massachusetts and Connecticut, 17 were interlined with vendee subsequent to entry into the purchase negotiations and are entitled to little consideration; even though heavy-hauling rights do not normally generate the same volume or frequency of shipments as general-commodity rights, only 9 outbound and 5 inbound to and from that area over a 2½-year period can hardly be considered an active operation. However, though of 49 shipments inbound and 2 outbound to and from Ohio 45 of the former moved west through Ohio in interline service to one destination from one consignor and therefore might be regarded as a single shipment, vendors' Ohio rights are found not to be dormant.—Aero Trucking, Inc.—Purchase—Kreitz, 93 M.C.C. 115 (121).

Reasons for a discontinuance of operations are not controlling in proceedings under §5.—Adley Exp. Co.—Control—McFaddin Exp., Inc., 93 M.C.C. 378 (384)*; reasons for failure to conduct operations have no bearing on question of whether carrier's rights are dormant.—H. Prang Trucking Co., Inc.—Purchase—Hyer Trucking, 93 M.C.C. 695 (698); furthermore, where question of dormancy is in issue, a mere "holding out" to perform service is not an acceptable substitute for actual operations, especially when evidence will not support conclusion that vendor actively attempted to secure traffic for transportation under the authority.—Willers, Inc.—Purchase—Kelly, 90 M.C.C. 21 (23; similarly, though vendor attributes sporadic nature of his operations to lack of calls for his service, his operating rights can only be found dormant when he transported no shipments during 6 months preceding filing of application, and only 3 interstate shipments in the preceding year.—West Nebraska Exp., Inc.—Purchase—Forsstrom, 87 M.C.C. 733 (736).

Though applicants formerly handled a sub-

stantial volume of automobile traffic in joint-line service, protestant's institution of plan I TOFC service between same points in collaboration with a railroad caused applicant's over-the-road traffic to virtually "dry up"; thus their failure to conduct active operations under the considered rights has been due to inability to secure traffic, not unwillingness to provide service. As they have continued to hold out to transport traffic under their joint-line arrangement, a finding that vendor has abandoned the purchase rights would not be justified.—Highway Transport Co.—Purchase—Dallas & Mavis, 90 M.C.C. 724 (728).

Vendor's general-commodity rights between Fitchburg, Mass., and described New Hampshire area are not dormant when he has served 6 or 7 shippers consistently and others occasionally and has never refused traffic tendered, and exhibits show that during periods covered he handled some 30 commodities of diverse nature; considering his limited facilities and territory, it cannot be considered unusual that there was no particular demand of him for transportation of additional commodities to or from New Hampshire or for service at additional points; he has rendered a continuous service to extent traffic was available at a representative number of points within his authorized territory.—United Transp. Co. of Rhode Island—Purchase—McCormick, 90 M.C.C. 201 (204).

Availability of traffic, nature of territory served, and sporadic nature of transportation needs of the oil industry, long recognized as valid reasons for limited operations, are considered in determining that vendor's heavy or cumbersome commodity authority between points in Texas and New Mexico, and its pipestringing authority, are not dormant despite its limited operations thereunder; however, those reasons may not be used as a crutch to bolster nonexistent operations, nor may conjecture or assumption be used in determining whether other portions of vendor's operations were active or dormant; there must be concrete proof of operations on which to base conclusions.—Belyea Truck Co.—Purchase—Ferguson Trucking Co., 90 M.C.C. 139 (147)*.

Although vendor's service to oilfields has been limited in certain instances and it has performed no stringing or picking up of pipe in connection with main or trunk pipelines in considered territory, there has been an almost complete absence of demand for such service in that territory for many months, and protestants likewise have rendered only limited pipeline service therein. Both vendor and protestants have maintained tariffs, insurance, and equipment and facilities necessary for pipeline operations and have solicited such traffic; vendor's inactivity has been due to scarcity of pipestringing jobs and inability to secure the few jobs available, not to any abandonment of its operating authority.—C & H Transp. Co., Inc.—Purchase—Tomlin Transp. Co., 90 M.C.C. 251 (254-5).

Although vendor's pipestringing activities have been somewhat limited, it transported and strung 106 shipments of line pipe in 1957, 1959, and 1960; whether such pipe was laid in a "main or trunk pipeline" as used in the Mercer description, or was to be used in transportation of petroleum products, is unimportant; the important thing is that vendor provided a service directly connected with the oil and gas industry, as contemplated by the Mercer case, and was equipped to and did provide service on large-diameter pipe normally used in main or trunk pipelines. Major pipestringing jobs are available only as pipelines are constructed, and there was little such construction in considered 3-State area during the 2 years preceding hearing; Mercer authority sold should remain intact, without cancellation of the pipestringing rights.—J. H. Rose Truck Line, Inc. — Purchase — Stanton Transp. Co., 90 M. C. C. 284 (290-1).

While no shipments are shown to or from York, Pa., under vendor's irregular-route rights between specified points in middle Atlantic States, a finding of dormancy as to that point is not warranted when performance of substantial operations under those rights is established.—Subler Transfer, Inc.—Purchase—Zanghi, 90 M.C.C. 911 (915).

While protestants contend that vendor has provided only limited service or none to certain points on its Montana intrastate routes, they do not contend that it has refused to handle, or has not solicited, traffic at those points; its failure to resume service between certain points prior to grant of temporary au-

thority to vendee does not of itself warrant finding that its corresponding proviso rights fell dormant; specific evidence of other service in the area during same period compels finding that each segment of its proviso rights north of Great Falls was in fact continued in use. Another segment involved a new route granted by the State commission; vendor took timely steps to implement proviso operations and inaugurate service, and its program was advanced without interruption by vendee; thus it cannot be said that those rights fell into such disuse as to require expansion by other carriers entitled to protection against a resumption of service by vendee.—United Truck Lines, Inc.—Purchase—United Freight Lines, 90 M.C.C. 337 (345-6).

Although evidence shows that liquidating carrier has conducted an active and substantial overall operation in area embracing many small agricultural communities, its operations must be examined in light of protestant's claim that portions of its rights were not used. Though it claims that it has never declined to serve the questioned points directly when so requested, and has served them through interline with local carriers, which is shown to be common practice in the general area, such a practice does not constitute service under its rights. And where it operated virtually with closed doors over a portion of its principal route, and provided no service whatever at intermediate points thereon, its rights are dormant as to such points.—Murphy Motor Freight Lines, Inc.—Control and Merger, 90 M.C.C. 535 (541, 542).

However, as a part of its overall operations it has provided some service at points at or near the ends of certain routes, and considering the low-density nature of the area embracing those and other intermediate points, a finding that its operations along those routes are dormant would not be warranted.—Id., p. 542.

As a rule, transactions involving disposition of operating rights are disapproved because of dormancy only where the evidence clearly shows that service from and to particular points and areas has been abandoned or discontinued for substantial periods of time.—Superior Trucking Co.—Purchase—Arthur Morgan Trucking, 90 M.C.C. 367 (370)*; similarly, where vendor's operating rights have not been used prior to purchase negotiations, a revitalization thereof during and after the negotiating period will not serve to activate the certificate. It is only where post-negotiation traffic reflects merely the continuation of pre-negoitation activities that the former traffic will be looked to in resolving the issue of dormancy.—American Red Ball Transit Co., Inc.—Purchase—Fallon, 90 M.C.C. 515 (519)*; and where no operations whatever are being conducted under the rights sought to be acquired, approval with resultant resumption of operations by another carrier would be consistent with public interest only on a clear showing of need for such service.—Deaton Truck Line, Inc.—Purchase—Magnolia Truck Line, 87 M.C.C. 674 (679).

Since operation under acquired carrier's radial authorities between La Grange, Ga., and points in Alabama and Georgia, respectively, is restricted by necessity of moving traffic between those States via La Grange, and transportation of traffic between points in extreme northern or southern portions of both States is unpractical owing to circuity, it was not a competitive factor on such traffic; however, it did conduct operations from points in those areas, and diversity of points from, to, and between which service is shown is sufficiently representative to establish substantial and continuous operations under its rights; conclusion that any portion of its authority is dormant is not warranted on the record.—Watkins Motor Lines, Inc.—Control and Merger, 90 M.C.C. 567 (583, 584).

Because of the specialized type of service vendor is authorized to render, it cannot be expected to operate with the same degree of regularity as carriers of general commodities. Vendor has not been shown to have refused any traffic offered, and in view of the volume of traffic transported during a 1-year period under considered portion of its rights, and the benefit to supporting shippers, evidence of traffic handled is sufficiently representative to show that it has rendered adequate and continuous service; a finding of dormancy and cancellation of those rights as a condition on purchase approval is not warranted.—C &H Transp. Co., Inc.—Purchase—Gulf Southwestern Transp., 90 M.C.C. 636 (640-1).

In order to resolve the issue of dormancy and not be misled by volume of traffic handled by vendor automobile-hauler, service actually rendered from each authorized origin must be considered, rather than its activities in the aggregate. And the nature of transportation needs of the automobile industry, long recognized by the commission as a valid reason for limited operations, is considered in concluding that vendor's rights, except those unexercised for periods upwards of 15 months prior to execution of purchase agreement, are not dormant despite the small amount of operations thereunder in some instances. However, the commission must have concrete proof of operations on which to base its conclusions, and applicants' argument that protestants also hold unused operating rights which they do not consider dormant does not support a finding that certain portions of vendor's rights are not dormant; nor may traffic generated subsequent to the purchase negotiations be considered in determining that issue.—Dealers Transit, Inc.—Purchase—Industrial Transit, Inc., 90 M.C.C. 873 (879-82).

When vendor transported only 10 shipments during year preceding filing of purchase application, the last one moving some 13 months before hearing, its operations must be considered dormant; protestant's transportation of 132 shipments over that entire period indicates that lack of movements cannot be attributed to seasonal nature of the commodity.—H.C. Gabler, Inc.—Purchase—Logan, 90 M.C.C. 436 (439).

Each case in which dormancy is an issue must be considered on its own merits. Regular routes of acquiring and acquired carriers are substantially duplicative between Lancaster, Pa., and New York City via Philadelphia, and since evidence warrants conclusion that latter's operations to and from points thereon are substantially dormant, it follows that full utilization of those rights under acquiring carrier's control would be tantamount to placing a new competitive operation in service between the points involved; decision in 65 MCC 312, distinguished. Since no inadequacy in existing service nor any need for new or additional service in New York City-northern New Jersey area is shown, approval of control on basis that would provide opportunity for full activation of that portion of acquired carrier's regular-route authority would be inconsistent with public interest.—Accelerated Transport-Pony Exp., Inc.—Control—Downing, 87 M.C.C. 711 (722, 723-4).

Routing practices: [Vols. 15, 18, 19].—See also Central Pac. Ry. Co. Control case, n. 45 *Conditions imposed*, above.

As a general rule, conditions should not be imposed unless they are clearly warranted by the record. Special routing conditions requested, which would require the Santa Fe to deliver to Southern Pacific at Texas junction points all westbound traffic originated on or moving over present lines of two subsidiaries it proposes to merge, when interchange junction is not specified by shipper, would require Santa Fe to short-haul itself on certain of its originated traffic, and cannot be justified in absence of a showing that they are necessary or desirable in public interest. Southern Pacific's competitive position will not be impaired by refusal to impose them; standard routing conditions imposed, which have generally been found adequate in merger cases, will afford uniform and adequate protection for all competing and connecting carriers by requiring Santa Fe to ensure continued maintenance of all routes and channels of trade via existing junctions and gateways.—Atchison, T. & S.F. Ry. Co. Merger, 324 I.C.C. 254 (256, 259).

Under findings in 286 ICC 373 that Peoria & E. Ry., as a nonoperating carrier, need not be a party to published joint rates, and that for purposes of rates and divisions commonly controlled and operated carriers should be treated as one system, New York Central, which operates the Peoria, must be considered the originating and terminating carrier on traffic over latter's line. As the Peoria has prospered in recent years under existing divisional arrangements, requested condition on Central's continued operation of its line, requiring routing of certain eastbound traffic via the Pennsylvania beyond Indianapolis to provide greater divisions to the Peoria, which would short-haul Central in violation of §15(4), should not be imposed under §5(2).—Cleveland, C., C. & St. L. Ry. Co.—Operating Agreement, 320 I.C.C. 430 (435-6).

In addition to standard conditions for preservation of through routes, special conditions which will create new through routes between Florida points on applicants' lines and the North and between such points and Birmingham and Montgomery, Ala., via Jacksonville, Fla., are imposed on merger of Atlantic Coast

Line into Seaboard Air Line, to minimize competing carriers' losses from diversion of interchange traffic and enhance their retaliatory powers. Opening of the Jacksonville gateway to Southern Ry. system on all traffic on a reciprocal basis will create new avenues of traffic for members thereof and their connections; also Illinois Central and Gulf, M. & O.R., which compete outside applicants' territory with Coast Line's subsidiary Louisville & N.R., and which could suffer substantial diversionary losses if the merged company close to favor L & N, will have available fully competitive reprisal routes.—Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122 (172-7, 181-3, 208-9)*.

Though Florida East Coast is now enjoined by outstanding court order from attempting to influence routing north of Jacksonville of traffic originating or terminating on its lines, the order provides for modification of that provision by the court or the commission; in view of the changed conditions resulting from the required opening of the Jacksonville gateway to the merged company's competitors, East Coast can be expected to take the necessary steps to secure removal of that restraint, which would revive its retaliatory power. Availability of new through routes in connection with Southern system lines, and fact that most fruit and vegetable traffic originates in the Florida area served by East Coast exclusively, give it a potentially strong reprisal weapon to use if the merged company should attempt to divert an excessive amount of traffic from it.—Id., pp. 175, 181, 208-9.

As Norfolk Southern serves 8 points competitive with Coast Line and 8 competitive with Seaboard, and as it is a financially weak, low-density carrier serving a predominantly rural area, interchanging the bulk of its joint-line traffic with those roads, without special protective conditions it would suffer substantial losses from diversion as result of their merger. Imposition of condition, effective only so long as Norfolk Southern remains an independent railroad, requiring the merged company to establish new through routes and joint rates with it via Wilson, Fayetteville, and Raleigh, N.C., is warranted. While that condition could conceivably provide Norfolk Southern more traffic than the volume actually needed to recoup its diversionary losses, it will not unduly affect the merged company, as such traffic will be subject to latter's solicitation efforts.—Id., pp. 177-8, 185, 209.

Since §203(a)(10) defines "interstate commerce" as including commerce between places in the same State through another State, vendee holding certain interstate but no intrastate authority within Pennsylvania could, after purchase of operating rights between Philadelphia and four New Jersey counties, transport Pennsylvania-to-Pennsylvania traffic via New Jersey unless a restriction is imposed on the unified rights. The test to be applied in such situations is the bona fides of the operation performed. Assuming a bona fide operation, the courts have held that a carrier may not be required to desist from serving two points in one State by conducting operations through another State. But where a carrier uses such a method of routing traffic as a subterfuge to evade State regulation of transportation of intrastate traffic, the operations have been held to be an abuse of its certificate, and the carrier, following appropriate proceedings brought for the purpose, may be required to cease and desist from such operations.—Evans—Purchase—Pocono Motor Freight Term., Inc., 97 M.C.C. 144 (148).

While vendee disclaims any intention to use the unified rights to transport Pennsylvania-to-Pennsylvania traffic, the rights now contain no prohibition against the institution of such operations by him or by any successor in interest. Should such operations by commenced, and protestants, the Commonwealth of Pennsylvania, or the commission were to challenge their bona fides, time-consuming procedures and perhaps extensive litigation would be required. Therefore, and in view of the Supreme Court's holding that if the State believes such an operation to be a subterfuge to escape its jurisdiction it should first file complaint with the commission under §204(c), and since vendee is agreeable to an appropriate restriction, purchase approval is conditioned to prohibit vendee from engaging in transportation between two points in Pennsylvania over interstate routes. But such restriction should not be construed as a limitation on vendee's right to apply to the State regulatory body for intrastate authority.—Id., pp. 148-9.

Louisville & Nashville's refusal to join in TOFC rates with Illinois Central via Martin, Tenn., interchange violates condition on approval of its merger of Nashville, C. & St. L. requiring preservation of all existing routes and channels of trade, also commission's in-

junction not to curtail right of industries on the Nashville to route traffic over any or all existing routes; 313 ICC 191 held that those conditions attach to subsequently established rates, and to joint rates. TOFC service does not require new routes merely because it employs new type of equipment, and the routes via Martin are open; L & N's refusal prevents commodities and traffic, for which through boxcar and other rates via Martin existed at time of merger and still exist, from moving as TOFC freight via that junction. Proceeding held open for 60 days for receipt of advice that L & N has complied with the prescribed condition, otherwise the matter will be further considered.—Rates, TOFC, between Midwest & South—Louisville & N.R., 318 I.C.C. 40 (43, 44).

Securities: [Vols. 12, 14, 16-19].—Although authorizations of an acquisition of control and of issuance of securities in partial payment of the consideration are governed by different statutory requirements and principles, and it may be desirable as a matter of administrative housekeeping to segregate them by separate docket numbers, they are one proceeding, and disposition of each must be read in light of the other; express deficiency of one may be overcome by express or implied conclusions in the other, or express grant in one may be markedly affected by an implied condition in the other. Approval under §5 of the "proposed" transaction must necessarily take into account the method of financing, and approval under §214 of the issue of securities necessarily takes into account the occasion for such financing; they are interdependent.—Walker v. United States, 208 F. Supp. 388 (392)*.

The court interprets as a single determination the commission's reports (1) authorizing control by carrier Central of a carrier and one noncarrier and issuance of promissory notes in amount of $750,000 to complete payment for their stock, also control of a second noncarrier by Callan (Central's controlling stockholder) as assignee of its rights under original agreement, and (2) authorizing Central (upon payment of the amount to it by Callan) to issue a note to plaintiff for $450,000 to complete payment for his stock in the noncarrier acquired by Callan, thus clothing Central with full authority and financial means (through Callan) to comply fully with its obligations under the original agreement; requirement of the law for §5 and §214 approval is thus satisfied; no further commission approval is needed.—Id., pp. 393, 396.

Though applicant proposes to finance purchase of carrier's stock through issuance and sale of bonds, it has not shown that this would be feasible without sale of its bonds on reasonable terms. As it will be required to buy shares of minority stockholders on same terms as under its agreement with the majority stockholder, final approval of control transaction should not be granted until the commission is assured of its ability to obtain on reasonable terms the funds necessary to acquire stock offered it by minority stockholders, as well as to consummate its agreement. Entry of order is therefore withheld pending applicant's making of necessary financial arrangements and granting of such authority as may be required under §20a.—Southern Ry. Co.—Control—Central of Georgia Ry. Co., 317 I.C.C. 557 (558, 560)*.

As recent increase in survivor's notes payable indicates possibility that the statutory limitation on its issuance of securities without prior commission approval may have been reached, approval of proposed merger is conditioned against construing it as authorizing issuance of additional capital stock within meaning of §214, if approval thereunder is required.—Atlas Van-Lines, Inc.—Control and Merger, 93 M.C.C. 570 (576).

Approval of merger of liquidating carrier into a new company is based on express understanding that it will take place immediately upon consummation of liquidating carrier's merger of an existing subsidiary, thereby eliminating necessity for it to seek or obtain authority to issue securities or assume obligation under §214.—All States Freight, Inc.—Merger, 90 M.C.C. 51 (56).

Without passing on whether execution and delivery of "acknowledgement of indebtedness" equal to net book value of assets acquired by vendor, payable on demand in whole or in part after 1 year from consummation of purchase, would constitute issuance of a security within §20a, as no application for authority therefor has been filed, purchase authority should not be construed as authorizing such issuance if authority is necessary under §214.—Santa Fe Trail Transp. Co.—Purchase—Santa Fe Transp. Co., 90 M.C.C. 123 (125).

Should it prove impractical or impossible for vendee to pay the purchase price out of

current funds as contemplated, purchase approval is not to be construed as authorizing issuance of any securities or assumption of any obligations in connection with the purchase which might be subject to §214, or the use of funds obtained under bank loans previously approved by the commission.—Helm's Exp., Inc.—Purchase--Keystone Transfer Co., Inc., 90 M.C.C. 679 (686).

Although on giving-effect balance sheet date survivor in proposed merger would have had capital stock and long-term obligations represented by securities within meaning of §214 that would not exceed the $1,000,000 exemption therein, should circumstances change so that at time of consummation the total amount of its securities outstanding, plus those to be assumed, would exceed $1,000,000, approval of the transaction should not be construed as authorizing such assumption or as approving consummation of the transaction without survivor's first having secured the commission's approval under that section.—M & G Convoy, Inc.—Purchase—Great Lakes Forwarding Corp., 90 M.C.C. 693 (698)*.

Following disapproval of original calling for applicant Central to issue promissory notes aggregating $1,500,000 to finance acquisition of control of a carrier and two noncarriers, Central assigned the contract for acquisition of one of the noncarriers (W & H) to its controlling stockholder, Callan, and proposed to finance acquisition of the other two companies by issuing notes for not over $750,000; approval of the proposal as thus modified did not authorize issuance under §214 of the $1,500, 000 notes called for by the initial contracts, since Central no longer sought such authority, but approved issuance only to a maximum of $750,000, and contemplated Callan's acquiring control of W & H as assignee of Central's obligation to purchase that company's stock; Central may not acquire W & H's stock by cash purchase, since that would depart substantially from the terms and conditions approved.—Central Freight Lines, Inc. —Control—Alamo Exp., 90 M.C.C. 96 (97, 99-100)*.

Apparently relying on the assignment as removing need to issue note for $450,000 called for by original agreement to complete payment for W & H's stock, Central did not seek authority therefor in the control proceeding, but now seeks such authority under §214, the proposed note to be issued only after payment of its full face value in cash to Central by Callan. Though no part of the transaction may be lawfully consummated without consummation of the entire transaction as authorized, Callan's acquisition of control of W & H may be consummated either through his direct purchase of its stock or through use of Central's note; proposed note authorized, in addition to all other outstanding authority to consumate the transaction.—Central Freight Lines, Inc., Note, 90 M.C.C. 246 (247, 249)*.

Although survivor, a noncarrier which would become a carrier upon consummation of proposed merger, unlawfully issued $300, 000 capital stock which is void because unauthorized, such issuance was under mistaken impression that it was not within commission's jurisdiction, and since survivor concurrently seeks authority under §214 to issue new stock to replace the void stock, disapproval of applications because of the law violation is not warranted.—Continental Tenn. Lines, Inc.—Control—Tennessee Coach, 87 M.C.C. 775 (779).

Separate agreements: [Vol. 19].—When plaintiff's petition for reopening of control proceeding (which attacked one of conditions imposed on control approval in 1923 and the agreement subsequently entered into between parties therein which embodied all the conditions imposed) raised issues relating to preferential solicitation and distribution of traffic between the control applicants, validity of the agreement as well as actions of the parties thereto should have been passed on by the commission in the reopened proceeding. Alleged preferential solicitation was attacked under several sections of the statute and the antitrust law; origin and authority for those practices being contained in both the challenged condition and the agreement, there was only one general issue before the commission; and the examiner developed all issues raised and received evidence thereon. Following decision in 376 US 375, the commission should have disposed of the entire matter; it should not have limited the issues on procedural grounds by considering the challenged condition separately, on the ground that attacks based on other sections of the act were not properly before it. Remanded.—Denver & R.G.W.R. Co. v. I.C.C., 229 F. Supp. 249 (251, 253-4)*.

Although New York Central and Pittsburgh

& Lake Erie have withdrawn their objections to Pennsylvania's proposed acquisition of stock control of Lehigh Valley, primarily because of filing of application for their merger with Pennsylvania, a considerable time may elapse before consideration of the merger application and even then the results are in doubt; public interest therefore requires that those carriers be considered.—Pennsylvania R. Co.—Control—Lehigh Valley R. Co., 317 I.C.C. 139 (147).

Although Reading Co.'s purchase of Lehigh & S.R. System is subject to Jersey Central's continued lease of the properties for a 35-year period, with the former owner continuing to receive the basic annual rental, purchase agreement provides that if the basic lease is terminated at any time during that period the parties will enter into a "Line Agreement" under which the Reading would have election to nonexclusive right to use the portion between Allentown, Pa., and Phillipsburg, N.J., and the former owner would be compensated on basis of a percentage of the salvage value of the line. However, while it appears to be the intent that the Line Agreement will be executed upon closing of purchase, effect thereof and of termination of the basic lease on rights and obligations of the parties is not clear; therefore, purchase approval should not be taken as approving any terms of the Line Agreement or modification of the basic agreement without the commission's prior approval.—Reading Co.—Purchase—Lehigh & S.R. System, 317 I.C.C. 633 (637).

See also Chicago & N.W. Ry. Co. v. Brotherhood of Locomotive Engineers, n. 70, above.

The commission's jurisdiction extends to the entire transaction and to all its terms and conditions, and that jurisdiction cannot be defeated by execution of separate contracts among the same parties, only one of which is presented for approval. Instant record contains the one and only agreement on which the commission's affirmative action is based, and the commission cannot be influenced in its decision by correspondence, not of record, which may have been interchanged by the parties and the commission after the record was closed. However, applicants are forewarned that approval does not extend to any other agreement concerning the transaction, if such there be; consummation must be predicated on the agreement of record contained in the application and presented at the hearing.—Atlas Van-Lines, Inc.—Control and Merger, 93 M.C.C. 570 (575).

Noncarrier company controlled by acquiring carrier's stockholders, which concurrently seeks authority to acquire stock control of acquiring carrier and through it indirect control of six subsidiaries including acquired carrier, by a separate agreement would acquire stock control of acquired carrier's present parent company and thereby indirect control of latter's three remaining subsidiaries. Since consummation of the second agreement is dependent on consummation of acquiring carrier's control of acquired carrier, the transaction is entirety is subject to the commission's jurisdiction, notwithstanding the separate agreements.—Mason & Dixon Lines, Inc.—Control—Silver Fleet, 90 M.C.C. 829 (833-4).

Five days before consummation of authorized control of two carriers engaged in armored-car operations, acquiring noncarrier agreed to restrictions suggested by Department of Justice on number of armored-car vehicles that would be operated in New York City, Newark, Buffalo, and Boston, in order to avoid long-drawn out court proceedings which it feared the Department would institute and which would delay the ultimate unification now proposed. While applicants submit that terms of the agreement are not to take effect without the commission's prior approval, the legal implications thereof, and whatever limitations applicants may have thereby imposed on themselves, are not for determination in unification proceeding.—Pittston Co.—Control—Brink's Armored, Inc., 87 M.C.C. 637 (649, 650-1).

Stock transactions: [Vols. 14, 17-19].—Although, effective upon approval of trackage agreement, the Milwaukee will acquire an option to purchase 29 percent of stock of Indiana Harbor Belt from New York Central at same price paid therefor by Central to the North Western, approval of that agreement is not to be construed as approving such stock purchase by the Milwaukee, which would give it a 49 percent stock interest in the Har-

bor Belt; if the option is to be exercised, prior supplemental authority must be obtained.—Chicago, M., St. P. & P.R. Co. Trackage Rights, 317 I.C.C. 14 (17)*.

Though incorporated in the same written instrument, provision for sale to New York Central and Harbor Belt of latter's stock held by the North Western is not a term or condition of proposed acquisition of trackage rights over the Harbor Belt's tracks by the Milwaukee and the North Western; transfer of the stock was not made contingent on the acquisition of trackage rights, or vice versa, and consideration paid by Central and Harbor Belt for the stock is not related to the charges to be paid by the Milwaukee and the North Western for the trackage rights. Thus, transfer of the stock was not an unlawful partial consummation of the trackage-rights transaction.—Id., 317 I.C.C. 550 (551-2)*.

But whether Central's acquisition of an additional 19 percent of Harbor Belt's stock, thus raising its direct or indirect ownership to 79 percent of the total outstanding , results in such a significant increase in its power to control the Belt as to bring the acquisition within purview of §5(2)(a) or §5(4) cannot properly be determined on present record; therefore, unless the situation changes or application is filed by Central, consideration will be given to institution of investigation under §5(7).—Id., p. 552.

Approval of purchase of vendor's interstate operating rights and brokerage license for a cash payment and 950 shares of vendee's 5-percent cumulative, nonvoting preferred stock is subject to condition requiring vendee to redeem the preferred stock to be issued within 10 years from date of issuance.—Shamrock Van Lines, Inc.—Purchase—Reely, 93 M.C.C. 455 (461).

See also U.S.A.C. Transport case, n. 45 *Violations of §5(4)*, above.

Temporary authority: [Vols. 12, 14-17, 19].—Since a new service could evolve after unification, the commission must determine whether compensatory benefits which would result from allowing the unification of vendor's and vendee's operating rights would outweigh the possible adverse effects on services and operations of competing carriers; and evidence of service rendered by vendee under temporary authority, although not conclusive, is admissible and properly to be considered with the other evidence in determining whether the transaction will be in the public interest.—Hove Truck Line—Purchase—Maurer, 97 M.C.C. 361 (369).

See also Hudson Transp. Co.—Purchase—Hillside Freight Lines, n. 115, below.

Examiner correctly concluded that vendee's application for temporary authority under §210a(b), predicated on claim that failure to grant such authority would result in destruction of vendor's operating rights, which were in fact dormant at the time, was fraudulent, and applicants did not except to such finding but filed affidavits attesting to termination of the temporary operations. In absence of objection such affidavits are incorporated in the record and considered as notice of voluntary termination of operations under §210a(b).—Calore Exp. Co., Inc.—Purchase—T.W. Waterman Co., 93 M.C.C. 291 (296, 297).

Extent to which acquiring carriers, under authority for temporary control through management, may reasonably take action to consolidate acquired carrier's general offices, terminals, and traffic and accounting functions with their own is a matter for their discretion, since they are forewarned that the order of approval issued under §210a(b) is not to be construed as creating any presumption as to the action which may be taken on the related §5 application.—Mason & Dixon Lines, Inc.—Control—Silver Fleet, 90 M.C.C. 829 (848).

A carrier which is temporarily leasing operating authority under §210a(b) may combine the leased rights with its existing permanent authority to provide a through service under the temporary unification, and may properly advertise the availability of the unified service, provided its tariff correctly identifies the leased authority.—Pilot Freight Carriers, Inc.—Purchase—Bison Fast Freight, 90 M.C.C. 709 (712).

Evidence of longstanding operations under temporary authority affords a means of establishing whether the unified operations have had any detrimental effect on protestants; when protestants have adduced no evidence to show effect, if any, on their operations of

vendee's service under temporary authority for a 4-year period, but merely express apprehension that they may lose some traffic to vendee after consummation, the improved service provided by vendee under the temporarily unified rights, together with shippers' expressed need therefor, warrants conclusion that public interest would be best served by its continuance on a permanent basis.—Ashworth Transfer, Inc.—Purchase—Willcoxon and Fowkes, 90 M.C.C. 107 (111)*.

Operations under temporary authority may properly be considered in determining whether a transaction would be in public interest, particularly where they are of long standing and afford a means of determining whether resulting unified service has had any destructive effect on protestants' operations. Protestant introduced no evidence to show effect, if any, of survivor's and its predecessor's control of liquidating carrier through management for over 5 years, but merely expresses apprehension that it might lose some traffic after consummation of merger. Considering the improved service provided during the temporary control, and supporting testimony of representative of a competing railroad that the merger would tend to stabilize existing transportation conditions, evidence as a whole warrants conclusion that public interest would best be served by continuance on a permanent basis of the unified service presently performed under temporary control. Merger approved.—Midwest Transfer Co. of Ill.—Control—Chamberland's, 90 M.C.C. 503 (508)*.

While grant of temporary authority for control of a carrier effectively terminates any unlawful control thereof that may have existed, it may not properly be construed as indicating that the commission either condoned or sanctioned any unlawful acts of the parties.—Central Freight Lines, Inc.—Control—Inland Motor, 90 M.C.C. 777 (786)*.

See also McFaddin Exp., Inc. v. Adley Corp., and Three "I" Truck Line, Inc. v. I.C.C., §210a, n. 1.

Transfer of operating rights: [Vols. 12-19].—Although the record shows that vendor has operated under soleproprietorship "grandfather" rights for many years and acquired a partnership interest in additional operating rights, and jurisdictional finding that transfer of the partnership rights to a successor corporation was not subject to §5 was made without knowledge of his individual carrier status, that jurisdictional question is merely collateral to the main issues in purchase of his individual rights and need not be determined in view of denial of the purchase on its merits; however, the matter will be given further separate consideration.—U.S. Van Lines, Inc.—Purchase—Holien, 90 M.C.C. 657 (661-1).

Violation of act: [Vols. 12-19].—Since it appears that carriers under unlawful common control may have commingled shipments in same vehicle and may have violated the lease-and-interchange regulations, the parties are warned that approval of proposed control transaction and lawful continuance of the common control would not make it lawful to engage in such practices.—West Bros., Inc.—Investigation of Control, 97 M.C.C. 125 (132).

While transactions accomplished in violation of §5(4) have sometimes been approved, especially in early days of motor carrier regulation, where it was shown that the parties had acted in good faith, perhaps without sound legal advice, and where they established by proper evidence that but for the law violation the transaction would be consistent with public interest for the future, as motor carrier law has matured transactions have been more consistently denied where the unlawful activity has been perpetrated by persons long acquainted with such law and with proceedings before the commission, and who know or should know the seriousness of their unlawful conduct and the commission's attitude toward it. See 75 MCC 45 and 80 MCC 257.—Ship-By-Truck Co. v. Crouch Bros., Inc., 93 M.C.C. 89 (102).

Applicant-respondents' deliberate and brazen attempt to mislead the commission, and the techniques employed, including filing of false or fraudulent applications under §5 and §210a(b) and submission of false exhibits supported by forged freight bills and false testimony under oath, are not only an affront to the commission but subversive of the entire regulatory process, requiring strong measures to ensure that there will be no recurrence of the flagrant violations of law and willful misrepresentations to which the commission has

thus been subjected. Neither the voluntary termination of operations under temporary authority nor termination of purchase agreement provides full assurance that vendee's unlawful control and management of vendor has been eliminated and will not be reinstated. Therefore, in addition to entry of cease-and-desist order, the Bureau of Inquiry and Compliance is instructed to consider criminal proceedings respecting the violations disclosed. —Calore Exp. Co., Inc.—Purchase—T.W. Waterman Co., Inc., 93 M.C.C. 291 (297, 298).

A transaction may be approved notwithstanding a law violation, where the parties have acted in good faith, or without sound legal advice, and where they have established by proper evidence that the transaction, except for the violation, would be consistent with public interest.—United States Van Lines, Inc.—Purchase—Bell, 90 M.C.C. 362 (365).

Regardless of whether or not an investigation under §5(7) has been instituted, it is entirely proper, in determining whether a proposed transaction is consistent with public interest, to consider matters bearing on possible prior unlawful operations.—Hart Motor Exp., Inc.—Control and Merger, 90 M.C.C. 527 (532)*.

Unauthorized consummation of transactions requiring the commission's prior approval under §5 impedes it from discharging its duties under the act; and approval of transactions already unlawfully consummated has usually been granted only where overriding public interest has been found so to warrant. —Seattle Transfer & Stor. Co.—Control—Mountain Road, 90 M.C.C. 15 (18).

Considered transaction is the third which applicant has unlawfully effected; report and order in the first case, approving his control of a carrier despite the law violation, should have been sufficient notice that prior approval is necessary whenever control of another carrier is proposed; yet instant control transaction was completely consummated despite finding in intervening purchase proceeding that a violation of §5(4) had again occurred; and, notwithstanding opportunity afforded by §210a(b) for temporary operation of carriers in financial distress, he waited at least a year after the unlawful consummation before filing instant application. Evidence is not persuasive that public interest requires approval; denied.—Id., p. 18.

While in the past transactions accomplished in violation of §5(4) have sometimes been approved where the parties acted in good faith and established by proper evidence that the transaction would otherwise be consistent with public interest for the future, as motor carrier law has matured approval has been consistently withheld where the unlawful activity has been perpetrated by persons long acquainted with the applicable law and proceedings before the commission, and who know or should know the seriousness of their unlawful conduct and the commission's attitude toward it.—Kaplan Trucking Co.—Control—Thomas Boyd, Inc., 90 M.C.C. 419 (426, 427)*.

Similarity of prior transactions whereby liquidating carrier's sole stockholder, a practitioner before the commission for many years, acquired operating rights and contracted for their sale to survivor barely a year later, and present proposal to sell liquidating carrier's stock for merger purposes, professedly because of his advanced age although he had not hesitated to acquire it the year before, makes clear that he is either trafficking in operating rights, which the commission has long disapproved, or is acting as accommodation party for survivor, which is unlawful. Applicants have already been brought under common control in violation of §5(4); considering experience of the principals involved with motor transportation law and the commission's requirements, such violation should not be blessed by approval of proposed merger.—Id., pp. 424, 427.

While examiner's report in proceeding whereby acquiring carrier in instant proceeding acquired control of another carrier disclosed elements of prior unlawful control of those two carriers by individual applicants, such violations were found not to have continued and are not properly before the commission in instant control proceeding.—Colonial Motor Freight Line, Inc.—Control—Central, 90 M.C.C. 441 (443).

Shipments between points in the Carolinas and points in Ohio, under vendor's authority

between the Carolinas and Parkersburg, W. Va., were transported, for the Ohio portion of the movement, in vendor's equipment under purported lease to an Ohio interstate carrier; no inspection was made at the claimed interchange point, although the driver, who remained on vendor's payroll, attached a placard to the tractor while in Ohio. The Ohio carrier had no knowledge of the shipment for several days and performed no service except permitting use of its rights. Such lease arrangement was clearly unlawful, and shipments transported thereunder cannot be considered as evidence of operation by vendor under the West Virginia rights.—Pilot Freight Carriers, Inc.—Purchase—Bison Fast Freight, 90 M.C.C. 709 (717-8).

111. Procedure, generally.—In considering whether the commission abused its discretion by denying motion of intervening railroad (plaintiff) to consolidate the North Western-Great Western merger proceeding with proceeding in NW's application to merge with the Milwaukee, the court recognizes that the statute does not explicitly require consolidation. However, §17(3) requires the commission to conduct its proceedings in a manner that will best contribute to the proper dispatch of business and the ends of justice; and defendants recognize that a refusal to consolidate may not prejudice a substantial right of any party to the proceeding or preclude the commission frmm properly performing its responsibilities under §5(2). And, in light of the Supreme Court's discussion of the consolidation issue in 386 U.S. 372, it seems that, although not required by law to consolidate all regional merger proceedings, the commission is required to impose those protective conditions which are necessary to survival of affected railroads before permitting a merger to proceed.—Soo Line R. Co. v. United States, 280 F. Supp. 907 (910-12)*.

There is merit to plaintiff's contention that consolidation of the pending Midwest mergers would have permitted (1) more thorough consideration of their overall effect on the area served, (2) better assessment of cumulative effects thereof, and (3) a better basis for judicial review. However, the commission did not require consolidation and the reviewing court can do so only if the commission's failure to do so was an abuse of its broad discretion; and, in making that determination, the court must of necessity, though with reluctance, give weight to the commission's argument that requested consolidation would cause a serious delay. Considering all the facts of record, and the fact that the Supreme Court has not held that the commission must consolidate all current and related merger proceedings, the court finds that refusal to do so in this instance was not an abuse of discretion.—Id., pp. 912, 913.

Although examiner found in investigation proceeding that vendee in instant purchase proceeding had performed unauthorized transportation and exercised control of two other carriers in lease and interchange arrangements contrary to provisions of §206(a), decision in instant proceedings need not be held in abeyance pending final decision in the investigation, which is an entirely separate and unrelated proceeding. Moreover, the matters at hand deal in large part with scope of rights of another carrier (vendor), and it is in public interest that it be formally informed as to the limitations on its rights without delay.—Home Transp. Co., Inc.—Purchase—Chattanooga Transfer, 97 M.C.C. 173 (189).

Motion to strike certain statements and references in applicant's reply to protestant's exceptions, denied; though they are admittedly outside the record and cannot be considered or given weight as evidence, they are also to some extent permissible assumptions presented in argument and raise no issues serious enough to warrant formal striking.—National City Lines, Inc.—Control—Automobile Carriers, 93 M.C.C. 683 (688-9).

There is no merit applicants' motion to strike portions of protestants' replies to their exceptions, on ground that protestants filed no exceptions and now seek, in guise of a reply, to argue issues beyond those considered in examiner's report; protestants' filing of exceptions after having won a decision from the hearing examiner would be a vain act tending to unnecessary prolongation of litigation. And though applicants request that, if those matters are not stricken, they be permitted to reply thereto, their proposed reply is directly contrary to rule 1.23(a) of Rules of Practice, which prohibits a reply to a reply,

and is therefore unacceptable.—Illinois-California Exp., Inc.—Purchase—Salt Lake-Kanab, 97 M.C.C. 38 (44-5, 46).

Applicants' motion to strike protestant's allegations in reply as exceptions not timely filed is without merit. Rule 1.87 of Rules of Practice, governing objections to an examiner's ruling on evidence, provides that an objection made at hearing may be pressed in the reply to exceptions; the present circumstances are appropriate for applying that part of the rule. Filing of exceptions merely to avoid waiver of an objection, after having won a decision from the hearing examiner, would be a vain act tending toward unnecessary prolongation of litigation, contrary to well-recognized judicial policies. Notwithstanding any previous decision to the contrary, in circumstances of instant proceeding protestant's objection was properly raised in the reply to exceptions and was not tantamount to an untimely filed exception.—Reading Transp. Co. —Control and Merger, 93 M.C.C. 11 (17).

112. Hearing; notice.—[Vols. 14-19].—See also Walker v. United States, §16(6), n. 1.

Lower court erred in concluding that the commission's denial of further hearing sought by appellees (protestants in commission proceeding) following execution of final nonexclusive operating agreement between applicant railroads and the Chicago Port District, which was part of proposed overall plan of extension of direct rail service to and within the Port District, constituted denial of due process to appellees. Changes in proposed lease agreement which the commission approved without a further hearing (deletion of objectionable exclusive right to operate clause and a more favorable formula for determining annual rental to be charged by the Port District) were insignificant compared with former agreements; appellees (though invited) refused to participate in negotiation of the contract, were not bound thereby, and had ample opportunity and did present evidence as to reasonableness of the rental charges; under the circumstances, therefore, appellees were not entitled to another hearing. judgment reversed and case remanded with directions to sustain the commission's orders.—Illinois Central R. Co. v. Norfolk & W.R. Co., 385 U.S. 57 (63-5, 73-5)*.

Plaintiffs' general allegations of being deprived of a constitutional right to a hearing before the commission merely for the sake of a hearing, without specifying particulars which made a hearing necessary and without showing how or in what way they have been injured, do not warrant setting aside the commission's finding that public interest did not require a hearing in considered railroad merger proceeding. Such finding is authorized by statute, is supported by substantial evidence, and is not arbitrary or capricious; moreover, though plaintiffs did not file a protest, the commission considered matters set forth in their letters in determining employee-protective conditions that should be imposed in connection with approval of the proposed merger. Commission's orders sustained.—Day v. United States, 264 F. Supp. 689 (691-3)*.

Whether hearings should be consolidated is a matter committed to the discretion of the administrative agency. In disposing of Chesapeake & Ohio's application to control Baltimore & Ohio without waiting for completion of hearings on applications pending before it for merger of other eastern railroads the commission did not abuse its discretion in that regard.—Broth. of Maint. of Way Employees v. United States, 221 F. Supp. 19 (29)*.

Ommission of hearing on trackage rights application, and finance board's alleged failure to state in its report on further consideration that hearing was unnecessary, did not constitute reversable error. In its original report the board concluded that hearing was not necessary in public interest, and its report and order on further consideration incorporated the prior report and order together with its conclusions. There is no requirement to repeat verbatim rulings made in a prior decision.—Chicago, M., St. P. & P.R. Co. Trackage Rights, 317 I.C.C. 550 (553)*.

Nor did grant of application without hearing deprive any opponents of their right to cross-examine and introduce evidence. Labor association's petition to intervene sought only to protect affected employees by imposition of appropriate conditions, and it did not request hearing then or when applicants sought reconsideration of the initial decision. The board considered effect of the transaction on

employees and imposed protective conditions, at which time no formal opposition had been registered. Thus it is evident that the association acquiesced in the determination and that all necessary facts were before the board.—Id., p. 553.

See also Seaboard Air Line R. Co. Merger, §17(6), n. 15.

Labor union's request for continuance of hearing to permit it to prepare its cross-examination of applicant's witnesses and offer rebuttal testimony was properly denied. The union was granted leave to intervene nearly 3 months before the hearing and was properly served with the required notices and orders. It has appeared in numerous railroad unification cases and should be familiar with commission hearings and types of testimony offered. Adequate opportunity was afforded for preparation of its case, and Rule 1.55 of the Rules of Practice requires that a party be prepared for hearing at its assigned time.—Detroit, T. & I.R. Co.—Control—Ann Arbor R. Co., 317 I.C.C. 619 (623)*.

Request for further hearing, based solely on substitution of bank which is executor of estates of two deceased controlling stockholders of vendee as applicant for indirect control of purchased rights, denied.—R.L. Jeffries Trucking Co., Inc.—Purchase—Eck Miller, 97 M.C.C. 151 (153).

Applicants' request for further hearing on purchase and related §207 applications, for purpose of submitting testimony and underlying documents to substantiate vendor's abstracts of past shipments, also shipper testimony indicating need for continuance of operations involved, denied. Though applicants assert that they were advised by counsel that evidence of past proviso operations by vendee would suffice to sustain their burden of proof without calling public witnesses, they do not claim that examiner interfered in any way with presentation of their case, and, having failed to avail themselves of opportunity to present such evidence at hearing, they are not entitled to have the proceeding reopened for that purpose, even if shipments they seek to authenticate could be given any substantial weight.—Prichard Transfer, Inc.—Purchase—Weiss, 93 M.C.C. 535 (542).

See also Illinois-California Exp. purchase case, n. 115, below.

Considering the relatively small number of shipments between Georgia and radial area around Akron, Ohio, in which vendor's services were involved, admission of additional evidence at further hearing would not warrant any change in conclusion reached on present record that neither vendor nor vendee, singly or jointly, has been a significant competitive factor on such traffic. Furthermore, the transaction as revised to exclude vendor's dormant West Virginia rights does not alter the burden of proof respecting the Georgia-Akron radius operations; protest filed prior to hearing served notice that protestant would raise the issue of tacking those rights with vendee's existing rights. Applicants have not satisfactorily explained their failure at initial hearing to introduce evidence within scope of that they now seek to present; request for further hearing denied.—Pilot Freight Carriers, Inc. —Purchase—Bison Fast Freight, 90 M.C.C. 709 (720-1).

Rule 1.240(c)(3) of Rules of Practice provides that protests which request public hearing shall specify with particularity the facts, matters, and things relied upon. Protest which merely states it "hereby protests the granting of" the application, and presses for an oral hearing, fails to meet the minimum requirements of that rule and Rule 1.40; therefore oral hearing is not required in the public interest.—Schenectady Transp. Corp.—Purchase— —Interstate Busses, 90 M.C.C. 623 (624).

Survivor's fears of competitive impact of interstate operations recently inaugurated by a Washington carrier under the single-State proviso, in combination with protestant's operations between Spokane and considered Montana area, do not warrant further hearing on proposed restriction of survivor's through service in the same territory. In view of pending proceeding to set aside the Washington carrier's registration of its intrastate certificate, there is no assurance that the proviso operations will be permitted to continue, and even if they are, the act contains adequate provisions for seeking modification of any restriction that may be imposed on survivor's rights.—Garrett Freightlines, Inc.—Control and Merger, 87 M.C.C. 619 (624)*.

115. Evidence.—[Vols. 12-19].—An administrative agency is not bound by common law principles of evidence and procedure; in proceeding on merger of two railroads exclusion by the examiner of report on earlier study concerning possible merger of those and a third railroad, and his curtailment of plaintiffs' cross-examination of a witness, was neither denial of due process nor prejudicial error in view of cumulative nature of any relevant part of such evidence.—Fried v. United States, 212 F. Supp. 886 (895-6)*.

Commission finding that Chesapeake & Ohio's control of Baltimore & Ohio would not result in any undue diversion of traffic from other eastern railroads is supported by substantial evidence. Representatives of a large number of major shippers over those roads testified that the affiliation would not cause any change in their habits of choosing rail carriers for their traffic; and, since shippers are the primary source of all freight traffic, their opinions are of impressive weight. Credibility of such witnesses and weight of their testimony were for the commission to determine, and plaintiffs' briefs are not persuasive that their testimony, and testimony of informed representatives of C & O and B & O that control would not result in substantial diversion from their rail competitors, was seriously impeached.—Broth. of Maint. of Way Employees v. United States, 221 F. Supp. 19 (26-7)*.

Though plaintiffs contend that the commission should have taken more evidence than it did, and, on its own initiative, should have employed independent counsel, accountants, and other experts to investigate and test the sufficiency of the evidence offered by the various parties, no interested party was foreclosed from offering any evidence it wished to offer, no counsel was denied opportunity to cross-examine witnesses, and at no time during the hearing did any plaintiff or the Department of Justice urge the commission to employ special counsel or other investigators to test the soundness of the evidence offered by the railroads applying for its approval. There is nothing in the statute requiring the commission to actively promote opposition to applicants before it by hiring independent counsel or experts.—Id., p. 28.

Porbative value of evidence pertaining to a particular operation, in determining issue of public convenience and necessity in directly-related §207 application proceeding, is not affected by fact that such operation may have been unlawful. If the operation shows a need for service, the need is no less because of fact (if it be a fact) that operating authority was lacking; therefore, evidence pertaining to an unlawful operation should not be rejected because it is "insubstantial." However, second-proviso operations of carrier to be acquired in proposed merger were carried on under color of law, since it held commission authority to do so, and no bad faith on its part was shown. In the circumstances of the case under review, the commission's rejection of protestants' (plaintiffs) contention that it was not appropriate to consider facts concerning the second-proviso operations as substantial evidence of need for that service, because question of validity of such operations was pending in another proceeding, was not an error.—Best Way Motor Freight, Inc. v. United States, 253 F. Supp. 314 (318-19)*.

See also Interstate Motor Freight System v. United States, n. 7 *Diversion*, above.

The commission is entrusted with broad discretion with respect to new evidence. In denying plaintiffs' request for further hearing to present evidence claimed to be "newly relevant" to questions of dormancy and unlawful control, the commission noted that they had failed to avail themselves of their prior opportunities at the hearing. Unlawful control was charged at the hearing, and plaintiffs could have then offered their proof; and, while the examiner had only sketchy evidence on which to base his conclusions as to dormancy, plaintiffs' new offer fails to undermine his findings. Sustained.—Lombard Bros., Inc. v. United States, 226 F. Supp. 905 (908-9)*.

Since, in accordance with rule 1.19 of the commission's Rules of Practice, sworn statements contained in carriers' joint verified purchase application are taken as part of the record and accepted as evidence unless specifically denied in a counterpleading, statements in complainant's purchase application, that it (the purchasing carrier) would employ all the vendor's employees, could be relied on by the commission; and the commission relied

on those sworn statements in determining that the proposed transaction was in the public interest.—Baggett Transp. Co. v. United States, 206 F. Supp. 835 (836-7, 838)*.

While the number of public and shipper witnesses for or against proposed Seaboard-Coast Line merger is not of controlling importance, it is significant that the proposal is supported by a substantial majority of both shippers and public officials; shippers representing approximately 90 percent of applicants' combined tonnage endorse the merger. The commission is required to and will give considerable weight to the views of these knowledgeable businessmen, civic leaders, and public officials.—Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122 (162)*.

Although extent to which estimated savings from proposed merger could be achieved through future abandonments of duplicating lines cannot be determined because of necessity for commission authorization in convenience-and-necessity proceedings, such potential savings cannot be completely ignored, since economies from elimination of duplicative services and facilities are a major objective of the merger. However, to extent that estimated economies from consolidation of survivor's remaining lines depend on effectuation of all or a substantial part of the proposed abandonments, or on discontinuance or substantial change of duplicate passenger services, which are likewise contingent on Federal or State authorization, they can be accorded very little weight.—Id., p. 155.

Although employees' representative questions acquiring carrier's estimate of number of jobs that would be eliminated by control transaction, the number of jobs to be affected is a matter within carrier's control and concerning which its officers have more accurate information; accordingly, its estimate is accepted as approximately correct.—Southern Ry. Co.—Control—Central of Georgia Ry. Co., 317 I.C.C. 557 (562)*.

Subsequent to reopening of electric railroad's §5 application, its trustee petitioned for leave to file a memorandum in connection with the commission's reconsideration; as no interested party has objected to such filing or has opposed commission's jurisdiction, no prejudice will result from filing of the memorandum and it is accordingly made part of the record.—Hudson & M.R. Co. Trustee Abandonment, 312 I.C.C. 701 (702)*.

Respondents, in their motion to strike, confirm adjudication as a bankrupt of carrier previously found to be unlawfully controlled, and copy of bankruptcy court's order authorizing sale of its operating rights to acquiring carrier was attached to the motion; these uncontroverted data may properly be incorporated in the record in investigation proceeding instituted to ensure termination of the law violations found to exist in the prior proceeding.—Jones Truck Lines, Inc.—Investigation of Control, 97 M.C.C. 225 (228).

Exhibits prepared from monthly IBM tabulations kept by vendor in regular course of business were properly admitted when the tabulations were available at hearing for inspection by protestants and witness who prepared the exhibits was available for cross-examination.—Buckingham Freight Lines—Purchase—Riss & Co., Inc., 93 M.C.C. 754 (761); also, protestant's exhibits based on IBM tabulations were properly admitted in evidence when they were prepared under direct supervision of witness testifying thereon. But exhibit prepared by protestant's traffic manager at Dallas and sent to its district manager at Oklahoma City solely for purpose of the hearing was properly excluded, since latter witness was not qualified to stand cross-examination thereon.—Arkansas-Best Freight System, Inc.—Purchase—Fine, 90 M.C.C. 858 (863).

Statement of vendor's gross revenues for a 15-year period, obtained from its ledger, was properly received in evidence; since the ledger is vendor's original record, financial statement prepared therefrom would be admissible. And since vendor's "day book" was kept in ordinary course of business and would be admissible as evidence under Rule 1.79 of Rules of Practice, it follows that an abstract based thereon was equally admissible. Moreover, vendor's owner who prepared the statement and abstract of shipments was qualified to testify, and was cross-examined, respecting data therein; and both the day book and ledger were available for inspection by prot-

estant's counsel.—North American Van Lines—Purchase—Fort Smith Furniture, 90 M.C.C. 629 (633).

Balance sheet and pro forma income statement with explanatory notes, estimating vendee's operating results and showing economies that would be realized by proposed purchase, submitted with applicants' exceptions, are received in evidence in absence of replies to their exceptions or objection to submission of such additional evidence.—Pre-Fab Transit Co.—Purchase—Hagan, 90 M.C.C. 65 (67-8).

Though protestants objected to vendor's attempt at the hearing to summarize numerous freight bills covering interline traffic, on basis that the freight bills were not in abstract form and that applicants had concluded their case, there is question as to whether applicants had in fact rested; doubt should have been resolved in applicant's favor and the evidence admitted, since a competent witness was available to testify concerning the data in the freight bills. Failure to present that information in a more concise manner in an exhibit does not render it inadmissible.—Barber Transp. Co.—Purchase—Conner, 90 M.C.C. 475 (479).

The fact that relevant data are abstracted orally, rather than in exhibit form, does not affect the admissibility of such evidence when offered by a competent witness. Testimony as to the volume of traffic handled by protestant was properly admitted over objection when presence of the underlying freight bills in the hearing room afforded opportunity for full cross-examination.—Pilot Freight Carriers, Inc.—Purchase—Bison Fast Freight, 90 M.C.C. 709 (721).

While examiner's refusal, in closing stages of hearing, to permit vendor to present documentary evidence concerning some 50 additional shipments was error, abstracts of shipments received in evidence, spanning a 21-month period, including some shipments after commencement of purchase negotiations, liberally supplemented by vendor's oral testimony concerning his transportation activities, were sufficient to portray clearly the pattern of service performed, and exclusion of the proffered evidence cannot reasonably be considered to have seriously prejudiced applicants' interests.—Aero Mayflower Transit Co., Inc.—Purchase—Walls, 93 M.C.C. 369 (376).

As to adequacy of evidence intended to show exercise of operating authority proposed to be purchased, the accepted rule is that exhibits of representative shipments indicating substantial systemwide operations need not show operation to and from every authorized point in order to establish that operations as a whole have been of continuing and substantial nature.—United Truck Lines, Inc.—Purchase—United Freight Lines, 90 M.C.C. 337 (346); likewise, while there is no established rule as to frequency of service required to establish that operations have in fact been conducted under vendor's special-commodity authority, some consistency of service must be demonstrated. Frequency of service and volume of traffic required to be shown depend on what would reasonably be expected of a carrier serving the area involved, considering its size and the points therein.—Emsley Truck Rentals, Inc.—Purchase—Foodway Exp., Inc., 90 M.C.C. 414 (416).

Abstract covering the 6 months preceding filing of purchase application, and abstract covering year ending 6 months prior to that period, both of which describe shipments as "vitrified products," together with applicants' explanation at hearing and affidavit concerning actual nature of commodities transported as vitrified products, are convincing that during those 18 months vendor was transporting sewer pipe, fittings, and related articles and clay products within scope of his permit. Shipments transported during the earlier period are not too remote to be considered as showing scope and continuity of vendor's service under his rights.—George L. Hooker, Inc.—Purchase—Ramey, 90 M.C.C. 792 (795).

Protestants were not prejudiced by receipt in evidence of copy of acquired carrier's operating authority, balance sheet and income statements taken from its books and records after its controlling stockholders had departed, list of its equipment after grant of temporary authority, or brochure advertising its authority and equipment utilized; however, such exhibits, other than the copy of its oper-

ating authority, are entitled to little weight.—Ashworth Transfer, Inc.—Control—Hawkes Transp. Co., 87 M.C.C. 653 (659)*.

Major deficits in acquiring carrier's own operations, despite constant and increasing revenues, are attributed by its management to the drain of conducting acquired carrier's operations under temporary authority; as there is no evidence to rebut such testimony and acquired carrier is shown to have been conducting substantial deficit operations, there is no reason not to accept that testimony as an accurate portrayal of the situation.—Adley Exp. Co.—Control—McFaddin Exp., Inc., 87 M.C.C. 665 (672)*.

Established evidentiary rules permit a cross-examiner to develop all circumstances within a witness's knowledge that may qualify or destroy his direct testimony, even though they may constitute new matters and part of the cross-examiner's own case. [See 130 F. 2d 330.] Liquidating carrier's operating manager testified on direct examination concerning operations whose lawfulness is directly in issue, and though no direct testimony concerning their legality was elicited from him, the only inference possible is that his evidence was intended to depict lawful operations in support of merger and certificate applications. As such, it was clearly within realm of the cross-examiner to explore that question through that witness, who by virtue of his position could be presumed to have personal knowledge of the pertinent details.—Hart Motor Exp., Inc.—Control and Merger, 90 M.C.C. 527 (531)*.

Vendor's stockholder testified that, to evidence his indebtedness to bank which financed his stock purchase, he executed his promissory note without endorser or comaker, pledging the stock as sole collateral; and at no time during the proceeding was he directly asked whether he was aware that vendee's stockholder had guaranteed or intended to guarantee the note, such evidence being elicited from other witnesses after he had been excused from the hearing. As vendee's stockholder did not believe that he had discussed the guarantee with vendor's stockholder, and bank employee who participated in the loan negotiations was uncertain whether the latter knew about it, but corroborated his testimony concerning the nature of the note and the collateral furnished, the record does not impeach the credibility of such witness's testimony concerning applicants' financial relations.—Thurston Motor Lines, Inc.—Purchase—Union Storage, 90 M.C.C. 595 (600)*.

The commission may take official notice of geographic facts.—Pilot Freight Carriers, Inc.—Purchase—Bison Fast Freight, 90 M.C.C. 709 (718, Note).

While there is not enough specific evidence to support any conclusion as to the newness of dry bulk transportation, the commission takes notice of the fact that it is a highly specialized form of transportation required by a relatively few shippers, more particularly when narrowed to dry chemicals as opposed to dry commodities generally, and that extensive facilities must be provided at both the shipping and the receiving ends for loading, unloading, and storage, which would retard acceptance and use of such service by shippers and receivers.—Berman's Motor Exp., Inc.—Purchase—Lang Storage & Trans., 90 M.C.C. 807 (815).

Although each transaction must be decided on its own record, the commission may take official notice of its findings in prior proceedings. In another transaction involving vendee and same protestants, new through service essentially the same as that proposed was found to be a destructive competitive factor, and there is nothing to indicate that approval of instant transaction would affect protestants differently. Thus, vendee's performance of single-line service under temporary authority in that proceeding cannot be considered to support its present proposal.—Barber Transp. Co.—Purchase—Conner, 90 M.C.C. 475 (480-1).

Inasmuch as temporary control authority was not exercised until mid-1959, and results of such operation, as well as acquiring carrier's independent operations, are not of record beyond mid-1960, a more informed judgement as to merits of proposed transaction, particularly its financial impact on acquiring carrier, calls for more current information, which is available in the carriers' annual and quarterly reports on file with commission and open to inspection by any interested party; official notice should there-

fore be taken of data in such reports; however, effectiveness of order will be deferred to allow any party to petition for further hearing to show why such data should not be considered.—Adley Exp. Co.—Control—McFaddin Exp., Inc., 87 M.C.C. 665 (670-1)*.

In considering vendee's fitness, the commission takes official notice of the fact that an action was filed in the district court seeking to enjoin vendee and two connecting carriers from continuing their unlawful common control, and that a criminal action was later filed in the same court charging vendee with 20 counts of unauthorized operations, which actions are still pending and were pending before the court prior to filing of purchase application.—Cooper's Exp., Inc.—Purchase—Ferguson Motor Transp., 90 M.C.C. 613 (618).

While the facts which form the basis for conclusions as to vendee's unfitness are not of record in purchase proceeding, but pertain to its conviction in a criminal action resulting from investigation instituted subsequent to hearing, they concern matters of which the commission may properly take notice without specific evidence, since the issue of fitness is always present in §5 proceedings.—United States Van Lines, Inc.—Purchase—Bell, 90 M.C.C. 362 (365-6); however, evidence relating to vendee's conviction of unauthorized operations 6 years prior to filing of purchase application, and prior to his acquisition of authority from the commission, is too remote to be considered in passing on his fitness to conduct operations sought to be acquired, and was properly excluded.—Pirkle—Purchase—P & A Refrigerated Exp., Inc., 90 M.C.C. 36 (37, 38).

Evidence of operations unlawfully conducted is entitled to little consideration in determining the question of public need for continuance thereof.—Tank Lines, Inc.—Purchase—S & N Freight Line, Inc., 90 M.C.C. 381 (386)*; similarly, vendee's unlawful charter operations out of Annapolis, Md., in vendor's origin area, can be given no probative value or weight to support activity under vendor's rights which it seeks to purchase.—Didlake—Purchase—Johnson, 87 M.C.C. 742 (744).

Where territorial or area operations are involved, to defeat an allegation of dormancy a showing of service must embrace a sufficient number of points throughout the territory to be considered representative of the whole. An irregular-route carrier is required only to submit evidence showing that it has rendered substantial service to a representative number of points in its authorized territory to support the conclusion that its operations have been substantial and continuous; and where a regular-route carrier has been conducting comparatively substantial operations throughout its system, it is not compelled to submit evidence of operations to and from every intermediate point or over all combinations of its routes. Generally, approval of transactions involving disposition of both regular- and irregular-route rights has been withheld and such rights considered dormant only where the evidence clearly shows that service to or from particular points or areas had been discontinued for substantial periods and other evidence to overcome the conclusion of dormancy has not been presented.—National Transp. Co.—Purchase—Hartford Transp. Co., 97 M.C.C. 206 (213)*.

Although vendor did not transport large volumes of traffic to and from certain points, the evidence of shipments transported is sufficiently representative to show that it has rendered a substantial and continuous service under its authority, except as to movement of household goods and other specified commodities, and, except as to those commodities, a finding that its operating rights are dormant would not be justified. Moreover, there is clear shipper testimony of advantages to the public which will result from unification of the rights involved.—Id., p. 213.

Though, considering the overall volume of traffic transported during the 1-year test period, acquired carrier's operations were active and voluminous, they must be examined, in light of protestants' claims, to determine whether they fail in any respects to meet the test of substantiality announced in prior decisions. The only service which may be considered in that regard is that lawfully conducted within scope of the carrier's operating rights, and a practice pursued for carrier's convenience of interlining shipments with local carriers to points within its own authority does

not constitute service under its rights. In applying that test the actual geographical coverage should be examined, as well as the number of shipments and range of commodities handled within such geographical coverage, to determine the extent to which the carrier provided service on a substantial number of commodities to a representative number of points within its authorized territories.—Branch Motor Exp. Co.—Control—Morgan Trucking Co., 93 M.C.C. 244 (256-7).

Though the Supreme Court, in 315 US 475, cautioned against pulverization of carrier's past operations, in discussing "bona fide" operations it pointed out that actual rather than potential or simulated service, and substantial as distinguished from incidental or sporadic service, is required, and that "substantial" service may have been confined to narrow limits. Applying those guides, evidence of acquired carrier's operations, to extent that it establishes a pattern of radial operations between eastern points and points in South Carolina and western North Carolina, fairly meets the test of substantiality; it does not, however, support a finding of substantial or continuous operations to, from, or between large geographical areas where there were relatively few shipments, involving a limited number of points, in service outside the pattern of operations shown by preponderance of the evidence. And whether the quantum of service provided had any direct relation to any circuity of operation necessitated by observance of gateway requirements of acquired carrier's authority need not be considered in applying the test of substantiality.—Id., pp. 257-8.

With exception of Virginia and eastern North Carolina, the length and breadth of considered southern area were adequately served in acquired carrier's East-South operations, preponderance of shipments during the test period being handled in that service. Over 200 points in the Carolinas were served either as origins or as destinations, and though hundreds of shipments could not be considered because they were duplicated in the exhibits, or were intrastate or unauthorized, the remaining thousands were apparently transported lawfully. That the carrier perforce provided a more abundant service at smaller communities is not unfavorable to a finding of substantiality, since it also served numerous large cities, and the variety of commodities listed in protestants' exceptions fully supports a finding that it handled a large cross-section of general traffic.—Id., pp. 258-9.

Though protestants object to consideration of traffic interlined at origin, such traffic involved only a small portion of vendor's shipments and is not critical in respect of the showing required to refute a challenge of dormancy. As existence and perpetuation of the practice of smaller household-goods carriers performing transportation for other line-haul carriers has been a characteristic of the household-goods-moving industry for many years, such activities are entitled to be weighed with other evidence in gaging vendor's competitive status in the industry.—Security Van Lines, Inc.—Purchase—Community & Johnson, 93 M.C.C. 399 (402).

Although a carrier has but one right to transport the same commodity between the same points, no matter how many times it may be described in carrier's certificate, where both duplicative rights are to be sold, or retained by acquired carrier in a control transaction, traffic that could have moved under either description should be considered as evidence, to the extent shown, that both rights have been utilized.—Aero Trucking, Inc.—Control—Friedman Transfer, 93 M.C.C. 342 (349-50).

There is no merit to protestant's contention that applicants' evidence and exhibits concerning liquidating carrier's intrastate operations were improperly received because such operations are outside the commission's jurisdiction and not material to the issue; in passing on a §5 acquisition the commission's jurisdiction extends to the entire transaction and it has an obligation to examine every facet thereof. Both applicants and protestants conduct integrated operations, subtended by both interstate and intrastate rights, to meet needs of shippers whose traffic frequently is of both kinds; this intimate and inescapable relationship makes evidence of intrastate operations material.—Reading Transp. Co.—Control and Merger, 93 M.C.C. 11 (17).

Since a proper interpretation of vendor's authority to transport uncrated furniture from

Baltimore and points within 50 miles thereof to points in 14 States and District of Columbia excludes shipments from Hagerstown, Md., which is beyond that radius, and, though it could lawfully serve Hagerstown in transportation of furniture under its general-commodity rights, movements to the 14-State area could be lawfully made only via Baltimore, a proper analysis of its service under the furniture rights should exclude all shipments which moved from Hagerstown to that area without observance of the Baltimore gateway. However, 130 shipments were lawfully transported during a 20-month period under the furniture rights, and, though 5 of them were transported after execution of the purchase agreement, there is no evidence of a buildup of vendor's traffic or of any appreciable change in its operations as a result thereof; accordingly, those shipments may be accorded full weight in reaching a determination on the merits.—North American Van Lines, Inc.—Purchase—Hagerstown Motor, 93 M.C.C. 125 (127, 128-9).

An irregular-route carrier of a limited class of commodities, such as vendor, is not required to show service to and from all points in its authorized territory to avoid a finding of dormancy; it is enough to show a fairly representative service and availability to perform additonal service had the traffic been offered. Such a showing has been made, although no service is shown at points in 2 of the 14 States; vendor held out to provide service on uncrated shipments of furniture, fixtures, and equipment and accepted all such shipments offered it; and it advertised its service and solicited some 100 shippers regularly by mail, as well as personal solicitation by its president and salesmen.—Id., p. 129.

While one of vendee partners served as vendor's agent in latter's Pennsylvania area and in that capacity solicited and arranged for transportation of traffic under rights vendee would now acquire, the record does not support a finding that the partnership thereby assumed control of vendor in violation of §5(4), and evidence concerning vendor's operations during the agency arrangement may be considered along with other probative evidence in that regard.—Bowser and Campbell —Purchase—Motorway Corp., 97 M.C.C. 192 (198).

Though proposal involving sale of irregular-route specific-commodity rights does not require a showing of transportation activity covering all of the territory, there must nevertheless be a fairly representative showing of service to support a finding that the operations have been active. Transportation services shown to have been actively performed under certain portions of vendor's rights are not sufficiently representative to preclude a finding of dormancy as to other portions which were entirely devoid of any activity whatsoever.—Id., p. 199.

To determine whether the single-line service proposed after unification of complementary operating rights would be substantially new or different from that furnished under the separate rights, consideration should be given to all traffic handled by applicants in interline service between their territories, whether interchanged with other carriers or between themselves. Considering the substantial volume of Michigan-St. Louis traffic in which applicants participated during the period preceding submission of purchase application, it is evident that their interline operations have been of competitive significance in connection with traffic between their territories.—Michigan Exp., Inc.—Purchase—Chicago-St. Louis Exp., Inc., 90 M.C.C. 671 (676)*.

Probative force of statement by witness of steel shipper with a large plant at Aliquippa, Pa., that his company needs additional single-line carriers to serve that point, is vitiated by his further statements that there are several hundred carriers now serving Pittsburgh and Aliquippa, and that services of such carriers have been satisfactory.—Wilson Freight Forwarding Co.—Purchase—Hammel, 90 M.C.C. 41 (44).

A showing of actual operations to, from or between all points or combinations thereof is not required to refute allegations of dormancy; and where a transaction would not result in acquisition of the involved rights by different interests, as in proposed purchase by one railroad subsidiary of an affiliate's property-carrying rights, the primary reason for requiring as detailed information concerning shipments handled as in case of unaffiliated car-

riers, namely, to guard against institution of a new and different service by unrelated interests where no need therefor has been shown, either becomes of minor importance or disappears.—Santa Fe Trail Transp. Co.—Purchase—Santa Fe Transp. Co., 90 M.C.C. 123 (128).

Determination of whether certain portions of vendor's operations were active or dormant may not be predicated on conjecture or assumption; there must be concrete proof of operations on which to base a conclusion. Applicants' protestation that exhibits submitted are merely representative of vendor's operations is insufficient to support a finding that certain portions are not dormant, especially where opposing counsel questioned adequacy of such evidence at initial hearing and applicants made no attempt at continued hearing some 2-1/2 months later to offer further proof of service under vendor's rights.—Belyea Truck Co.—Purchase—Ferguson Trucking Co., 90 M.C.C. 139 (147)*.

Although operations of a vendor should not be pulverized to show service at all points in its territory, it is incumbent on applicants to adduce sufficient evidence to show service between significant points. Failure to show movements of local traffic between Washington and Baltimore and northbound on vendor's regular routes in North Carolina clearly indicates that the traffic is being transported by other carriers.—Bowman Transp., Inc.—Purchase—A.W. Hawkins, Inc., 90 M.C.C. 303 (325); similarly, the single shipment of roofing shown in vendor's abstract of shipments can be given no weight as evidence of its activities under the involved rights. Moreover, that shipment was apparently handled under vendor's hardware authority and legality thereof is doubtful in view of fact that it originated at a steel company and was destined to a sheet metal company.—Willers, Inc.—Purchase—Kelly, 90 M.C.C. 21 (23).

Evidence required to show nature and scope of past and present operations under operating rights sought to be acquired should be such as to establish that interstate operations have been conducted and are continuing, and should include information relating to frequency of service, volume of traffic handled, territory served, and commodities transported. Evidence of generalized nature relating to revenues realized, equipment utilized, and persons employed is insufficient, standing alone, for proper evaluation of extent of interstate operations involved; the commission is bound by the evidence of record, which in instant case is not sufficiently comprehensive for a determination of the basic question of whether approval of proposed transaction would be consistent with public interest. Denied.—Zern—Control—William A. Kelly, Inc., 90 M.C.C. 25 (29).

Shipments listed in acquired carrier's abstract that are not shown to be lawful and interstate in character may not be considered in determining scope of its past operations; there is more than a mere suspicion that its operations have been conducted in disregard of restrictions on its authority, although the evidence as to some such operations is inconclusive. Considering all factors, it has shown active and continuous service only to the extent described in appendix B. And though certain authority is considered active because granted too recently for shipments thereunder to have been shown at hearing, the rights found dormant may not be presumed to be required merely because they were once found to be.—Mitchell Bros. Truck Lines—Control—Empire Transport, 93 M.C.C. 38 (42-3).

While every case must be considered on its own merits, examiner correctly took cognizance of certain evidence of vendor's past operations adduced in proceeding on a prior §5 application which was denied; evidence of operations under vendor's rights by acquiring carrier therein under temporary authority must also be considered, at least to extent that it shows continuity of vendor's service under the rights proposed to be sold. However, in gaging nature and extent of past service, pri-

mary consideration must be given evidence of vendor's independent operations several months prior to agreement in the earlier transaction and after termination of the temporary authority therein.—Dorn's Transp., Inc.—Purchase—Mayberry Motor Freight, 90 M.C.C. 269 (275).

Also, evidence of operations by instant vendee under temporary lease authority must be considered along with other evidence of need for continuance by it of vendor's single-State proviso operations and effect thereof on competing carriers. Past substantial and continued operations under the proviso merit the same status as past lawful operations by a vendor of a certificate issued by the commission, and proof required of a purchaser of proviso operations should be no less or greater than that required of a purchaser of certificated rights.—Id., p. 275.

Whether vendee's proposed all-motor service under purchased rights would be less costly and more expeditious than current rail service of its parent railroad cannot be determined when no evidence was presented as to transit time or operating costs of present l.c.l. service, or as to service that would be required of vendee to transport l.c.l. traffic now moving in rail service and operating costs thereof; nor is it shown what merchandise cars would be eliminated entirely from handling of l.c.l. traffic if purchase were approved.—Burlington Truck Lines, Inc.—Purchase—H.B. Green Transp., 90 M.C.C. 865 (870).

Though as a rule the commission should not be too critical in analyzing evidence of the scope of a vendor's past operations to find that it has rendered an active and continuous service under its authority, where operations under single-State proviso are involved and the transaction would result in issuance of a certificate for their continuance, based on past operations performed under the proviso, the proof presented should be convincing. See 38 MCC 547 and 85 MCC 447.—Roush—Control—Southern California Freight Lines, 90 M.C.C. 459 (469)*.

Applicants' late-filed exhibit covering liquidating carrier's proviso operations over route segment for which certificate is sought lists 304 shipments as handled by affiliated express company which operates solely in intrastate commerce. Such shipments have no probative value to show interstate operations by liquidating carrier; to consider them as its shipments would disregard the plain language of the exhibit. Applicants' statement that some of those shipments were incorrectly billed as traffic of the affiliate to avoid a State tax not only cannot be accepted as a valid reason for treating them as those of liquidating carrier, but strikes at applicants' very fitness.—Id., pp. 467, 468.

While it is possible that some of the other shipments rejected by the examiner as not clearly shown to have moved in interstate commerce could have so moved, the burden was on applicants to submit appropriate proof to support such a conclusion. One primary purpose of the further hearing was to give applicants opportunity to establish that liquidating carrier conducted interstate operations over considered segment, and they cannot now complain that the documentary data submitted to show such service should be disregarded in part as designated by them. It is implausible that the late-filed exhibit, practically the backbone of their case, would be prepared with such disregard for accuracy. Examiner correctly excluded 404 of the shipments shown from consideration.—Id., pp. 468-9.

The remaining 77 l.t.l. shipments handled during the 11-month period are completely inadequate to show that liquidating carrier's proviso operations over that segment were substantial enough to warrant grant of certificate. Claim of lack of time for that carrier to develop interstate traffic thereover is unimpressive, considering that it was eligible to conduct proviso operations thereon for almost a year prior to negotiations between the parties. And evidence introduced at further hearing showing subsequent substantial in-

crease in its service to and from points on that segment, both single-line and jointly with a prospective affiliate under temporary authority, has little value to show scope of its proviso operations and is of limited significance in determining whether the transaction would be consistent with public interest. Applicants have failed to justify inclusion of considered segment in certificate granted survivor.—Id., pp. 469-70.

Allegation that vendor's single-State proviso rights were dormant preceding its interline arrangement with vendee is not rebutted by abstracts of representative shipments showing no service under its irregular-route rights before that arrangement; and vendor's nebulous testimony that it served the involved areas when called upon does not refute protestants' definitive testimony that it did not serve one area, served the other only on occasion, and refused shipments for delivery except to points between termini of its certificated regular route. It is uncontroverted that vendor's operations changed dramatically almost immediately after inauguration of the interline arrangement, and there is ample evidence that vendee assumed the burden of building them up to present a picture of active operations throughout vendor's entire territory. As such, the proviso operations do not merit consideration, particularly in absence of cogent evidence of public need for service that would be provided thereunder.—Lombard Bros., Inc.—Purchase—Millis, 90 M.C.C. 604 (609, 611)*.

Where a carrier has been conducting comparatively substantial operations throughout its system it need not submit evidence of operations to and from every intermediate point, or in connection with all combinations of its routes, to show that its operations have been substantial and continuous. Considering nature of service that would result from proposed control, the record conclusively establishes that both acquiring and acquired carriers are conducting substantial operations generally throughout scope of their respective authorities; and while during the past 4 or 5 years acquired carrier's operations have admittedly deteriorated somewhat and it has increasingly used other carriers for service at intermediate points, its average annual earnings have remained constant in neighborhood of $5,000,000, its annual tonnage has never fallen below 200,000 tons of intercity traffic, and it has provided continuous service at principal cities on its routes.—Mason & Dixon Lines, Inc.—Control—Silver Fleet, 90 M.C.C. 829 (843-4).

In determining whether service resulting from a transaction would be substantially new and different from that formerly provided, all traffic handled by the carriers in interline service between their territories, whether interchanged with each other or with other carriers, is entitled to consideration. Acquiring and acquired carriers have continuously maintained interline arrangements for at least 12 years; and while volume of traffic interchanged between them was light compared to that handled by certain protestants, and they failed to show movements between many combinations of points and areas, failure of the interlining carriers to secure a large volume of traffic from and to any particular point or between points in small and select areas is entitled to little weight in determining the nature of the service that would evolve.—Id., p. 845.

Considering vendor's specialized irregular-route authority and the destinations involved, his transportation of 51 t.l. shipments from Chicago and 4 from Wilmington, Ill., to widely scattered points in Iowa shows a substantial service from those two origins commensurate with his resources and relation of that authority to his overall operations. While for a period of years he conducted operations almost exclusively in vehicles trip-leased from vendee and used vendee's drivers, and the involved traffic moved on vendee's billing and delivery receipts, applicants nevertheless endeavored to comply with the leasing rules respecting inspections, driver logs, and collection of charges, the traffic moved under vendor's insurance, and the vehicles and drivers were under his control. In the circumstances those shipments may properly be re-

garded as those of vendor and as supporting a finding of regular and continuous service to the extent indicated.—Kroblin Refrigerated Xpress—Purchase—Davis, 93 M.C.C. 356 (359-60).

Irregular-route carriers need not show service to and from all authorized points to establish that their rights have been actively utilized; and the rule of substantiality, under which such a carrier need only show that it has rendered substantial service to a representative number of points, applies to commodities as well as territory. Shipments handled by liquidating carrier in 1958, 1959, and first half of 1960 are similar to those transported in last half of 1960, prior to commencement of merger negotiations, and are material to show continuity of its operations. It has served its authorized territory for a substantial period, and while some points were served more frequently than others and some commodities transported less frequently than others, the several hundred representative shipments handled prior to filing of merger application, showing service at points in all authorized States and including products within principal classes of its authorized commodities, refute any claim of dormancy. Its operations are thus shown to have been substantial and continuous.—Youngstown Cartage Co.—Control and Merger, 93 M.C.C. 318 (325, 326-7).

Moreover, while not conclusive, evidence of service provided by survivor under temporary lease of liquidating carrier's rights is admissible and properly to be considered in determining whether the transaction would be consistent with public interest, particularly where the temporary operations, being of long standing , are indicative of whether unification might have detrimental effect on existing carriers. Survivor has been rendering service under temporary authority for over 2 years between points in liquidating carrier's territory, and between certain points in their respective territories by tacking their rights, and protestants who furnished information concerning their revenues for the years before and after the temporary unification showed an increase in the latter over the former; thus protestants have not shown that approval of merger without a restriction against tacking of survivor's existing and acquired rights would have a materially adverse effect on their operations.—Id., pp. 325, 327-8.

In determining consistency of service of irregular-route carriers of a limited class of commodities, it is recognized that such authority is not in same category as regular-route, general-commodity authority, but rather contemplates a specialized call-on-demand service for a few shippers and consignees; such a carrier is not required to present evidence of service to and from all authorized points in its irregular-route area, but evidence must show a continuous operation serving a representative number of points.—Superior Trucking Co.—Purchase—Arthur Morgan Trucking, 90 M.C.C. 367 (370-1)*.

An irregular-route carrier is required only to show that it has rendered substantial service to a representative number of points within its authorized territory to support a finding that its operations have been substantial and continuous; and where a regular-route carrier is conducting substantial operations throughout its system it need not submit evidence of operations to and from every authorized point or over all combinations of its routes.—Long Transp. Co.—Control—Marine Transit, Inc., 90 M.C.C. 261 (264); and there is even less reason for holding acquired carrier to a showing of more than representative points in view of its limited and highly specialized commodity authority, as well as fact that the traffic is seasonal in nature. While its services has been limited in some instances and not all origins and destinations have been served, evidence establishes that service under its rights has been frequent and widely dispersed to numerous points throughout its authorized territory. —Id., pp. 264, 265.

The test of substantiality of past irregular-route operations is a flexible standard gaged according to nature of the commodity transported and type of service performed, as opposed to a hard and fast rule requiring proof of service in each State, city, or other geographical area designated; and as nature of the commodity or service becomes more narrowly confined or specialized, greater leniency can be shown in determining whether vendor has conducted a substantial service

"throughout" his authorized territory. But to apply that test so that, whenever an irregular-route carrier has provided substantial and continuous service to any portion of his authorized territory, however extensive that territory might be, such geographically limited service would suffice to establish that the entire authority had been actively exercised would be a strained interpretation.—Knox Motor Service, Inc.—Purchase—K & A Truck Lines, Inc., 93 M.C.C. 26 (30).

Though the specific-commodity authority embraced in proposed purchase is broad and the authorized area is not extensive, vendor has confined its service to the area north and east of the Tri-Cities, and to avoid a finding of partial dormancy it is reasonable to require a showing of service to points in each of the areas designated in that authority. While the record does not show clearly what part of vendor's Wisconsin-Iowa operations shown in its abstract of shipments was performed by it and what part by interline carriers, the pattern of its operations otherwise, together with certain implications in the record, indicates that it performed the Wisconsin-Tri-Cities portion; but the only five shipments shown between the Tri-Cities and points in Iowa, for which its authority is questionable, are insufficient, even if allowed, to establish substantial service to the entire State.—Id., pp. 29, 30-1.

An irregular-route general-commodity carrier is required only to show service on a substantial number of commodities at a representative number of points within its authorized territory in order to support a finding that its operations have been substantial and continuous. Evidence of shipments andled on 9 separate days over a 22-month period reflects a substantial and active operation for a carrier of liquidating carrier's size, and summary of service performed on certain commodities, showing that contrary to protestants' contention they were in fact transported under its rights, is not intended to imply that every conceivable commodity must be shown to have been transported.—Jones Motor Co., Inc.—Control—Mundy Motor Lines, 90 M.C.C. 899 (906-908).

However, certain of liquidating carrier's general-commodity radial rights are totally divorced from and outside of territory wherein substantial operations are shown. Shipments shown as handled to such radial points are only 0.001 percent by number and 0.016 percent by weight of total shipments handled systemwide; more significantly, most of them were transported subsequent to execution of merger agreement; such shipments are entitled to little weight in determining nature and scope of a prospective seller's operations.—Id., p. 907.

Where territorial operations are claimed, a showing of service must embrace a sufficient number of points throughout the territory involved to be considered representative of the whole, and an irregular-route carrier is only required to submit evidence that it has rendered substantial service to a representative number of points within its authorized territory in order to support conclusion that its operations have been substantial and continuous.—Watkins Motor Lines, In.c—Control and Merger, 90 M.C.C. 567 (582); however, such evidence must of necessity include a showing that carrier has held itself out to handle all the traffic possible, commensurate with its facilities and ability.—Ashworth Transfer, Inc.—Control—Hawkes Transp. Co., 87 M.C.C. 653 (661)*.

The paucity of evidence relating to management policies of acquired carrier's stockholders during 1958 precludes finding that it has so held out; giving consideration to its authorized service area, its resources and facilities, its status as an irregular-route carrier of specific commodities, and testimony of supporting shipper, also giving credence to traffic handled as machinery, without determining whether it was properly so classified, analysis of shipments handled in 1958 shows that its service was limited to movement of building materials, explosives, and heavy machinery from a few origins to points in four States; the few isolated shipments transported to and from other points are insufficient to alter conclusion that its operating rights were not otherwise actively utilized.—Id., p. 661.

Evidence establishing the pattern of acquired carrier's operations prior to authorization of temporary control as being nonradial between New England points and radial between those points and Philadelphia gateway

and its other authorized points, except Scranton, Pa., Hudson Valley (including New York City and Long Island), and northern New Jersey areas, fairly meets the test of substantiality. However, that evidence cannot be used to support a finding of substantial or continuous operations to or from large geographical areas where, even giving full weight to shipments subsequent to date of stock-purchase agreement, only a few shipments are shown to a limited number of points, entirely outside the pattern of operations established by the preponderance of the evidence.—Accelerated Transport-Pony Exp., Inc.—Control—Downing, 87 M.C.C. 711 (717, 721).

Substantially all of acquired carrier's traffic to from the Scranton area is shown to have been interlined at Philadelphia, with only occasional or sporadic movements in single-line service. No direct service is established to or from Hudson Valley area until well after date of the agreement; shipments prior thereto are not supported by documentary evidence or are too remote in time to be considered in evaluating the pattern of operations. In the Long Island-New York metropolitan area, direct service is shown on only 7 shipments prior to temporary control; shipments thereafter are entitled to little weight. Only a relatively few shipments to scattered points in northern New Jersey are shown; shipments interchanged at Newark as part of an emergency tobacco movement were an exception to the usual practice of interlining at Philadelphia and have little weight. Operations to those areas were thus too sporadic and limited to have any competitive significance.—Id., pp. 717-22.

Although evidence of service rendered by a prospective purchaser under temporary authority cannot be considered conclusive, it is admissible and properly to be considered with other evidence to determine whether the transaction and unified service would be consistent with public interest.—Chicago Kansas City Freight Line, Inc.—Purchase—Capitol, 97 M.C.C. 68 (73); Sanborn's Motor Exp., Inc.—Purchase—Bemis Exp., Inc., 93 M.C.C. 728 (734); United Truck Lines, Inc.—Purchase—United Freight Lines, 90 M.C.C. 337 (345); C & H Transp. Co., Inc.—Purchase—Gulf Southwestern Transp., 90 M.C.C. 636 (640); Mistletoe Exp. Service—Purchase—Central News Exp., Inc., 90 M.C.C. 797 (803); particularly where the operations under temporary authority are of long standing and afford a means of establishing whether the unified operations have had any detrimental effect on protestants and other established carriers.—Bowman Transp., Inc.—Control and Merger, 93 M.C.C. 133 (139); Ashworth Transfer, Inc.—Purchase—Willcoxon and Fowkes, 90 M.C.C. 107 (111)*; Von Der Ahe Van Lines, Inc.—Lease and Purchase—Bee-Line, 90 M.C.C. 888 (895)*.

Evidence pertaining to nature and scope of operations conducted under vendor's rights, both prior and subsequent to grant of temporary authority to vendee, is entitled to full weight, since absence of any marked disparity in volume of traffic handled during the respective periods indicates that there was no influence or domination of vendee during the purchase negotiation.—Hart Motor Exp., Inc.—Purchase—Lake Superior Motor Frt., 90 M.C.C. 652 (654).

Service by two control applicants under their successive temporary authorities for control of acquired carrier may properly be considered, along with other factors, in determining scope of its operations, but is not controlling.—Watkins Motor Lines, Inc.—Control and Merger, 90 M.C.C. 567 (582); and, though merely representative, abstracts of over 1,300 shipments, representing every 20th shipment handled by acquired carrier during the last 8-1/2 months preceding authorization of temporary control, cover a sufficient period to give a clear picture of the carrier's operations and indicate that a substantial service has been performed.—Id., p. 582.

Operations under temporary authority, while not controlling, may properly be considered with other evidence to determine whether a transaction would be consistent with public interest, particularly when they are of long standing and afford a means of determining whether the resulting service has had any destructive effect on protesting carriers. Considering extent to which acquired carrier's operations have been rehabilitated under acquiring carrier's temporary management, and expressed need of supporting shippers for continuance and improvement of its service

within scope of its authority, evidence is convincing that substantial compensatory benefits have resulted, not only to acquired carrier, but also to the public served by it, without any serious adverse effect on protestants' operations and services.—Mason & Dixon Lines, Inc.—Control—Silver Fleet, 90 M.C.C. 829 (845, 847).

In view of applicants' claim that protestants' operating results have markedly improved during acquiring carrier's temporary control of acquired carrier, and fact that financial data used are somewhat outdated, official notice should be taken of data in protestants' latest filed annual reports; therefore, in consonance with §7(d) of Administrative Procedure Act, effectiveness of order of approval is deferred for a sufficient period to allow any party to petition for further hearing for purpose of showing why such data should not be considered.—Branch Motor Exp. Co. —Control—Morgan Trucking Co., 93 M.C.C. 244 (260).

Vendee's considerable operations under temporary lease of vendor's dormant rights are not the best evidence of need for their continuance. Nor is the fact that competing carriers have prospered during that period conclusive, particularly where it is not shown whether such prosperity extended to their operations in competitive area involved, since conceivably an overall operation may be progressively more prosperous despite the falling off of traffic in particular areas. Moreover, even temporary service over a long period does not alone establish public need, nor should it be considered solely as a reason for approval of purchase where it is not established by other evidence that the transaction, if approved, would result in fulfillment of such need.—C & H Transp. Co., Inc.—Purchase—Ferguson Trucking, 93 M.C.C. 741 (748-9)*.

Operations conducted under temporary authority have little weight in determining scope and manner of operations conducted by vendor prior thereto; pattern of instant vendee's operations under temporary authority is clearly not the same as that of vendor's past operations.—Bowman Transp., Inc.—Purchase—A.W. Hawkins, Inc., 90 M.C.C. 303 (325).

Evidence of shipments handled by a vendor after date of purchase agreement may be introduced to show that service subsequent thereto has continued to be substantially similar to that conducted previously; but the commission's conclusions are not based solely on such service.—Kroblin Refrigerated Xpress, Inc.—Purchase—Davis, 93 M.C.C. 356 (359); however, a seller has the right to augment his traffic subsequent to the agreement date so long as the augmentation is free from the control, influence, or domination of the prospective purchasej. Vendor's decreased gross operating revenues indicate that traffic handled before and after purchase agreement date was handled in the ordinary course of business and free from vendee's influence and dominion (otherwise its revenues probably would have increased) and such shipments may properly be considered. —Barber Transp. Co.—Purchase—Conner, 90 M.C.C. 475 (478).

Ordinarily traffic handled after applicants enter their purchase agreement is entitled to little weight in establishing continuity of operations under particular rights, principally because of buildup of service thereunder to meet a possible challenge of dormancy; but where the traffic handled after the contract date merely shows a continuation of activities prior thereto it may be considered.—Midwest Transfer Co. of Ill.—Control—Chamberland's, 90 M.C.C. 503 (508)*.

Iron and steel shipments transported under vendor's heavy-hauling rights after purchase negotiations began are considered as made in anticipation of the proposed sale and as moved solely as result of vendee's influence, and therefore are entitled to little weight as showing active operations. This is not to say that a prospective seller is foreclosed from stimulating the use of its operations in anticipation of their sale, but that when the buyer

dominates such efforts the commission refuses to give significant weight to the evidence of such increased activity.—Aero Trucking, Inc. —Purchase—Kreitz, 93 M.C.C. 115 (117).

Shipments transported under vendor's heavy-hauling authority some 2 years prior to purchase negotiations are not too remote to be considered; were this the only evidence of vendor's activity, its exclusion on ground of remoteness would be proper, but as evidence to show continuity and general nature of vendor's specialized service over a long period it is entitled to some weight. Neither should all vendor's operations after initiation of negotiations be disregarded, but only those movements under vendee's domination or influence; in that category are shipments interlined between applicants under arrangement entered into about the time negotiations began, since that arrangement, which replaced one between vendor and other carriers, must be held to have been for purpose of facilitating approval of purchase. Since no temporary authority was sought or granted, there is no basis for finding that other shipments during that period were under vendee's influence; a vendor has the right to build up its operations to make them more readily marketable, and evidence of such increased activity will be denied substantial weight only when the prosepective buyer influences such efforts.—Superior Trucking Co.—Purchase—Arthur Morgan Trucking, 93 M.C.C. 64 (68)*.

Although no traffic is shown between any two points in Tennessee and/or Kentucky, and little recent traffic is shown between either of those States and other States, in view of the specialized nature of vendor's rights there is enough to establish that it has been providing latter service as part of its pattern of operations, although its main activity has been between Illinois and Missouri; applicants have shown that vendor's rights are not dormant territorially as to movements between Missouri and Illinois and between those States and Tennessee and Kentucky. Further, the record shows that it has transported a representative assortment of commodities embraced by its heavy hauler authority.—Id., pp. 68-9.

Where dormancy is an issue under §5, little weight should be given evidence of operations conducted after negotiations for the sale of the rights were entered into.—K-Lines, Inc. —Purchase—Consolidated Freightways, 93 M.C.C. 720 (722); similarly, operations instituted by prospective vendor after it commenced or concluded negotiations for sale of its rights are entitled to little weight in determining nature and extent of its activity as a motor carrier.—Deaton Truck Line, Inc.—Purchase—Magnolia Truck Line, 87 M.C.C. 674 (680); and, since transfer of dormant operating rights under §5 may be approved only on a showing that there is need for the service which may be reestablished thereunder, contention that since there were no protestants at the hearing it was unnecessary to introduce shipper witnesses is without merit.—West Nebraska Exp., Inc.—Purchase—Forsstrom, 87 M.C.C. 733 (736).

Evidence relating solely to operations conducted subsequent to a purchase contract is entitled to little weight in reaching a decision on the merits, especially where such operation appears to have been intended primarily to facilitate approval of the transaction. Shipments handled by vendor to and from West Virginia points under unlawful leasing arrangement may not be considered, and there is no other evidence of service to those points prior to purchase agreement; vendor reactivated those rights after lease of another portion of its rights to vendee, undoubtedly aided by money loaned it by vendee under the agreement, and interlined a substantial volume of traffic with vendee. Such reactivation was clearly an endeavor to eliminate or mitigate the issue of dormancy, and shipments thus handled are entitled to no weight.—Pilot Freight Carriers, Inc.—Purchase—Bison Fast Freight, 90 M.C.C. 709 (718).

Little weight can be given evidence of shipments handled by vendor in interline service

with other household-goods carriers after commencement of purchase negotiations with vendee when its annual reports for the 3 preceding years show no operating revenues, portions of prorated line-haul revenues paid the interchange carriers are not shown with any degree of certainty, and its principal stockholder admitted at hearing that in many instances bills of lading underlying the shipments had been altered to show the correct routing by the participating carriers.—American Red Ball Transit Co., Inc.—Purchase—Fallon, 90 M.C.C. 515 (518)*.

No underlying documents were made available to substantiate vendor's abstract of shipments allegedly transported prior to 1962, and he was unable to testify concerning any of them from his own knowledge. He also lacked adequate personal knowledge as to 1962 shipments, some 75 percent of which were handled under a lease-and-interline arrangement with vendee, and relied entirely on his abstract, which was supported mainly by purported invoice copies made by a typist, that he had not checked against originals, and no other witness was made available to vouch for their accuracy. Obviously, most of the copies presented as underlying documents were not made in ordinary course of business and would never be relied on by vendor for collection of debts owed. Without any other means of authenticating vendor's abstracts or of providing protestants opportunity to test their reliability on cross-examination, examiner, on protestants' objection, properly rejected that evidence.—Prichard Transfer, Inc.—Purchase—Weiss, 93 M.C.C. 535 (540-1).

Additionally, all shipments abstracted were moved long after execution of the purchase agreement, the earliest some 75 days, and the most recent about 16½ months, subsequent to that date. Traffic developed after negotiations for sale of rights is entitled to little weight in determining continuity and scope of prior operations under those rights, and, following 80 MCC 245, 87 MCC 117, and 90 MCC 515, application must be denied when applicants' entire case rests on vendor's activity long after negotiations were instituted for the sale of his rights.—Id., pp. 541-2.

Though the general rule is that where a financial exhibit is questioned by opposing parties a competent witness should be made available for cross-examination thereon, a transaction may be found consistent with public interest even though no competent witnesses are presented to authenticate the financial data. While applicants failed to make such a witness available at either initial or further hearing, they were severely handicapped by the death of vendor's general manager prior to initial hearing, also by illness of its stockholder-president which prevented his attending that hearing and his death prior to the further hearing, which forced them to rely on witnesses only secondarily related to vendor to establish the nature and scope of its past operations. In the circumstances, and in view of transparent nature of vendor's financial statements, their consideration as evidence did not prejudice protestants.—Von Der Ahe Van Lines, Inc.—Lease and Purchase—Bee-Line, 90 M.C.C. 888 (889, 891)*.

While there is no requirement that abstracts of shipments transported by a carrier be made only from bills of lading, they must be supported at hearing by the underlying data used, in order to assist cross-examination and prevent inclusion of spurious evidence. Abstracts have been admitted when underlying documents were made in ordinary course of business, even though witness had no knowledge of how they were prepared and could not otherwise stand cross examination, and also where underlying data were not available but the witness was qualified to testify and stand cross-examination with regard thereto. Vendee's president was properly qualified to authenticate the supporting data, and stand cross-examination theron, as to shipments transported by vendor and vendee in interline arrangements, but not as to shipments allegedly transported by vendor alone or by a third carrier under lease arrangement with vendor. —Id., pp. 891-2.

However, the abstract of shipments interlined with the third carrier was admissible when testimony of the widow of vendor's general manager, who had gained some knowledge of vendor's operations while assisting her husband, was corroborated by individual who inspected vehicles of other carriers being leased to vendor, who identified underlying manifests as signed by him or by one of his authorized employees, and by a State Highway Department employee who verified shipments listed thereon as entering the State on trucks owned by or leased to vendor.—Id., p. 894.

Also, the widow of vendor's general manager, who assisted her husband in handling its transportation matters during a 2-year period prior to his death, submitted verbatim abstracts of notations made by her husband in his diary and on his office calendar covering shipments handled during a period of about 6 months. Both the diary and calendar were made available at the hearing, and witness identified some shipments shown in the abstracts and testified she had catalogued underlying documents and assisted in preparing other exhibits listing shipments interlined with vendee and the third carrier. Applicants have attempted to present every witness who could possibly authenticate vendor's records and testify concerning abstracts predicated thereon; to reject such testimony, in the circumstances, as insufficient to establish authenticity of the records offered could create a situation in which proof of a vendor's operations would be impossible solely because those who made the records are dead. Even at common law the unavailability of the witnesses would supply the need for use of vendor's records.—Id., 93 M.C.C. 498 (503)*.

In any event, the disputed exhibits are admissible under the "normal course of business" exception to the hearsay rule. The main purpose of the Federal Business Records Act and rule 1.79 of the commission's Rules of Practice, which is almost identical in language, is to lighten the burden of producing or accounting for witnesses by permitting records to be verified by anyone who knows that they are made in the regular course of business; and fact that the witness neither prepared the records nor supervised their preparation does not affect their admissibility. [See 81 MCC 683 and 305 F. 2d 121.] Testimony of the general manager's widow, who worked in her husband's office and assisted him in preparation of many of the records, is sufficient to establish that those documents and records, including the shipping papers and notations from the diary and calendar, were made and kept in the regular course of business.—Id., pp. 504, 506.

Technical ules on admission of evidence should not be permitted to frustrate the ends of justice; see 278 F. 2d 415. In addition, when the commission functions in a quasi-judicial capacity, unlike a court it is dealing with an area of specialized knowledge and activity in which it presumably has a special competence; and, also unlike a court, it is in every case obligated to weigh the public interest considerations, not merely those of the particular litigants. Consequently, it should not be limited by strict rules on admissibility of evidence, such as may govern adversary proceedings between private litigants before a court.—Id., p. 505.

Abstracts of past shipments may be received to show scope and nature of a carrier's past service only when they are supported by original underlying records, which in contested cases must be available to opposing parties for inspection and cross-examination thereon; and admission of such data, even though supported by underlying documents, has been refused where the witness presented was not sufficiently competent to verify their authenticity. Abstract of shipments submitted with the application, although prepared from acquired carrier's books and records, may not be considered when the shipments listed therein, except those embraced in exhibit subsequently submitted at the hearing, could not be further supported.—Ashworth Transfer, Inc.—Control—Hawkes Transp. Co., 87 M.C.C. 653 (659-60)*.

While exhibit submitted at hearing listed

some 345 shipments over a period of 3-1/2 years prior to December 1958, the only witness presented for cross-examination were one of acquiring carrier's controlling stockholders, who could testify only as to shipments interlined by the two carriers, a shipper representative who was familiar to some extent with explosives shipments handled by acquired carrier, and latter's driver-manager who had been in its employ since January 1958 and managed its operations after departure of its stockholders; those witnesses were sufficiently qualified to testify respecting its operations subsequent to January 1958; shipments prior thereto were substantially unauthenticated and were too remote in time to be considered for purpose of establishing the pattern of operations evolved under acquired carrier's rights, responsive to transportation needs of the area served, and may not be considered.—Id., p. 660.

While data in vendor's abstract of shipments handled in 1957 are somewhat remote, consideration thereof is necessary to afford a picture of the scope and nature of services performed under its rights prior to assignment for the benefit of creditors. Also, though evidence of service performed under temporary lease authority (granted because of vendor's adverse financial condition), by a prior vendee-applicant which later withdrew, cannot be considered conclusive, it is entitled to consideration along with other evidence; in instances where lessee withdraws and the rights revert to lessor, service by lessee must be considered a continuation of operations previously by lessor in future consideration of sale of the rights to another party. Contention that shipments so handled by prior vendee should not be considered because its stockholders subsequently acquired duplicating rights and continued operations in the area, is without merit; its abstract covers a period antedating termination of the temporary authority.—Hudson Transp. Co.—Purchase—Hillside Freight lines, Inc., 87 M.C.C. 759 (763).

Operations performed by instant vendee under temporary authority are pertinent to determination of questions of scope thereof as compared to service performed by vendor and prior vendee, shipper support for continuation of its service, particularly to extent it exceeds that of vendor and prior vendee, and effect thereof on protestant motor carriers. However, shipments originated by vendee under temporary authority at points also embraced in its own authority, and the few shipments from points beyond vendor's authorized area and not clearly shown to have been handled in interline, have little value to show scope of service under vendor's rights. Considering broad areas involved, as well as existing service available, evidence does not warrant finding of need for continuance of vendee's service to and from points in northern Pennsylvania area.—Id., pp. 764, 765-6.

Except where provision has been made by the hearing officer, or where there is special justification, the commission will not receive in evidence any documents, letters or other writings submitted after the close of a hearing. Accordingly, affidavit of one law firm and letter of another concerning their employment by vendee, submitted with applicants' exceptions to the proposed report, are excluded; however, official notice may be taken of information contained in vendee's annual report to the commission, copies of which were also submitted with those exceptions. Also, certain other matters complained of therein, being without foundation in the record, are stricken as not properly in evidence.—R. L. Jeffries Trucking Co., Inc.—Purchase—Eck Miller, 97 M.C.C. 151 (165).

Letter to the commission from carrier (not a party to purchase proceeding) which purchased vendor's intrastate rights and instituted interstate operations under former single-State proviso, offering to accept restrictions on any certificate of registration issued in its pending §206(a)(7) proceeding, as proposed by the parties to meet objections to vendee's purchase of vendor's interstate rights, is not properly in evidence and may not be considered because of its hearsay character and inability of opposing parties to cross-examine; any consideration thereof would also be contrary to rule 1.86 of the Rules of Practice. And while the commission may take official notice of certain matters of fact, the restriction proposed in that letter and its effect in conjunction with other restrictions proposed on those rights and vendor's interstate rights are not such matters of common knowledge and,

thus, may not be the subject of official notice by the commission.—Illinois-California Exp., Inc.—Purchase—Salt Lake-Kanab, 97 M.C.C. 38 (41, 44, 45).

And though applicants request further hearing solely to admit the letter into evidence, rule 1.101(b) of Rules of Practice requires that an explanation be given why such evidence was not previously adduced. Hearings covering a period of 3 months were held at Salt Lake City where purchaser of the intrastate rights has its headquarters, and applicants were apprised of protestants' opposition based on creation of duplicate rights during the first day of hearing, yet made no effort to present the proposed restrictions. In absence of an acceptable reason why such evidence was not submitted in a timely manner, applicants should not be permitted to supplement the record at this late date.—Id., p. 45.

Control applicants' contention at oral argument that it is doubtful whether they jointly control or have power to control a noncarrier company which controls three carriers, and their assertion in subsequent letter to the commission that their stock interest in that company has been reduced to about 20 percent, must be disregarded in absence of supporting evidence of record.—Best Transport, Inc., 88 M.C.C. 147 (150, Note 4)*.

Evidence is entirely deficient to support the requisite finding that proposed control by Canadian railroad's subsidiary holding company of a motor carrier also operating partly in United States would enable the railroad to use the motor service to public advantage in its operations. Though applicants state that the railroad would turn some l.c.l. traffic over to the motor carrier where its rail service is considered inadequate and the traffic would be expedited, they submitted no estimate either of volume of rail traffic that could be handled in substituted motor-for-rail service or of economies and benefits that could be effected thereby. Nor do they show extent, if any, to which resulting operations would require a prior or subsequent rail movement; on the contrary, they admit that there would be no elimination or reduction of rail service and that the motor carrier would be used separately as a funnel for traffic of all motor carriers under the holding company's control. Application denied.—Canadian Natl. Transp.—Control—Husband International, 93 M.C.C. 80 (87-8).

Contention in protestants' reply to applicants' exceptions, that examiner erred in refusing to admit an exhibit purporting to contain testimony of one of applicants' witnesses in an unrelated proceeding, and requesting that it be received in evidence, is tantamount to an exception to the examiner's ruling on the exhibit; as an exception included in a reply will not be considered unless timely filed (Rule 1.96(a), (b) of Rules of Practice), such request is denied. Also, supplemental data contained in applicants' exceptions may not be considered in view of protestants' objections to acceptance thereof as part of the record, on ground that such material was not offered at hearing when all parties were present and had opportunity for cross-examination; protestants' motion to strike such data, granted.—Be-Mac Transport Co., Inc.—Purchase—Nix, 87 M.C.C. 737 (740).

Applicants must make a prima facie showing of fitness, but unless some error in that showing or some other fact indicating unfitness is brought out by another party on cross-examination, vendee's fitness may be accepted. When protestants failed to uncover any specific violations in vendee's interline practices, they demanded production of drivers' logs, lease agreements, etc., in order to explore legality of the interline. Applicants properly objected to bringing in every document or piece of information as to their interline for purposes of a "fishing expedition"; there is nothing unusual in fact that a vendee in a §5 purchase proceeding, not coupled with any investigation or enforcement proceeding, did not have copies of written interline agreements, drivers' logs, or shipping manifests available in the hearing room for protestants' inspection. Protestants' mere questioning of lawfulness of the interline falls far short of showing facts to create a valid doubt.—Security Van Lines, Inc.—Purchase—Community & Johnson, 93 M.C.C. 399 (403).

Evidence relating to unauthorized shipments or transportation cannot be considered in determining the extent to which a carrier has exercised its operating authority.—Southwest Frt. Lines, Inc.—Control—Direct

Transports, 93 M.C.C. 439 (449).

Applicants have the burden of establishing details of past operations by a competent representative. When, under an agreement not introduced in evidence, survivor leases its equipment and drivers to liquidating carrier from origin to destination, and liquidating carrier's stock owner, the only witness presented to stand cross-examination on its operations, had little knowledge of its day-to-day operations and had no knowledge of location of inspection station established at the carriers' common gateway or of identity of person relied on to inspect and placard vehicles, but apparently relied on her office manager, there is ample reason to doubt that liquidating carrier exercised any control over survivor's equipment and drivers while operating in former's territory. Cross-examination of applicants' witnesses was piercing enough to rebut any presumption that the purported interline arrangements were lawful; moreover, since lawfulness of the interline is seriously questioned, and all such interline occurred after merger application was filed, any evidence as to such operations is entitled to no weight.—Dealers Transit, Inc.—Control and Merger, 93 M.C.C. 611 (618-9, 620).

Evidence of deficit operations ascribed to the purchase routes in protestant's traffic study is inconclusive to show that available traffic in considered area will not support competitive operations of two buslines. Its selection of a week in autumn for purpose of showing that vendee and itself do not conduct compensatory operations over the direct Boston-Portland route is not sufficiently representative for determination.—Trailways of New England, Inc.—Purchase—Interstate, 93 M.C.C. 217 (225-6).

Realizing that an exhibit depicting scope of operations performed under the rights to be acquired is necessary and important in a §5 proceeding, applicants made a concerted effort to prepare an exhibit to withstand the charge of dormancy of vendor's rights, and to substantiate shipments listed therein, most of which were handled in vendee's equipment and on its billing, vendee's transportation documents were traced onto those of vendor, signatures forged, and the documents crumpled and stepped on to give them appearance of having been handled by drivers of the vehicles. Despite sanctity of the oath, testimony of participants in those machinations differed widely, and there is no doubt that some of the witnesses perjured themselves; nevertheless, the sum total of the evidence discloses a flagrant violation of §5(4).—Calore Exp. Co., Inc.—Purchase—T.W.Waterman Co., Inc., 93 M.C.C. 291 (296).

The techniques employed--submission of false exhibits supported by forged freight bills and false testimony under oath--are not only an affront to the commission but subversive of the entire regulatory process. In order to exercise informed judgment in discharging its statutory responsibilities the commission must be able to rely fully on integrity of the basic documents reflecting the business transacted by the transportation companies subject to its regulation; therefore, strong measures are warranted to prevent a recurrence of such willful misrepresentations by applicant-respondents or others. Bureau of Inquiry and Compliance is accordingly instructed to consider criminal proceedings respecting the violations of the act disclosed, and to bring to attention of the Department of Justice the perjury which appears to have been committed by certain witnesses.—Id., pp. 297, 298.

Exhibits which admittedly were not statistics or documents maintained in regular course of business, but were abstracted from freight bills and specially prepared for presentation at hearing to show alleged adverse effect on protestant of vendee's operations under temporary authority, and traffic which would be exposed to vendee's single-line competition after permanent unification, represent a type of evidence which the commission, in a long line of cases, has required to be supported by underlying data when objection to its admission is raised. See 74 MCC 193. Examiner correctly rejected the proffered exhibits when applicants objected to their receipt in evidence.—Michigan Exp., Inc.—Purchase—Chicago-St. Louis Exp., Inc., 90 M.C.C. 671 (675)*.

Acquiring carrier's valuation of acquired carrier's equipment and terminals was not supported when persons who appraised three terminals were not available at hearing for cross-examination; appraiser of a fourth was

not familiar with structural features of the buildings, did not know thickness of yard paving, which would determine its value, and could offer no basis for his appraisal other than asking price of other property in the area; excess of fair market value over depreciated book value of a fifth terminal was not shown; appraised value of a sixth exceeded cost of its construction the preceding year by some $90,000; and appraised value of motor equipment did not necessarily represent its fair market value at time of hearing. While the equipment and terminals might well have fair market value in excess of net book value, no reasonable determination thereof could be made from evidence submitted.—Red Ball Motor Freight, Inc.—Control—Couch Motor, 87 M.C.C. 627 (630-1).

Though acquiring carrier based its appraisal of acquired carrier's operating rights on estimate that, based on its experience with another subsidiary, it could increase former's operating revenues by 20 percent, operating revenues of both under its control showed a lesser percentage of annual increase than prior thereto, and it is not shown that acquired carrier's operating problems are the same as those of the existing subsidiary at time control of it was acquired; acquiring carrier admits its estimate of savings includes duplications, and it is evident that some represent arbitrary figures not based on a careful study of its operations and that others would materialize only to extent that an increase in revenues would be actually achieved; such estimates are overly optimistic and lack substantial support in the records.—Id., pp. 631-2.

Presumptions: [Vols. 14, 17-19].—In absence of evidence to the contrary, it must be presumed that acquiring carrier, under temporary control authority, has been providing honest and bona fide management, with unfavorable results to both that carrier's and its own otherwise profitable operations, to which much weight should be given in determining whether the transaction would be consistent with public interest.—Adley Exp. Co.—Control—McFaddin Exp., Inc., 87 M.C.C. 665 (672)*.

When at further hearing applicants again failed to support vendors' exhibit by production of underlying data, which they assert were lost or mislaid since preparation of the exhibit, and freight bills offered were rejected because not within limits prescribed by order assigning and defining purpose of the further hearing, and there is no other evidence to support contention that a reasonably active and continuous service was rendered under vendor's rights prior to grant of temporary authority, it must again be presumed that the operations were dormant.—Ashworth Transfer, Inc.—Purchase—Willcoxon and Fowkes, 90 M.C.C. 107 (109):.

126. Burden of proof.—[Vols. 15-19].—Once dormancy has been found, in proceeding involving sale of motor carrier operating rights, purchasing carrier has the burden of proving public need for his service in order to justify reactivation of dormant routes; and logically, the commission then requires the same degree of proof in an application to reactivate wholly unused routes as it would in an application for new routes. Purchasing carrier's obligation is to show by shipper testimony that need for additional service is present or immediately forseeable—and, conversely, upon protest of authorized carriers, that existing service offered is incapable of meeting shipper demands. Testimony of vendee's (plaintiff) shipper witnesses clearly shows that, while they might prefer its service, they have no great difficulty in obtaining service from other carriers. The commission's order denying plaintiff authority to purchase rights of another motor carrier sustained, and temporary restraining order vacated.—C & H Transp. Co., Inc. v. United States, 249 F. Supp. 97 (100-1)*.

Where water carrier seeks authority to purchase motor-carrier operating rights and property, in absence of a clear showing of a different intent by Congress, the *maxim expressio unius est exclusio alterius* should apply, and proviso of §5(2)(b) and the provisions of §5(14) and (16) should not be construed to require water carrier, having no affiliation with a railroad, to sustain the same burden of proof as rail carriers, namely that it will be able to use the motor carrier rights to public advantage in its own operations; water carriers need only show that proposed transaction will be consistent with public interest,

which phrase has been construed to mean compatible and not contradictory or hostile to the public interest.—TTC Corp.—Purchase—Terminal Transport Co., Inc., 97 M.C.C. 380 (385, 397-9, 403)*.

See also Illinois Central case, §5(16), n. 13.

Proviso of §5(2)(b) makes it mandatory that an applicant motor carrier which is controlled by a railroad present evidence that the transaction proposed will enable the railroad to use the acquired motor operations to public advantage in its rail service; and fact that railroad-controlled vendee's present operations generally are not restricted to service auxiliary or supplemental to the rail service, or that it has been authorized to acquire unrestricted rights in other proceedings, is neither controlling nor determinative.—Burlington Truck Lines, Inc.—Purchase—H. B. Green Transp., 90 M.C.C. 865 (869).

Although vendor is authorized to serve 195 points in Illinois and Iowa, its routes out of Chicago do not parallel the lines of vendee's parent railroad in several instances, and applicants submitted evidence to show that the railroad could use the motor service proposed under the acquired rights to public advantage at only 1 point in Illinois and 5 small points in Iowa; they have not attempted, even by a modicum of proof, to show how the railroad would be able to use vendee's substituted motor service to a substantial number of large points served by vendor but not on the rail lines, as well as a number of large points on the rail lines and served by vendor but not by vendee. Applicants have thus failed to meet the proof requirements of §5(2)(b); denied.—Id., pp. 869-71.

See also Pilot Freight Carriers purchase case, n. 110 *Restrictions on operating rights*, above.

Dormancy does not in all instances preclude transfer of operating authority particularly if public need is shown for revitalized service thereunder; thus, transfer of dormant rights has been permitted when testimony of shipper witnesses established that they need the service and cannot be served satisfactorily by existing carriers. However, when such a showing is attempted, the burden of proof rests with applicants and cannot be shifted to protestants as if the matter were simply one of proving adverse competitive effect. And where service in several States is authorized under the rights involved, it is generally incumbent on the parties to show service to each State, in order to demonstrate active use of those rights. Applicants failed to meet their burden of showing need for revitalized service under the portion of considered rights found to be entirely dormant in prior report.—C & H Transp. Co., Inc.—Purchase—Ferguson Trucking, 97 M.C.C. 741 (748, 750)*.

Where rights sought to be acquired have become dormant, for whatever reason, it is incumbent on applicants to show that the carrier proposing to acquire the rights would meet some transportation need not being met by existing carriers, and fact that control alone is sought, rather than unification by purchase or merger, does not alter that burden.—Adley Exp. Co.—Control—McFaddin Exp., Inc., 93 M.C.C. 378 (384)*; also, the mere fact that acquiring carrier may reap additional benefits from the transaction does not lessen applicants' burden of proof concerning public need, nor does protestants' failure to show with particularity the traffic or revenues they would lose under the unified rights warrant special consideration where applicants fail to establish that the transaction would be consistent with public interest.—U.S. Van Lines, Inc.—Purchase—Holien, 90 M.C.C. 657 (661).

In transactions subject to §5 applicants have the burden of proving that their proposal will be consistent with public interest, and where a new service is involved they must show a need therefor. They may not escape this required showing by contending that protestants have not submitted positive proof of diversion of their traffic as a result of the proposed unification. Evidence of sporadic movements in the past and possibility of increased movements for the future fails to establish a need for the new type of service which was not previously rendered by vendee and vendor between themselves or with other carriers.—North American Van Lines, Inc.—Purchase—Hagerstown Motor, 93 M.C.C. 125 (131-2); and applicants may not evade their burden of proof by such contentions, particularly where vendor's service has been for the most part a local operation out of one

area, with little or no service conducted from a vast number of other authorized origin areas.—Aero Mayflower Transit Co., Inc.—Purchase—Walls, 93 M.C.C. 369 (377).

Although the burden is on applicants to show that approval of proposed transaction would be consistent with public interest, the burden is on protestants to show with more particularity just how much traffic they would lose and to what degree their operations would be harmed by approval. Requirement that conjectural and speculative data be displaced by more concrete evidence is only placing on protestants the burden of supporting their contention that they would be materially adversely affected by the transaction. Protestants have not made such a showing.—Helm's Exp., Inc.—Purchase—Keystone Transfer Co., Inc., 90 M.C.C. 679 (685); C & H Transp. Co., Inc.—Purchase—Gulf Southwestern Transp., 90 M.C.C. 636 (641).

Burden is on applicants to submit evidence to support a finding that proposed transaction would be consistent with public interest, including, where single-line service amounting to a new and different service would result, evidence of need for such service.—Bowman Transp., Inc.—Purchase—A. W. Hawkins, Inc., 90 M.C.C. 303 (327); accordingly, while fact that no shipper expressed need or preference for vendee's proposed single-line service is not fatal to the purchase application, applicants failed to meet their burden of proving the transaction would be consistent with public interest when they submitted no evidence of substantial participation by vendee in interline traffic between Chicago and Omaha (which would be fruitful sources of traffic for its proposed service) and approval would adversely affect protestants who are providing adequate service.—Barber Transp. Co.—Purchase—Conner, 90 M.C.C. 475 (480, 481).

The act does not in so many words require a finding of fitness to be made in §5 proceedings; rather, a showing of fitness is part of applicants' burden of showing the transaction to be consistent with public interest.—Security Van Lines, Inc.—Purchase—Community & Johnson, 93 M.C.C. 399 (403).

Applicants' burden of proving that their interline operations prior to grant of temporary authority were lawful is of more than usual importance where such operations are being used to establish public convenience and necessity for their continuance by vendee in related §207 proceeding, and vendee's fitness in both proceedings rests heavily on their legality.—Liquid Transporters, Inc.—Purchase—Black, 93 M.C.C. 423 (427).

Approval of a transaction unlawfully accomplished in violation of §5(4) requires a positive showing that continuance of the common control and management would be consistent with public interest. Merger applicants have not met that burden when only evidence offered is desire of liquidating carrier's stock owner to dispose of it because of his age, plus fact that survivor would benefit from single-line service; such evidence, without more, would not support a finding that any overriding public interest would be served.—Kaplan Trucking Co.—Control—Thomas Boyd, Inc., 90 M.C.C. 419 (427)*.

As a prerequisite to a finding that a proposed transaction under §5 is consistent with public interest, it is part of applicants' burden to show by competent evidence the nature and scope of past and present operations under the interstate rights sought to be acquired, or, alternatively, where there is no acceptable evidence of what operations are being performed that material benefits to the public would result were operations to be instituted under those rights. As to latter alternative, applicants chose not to submit shipper evidence, and their case consequently hinges entirely on whether examiner properly rejected vendor's exhibit of shipments allegedly transported during a 3-month period subsequent to the purchase agreement. Since shipments listed in vendor's abstracts were not authenticated, that evidence was properly rejected and cannot be found to resolve the basic question of consistency with public interest; applicants have failed to meet their burden of proof, and application must be denied.—Prichard Transfer, Inc.—Purchase—Weiss, 93 M.C.C. 535 (541).

While the test of substantiality of a selling carrier's past operations may have been more frequently applied to territory or points served, it has also been employed where the issue embraced types of commodities transported, and under principles laid down in 315

US 475 there is no justification or logic for limiting that test to geographical scope of operations under the rights involved. A showing should be made that the carrier operated as a common carrier of a large group of commodities or of a whole class or classes of property, even although it may not have transported all commodities falling within their generic classification.—Gillette Motor Transport, Inc.—Control—Voss, 93 M.C.C. 265 (267-8)*.

Initially, applicant for authority under §5 to acquire carrier operations has the burden of establishing that the transaction would be consistent with public interest. Part of that burden is to show the nature and scope of the operations to be acquired; if applicant elects to do this on a representative basis, it is its burden to introduce evidence of those operations that is truly representative not only of their geographic coverage but also of the volume and frequency of shipments transported within the geographical coverage shown.—Accelerated Transport-Pony Exp., Inc.—Control—Downing, 87 M.C.C. 711 (723).

If record in control proceeding contains all the necessary elements and accurately depicts, on a representative basis, the past operations of acquired carrier, conclusions reached as to the limited nature or dormancy of substantial portions thereof are fully justified; on the other hand, if evidence furnished is deficient and does not accurately reflect the nature and scope of those operations, responsibility therefor rests with control applicant; in either event it has not met its burden of proof as to those portions of acquired carrier's rights.—Id., p. 723.

In all purchase proceedings under §5 the burden is on applicants to show the scope and nature of, and to establish the continuity of, the selling carrier's past operations.—Superior Trucking Co.—Purchase—Arthur Morgan Trucking, 90 M.C.C. 367 (370)*; and such a showing is necessary even where the issue of dormancy has not been raised. As part of such proof, the commission requires applicants to submit an abstract of shipments transported by the selling carrier during the 6 months immediately preceding filing of the application.—West Nebraska Exp., Inc.—Purchase—Forsstrom, 87 M.C.C. 733 (736).

Part of applicants' burden of proof in a §5 proceeding is to show the nature and scope of past and present operations conducted under operating rights sought to be acquired, or in the alternative, material benefits that would enure to the public as a result of institution of operations under rights where there is no evidence that any interstate operations are being performed. And when application seeks authority for purchase by a corporate carrier of operating rights of an individual, but latter, through related and inseparable transactions, would acquire control of all the operating rights and properties involved and is the real party in interest, the individual is in fact the purchaser and the corporate carrier is the seller in the transaction when viewed in entirety; therefore, applicants' burden of proof is to show scope of operations conducted by the corporate carrier.—Zern—Control—William A. Kelly, Inc., 90 M.C.C. 25 (28, 29).

The "test of substantiality" of a selling carrier's past operations has usually been applied in reference to the territory or points served, and a carrier holding general-commodity authority need not show that it has transported each and every commodity embraced thereby. However, where general-commodity authority contains no restriction against transportation of commodity classes usually excepted therefrom because they involve services in specialized fields of transportation and require special equipment and unique services which general-commodity carriers usually cannot provide, no less should be expected of applicants in showing a vendor's past exercise of its rights to transport such commodities, or of need for their revitalization by vendee if dormant, than would be required of specialized carriers involved in a transfer of like rights.—Gillette Motor Transport, Inc.—Control—Voss, 90 M.C.C. 663 (664-5, 669)*.

Burden of establishing that a transaction under §5 is consistent with public interest is on applicants, and must be met with competent evidence; in meeting this burden, and to enable a carrier to show scope and nature of its past service without necessity of introducing voluminous data, abstracts of shipments it has transported are received, but only where they are supported by the original under lying records, which in contested cases must be available to opposing parties for inspection

and cross-examination thereon; and the commission has refused to accept such data, even though supported by underlying documents, where the witness presented was not sufficiently competent to verify the authenticity of the data.—Ashworth Transfer, Inc.—Control—Hawkes Transp. Co., 87 M.C.C. 653 (659)*.

Applicants seeking approval of common control of two or more carriers have the burden of showing that the proposed transaction will be consistent with public interest; and as the number of motor carriers to be controlled or managed in a common interest increases, proportionately greater justification for such common control must be shown.—Schwerman Trucking Co. of Ala., Inc., 88 M.C.C. 495 (499).

See also Roush Control case, n. 115, above.

Factors deemed sufficient grounds for approving common control of two or a limited number of operating companies in the past are not necessarily controlling of situations wherein a large number of carriers are sought to be controlled in common interest; as the number of commonly controlled carriers expands, and the resulting administrative and substantive problems increase, an applicant seeking authority to control additional motor carriers is logically required to establish more substantial reasons for the formation of additional carrier entities than might otherwise be necessary.—Best Transport, Inc., 88 M.C.C. 147 (155-6)*.

Section 5. (3) Noncarrier deemed carrier upon acquiring control.j

[Unchanged. See vol. 11, p. 9212.]

Amendments, see footnotes, vol. 6. p. 5169, vol. 11, p. 9212; historical note, p. 5169

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Volume 11—p. 9213; Volume 12—p. 10272; Volume 13—p. 10980; Volume 14—p. 11477; Volume 15—p. 12052; Volume 16—p. 12686; Volume 17—p. 13355; Volume 18—p. 14121; Volume 19—p. 15267.

10. Controlling person subject to reports, accounting, provisions.—[Vols. 11-19].—See also Schwartz v. Alleghany Corporation case, 28 USC §2325, n. 7.

In light of the primary jurisdiction of the commission, and its outstanding orders and decisions regulating Alleghany Corp. as a common carrier, the court lacked jurisdiction under the Investment Company Act to entertain stockholder's derivative action to set aside railroad corporation's sale of owned stock to individual defendants, who are alleged to be nominees of Alleghany. Plaintiff's suit proceeds on the theory that, because Alleghany was then an investment company which failed to register with the Securities and Exchange Commission as required by Investment Company Act, considered sale of stock to its nominees was void; however, evidence establishes that at all relevant times Alleghany was subject to regulation by the commission as a carrier and, therefore, was not an investment company which was required to register with SEC; moreover, SEC's order declaring that it had ceased to be an "investing company" was also outstanding when the transaction took place.—Schwartz v. Bowman, 244 F. Supp. 51 (54-60, 65-6, 69)*.

As provisions of §5(3) for subjecting noncarriers acquiring control of carriers to the accounts, reports, and securities requirements of the act are permissive, it is discretionary with the commission whether to designate as a "carrier" subject to those requirements an investment company which, principally through a holding company that it controls by stock ownership, will acquire power to exercise indirect control of survivor in approved railroad merger. Since its direct interest in the merger company is merely incidental to its primary business of managing trusts and estates, and in addition to its minor stockholdings in the merging carriers it holds securities of other railroads in various fiduciary capacities and in relatively small amounts, the public interest does not require that it be subjected to those provisions of the act.—Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122 (197)*.

Since interests in transportation of paper company and its parent timber company, authorized respectively to acquire direct and indirect control of a carrier, are incidental and subordinate to their primary noncarrier activities, it is unnecessary to subject either to provisions of the act under §5(3), except that both will be required to file such special reports as may be directed under §20.—Georgia-Pacific Corp.—Control, 320 I.C.C. 115 (120).

Since interest of noncarrer holding company in acquiring indirect control of three small railroads, through stock purchase by lines of Mo.-Pac. system whose stock it owns, is incidental and subordinate to its primary business (i.e., the operating of a natural gas pipeline system and of cement production and distribution facilities), and since railroad carriers involved in the acquisition are required to file regular reports, it is not necessary to subject noncarrier to regulation under §5(3), except to extent of filing annual reports on commission's Form A and of such special reports as may be required pursuant to §20(1) and (2); however, jurisdiction is reserved for requiring compliance with provisions of §20a(2-11) if considered necessary in the future to protect public interest.—Texas & Pac. Ry. Co.—Control—Kansas, O. & G. Ry. Co., 324 I.C.C. 309 (320, 323)*.

Although merger of holding company which controls a single established railroad system into a new corporation amounts merely to a reincorporation of the old company and is not subject to §5(2), and therefore the new company may not be subjected to the accounts, reports, and securities provisions of the act under §5(3), upon consummation the new company will be subject to, and must comply with, provisions of §§20(1-10) and 20a(2-11) in lieu of the old company to extent provided by order in debt adjustment proceeding, 254 ICC 239.—Delaware & Hudson Co. Merger, 317 I.C.C. 177 (180).

Inasmuch as the activities and investments of the four applicant corporations which control vendee are principally related to transportation, all four should be subjected to the reporting regulations; jurisdiction reserved to subject any of them to other provisions in §5(3) by supplemental order, should that be necessary in the future.—Hudson Transit Lines, Inc.—Purchase—Inter-City Transp., 97 M.C.C. 524 (529-30)*.

As the primary investment of recently organized noncarrier corporation is in capital stock of vendee carrier, it should be considered a carrier and should be subjected to the accounts, reports, and securities provisions of the act.—Deaton Truck Line, Inc.—Purchase—Lavender, 97 M.C.C. 256 (257, 269)*; likewise, since primary function and purpose of controlling noncarrier is to hold stock of vendee carrier, upon consummation of proposed purchase the noncarrier will be made subject to accounts, reports, and securities provisions of the act.—E. & L. Transport Co. —Purchase—Dealers Transport Co., 87 M.C.C. 785 (787).

Since Greyhound Corp.'s principal source of income, upon its becoming a holding company after sale of its operating rights to a wholly owned subsidiary, would be from carrier operations subject to the act and from noncarrier companies engaged for the most part in activities closely related thereto, public interest requires that it continue to be subject to the accounting, reporting, and securities provisions of the act.—California Parlor Car Tours Co.—Purchase—Greyhound, 93 M.C.C. 392 (395).

Though upon consummation of control transaction motor carrier operations would represent a substantial portion of total investment and revenues of acquiring noncarrier company, it would not be engaged primarily in such transportation and it is therefore presently unnecessary to subject it to the accounts, reports, and securities provisions of the act. Should necessity therefor arise in the future, extent to which it should be subjected to those provisions may be determined by supplemental order under §5(9).—Lease Plan International Corp.—Control—National, 93 M.C.C. 203 (207)*.

Although Crown, a noncarrier controlled by acquiring carrier's stockholders, seeks authority to acquire control of that carrier and through it 6 subsidiaries including acquired carrier, also to acquire control of latter's parent holding company and through it 3 noncarrier subsidiaries, it desires not to be subjected to provisions of the act enumerated in §5(3)

because of its plans to act as an investment company with diversified interests. However, upon consummation it would directly control acquiring carrier and would indirectly control latter's 2 carrier subsidiaries as well as 7 noncarrier companies engaged in activities related to transportation, and its principal source of income at that time would be from carriers subject to the act and companies engaged in activities closely related thereto. In such circumstances public interest would require that Crown be subjected to the act as specified in §5(3).—Mason & Dixon Lines, Inc.—Control—Silver Fleet, 90 M.C.C. 829 (834, 848-9).

Crown is not now a carrier as defined in the act and if, as it has indicated, it would not consummate control of acquiring carrier if it were thereby subjected to §5(3), it would not be a corporation which has directly or indirectly acquired control of any carrier pursuant to a §5 authorization, and the provisions of §5(3) would be inapplicable. Therefore, in view of its stated desire not to be subjected to the securities provisions of the act, the transaction as authorized will not include authority for Crown to acquire control of the acquiring carrier.—Id., p. 849.

Section 5. (4)-(8). Control effected by other than prescribed methods; Affiliation; Investigation; Injunctions.—[Unchanged. See vol. 11, p. 9213-9215.]

Amendments, see footnotes, vol. 6, pp. 5170-5176, vol. 11, pp. 9213-9215; historical notes, pp. 5170-5176; cross references, vol. 9, p. 7461.

Section 5. (9).—[Unchanged. See vol. 11, p. 9215, vol. 15, p. 12054.]

Amendments, see footnotes, vol. 6, p. 5177, vol. 11, p. 9215; historical note, p. 5177.

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§5(9): Volume 2—p. 1387; Volume 6—p. 5177; Volume 9—p. 7464; Volume 12—p. 10272; Vol. 13—p. 10981; Volume 14—p. 11478; Volume 15—p. 12053; Volume 16—p. 12687; Volume 18—p. 14122; Volume 19—p. 15270.

10. Supplemental orders.—[Vols. 6, 9, 12-16, 18, 19].—Although order authorizing acquiring carrier to issue a promissory note to plaintiff in partial payment for his stock in a noncarrier affiliate of acquired carrier was issued in a finance-docket proceeding, it was a supplemental and integral part of the control proceeding under review. Plaintiff's contention that this supplemental order is invalid because wholly in camera is unfounded; he had notice of the §214 application and filed formal pleading seeking its dismissal, and he was not denied right to participate in it.—Walker v. United States, 208 F. Supp. 388 (393)*.

Plaintiff likewise fails as to the merits; there was no need for any further or new evidence, since acquiring carrier's controlling stockholder is required to provide in advance the funds with which to make the cash payment and fund the retirement of the note.—Id., p. 394.

The commission, having concluded on controverted evidence that vendee in purchase proceeding had not complied with terms of its application with regard to protection of carrier employees, had the power under §5(9) to supplement and modify its original order by imposition of an employee protection condition, although certificate covering the purchase rights had been issued, apart from inadvertence and fraud. [Citing 367 US 316.] Vendee's failure to abide by material statements in its application, although arising from a mere breach of obligation to do so, would constitute "good cause shown" for supplementing order based on such application, when proceedings to redress the failure were in fieri when the certificate was issued and notice and opportunity to be heard was afforded the carrier.—Baggett Transp. Co. v. United States, 206 F. Supp. 835 (842)*.

Section 5[1] (10) Unifications, consolidations, etc., of motor carriers only.—Nothing in this section shall be construed to require the approval or authorization of the commission in the case of a transaction within the scope of paragraph (2) where the only parties to the transaction are motor carriers subject to part II (but not including a motor carrier controlled by or affiliated with a carrier as defined in section 1(3)), and where the aggregate gross operating revenues of such carriers have not exceeded $300,000 for a period of twelve consecutive months ending not more than six months preceding the date of the agreement of the parties covering the transaction. (Aug. 9, 1935, c. 498, §1, 49 Stat. 555; Sept. 18, 1940, c. 722, §7, 54 Stat. 908; July 27, 1965, Pub. Law 89-93, 79 Stat. 284.)

* * * * * *

[See vol. 11, p. 9215, vol. 15, p. 12054.]

[1]By §2 of the act of July 27, 1965, the amendment of the first subparagraph of §5(10) applies only to agreements entered into on or after the 60th day after date of enactment.

Historical Note

See vol. 19, p. 15270

Section 5. (11) Plenary nature of authority under section.—[Unchanged. See vol. 11, p. 9216.]

Amendments, see footnotes, vol. 6, p. 5178, vol. 11, p. 9216; historical note, vol. 6, p. 5178.

Notes of Decisions

Volume 2—p. 396; Volume 6—p. 5178; Volume 9—p. 7464; Volume 14—p. 11478; Volume 15—p. 12054; Volume 16—p. 12687; Volume 17—p. 13357; Volume 18—p. 14123; Volume 19—p. 15270.

1. Relief from antitrust laws, in general.—[Vols. 14-16, 18, 19].—Although the statute does not authorize the commission to ignore the antitrust laws, there can be little doubt that it is not to measure §5(2) proposals by the standard of the antitrust legislation; rather, it must accommodate §5(2) and the antitrust legislation. It matters not that the railroads merger in issue, which the commission approved, might otherwise violate the antitrust laws; Congress has authorized the commission to approve a proposed merger of railroads if it makes adequate findings, in accordance with criteria set forth in 321 US 67, that such merger would be consistent with the public interest. Judgment vacated and case remanded to district court for full review of he commission's findings and order.—Seaboard Air Line R. Co. v. United States, 382 U.S. 154 (155, 156-7)*.

Decisions in 369 US 482, 371 US 296, and 374 US 321 confirm the view that an exemption such as is afforded by §5(11) cuts across the antitrust laws and avoids necessity of their enforcement by the agency exercising regulatory jurisdiction.—Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122 (134)*.

See also TTC Corp.—Purchase—Terminal Transport Co., Inc., NTP, n. 10 *Water carriers*.

Upon commission's approval of a transaction under §5, parties thereto are relieved, by virtue of §5(11), of prohibition of the antitrust laws to extent of the authorized participation. However, while the commission's jurisdiction arises under §5 and not under the antitrust laws, this does not mean that it should not consider matters relating to restraint of competition and monopolistic tendencies which

are the specific object of the antitrust laws.—Pittston Co.—Control—Brink's Armored, Inc., 87 M.C.C. 637 (650).

2.——State laws.—[Vols. 14-19].—Section 5(11) makes the commission's jurisdiction under §5 exclusive and plenary, but with an important restriction with respect to shareholder voting; that restriction provides for a majority of votes of shareholders unless a different vote is required by State law, and language "required under applicable State law" therein embraces all State laws. Missouri Pacific's proposal to consolidate Texas & Pacific is a "corporate consolidation" within §5(11); and governing Missouri statute, which requires affirmative vote of at least two-thirds of all outstanding voting shares, provides that articles of incorporation shall control when they require "a greater portion of the shares, or of any class or series thereof." Thus, since §D(3) of MoPac's Articles of Association (providing that four kinds of corporate change shall not be effected without assent of a majority of both Class A and Class B stockholders) clearly includes the plan of consolidation in issue, Missouri law must be applied; that law requires application of MoPac's articles of association, which in turn require assent of the majority of the shareholders on a separate class-vote basis.—Levin v. Mississippi River Fuel Corp., 386 U.S. 162 (167-70)*.

The controlling consideration in approving mergers and consolidations being the public interest, the commission may authorize a carrier to abandon facilities within a State even though State laws prohibit the same; under §5(11), the commission has power to exempt railroads from operation of State laws in a §5 proceeding.—Chicago & N.W. Ry. Co. v. Brotherhood of Locomotive Engineers, 202 F. Supp. 277 (284)*.

Although it is unnecessary to determine whether agreement covering operation of Peoria & E. Ry. by New York Central is an operating agreement or a lease, notwithstanding such distinction may have special significance under Illinois law, since in either case it is subject to the commission's plenary and exclusive jurisdiction under §5, and approval leaves nothing for determination under State law that affects validity of the unified operations, applicants to not thereby escape any applicable statutory requirements for obtaining stockholder assent; and, since authority granted under §5 is permissive, the order of authorization cannot prejudice any rights the Peoria's security holders may desire to assert in the courts.—Cleveland, C., C. & St. L. Ry. Co.—Operating Agreement, 320 I.C.C. 430 (432-3).

Whether noncarrier's assent or vote, as owner of over 90 percent of common stock of carrier it proposes to merge, in favor of such unification, including elimination of interveners' minority stock interest, would be null and void under Illinois law is not controlling on commission's exercise of its exclusive and plenary authority under the act. However, applicants do not, by obtaining commission's approval, avoid any statutory requirement of lawful assent; legality of steps assailed by interveners is for determination under the applicable State laws by courts of competent jurisdiction.—Pittston Co.—Control—Brink's Armored, Inc., 87 M.C.C. 637 (643).

3.——Other acts.—[Vols. 18, 19].—The plain language of §5(11), conferring exclusive and plenary jurisdiction on the commission to approve mergers and relieving the carrier from all other restrainst of federal law, indicates intent of Congress that the commission have jurisdiction to prescribe the method for resolving labor problems arising directly out of approved mergers, and there is no express or implied exception of provisions of Railway Labor Act from the operative provisions of §5(11). Moreover, §5(11) is self-executing, and the commission need not expressly order or declare that a carrier be relieved from certain restraints; approval of appellee's merger, including protective agreement stipulated by it with employees, carried with it, in absence of language indicating a contrary intent, any exemption from restraints of other laws to extent necessary to carry out the merger.—Brotherhood of Locomotive Engineers v. Chicago & N.W. Ry. Co., 314 F. 2d 424 (431-2)*.

See also Schwartz v. Bowman, §5(3), n. 10.

Since the commission adopted the "stipulation" of railroads and unions for protection of railroad employees as part of its order approving merger of the railroads, the parties in

carrying out consolidation of certain railroad yards are relieved from requirements of the Railway Labor Act by virtue of §5(11). Defendant's contention that §5(11) provides only for relief from State laws or Federal antitrust statutes cannot be sustained; no such limitation can be found in words of that statute.—Chicago & N.W. Ry. Co. v Brotherhood of Locomotive Engineers, 202 F. Supp. 277 (284-5)*.

See also Texas & N.O.R. Co. v. Brotherhood of Railroad Trainmen, §5(2), n. 70.

Section 5. (12), (13), (14).—[Unchanged].

Notes of Decisions

§5(13): Vol. 15—p. 12055; Volume 19—p. 15272.

§5(14): Volume 2—p. 1405; Volume 6—p. 5186; Volume 9—p. 7466; Volume 11—p. 9218; Volume 12—p. 10273; Volume 13—p. 10981; Volume 14—p. 11480; Volume 15—p. 12056; Volume 16—p. 12688; Volume 18—p. 14124; Volume 19—p. 15272.

§5(13). 2. Construction and interpretation.—[Vols. 15, 19].—See also McFaddin Express, Inc. v. Adley Corporation, 363 F. 2d 546, 28 USC §1331, n. 4.

The commission has found consistently since 1941 that a carrier operating in interstate or foreign commerce under partial exemption of the former second proviso of §206(a)(1) is a carrier within meaning of §5(13) and as defined in §203(a)(14); and that conclusion applies to carriers continuing former proviso operations under the "grandfather" provisions of §206(a)(7).—Caton Transfer Co., Inc.—Lease—Caton, 93 M.C.C. 416 (417, 419).

When vendor, in addition to claiming benefits of single-State proviso for certain of its operations, holds certificates from the commission, it is a carrier as defined in the act, regardless of whether it has actually been conducting operations under the proviso.—United Truck Lines, Inc.—Purchase—United Freight Lines, 90 M.C.C. 337 (343).

Carrier status under Part II of vendors operating under single-State exemption proviso depends on facts existing at the date operations are discontinued, or taken over by a vendee, as result of the purchase contract.—Midwest Motor Exp., Inc.—Purchase—Daniel, 90 M.C.C. 590 (592).

Since evidence adequately supports conclusion that intrastate carrier (liquidating carrier in proposed merger) was not operated as a bona fide independent going concern, but even before filing of its BMC-75 statement was controlled and managed by individual controlling a multistate carrier, its interstate operations under single-State proviso were unlawful from their inception; thus it has no carrier status under the act and, since the commission has no power to adjudicate matters concerning transfers and acquisitions of noncarriers, its purported rights are not properly the subject of an application under §5.—Hart Motor Exp., Inc.—Control and Merger, 90 M.C.C. 527 (533-4)*.

§5(14). 4. Carriers affected; "interest."—[Vols. 2, 6, 9, 11, 12].—Proposed merger of an intercoastal water carrier into parent lumber company which also controls a railroad subject to Part I is not within prohibition of §5(14) when there is neither competition nor possibility of competition between them, the railroad being a class III short line principally handling traffic interchanged with truckline railroads and having no facilities or other connection at the water carrier's ports of call.—Weyerhaeuser Co. Merger, 317 I.C.C. 434 (439)*.

Section 5. (15), (16).—[Unchanged.]

Notes of Decisions

§5(15): Volume 2—p. 1409; Volume 6—p. 5188; Volume 9—p. 7468; Volume 11—p. 9220; Volume 19—p. 15272.

§5(16): Volume 2—p. 1410; Volume 6—p. 5190; Volume 9—p. 7469; Volume 11—p. 9221; Volume 14—p. 11481.

§5(16). 1. Construction.—[Vols. 2, 6, 9, 11, 14].—Purpose of Panama Canal Act respecting waters "elsewhere" was to restore all water routes of the country to a condition of freedom from any domination that would reduce their usefulness in the common interest of the people; on a watercourse where the water lines are free from domination or control by the railroads there will be a healthy competition between them and paralleling railroads for all suitable and available traffic. —Illinois Central R. Co.—Control—John I. Hay Co., 317 I.C.C. 39 (48-9).

However, §5 was not intended to forbid railroad ownership, operation, or control of water carriers, but to forbid use of such ownership or control in a manner which would restrict movement of interstate commerce in the interest of the railroad's competing rail lines. The 1940 revisions of that section make clear that paragraph (16) is primarily directed to interests by railroads in competing water lines, and that this, not the operation of the water line in and of itself, was the matter to be brought under control; mere interest of a railroad in a water carrier, or existence of some competition between them, particularly where the water routes are in effect an extension of the rail lines, does not of itself warrant denial of an application by a railroad to acquire control of a competing water carrier.—Id., pp. 50, 51-2.

The phrase "does or may compete for traffic" does not mean a vague, possible though improbable, competition, but a probable, potential competition, as when the water line is entirely divorced from the railroad; therefore, from a practical view the question is, would the water carrier, when free to consult only its own interests, compete for traffic with the railroad line?—Id., p. 49.

"Control" as used in the act means power or authority to manage, direct, superintend, restrict, govern, administer, or oversee. Where two railroads, through a wholly owned subsidiary, seek to acquire upwards of 95 percent of stock of a water carrier whose operations are substantially competitive and parallel to their rail lines, finding is warranted that the water carrier would be under their complete domination and control and that insofar as its overall policies are concerned it would not be independent, when directors of the existing subsidiary, which through liquidation acquire and operate the water carrier properties, hold and would continue to hold director and officer positions with the railroads; and even if neutral directors could be elected it would be unreasonable to assume that the railroads would permit selection of any director or officer who would not be amenable to their control.—Id., p. 52-3.

13. [Proceedings]——Showing required.—[Vol. 2].—Where bargeline's routes substantially parallel lines of railroads seeking to acquire joint control of it, the railroads provide service at a number of ports and terminals served by it, and it and the railroads are in constant competition for traffic susceptible of barge movement, approval of the transaction must be based on conclusion that proposed control satisfies the provisions of §5(16) and, as a part thereof, the provisions of §5(2); evidence presented must be specific in showing that the transaction would comply with the provisions of the act, including requirement of §5(16) that it will not exclude, prevent, or reduce competition on the water routes involved. Applicant railroads have failed to establish that their proposed acquisition of ownership operation, and control of the

bargeline would not prevent that common carrier from being operated in interest of the public and with advantage to the convenience and commerce of the people. Denied.—Illinois Central R. Co.—Control—John I. Hay Co., 317 I.C.C. 39 (47, 52, 53-4).

15.——Effect of finding of competition.—[Vols. 2, 9].—A mere finding that there is actual or potential competition between a railroad and a water carrier in which it has an interest does not ipso facto require their separation; and a conclusion that some reduction in competition might result from a railroad's control of a water carrier does not necessarily justify denial of an application under §5(16). The important considerations are whether the proposed acquisition would prevent the water carrier in future from being operated in advantage of and for convenience of the people, and whether railroad control would "exclude, prevent, or reduce competition" on the water routes involved; provisions of the statute, including that phrase, must be strictly interpreted and applied, and evidence presented must be specific in showing that the transaction would comply with provisions of the act.—Illinois Central R. Co.—Control—John I. Hay Co., 317 I.C.C. 39 (48, 52).

In determining whether proposed acquisition of control by two railroads of a bargeline whose operations are substantially competitive to and parallel their rail lines, serve same river ports, and offer little prospect of supplementing or extending the rail lines, would exclude, prevent, or reduce competition on the water routes, the question is whether the transaction would eliminate, diminish, forestall, hinder, or frustrate competition on those routes in any manner or to any material degree; to decide this question in applicants' favor would require a finding that the acquired carrier's competitive status under railroad control would compare favorably with its present status as an independent water carrier.—Id., pp. 52, 54.

Considering the directly competitive nature of the water and rail operations involved, such finding cannot be made when the facts are convincing that, following its acquisition by the railroads, the bargeline operations would not be free from their control and supervision and would be managed in such manner as to serve the railroads' interests and enhance movement of traffic over all-rail routes; it is apparent that the railroads intend to retain all possible traffic on all-rail routing, and that any through routes and joint rates with acquired carrier and other water carriers would be limited to noncompetitive traffic; under railroad domination, the bargeline's employees would be reluctant to solicit traffic adverse to the railroads' interest, particularly if diversion from all-rail to all-barge movement might result; thus the transaction would reduce competition between acquired carrier and the railroads.—Id., pp. 53, 54. [But see dissent.]

In addition, the competitive advantage over independent water carriers which would accrue from control by two strong railroads, particularly in enhancement of the bargeline's already strong financial position and availability of the railroads' industrial development and solicitation staffs, would be so substantial as to jeopardize continuance of independent water operations on considered routes; any additional traffic it might obtain from increased industrial activity in area served would be at expense of other carriers plying those routes; and while the transaction would result in immediate increase in competition for available water traffic, and protestants might be able to withstand such competition for a time, the end result, considering acquired carrier's expanded facilities, additional equipment, more frequent sailings, and enlarged solicitation force, would be a sharp reduction, and possibly complete elimination, of competition on the water routes. Denied.—Id., pp. 54-5. [But see dissent.]

16.——Permission granted or denied.—[Vols. 2, 6].—Considering all factors, it cannot be found that proposed acquisition of control of a competing bargeline by two strong railroads would not exclude, prevent, or reduce competition on the water routes involved; transportation services now provided by competing water carriers are reasonably satisfactory and reliable, and their ability to continue to serve the public would be impaired by approval of the transaction, whereas denial would not alter existing competitive relation of the parties or deprive the shipping public of adequate and continuous water serv-

ice. Nor would the transaction be consistent with public interest even if approved with conditions suggested by the examiner; restriction of the bargeline's operations to those auxiliary or supplemental to rail service would be unrealistic and impractical, and even if acceptable to applicant railroads would not permit the findings necessary to approval. Denied.—Illinois Central R. Co.—Control—John I. Hay Co., 317 I.C.C. 39 (55).

Regulations of the Commission

30 FR 12467, Sept. 30, 1965, Parts 7, 179, 180: Following enactment of Public Law 89-93 (79 Stat. 284) which makes gross operating revenues the basis for determining whether proposed unification or acquisition of control comes within §5(10) exemption, Forms BMC-44 (Rev.), BMC-45 (Rev.), BF-200, and BF-201 are revised; footnote 1 of §179.1(a) is revised; §§180.2 Definitions, and 180.3 Computation of vehicles involved in uifications, are deleted; and new §180.3 Computation of gross operating revenues of carriers involved in unifications, substituted in lieu of deleted §180.3, effective Sept. 25, 1965.

31 FR 8872, June 25, 1966, Part 180: Control or Consolidation of Motor Carriers or Their Properties, §180.3 Computation of gross operating revenues of carriers involved in unifications, paragraph (a) revised, and new §180.4 Deduction of revenues from sources other than regulated transportation, added, effective on date of publication.

Section 5a. Agreements between carriers.—[Unchanged. See vol. 14, p. 11481.]

Historical notes, vol. 14, p. 11483.

Notes of Decisions

Volume 15—p. 12056; Volume 16—p. 12688; Volume 17—p. 13358; Volume 18—p. 14124; Volume 19—p. 15273.

2. Construction and interpretation.—[Vols. 15, 17-19].—Statute providing that, if the commission approves a rate agreement between two or more carriers, parties thereto are relieved from operation of the antitrust laws, does not authorize a "contract" between carriers and the commission. Therefore it does not support appellant's contention that defendants breached their "contract" with the commission by continuing to charge rates critized but not yet cancelled by the commission. Such contention is utterly lacking in merit and appellant's newly advised theory is merely a novel presentation of a rejected claim.—Lynchburg Traffic Bureau v. Smith's Transfer Corp. of Staunton, Va., 339 F. 2d 478 (480-1)*.

Mere reference in §5a(2) to an agreement between or among two or more carriers "relating to" rates (including charges between carriers) does not mean that every agreement between carriers which has some such relation is within purview of that section; almost any carrier activity can be said to "relate to" rates and charges in some way, and so to interpret §5a(2) would be illogical and a complete distortion of the clear congressional purpose in its passage. Legislative history of §5a(2) reveals that the language descriptive of the agreements to be covered was adopted to narowly restrict that coverage in accordance with the limited congressional purpose in enacting §5a, namely, to provide a means whereby parties to an agreement relating to procedures for joint consideration and establishment of rates and charges might be relieved from operation of the antitrust laws; commission has long recognized and adhered to that limited purpose.—Alaska S.S. Co. and Consolidated Freightways—Agreement, 322, I.C.C. 726 (730).

Although, under 1962 amendment of §216(c) subjecting to regulation by the commission any through routes and joint rates established for transportation of property between Alaska or Hawaii and the other 48 States by water carriers subject to the Shipping Acts and motor carriers subject to Part II, applicant water carrier operating between ports in Alaska and Washington under juris-

diction of the Maritime Commission became subject to the commission's jurisdiction, including any necessary administrative determinations under §5a, when it joined with a motor common carrier to establish through motor-water-motor routes and rates between Seattle and points in Alaska, proposed agreement covering the joint operations contains no joint ratemaking procedures and has no such purpose. Only such provisions could be approved under §5a, and without them there is nothing in the agreement requiring such approval; application dismissed.—Id., pp. 728, 730.

As no single railroad serves both origin and destination areas of considered canned goods traffic, reduced transcontinental rate in issue could be established only by joint action, which was taken pursuant to respondents' §5a agreement (approved in 287 ICC 701) relating to their joint ratemaking procedures; §5a(9) relieves parties to such an approved agreement, and other persons, from operation of antitrust laws with respect to making of the agreement and to carrying it out in conformity with its provisions and the terms and conditions prescribed by the commission; and protestant makes no claim that respondents failed to employ the procedures outlined in their agreements in processing the proposals which culminated in the reduced rate. Respondents' concerted action was therefore immune from antitrust laws.—Canned Goods from Pacific Coast to Eastern Points, 315 I.C.C. 769 (791).

Since purpose and intent of §5a is to give immunity to certain antitrust violations, it is immaterial whether complaint against rate bureau's filing of protests of rates published by complainant, a nonmember, actually alleged antitrust violations or only violations of §5a. Holding of 365 US 127 that joint solicitation of government action respecting enforcement of laws does not violate the Sherman Act applies also to solicitation of such action before administrative agencies (299 F. 2d 133). The bureau's practice of filing protests and appearing in the resulting proceeding before the commission is a lawful representation of interests of its member carriers; and its action in protesting some 12 percent of complainant's schedules over a 10-year period does not constitute harassment of, unwarranted interference with, or a restraint upon the free and unrestricted right of a nonmember carrier to make necessary rate adjustments.—Arbet Truck Lines, Inc. v. Central States Motor Freight, 321 I.C.C. 460 (461, 463, 466). [But see dissent.]

4. Carriers of one class; agreements not within §5a provisions.—[Vols. 15-19].—Though bylaws of Alaska Carriers Assn. provide for inclusion of motor carriers of passengers, there is no such provision in the articles of incorporation, and language used throughout application and related exhibits clearly indicates intention to confine membership to carriers of property; application is therefore so considered. And though all present parties to the agreement are common carriers, the agreement does not limit participation to such carriers, and thus is incompatible with standards of §5a in that carriers of more than one class might be permitted to consider jointly rate matters other than those permitted by §5a(4). Further, provisions of the bylaws requiring approval of new members by the board of directors or membership committee place a restraint on participation in the agreement; bylaws should be amended to provide clearly that any motor common carrier operating in interstate or foreign commerce under authority from the commission within the territory involved may become a party to the agreement on same terms and conditions as apply to existing members.—Alaska Carriers Association, Inc.—Agreement, 321 I.C.C. 7 (9-10)*.

Also, though parties to the agreement are engaged in both interstate and intrastate commerce within Alaska, rates applicable exclusively to intrastate commerce are not within purview of §5a, and, since the commission has no jurisdiction over such rates under that section, antitrust relief cannot be granted with respect thereto under §5a.—Id., p. 10.

Although amended agreement provides that any motor common carrier operating in Alaska may enter into it and participate in association tariffs and, through membership in the general rate committee, have voting rights as to all matters pertaining to such participation, admission to membership in the association is still subject to approval by the board of directors or the membership committee. The

commission has consistently held that no agreement under §5a will be approved unless all carriers of same class in the territory are admitted to membership as a matter of right on same terms as existing members. While carrier signatories to the agreement agree to be bound by bylaws of the association governing the essential ratemaking procedures, those not members of the association have no voice as to any future changes in the bylaws; accordingly, to extent that such provision of the bylaws continues to place a restraint on a carrier's participation in the agreement through restriction of membership, it is incompatible with standards for approval established under §5a and should be removed.—Id., 322 I.C.C. 697 (698-9)*.

Provision of bylaws of forwarder bureau that any "eligible" applicant may seek membership in manner prescribed by board of directors, upon payment of dues in compliance with rules also presecribed by the board, but without further specification of eligibility requirements, and provision of ratemaking agreement that it shall become effective when executed by a majority of participating forwarders, thus indicating that an application for membership must be approved by existing members, are not compatible with standards established by and under §5a. Appropriate amendments should be made to provide that any freight forwarder of property operating in interstate commerce under authority from the commission within the territory involved may become a party to the agreement on same terms and conditions as existing members.—Hawaiian Freight Tariff Bureau, Inc.—Agreement, 319 I.C.C. 8 (10).

5. Independent action; ratemaking procedure.—[Vols. 15-19].—There is no merit to defendant's contention that plaintiff household goods carriers, who are parties to different rate bureaus approved by the commission under §5a, had no right of independent action in connection with considered supplements filed by their respective rate publishing agents for account of member carriers. Each plaintiff was told of its bureau's proposal to publish new §22 rate quotations and specifically given an opportunity to reject participation in the blanket cancellation of individual rate tenders previously filed as well as the new rates; no member carriers objected to proposed changes. Moreover, both plaintiffs were specifically informed that their respective agent's filing of proposed supplements did not preclude their rights to independent action. Cancellation of plaintiffs' individual rate tenders by blanket cancellation notices issued by their respective agents did not violate their individual right to free and independent action.—United Van Lines, Inc. v. United States, 353 F. 2d 741 (745).

Provisions of carrier association's bylaws which might unduly restrain freedom of individual members to take independent action by subjecting them to possible expulsion for violating any provisions thereof, other than one involving payment of money owed to the association, should be stricken.—Alaska Carriers Association, Inc.—Agreement, 321 I.C.C. 7 (11)*.

Provisions of rate bureau's bylaws concerning membership of general rate committee consisting of carrier representatives and alternates are vague as to manner in which such representatives are to be elected or selected, and are so framed that one member carrier could conceivably have more than one representative on the committee; however, the commission has consistently held that no carrier member of such an organization shall have more than one representative or vote on any board or committee dealing with matters within purview of §5a. Also, though it is indicated that such rate committee shall have a chairman, no provision is made as to his representation or manner of his election. The bylaws should be appropriately amended in those respects.—Oil Capital Tariff Bureau, Inc.—Agreement, 321 I.C.C. 263 (265-6).

Although each member of forwarder bureau is entitled to one vote in election of directors or transaction of business, which may be exercised in person or by proxy, the bylaws are silent as to number of votes required to carry an action; amendment should be made providing that all actions of the bureau are by majority vote of members present and voting at regular and special meetings. Likewise, amendment should be made to provide as to the number of votes required to carry an action of the board of directors.—

Hawaiian Freight Tariff Bureau, Inc.—Agreement, 319 I.C.C. 8 (11).

And though rules of procedure governing publication of tariffs provide that members of the general rate committee "elect" members of their respective standing rate committees, the bylaws empower the board of directors to "appoint" standing rate committees. This discrepancy should be clarified or appropriately amended.—Id., p. 12.

Causes for expulsion of a carrier from a tariff-publishing bureau, conference, or association should be limited to failure to pay financial obligations incurred under the agreement. Provision in bylaws of forwarder bureau for termination of membership for violation of rules prescribed by board of directors should be stricken to extent it might unduly restrain freedom of individual members to take independent action by subjecting them to possible expulsion from the bureau for violating any provisions thereof other than one involving payment of money owed to the bureau.—Id., p. 10.

Under §5a(6) the commission may not approve an agreement establishing procedure for joint consideration of any matter unless each party is accorded the free and unrestricted right to take independent action. Agreement covering use and interchange of equipment defines "compensation" as that which users of equipment shall pay to the owners thereof; provides that, unless independent action is taken, all parties are mutually bound by contract to the rate of compensation established by the committee; and specifies a method whereby an owner may take independent action as to the rate of compensation it will charge, but does not provide for independent action by the user as to the rate it will pay. In failing specifically to accord users such right of independent action, the agreement is contrary to §5a(6).—National Motor Equipment Interchange—Agreement, 319 I.C.C. 46 (48-9)*.

While the statutory right of independent action does not confer on a party to the agreement the power to determine unilaterally what another must accept for use of that other's vehicles, neither owners nor users are bound by each other's independent announcements, since they are bound by the agreement only to the extent that independent action has not been taken, and no justification appears for permitting users to be accorded less freedom of independent action than owners. Order terminating approval of the agreement will be entered unless it is revised in accordance with the commission's finding and the commission notified of such action within 60 days from service of report.—Id., p. 49. [But see dissent.]

Article III of agreement for joint consideration of matters pertaining to interchange of equipment, as approved in 305 ICC 196, contemplates a schedule of charges for use of vehicles and a procedure whereby owners may make independent announcement of charges varying therefrom, but makes no mention of a user's right of independent action as to the rate of compensation he will pay; thus, guarantee by article IV of the right of independent action established by article III guarantees the user's right of independent action only to the extent of negotiating a rate different from that in the schedule of charges, or of withdrawing from the agreement, and does not establish in users of interchanged vehicles the right to make independent, unilateral announcements as to charges they will pay for such use.—Id., 316 I.C.C. 448 (452)*.

Section 5a(6) guarantees the right of independent action only with reference to matters specifically contemplated in each agreement; therefore, interchange committee's cancellation of independent user announcements unless concurred in by connecting carriers concerned was no denial of the right of independent action guaranteed under §5a. The right to private ownership of property includes the power to determine the charge which the user thereof shall pay, and considered agreement does not divest owners of this right.—Id., p. 452.

Although question of whether the interchange committee's action in issuing challenged directive was valid, since a quorum failed to vote, is not germane to issue of whether interchange agreement guarantees to users the right to issue independent announcements, the committee is admonished to follow strictly the procedures set forth in the agreement.Id., p. 451.

Respondents' right of independent action

under §5a has no bearing on removal of undue prejudice found to exist in rates proposed by them under that right of action.—Iron and Steel from Ill,. Ind., Kans., and Mo. to Iowa, 315 I.C.C. 403 (410).

Respondents' collaboration with each other outside formal ratemaking procedure, their nonpublic meetings with shippers, and action of Special Canned Goods Committee, which did not keep regular records of its proceedings, were all preliminary to consideration of transcontinental adjustment finally approved, including reduced rate in issue, by the duly constituted bodies specified in their approved agreements, for purpose of obtaining information necessary to thorough and intelligent consideration of the subject matters; exchange of information by individual railroads and formation of special committees to investigate any traffic matter before the organization are expressly provided for in the agreements; function of the canned goods committee was solely advisory, and it was not required by the agreements to hold hearings or keep minutes of its informal conferences with shippers; such action complied fully with the applicable §5a agreements.—Canned Goods from Pacific Coast to Eastern Points, 315 I.C.C. 769 (791-2).

Tariff bureau's bylaws should be corrected to provide that members of the board of directors shall each represent a different carrier member, and that members of the board and members of subcommittees appointed by the rate committee shall be bureau members or their employee representatives. And though the bylaws provide for changes or amendments thereof, it should be understood that the relief provided by §5a(9) will not apply to any such change which results in a revision of the ratemaking procedures unless it is first approved by the commission.—New York Movers Tariff Bureau, Inc.—Agreement, 319 I.C.C. 283 (285-6).

8. Notice.—[Vols. 15-19].—Although procedures for handling of proposals before general rate committee are published in rate bureau's bulletin, no specific provision is made in the bylaws for giving advance notice to the committee membership of meetings, other than special meetings, at which such proposals are to be considered. To eliminate any possibility of members not being represented at meetings, the bylaws should be amended to provide for at least 5 days' advance written notice thereof.—Oil Capital Tariff Bureau, Inc. —Agreement, 321 I.C.C. 263 (266).

While the bureau's rules of procedure provide that notice of all proposals received and disposition thereof by the standing rate committee shall be published in the bulletin, the bylaws do not specifically provide for notice to interested parties of final actions taken by the general rate committee upon appeal. Notice of final actions should be given in the same manner and to the same extent as docketed proposals; the bylaws should provide for notice of final actions of the general rate committee in same manner as provided therein respecting actions taken by the standing rate committee.—Id., pp. 267-8.

Notice to members of any special meetings of membership of forwarder bureau should set forth, in addition to the place, day, and hour, the reason for the called special meeting, and appropriate provision therefor should be made in the bylaws.—Hawaiian Freight Tariff Bureau, Inc.—Agreement, 319 I.C.C. 8 (10).

And in view of the wide territory in which members of applicant bureau are located, mailed or wired announcements of 48 or 24 hours, respectively, for calling of board meetings appear too short notice to afford sufficient time for all directors who might wish to be present at meetings of the board. As in case of membership meetings, 5 days' notice should be required.—Id., p. 11.

Proposed ratemaking agreement contains no provision for giving notice of filing of proposals or of action taken thereon to any persons other than member carriers, or which affords shippers opportunity to be heard and to make presentations orally or in writing for or against any proposals; thus, unless advised by member carriers, shippers would not be aware of pending proposals or of final action thereon. Agreement should be amended to provide that appropriate notice of filing of proposals be given to interested parties desiring such information, that they be permitted to be heard on such matters, and that notice of final actions taken by the bureau be given in same manner and to same extent as for

docketed proposals.—New York Movers Tariff Bureau, Inc.—Agreement, 319 I.C.C.283 (287).

18. Approval of agreements by commission. —[Vols. 15-19].—Inasmuch as petitioner's §5a agreement, as approved by the commission, does not include specific procedures for consideration or publication of quotations made by its member carriers under §22 to apply on government traffic, and petitioner does not detail procedure which might be employed in the joint consideration of §22 quotations, §5a(9) relief will not apply to joint consideration of such quotations without further amendment of the present agreement. Moreover, language of §22(2) is explicit in providing that §5a(9) will apply to consideration of §22 quotations, but only on submittal of quotations made pursuant to an agreement approved by the commission (except those not submitted for security reasons); therefore, joint consideration of quotations without their subsequent submittal to the commission would not constitute action under the protection of §5a(9).—Southern Motor Carriers—Agreement, 323 I.C.C. 396 (397-8)*.

Agreement of motor common carriers operating within, from, and to Alaska for joint consideration of rate matters, including through routes and joint rates with carriers of other classes, approved, subject amendments indicated. However, it should be understood that relief granted from antitrust laws under §5a(9) will not apply to any changes in bylaws or rules of the association which may result in changes in the ratemaking procedures unless and until an amended agreement establishing such change is submitted to and approved by the commission.—Alaska Carriers Assn., Inc. —Agreement, 321 I.C.C. 7 (15)*.

Notwithstanding provision of bylaws of forwarder bureau that they may be amended by majority vote of members present at any regular or special meeting, to extent that any proposed change in the bylaws may result in revision of ratemaking procedure relating to matters specified in §5a(2), and to safeguard the right of independent action of any individual member as provided in §5a(6), it should be understood that the relief provided by §5a(9) will not apply thereto unless and until an amended agreement establishing such change is submitted to and approved by the commission.—Hawaiian Freight Tariff Bureau, Inc. —Agreement, 319 I.C.C. 8 (12).

Entry of order of approval of revised rate agreement withheld for 3 months from date of service of report to afford applicants opportunity to present amendments thereto in harmony with those outlined.—Oil Capital Tariff Bureau, Inc.—Agreement, 321 I.C.C. 263 (269); similarly, since ratemaking agreement of New York-New Jersey household goods carriers is approved, subject to indicated revisions, entry of the order is withheld for 3 months to afford applicants time to effect such corrections.—New York Movers Traffic Bureau, Inc.—Agreement, 319 I.C.C. 283 (287).

Proposed amendment to conduct committee meetings concerning both Texas and Louisiana in Dallas rather than at two different locations on different dates would reduce carrier expenses, result in more economical functioning of the bureau and facilitate disposition of rate matters. Use given New Orleans meetings has been relatively small and need for their continuance has not been established. Meetings at Dallas would not cause undue hardship to any shippers or receivers of freight and rules as to public hearings will not be changed. The agreement of the Western Traffic Association, modified as proposed, is in furtherance of national transportation policy and in accordance with §5a. Amendment approved.—Western Traffic Association —Agreement, 318 I.C.C. 726 (727, 729-30)*.

Regulations of the Commission

28 FR 1960, Feb. 28, 1963: Retention periods, records, rate-making organizations, 49 CFR §130.30.
29 FR 3088, Mar. 5, 1964: Same records retention periods reference.
30 FR 3163, Mar. 6, 1965: Same records retention periods reference.
31 FR 4067, Mar. 8, 1966: Same records retention periods reference.
32 FR 3664, Mar. 2, 1967: Same records retention periods reference.
NOTE: For recodification, see 49 CFR, Editorial Note, 32 FR 5606, April 5, 1967.
32 FR 15484, Nov. 7, 1967, Part 103 [formerly Part 3]: Carrier Agreements Relating to Rates, Fares, etc., new §103.5 Public notice, added, effective Nov. 15, 1967.
33 FR 4067, March 1, 1968: Record Retention Guide, XXIV Interstate Commerce Commission [Revised] 1.8 Rate-making organizations, 49 CFR Part 1253.

Section 6. Schedules and statements of rates, etc., joint rail and water transportation—(1) Schedule of rates, fares, and charges; filing and posting.—[Unchanged. See vol. 9, p. 7472.]

Amendments, see footnotes, vol. 2, p. 1413; historical notes, p. 1414, vol. 12, p. 10273, vol. 13, p. 10982.

Notes of Decisions

Volume 2—p. 1416; Volume 6—p. 5192; Volume 9—p. 7472; Volume 11—p. 9221; Volume 12—p. 10274; Volume 13—p. 10982; Volume 14—p. 11483; Volume 15—p. 12060; Volume 16—p. 12692; Volume 17—p. 13362; Volume 18—p. 14128; Volume 19—p. 15277.

2. Construction.—[Vols. 2, 6, 12, 19].—Mere publication of a tariff does not of itself make the publisher a common carrier or make every service it performs a part of common carriage with consequent common carrier liability; in unloading forwarder freight consigned to plaintiff forwarder (lessee of a portion of defendant's freight depot), after line haul by a motor carrier or a connecting railroad, and in assessing unloading charges published in its tariff, defendant performed such service at plaintiff's request as consignee, and not as a common carrier of shipments in question.—Republic Carloading & Distrib. Co. v. Missouri Pac. R. Co,. 302 F. 2d 381 (386, 387, 388)*.

So long as a carrier files with the commission, and keeps open for public inspection, schedules showing all rates, fares, and charges for transportation which it is authorized to perform, there is substantial compliance with §6(1).—All Commodities, New York to Baltimore and Washington, 319 I.C.C. 627 (629)*.

3. Purpose; uniformity and prevention of discrimination, publicity, and certainty as to rates.—[Vols. 2, 6, 18, 19].—Purpose of statutory requirements that tariffs containing carriers' rates and charges be filed and published is to secure uniform treatment of shippers and to shut out opportunity for discrimination and prejudice.—Atchison, T. & S.F. Ry. Co. v. Bouziden, 307 F. 2d 230 (234).

One of the principal purposes of the statute was to prevent discrimination by granting preferential rates. Accordingly, a positive duty was imposed on all carriers to establish schedules of reasonable rates which should have uniform application and which should not be departed from so long as established schedules remained unaltered in the manner provided by law.—Humble Oil & Refining Co. v. Great Northern Ry. Co., 212 F. Supp. 747 (751).

Rates, Fares, and Charges

27. Joint rates.—[Vols. 2, 6, 9, 13, 15-18].—Although proportional rates on automobiles transported in substituted motor-for-rail service following rail TOFC movement are found unlawful and ordered canceled, joint rail-motor rates published in same schedule are unchallenged, and order of cancellation is without prejudice to refiling of such joint rates.—Motor Vehicles—Idaho, Nevada, and Utah Origins, 318 I.C.C. 859 (867-8).

38. Proportional rates.—[Vols. 2, 6, 9, 11-19].—Schedules naming proportional rates on automobiles from unloading ramps at specified points to destinations in five States, which apply on traffic having prior rail TOFC movement and include delivery to consignee in substituted motor-for-rail service, ordered canceled because general-commodity motor carriers performing the service under contract with respondent lack authority to transport automobiles in special equipment such as standard carryall or convertible Durabilt trailers.—Motor Vehicles—Idaho, Nevada, and Utah Origins, 318 I.C.C. 859 (866-7).

Charges (Other than Rates and Fares)

55. All services offered and performed.—[Vols. 2, 6, 9, 11, 16, 17, 19].—There is no proof that Pennsylvania R., through a subsidiary equipment company, is engaged in furnishing equipment and services to defendant freight consolidator at charges not published and filed with the commission, since the Pennsylvania's tariffs applicable to the involved traffic (which moves in plan III TOFC service) were not made part of the record. However, any failure of the Pennsylvania to publish trailer rental charges is not a violation of the Interstate Commerce Act or the Elkins Act, under decision in 314 ICC 5; while that decision has been challenged in the courts, it nevertheless presently stands as an order of the commission and is recognized as the applicable law until overruled or modified by the courts.—Natl. Motor Freight Traffic Assn. v. Delaware Valley, 323 I.C.C. 560 (573)*.

56. Switching.—[Vols. 2, 6, 9, 11-14, 16, 17, 19].—Under Tariff Circular 20 switching line which is not a party to water carrier's tariff publishing joint rail-water rates on coal is required to have on file a tariff naming its charges for intermediate switching from originating railroad to private company which performs the transfer to vessel; publication of per-car charge equivalent to 5 days' per diem reclaim which it receives in connection with terminal switching under the lake-cargo rates complies with §6.—Chicago, B. & Q. R. Co. v. Chicago & E.I.R. Co., 315 I.C.C. 37 (39)*.

57. Terminal services; lighterage included.—[Vols. 2, 6, 9, 11-13, 15, 17, 18].—It is not unlawful for carriers to publish tariffs which extend to shippers, under the line-haul rate or charge, various services generally regarded as accessorial; §6(1), in providing that tariffs shall "state separately all terminal charges * * * and all other charges which the commission may require," makes no requirement that all "other" charges be separately stated, but only such as "the commission may require," and in numerous cases the commission has refused to require separate statement of accessorial charges.—Port of New York Authority v. Aberdeen & R. R. Co., 318 I.C.C. 469 (475)*; Id., 321 I.C.C. 738 (744)*.

66. Protective service.—[Vols. 2, 6, 11-14, 16].—It was not intended, by enactment of §6(1) and the "transportation" definition in §1, to prohibit a carrier from regarding the haulage of the freight and any incidental protection against heat or cold as one combined transportation service for which a single charge might lawfully be made, but merely to require, where a separate charge is in fact levied, that it be published and filed so that it will be uniformly available and applied without discrimination. Thus, while all charges must be separately stated, it is not unlawful to secure compensation for the protective service by including it in the line-haul rate (citing 56 ICC 449); and since tariff circular rule 10(a) was adopted merely to enforce that part of §6, such inclusion does not violate that rule.—Refrigeration, Meats & Packinghouse Products—Midwest, 319 I.C.C. 113 (119).

Though a rail carrier may in its discretion propose and perhaps justify inclusion of refrigeration charges in line-haul rates, no unlawfulness is shown in rail respondents' present method of separately publishing the refrigeration charge on considered citrus traffic; 241 ICC 503 indicated that charges for terminal services on perishables, including storage and icing, should be separately stated.—Frozen Juice and Fruit from Florida to the North, 319 I.C.C. 577 (597).

Rules and Regulations

81. In general.—[Vols. 2, 6, 9, 12].—Inasmuch as assays and other ore tests in the smelting industry are directed to determining the market value of ores, the term "value" as used in plaintiff's intrastate commodity rate tariff rules concerning certification of ore val-

ues means the commercial or market value made on the basis of such assays or other ore tests. Artificially created incentive prices for manganese ore under government stockpiling program did not constitute the values of such ores in considered intrastate shipments for purposes of certification in accordance with the tariff rules since, other than under the stockpiling program, manganese ores shipped had no market value and could not have been sold at any price. No form of certification is prescribed in the rules, and record is clear that both parties considered notations on the bills of lading as certification of value; there was substantial compliance with the tariff rules. Plaintiff found not entitled to recover additional charges claimed.—Northern Pac. Ry. Co. v. United States, 355 F. 2d 601 (605-6). [Not arising hereunder.]

Although, due to elasticity in the descriptions of oil which enter each stream, it is difficult to outline minimum and maximum gravity, and the oliensis of the various streams in which oil is transported through pipelines, the tariff in issue should contain rules governing the segregation of crude oil into streams, with definite specific specifications for each stream. Many pipeline tariffs provide rules governing segregation requirements, so that shippers are fully aware of conditions under which a certain grade of crude oil will or will not be accepted; and it is clearly desirable that defendant's tariff contain similar rules which will avoid future controversies. Defendant's tariff should be amended accordingly and, while no order to that effect is entered, such amendment should be accomplished within a reasonable time in accordance with tariff-circular rules.—Denver Oil Co. v. Platte Pipe Line Co., 316 I.C.C. 599 (604-5)*.

84. Limitations upon liability.—[Vol. 2].—Rules 130 and 135 of Perishable Protective Tariff, relied on by carrier (in action against it to recover for damage to shipment of melons) as absolving it from liability upon proof that it exercised reasonable care and complied with shipper's instructions, do not reflect a change in the federal law governing carrier's liability when read in light of history underlying their adoption. Rule 130 merely restates the common-law rule that carrier shall not be held liable, in absence of negligence, for damage resulting wholly from an inherent vice or defect of the goods; and rule 135 merely reiterates common-law and bill-of-lading rule that carrier is not liable, in absence of negligence, for act or default of shipper or owner: they reflect nothing more than the objective of giving "some warning to shippers" that a carrier was not liable for inherent tendency of perishable goods to deteriorate or decay, or for shipper's failure to give proper transportation instructions. A carrier's liability for loss or damage is determined by law; nothing can be added to or subtracted from the law by limitations or definitions in tariffs.—Missouri Pac. R. Co. v. Elmore & Stahl, 377 U.S. 134 (139-43)*.

86. Furnishing equipment.—[Vols. 2, 6, 9, 13].—Rule in tariff naming plan II-1/2 TOFC rates, under which the railroad furnishes the trailer but leases it to shipper or consignee for performance of the terminal pickup and delivery, providing that a trailer lease and inspection form receipt be filled out and signed by lessee when the trailer is received from the railroad at the rail ramp site, is clear and unambiguous. While execution of such receipt at shipper's office is a clear violation of the tariff, any such violation is not due to ambiguity of the rule, and no amendment thereof is required.—Foodstuffs, Macon, Ga., to Florida, Indiana, Kentucky, Ohio, 321 I.C.C. 132 (133, 135).

Form and Effect of Publication

136. Plain and definite statement required.—[Vols. 2, 6, 9, 11-19].—It is a sound principle that, to preclude application of rates over routes which carriers consider to be undesirable, unduly circuitous, or unnatural, such routes must be specifically excepted from general routing instructions, as provided in plan 2 of rule 4(k) of Tariff Circular 20. Any different conclusion would foster confusion in tariff interpretation and encourage uncertainty in tariff publication, contrary to express requirements of §6 that all tariffs shall "plainly state" the rates and charges applicable on the traffic covered thereby.—Producers Co-operative Oil Mill v. St. Louis-S. F. Ry. Co., 322 I.C.C. 267 (271)*.

Publication of all-commodity rates restricted to shipments loaded by shipper or at his

expense in not over two standard cars, but not subject to promiscuous loading or marriage rules, is not indefinite in violation of §6(1). Individual packages are sorted and consolidated by shipper-forwarder, loaded in accordance with a detailed assignment list, and tendered to carrier at end of the day; shipper, having presumably tendered the freight in a manner to obtain the most favorable rates, knows with reasonable certainty what the applicable rate will be, since it alone knows the quantity intended to be shipped, prior to the actual tender; and fact that the precise transportation charges may not be determined beforehand is true of most shipments subject to specified weights, due to the related problem of having sufficient density to meet the minimum weight.—All Commodities, New York to Baltimore and Washington, 319 I.C.C. 627 (629)*.

Nor are the proposed rates uncertain because they alternate with all rates named in the same or other tariffs, as provided by two general rules in the pertinent tariff governing alternative application of rates producing lower charges, as result of which the applicable rates might not be known in many instances until time fo tender, the quantity shipped being within control of the shipper.—Id., p. 630.

Commodity description of Railway Exp. Agency's proposed quantity rates on "wearing apparel" is indefinite in that it is not clear whether that generic description includes such articles as boots and shoes. Since the governing tariff contains other rates on boots and shoes, REA is admonished to state specifically therein whether they are included in the proposed commodity description.—Aggregate Rates on Wearing Apparel—Ry. Exp. Agency, 318 I.C.C. 737 (747)*.

Since proposed boxcar rate, minimum 40,000 pounds, on all freight in no more than two 40-foot cars, would alternate with (but not supplant) respondent's rate, minimum 26, 500 pounds in one car, and its 30,000 pound-minimum all-freight rate which is subject to the so-called promiscuous loading and marriage rules, shippers would have no way of knowing until after a shipment is loaded just what rates they must pay. It is only just and reasonable to require preseveration of the shipper's right to know in advance what rates and what applicable minimum weights are available, so they may exercise their option of using the lowest rate available through selective loading. Proposed rate is potentially discriminatory because under actual operating conditions applicable charges could not be ascertained at least until the car doors are closed; not approved.—Freight, All Kinds, N. Y. & N. J. to Indianapolis, 316 I.C.C. 623 (624-5).

137. Binding on carrier and shipper, notwithstanding contract.—[Vols. 2, 6, 9, 11-15, 17]. —Once a tariff has been duly filed and lawfully published, it is binding upon both the carrier and any shipper taking advantage of it; its terms (in essence) become in such respects the only contract between the two allowed by law. A person who claims and accepts the benefits of a tariff therfore is bound also by its limitations and reciprocal obligations.—Union Pac. R. Co. v. Higgins, 223 F. Supp. 396 (401).

See also Atchison, T. & S.F. Ry. Co. v. Bouziden, §6(7), n. 5.

141. Points of origin and destination stated. —[Vols. 2, 9, 12, 16, 17, 19].—Under §6 it is incumbent on rail carriers to publish rates and rules compatible with the actual services to be performed. Though tariff publishing proposed TOFC rate indicates a holding out of modified plan II service from Mechanicsburg, Pa., carrier actually provides physical rail service from Harrisburg, and shipper moves the trailers 9 miles in line-haul service from Mechanicsburg to Harrisburg. Form of publication of proposed rate is therefore not proper; cancellation required.—Aluminum Billets, Mechanicsburg, Pa., to Youngstown, Ohio, 319 I.C.C. 307 (308).

151. Notice chargeable to shipper.—[Vols. 2, 6, 9, 12-15, 17, 18].—Both shippers and carriers are presumed to know that provision of tariff governing diversion of shipments required diversion orders to be made in writing or confirmed in writing. Shippers' verbal request for diversion, given to stockyards operator who had charge of feeding, watering, and resting their shipments of cattle in transit, did not comply with tariff requirement and was not binding on the railroad.—Atchison, T. & S. F. Ry. Co. v. Bouziden, 307 F. 2d 230 (234).

Regulations of the Commission

27 FR 9654, Sept. 29, 1962, Part 141: Freight schedules, amended by adding thereto §141.200 Alternation of through rates with aggregate of intermediate rates, effective Oct. 1, 1962.

30 FR 6162, May 1, 1965, Part 141: Freight Schedules, §141.200 Alternation of through rates with aggregate of intermediate rates, paragraph (a) amended, effective May 10, 1965. [Special Permission No. 16500; Amdt.]

33 FR 4603, March 15, 1968: Ex Parte No. 259 Increased Freight Rates; Special Permission 68-4000, Master Tariffs.

Section 6. (2) Schedule of rates through foreign country.—[Unchanged. See vol. 9, p. 7483.]

Amendments, see footnotes, vol. 2, p. 1455; historical notes, p. 1455.

Notes of Decisions

Volume 2—p. 1455.

Section 6. (3) Change in rates, fares, etc.; notice required, simplification of schedules.—[Unchanged. See vol. 9, p. 7484.]

Amendments, see footnotes; vol. 2, p. 1456; historical notes, p. 1456.

Historical Note

By Executive Order 11107, Administration of Alaska Railroads, dated April 25, 1963, the Interstate Commerce Commission is given jurisdiction "to fix, change, or modify rates for the transportation of passengers and property" under the authority set forth in the Alaska Railroad Act, 38 Stat. 305, which jurisdiction had been given to the Secretary of the Interior by Executive Order No. 3861 of June 8, 1923; latter order superseded. (28 FR 4225, April 30, 1963)

Executive Order 11107 codified as Title 49, Chapter II, Part 1200—Administration of Alaska Railroads (49 CFR §§1200.1 - 1200.4), 28 FR 12278, Nov. 20, 1963.

Notes of Decisions

Volume 2—p. 1457; Volume 6—p. 5210; Volume 9—p. 7484; Volume 12—p. 10276; Volume 16—p. 12694; Volume 17—p. 13366; Volume 18—p. 14130; Volume 19—p. 15280.

Section 6. (4) Joint tariffs.—[Unchanged. See vol. 9, p. 7486.]

Amendments, see footnotes, vol. 2, p. 1461; historical note, p. 1461.

Notes of Decisions

Volume 2—p. 1461; Volume 6—p. 5214; Volume 9—p. 7486; Volume 11—p. 9226; Volume 12—p. 10277; Volume 13—p. 10985; Volume 14—p. 11486; Volume 15—p. 12063; Volume 16—p. 12695; Volume 17—p. 13367; Volume 18—p. 14130.

Section 6. (5) Copies of traffic contracts to be filed.—[Unchanged. See vol. 15, p. 12063.]

Amendments, see footnotes, vol. 2, p. 1466, vol. 15, p. 12063; historical note, vol. 2, p. 1466.

Notes of Decisions

Volume 2—p. 1466.

1. Filing division sheets.—[Vol. 2].—If defendants adopt divisions of through rates on ex-rail from Tennessee and Mississippi River ports to the South as measure of nondiscriminatory rates on ex-barge grain, they will be required to file with the commission and maintain on current basis the appropriate division sheets or other evidence of contemporary sharing of revenue from the joint all-rail rates. —American Barge Line Co. v. Alabama G. S. R. Co., 316 I.C.C. 759 (773, 775)*. [But see dissent.]

Section 6. (6) Form and manner of publishing, filing, and posting schedules; unlawful use.—[Unchanged. See vol. 11, p. 9227.]

Amendments, see footnotes, vol. 2, p. 1468, vol. 11, p. 9227; historical note, vol. 2, p. 1468.

Historical Note

Rates and fares of railroads within the Alaska Railroad Act, jurisdiction of the commission, see Historical Note concerning Executive Order 11107 following §6(3).

Notes of Decisions

Volume 2—p. 1468; Volume 6—p. 5217; Volume 9—p. 7488; Volume 11—p. 9227; Volume 14—p. 11487; Volume 17—p. 13367; Volume 19—p. 15282.

Section 6. (7) Transportation without filing and publishing rates forbidden; rebates; privileges.—[Unchanged. See vol. 9, p. 7489.]

Amendments, see footnotes, vol. 2, p. 1472; historical notes, vol. 2, p. 1472, vol. 16, p. 12695.

Notes of Decisions

Volume 2—p. 1475; Volume 6—p. 2518; Volume 9—p. 7489; Volume 11—p. 9228; Volume 12—p. 10277; Volume 13—p. 10985; Volume 14—p. 11487; Volume 15—p. 12064; Volume 16—p. 12696; Volume 17—p. 13367; Volume 18—p. 14131; Volume 19—p. 15282.

1. Transportation prohibited without lawfully filed tariff.—[Vols. 2, 6, 9].—Rates on government traffic which have been properly submitted to the commission pursuant to §22(2) are not unlawful on ground that they have not been published and filed as required by §6(7).—Tennessee Products & Chem. Corp. v. Louisville & N. R., 319 I.C.C. 497 (507).

See also Bangor & A. R. Co. Trackage Rights, §5(2), n. 56.

5. Effect of tariff in force.—[Vols. 2, 6, 9, 11, 12, 14-19].—Until changed, tariffs bind both carriers and shippers with the force of law; under §6 the carrier cannot deviate from the rate specified in the tariff for any service.—Pennsylvania R. Co. v. United States, 315 F. 2d 460 (464-5)*.

A tariff, so long as it remains in effect, binds both carriers and shippers with the force of law. Tariff requirement that diversion orders be made in writing or confirmed in writing was not complied with by shippers; no contract of the carrier could reduce amount legally payable for transportation of defendants' cattle shipments, or release shippers from obligation to pay the charges. Compromise agreement between railroad and shippers under which shippers paid charges on basis of lesser through rate, rather than on basis of applicable combination rate, was unlawful and not binding on carrier.—Atchison, T. & S. F. Ry. Co. v. Bouziden, 307 F. 2d 230 (233, 234, 235).

Rates charged for interstate rail shipments are controlled by tariffs duly published and filed with the commission, and such tariffs have the same force and effect as a statute.—Chicago, R. I. & P. R. Co. v. Furniture Forwarders of St. Louis, Inc., 267 F. Supp. 175 (176); also, since railroad's lighterage and terminal tariff filed with the commission has the weight of law, it may not be altered or modifed by the parties.—Pennsylvania R. Co. v. Moore-McCormack Lines, Inc., 246 F. Supp. 143 (147)*.

A tariff is in essence a statement by the carrier to possible shippers that it will furnish certain services under certain conditions for a certain price, and once it has been legally promulgated it is binding on both the carrier and any shipper who takes advantage of it; its terms (in essence) become in such respects the only contract between the two allowed by law; one who claims and accepts the benefits of a tariff therefore is bound also by its limitations and reciprocal obligations. Thus, when defendants requested and accepted advance

payment of inbound freight and storage charges on considered shipment, as provided in the tariff, they obligated themselves to pay all lawful charges due thereon.—Union Pac. R. Co. v. Higgins, 223 F. Supp. 396 (401).

A rate, to have final lawfulness and validity, must be lawfully established, must be just and reasonable, nondiscriminatory and nonprejudicial. Lacking any of these essentials, it cannot be the valid, lawful rate even though it becomes the applicable rate by virtue of being on file with the commission. [Citing 253 F. 2d 449.] While federal court restraining order and injunction prevented railroads' charging and collecting the lawfully established reduced rate in issue during effective period thereof, since defendants did not amend their tariffs to show effect of the court order, the injunctive order did not affect validity of the lawful rate.—Humble Oil & Refining Co. v. Great Northern Ry. Co., 212 F. Supp. 747 (752-5).

Principles Governing Tariff Interpretation

10. In general.—[Vols. 2, 6, 9, 11-19].—When the issue in carrier's action to recover amount of claimed overcharges, deducted by the Government on post-audit from amounts admittedly due plaintiff for other services, involves construction of published tariffs, it presents purely a question of law. And, in accordance with established rules of tariff interpretation, the court must examine and give effect to every pertinent word, clause, and sentence of the §22 Quotation and the tariffs before it.—Great Northern Ry. Co. v. United States, 352 F. 2d 375 (376-7).

See also Baggett Transp. Co. case, 319 F. 2d 864, §22(1), n. 5.

In tariffs which permit application of substantially lower "battery" rates when a number of different articles in volume equal to two or more carload shipments are tendered at named origin points and are loaded at carrier's freight house or facilities leased from carrier in one day under one bill of lading for each carload "or" under one bill of lading for entire quantity by one consignor to one consignee at one destination over one route, the word "or" presents alternative methods for shipping. Plain meaning of the tariffs is that "or" separates alternative methods of drawing bills of lading and that the shipments must be "tendered * * * and loaded * * * in one day * * *by one consignor to one consignee via one route," regardless of which type of bill of lading is used. Therefore, in order to obtain the battery rate on a shipment of two or more cars, the cars must be tendered for shipment in the same day and, if shipper gives cars to carrier over a period of several days, the cars must be held by carrier until entire battery is received.—Chicago, R. I. & P. R. Co. v. Furniture Forwarders of St. Louis, 272 F. Supp. 62 (63-4)*.

A tariff must be construed to avoid unjust, absurd, or improbable results; and strict construction of tariffs against carriers that drafted them is not justified when such construction would ignore a permissible and reasonable construction which conforms to intention of the tariff framers. Although nothing in considered commodity tariff (containing an intermediate rule) specifically precludes its application over route constructed, the route used to justify application of an intermediate rule cannot under any circumstances be unreasonable. While constructed route physically exists, there has been no commercial use of such a route, and mere physical connections are not enough to establish a route; moreover, both carriers' and shippers' course of business negatives existence of such route. Therefore, and in light of principles stated in 212 F. 2d 812, the commission's application of the intermediate rule was arbitrary and improper; reparation orders set aside and enjoined.—Hygrade Food Products Corp. v. New York Central R. Co., 266 F. Supp. 946 (951-2)*.

Railroads draft their own tariffs, and such instruments should be construed strictly against them and in favor of the shipping public. Thus, while it is generally held that tariffs must be applied strictly according to their terms, strict interpretation of two alternating sections of tariff naming rates on ground limestone (lower rates in sec. 4 thereof being restricted to limestone "having value only" for building, paving, etc., purposes and so certified on bills of lading) would lead to an absurd and unjust conclusion. There is no limestone that can be used solely for construction purposes; plaintiff's limestone can be used for

construction and other purposes; considered shipments moved to feed mills under bills of lading containing certification from which word "only" was omitted; for over 3 years railroads accepted feed shipments with such certification, and charged lower rates, without questioning its applicability. The restriction in tariff section 4 being impossible of accomplishment is a nullity; thus, unrestricted, lower rated of the alternate sections would apply. —Calcium Carbonate Co. v. Missouri Pac. R. Co., 329 I.C.C. 458 (462-3)*.

By ordinary rules of tariff interpretation, phrases that follow are subordinate to, and modify or qualify, the initial phrase.—Guerdon Industries, Inc. v. Union Pac. R. Co., 315 I.C.C. 277 (279).

A basic rule of tariff interpretation is that tariffs must be given a fair and reasonable construction.—Traylor Engineering & Mfg. v. Lehigh Valley R. Co., 316 I.C.C. 31 (36); a meaning which is clear from the context may not be rendered obscure by resort to technical rules of grammer.—Petition of Southern Pacific Co. for Declaratory Order, 316 I.C.C. 661 (664); but where there is no ambiguity in the provisions of a tariff there is no room for construction.—R.M. Hollingshead Corp. v. Alton & S. R. Co., 319 I.C.C. 86 (88).

Tariffs are to be construed strictly according to their language, and an allegation under §6 requires that the commission strictly interpret the terms of the governing tariff; as §6 does not deal specifically with the justness or reasonableness of the end result, there is no room for construction where the language of the tariff is clear and unambiguous.—Allis-Chalmers Mfg. Co. v. Great Northern Ry. Co., 315 I.C.C. 152 (154).

11. Intent of framers not controlling.—[Vols. 2, 6, 9, 11-13, 15-19].—Intention of the framers of a tariff is not controlling where the tariff provision in controversy is so clearly worded as to leave no room for construction. —Metropolitan Metals, Inc. v. Pennsylvania R. Co., 314 I.C.C. 737 (738).

12. Ambiguities construed against maker.—[Vols. 2, 6, 9, 12, 14-19].—See also Halstead v. Norfolk & W. Ry. Co., n. 263, below.

In tariff providing that, where transit privileges are authorized in tariffs of participating lines, distances shall be computed via the transit point, the only explanation of "transit privileges" is another item titled "Terminal or Transit Privileges or Services," apparently listing four categories thereof without evident segregation; thus, though latter item lists both "reconsignment" and "transit privileges," it is patently ambiguous and does not support district court's statement that it specifically defines "reconsignment" as a transit privilege. That the tariff framers listed the two items under different headings supports conclusion that they did not assume one term used under one heading to encompass the other; and, as the first item does not specifically define "transit privileges," it likewise is ambiguous and must be construed before any correct application of the distance rates can be made.—United States v. Great Northern Ry. Co., 337 F. 2d 243 (254-6)*.

Appellee railroad's argument that construction of "transit privileges" is unnecessary to a decision in its favor, because appellant chose the route of movement and the distance rate should therefore be applied via the route so chosen, regardless of presence or absence of transit privileges, ignores the plain meaning of the words of the tariff, which make the distance rate applicable to the short origin-to-destination distance regardless of physical movement of the cars, except where transit privileges are granted. As appellee authored the tariff, it must have been aware of that fact, and cannot now attempt to change the rate by judicial construction not in harmony with the plain meaning of the words used.—Id., p. 249.

The commission's decision, in proceeding to which appellee was a party and which involved construction of the same tariff in a similar situation, that "transit privileges" as used therein did not include reconsignment, is consistent with its traditional view, accepted by the courts, and is entitled to great weight in appellant's subsequent suit to recover overcharges on shipments stopped for reconsignment. Possibility that in some circumstances unreasonable results might flow from that interpretation does not entitle appellee to one different from the plain meaning of the words used by it in the tariff; tariffs are written by the carrier and accordingly are construed in

shipper's favor in case of ambiguity. If the commission's construction was not in accord with carrier's understanding and intent, its obvious remedies were either a direct attack on those findings in the case in which it was a party, or amendment of the tariff to correspond with its intent. The district court's interpretation of "transit privileges" as including reconsignment was in error; reversed with direction to enter judgment for appellant.—Id., pp. 247, 248-9.

Construction of a rail tariff should be that meaning which the words used might reasonably carry to the shippers to whom they are addressed, and any ambiguity or reasonable doubt as to their meaning must be resolved against the carriers. But claimed ambiguities or doubts as to meaning of the tariff must have a substantial basis in the light of the ordinary meaning of words used and not a mere arguable basis. Governing tariff was obviously drafted to cover all export shipments; since meaning of relevant tariff item is doubtful when applied to present unusual situation, the doubt as to considered shipments is resolved against the railroad.—Chicago, R. I. & P. R. Co. v. Furniture Forwarders of St. Louis, Inc., 267 F. Supp. 175 (176-7).

Had defendant railroads wished to specifically restrict provisions of commodity tariff (publishing rates from Evansville, Ind., which the commission found applicable on plaintiff's shipments from Indianapolis to southeastern points under intermediate rule therein) only to shipments originating in Kentucky and at Ohio River crossings, they could have done so by stating that fact clearly; however, on its face, the tariff applies to shipments from "Kentucky also Ohio River crossings" and its index of stations lists Kentucky points and Ohio River crossings (including Evansville but not Indianapolis). Fact that the commodity tariff was published solely by carriers' southern territory agent, whereas class rate tariff containing rates actually collected was published by agents for their central and southern territories, is a fact that merely gives rise to an ambiguity as to whether the commodity tariff was restricted to shipments from Kentucky or from Ohio River crossings; such ambiguity is to be resolved against the carriers.—Hygrade Food Products Corp. v. New York Central R. Co., 266 F. Supp. 946 (949-50)*.

13. Reasonable doubts resolved in favor of shipper.—[Vols. 2, 6, 9, 11-14, 16-19].—Part II, §217(b), n. 25.

Although doubt as to meaning of a tariff provision must ordinarily be resolved in favor of shipper, the doubt must be a reasonable one; and carriers' inconsistency in interpreting their tariffs is not conclusive that a reasonable doubt exists.—Guerdon Industries, Inc. v. Union Pac. R. Co., 315 I.C.C. 277 (279).

15. Construction not to be strained or unnatural.—[Vols. 2, 6, 9, 11-19].—Interpretation of restriction in tariff item naming rate sought on 11 carloads of iron or steel sheets, i.e., iron or steel sheet not over 36 inches in length or width, as applying to rolled packages rather than to length of the sheets if unrolled would be strained and unnatural. To extract a dimensional restriction from its position in the middle of phrases modifying the initial description and apply it to a subsequent shipping requirement would do violence to the context and sequence of the description; moreover, considerations other than the tariff item describing the commodities determine size of the package.—Guerdon Industries, Inc. v. Union Pac. R. Co., 315 I.C.C. 277 (278-9).

16. Entire tariff to be considered.—[Vols. 2, 6, 9, 11-19].—Construction of a rail tariff presents a question of law and does not differ from that presented when construction of any other document is in dispute. The four corners of the instrument must be visualized and all of the pertinent provisions considered together, giving effect so far as possible to every word, clause, and sentence contained therein. Governing tariff was obviously drafted to cover all export shipments; however, meaning of item relevant to responsibility for freight at Pacific Coast ports is doubtful when applied to shipments to Naval Supply Depot, Pier 91, Seattle, Wash., since drafters thereof did not contemplate the unusual situation which such a government supply depot would create. Therefore, resolving doubt as to the tariff's meaning against the carrier, considered tariff item did not exclude application of export rate named therein to the 13 shipments in issue. Judgment in favor of defendant.—Chicago, R. I. & P. R. Co. v. Furniture For-

warders of St. Louis, Inc., 267 F. Supp. 175 (176-7).

Proper construction of tariffs requires that the interpretation accord some meaning to all provisions. Accordingly, in interpreting minimum-rate rule in transit tariff governing application of multiple-car rates on soybean cake and meal, the parenthetical phrase "(in volume unit forwarded from the transit point)" may not be disregarded.—Vol. Rates on Processed Meal—Midwest to Ports, 322 I.C.C. 456 (478).

In applying the minimum-tender requirement of promiscuous loading rule providing for computation of charges on mixed shipments tendered "in volume equivalent to two or more carload shipments," the test is whether or not the volume tendered is equivalent to two or more carloads, using the minimum weight applicable to any of the articles in the shipment; rates published to apply on the articles shipped do not enter into such determination.—Ford Motor Co. v. Atchison, T. & S. F. Ry. Co., 315 I.C.C. 134 (136).

Once the minimum-tender requirement is met, provisions of tariff item referred to in the rule concerning rate and c.l. minimum weight become applicable. On shipment of automobile parts, bumpers, and wheels, a single rate and minimum weight was provided for parts and bumpers, and that rate was correctly applied to weight of those articles; but as wheels were subject to alternative rates and minima, the "lowest charge obtainable" under those rules resulted from application of the lowest of the alternative rates to the actual weight of the wheels. Applicable charges determined and reparation awarded.—Id., pp. 135, 136.

All pertinent provisions of a tariff must be considered together, and a reasonable interpretation thereof as a whole is required.—Metropolitan Metals, Inc. v. Pennsylvania R. Co., 314 I.C.C. 737 (738); and if those provisions may be said to express the intention of the framers under a fair and reasonable construction, that intention must be given effect.—Nonapplication of Coarse or Feeding Grain Rates, 316 I.C.C. 547 (550).

17.——Effect of title page.—[Vols. 2, 6, 9, 11, 12, 14-16, 18, 19].—General title page description of territory for which rates are published in a tariff does not have the effect of limiting application of the tariff, particularly of intermediate rules therein, to points within the territory described on the title page. On its face, commodity tariff containing intermediate rule, which the commission applied to plaintiff's shipments from Indianapolis, Ind., shows that it applies from Ohio River crossings (which include Evansville but not Indianapolis); and the tariff does not designate points of origin with more particularity. Thus, since restrictions on intermediate rules must be clear and not merely inferred from tariff provisions or from the title page, intermediate rule in considered commodity tariff is not limited to territory specified on title page thereof; however, the route used to justify application of an intermediate rule cannot under any circumstances be unreasonable.—Hygrade Food Products Corp. v. New York Central R. Co., 266 F. Supp. 946 (949-50)*.

18.——Reference to other tariffs or classifications.—[Vols. 2, 6, 9, 12-16, 18, 19].—Sand coated with less than 5 percent phenolic resin may appropriately be termed either foundry-core or bonded molding sand; complainant's addition of phenolic resin as binding agent to sand used for coating purposes establishes its identity as artificially or synthetically bonded molding sand. Tariff naming class rate charged, on "sand, foundry core, containing 5% or less phenolic resin," provided (without reference to value of commodity shipped) that commodity rates named in other tariffs for domestic traffic via same routes would apply on coastwise, export, or intercoastal shipments if they produced lower charges; therefore, lower rate named in sand and gravel tariff on "sand, molding, bonded (naturally or otherwise)" was applicable on complainant's export shipments, notwithstanding their comparatively high value. Reparation awarded.—Akron Brass Mfg. Co., Inc. v. Baltimore & O. R. Co., 315 I.C.C. 468 (469-70).

Commodity Rates

46. Commodity; whether specific designation supersedes general description.—[Vols. 2, 6, 9, 11-19].—It was not arbitrary, capricious, or an abuse of discretion for the commission to construe tariff item "automobile parts, noibn, iron or steel" published under the generic heading "Automobile parts," rather than the items "forgings, nos" or "forgings, noibn" under the heading "Manufactured iron or steel articles," as more specific for application on shipments of iron or steel bumper back bars and stabilizer bars which, though made by a forging process, moved to complainant's automobile assembly factory where they were installed on automobiles without any further work on them. Record contained substantial evidence from which the commission could conclude that catch-all term "automobile parts" is restricted to automobile parts made of iron and steel, while catch-all term "forgings" applies broadly to parts made of iron and steel; affirmed.—General Motors Corp. v. United States, 207 F. Supp. 641 (642, 645)*.

Where a commodity falls within a specific description in the classification, the rating for that specific description applies thereon. Class B rating and rates on "Boards or sheets, flat, sawdust or ground wood with added resin binder not exceeding 10% by weight," under general heading "Lumber, Veneer, or Forest Products," were applicable on shipments of Plaswood lumber made of pinewood shavings or pieces coarsely ground and bound together by resin, rather than lower commodity rates on lumber, including yellow pine lumber.—Plaswood Corp. v. Alton & S. R., 321 I.C.C. 434 (446, 449).

47.——Cross reference in commodity rates.—[Vol. 2].—Purpose of a commodity index is merely to aid the user of a tariff in locating rates or rate bases, and failure to index a commodity in a tariff does not void a rate published therein. Though rate item producing lower rates sought is not shown opposite scrap brass and copper in commodity index, rate columns specified both in that item and in item producing higher rates charged were plainly made subject to note providing that rates therein would apply on scrap brass and copper having value only for remelting, thus setting up conflicting rates.—Zack v. Canadian National Rys., 315 I.C.C. 256 (257-8).

The purpose of commodity index in a tariff being merely to facilitate reference to rates or rate bases, failure to index a point, a commodity, or an item in a tariff does not void a rate published therein; thus, defendants' contention, that a published rate basis cannot be used unless properly indexed, is without merit. While note providing that rates shown in certain rate items would apply on scraps of brass and copper having value only for remelting was not referred to in the index, it was plainly shown in connection with each of conflicting commodity rate columns and applied with equal force to all items making reference to it; shipper is entitled to the lower commodity rates named in those items.—Metropolitan Metals, Inc. v. Pennsylvania R. Co., 314 I.C.C. 737 (738-8).

49.——Commodity description; determination by analogy.—[Vols. 2, 6, 9, 11-19].—The nature and character of a commodity at time it is tendered for shipment determine its identity for transportation purposes. Significant facts which weigh heavily in determining the description applicable to a given shipment are (as stated in 306 ICC 611) the producer's description of the commodity for sales purposes, the manner in which it is billed, its use and value, and how it is regarded in the trade. Considered in the light of those criteria, evidence establishes that considered commodity, used as padding in automobile door panels, was padding material in batting form made from synthetic fiber, and that tariff item naming rates on "Batting, Wadding, Pads, or Padding * * *" provides an accurate description of commodity shipped.—Fibre Bond Corp. v. Canadian National Rys., 318 I.C.C. 549 (552-3, 554).

Lower rate named on "Alcohol and other articles as designated" did not apply on considered shipments of brake fluid mixtures; although complainant's witness testified that each of the raw materials contained in the mixtures were listed in that item, he did not identify them. A reasonable interpretation of that item, which lists specific chemicals, does

not permit inclusion of chemicals more generally described as polyglycols or glycol ethers, which complainant's mixtures contained. It is incumbent on complainant to show by affirmative evidence that its mixtures are included in the tariff item, and mere assertion, without supporting evidence, that the unidentified raw materials are included therein does not establish the fact. Since only two of chemicals contained in one or more of the several mixtures are shown to be specifically included in that item, complainant's claim of its applicability is not sustained.—R. M. Hollingshead Corp. v. Alton & S. R., 319 I.C.C. 86 (88).

Absence of essential parts not affecting the identity of an article transported does not destroy its fundamental character for ratemaking or tariff-interpretation purposes. Though corrosion and oxidation inhibitors are added to the brake-fluid mixtures after they are received by complainant, the volume of those additives is not disclosed, and in absence of convincing evidence to the contrary the brake-fluid rates charged were applicable.—Id., p. 89.

Rate on "clay, noibn, crude (not crushed, ground, or pulverized)" found inapplicable as factor of lower combination under aggregate rule on crude clay air-dried and reduced to finely broken clay by passing through a "shredder" machine. Condition of the clay after passing through such machine is unlike that of "shredded" products as usually known and accepted, such as shredded cabbage, rags, or paper. Moreover, shredding is usually associated with cutting, and complainant's machine employs no cutting devices; exhibit picturing the clay after passing through the machine shows it to be grated or pulverized to some extent, and it has all been reduced to fine particles. Assailed single-factor rate on "clay, noibn, crude or ground," found applicable.—Universal-Rundle Corp. v. Texas & N.O.R. Co., 319 I.C.C. 458 (460)*.

Complainant's evidence consisting of photographs of commodity shipped (showing it to be a flexible plastic product, in rolls) and photographs of flat rectangular pieces described by its witness as sheets, together with verified statement of its traffic manager to the effect that commodity shipped was sheeting, not sheets, is not convincing that the rate on plastic sheets was inapplicable on considered shipments. From the photographs, the only distinguishing feature between commodity shipped and that represented by complainant to be sheets is that former is flexible enough to be marketed and shipped in rolls, while latter is shipped flat; however, the classification provides a rating on plastic "sheets in wrapped rolls," indicating that "sheets" are not confined to pieces of inflexible plastic.—Firestone Tire & Rubber Co. v. Atchison, T. & S.F Co., 318 I.C.C. 107 (109-10).

Rate named on topped or reduced crude petroleum oil with API gravity not over 38° and requiring further "refining or processing" for production of refined petroleum products, restricted to movement to a refinery for further manufacture or processing, applied on considered shipments to consignee which processes and sells asphalt. That the material shipped is a residue of refining processes within tariff definition of topped or reduced oil, with gravity not over 38°, is undisputed; since treatment of the material is necessary to meet consignee's customers' specifications as to grade of asphalt desired, there is "further processing"; and consignee's plant, being a place for further processing, is in nature of a refinery within meaning of the tariff description.—Empire Petroleum Co. v. Chicago, B. & Q.R. Co., 315 I.C.C. 291 (296).

Class rates on rust-preventive pipeline coating, asphaltum based, were applicable on complainant's coating consisting of 81 percent asphalt and 19 percent slate flour, designed for application to pipelines to prevent corrosion, rather than lower commodity rates on asphalt; considered product is a manufactured compound which is more than merely asphalt; and inclusion of the pipe coating description under generic heading "Paint, Paint Material or Putty" has no special significance, since such protective coatings may reasonably be considered paint materials.—Monsanto Chemical Co. v. Alton & S.R., 314 I.C.C. 745 (746, 747).

Since rate claimed applicable on electric transformer parts shipped was subject to a tariff note providing that it applied only on transformers weighing not over 1,100 pounds, or parts thereof, that rate was not available on

transformers parts shipped with, and pertaining to a transformer weighing 288, 604 pounds; rates charged on parts shipped found applicable.—Westinghouse Electric Corp. v. Pennsylvania R. Co., 318 I.C.C. 1 (3).

In description "Iron or Steel Sheet, * * * not over 36 inches in length or width," latter phrase modifies the article itself and has no relation to size of shipping package; rate named thereon was inapplicable to sheets 1,650 to 3,000 feet long, shipped in rolled packages not exceeding 36 inches in length or width; higher rates named on sheet under heading "Iron or Steel Articles" applied.—Guerdon Industries, Inc. v. Union Pac. R. Co., 315 I.C.C. 277 (278, 279).

In view of the various operations performed on considered rotary kiln shell sections before shipment, and fact that final welding together of the sections was not performed until after arrival at destination because of extreme length of completed kiln shell, conclusion is warranted that they were "machine parts," rather than "structural forms," "unfinished shapes," or "pipe"; and various iron and steel articles shipped therewith but not itemized in the bill of lading, which were made according to specifications for use in assembly of a rotary kiln, constituted parts of the machinery included in rate item covering "machine parts." Furthermore, since only assembly, including welding the sections together, was required at destination, the articles shipped could not be considered merely unfinished shapes or structural forms.—Forms or Unfinished Shapes, Fabricated—Classification, 316 I.C.C. 679 (681-2).

Although eight shipments together constituted all parts necessary to erect and operate a rotary cylinder kiln, they were not within description "Kilns, rotary cylinder," when none of them individually constituted a rotary kiln in any form; and since they moved at different times, the situation was not within classification rule 20 providing that parts constituting a complete article, when moved as one shipment on one bill of lading, will take the rate provided for the complete article.—Traylor Engineering & Mfg. v. Lehigh Valley R. Co., 316 I.C.C. 31 (35).

Item naming rate sought, on "Machinery, paper mill or pulp mill, K.D. or Parts thereof," with no other restriction on its application, is not limited to machinery which can be used only in pulp or paper mills, or even to machinery actually used in making paper or pulp; it is therefore not a strained or unnatural construction to hold that complainant's shipments, which were intended for use in a paper mill as part of the pulp-making process, constituted pulp or paper mill machinery within that item.—Id., p. 36.

51. Use to which article is put.—[Vols. 2, 6, 9, 11-10].—See also General Motors Corp. v. United States, n. 46, above. While use to which a commodity is put is not controlling, it is helpful in determining what the commodity is, and the question of use is implicit in commodity description "insulating material." Though complainant, in reliance on agreement with carriers' Weighing and Inspection Bureau, billed as "insulating material" shipments of bonded fiber padding intnded for use in automobile door panels, that description neither specifically covers complainant's product nor accurately describes its use; its insulating qualities are only incidental to its use and sale as padding, and it would be a strained construction of the governing tariff descriptions to find that padding material becomes insulating material simply because it can be so used. Lower rates on pads and padding found applicable.—Fibre Bond Corp. v. Canadian National Rys., 318 I.C.C. 549 (552-3, 554).

Although use of rotary kilns for recovery of lime is not restricted to the pulp-making industry, considered shipments constituted parts of a complete machine to be installed in consignee's paper mill, which was designed specifically for that mill and became an integral and indispensable part of its pulp-making operations; rate named on paper or pulp mill machinery parts, rather than higher rate on machinery parts, therefore applied.—Traylor Engineering & Mfg. v. Lehigh Valley R. Co., 316 I.C.C. 31 (33, 36).

Considered rotary kiln sections were not entitled to the rate on pipe, since they were designed for a specific purpose other than purposes for which pipe is designed and generally used; see 308 ICC 529.—Forms or Unfinished Shapes, Fabricated—Classification, 316 I.C.C. 679 (681, 682).

52. Invoices, billing, bills of lading, not conclusive.—[Vols. 2, 6, 9, 14, 16-19].—While description in the bill of lading is not controlling as to identity of the commodity shipped, it is a factor to be considered. In absence of convincing evidence to the contrary, rate on brake fluid was applicable on shipments billed as brake fluid mixture, to which an undisclosed volume of corrosion and oxidation inhibitors was added after their receipt by complainant.—R. M. Hollingshead Corp. v. Alton & S.R., 319 I.C.C. 86 (89).

Use of an erroneous commodity description in shipping documents, even though agreed on between shipper and carriers, does not deprive shipper of right to recover overcharges if a different and lower-rated description was in fact applicable. Though carriers' Weighing and Inspection Bureau advised complainant that its batting, when used as padding for automobile door panels, should be described as "Insulating Material, NOIBN," and so described it in weight agreement submitted to complainant, and complainant in reliance thereon billed considered shipments accordingly, complainant was not bound by that agreement to pay the higher charges on insulation when nature and use of the commodity warranted application of lower rate on pads or padding. Shipments found overcharged.—Fibre Bond Corp. v. Canadian National Rys., 318 I.C.C. 549 (551, 553-4).

53. Rates applicable to articles as commercially described.—[Vols. 2, 6, 9, 11-19].—Terms used in a tariff must be given the meaning recognized and understood in the industry or trade in which they are used. Paco sand, though a geological sand, is not a sand for rating purposes when it is used for same purpose as feldspar mixed with silica sand, is sold like other feldspar mixtures on basis of chemical analysis, and is advertised by its producer as "a natural feldspar-silica blend." Rates on former description "Sandspar, feldspathic, chemical content not exceeding 14 percent alumina" and on present description "Feldspar, containing in excess of 23 percent free silica" were and are applicable on Paco sand, rather than lower rates on sand.—Copps v. Alabama G.S.R. Co., 319 I.C.C. 192 (196, 198).

Producer's description of a commodity for sale purposes is a significant factor in determining its identity for transportation purposes. Though complainant, in conformity with its weight agreement with carrier bureau, billed as "insulating material" shipments of bonded-fiber batting for use in automobile door panels, its advertising stressed use thereof as batting or padding and there is no showing that it ever described the commodity as "insulating material" for purposes of sale. Lower-rated description "Batting, Wadding, Pads or Padding" accurately describes the commodity involved and was applicable.—Fibre Bond Corp. v. Canadian National Rys., 318 I.C.C. 549 (552, 553-4).

Combination Rates

80. Not applicable when single-factor through rate is published.—[Vols. 2, 6, 9, 12-14, 16-18].—As a general rule, if a through rate is in existence, shipper may not combine the intermediate rates; the through tariff is the only lawfully applicable rate. However, the United States, unlike a private party, may contract with railroads for transportation "at reduced rates," and carriers need not as a general rule abide by their published tariffs in dealing with the United States. Thus, if a §22 quotation rate reveals intention that it may be so used, it may be combined with another quotation rate to produce an aggregate lower than the through tariff rate; and since the Government may receive preferences, a quotation rate may conceivably be also combined with a local tariff if the quotation is designed to be used in that manner.—Great Northern Ry. Co. v. United States, 312 F. 2d 901 (903).

81. Lowest combination applicable in absence of published single-factor through rate.—[Vols. 2, 6, 9, 12, 14-19].—See Great Northern Ry. Co. v. United States, 312 F. 2d 906, §22(1), n. 5.

82. Rule of commission governing combination rates.—[Vols. 2, 6, 9, 11].—See Great Northern Ry. Co. v. United States, 312 F. 2d 906, §22(1), n. 5.

Rates Fixed by Combination Rule

93. Effect of provisions restricting use of rule.—[Vols. 2, 6, 9, 14].—See Great North-

ern Ry. Co. v. United States, §4(1), n. 139.

96. Effect upon the aggregate-of-intermediate rates.—[Vols. 2, 6, 9, 13-19].—Although none of shipments moved over routes over which combination rates claimed under aggregate rule apply, that rule removes application of class rates if lower combinations apply over any class-rate route, and no limitation has been shown upon application of class rates via route over which the lowest combination of rates sought was published. Rates on basis sought found applicable.—Sioux City Foundry & Boiler Co. v. Chicago, B. & Q. R. Co., 318 I.C.C. 13 (16).

Intermediate Provisions

109. In general.—[Vols. 2, 6, 9, 11-19].—Part II, §217(b), n. 80.

Restrictions on intermediate rules, while permissible, must be clear and not merely inferred from general provisions in the tariff or from its title page; thus, intermediate rule in commodity tariff naming rates on shipments from "Kentucky also Ohio River crossings" to southeastern points is not limited by title-page description of territory and "Index of Stations" list of origins, since restriction of the tariff's application, and particularly of the intermediate rule therein, may not be inferred from such general description of territory. However, the route constructed for application of an intermediate rule must be reasonable in light of the extent and direction of circuity and the commercial usage of such route. See 212 F. 2d 812. Therefore, there being no commercial usage at all of the route constructed for application of considered commodity tariff to plaintiff's shipments, the commission's finding that the constructed route was reasonable was arbitrary and unsupported by the evidence; the commission improperly applied tariff intermediate rule to an unreasonable route. Reparation order set aside and enjoined.—Hygrade Food Products Corp. v. New York Central R. Co., 266 F. Supp. 946 (950-2)*.

Since orders granting fourth-section relief are permissive, authorizing higher rates at intermediate points to the extent indicated, the reference to §4 orders in rate tariff containing intermediate rules does not change application of the intermediate rules.—Sioux City Foundry & Boiler Co. v. Chicago, B. & Q. R. Co., 318 I.C.C. 13 (15).

Since respondent's tariff naming plan II TOFC rates provides routes between Chicago and Kansas City via Milwaukee and Savanna, Ill., as well as more directly through Savanna, each of which is as much "a given route" as the other within meaning of the intermediate rules, and with only four exceptions no commodity rates are named on TOFC traffic between Milwaukee and Kansas City, under terms of the intermediate rules the Chicago rates apply between those points. Argument that only a strained interpretation of the rules could place Milwaukee intermediate between Chicago and Kansas City is unsound because the rules do not require that a point be directly intermediate, and the 25.2-percent circuity of the route via Milwaukee is not so great as to preclude application of the rules. See 281 ICC 705.—Addition of Milwaukee to Chicago Group Rates—K. C., 318 I.C.C. 755 (758-9).

An intermediate rule is a rule of general application, unless specifically restricted, and as such exists independently; it applies either generically or specifically according to its own language.—Allis-Chalmers Mfg. Co. v. Great Northern Ry. Co., 315 I.C.C. 152 (154).

More-distant-point rate claimed applicable under destination intermediate rule was subject to encircled reference indicating that it was published under authority of a fourth-section order, and the intermediate rule was subject to an exception providing that it would not apply where such specific reference is shown in connection with the more-distant-point rate; that such reference was erroneous because the order referred to did not grant relief at the more distant point on traffic from origin of shipments involved is a factor unrelated to application of the rule, which operates only according to its terms; that reference can only be construed as giving effect to the restrictive language of the rule; therefore, the rate sought had no application to the intermediate destination.—Id., pp. 153, 154.

Single-factor rate on coke from Indianapolis to Niagara Falls, Ont., is not applicable under intermediate rule to Hamilton and Sarnia, Ont., when that rule is restricted not to

apply to intermediate points on Canadian National, Grand Trunk, or New York Central, and other defendants either do not serve Hamilton or Sarnia or are not parties to tariff naming the rate to Niagara Falls.—Board of Directors for Utilities v. Canadian National Rys., 315 I.C.C. 471 (475).

110. Specific rate established by intermediate rule.—[Vols. 2, 6, 9, 11-19].—An intermediate rule in a tariff establishes specific rates just as positively, plainly, and legally from unnamed intermediate points as if such points were specifically named.—Addition of Milwaukee to Chicago Group Rates—K. C., 318 I.C.C. 755 (758).

An export rate established by an intermediate rule is just as specific as though specifically published, and takes precedence over a domestic rate.—Nueces County Nav. Dist. No. 1 v. Atchison, T. & S.F. Ry. Co., 315 I.C.C. 155 (162-3).

111. Effect as to points indexed or named.—[Vols. 2, 6, 9, 12-15, 17, 18].—Although fourth-section application incorporated by reference in fourth-section order referred to in connection with destination intermediate rule in tariff naming rate from Milwaukee to Omaha (sought to be applied to Sioux City under that rule) stated that destination departures in Iowa were at named points to which specific commodity rates were published, no commodity rate to Sioux City is shown which could be applied from Milwaukee on considered shipments in lieu of the specific rate made by the intermediate rule; use of that rule is therefore not precluded by the fourth-section order.—Sioux City Foundry & Boiler Co. v. Chicago, B. & Q.R. Co., 318 I.C.C. 13 (15).

114. Routing restrictions to be observed.—[Vols. 2, 6, 9, 12, 16-19].—While destination intermediate rule in tariff naming rate from Milwaukee to Omaha (claimed applicable on shipments to Sioux City) is restricted not to apply "via lines operating west of the Missouri River," fourth-section order referred to in connection with that rule was issued in response to and incorporates §4 application which indicates that Milwaukee-Omaha rates covered thereby were to be subject to the intermediate rule except at points on routes operating west of the river. However, as carriers serving Sioux City (on the east bank) have lines operating both east and west of the river, limitation on application of the rule over their lines west of the river has no effect on its application at points on their lines east of the river.—Sioux City Foundry & Boiler Co. v. Chicago, B. & Q. R. Co., 318 I.C.C. 13 (15).

Rate sought is restricted to two routes, one of which embraces the Soo Line to Waukesha, Wis., thence a route of the North Western via Sioux City, and defendants have shown no tariff authority for their interpretation of the routing provisions as precluding availability of that route. Had the North Western desired to limit routing from Waukesha to Omaha to specific lines of its system, it was free to do so, but it provided no internal routing, and 12.3-percent circuity of that route compared with its short route between those points does not prevent complainant's use thereof to apply the rate sought to Sioux City.—Id., p. 16.

115. Unreasonably circuitous routes.—[Vols. 2, 6, 9, 11-13, 16, 17, 19].—See Blandin Paper Co. v. Great Northern Ry. Co., §16(2), n. 2.

116. Reasonable and practical routes.—[Vols. 2, 6, 9, 11-16, 18, 19].—Route used to justify application of an intermediate rule cannot under any circumstances be unreasonable, and its unreasonableness is judged by the extent and direction of circuity and commercial usage of the route. As stated in 212 F. 2d 812, a route constructed for such use must be reasonable in light of three equal factors: (1) the extent and (2) direction of circuity and (3) commercial usage of a route. While maximum circuity limitation in commodity tariff in issue may meet requirement that extent and direction of circuity be reasonable, there was no commercial use of any kind of route constructed for intermediate application of the rates therein; and maximum circuity limitation may not be used to defeat the third element to be considered in determining reasonableness of the constructed route. In light of evidence of record on the absence of commercial usage, the commission's finding that the constructed route was nevertheless reasonable was arbitrary and unsupported by sufficient evidence. Orders awarding reparation to plaintiff are invalid, unenforceable,

and are set aside and enjoined.—Hygrade Food Products Corp. v. New York Central R. Co., 266 F. Supp. 946 (950-2)*.

Switching Rates

124. In general.—[Vols. 14-19].—Railroad is not entitled to collect alleged undercharges for switching service on cars of scrap iron purchased by defendant from seven other railroads when vendor railroads moved the cars to the Kansas City Switching District (before title to the lading passed to buyer) and there turned them over to plaintiff for switching delivery to consignee's plant located within that switching district; reciprocal switching rate in tariff Sec. 1, rather than Sec. 2 intraterminal rate, is the proper applicable rate for plaintiff's switching service. Although the tariff provides that Sec. 1 rates apply only in connection with road-haul shipments, the term "shipments" therein is interpreted as encompassing considered switching movements to defendant consignee's plant, even though vendor railroads did not have to charge any rates for the movement from various origins outside the switching district, since the scrap remained company property until arrival at Kansas City, and the cars were not delivered to consignee by vendors' employees. Judgment in favor of defendant.—Atchison, T. & S.F. Ry. Co. v. Erman-Howell Division, 279 F. Supp. 625 (626-7, 629-31).

Conflicting Rates

141. Lowest of conflicting rates applicable.—[Vols. 2, 6, 9, 11-19].—Carriers are responsible for their published tariff provisions, and where conflicting provisions are maintained, those resulting in the lowest charge to shipper are applicable.—Farmers Union Grain Term. Assn. v. Canadian Natl. Rys., 315 I.C.C. 559 (565)*.

Tariff naming column commodity rates on generator parts and electric switchboards from Pittsburgh to float bridge at New York City provided that they would be superseded by commodity rates published in other tariffs either specifically or by intermediate application; tariff naming lower specific rates sought by complainant under intermediate rule therein provided that that rule would not apply if a commodity rate otherwise applicable was named in any other tariff. Since the tariff provisions were in conflict, complainant was entitled to application of the lower rates sought as factors for movement to the float bridge.—Westinghouse Electric Corp. v. Pennsylvania R. Co., 318 I.C.C. 460 (462-3).

When tariff note specifically provided that rates published in certain rate items under description of brass or copper scrap would also apply on scrap having value for remelting only, and that note was referred to in connection with each of rate columns named in items naming different rates, it applied with equal force to all, thus setting up conflicting rates. Shipper is entitled to the lowest charge where there is a tariff conflict or where reasonable doubt exists as to applicability of two disputed rate bases; reparation awarded to basis of the lower rates.—Zack v. Canadian National Rys., 315 I.C.C. 256 (258); Metropolitan Metals, Inc. v. Pennsylvania R. Co., 314 I.C.C. 737 (738-9).

160. Export and domestic rates.—[Vols. 2, 6, 9, 11-18].—All of the requisites of the tariff must be met in order to entitle shipper to an export rate. Defendant's failure to comply with all the tariff conditions precedent results in application of the higher domestic rates on its shipments.—Louisiana & A. Ry. Co. v. Export Drum Co., 228 F. Supp. 89 (95)*.

Item in governing export tariff pertaining to responsibility for freight at Pacific Coast ports did not exclude application of export rate which defendant prepaid, instead of higher domestic rate sought to be applied, on considered shipments which were billed for export and consigned to Naval Supply Depot, Pier 91, at Seattle, Wash. The tariff was obviously drawn to cover all export shipments; and, that drafters thereof unfortunately did not contemplate the unusual situation which government supply depots similar to Pier 91 would create, is borne out by fact that considered item has since been amended to cover the problem posed by such supply depots. Meaning of the tariff is certainly doubtful when applied to the situation under consideration, and that doubt must be resolved against the carrier; judgment in favor of defendant.—Chicago, R.I. & P.R. Co. v. Furniture For-

warders of St. Louis, Inc., 267 F. Supp. 175 (176-7).

An export rate established by an intermediate rule takes precedence over a domestic rate.—Nueces County Nav. Dist. No. 1 v. Atchison, T. & S.F. Ry. Co., 315 I.C.C. 155 (162-3).

162. Distance rates.—[Vols. 2, 6, 19].—See also United States v. Great Northern Ry. Co., n. 12, above.

Although tariff publishing Minnesota intrastate scale on grain and providing for refund to basis of intrastate rates to Duluth on shipments to Superior, Wis., when reshipped beyond by water, requires use of distances over short-line intrastate routes embracing not more than three railroads, individual tariffs of two originating carriers, in sections governing inspection and reconsignment, require use of actual distances over routes of movement when there is reconsignment at intermediate points, in direct conflict with provisions of the rate tariff and of orders in 164 ICC 619 which contemplate application of the Duluth rates to Superior. Under principle that, where tariff provisions conflict, those resulting in lowest charge to shipper apply, applicable rates on shipments from Minnesota origins to Superior, held at Minneapolis for inspection and reconsignment, were the scale rates from each origin over the short intrastate route to Duluth, plus any inspection, diversion, or reconsignment charges.—Farmers Union Grain Term. Assn. v. Canadian Natl. Rys., 315 I.C.C. 559 (564-5)*.

Routing

180. Restriction in tariff.—[Vols. 2, 6, 9, 11, 12, 15-19].—Neither rate charged nor rate sought to be collected applied on shipment from Power Mont., to Oklahoma City, in group E-1; former applied on shipments from Montana only when destined to points in group H, and latter was restricted to points taking a different rate basis than Power; higher rate named to group E-1 points from points in Montana and not otherwise restricted, found applicable.—Clements Foods Co. of Oklahoma City v. St. Louis-S.F. Ry., 315 I.C.C. 516 (517).

181. Unrestricted rates apply over any route made up of lines of participating carriers.—[Vols. 2, 6, 9, 11-19].—See also Hygrade Food Products Corp. case, n. 17, above.

Where tariff specifically provides, in accordance with plan 2 of rule 4(k) of Tariff Circular 20, that rates will apply over all routes composed of lines of carriers parties thereto, such publication renders application of claimed routes both definite and certain and presumably reasonable. Burden is on carriers to publish definite routing restrictions if they deem any routes to be in any respect unreasonable; nor may a carrier claim a route to be excessively circuitous or unreasonable when the tariff thus specifically provides for its use.—Producers Cooperative Oil Mill v. St. Louis-S.F. Ry. Co., 322 I.C.C. 267 (271)*.

183. Backhauling or circuitous routing required.—[Vols. 2, 6, 9, 11, 12, 16-19].—Routing provisions governing application of through rate charged on shipments from Oklahoma City to Quincy, Ill., and rate to Moberly, Mo., claimed as factor of lower combination rate inserted by shipper in the billing, specified Moberly as the gateway to Quincy and Boonville, Mo., as the gateway to Moberly, but provided no specific routing east of either gateway. Shipments forwarded over the higher-rated route were misrouted when, under those provisions, they could have moved over a route via Booneville to Moberly and beyond, over which the higher rate did not apply. While the described route via Booneville to Moberly involved an out-of-line haul, the circuity of about 11 percent is not excessive; moreover, as the tariff specifically provided that rates would apply over all routes composed of participating carriers, defendants may not claim that route to be excessively circuitous or unreasonable.—Producers Cooperative Oil Mill v. St. Louis-S.F. Ry., 322 I.C.C. 267 (270-1)*.

Reconsignment, Diversion, Reshipment; Transit

194. In general.—[Vols. 17, 18].—By agreement of the parties charges on Government shipments originally shipped to Seattle under a §22 quotation and backhauled to ultimate

destinations upon reconsignment are to be computed under rule 14 of plaintiff's reconsignment tariff, which provides for application of the combination of tariff rates to and from the reconsignment point as maximum. Though the §22 quotation is not a "tariff," it provided that shipments thereunder would be subject to all charges and allowances respecting reconsignment and to all other rules which in any way increase or decrease the amount to be paid; thus, the maximum charge should be computed using the quotation as if rule 14 were included therein, and treating the quotation as a tariff for purpose of that rule, to permit aggregation of favorable rates in case of reconsignment; the United States is entitled to combine the quotation and local tariff to produce the maximum charge.—Great Northern Ry. Co. v. United States, 312 F. 2d 901 (905).

Three of carriers originating considered shipments of grain held at Minneapolis for inspection and reconsignment, which were later moved beyond Superior, Wis. by lake vessel, maintain rules in their local tariffs governing reconsignment of freight and holding of shipments for surrender of bills of lading or written orders, or for inspection at stations on their lines; the fourth originating carrier provides for those services in an agency tariff. Reasonable construction of those tariffs and tariff providing for rates on grain moved beyond Superior by water, as a whole, indicates that defendants authorize inspection, holding for disposition orders, and forwarding from hold points as part of their diversion and reconsignment service; applicable rates determined accordingly.—Farmers Union Grain Term. Assn. v. Canadian Natl. Rys., 315 I.C.C. 559 (563-4, 565)*.

195. Reconsignment as distinguished from reshipment.—[Vols. 2, 6, 9, 19].—See Great Northern Ry. Co. v. United States, §1(6), n. 303.

201. Rate applicable in absence of privilege.—[Vols. 2, 9, 18].—Since tariff authorizing fabrication in transit did not name billboards or signboards as outbound articles in connection with which transit was permitted, transit did not apply on iron and steel articles reshipped after fabrication as parts of completed billboards or signboards; rates on iron and steel articles not subject to transit applied on the inbound shipments, and flat rates on billboards and signboards, plus transit charge, on the outbound shipments.—Dolby Advertising of Lake Charles v. Texas & N. O. R. Co., 315 I.C.C. 33 (36).

205. Transit.—See §1(6), n. 538, applicable charges.

Observance of Published Tariffs

215. Departure from rate named in tariff unlawful.—[Vols. 2, 6, 9, 11, 12, 14-19].—Defendants' master increase tariff making applicable general increases authorized in Ex Parte No. 212 specifically provides that no increase is to apply on "Plate or sheet, iron or steel, NOIBN," which abbreviation is defined in that tariff as meaning "not otherwise indexed by name and not more specifically provided for in this tariff"; as waster plates or sheets are not otherwise indexed or more specifically provided for in the increase tariff, it is apparent that they ar embraced in that provision and that no increase was provided on those commodities. Rates including 2 percent increase authorized in Ex Parte 212 were therefore inapplicable; applicable rates determined.—Joliet Wrought Washer Co. v. Chicago, R. I. & P. R. Co., 315 I.C.C. 477 (479).

217. Strict compliance with tariff rules as to service offered.—[Vols. 2, 6, 9, 13-19].—Under §6 a carrier cannot deviate from the rate specified in its tariff for any service; and when one of conditions of export tariff, that the export rates would apply only of traffic which did not leave the delivering carrier's possession at the port, was not fulfilled in case of certain war-blocked export shipments of Government freight, the railroad had to collect the domestic rates called for by the tariff in that circumstance.—Pennsylvania R. Co. v. United States, 315 F. 2d 460 (464-5)*.

Railroad could not waive tariff requirement that any diversion request be made in writing or confirmed in writing; nor could it authorize stockyard operator, who was in charge of feeding, watering, and resting cattle in transit, to accept oral diversion requests from shippers. Shippers concede they did not give carrier a written diversion request, or confirm such a request in writing; oral request given to

stockyard operator was not lawful and was not binding on the railroad.—Atchison, T. & S.F. Ry. Co. v. Bouziden, 307 F. 2d 230 (233, 234).

When tariff in issue, in railroad's suit for claimed undercharges on defendant's shipments of empty steel drums from Texas to Baton Rouge, La., provides that lower rates therein apply only when (a) immediate preceeding transportation of the filled drums to shipping point of empty drums was by rail freight, (b) a record is maintained of filled containers received and empty containers returned, and (c) shipper furnishes carrier a certificate of prior rail service on the filled containers, shipper is entitled to the lower rate only if all requirements are met. Requirements (a) and (c) were met when, though defendant trucked the shipments from plant where filled drums were received by rail about 15 miles to the rail yard, the rail yard and plant (in same commercial zone) constitute a "shipping point"; and the certificate defendant furnished contains the substance, but not precise language, of that required. However, defendant's maintenance of a record on empty containers shipped, but no record of filled containers received, does not meet requirement (b); thus, defendant is not entitled to the lower rate on its shipments. Railroad is entitled to judgment, with interest.—Louisiana & A. Ry. Co. v. Export Drum Co., 359 F. 2d 311 (315-7)*.

Also, railroad is entitled to collect alleged undercharges on defendant's shipments from Knoxville and Nashville, Tenn., to Baton Rouge, which were moved in defendant's trucks therefrom to New Orleans for export. Applicable tariff provides that export rates named therein apply only over routes published in Southern Ports Routing Guide, and the routing guide named no direct routes between either of the origins and the destination; there being no published routes available to those shipments, lower export rates claimed by defendant could not possibly apply. Furthermore, tariff provided that export rates applied only on goods exported from destination point of the inbound shipments; considered shipments were not exported from their rail destination point, Baton Rouge, but were trucked to New Orleans and exported therefrom by defendant's vendee; under the circumstances, no export rates can apply.—Id., 228 F. Supp. 89 (93-5)*.

Under applicable tariffs naming "battery" rates on a shipment of different articles of volume equal to two or more carloads, the cars must be tendered for shipment in the same day (regardless of whether they move under bills of lading for each car or under one bill of lading for the entire quantity), and it follows that in order to give defendants the substantially lower battery rates on a shipment of several cars which were delivered to the railroad over a period of several days, plaintiff was compelled to detain the cars until the entire battery was delivered. There is no question that plaintiff may detain cars in such shipment until entire battery is received, but if it does so in order to give shipper benefit of the lower battery rate, it must, under the regulations, charge demurrage on the detained cars for such service. Judgment for carrier in amount of demurrage charges claimed.—Chicago, R.I. & P.R. Co. v. Furniture Forwarders of St. Louis, 272 F. Supp. 62 (64)*.

Even assuming that all chemicals contained in complainant's shipments of brake fluid mixtures were embraced in tariff item claimed applicable, mixing rule 10 of governing classification would not apply since it comes into operation only when there are a number of articles in a shipment or the same article is shipped in different containers; the various chemicals included in the physical mixtures are no longer separate articles on which charges can be computed under a mixed-carload rule. Moreover, both rule 35 of the classification and the considered tariff provide for mixtures in compartmentalized tank cars, whereas complainant's shipments moved in uncompartmented tank cars.—R.M. Hollingshead Corp. v. Alton & S.R., 319 I.C.C. 86 (89).

The prerequisite to application of a through transit rate is strict observance of the substantial conditions of governing transit tariff; subjecting the inbound commodity to a process not authorized by the transit tariff is not the required compliance. Governing tariff contained no provision for transit on pipe fabricated from sheets and wrapped at Portland, Oreg., and thus no fiction of transit to trans-

form the separate movements to and from Portland into a single through movement from origin to ultimate destination; therefore, through rates from points of origin to ultimate destinations, with transit at Portland, were not applicable on such shipments.—Petition for Southern Pacific Co. for Declaratory Order, 316 I.C.C. 661 (665).

222. Carriers' duty to collect tariff charges.—[Vols. 2, 6, 9, 11-19].—No act or omission of a carrier will estop or preclude it from enforcing payment of amount due under a lawful tariff. Hence, by its action in accepting a shipping order coupled with an unlawful diversion request, connecting carrier could not estop or preclude, by implied agreement or otherwise, right and duty of delivering carrier to collect freight charges on considered cattle shipments on basis of the applicable combination rate, rather than on lower through rate which would have applied had shippers' diversion request been in accord with tariff requirements.—Atchison, T. & S.F.Ry. Co. v. Bouziden, 307 F. 2d 230 (234-5).

See also Chicago & E.I.R. Co. v. Midwest Homes, Inc., §6(7), n. 263.

In railroad's actions to recover freight charges from the United States on shipments consigned to two naval bases, and which moved on uniform straight bills of lading carrying notations "to be prepaid" and "Total Prepaid," plaintiff's motion to strike the government's pleas of estoppel must be denied. In view of the Supreme Court's statement in 352 US 59, "Nor, unlike the case of a private shipper, do we think the defense of estoppel is unavailable to the Government," the pleas of estoppel cannot be stricken unless there is a distinction between the government as a shipper and as a consignee; no such distinction is apparent to the court.—Southern Pac. Co. v. United States, 243 F. Supp. 834 (838-9)*.

Shipping documents on considered shipments are the basis of established commercial transactions and are relied on by all parties as a correct statement of the realities of the situation. Plaintiff, initial carrier, accepted bill of lading stamped "to be prepaid" and issued the Freight Bill for Prepaid Charges, thus leading destination carrier to deliver to consignee the Check-out Slip marked "prepaid." Those events instituted by plaintiff led consignee to accept the goods and pay the consignor therefor on the mistaken assumption that freight charges had been prepaid by consignor in accordance with his contractual obligations; thus the United States, by reason of plaintiff's conduct, paid the freight charges to the consignor. Though carrier could not collect the freight charges from consignor because it was insolvent, under the circumstances, plaintiff's conduct warrants invocation of the doctrine of estoppel in its suit to collect from the government as consignee.—Id., 243 F. Supp. 839 (840-1)*.

It has long been established that if freight rates paid for a shipment are less than the tariff approved by the commission, the railroad is required to collect the undercharges under penalty of severe fines.—Louisiana & A. Ry. Co. v. Export Drum Co., 228 F. Supp. 89 (95)*.

A carrier cannot waive or be estopped from collecting full charges prescribed by published tariffs. Plaintiff is not permitted nor can it be required to waive collection of the charges due on considered shipment, nor is it privileged to do so. Defendants, by requesting and accepting advance payment of inbound freight and storage charges in issue, guaranteed payment of all lawful charges due on the shipment and are indebted to complainant in amount thereof; judgment for plaintiff for that amount plus interest and costs.—Union Pac. R. Co. v. Higgins, 223 F. Supp. 396 (401-2).

Agreement between plaintiff railroad and defendant shippers to be governed by decision of Maryland district court in plaintiff's suit involving same question as to whether the commission's service order (reducing free time for unloading boxcars at ports) applied to plaintiff's storage tariff granting grain shippers a longer free time for storage in cars, is not unenforceable on ground that, according to a diffent decision by the Court of Appeals in another circuit, it would permit carrier to waive charges it is legally obligated to collect under §6(7). The act would be violated only if the parties had agreed between themselves that carrier would not collect the extra charges it claims are due under the service order. Agreements like the one under review, which tend to expediate disposition of multi-

ple claims, are within policy of the Federal Rules of Civil Procedure and should be encouraged if otherwise valid and not contrary to any statutory provision.—Western Maryland Ry. Co. v. Continental Grain Co., 219 F. Supp. 126 (129-30, 131).

Although, in investigation proceeding where the primary issue is lawfulness of considered rates for future application, there is no need to determine applicability of the rates on shipments moving prior to effective date of amended schedules rendering that issue moot as to future shipments, carriers are required and expected to collect any outstanding undercharges that may be due on past shipments.—Vol. Rates on Processed Meat—Midwest to Ports, 322 I.C.C. 456 (475).

Carriers subject to regulation by the commission are required to charge the applicable rates published in their tariffs, and tariff users are entitled to rely on the plain provisions thereof. Where reasonable doubt exists as to applicability of two disputed bases, shipper is entitled to benefit of the lowest charge.—Zack v. Canadian National Rys., 315 I.C.C. 256 (258).

223. Liability for payment.—[Vols. 2, 6, 9, 13, 19].—See Union Pac. R. Co. v. Higgins, n. 222, above.

225. Refund of overcharges.—[Vols. 2, 6, 9, 17].—Although rates charged are found applicable and not unreasonable or otherwise unlawful, one shipment involved an overcharge, on which defendants are making refund; dismissal of the complaint will not preclude a refund of any overcharges which may be outstanding.—Lakeland Hide & Leather Co. v. Atlantic Coast Line R. Co., 316 I.C.C. 303 (306).

228. Rebates and concessions.—[Vols. 2, 6, 9, 11-19].—While ownership or maintenance of tracks inside a plant by a carrier, for use or benefit of the industry, violates §6(7), when such tracks are not in fact plant facilities, though used incidentally for temporary placement of industry cars to facilitate interchange of cars in line-haul service, no violation occurs.—A. O. Smith Corp. Terminal Allowance, 319 I.C.C. 99 (101)*.

Provision in tariff naming TOFC rates under which shippers move railroads' trailers to and from ramp sites, that, if prior arrangements are made with respondents, shippers or their agents may transport the trailers to destinations beyond tariff terminal areas, is a privilege within meaning of §6(7) since it holds out to provide something of value to shippers. As there is nothing to indicate the charge therefor or that it would not invite discrimination, since it would be discretionary with respondents to grant the privilege, and it is also a possible source of illegal rebating, it cannot be found lawful; cancellation required, without prejudice to any different conclusion in Ex Parte No. 230.—Iron and Steel Articles between Atlanta and St. Louis, 318 I.C.C. 80 (83).

231. Misquotation by carriers or tariff error.—[Vols. 2, 6, 9, 11-18].—Assurance to complainant by initial carrier's representative that the carriers would file special-docket applications to make refund on any shipments from considered origins to basis of lower per-car rates sought, previously requested per-car rates not having been published, was in legal effect similar to a misquotation of rates when not all participating carriers were agreeable to paying reparation; misquotation of rates is not an excuse for paying or charging either less or more than the rate duly filed in tariffs.—Farmers Potato Distr. Co., Inc. v. Atchison, T. & S.F Ry., 318 I.C.C. 415 (419)*.

That encircled reference governing rate claimed applicable under intermediate destination rule, indicating that it was published under authority of a fourth-section order, was erroneous because the order referred to did not grant fourth-section relief at the more-distant point on tariff from origin of complainant's shipments is irrelevant to application of the intermediate rule, which operates only according to its terms.—Allis-Chalmers Mfg. Co. v. Great Northern Ry. Co., 315 I.C.C. 152 (153, 154).

That a conflict in rates may have been the result of an error in tariff publication is irrelevant to shipper's right to application of the lower of the conflicting rates; determination of an issue of applicability of rates is not affected by the equities of the complaint.—Metropolitan Metals, Inc. v. Pennsylvania R. Co., 314 I.C.C. 737 (739).

238. Furnishing cars to conform with tariff minimum weights.—[Vols. 2, 6, 9, 12, 13, 16-

18].—First sentence of paragraph (a) of minimum weight rule in tariff naming rates on sand and gravel provides for a minimum based on 90 percent of marked capacity of car used, unless loaded to full visible capacity; second sentence provides a carriers' convenience rule; and third sentence limits size of cars for which carriers will accept orders to those of not less then 80,000 pounds capacity. That paragraph must be considered as a unit; and notwithstanding carrier's furnishing of a 100,000-pound car in lieu of 60,000-pound car ordered, the applicable minimum weight, unless loaded to full visible capacity with less weight, was 72,000 pounds, that being the minimum for the smallest car for which, under the tariff rule, orders would be accepted. —Infilco, Inc. v. Chicago, R. I. & P. R. Co., 315 I.C.C. 511 (513-4).

While no explanation is offered for carrier's acceptance of orders for 60,000-pound cars in direct contravention of the tariff provisions, its action or special agreements in that respect cannot take priority over the tariff provisions as published, which are binding on shippers and carriers alike.—Id., p. 515.

Actions before the Courts and Commission

260. Construction and interpretation of tariffs by commission.—[Vols. 2, 6, 9, 12, 16-19].—Ordinarily, tariff construction, like the interpretation of any other writing, is a typical judicial function, even though the divination be a difficult one. But though some of the possible constructions of the involved transit tariff are more plausible than others, and the court could pick a path through the tariffese if none but the immediate adversaries would be affected, the stakes are much higher. First, there is the desirability of uniformity which runs through carrier tariff law; second, and perhaps more important, the commission and the courts recognize that transit tariff privileges are subject to much abuse and unless carefully policed may be the instrument of forbidden discriminations and undue preferences between shippers, points, commodities, and the like. Lest such basic perils to a sound transportation policy be overlooked, and since the record in carriers' suit for undercharges is too sketchy in testimony as to both railroad practices and the provisions of the tariffs for the court to divine with safety what is really meant, the commission should first interpret and apply the considered tariff to the situation posed by the record.—Louisville & N.R. Co. v. Knox Homes Corp., 343 F. 2d 887 (892, 893-4)*.

Primary jurisdiction is most frequently resorted to where application of tariff provisions, as in the instant case, turns on factual evaluation of typically transportation matters; uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of judicial review are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies better equipped than courts by specialization, by insight gained though experience, and by more flexible procedure. The primary jurisdiction of the commission properly may and should be invoked for the construction and interpretation of the tariff at issue. The district court's judgment in that respect is therefore vacated with directions to hold the cause in abeyance while the parties seek the commission's views in any form of proceeding it deems appropriate.—Id., 894, 896.

If the policy reflected by commission decisions interpreting tariff provisions is reasonably sound, then uniformity of application so essential in a regulated transportation industry makes it important that courts give their imprimatur to the policies thereby reflected. Efforts by courts, no matter how plausible on traditional construction principles, to avoid the impact of the general policy by refined distinctions based on terminology will inevitably impinge on uniformity and thereby put the court in the transportation-regulating business.—Strickland Transp. Co. v. United States, 334 F. 2d 172 (178).

Though ordinarily construction of a tariff is a matter of law for the court, preliminary resort to the commission may sometimes be required, as when words requiring construction are of a technical nature, or where extrinsic evidence within its particular field of expertise is required to reach a satisfactory conclusion. This "primary jurisdiction" doctrine applies where a claim, though originally cog-

nizable in the courts, is of such nature that the question involved should be determined initially by an agency, resort to which is deemed necessary because the courts, while retaining the final authority, should avail themselves of the agency's aid in gathering the relevant facts and marshalling them into a meaningful pattern. It is only when the words in the tariff are used in their common, ordinary sense, with no particular connotation in the field of the agency, that the doctrine of primary jurisdiction is inapplicable and the construction becomes a matter of law for the courts without prior resort to the agency.—United States v. Great Northern Ry. Co., 337 F. 2d 243 (246)*.

"Transit privileges," being a generic term requiring specific definition, must have a particular connotation in the transportation field, and is therefore a matter for primary construction by the commission within its particular expertise and knowledge in that field; and where it has previously made such a determination its decision should be given some consideration by the courts. Where such an issue is raised, requiring knowledge of a specialized field beyond the normal scope of experience of a court, it is necessary to review to establish that the expertise of an agency has at least been considered by the court, and if it appears that it has done so a judgment rendered by it is a priori suspect. As the specific question raised in the instant case has been ruled on by the commission in a proceeding involving similar traffic and the same tariff, wherein appellee was a party, the primary jurisdiction has been satisfied and there was no need to refer the instant matter again to the commission.—Id., pp. 246-8.

Although the commission's prior determination of the issue has no res judicata effect in the instant action and is not binding on the court per se, it is manifestly entitled to the greatest deference and weight; and the rationale requiring such weight to be given that decision applies when the same question comes up in a subsequent matter rather than on direct review, since the rulings, interpretations, and opinions of the agency constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The determination now to be made is quite in line with the commission's prior pronouncement distinguishing "transit privileges" and "reconsignment," and the district court should have considered that decision in construing those terms as found in the tariff involved.—Id., p. 248.

Only issue the commission was called upon to determine was the meaning of "in bond" as used in tariff item naming rates on "alcohol * * * in bond." The commission's finding, based on its expert knowledge, that "in bond" has a settled meaning which does not apply on complainant's shipment, is a reasonable one and should not be set aside.—United States v. I.C.C., 309 F. 2d 645 (645, 646)*.

Railroads draft their own tariffs and, like any other written instruments, tariffs should be construed against the drafters and in favor of the shipping public. Interpretation of two alternating sections in tariff naming scale rates on ground limestone (lower rates in tariff Sec. 4 applying on limestone "having value only for building, paving, roadmaking or roofing purposes" and so certified on bill of lading) and construction of commodity description in Sec. 4 as not including complainants' shipments of limestone that moved to feed mills under bills of lading stating that limestone shipped "has value for" those purposes (but omitting word "only" because it can be used for other purposes) produces an absurd result and strips that tariff section of all meaning. Moreover, for more than three years the railroads accepted plaintiffs' certification as being in substantial compliance with Sec. 4, and charged the lower rates on shipments to feed mills. Thus, the commission's decision that lower Sec. 4 rates are inapplicable cannot stand; case is remanded for further commission proceedings in conformity with the court's opinion.—Calcium Carbonate Co. v. United States, 256 F. Supp. 99 (101-3)*.

262. Remedy of carrier on shipper's refusal to pay.—[Vols. 2, 9, 11, 15, 16].—In railroad's suit to collect alleged undercharges on shipments of empty steel drums, shipper is not entitled to lower rate named in tariff in question when, by its failure to maintain a record of filled drums received by rail freight and empty drums returned, it did not comply with all requirements in tariff provision governing

application of that rate; and carrier is entitled to judgment plus interest. Both the act and the commission's regulations are silent as to allowance of prejudgment interest, but that question is initially one of federal law. The parties should be in the same position at the end of the dispute regardless of whether shipper refuses to pay disputed amount and carrier is forced to sue, or shipper pays and then sues for overcharges, and propriety of including interest from date of payment of overcharges has long been upheld by the courts; accordingly, prejudgment interest is awarded from dates of all of defendant's shipments to date of judgment and, pursuant to 28 USC §1961, interest is also awarded on the judgment from date thereof.—Louisiana &A. Ry. Co. v. Export Drum Co., 359 F. 2d 311 (317)*.

263. Actions to enforce provisions.—[Vols. 2, 6, 11-15, 17-19].—It is carrier's duty to collect the full tariff rate irrespective of mistake, misquotation of rates, or collusion between carrier and a third party resulting in lower rates to shipper. Trial judge properly computed charges on defendant's shipments of mobile-home sections on basis of the minimum weight for a 46-foot long flat car when defendant's letter (signed by its president) addressed to plaintiff's agent ordered cars of up to a maximum length of 46 feet, and that letter constituted its only order for flat cars. While each shipment moved under a bill of lading stating that, plaintiff being unable to furnish the 41' 6" flat car ordered, larger flat car was "furnished at carrier's convenience," and defendant paid charges computed for a 41' 6" car in accordance with Classification Rule 34, the bills of lading were prepared after cars were in transit and did not constitute orders for any of the shipments. Also, measurement showed that the loads could not be placed on a 41' 6" car and Rule 34 provides that, in such circumstances, shipper pays the rate for the car furnished. Judgment for plaintiff affirmed. —Chicago, E.I. & R. Co. v. Midwest Homes, Inc., 371 F. 2d 300 (301-3).

Since applicable tariff rules and regulations approved by the commission and contained in the Uniform Freight Classification have the force and effect of law, their construction is a matter of law for the court; and since shipper had no hand in their preparation, if they are found to be susceptible of different interpretations the construction most favorable to shipper must be adopted.—Halstead v. Norfolk & W. Ry. Co., 236 F. Supp. 182 (189). [Not arising hereunder.]

Although, after Maryland district court had held (adversely to plaintiff's contention) that commission service order reducing free time on boxcars held for unloading at ports to 7 days was intended to deal only with demurrage tariffs and did not affect plaintiff's storage tariff granting grain shippers 20 days' free storage in cars, the Court of Appeals for a different circuit reached a contrary conclusion in a suit by another railroad, latter decision (though it will be persuasive in future litigation involving interpretation of the service order) is no more conclusive than the decision of the Maryland district court and in no way impairs that court's holding, which plaintiff and instant defendants agreed would govern the outcome of their dispute. That agreement, freely entered into between the parties, cannot now be ignored because of such conflicting determination, particularly since plaintiff did not appeal the district court decision and thereby lost its opportunity to obtain a reversal or, failing that, to create a conflict among the circuits which would afford basis for certiorari by the Supreme Court.—Western Maryland Ry. Co. v. Continental Grain Co., 219 F. Supp. 126 (128, 130).

Plaintiff's failure to appeal the district court's decision also undermines its contention that it cannot abide by the agreement because the Interstate Commerce Act requires it to litigate all its rate claims against shippers; it cannot consistently brush aside its failure to litigate that decision to appellate determination while insisting that it is under an absolute duty to prosecute its rate claims to effect. Further, plaintiff cites no statutory or case law obligating it to litigate all rate claims; and if it was not required by the act to take an appeal in the test case (which apparently it was not), it was not required to shop for a circuit which would disagree with the decision in the test case. In its suit in New York district court to collect charges for storage and detention beginning on the eighth day after arrival, plaintiff has not sustained its burden of showing why the considered agree-

ment should not be enforced; defendants' motion for summary judgment granted.—Id., pp. 130, 131.

Words and Phrases

328. "In bond."—[Vol. 18].—The term "in bond" as used in considered tariff item covers shipments which are under bond to the Government as security for payment of the excise tax. Considered shipments having been taken out of storage and no longer under bond to the Government at time of their tender for transportation, were not "in bond" as that term is used in the tariff.—United States v. I.C.C., 309 F. 2d 645 (645-6)*.

Section 6. (8)-(10). Preference to shipments for United States; Schedule lacking notice of effective date; Penalty.—[Unchanged. See vol. 9, p. 7521.]

Amendments, see footnotes, vol. 2, pp. 1530-1532; historical notes, pp. 1530, 1531; vol. 17. p. 13389.

Historical Note

Rates and fares of railroads within the Alaska Railroad Act, jurisdiction of the commission, see Historical Note concerning Executive Order 11107 following §6(3).

Notes of Decisions

§6(8): Volume 17—p. 13389; Volume 18—p. 14148; §6(9): Volume 2—p. 1531; Volume 19—p. 15307; §6(10): Volume 2—p. 1531.

Regulations of the Commission

32 FR 10794, July 22, 1967, Part 107a: Administrative Collection of Enforcement Claims, new Part 107a, adopting regulations published in 4 CFR Parts 101 through 105, added, effective Aug. 1, 1967.

Section 6. (11) Jurisdiction of commission over transportation by rail and water.—[Unchanged. See vol. 11, p. 9238.]

Amendments, see footnotes, vol. 2, p. 1535, vol. 11, p. 9238; historical note, vol. 2, p. 1536.

Notes of Decisions

Volume 2—p. 1536; Volume 6—p. 5279; Volume 9—p. 7524; Volume 11—p. 9239; Volume 12—p. 10289; Volume 13—p. 10997; Volume 15—p. 12076; Volume 17—p. 13389; Volume 18—p. 14148; Volume 19—p. 15307.

30. Establishment of proportional rates by rail.—[Vols. 2, 6, 12, 13, 15, 17-19].—Although §6(11)(b) does not state the circumstances under which authority therein granted to prescribe proportional rail rates to and from the ports in connection with coastwise water movements may be exercised, it is apparent that such action must be based on a record in an appropriate proceeding which provides evidence justifying exercise of that power.—Agricultural Insecticides—Heyden, N.J., to Houston, Tex., 319 I.C.C. 493 (496)*.

Although Seatrain Lines urges that the commission, in connection with approval of reduced rail rate on candy from New York City area and intermediate Pennsylvania points to Texas points, order respondents to establish proportional rates on same level from those origins to Edgewater, N.J., and from Texas City to the interior destinations, the existing rates to and from the ports, which are not under investigation, are not unreasonable merely because they are higher percentages of first class than the reduced all-rail rate, and cost evidence does not indicate that they exceed a maximum reasonable level. As the reduced rate is amply compensatory and not competitively destructive or discriminatory, there is no justification for prescription of the proportionals sought.—Candy and Confectionery from N.J., N.Y., & Pa. to Tex., 321 I.C.C. 154 (161).[But see dissent.]

Section 6. (12) Jurisdiction of commission over carriers contracting with water carriers operating to foreign country.—[Unchanged. See vol. 11, p. 9239.]

Amendment, see footnote, vol. 11, p. 9239.

Section 7. Combinations to prevent continuous carriage of freight prohibited.—[Unchanged. See vol. 9, p. 7526.]

Historical note, see vol. 16, p. 12715.

Notes of Decisions

Volume 2—p. 1542; Volume 6—p. 5280 ; Volume 9—p. 7526; Volume 16—p. 12715.

Section 8. Liability in damages to persons injured by violation of law.—[Unchanged. See vol. 9, p. 7527.]

Notes of Decisions

Volume 2—p. 1547 Volume 7—p. 5281; Volume 9—p. 7527; Volume 11—p. 9240; Volume 12—p. 10289; Volume 13—p. 10998; Volume 14—p. 11501; Volume 15—p. 12077; Volume 16—p. 12715; Volume 17—p. 13390; Volume 18—p. 14149; Volume 19—p. 15308.

In General

2. Construction.—[Vols. 2, 7, 9].—Since §8 relates to rail and water carriers, not to common carriers by motor vehicle, it does not provide appellant a remedy for its claim that defendant motor carrier and its rate bureau breached their "contract" with the commission to be bound by decision in consolidated investigations into proposed rate increases, by charging rates criticized but not yet cancelled by the commission.—Lynchburg Traffic Bureau v. Smith's Transfer Corp. of Staunton, Va., 339 F. 2d 478 (480-1)*.

The commission's power with regard to reparation is discretionary, and it may in certain instances deny reparation even though a rate is unreasonable when there is good and sufficient reason for doing so. However, since carriers were notified in 300 ICC 373 that, except in extraordinary circumstances, a 5-year period after effective date of the docket No. 28300 class rates was the maximum reasonable for correcting abnormalities in the rate structure, and since record contains no convincing evidence of any such extraordinary circumstances, the numerous and complex problems faced by the railroads in bringing the rate structure into alignment with new uniform class rates cannot be the basis for a waiver of reparation after that 5-year period has expired.—William Volker & Co. of Texas v. Atchison, T. & S.F. Ry., 318 I.C.C. 249 (271).

3. Applicability to transportation in United States.—[Vols. 2, 7, 9, 12, 13, 15-19].—When defendant United States railroads and their connecting Canadian railroads had entered into a joint through international rate on potash from New Mexico origins to Canadian destinations, the commission had jurisdiction to determine reasonableness thereof in Canadian shipper's reparation proceeding assailing the rate as unreasonable on its shipments, and to order the domestic carriers to pay reparations in the entire amount by which the joint through rate charged is unreasonable. Lower court's holding that, since the commission had no jurisdiction to determine reasonableness of rates for transportation taking place in Canada, it had no power to order reparations with respect to Canadian portion of considered transportation, reversed.—Canada Packers, Ltd. v. Atchison, T. & S.F. Ry. Co., 385 U.S. 182 (183-4)*.

4. Retroactive findings (Arizona Grocery Doctrine).—[Vols. 7, 9, 11-19].—General revenue increases authorized in freight rates to offset railroad operating expenses are not prescribed rates within the Arizona Grocery case principle, as reports in the various ex parte proceedings expressly found. Reparation may

be awarded in amount by which assailed rate on previously prescribed basis plus general increases exceeds rate sought which is not lower than the basis prescribed.—American Colloid Co. v. Illinois Central R. Co., 321 I.C.C. 375 (377).

General increases authorized in line-haul rates on bituminous and lignite coal and in charges for transfer or dumping of coal and coke at lake and river ports are not to be considered prescribed within meaning of Arizona Grocery case, 284 US 370.—Increased Rates on Coal and Petroleum Coke, 316 I.C.C. 159 (178).

Although complainant has made a prima facie showing of unreasonableness of rate charged on salt from Silsbee, Utah, to Olympia, Wash., compared with reduced rate subsequently established, under Arizona Grocery case doctrine (284 US 370) the commission may not award reparation to a lower basis than that previously prescribed; however, increases authorized in general revenue proceedings are not "prescribed" within meaning of that decision; reparation awarded in amount by which assailed rate exceeded base rate prescribed as reasonable maximum between those points in 197 ICC 115.—Van Waters & Rodgers, Inc. v. Western Pac. R. Co., 315 I.C.C. 743 (745, 746).

Nature of Liability Imposed

13. Relation to rates for the future.—[Vols. 2, 7, 9, 11-19].—Awarding reparation for the past and fixing rates for the future involve determination of essentially different matters: one is in its nature private and the other public; one is made by the commission in its quasi-judicial capacity to measure past injuries sustained by a private shipper, and the other is made, in its quasilegislative capacity, to prevent future injury to the public.—William N. Feinstein & Co. v. United States, 209 F. Supp. 613 (620)*.

The commission's finding in 298 ICC 637 that unloading charges on shipments of vegetables delivered at carrier's Manhatten pier station would be unreasonable for the future did not preclude its finding in 313 ICC 783 that previous collection of such charges for unloading plaintiff's shipments of onions was not unreasonable. Such finding of future unlawfulness did not logically compel a subsequent finding of unlawfulness for the past; neither the commission in 298 ICC 637, nor the Supreme Court in 347 US 645 in considering the same charges, found that they were unlawful when assessed; thus there was extant no prior finding which would bind the commission in 313 ICC 783 to find that the unloading charge was unlawful when paid.—Id., p. 620.

Though basic and well-founded when applied to proper factual situations, the principles that (1) a reduction in rate or prescription of a reduced rate for the future does not establish unreasonableness of the previous higher rate, and (2) awarding of reparation for the past and fixing of rates for the future involve essentially different questions, are irrelevant in instant proceeding where damages are sought in amount of the difference between increased switching charge which became effective upon expiration of the suspension period and the lower switching charge subsequently approved.—Flores v. Texas & N.O.R. Co., 316 I.C.C. 440 (441).

To Whom Right of Action Accrues

17. Person or persons injured.—[Vols. 2, 7, 9, 19].—Pullman conductors are persons who will be injured by failure of carriers to observe provisions of Part I of the act if they lose their jobs as result of the Pennsylvania and the Pullman Co. instituting proposed new operation, in which the Pennsylvania's train conductors would perform all functions now performed by Pullman conductors in sleeping cars operated in service local to the Pennsylvania, under an agreement which purports to amend existing pooling agreement without the procedure required by §5(1). Therefore, Pullman conductors thus injured may recover damages from those carriers as provided in §§8 and 9.—Brogan v. Pennsylvania R. Co., 211 F. Supp. 881 (884, 886).

40. Person paying charges.—[Vols. 2, 7, 9, 11, 12, 17, 18].—In absence of adverse claimants, reparation may properly be awarded to the consignee who paid the freight charges.—William Volker & Co. of Texas v. Atchison, T. & S.F. Ry., 318 I.C.C. 249 (257).

43. Persons bearing charges.—[Vols. 2, 7, 9, 13, 16-19].—Though defendants allege that freight charges on involved shipments were not paid or borne by either complainant A, which produces the commodity, or complainant B, which markets it, evidence is persuasive that under procedure for settlement of accounts between B as broker and its consignees, on one hand, and B as consignee of A, on the other, B's consignees paid the freight charges in the first instance upon delivery of shipments and transmitted the freight bills to B, which deducted amounts thereon from prices shown on its invoices to consignees; and that A, in turn, upon surrender of the paid freight bills by B, deducted such charges by crediting them against invoice prices paid it by B. Thus, although the freight charges were initially paid by consignees, they were ultimately borne by A.—Plaswood Corp. v. Alton & S. R., 321 I.C.C. 434 (445).

Grounds for Recovery, Generally

81. Violations of the act.—[Vols. 2, 7, 9, 11, 15].—When a shipper relies on carriers' advice as to how its commodity should be described in shipping papers, shipper may not be deprived of his right to recover overcharges if the advice furnished is erroneous and, in reliance thereon, an incorrect commodity description appears on the shipping documents. In other words, use of an erroneous description, even though agreed on by the shipper and carriers, does not deprive shipper of the right to recover overcharges if a different description providing a lower rate was, in fact, applicable.—Fibre Bond Corp. v. Canadian National Rys., 318 I.C.C. 549 (553).

83. ——Acts not a violation; agreement to reduce rates.—[Vols. 2, 7, 9, 12, 14, 15, 17, 19].—Although import rates on crude rubber from North Atlantic ports to Pauline, Kans., had originally been reduced to parity with Topeka, in same rate base area, at the Government's request, defendants failed to reduce the rates to Pauline when they reduced rates to Topeka and other midwestern points; and despite a letter from delivering carrier to effect that rates to Pauline should not exceed those currently in effect to Topeka, parity was not restored until nearly 14 months after th Government requested that the Topeka basis be applied retroactively to Pauline; defendants' explanation of the delay as due to their consideration of retroactive application of the basis sought, together with difficulties concerning port differentials, is not satisfactory; reparation awarded.—United States v. Atchison, T. & S. F. Ry. Co., 315 I.C.C. 259 (261-2, 263).

85.——Delay.—[Vols. 2, 9, 12-14, 16-18].—Recovery of damages for delay in shipment must be limited to compensation for loss. Although shipment of plums was not transported and delivered to plaintiff with "reasonable dispatch" within meaning of that term in uniform bill of lading, and the 2-day period of delay was unreasonable and unexcused, plaintiff is not entitled to damages when there was no physical damage to or deterioration of the plums, and they were sold at retail at the identical price for which they would have been sold had they been delivered 2 days earlier. Plaintiff has not shown that it suffered any compensable loss; cause dismissed.—Great Atlantic & Pacific Tea Co. v. Atchison, T. S.F. Ry. Co., 224 F. Supp. 903 (903, 905, 907)*.

89.——Taxes.—[Vols. 2, 14-16, 18, 19].—The commission is without authority to order refund of transportation taxes.—William Volker & Co. v. Atchison, T. & S.F. Ry., 318 I.C.C. 249 (250); Budlong Pickle Co. v. Ann Arbor R. Co., 315 I.C.C. 333 (334).

94. Willingness of carrier to make reparation.—[Vols. 2, 6, 9, 16, 18, 19].—Though no special-docket application was actually filed to make refund on shipments of fish oil residium which moved from Atlantic coast points to Muscatine, Iowa, and Mendota, Ill., during period between establishment of reduced basis in official territory generally and the establishment of that basis to Muscatine and Mendota, the facts that originating carriers had indicated a willingness to do so, that complainant actively supported the reductions, and that western carriers serving those destinations introduced no evidence in the complaint proceeding, are entitled to consideration along with other evidence of unreasonableness. Reparation awarded.—Kent Feeds,

Inc. v. Pennsylvania R. Co., 319 I.C.C. 427 (429)*.

Assurance of a railroad official that shipments would be handled for reparation is not controlling as to reasonableness of rates charged.—Farmers Potato Distr. Co., Inc. v. Atchison, T. & S.F. Ry., 315 I.C.C. 105 (109)*.

While defendant's admission in its statement registered on special docket that assailed rate was published in error is not controlling, it is a relevant factor that has probative value to support complaint seeking reparation.—Arkansas Plant Food Co. v. St. Louis S.W. Ry. Co., 315 I.C.C. 680 (681, 682).

95. Failure to obey orders of commission.—[Vols. 2, 7, 9, 11, 12, 14, 16, 17].—Carrier's violation of an order prescribing a rate relation to remove undue prejudice does not create a presumption that shippers have been damaged thereby; without a showing of actual damage caused by violation of the order, no reparation can be awarded.—Phillips Petroleum Co. v. Panhandle & S.F. Ry. Co., 315 I.C.C. 378 (380).

Although, during period between competitive reduction of rates on naphtha from Oklahoma group 3 to Illinois points and subsequent corresponding reduction of rates to considered Indiana points, assailed rates to Indiana exceeded differentials prescribed over Effingham, Ill., in 243 ICC 589, they were not unreasonably high merely because defendants were not in compliance with order in that proceeding. The differential rates to Indiana were not prescribed as reasonable maxima, but to remove undue prejudice, and complainants do not show specific damage as result of temporary widening of the differential. Reparation denied.—Anderson-Prichard Oil Corp. v. Alton & S.R., 315 I.C.C. 59 (62).

Measure of Damages, Generally

109. Interest.—[Vols. 2, 7, 9, 11, 13-19].—Both the act and the commission's regulations are silent on question of allowance of prejudgment interest; however, being part of the determination of proper remedy for enforcement of tariffs established pursuant to the act, the question is initially one of federal law. As the common law recognizes, only way a wronged party can be made whole is to award him interest from time he should have received money due him; disputing parties should be in same position at end of the dispute regardless of whether shipper does not pay amount claimed and carrier is forced to sue, or shipper pays and then sues for overcharges, and the propriety of commission practice of including interest from date of payment in a reparation award on overcharges has long been upheld by the courts. Whether or not the commission in its discretion could refuse to award such interest, interest from time the money is due (date of shipment) is a mandatory element of the damages in actions initiated in federal district courts for undercharges on freight shipments.—Louisiana & A. Ry. Co. v. Export Drum Co., 359 F. 2d 311 (317)*.

Unreasonable Rates and Charges

121. Basis of award, in general.—[Vols. 2, 7, 9, 16-19].—Before an award of reparation may be made under §1, it must appear that the assailed rates exceeded a maximum reasonable level. Depressed rates are not an acceptable standard of maximum reasonableness, nor does subsequent reduction of assailed rates indicate that they were unjust and unreasonable. Since assailed rates were the going rates on considered traffic, and the lower compared rates were reduced to retain traffic threatened by motor competition and to establish a higher minimum weight, reparation is denied.—Grand Rapids Gypsum Co. v. Ann Arbor R. Co., 321 I.C.C. 293 (295-6); also, prior findings awarding reparation on shipments charged combination rates, because clearance difficulties required movement over nontariff routes, are not controlling in similar circumstances when there is no showing that the rate sought for reparation purposes was ever prescribed as reasonable maximum on considered commodity in the territory involved.—Westinghouse Electric Corp. v. Pennsylvania R. Co., 318 I.C.C. 1(4).

Defendants concede that charges collected on shipments of steel plates at combination rate applicable over route of movement, which because of clearance difficulties was used instead of lower-rated route specified by

shipper, were unreasonable. Charges suggested by them as reasonable maximum, based on mileage scale prescribed on iron and steel articles in 155 ICC 517, including authorized increases through Ex Parte No. 212, would be just and reasonable and they will be expected to make reparation to complainant on that basis.—Electric Boat Division v. New York, N.H. & H.R. Co., 319 I.C.C. 83 (85)*.

Defendants have failed to rebut presumption of unreasonableness in charging of commodity rates on considered shipments which exceeded exceptions rates contemporaneously applicable on like traffic in same general territory and to more distant points over same route. Reparation awarded to basis of the exceptions rates, with interest.—Westinghouse Electric Corp. v. New York Central R. Co., 318 I.C.C. 277 (280).

Assailed rates on Government shipments of crude rubber from port of New York to Pauline, Kans., were higher during claimed reparation period than rates on same commodity from North Atlantic ports, including New York, to points in official and western territories which then had the lower Topeka basis sought, and at same time rates to Topeka and Pauline were on parity from certain gulf ports and western origins; Pauline and Topeka are in same rate base area and transportation conditions are substantially the same to both points; moreover, delay of nearly 14 months in reestablishing rate parity of Pauline with Topeka, as requested by the Government, is not satisfactorily explained; reparation awarded to basis of the rates to Topeka.—United States v. Atchison, T. & S.F. Ry. Co., 315 I.C.C. 259 (263).

122. Voluntary reductions.—[Vols. 2, 7, 9, 12, 14, 17-19].—See also §1(5), n. 319.

Where reduced rates which have become effective upon expiration of the statutory suspension period are ultimately found unlawful, §8 appears to provide that carriers would be liable in damages to persons injured thereby, since all provisions of the act are required to be administered and enforced with a view to carrying out the national transportation policy, and an unreasonably low rate found to violate that policy would give rise to an action for damages.—Arrow Transp. Co. v. Southern Ry. Co., 308 F. 2d 181 (185-6)*.

Where no significant difference is shown in transportation or competitive conditions affecting movement of cement over different routes from same origin to same destination as those of complainant's shipments, no reason appears why reduced rate established over other routes with different delivering carriers was not made applicable over route of movement. Assailed rate found unreasonable and reparation awarded.—Penn-Dixie Cement Corp. v. Chesapeake & O. Ry. Co., 319 I.C.C. 289 (290)*.

While subsequent voluntary reduction of assailed rate does not establish unreasonableness thereof, it is a relevant factor and has probative value to support complaint seeking reparation.—Arkansas Plant Food Co. v. St. Louis S.W. Ry. Co., 315 I.C.C. 680 (682).

Though neither subsequent reduction of a rate, nor comparative distances, nor destination grouping on other traffic would be alone controlling, all are relevant factors having probative value to support complaint seeking reparation. Rate sought on salt from Silsbee, Utah, to Olympia, Wash., is the same as that which applied on shipments to more-distant points of Aberdeen, Seattle, and Tacoma, with the latter two of which Olympia is grouped on commodities generally, and complainant's competitor at Newark, Calif., had a lower rate which was the same to all those destinations; moreover, reduced rate established to the other points and subsequently made applicable to Olympia was established in anticipation of a continuing movement expected to recur each year. Considering all those circumstances, complainant has made a prima facie showing that rate charged to Olympia was unjust and unreasonable. Reparation awarded.—Van Waters & Rodgers, Inc. v. Western Pac. R. Co., 315 I.C.C. 743 (746).

125. Reduction by order of commission.—[Vols. 2, 7, 11].—The commission's approval of a lower switching charge as a reasonable maximum, after proposed higher charge had become effective at the end of the suspension period, was tantamount to finding that any charge assessed after expiration of the suspension period which exceeded that subsequently approved was unlawful.—Flores v. Texas & N.O.R. Co., 316 I.C.C. 440 (442).

127. General readjustment; exceptions and limitations.—[Vols. 2, 7, 9, 11, 19].—All involved shipments were delivered after the cut-off date of the 5-year period fixed by 303 ICC 373 as a reasonable time for carriers to correct abnormalities resulting from general class-rate revision and establishment of uniform classification basis. Assailed exceptions rates and charges paid exceeded the uniform classification basis, and no extraordinary circumstances are shown to warrant denial of reparation; awarded to basis of corresponding uniform class rates on same commodities between same points, plus authorized general increases.—United States v. Missouri Pac. R. Co., 322 I.C.C. 418 (421).

Although prior to 300 ICC 373 the commission, in recognition of the many complex problems involved in bringing the rate structure into alinement with the prescribed uniform class-rate basis, denied reparation in case of commodity or exceptions rates exceeding the new class rates, notwithstanding their unreasonableness, that decision notified carriers that a period of 5 years from effective date of the uniform class rates would be a maximum reasonable time for completion of such adjustments. The 5-year period was suggested by the railroads themselves, and the difficulties cited by defendants, which were the very reason for the commission's past denials, cannot be the basis for waiver of reparation after that period has expired. Reparation awarded, with interest, on shipments charged rates higher than the uniform class rates.—William Volker & Co. of Texas v. Atchison, T. & S.F. Ry., 318 I.C.C. 249 (271).

132. Proof and measure of damages.—[Vols. 2, 7, 12, 13, 17-19].—Burden of proving unreasonableness of rates which are in effect is on complainant; and where reparation is sought the total rates must be shown to exceed reasonable maximum levels. Complainant's evidence respecting unreasonableness of assailed rates on iron or steel waster sheets is directed solely to reasonableness of 2-percent increase made in the basic rates, which was not specifically authorized in Ex Parte No. 212, and fails to indicate that the total rates exceeded reasonable maxima; no award of reparation may be made on ground of unreasonableness.—Joliet Wrought Washer Co. v. Chicago, R.I. & P.R. Co., 315 I.C.C. 477 (480, 481).

Though neither fact that lower rate sought applied in reverse direction during movement of considered shipments, nor defendant's admission that rate charged was published in error, and its subsequent reduction thereof to basis sought, nor complainant's showing that, minimum weights and actual loadings considered, rate sought would yield higher car-mile earnings than that assailed, would alone be controlling, all are relevant factors and have probative value to support complaint; complainant has made a prima facie showing of unreasonableness; reparation awarded to basis sought.—Arkansas Plant Food Co. v. St. Louis S. W. Ry. Co., 315 I.C.C. 680 (681-2).

133. Effect of suspension order, or postponement.—[Vols. 9, 15, 17].—Although no order was entered requiring carrier to keep records of amounts received after increased switching charge became effective, as provided by §15(7), where the ultimate determination of maximum reasonableness is made after termination of the suspension period the findings may be applied retroactively to effective date of the charge, and in a subsequent complaint proceeding claiming reparation based on such findings, additional evidence of unlawfulness need not be submitted. Contention that approval of the lower charge was solely a prescription for the future ignores fact that it was tantamount to a finding that any higher charge assessed after expiration of suspension was unlawful. Reparation awarded to basis of the lower charge approved, with interest.—Flores v. Texas & N.O.R. Co., 316 I.C.C. 440 (442).

134. Interim percentage increases.—[Vols. 16-19].—Rates on crude vermiculite which included full percentage interim increases authorized in first and second reports in Ex Parte No. 166 were not unreasonable merely because those reports prescribed maximum holddowns on limestone rock, furnace slag, and perlite rock; shipments of furnace slag and limestone rock ordinarily move only relatively short distances and therefore are generally charged same percentage increases as complainants' shipments, thus were not treated differently; though perlite rock moves substantial distances, during the reparation peri-

od it was a relatively minor competitor of crude vermiculite; and there is no showing of similarity of transportation characteristics warranting finding rates on perlite rock to be a reasonable maximum level for complainants' shipments.—Zonolite Co. v. Great Northern Ry. Co., 315 I.C.C. 303 (305, 307)*.

Moreover, where reparation is sought, total charges resulting from the basic rates plus the increases must be shown to exceed reasonable maximum levels; basic rates on crude vermiculite were not prescribed by the commission, but were reduced rates established at shipper requests; and complainants' comparison of revenues from the assailed rates with their determination of out-of-pocket costs of the transportation service is not controlling in passing on maximum reasonableness thereof. Reparation denied.—Id., pp. 306, 307.

Unreasonable Classifications, Regulations, and Practices

140. In general.—[Vol. 2].—Although defendants attempt to justify their failure to establish reduced exceptions basis on fish oil residuum to the border point of Muscatine, Iowa, and the northern Illinois point of Mendota (both served by western railroads) at the same time as that basis was established in official territory generally, on ground that such a practice is not uncommon, there is no apparent difference in transportation conditions justifying such failure. In the circumstances, the prior and subsequent similarity of rate treatment of those points and other official territory destinations constitutes a prima facie showing of unreasonableness of a practice causing unreasonable rates. Reparation awarded to basis of the reduced rates established subsequent to movement of considered shipments.—Kent Feeds, Inc. v. Pennsylvania R. Co., 319 I.C.C. 427 (429-30)*.

142. Weights and weighing.—[Vols. 2, 7, 9, 11-19].—See U.S. Department of Defense v. Alton & S.R., §1(6), n. 236.

149. Routing and misrouting.—[Vols. 2, 7, 9, 17, 18].—See also Blandin Paper Co. v. Great Northern Ry. Co., §16(2), n. 2.

Shipments were misrouted and shipper is entitled to reparation when rate named in bill of lading, which was held out by an aggregate rule, was not established over route named in the billing until after shipments moved, but initial carrier's agent did not call shipper's attention to the conflict, and at time of movement the lower aggregate was available over a route embracing initial carrier, over which the higher joint rate applicable over the route of movement did not apply.—Producers Cooperative Oil Mill v. St. Louis-S.F. Ry. Co., 322 I.C.C. 267 (269, 271)*.

Unjust Discrimination

171. Cause of action based on statute.—[Vols. 2, 9, 19].—See Wright v. Chicago, B. & Q. R. Co., §3(1), n. 103.

Undue Preference and Prejudice

180. Proof and measure of damages.—[Vols. 2, 7, 9, 11-19].—To establish undue prejudice and disadvantage under §3, complainant must show that it was injured by reason of the rates charged, how the discrimination or disadvantage affected it to its damage, and the extent of the injury or amount of damage; and the proof of damage must be by such evidentiary facts as would be required to sustain a recovery in a court of law.—Lakeland Hide & Leather Co. v. Atlantic Coast Line R., 316 I.C.C. 303 (306); that complainant, in order to meet competition from a lower-rated origin, had to bear substantial out-of-pocket loss on each carload of salt shipped does not alone constitute the definiteness needed to prove damage under §3.—Van Waters & Rodgers, Inc. v. Western Pac. R. Co., 315 I.C.C. 743 (745-6).

To be entitled to award of reparation under §3, complainant must show with same degree of certainty as required in a court of law that he has been damaged by the unlawful rate situation, and the amount of damage thus suffered. Measure of damages is not necessarily the difference between one rate and another; complainant claims damages in amount of difference between assailed rate and that subsequently established in compliance with outstanding §3 order, but such difference is not shown to be equal to the actual monetary damage suffered; reparation denied.—Phillips Petroleum Co. v. Panhandle & S.F. Ry. Co.,

315 I.C.C. 378 (380); similarly, departure from a prescribed nonprejudicial differential relationship due to carriers' reduction, for competitive reasons, of rates to the preferred destinations does not alone create a presumption that complainant has been damaged.—Anderson-Prichard Oil Corp. v. Alton & S.R., 315 I.C.C. 59 (62).

Complainant's showing that the market price of sulphuric acid at Thompson, Utah, was set by its competitor at Avon, Calif., and that it was forced to absorb the difference between the rate applicable on its shipments from Fort Worth and the lower rate available to the competitor is not rebutted; such difference was unduly prejudicial to complainant; reparation awarded in amount of the difference in charges collected and those based on the lower rate charged the competitor.—Stauffer Chemical Co. v. Fort Worth & D. Ry. Co., 315 I.C.C. 63 (65)*.

Section 4 of Interstate Commerce Act

186. Long-and-short-haul; rates subject to rule 27.—[Vols. 2, 7].—With respect to shipments of potatoes to destinations covered by holdout rule in tariff publishing lower per-car rates from a more distant point, defendants voluntarily held themselves out to provide the rate basis set out in the holdout rule, which basis was used by the railroads and approved by the commission in granting fourth-section relief for the per-car rates; that basis may therefore be accepted as reasonable for reparation purposes for those shipments.—Farmers Potato Distr. Co., Inc. v. Atchison, T. & S.F. Ry., 315 I.C.C. 105 (109-10)*.

Since fourth-section order granting relief on potatoes from southern to official-territory points required official-territory defendants, to extent they were applicants in the fourth-section proceeding, to maintain from Portlock, Va., an intermediate point on direct routes from Euclid, Va., in official territory, rates constructed on same basis and in same manner as rates established by them from Euclid to same destinations, their failure to provide that basis for constructing rates from Portlock in holdout rules voluntarily established in compliance with intermediate-point condition of that order violated the terms thereof. Such failure to comply with the commission's orders should not be allowed to defeat the right to reparation of a shipper at a higher-rated intermediate point. Reparation awarded on direct-route shipments from Portlock to basis of rates constructed as described.—Id., 318 I.C.C. 415 (417-8)*.

Section 6 of Interstate Commerce Act

193. Overcharge.—[Vols. 2, 7, 9, 11, 13, 14, 17, 19].—See also Zack v. Canadian National Rys., §6(7), n. 141.

When a shipper relies on carriers for advice as to how its commodity should be described in shipping papers, he may not be deprived of his right to recover overcharges if advice furnished is erroneous and, in reliance thereon, an incorrect commodity description appears in the shipping documents. Carriers' Weighing and Inspection Bureau advised shipper that its batting, when used as padding for automobile door panels, should be described as "Insulating Material, NOIBN," and so described it in the weight agreement; accordingly, shipper so described considered shipments in its billing. In view of evidence as to nature and use of commodity shipped, which shows it to be padding material in batting form, tariff item naming lower rates on "Batting, *** or Padding" provides an accurate description thereof; and since charges were based on class ratings published on insulating materials, the shipments were overcharged. Reparation awarded with interest.—Fibre Bond Corp. v. Canadian National Rys., 318 I.C.C. 549 (551, 553, 554).

Commodity rate per gross ton on ferrophosphorus, minimum 56,000 pounds, was applicable on shipment weighing 68,200 pounds, rather than lower rate on 100,000-pound mimimum; collection of charges at class 22.5 rate per 100 pounds resulted in overcharges on that shipment; complainant is entitled to reparation.—H. A. Lott, Inc. v. Louisville & N.R. Co., 316 I.C.C. 409*.

In view of finding that shipments comprising parts of a rotary kiln for installation in consignee's paper mill were pulp or paper mill machinery parts within item in section 1 of tariff, it need not be determined whether that description was more specific than that of

machinery parts in section 2, under which shipments were billed and charged; under alternating provisions of the tariff for application of the lower of charges applying under the two sections, the lower charges under the section 1 item should have been applied; reparation awarded, with interest.—Traylor Engineering & Mfg. v. Lehigh Valley R. Co., 316 I.C.C. 31 (36-7).

Charges based on combination rates which did not become effective until after considered shipments moved were inapplicable; reparation awarded to basis of single-factor rate still in effect when shipments moved.—Hutchinson Iron & Metal, Inc., v. Balitmore & O.R. Co., 316 I.C.C. 667 (670).

194. Undercharge.—[Vols. 2, 7, 9, 12-17].—In actions initiated in federal district courts for undercharges on freight shipments, interest from the time the money is due (date of shipment) is a mandatory element of the damages.—Louisiana & A. Ry. Co. v. Export Drum Co., 359 F. 2d 311 (317)*.

201. Failure to observe commission's tariff rules.—[Vols. 2, 7, 17, 18].—Defendants' failure to publish a tariff provision in accordance with tariff circular rule 66 was prima facie unreasonable and resulting presumption of unreasonableness of charges collected on minimum weight for 53-foot car used is not rebutted. Rule 66 requirements as to notations on the bill of lading were generally followed, and if defendants had published a rule in conformity therewith applicable charges would have been those on basis of the 40-foot car ordered; reparation awarded with interest.—United States v. Atlantic Coast Line R. Co., 318 I.C.C. 869 (870, 872).

Complaints Seeking Reparation

217. Necessity of through charges being in issue——parties.—[Vols. 2, 7, 9, 11, 15-19].—For reparation purposes it must be shown that the total charges were unjust or unreasonable, not just a single factor or segment; thus, no award can be made on Government shipments of crude rubber which moved from the port of New York to Pauline, Kans., whence they were reshipped by rail to Topeka after storage in transit under a §22 arrangement, when the complaint assailed only the factor charged from New York to Pauline.—United States v. Atchison, T. & S.F. Ry. Co., 315 I.C.C. 259 (262).

But in respect of shipments which moved by rail from Pauline to Memphis or by truck to other destinations, as to which complainant's transit privilege was either unexercised or not available, the assailed rates from New York to Pauline constituted through rates and their reasonableness is properly in issue.—Id., p. 262-3.

Proof of Damage

221. Showing of proximate cause and financial damage prerequisite to award.—[Vols. 2, 7, 9, 11, 16, 17].—Even if defendant's acquisition of stock of Central of Georgia violated §5(4), it was not the proximate cause of plaintiff's alleged losses from "short sales" of stock of that carrier during a period beginning some 3-1/2 years, and ending about 16 months, prior to the time when defendant began acquiring Central's stock; plaintiff has failed to establish any ground for recovery of damages under §8.—Goldsmith v. St. Louis—S.F. Ry. Co., 201 F. Supp. 867 (870).

222.Burden of proof.—[Vols. 2, 7, 9, 11, 14, 17-19].—The commission's finding in 298 ICC 637 that unloading charges on shipments of vegetables delivered at carrier's Manhattan pier station would be unreasonable for the future did not preclude its finding in 313 ICC 783 that previous collection of such charges for unloading plaintiff's shipments of onions was not unreasonable. Burden of proof in each case rests on different parties: as the earlier case was a suspension proceeding under §15(7), burden was on proponent carriers to show that the unloading charges were just, reasonable, and otherwise lawful, while in the case under review the burden was on plaintiff (complainant therein) to show that the unloading charge was unlawful when assessed. Clearly, plaintiff could not sustain his burden of proof by showing that the carriers failed to meet theirs in the earlier case.—William N. Feinstein & Co. v. United States, 209 F. Supp. 613 (620)*.

In order to refute validity of team track delivery as an option to pier delivery, it was incumbent on plaintiff to show that team track

facilities for delivery of fresh vegetables were not available to meet the reasonable demands therefor. This burden plaintiff failed to meet; there is no evidence in the record that any shipper or consignee who requested team track delivery during the period involved found it unavailable, and it can only be inferred that there was room at the team tracks for all who wanted it.—Id., p. 623.

Recovery cannot be had under §8 unless it is shown that, as a result of defendant's acts, damages in some amount susceptible of expression in figures resulted; these damages must be proved by facts from which their existence is logically and legally inferable; they cannot be supplied by conjecture.—Goldsmith v. St. Louis-S.F. Ry. Co., 201 F. Supp. 867 (870).

Even though entire commission found in an earlier proceeding that lower rates sought by instant complainants were applicable under origin intermediate rule over routes not directionally out of line or unreasonably circuitous, complainants still have burden of identifying their shipments, establishing that shipments are within rule of the prior case, and proving that they paid and bore assailed charges. This evidence and proof cannot be supplied by reference to assertions in informal proceedings unless the parties agree that the informal dockets may be incorporated in the formal record; since defendants refused to agree to incorporation of any portion of the informal proceedings, they may not be considered.—Harden Farms of California v. Akron, C. & Y. R. C., 318 I.C.C. 186 (187-8).

224. Quantum and character of evidence.—[Vols. 2, 7, 9, 16-19].—Before considering the merits of claims for reparation of a part of charges paid on past shipments, manifestly it should appear initially, by at least a fairly representative showing, that the charges claimed to have been unlawful were in fact paid.—B.G. Anderson & Co. v. Atlantic Coast Line R. Co., 319 I.C.C. 224 (225).

Although affidavits of 11 individuals as to complainants' paying and bearing of charges at assailed rates were submitted under modified procedure, none of them appeared at subsequent hearing for cross-examination. In view of defendants' objections, statements of those witnesses may not be considered as evidence.—Harden Farms of California v. Akron, C. & Y.R. Co., 318 I.C.C. 186 (188).

225.——Personal knowledge of shipments.—[Vols. 2, 7, 9, 11, 12, 14-16].—Only complainants' counsel and two traffic consultants appeared at hearing on complaint seeking reparation on behalf of 10 complainants. Counsel's knowledge of the paying and bearing of assailed charges was based on perusal of complainants' records, which he obtained either by mail from the consultants or by going to complainants' places of business. The consultants' knowledge was obtained in the same manner and, though one states he gave advice on paying of charges and the other that he witnessed unloading of some shipments, neither testified as to personal knowledge that complainants paid and bore charges on any particular shipment. Affidavit from officer of each complainant to effect that affiant had personal knowlege of all of his company's shipments and that his company paid and bore charges thereon, offered by the consultants, could not be considered as evidence thereof, when the officers were not present for cross-examination. As general confusion prevails in identification of shipments, no purpose would be served in considering the merits; complaint dismissed.—B. G. Anderson & Co. v. Atlantic Coast Line R. Co., 319 I.C.C. 224 (225, 226).

Although affidavits of 11 individuals concerning various complainants' paying and bearing of assailed charges were submitted under modified procedure, at subsequent hearing none of those affiants appeared for cross-examination; instead, complainants presented four traffic bureau officials whose only knowledge of considered shipments was derived from their perusal of complainants' freight bills. Evidnce offered by witnesses having no knowledge of the facts has no probative value, and complainants have failed to meet their burden of proof, since their failure to submit a witness with personal knowledge of movement of their shipments and paying and bearing of charges thereon deprived defendants of opportunity by cross-examination to test the accuracy of the facts adduced or reliability of the real source

of the information.—Harden Farms of California v. Akron, C. & Y. R. Co., 318 I.C.C. 186 (188-9).

But deposition by sales and office manager of one complainant, including cross-examination by defendants, which was taken by agreement of the parties and made part of the record, in which he testified that he personally ordered routing of that complainant's shipments under assailed rates and knew that it paid or bore the charges, and that during same period he performed another complainant's traffic work, had personal knowledge of all its shipments, and knew that it also paid or bore the charges, establishes right of those complainants to reparation under prior decision in which issue of applicability of assailed rates was determined.—Id., pp. 188, 189.

230.——Rule 100 statements.—[Vols. 2, 7, 9, 12, 14, 15].—Where complaint alleging unreasonableness of charges collected or assessed was filed more than 2 years after shipments were delivered, and record does not show which, if any, met conditions of §16(3)(d) governing extension of the limitation period, entry of order awarding reparation or authorizing waiver of undercharges on all shipments not barred, or dismissing complaint because all shipments are barred, is withheld pending compliance with Rule 1.100 of Rules of Practice.—Foremost Food & Chemical Co. v. Alton & S. R., 318 I.C.C. 35 (38, 39).

Defenses

244. Laches.—[Vol. 2].—See Plaswood Corp. case, §16(3), n. 8.

Attorneys' Fees and Costs

251. Proceedings in court.—[Vols. 2, 7, 9, 16, 17].—Damages claimed by appellant consist, in large measure, of counsel fees and other expenses incurred in prior court and commission proceedings; the court knows of no precedent or authority for reimbursing an unsuccessful litigant for such expenditures.—Lynchburg Traffic Bureau v. Smith's Transfer Corp. of Staunton, Va., 339 F. 2d 478 (481)*

Section 9. Remedies of persons damaged; election; witnesses.—[Unchanged. See vol. 9, p. 7575.]

Amendments, see footnotes, vol. 2, p. 1650; historical note, p. 1650.

Notes of Decisions

Volume 2—p. 1651; Volume 7—p. 5368; Volume 9—p. 7575; Volume 11—p. 9246; Volume 12—p. 10294; Volume 13—p. 11001; Volume 14—p. 11505; Volume 15—p. 12082; Volume 16—p. 12724; Volume 17—p. 13402; Volume 18—p. 14158; Volume 19—p. 15319.

3. Construction.—[Vols. 2, 7].—Section 9 does not impair the right of shippers to obtain judicial review of adverse orders of the commission under 28 USC §1336 merely because the order is sought as a basis for reparations. [337 US 426.]—General Motors Corp. v. United States, 299 F. 2d 233 (234)*.

See also Brogan v. Pennsylvania R. Co., §8, n. 17.

Actionable Damage Entitling to Relief

22. Controversies not arising under the act.—[Vols. 2, 9, 12, 13, 19].—See Western Maryland Ry. Co. v. Continental Grain Co., §6(7), n. 263.

Election of Forum

31. Option of forum matter of right.—[Vols. 2, 7, 9, 12-15, 17, 19].—The fact that plaintiff elected to make complaint for reparation to the commission, instead of the court, did not preclude it from obtaining judicial review of the commission's adverse order. This is implicit in the holding in 337 US 426 that Congress never intended to vest final jurisdiction in the commission; it makes no difference that in instant case only the question of reparations was in issue before the commission.—General Motors Corp. v. United States, 299 F. 2d 233 (234)*.

Exclusive Jurisdiction of Commission and of Courts

37. General statement of rule.—[Vols. 2, 7, 12, 15, 16, 18, 19].—Although §9 gives the complainant the alternatives of seeking reparations by complaint to the commission or by bringing suit in a federal district court, the primary jurisdiction doctrine requires initial submission to the commission of questions that raise "issues of transportation policy which ought to be considered by the commission in the interests of a uniform and expert administration of the regulatory scheme laid down by [the] Act." See 352 US 59 and 234 US 138. Thus, a shipper who commences his §9 reparation proceeding in a district court will nevertheless be required to obtain the commission's decision on issues, such as reasonableness of rates, which call the primary jurisdiction into play; and the court ordering referral to the commission has exclusive jurisdiction of any civil action to enforce, enjoin, or set aside a commission order arising out of such referral.—I.C.C. v. Atlantic Coast Line R. Co., 383 U.S. 576 (579-80)*.

Since the doctrine of primary jurisdiction, being a question of proper allocation of business between the courts and administrative agencies, is not subject to waiver, the court must apply it if it is applicable. Therefore, the court must determine whether, under that doctrine, tariff items in dispute in railroad's suit to recover alleged undercharges must first be construed by the commission, although that issue had not been raised by either party at any stage in the proceedings.—Louisiana & A. Ry. Co. v. Export Drum Co., 359 F. 2d 311 (314)*.

41. Weight accorded determination by commission.—[Vols. 2, 7, 9].—See United States v. Great Northern Ry. Co., §6(7), n. 260.

44. Questions as to damages justiciable without determination by commission.—[Vols. 2, 7, 9, 11-17].—Railroad's court action to recover alleged undercharges, involving construction of "shipping point" and "a record" in the tariff, does not fall within primary jurisdiction of the commission; intial resort to the commission is required only when words in dispute are used in a technical sense, requiring extrinsic evidence to determine their meaning. Although the commission has neither construed the disputed tariff items nor indicated their purpose, and both parties believed expert testimony necessary, reasonableness of the rates is not in question; purpose of the tariff is clear, even to laymen; thus, the courts are as competent as the commission to interpret the disputed tariff.—Louisiana & A. Ry. Co. v. Export Drum Co., 359 F. 2d 311 (314-5)*.

Tariff construction and overcharges.—[Vols. 2-19].—See U.S. v. Great Northern Ry. Co., §6(7), n. 260.

Section 10. (1)-(4) Violations of regulations by carrier: false billings, classification, claim; inducing unjust discrimination; penalties.—[Unchanged. See vol. 9, 7582, 7583, 7586.]

Amendments, see footnotes, vol 2, pp. 1671, 1686, 1694, vol. 9, p. 7582; historical notes, vol. 2, pp. 1671, 1680, 1687, 1694, vol. 9, p. 7584.

Notes of Decisions

Volume 2—pp. 1672-1694: Volume 7—p. 5378: Volume 9—pp. 7582-7586; Volume 12—p. 10295; Volume 13—p. 11002; Volume 18—p. 14160.

§10(1). 2. Construction—[Vols. 2, 13].—Primary intent and purpose of the act is to insure uniform treatment of those who use this country's transportation facilities; employment of trivialities to differentiate one shipping point, where two such points in the same commercial area are contiguous, destroys uniform treatment and the intent of the

statute is frustrated.—Louisiana & A. Ry. Co. v. Export Drum Co., 228 F. Supp. 89 (92, 93)*.

§10(4). 6. Jurisdiction.—(Vol. 2].—Evidence offered to support contention of a conspiracy of railroads and other shippers to eliminate competition of complainant's product by improper classification thereof was inadmissible in complaint proceeding; damages provided in §10(4) follow conviction in Federal court of the misdemeanors therein set forth.—Copps v. Alabama G.S.R. Co., 319 I.C.C. 192 (196-7).

Section 11. Interstate Commerce Commission; appointment, term, and qualifications of commissioners.—[Unchanged. See vol. 11, p. 9247.]

Amendments, see footnotes, vol. 2, p. 1696, vol. 9, p. 7587, vol. 11, p. 9247; historical note, vol. 2, p. 1696.

Historical Notes

By Joint Resolution, Public Law 87-429, April 4, 1962, Congress authorized and requested the President to issue a proclamation designating April 5, 1962 as Interstate Commerce Commission Day; for the purpose of commemorating the seventy-fifth anniversary of the Interstate Commerce Commission.

Executive Order 11222, dated May 8, 1965, Prescribing Standards of Ethical Conduct for Government Officers and Employees; 30 FR 6469, May 11, 1965.

Notes of Decisions

Volume 2—p. 1697; Volume 7—p. 5379; Volume 12—p. 10296; Volume 13—p. 11003; Volume 14—p. 11506; Volume 15—p. 12084.

Section 12. Authority and duties of commission; witnesses; depositions—(1) Authority, duties and proceedings of commission, witnesses.—[Unchanged. See vol. 11, p. 9247.]

Amendments, see footnotes, vol. 2. p. 1701, vol. 11, pp. 9247-9248; historical notes, vol. 2, p. 1701, vol. 15, p. 12084, vol. 16, p. 12726.

Historical Note

The commission recommends, in view of prohibitions in 18 USC §1001, that the IC Act and various related acts be amended to eliminate the mandatory requirement that certain reports, applications, and complaints be filed with the commission under oath, and that such oath provisions be made discretionary with the commission.—Annual Report, 1962, p. 209; renewed, Annual Report, 1963, p. 21.

Notes of Decisions

Volume 2—p. 1702; Volume 7—p. 5380; Volume 9—p. 7588; Volume 11—p. 9249; Volume 12—p. 10296; Volume 13—p. 11003; Volume 14—p. 11506; Volume 15—p. 12085; Volume 16—p. 12727; Volume 17—p. 13305; Volume 18—p. 14160; Volume 19—p. 15320.

Functions of Commission

5. In general.—[Vols. 2, 7, 19].—In absence of express constitutional provision for executive agencies with quasi-legislative and/or quasi-judicial functions, their clear constitutionality rests on their capacity to function exclusively within limits of each of their several personalities. It is only where there is a pretense of one personality, while in fact there is a performance of another, that the action of a regulatory agency with judicial functions becomes artbitrary, capricious, and unconstitutional. Even where two or three heads of these multi-headed creatures of modern government perform at the same time, and even where that multi-performance is by one unit or by one individual, the performance of each head must be true to its character, and one may not act in guise of the other. This principle of "separation of functions," as it applies to administrative agen-

cies, finds statutory expression in §5 of Administrative Procedure Act.—Atchison, T. & S.F. Ry. Co. v. United States, 231 F. Supp. 422 (428)*.

6. Nature of functions.—[Vols. 2, 7, 9, 19].—It is a basic principle that executive, legislative, and judicial functions of an administrative agency should to a considerable extent be separated from each other. The act of defending a judicial determination in court is executive, not judicial, and when, to perfect that defense, an ex parte reconsideration of a judicial determination is made, such reconsideration is an executive act done in guise of the judicial, and is arbitrary and unfair. However, the commission's reopening of proceedings before it, while they are the subject of judicial review, without prior request of or notice to the court, does not appear to be sufficient reason of itself to justify the court's holding the commission's subsequent order void and of no effect.—Atchison, T. & S.F. Ry. Co. v. United States, 231 F. Supp. 422 (427, 428)*.

7.——Quasi-judicial functions.—[Vols. 2, 7, 9, 19].—The commission is a quasi-judicial administrative agency exercising judicial functions in its licensing and enforcement activities; and an appeal from, or reconsideration or review of, a decision by such a body is not essential to due process provided due process was accorded in the original determination.—Studna v. United States, 225 F. Supp. 973 (981)*.

It is a denial of due process of law, and is arbitrary and unfair, when a judicial branch of a regulatory agency, under review by the court, once made aware by the executive branch of that agency of a litigant position taken in seeking higher judicial review of its determination, may, without notice to the appellant and an opportunity to be heard, change and adjust the form of its judicial position to facilitate a victory by its executive branch for its original judicial determination. Such a situation might well demand of the court that it hold the report and order on reconsideration void and of no effect.—Atchison, T. & S.F. Ry. Co. v. United States, 231 F. Supp. 422 (428)*.

When the commission functions in a quasi-judicial capacity, unlike a court it is dealing with an area of specialized knowledge and activity in which it presumably has a special competence; and, also unlike a court, it is in every case obligated to weigh the public interest considerations, not merely those of the particular litigants. Consequently, it should not be limited by strict rules on the admissibility of evidence.—Von Der Ahe Van Lines, Inc.—Lease and Purchase—Bee-Line, 93 M.C.C. 498 (505)*.

9.——Legislative.—[Vols. 2, 7, 9].—Regulations of an agency of the United States must be issued within the powers conferred by Congress; if agency regulations go beyond what Congress has authorized, they are void.—Federal Maritime Commission v. Anglo-Canadian Shipping Co., 335 F. 2d 255 (258). [Not arising hereunder.]

Since it is elementary that power to prescribe rates for the future is a legislative function, it would seem equally clear that power to suspend or not suspend proposed rates involves determination of what the rates shall be during the suspension period and is itself a legislative function.—Arrow Transp. Co. v. Southern Ry. Co., 308 F. 2d 181 (184)*.

While, narrowly, the commission in passing upon fourth-section application was called on to determine whether applicants had made out a special case to justify long-and-short-haul discrimination, it was broadly engaged in performing its quasi-legislative function of rate-making, involving exercise of broad discretion.—Igert v. United States, 211 F. Supp. 42 (44)*.

Powers and Duties

16. Authority dependent on statute.—[Vols. 2, 7, 9, 15].—The commission, being a creature of statute, cannot exceed the specific authority delegated to it by Congress. Stated purpose of the Safety Appliance Acts and §25, as amended, is "to promote safety of employees and travelers on railroads"; therefore, since neither of those statutes nor §1(21) vest the commission with any safety jurisdiction over railroads with respect to rail-highway grade-crossings, jurisdiction to establish safety regulations with respect to such grade-crossing matters resides exclusively in the States. The commission's conclusion that it lacked jurisdiction over railroads with respect

to rail-highway grade-crossing matters, and its discontinuance of investigation proceeding, sustained.—American Trucking Associations, Inc. v. United States, 242 F. Supp. 597 (600-1)*.

Inquiry Into Business Management of Carriers

37. Use of information.—[Vols. 2, 7, 19].—When plaintiffs, against whom the [Federal Trade] commission had issued a complaint, showed that public disclosure of information contained in a document they produced pursuant to a subpena duces tecum would cause serious injury to their business, there was good cause for holding such information confidential. Business secrets should be kept from sight and knowledge of plaintiffs' competitors so far as it is practicable to do so in the discharge of the commission's responsibilities under the law.—Graber Mfg. Co. v. Dixon, 223 F. Supp. 1020 (1022-3).[Not arising hereunder.]

Power to Require Testimony

45. In general.—[Vols. 2, 7].—Shipper protestant's request for issuance of subpenas to require a designated officials of respondents to disclose amounts of divisions to be received by the participating carriers out of proposed joint rail-water rates, denied; the division of a joint rate is of no concern to shippers.—Rail-Water, Grain in Bulk, from Mo., Ill., & Ind. to Buffalo, 319 I.C.C. 123 (126-7)*.

Production of Books, Papers, Etc.

54. Power of commission.—[Vols. 2, 11].—The commission is one of three federal agencies which appear to have been vested with express statutory authority to authorize prehearing inter-party discovery involving the production of documents. In each case, the agency also has both general rulemaking power and subpena power; this indicates that Congress did not intend federal agencies to predicate discovery procedures upon statutes conferring general rulemaking or subpena power.—Federal Maritime Commission v. Angol-Canadian Shipping Co., 335 F. 2d 255 (261). [Not arising hereunder.]

57. Subpena.—[Vols. 2, 11, 12, 17-19].—There was no error in examiner's refusal to grant protestants' request for subpena duces tecum to require respondent to produce certain documents underlying cost data submitted. Respondent offered at hearing to produce as much data as would be reasonably material; the data were inspected by an independent accountant through agreement of the parties, and protestants made no subsequent request.—Towing Rates, Pittsburgh Towing Co., 321 I.C.C. 366 (367).

Regulations of the Commission

27 FR 7640, Aug. 2, 1962, Part 6: Fees for copying, certification, services, etc., paragraph (h) of §6.1 amended, effective on date of order.

28 FR 7397, July 19, 1963, Part 6: Fees for copying, certification, services, etc., paragraph (h) of §6.1 amended, effective on date of order.

28 FR 9435, Aug. 28, 1963, Part 9a: Administrative Interpretations, §9a. 1 Authorizattion for adjustment of claims for damages resulting from misrouting. New part and section added, effective on date of order.

29 FR 8418, July 3, 1964, Part 6: Fees for copying, certification, services, etc., paragraph (h) of §6.1 amended, and the Commission's policy regarding reproduction of copies of transcript from any source other than the official reporter stated, effective on date of order.

29 FR 4914, April 8, 1964, Part 500: New Subchapter E—Intermodal Transportation, Part 500 Practices of For-Hire Carriers of Property Participating i Trailer-on-Flatcar Service, §§500.1 - 500.8, added, effective July 6, 1964.

29 FR 8421, July 3, 1964, Part 500: Practices of For-Hire Carriers Participating in Trailer-on Flatcar Service, effective date of order (29 FR 4914) postponed pending further order.

29 FR 11126, July 31, 1964, Part 51: New Part 51—General Requirements, added under the heading Parts 51-59, Consolidation, Finance, and Reorganization, effective Oct. 1, 1964.

29 FR 11273, Aug. 5, 1964, Part 500: Practices of For-Hire Carriers Participating in Trailer-on-Flatcar Service, effective date of order (29 FR 4914) fixed as Sept. 11, 1964.

29 FR 12508, Sept. 2, 1964, Part 500: Effective date of order (29 FR 4914) as amended (29 FR 11273) postponed until further order.

30 FR 8968, July 16, 1965, Part 6: Fees for Copying, Certification and Services in Connection Therewith, §6.1 Charges, paragraph (h) amended, effective on date of order.

30 FR 12669, Oct. 5, 1965, Part 6: Fees for Copying, Certification, and Services in Connection Therewith, §6.1 Charges, paragraphs (a), (b), (c), (d), (e), and (f) amended, effective Oct. 1, 1965.

31 FR 8573, June 21, 1966, Part 6, Fees for Service Performed in Connection with Licensing and Related Activities, amended, effective July 22, 1966.

NOTE: For recodification, see 49 CFR, Editorial Note, 32 FR 5606, April 5, 1967.

32 FR 9020, June 24, 1967, Part 100 [formerly Part 0]: The Commission, §100.10 Availability of statements of policy, interpretations, and other matters not required to be published in the Federal Register, added, effective July 4, 1967.

32 FR 9020, June 24, 1967, Part 105a (new part): Inspection of Records, §§105a.1 through 105a.4, added, effective on July 4, 1967.

32 FR 9816, July 6, 1967, Part 105a: Inspection of Records, §105a.] amended by addition of paragraph (f) ICC Manual-Administration, effective July 4, 1967.

32 FR 11214, Aug. 2, 1967, Part 100 [formerly Part 0]: The Commission, §100.5 Credentials required by special agents, accountants, and examiners, amended, effective Aug. 1, 1967.

32 FR 12689, Sept. 1, 1967, Part 600 [formerly Part 500]: Practices of For-Hire Carriers of Property Participating in Trailer-on-Flatcar Service, effective date, except as to §§600.7 and 600.8, is Aug. 18, 1967; §600.7 shall become effective Nov. 16, 1967, and §600.8 shall become effective Feb. 18, 1968.

32 FR 13414, Sept. 23, 1967, Part 106 [formerly Part 6]: Fees, §106.2 Filing fees, amended, effective Oct. 20, 1967.

NOTE: For Republication and Redesignation of Regulations, see 32 FR 20003, Dec. 20, 1967.

33 FR 3135, Feb. 17, 1968, Part 1001 [former Part 105a, formerly Part 5a]: Inspection of Records, list of locations of the Commission's field offices, which follows §1001.4, amended to show changed addresses of certain area offices, effective Feb. 15, 1968.

33 FR 4370, March 9, 1968, Part 1000 [former Part 100, formerly Part 1]: The Commission; Subpart B—Canons of Conduct, §§1000,735-11 through 100.735-30 and Appendixes I and II revised and republished.

33 FR 6162, Apr. 23, 1968, Part 1001 [former Part 105a, formerly Part 5a]: Inspection of Records, list of field offices and locations which follows §1001.4, amended, effective upon publication, except as to Louisville, Ky. which is effective Apr. 30, 1968.

Section 12. (2)-(7).—[Unchanged. See vol. 9, pp. 7592-7596.]

Amendments, see footnotes, vol. 2, pp. 1720-1730; historical notes, vol. 2, pp. 1720-1725.

Notes of Decisions

§12(2); Volume 2—p. 1720; Volume 13—p. 11003; Volume 14—p. 11507; Volume 16—p. 12727; Volume 18—p. 14161.

§12(3): Volume 2—p. 1723; Volume 9—p. 7593; Volume 12—p. 10297; Volume 14—p. 11508.

§12(4): Volume 2—p. 1726; Volume 7—p. 5387; Volume 9—p. 7594; Volume 11—p. 9250; Volume 12—p. 10297; Volume 14—p. 11508.

§12(5): Volume 2—p. 1728; Volume 7—p. 5388; Volume 9—p. 7595.

§12(6): Volume 2—p. 1729; Volume 7—p. 5389.

§12(7) : Volume 2—p. 1730; Volume 7—p. 5389.

§12(2). 1. Extent of power to subpena.—[Vols. 2, 13, 14, 16, 18].—The [Federal Trade] Commission may exercise its broad power of investigation and subpoena prior to filing a complaint; as an administrative agency of the United States charged with seeing that the act is enforced, it "has a power of inquisition"; is somewhat analogous to the Grand Jury. If the investigation is within the commission's authority and unless evidence sought by subpoenas is clearly irrelevant and immaterial, it is the duty of the District Court to order compliance; and subpoenaed documents may be retained by the commission for a reasonable length of time. And, in an investigational hearing there is no requirement that subpoenas be made returnable to the commission or a hearing examiner; they may be made returnable to an attorney-examiner.—Federal Trade Commission v. Standard American, Inc., 306 F. 2d 231 (234-5, 236). [Not arising hereunder.]

§12(2). 2. Aid of courts.—[Vols. 2, 14].—In proceeding on application of the [Securities and Exchange] commission for an order requiring obedience to subpena duces tecum issued by it in a duly authorized investigation, the trail court should inquire whether the commission was acting arbitrarily and whether it was acting within scope of its authority in issuing the subpena. The commission's position that facts bearing upon those questions cannot ever be material, because even if established the court must nevertheless enforce

the subpena, is not correct.—Shasta Minerals & Chemical Co. v. Securities & Exchange Commission, 328 F. 2d 285 (286-8). [Not arising hereunder]

§12(3). 7. Contempt.—[Vols. 2, 12, 14].—Statutes providing that a Federal Court may order compliance with a subpena issued by an administrative agency make available a judicial remedy for the agency which, if granted, is enforceable as any court order by the power to punish for contempt. Such power to punish is not generally available to federal administrative agencies; thus recourse is sought in separate judicial proceedings.—Shasta Minerals & Chemical Co. v. Securities & Exchange Commission, 328 F. 2d 285 (286).

Section 13, Complaints to and investigations by commission—(1) Complaint to commission of violation of law by carrier; reparation; investigation.—[Unchanged. See vol. 9, p. 7597.]

Amendments, see footnotes, vol. 3, p. 1731; historical note, p. 1731.

Historical Notes

By Executive Order 11107, Administration of Alaska Railroads, dated April 25, 1963, the Interstate Commerce Commission is given jurisdiction "to fix, change, or modify rates for the transportation of passengers and property" under the authority set forth in the Alaska Railroad Act, 38 Stat. 305, which jurisdiction had been given to the Secretary of the Interior by Executive Order No. 3861 of June 8, 1923; latter order superseded. (28 FR 4225, April 30, 1963)

Executive Order 11107 codified as Title 49, Chapter II, Part 1200 – Administration of Alaska Railroads (49 CFR §§1200.1 - 1200.4), 28 FR 12278, Nov. 20, 1963.

Notes of Decisions

Volume 3—p. 1733; Volume 7—p. 5390; Volume 9—p. 7598; Volume 11—p. 9252; Volume 12—p. 10297; Volume 13—p. 11004; Volume 14—p. 11509; Volume 15—p. 12086; Volume 16—p. 12728; Volume 17—p. 13406; Volume 18—p. 14162; Volume 19—p. 15323.

Generl Nature of Proceedings

3. Jurisdiction to entertain complaint.—[Vols. 3, 7, 19].—A complaint against reduced rates established on government traffic by a §22 quotation, particularly one alleging violation of §3(1), may not be entertained. Unlawfulness defined by §§2 and 3 consists either in an "unjust discrimination" or an "undue or unreasonable preference or advantage," and object of §22 was to settle beyond all doubt that discrimination in favor of persons therein named should not be deemed unjust (145 US 263). Moreover, the Supreme Court stated in 355 US 534 that §22 exempts transportation for the United States from the rate provisions of the act; Congress has thus seen fit to accord preferential treatment to government traffic, and such action may not be presumed to be an idle gesture. And since §22 permits free carriage, the minimum-rate provisions of §1 are likewise inapplicable. Complaint assailing defendant's granting to TVA of §22 rates on coal moving to its power plant from western Kentucky mines, but not from complaining southern Tennessee mines, dismissed for lack of jurisdiction.—Tennessee Products & Chem. Corp. v. Louisville & N.R., 319 I.C.C. 497 (501-2, 503).

The commission has no authority to entertain complaints, alleging illegal abandonment, by crewmen on defendant's tugboat who lost their jobs as result of discontinuance of its tugboat operations, when neither defendant nor any other interested party has applied for certificate permitting abandonment of the tugboat operations. However, under §1(20) a competent court is the only forum having jurisdiction to grant relief for a violation of §1(18); and in absence of an application for certificate authorizing abandonment of all or a portion of a line of railroad, or operation thereof, the commission has no jurisdiction to consider whether an abandonment should be permitted.—McGrody v. Baltimore & O. R. Co., 317 I.C.C. 253 (254).

10.——Moot questions.—[Vols. 3, 7, 9, 11, 12, 14-19].—Part II, §204(c), n. 26

Alleged violations of §§5(1), 5(2), 6(1), 6(7) and 15(8) in the complaint proceeding, which (following issuance of examiner's report and recommended order) was consolidated with merger application proceeding, would become moot upon consummation of the merger, as approved, since the factual foundation upon which the complaint rests would thereby be destroyed. Therefore, relying upon merger applicants to promptly consummate their proposal within the 90 days provided in the order, the complaint is dismissed.—Southern Pac. Co. Merger, 327 I.C.C. 38 (39, 47-8)*.

Though after issuance of proposed report defendant restricted assailed rate on petroleum products to shipments in tank cars of not less than 10,000-gallon capacity, and issues are therefore moot as to cars of less capacity, the complaint is not moot when lawfulness of assailed rate on shipments in cars of 10,000-gallon capacity or more remains in issue.—Prue Motor Transp., Inc. v. Boston & M.R., 316 I.C.C. 299 (299-300).

Where no court suit was filed by carrier within 3 years from date of delivery of shipments, complainant was not liable for undercharges beyond the 3-year statutory period, and issue as to waiver of undercharges on such shipments is moot.—Foremost Food & Chemical Co. v. Alton & S. R., 318 I.C.C. 35 (38).

11. Effect of satisfaction of complaint.—[Vols. 3, 12, 19].—When informal complainant accepted without qualification railroads' offer to pay reparation on all shipments covered by informal complaint on which the statute had not run, making of such payment pursuant to special-docket order terminated the informal complaint as provided in Rule 25(e) of the commission's Rules of Practice; and when subsequently, after a nominally contested formal proceeding, complainant was paid a further sum on additional shipments allegedly covered by the informal complaint, the railroads were justified in considering that this had entirely closed out the matter. Established principles of contract law regarding compromise and settlement require a like conclusion; complainant's acceptance of the second check representing "payment in full of all matters in Informal Complaint" terminated and compromised whatever might then have been left of the informal complaint, and it could no longer stay the statute of limitations.—Atlantic Coast Line R. Co. v. United States, 213 F. Supp. 199 (202, 203, 205)*.

Scope of Power to Investigate

27. Duty to make investigation; lack of diligence in bringing complaint.—[Vols. 3, 7, 9, 12].—Although 5 telegraphic informal complaints and one written one were filed within the statutory period, complainants failed to comply with the commission's requests for written confirmation of the telegraphic complaints, accompanied by sufficient copies for service on all defendants, or to correct deficiencies pointed out by the commission in the mailed informal complaint, or to take any further action regarding those complaints prior to filing of formal complaint nearly 10 years later, following declination of other informal complaints. The commission does not condone laxity in preparation and presentation of cases before it; complainants are estopped by laches from raising issue of unreasonableness of rates charged on shipments embraced in the 6 specified informal complaints, which are deemed to have been abandoned.—Plaswood Corp. v. Alton & S.R., 321 434 (439-42).

29. General-revenue cases; general findings.—[Vols. 7, 9, 11-19].—In condemning plaintiffs' flat increase in intraterminal and interterminal switching charges in eastern district solely because it would result in substantially greater percentage increases at some localities than at others, the commission ultimately treated the case as a §3 matter. There are unquestionably differences between reasonableness and rate relations, and consideration of the latter is a matter for procedures and standards of §3; the commission made no finding of undue or unreasonable prejudice or disadvantage, and could not have done so, for no such theory was pursued and no such evidence presented. Since, on the commission's own finding, the increased rates remain within the zone of reasonableness, its order requiring cancellation of the increase is set aside.—Pennsylvania R. Co. v. United States, 216 F. Supp. 199 (201, 202)*.

Parties

30. Complainants; in general.—[Vols. 3, 7, 9, 11, 13, 15, 18, 19].—Although complainant, a corporation engaged in producing and purchasing natural gas and operating a system for transportation thereof at rates subject to jurisdiction of Federal Power Commission under Natural Gas Act, is neither a shipper or consignee of coal nor a competitive common carrier under provisions of Interstate Commerce Act, it has standing under §13(1) to complain of anything done or omitted to be done by any common carrier subject to provisions of part I of ICA; that section establishes a complainant's right, without regard to nature of its interests, to allege violation of any section of the act, including §§2 and 3(1). Complaint alleging unlawfulness of defendant's unit train rates on coal, based on annual volume minima, may properly be entertained. —Natural Gas Pipeline Co. of America v. N.Y.C. R. Co., 323 I.C.C. 75 (84).

37. Parties of whom complaint may be made; in general.—[Vols. 3, 15, 17].—Since controversies between noncarriers are for the courts, not the commission, noncarrier consignor and consignee were not proper parties defendant to complaint by competing noncarrier attacking rates charged, and contained in tariffs published, by carriers subject to the act; decision in 333 US 169, distinguished. And provisions of §2 of Elkins Act authorizing inclusion as parties of all persons interested in or affected by the rates considered concern enforcement proceedings brought by the commission or other proper authorities, not by private parties; a complaint under §13 is not an enforcement proceeding.—Empire Petroleum Co. v. Chicago, B. & Q.R. Co., 315 I.C.C. 291 (292-3).

38.——Effect of receivership.—[Vols. 3, 7, 9].—A trustee is not a proper party defendant for acts not arising from the trustee's conduct of the business of the bankrupt carrier. Since alleged violations occurred before movants' appointment as trustees of the New Haven, they could not be made defendants without permission of the bankruptcy court, which was not obtained; motion granted to dismiss complaint as to the trustees and to substitute the railroad corporation as defendant.—Foremost Food & Chemical Co. v. Alton & S. R., 318 I.C.C. 35 (36, 39).

Trustees were not in charge of defendant railroad's operations at time involved shipments moved and cannot be joined as defendants without permission of bankruptcy court; motion to dismiss complaint as to them, granted.—Firestone Tire & Rubber Co. v. Atchison, T. & S. F. Ry. Co., 318 I.C.C. 107 (108).

Pleadings, Generally

46. Scope of issues.—[Vols. 3, 7, 9, 11-17, 19].—Though western trunklines that are active defendants urge that hearings should have covered all traffic between eastern and w.t.l. territories, notwithstanding eastern complainants' 1955 agreement with midwestern lines for application of the Docket No. 28277 divisional basis previously accepted by western railroads other than those defendants, at the time of the prehearing conference it was fully understood that the midwestern group's action had practically satisfied the complaint as to them, and no suggestion of needed amendments was made at that time.—Akron, C. & Y. R. Co. v. Atchison, T. & S.F. Ry. Co., 316 I.C.C. 351 (362)*.

And though the active defendants urge that they should have been permitted to amend their cross-complaint to include subdivisions of the interterritorial rates, their petition thus to amend, filed 13 months after the prehearing conference, was denied as a procedural matter and they did not appeal from that order or file separate complaint against the other defendants. Such an issue would not necessarily be germane to the proceeding, since more than half the indicated revenue would not involve subdivisions. The commission may properly pass upon primary divisions of the interterritorial rates without considering subdivisions; and there is likewise no error in handling the proceeding as a controversy solely between complainants and the active defendants.—Id., pp. 362-3.

Broadening the issues: [Vols. 7, 9, 14-19].—As San Francisco County, including San Francisco, is not among counties allegedly preferred, evidence pertaining to competition with companies located at San Francisco or other points beyond the allegedly preferred

area cannot be considered to establish existence of unlawful prejudice to Stanislaus County. To include San Francisco within scope of the complaint would unduly broaden the issues.—Stanislaus County v. Atchison, T. & S.F. Ry. Co., 315 I.C.C. 459 (465)*.

Since complainant's allegation that it is unduly prejudiced because competitors have lower inbound rates on green salted hides, and thus have an undue rate advantage in sale of finished leather products in competitive markets, was not embraced in the complaint as required by Rule 1.30(a) of Rules of Practice, and defendants were unaware of that allegation and thus not prepared to answer it, it may not be considered.—Lakeland Hide & Leather Co. v. Atlantic Coast Line R., 316 I.C.C. 303 (305).

Prayer for general or particular relief: [Vols. 3, 7, 11, 14].—In fairness to defending parties, it is elemental that a complaint should state all relief which is sought, and the basis thereof. Prayer in complaint that the commission enter such orders or further orders as it might deem necessary or appropriate to afford complainants relief in the premises is a catchall clause that cannot be construed as encompassing claims not specifically stated in the complaint.—Copps v. Alabama G.S.R. Co., 319 I.C.C. 192 (193).

48. Averments sufficient to put defendant on notice.—*Issue of reparation:* [Vols. 3, 7, 9, 11, 15, 19].—Examiner properly sustained defendants' objection that they were taken by surprise when, at the hearing, complainants sought to amend the complaint to include a request for reparation, there being no notice of claimed damages in the complaint. Prayer in the complaint that the commission enter such orders as it might deem necessary or appropriate to afford complainants relief in the premises is a catchall clause that cannot be construed embracing reparation.—Copps v. Alabama G. S. R. Co., 319 I.C.C. 192 (193).

Complaints

53. Consolidation for hearing and decision. —[Vols. 3, 7, 9, 17].—Suspension of considered order of the commission prescribing divisions of joint rates between southern border points and official territory on the basis prescribed in Docket No. 29885 for rates between the border points and southern territory, until conclusion of reopened proceedings in the latter case, would be tantamount to reversal by the court of the commission's refusal to consolidate the proceeding under review with the reopened Docket No. 29885, which was clearly within the commission's discretion.—Boston & M. R. v. United States, 208 F. Supp. 661 (677)*.

See also Southern Pac. Co. Merger case, n. 10 above.

Jurisdiction to Proceed

62. Appearance and failure to appear.—[Vols. 3, 7, 17].—See B. G. Anderson & Co. case, n. 121, below.

Interventions

71. Interventions; generally.—[Vols. 3, 7, 9, 11, 12, 16, 17].—Complainant's motion to exclude North Carolina Utilities Commission from participation in proceeding involving rate relations between two North Carolina ports, on ground that State law restricts its representation to shippers and receivers in North Carolina, whereas its evidence was directed to rates applicable beyond that State, overruled. The utilities commission is empowered and authorized to bring actions before the Interstate Commerce Commission which in its opinion are necessary to secure just and reasonable freight rates for North Carolina shippers and receivers; and no provision is cited which limits the type of action it may bring, or the extent of its participation in commission proceedings, to achieve that end. —City of Wilmington v. Alabama G. S. R. Co., 316 I.C.C. 709 (710)*.

Motions

86. For dismissal.—[Vols. 7, 9, 12-16, 18, 19].—Examiner did not exceed his authority in overruling defendant noncarriers' motions for dismissal of complaint as to them on the ground that, not being common carriers, they were not subject to the commission's jurisdiction; under Rule 1.70 of the Rules of Practice, examiner's power to decide motions for dis-

missal is denied only as to those involving final determination of merits of the proceeding, and defendants' motions did not seek dismissal on the merits.—Empire Petroleum Co. v. Chicago, B. & Q. R. Co., 315 I.C.C. 291 (292).

However, since controversies between noncarriers are for the courts, not the commission, motions to dismiss as to those defendants should have been, and are, sustained; provision of §2 of Elkins Act, cited by complainant noncarrier, authorizing inclusion as parties of all persons interested in or affected by the considered rate, concerns enforcement proceedings by the commission or other proper authorities, and a complaint under §13 is not an enforcement proceeding. —Id., pp. 292, 293.

The Hearing

120. Right to a full hearing.—[Vols. 3, 7, 9, 11, 12, 16, 17, 19].—See also §15(6), n. 8.

Although defendants were advised that their request for oral hearing and cross-examination did not meet the specificity requirement of rule 1.53 of Rules of Practice, and were allowed ample time for compliance, adequate response was not forthcoming and oral hearing was denied. Defendants' reply statement did not dispute any of facts stated by complainant's witnesses. Where material facts are not controverted, oral hearing would serve no useful purpose and denial thereof is within the agency's discretion; §7(c) of Administrative Procedure Act is ample authority for the procedure followed. Failure to accord defendants an evidentiary oral hearing was not error under the circumstances.—United States v. Missouri Pac. R. Co., 322 I.C.C. 418 (419).

121. Duty to present case with diligence.—[Vols. 3, 7, 12, 13].—Although hearing was transferred to Philadelphia expressly to facilitate complainants' appearance, only their counsel and two traffic consultants, none of whom had personal knowledge as to paying and bearing of assailed charges, appeared; and affidavits of complainants' officers to that effect cannot be considered because affiants were not present for cross-examination. As record indicates that more than one claim was made, either formally or informally, on some shipments, and general confusion prevails in identification of shipments, no purpose would be served by considering the merits. The claims have been abandoned by failure to present admissible evidence respecting the paying and bearing of charges; complaint dismissed.—B. G. Anderson & Co. v. Atlantic Coast Line R. Co., 319 I.C.C. 224 (225, 226).

126. Burden of proof; when upon complainant.—[Vols. 3, 7, 9, 15, 17-19].—The presumption of unreasonableness created by Rule 66(a) of Tariff Circular 20, where charges assessed on basis of the minimum weight published for a larger car furnished for carrier's convenience exceed those based on a lower minimum for a smaller car ordered by shipper, does not become operable unless and until the basic facts on which its application is predicated are established by substantial evidence; and it is only reasonable that the burden of proving those facts rests on shipper as the person seeking the advantage of that presumption.—Baltimore & O. R. Co. v. United States, 217 F. Supp. 918 (922)*.

See also Southern Ry. Co. v. United States, §15(3), n. 36.

In a complaint proceeding the burden of proof rests with complainants. Complaining railroads have not established that their lost coal traffic was captured by defendants through establishment of assailed joint rail-water rates, thus it cannot be found that those rates are inimical to maintenance of just and reasonable coal-rate structures or that they constitute a destructive competitive practice. —Chicago, B. & Q. R. Co. v. Chicago & E.I. R. Co., 322 I.C.C. 138 (146)*.

Complaints assailing divisions of rates, see §15(16), n. 32

Before considering the merits of claims for reparation on numerous past shipments, it should appear initially, by at least a fairly representative showing, that the charges claimed to have been unlawful were in fact paid.—B. G. Anderson & Co. v. Atlantic Coast Line R. Co., 319 I.C.C. 224 (225).

Reparation, proof of damages, see §8, n. 222.

Statement in 331 US 284 that it is a matter of right that regions and shippers be not preju-

diced nor their competitors preferred does not overrule the oft-repeated holdings of the courts and the commission that the burden of supporting an allegation under §3 by adequate proof rests on complainant. While, where such evidence is of record, the burden is on the carriers to show by convincing evidence that there is enough dissimilarity in the transportation circumstances to justify the difference in rate treatment, absence of latter evidence does not afford a basis for relief without the requisite showing by complainant.—Lynchburg Traffic Bureau v. Chesapeake & O. Ry. Co., 319 I.C.C. 74 (81-2)*.

Complainants have the burden of proving that rates complained of are unlawful under some provision of the act.—Louisville Chamber of Commerce v. Ahnapee & W. Ry. Co., 318 I.C.C. 749 (753).

Burden is on complainant alleging inapplicability of rate charged to prove that commodity shipped was of a character to entitle it to rate claimed applicable; evidence consisting merely of a conclusion of complainant's traffic manager and photographs which do not definitely distinguish commodity shipped from those on which rates charged are named does not meet that burden.—Firestone Tire & Rubber Co. v. Atchison, T. & S. F. Ry. Co., 318 I.C.C. 107 (109-10).

Although motor carrier parties in embraced complaint and suspension proceedings, involving existing and proposed motor rates which they admitted were not compensatory, had very little interest in outcome of the proceedings, that fact does not compel a conclusion in rate bureau's complaint proceeding that rail TOFC rates on the same commodities are noncompensatory; if such conclusion were reached, complainant would succeed by its own procedural ambivalence and regardless of the lack of substance of the complaint. The issue being whether assailed TOFC rates are just and reasonable, the primary question to be considered is whether they are compensatory, and complainant has the burden of proving that they are noncompensatory; as no convincing evidence of noncompensativeness was presented, complainant failed to sustain its burden of proof.—Middlewest Motor Freight Bureau v. Great Northern Ry., 318 I.C.C. 443 (445, 447).

See also Terminal Charge on Order Bills of Lading Shipments, APA, 5 USC *Burden of Proof*.

Evidence

135. Application of principles of stare decisis and res judicata.—[Vols. 3, 7, 9, 11-14, 16-19].—A question of tariff interpretation does not differ in character from that presented in construction of any other disputed document; the rule that parol evidence cannot be admitted to vary the terms of a written agreement governs, and if state and Federal cases are not at odds "federal law" may include relevant state cases.—Baggett Transp. Co. v. United States, 319 F. 2d. 864 (868). [Not arising hereunder.]

See also William N. Feinstein & Co. v. United States, §8, n. 13.

Although a decision of the commission has been challenged and is pending before a three-judge district court, it nevertheless presently stands as an order of the commission and is recognized as the applicable law until overruled or modified by the courts.—Natl. Motor Freight Traffic Assn. v. Delaware Valley, 323 I.C.C. 560 (573)*.

Approval of a ratemaking innovation because of unusual facts and circumstances surrounding the transportation does not constitute a precedent for indiscriminate use of that form of ratemaking.—Vol. Rates on Processed Meal—Midwest to Ports, 322 I.C.C. 456 (478).

With respect to the issue of applicability, the division of the commission is obliged to follow the precedent established by the entire commission in prior proceeding involving application of the same tariff provisions on the same commodities.—Harden Farms of California v. Akron, C. & Y. R. Co., 318 I.C.C. 186 (187).

Finding in 308 ICC 529 that same shipper's rotary kiln parts were not pulp and paper making machinery when shipped to pulp and paper mills was made in connection with allegations under §§2 and 4 that rotary kilns and paper making machinery were like kinds of traffic; that finding was general in nature, to effect that rotary kilns as such are not necessarily pulp and paper making machinery, and is not determinative of complaint seeking ap-

plication of rate on "Machinery, paper mill or pulp mill, K.D. or Parts thereof," on shipments of parts of a rotary kiln for installation in consignee's paper mill.—Traylor Engineering & Mfg. v. Lehigh Valley R. Co., 316 I.C.C. 31 (35).

See also Chicago, R.I. & P. R. v. U.S., §2, n. 17; §3(4), n. 41.

136. Admissibility, in general.—[Vols. 7, 9, 11-19].—Defendants' objection to certain of complainant's cost evidence which was determined with use of electronic computer equipment, overruled; underlying data and working papers used by the cost analyst were made available to defendants for purpose of verifying end results of his recomputation thereof, and the cost analyst was available for cross-examination. As defendants were given time to prepare rebuttal cost data, any deficiencies in the study due to improper costing procedures or incorrect data could be determined by them and would go to weight of that evidence rather than its admissibility.—American Colloid Co. v. Akron, C. & Y. R. Co., 321 I.C.C. 91 (93).

Objection to certain evidence concerning cost of ownership and operation of refrigerator cars, on ground that witness relied on figures furnished by others not available for cross-examination, and that underlying data were not of record, overruled. Witness is an executive assistant of carline company, and his duties include budgetary and cost control; objection goes more to weight to be accorded his evidence.—Fresh Vegetables from Tex., Calif., Ariz., and N. Mex., 319 I.C.C. 141 (144).

Admission in evidence of notarized communications from paper company officials, a trade association official, and an engineering consultant, stressing importance of complainant's rotary kiln in operation of sulphate paper mills, also letter from superintendent of carriers' weighing & inspection bureau expressing agreement with witness's interpretation of considered tariff item, was not error; witnesses introducing the letters were available for cross-examination as to whether they had received them, whether they could independently testify as to truth of factual matter in the letters, and whether the writers were qualified to express opinions on the subjects dealt with; weight to be given the opinions thus expressed can have no bearing on their admissibility.—Traylor Engineering & Mfg. v. Lehigh Valley R. Co., 316 I.C.C. 31 (33-4).

Complainant's objection to certain tonnage evidence submitted by defendants, because underlying work papers were not made available for examination, was properly overruled when defendants had refused to produce such papers in order not to disclose location of their shippers and consignees to competitors. —United States v. Oklahoma City-Ada-Atoka Ry. Co., 316 I.C.C. 731 (753)*.

Examiner's refusal to admit evidence offered in support of complainants' contention that the railroads and other shippers conspired to eliminate competion of complainants' product through improper classification thereof did not deprive complainants of any right to obtain consideration of antitrust issues. The commission has no jurisdiction over shipper claims based on antitrust violations; and damages provided in §10(4) follow conviction in Federal court of the misdemeanors therein set forth. Examiner's ruling sustained.—Copps v. Alabama G.S.R. Co., 319 I.C.C. 192 (196-7).

Defendants' objection to complainants' exhibit based in part on formulas in public statement No. 5-59 of commission's cost finding section, on ground that witness who prepared it was not qualified as a cost expert and was not familiar with elements entering into average unit costs shown in the exhibit, sustained.—Budlong Pickle Co. v. Ann Arbor R. Co., 315 I.C.C. 333 (334).

In its exceptions, complainant constructed a combination rate lower than that previously sought (which was found inapplicable), not in support of an applicability issue, but to show unreasonableness of assailed single-factor rate; such additional "evidence," in nature of a rate comparison, should not have been considered, since under the commission's rules of practice such additional matter may not be embodied in exceptions; prior finding awarding reparation, reversed.—Locarni Marble Corp. v. Missouri Pac. R. Co., 315 I.C.C. 369 (370)*.

140. Official notice.—[Vols. 3, 7, 9, 11-19].—Part II, §204(c), n. 75.

Administrative agents and agencies are not

permitted to take judicial notice of evidentiary material which is not a matter of common knowledge. In an administrative hearing where the facts are adjudicative, disputed, and critical, nothing less than submission through evidence, subject to cross-examination and rebuttal, will normally suffice. Furthermore, the practice of judicially noticing "facts" after reception of evidence is closed is inconsistent with §7(d) of APA, 5 USC §1006(d).—Cook v. Celebrezze, 217 F. Supp. 366 (368). [Not arising hereunder.]

Since an administrative agency may take notice of the kinds of fact which a court notices, it may properly take official notice of a Federal Census Report.—Northern Pac. Ry. Co. Abandonment and Construction, 317 I.C.C. 513 (517)*; the commission takes official notice that 1960 census figures show that population of the 11 mountain-Pacific States increased 205 percent from 1920 to 1960, and that that of California more than doubled between 1940 and 1960.—Akron, C. & Y. R. Co. v. Atchison, T. & S.F. Ry. Co., 321 I.C.C. 17 (53)*.

Official notice is taken of fourth-section order referred to of record, and of verified applications referred to therein.—Farmers Potato Distr. Co., Inc. v. Atchison, T. & S.F. Ry., 318 I.C.C. 415 (416, Note 4)*.

The commission may officially notice that grain rates from central and western Montana, including origins specified in instant investigation, have been reduced once and sometimes twice since institution of the investigation.—Grain from Idaho, Oreg. & Wash. to Ports in Oreg. & Wash., 319 I.C.C. 534 (563)*; also, that subsequent to the hearings the approximate parity in rates from Pacific Northwest and from southern Idaho and Utah to California, which had been almost restored by the reductions under investigation in rates from the Pacific Northwest, was again disturbed by reductions from southern Idaho and Utah, to detriment of the Pacific Northwest.—Id., p. 564.

The commission takes official notice that out-of-pocket costs of water carriers are not less than 85 percent of their fully distributed costs.—Pig Iron, Buffalo, N.Y., to Chicago, Ill., and Gary, Ind., 315 I.C.C. 601 (613)*.

145. Presumptions.—[Vols. 3, 7, 9, 13].—Before the presumption of unreasonableness created by Rule 66(a) of Tariff Circular 20, where charges assessed on basis of the minimum weight published for a larger car furnished for carrier's convenience exceed those based on a lower minimum for a smaller car ordered by shipper, becomes operable it must be established by substantial evidence that (1) the shipper ordered a car of a particular size, (2) the carrier was given sufficient time to furnish the car ordered, and (3) the shipment would have fitted in or upon the car ordered.—Baltimore & O. R. Co. v. United States, 217 F. Supp. 918 (922)*.

It is a long-established rule that, while recitations in a bill of lading concerning quantity and quality of the goods shipped may be considered prima facie evidence of such facts, those relating to the agreement to carry goods via a certain route on a designated car are contractual. Notations as to size of car ordered, which the government relies on to support setoff claimed under Rule 66(a), fit neither the contractual nor the prima facie proof aspects of the bill of lading; though by statute a bill of lading may be prima facie proof of other facts which it recites, no statute has been found that has that effect as to any notation of size of car ordered. Authorities cited indicate that in circumstances like those involved such notations, absent other confirmatory evidence, will not support a finding of such facts, and that absence of notation, in compliance with Rule 66(a)(4), as to the date that certain size cars were allegedly ordered may well constitute a fatal defect in the government's proof.—Id., pp. 924-5.

147. General legal sufficiency of evidence.—[Vols. 3, 7, 19].—Typical evidence rule as to divisions, see §15(6), n. 22 *Sufficiency of evidence.*

148. Competency.—[Vols. 3, 7, 12, 13, 15-19].—Administrative agencies are not bound by rules of evidence relating to competency. The law of evidence was originally developed for jury trials, and the distinction between rules of evidence applicable in actions at law and the more liberal practice prevailing in equity is recognized in Rule 43(a) of Federal Rules of Civil Procedure, providing that all evidence shall be admitted which was formerly admissible in suits in equity. Moreover, the

courts have not imposed on administrative agencies any rigid requirement that they must exclude all evidence that would not be admitted at a trial before a judicial tribunal; admission of evidence objected to as incompetent presents an entirely different question from an agency's exclusion of evidence that should have been admitted.—United States v. I.C.C., 221 F. Supp. 584 (588-9)*.

Affidavits from an officer of each of 10 complainants to effect that the officer had personal knowledge of all shipments made by his company and that his company paid and bore charges on attached list of shipments were properly exclude on ground that the officers were not present for cross-examination and their statements therefore could not be considered as evidence.—B. G. Anderson & Co. v. Atlantic Coast Line R. Co., 319 I.C.C. 224 (225).

Informal opinion of commission's Bureau of Traffic as to applicability of a tariff description to complainant's shipments, based entirely on complainant's representations, is not binding on the commission in a formal proceeding.—Firestone Tire & Rubber Co. v. Atchison, T. & S. F. Ry. Co., 318 I.C.C. 107 (109).

149.——Hearsay.—[Vols. 3, 7, 9, 15-19].—Letters from shippers to defendants or rate bureau are not admissible, over objections, because of their hearsay character and inability of opposing parties to cross-examine persons who made statements set out in such documents.—Firestone Tire & Rubber Co. v. Atchison, T. & S.F. Ry Co., 318 I.C.C. 107 (109).

151.——Admissions.—[Vols, 3, 7, 9, 13-16, 19].—While defendant's admission that assailed rate was published in error is not controlling, that fact, as well as its subsequent establishment of a reduced rate the same as that applicable in reverse direction during period of movement, are relevant factors and have probative value to support complaint.—Arkansas Plant Food Co. v. St. Louis S.W. Ry. Co., 315 I.C.C. 680 (681-2).

See also Tractors—T.L. & W.T.L. Territories to S.W. & W.T.L. Ter., §15(7), n. 50

155. Relevancy.—[Vols. 3, 7, 9, 12-15, 17-19].—Evidence showing tax expenditures of the citizens of Freeport, Tex., to develop their port, and the loss they would experience if lack or rate parity would prevent completion of a truly competitive port, is irrelevant to the issues of port preference and prejudice properly under consideration, and should not have been admitted or given weight. Nevertheless, it cannot be ignored that the combined difference in rates and transit arrangements was the cause of Freeport's inability to attract those collateral facilities which would allow it a competitive standing beside the other Gulf ports.—Atchison, T. & S.F. Ry. Co. v. United States, 231 Supp. 422 (431)*.

Although in rejecting as irrelevant transcontinental western lines' proffered evidence relative to traffic not subject to 1955 agreement of midwestern and eastern railroads to accept the Docket 28277 basis of divisions, the commission intended to narrow the issues to official-w.t.l. divisions between the eastern and plaintiff transcontinental western lines only, pleadings in the proceedings were never amended to reflect that fact. Plaintiffs' exhibits, offered to show that the 28277 scale was greatly beneficial to midwestern lines, would have gone to very heart of the issue of whether the midwestern carriers' voluntary adoption thereof was "conduct of lines in like situations" within precedent in 31 ICC 673; such evidence was not only put in issue by original pleadings but was the type of evidence necessary to establish a basis for the commission's test of comparison in prescribing the same divisions schedule for plaintiffs' traffic; hence it cannot be called irrelevant.—Atchison, T. & S.F. Ry. Co. v. United States, 225 F. Supp. 584 (588, 602-3)*.

Copy of counsel's request for a declaratory order in a suspension proceeding involving rates on like traffic was properly excluded as immaterial and irrelevant in complaint proceeding.—B. G. Anderson & Co. v. Atlantic Coast Line R. Co., 319 I.C.C. 224 (225).

Commercial conditions, and the close commercial relationship between the ports of Freeport and Houston, Tex., are relevant factors in the consideration of port groupings.—Brazos River Harbor Nav. Dist. v. Abilene & S. Ry. Co., 319 I.C.C. 54 (56-7, 67)*.

Since the principal issue in investigation is whether promiscuous loading privilege should be extended to shippers, evidence respecting

promiscuous loading by carriers is relevant to determination thereof.—Loading of Freight by Shippers at Eastern Points, 316 I.C.C. 179 (180)*.

160. Expert opinion.—[Vols. 3, 9, 12, 13, 16, 17, 19].—Objection to testimony of assistant freight traffic manager who handles rate adjustments and related matters for one of defendant railroads, on ground that it is opinion evdence from a witness unqualified to testify regarding chemical matters, overruled. Complainant does not challenge witness's expertise in his field, and any opinions expressed by him were offered as those of a rate expert, not as those of a chemist.—R. M. Hollingshead Corp. v. Alton & S. R., 319 I.C.C. 86 (87).

166. Parol or extrinsic evidence; proceedings before the commission.—[Vols. 3, 7, 15, 17, 19].—Though the Government objected to the commission's admission of a transcript of testimony of several witnesses in two earlier proceedings, the United States was also a party in those cases and government counsel had opportunity to cross-examine the witnesses, and in overruling the objection the commission indicated that government counsel would have a right to call those witnesses and cross-examine them in the hearing then pending. Argument that because different government departments were involved in the earlier and the instant proceedings the parties were not the same is untenable: the United States is a single entity. In any case, there was no reversible error in the commission's admission of the transcript, since its own rules specifically provide for admission of transcripts of evidence in other proceedings, subject to certain safeguards and limitations.—United States v. I.C.C., 221 F. Supp. 584 (589)*.

While it would not constitute error in and of itself for the commission to incorporate evidence from another docket, this practice could in certain circumstances create unjustified prejudice. In determining that existing basis of dividing joint interterritorial rates between eastern carriers and transcontinental western lines was unlawful, the commission asserted that data respecting rates applicable to plaintiffs was available to it in Docket 28277; however, that proceeding dealt with traffic interchanged with the eastern lines which originated or terminated on only six midwestern railroads, and the data antedated World War II. That data is not before the court, and the court cannot determine whether it is not outdated, whether is is representative, whether it is substantial, or whether it is applicable to plaintiffs at all.—Atchison, T. & S.F. Ry. Co. v. United States, 225 F. Supp. 584 (599-600)*.

167.——Papers on file with the commission.—[Vols, 3, 7, 9, 14, 16].—Governing freight classification, tariffs, and supplements thereto, were duly published and filed with the commission and were in effect at all times pertinent to railroad's suit against shipper to collect alleged undercharges; and photostatic copies thereof, in whole or in part, may be admitted into evidence without further proof of their authenticy, as fully as if they were certified by the Secretary of the Commission.—Louisiana & A. Ry. Co. v. Export Drum Co., 228 F. Supp. 89 (90)*.

170. Exhibits.—[Vols. 3, 7, 9, 11, 15-18].—No prejudicial error is shown in examiner's requiring complainant to cross-examine defendant's witness on basis of an IBM tabulation of shipments during a 14-month period, and denying its request for that document to be made part of the record. Under authority granted, pursuant to subpena issued at complainant's request, for photocopying and filing copies of the monthly reports of oil clearinghouse on which that tabulation was based, complainant was authorized to file copies of that underlying data as a late-filed exhibit.—Denver Oil Co. v. Platte Pipe Line Co., 319 I.C.C. 725 (726, 728)*.

185. Weight accorded evidence.—[Vols. 3, 7, 9, 11, 13-17, 19].—Testimony of complainant's traffic manager that commodity shipped was plastic sheeting, not "sheets" within tariff description, is a mere conclusion which is entitled to little weight without some evidence as to how that conclusion was reached.—Firestone Tire & Rubber Co. v. Atchison, T. & S.F. Ry. Co., 318 I.C.C. 107 (109).

See also Kansas Intrastate Freight Rates and Charges. §13(4), n. 58.

Argument

191. Oral argument.—[Vols. 3, 15, 16, 17].—There is nothing in the Interstate Com-

merce Act, the Administrative Procedure Act, the commission's General Rules of Practice, or Article V of the Constitution which entitles plaintiffs (defendants to complaint assailing divisions of joint jates) to oral argument before the commission in addition to written argument. Section 15(6) states only that the commission "after a full hearing upon complaint" may prescribe just, reasonable, and equitable divisions; and the commission has construed Rule 1.98 of its Rules of Practice, which provides for oral argument, to mean that granting of a request therefor in complaint proceedings is discretionary.—Boston & M. R. Co. v. United States, 208 F. Supp. 661 (669)*.

The exhaustive briefs filed by plaintiffs with the commission before the challenged order was entered disclose that they fully exploited the ample opportunities granted them to present, in writing, all their arguments in support of their own views and in opposition to complainants' claims, and counsel for plaintiffs admitted that it was doubtful if anything could have been said orally that was not thus stated in writing. In the circumstances, granting of opportunity for oral argument was within the commission's discretion, and denial of plaintiffs' request did not deprive them of a full hearing or render the commission's order invalid.—Id., pp. 668, 669-70.

Proposed Reports

207. Exceptions; time and manner of making exceptions.—[Vols. 3, 9, 19].—Complainant's reply to defendants' exceptions included exceptions to the examiner's report and recommended order which were not filed within the 30-day period specified by Rule 1.96(b) of the Rules of Practice; therefore, to the extent that complainant's reply constitutes exceptions to examiner's report, defendants' motion to strike that part of the reply to their exceptions is granted.—Middlewest Motor Freight Bureau v. Great Northern Ry., 316 I.C.C. 443 (444).

Modified Procedure

215. In general.—[Vols. 3, 7, 13-19].—Appendix to complainant's reply statement in proceeding handled under modified procedure, consisting of a rate comparison and an affidavit of an official of complainant as to necessity to reduce price of considered commodity to meet competition of lower-rated origins, embodies new matter which is not in the nature of rebuttal of defendant's statement; motion to strike, granted.—Anderson-Prichard Oil Corp. v. Alton & S. R., 315 I.C.C. 59 (60).

An affidavit is defined as a sworn statement in writing, especially one made on oath before an authorized officer; and the affidavit is the entire statement, not just the verification. Statement of facts by complainant's sales manager affirmatively states that he is personally familiar with considered shipments and personally handled bids which developed them; statement of another witness, who is associated with complainant's general traffic manager and handles its office and rate matters in same area, states that he is familiar with the rates and tariffs involved and with correspondence covered by exhibits attached to his statement; affidavits of those two witnesses clearly indicate that they have personal knowledge of the matters to which they testified, and thus substantially comply with Rule 1.50 of Rules of Practice.—Van Waters & Rodgers, Inc. v. Western Pac. R. Co., 315 I.C.C. 743 (744).

Conference Plan

226. Prehearing conference.—[Vols. 11, 13, 15, 17, 19].—Request for a prehearing conference of all parties in rule-making proceeding, denied; questions raised can best be considered following submission of written statements, and prehearing conference at this time would serve no useful purpose.—Rules to Govern Assembling & Presenting Cost Evidence, 321 I.C.C. 238 (243).

Section 13. (2) Complaints by State commissions; inquiry on commission's own motion; expenses of State commissions.—[Unchanged. See vol. 9. p. 7625, amendment, vol. 11, p. 9261.]

Amendments, see footnotes, vol. 3 p. 1825; historical note, p. 1825.

Historical Note

Rates and fares of railroads within the Alaska Railroad Act, jurisdiction of the commission, see Historical Note concerning Executive Order 11107 following §13(1).

Notes of Decisions

Volume 3—p. 1826; Volume 7—p. 5470; Volume 9—p. 7625; Volume 11—p. 9261; Volume 12—p. 10303; Volume 13—p. 11011; Volume 15—p. 12093; Volume 17—p. 13418; Volume 18—p. 14172; Volume 19—p. 15336.

2. Inquiry on commission's own motion.—[Vols. 3, 7, 9, 11, 15, 19].—Discontinuance, see Iron and Steel Articles—Eastern Motor Carriers, §204(c), n. 250.

Although order instituting investigation on the commission's own motion made no reference to §15(1), which is the source of its power to prescribe minimum rates, subsequent modifying order stated that investigation was confined to justness and reasonableness of the described rates under §1, which embraces rates that are unlawful because less than minimum reasonable rates as well as those that exceed maximum reasonableness; therefore, if a determination of unlawfulness is made in the investigation, under §15(1) the commission may implement that finding by exercising its authority to prescribe lawful rates. [See 335 US 573.] Failure to state the source of that power in orders instituting instant investigation in no way prejudices the respective parties.—Fresh Vegetables from Tex., Calif., Ariz., and N. Mex., 319 I.C.C. 141 (156).

Moreover, under §13(2) the commission, in an investigation instituted on own motion, is invested with power and authority like that in a complaint case, and therefore has authority to enter an order affecting rates established subsequent to institution of the investigation. —Id., p. 157.

4.——Subjects of inquiry.—[Vol. 3].—It was not intended that adoption of the 15 cost studies by commissions's cost finding section, listed in appendix to notice of rule-making proceeding as published, should permit carriers to put those studies in evidence instead of evidence of their own costs, thereby shifting the burden of going forward with the evidence to protestants. Those studies are ancillary to purposes of the proceeding, which is concerned with propriety of methods of estimating costs, and which can as well be accomplished through adoption of cost formulas alone. Withdrawal of the studies (which are dependent on validity of the cost section's formulas used to obtain the cost scales set out therein) will not affect consideration of the formulas, and does not reflect approval or disapproval of those cost studies or the underlying formulas.—Rules to Govern Assembling & Presenting Cost Evidence, 321 I.C.C. 238 (240-1). [But see dissent.]

6.——Parties; bringing in new defendants.—[Vol. 3].—It would conduce to more thorough and useful review of cost formulas considered for adoption if the commission's cost finding section were to present its views of presentations of parties to rule-making proceeding, and the parties in turn were given opportunity for rebuttal. Request for participation of the cost finding section granted to extent indicated.—Rules to Govern Assembling & Presenting Cost Evidence, 321 I.C.C. 238 (243).

8.——Procedure.[Vols. 3, 12].—Since rates in issue were in effect when investigation was instituted, the burden of proof does not rest on respondents, and examiner properly directed protestants to proceed first with introduction of their evidence.—Export Grain from Texas to Texas Points, 319 I.C.C. 16 (18).

Although respondents do not have the burden of proving lawfulness of rates in effect before investigation was instituted, rail respondents failed to adduce any evidence of their actual costs to overcome the prima facie showing of Bureau of Inquiry and Compliance that considered rates are unreasonable because substantially below out-of-pocket costs, and thus have failed to sustain their burden of going forward.—Petroleum and Products from Oklahoma to Illinois, 318 I.C.C. 425 (428).

10.——Orders and enforcement thereof.—[Vol. 3].—Trial court did not abuse its discretion in denying the [Federal Trade] commission's petition for leave to inspect and copy certain evidence given before grand juries, which had returned indictments against certain corporations for violations of the Antitrust Acts, in connection with its investigation of possible violations of the commission's cease-and-desist orders previously issued against eight of those corporations. Such a petition is addressed to the sound discretion of the trial judge, to be dealt with by him in light of particular facts and circumstances of the particular case; that discretion should be exercised favorably to disclosure only when it is persuasively shown that the ends of justice require it. Trial judge's action on such a petition may not be disturbed absent a clear abuse of discretion.—Grand Jury Proceedings, In re, 309 F. 2d 440 (442, 444). [Not arising hereunder.]

Proceedings before a grand jury are protected against disclosure by the common law policy of secrecy, which policy is continued in rule 6(e) of Federal Rules of Criminal Procedure; "attorneys for the government" in that rule is restrictive and does not include attorneys for administrative agencies. The commission does not seek grand jury evidence for use in any judicial proceeding; it seeks private disclosure in aid of an administrative investigation which is not preliminary to or in connection with judicial proceeding within intendment of that rule. While disclosure of the evidence might facilitate the commission's investigation and serve the convenience of the agency, more is required to outweigh the traditional policy of secrecy of matters occurring before a grand jury.—Id., pp. 443-4.

14. Complaint not dismissed, absence of direct damage to complainant.—[Vols. 3, 7, 9, 12, 17, 18].—Since §13(2) provides that no complaint shall be dismissed because of absence of direct damage to complainant, the commission had jurisdiction to consider complaint by oil marketing company alleging discrimination in pipeline's refusal to accept certain shipments of crude oil for transmission in its "asphalt sour stream" even though prospective buyer, which would have been both consignor and consignee, never made a request for shipment.—Denver Oil Co. v. Platte Pipe Line Co., 316 I.C.C. 599 (601-2)*.

Section 13. (3) Investigation involving State regulations; conference of State and interstate commissions.—[Unchanged. See vol. 9, p. 7626, vol. 11, p. 9261.]

Historical note, vol. 3, p. 1830.

Notes of Decisions

Volume 3—p. 1831; Volume 7—p. 5472; Volume 9—p. 7626; Volume 11—p. 9261; Volume 12—p. 10304; Volume 13—p. 11011; Volume 14—p. 11514; Volume 16—p. 12736; Volume 18—p. 14172; Volume 19—p. 15337.

2. Investigation; on petition of carrier concerned.—[Vol. 3].—Motion of Oklahoma comission to strike all allegations of respondents' petition concerning its refusal to grant intrastate increases equivalent to those authorized in ex parte proceedings prior to Ex Parte No. 223, on ground that respondents' failure to file petition with Interstate Commerce Commission following each such denial or partial denial constituted laches, denied.

While the carriers may have been somewhat remiss in not appealing to ICC immediately after denial of their requests by the Oklahoma commission, there is not statutory requirement that they take immediate action. Moreover, laches is an equitable doctrine and cannot be upheld in an administrative proceeding; it is a valid defense only where delay in enforcing a claim works a disadvantage to the other party; but, instead of a disadvantage, respondents' delay in petitioning for relief under §13(4) gave Oklahoma shippers the advantage, for a considerable period, of lower rates than they would otherwise have enjoyed.—Oklahoma Instrastate Freight Rates and Charges, 321 I.C.C. 186 (207)*.

6. "Made or imposed by authority of any State."—[Vols. 3, 7, 11, 18, 19].—While reasonableness of intrastate fares is primarily a matter for determination by the State commission, because of Texas law limiting passenger fares on all railroads in that State to 3 cents a mile the Texas commission lacks jurisdiction to determine reasonableness of proposed increased coach fares exceeding that amount. However, the commission is not bound by an such limitation, and would be remiss in its duty and responsibility under the act, especially§13, if it failed to make a determination as to lawfulness of the proposed fares.—Texas Intrastate Passenger Coach Fares, 318 I.C.C. 151 (152, 155)*.

On further hearing, though Missouri Pacific and Texas & Pacific request an order under §13 requiring them to maintain reserved seat charges for certain intrastate passenger service similar to those charged interstate passengers (on ground that those charges plus the basic coach fares they seek would exceed the Texas statutory limitation), nothing indicates that such charges would or should be construed as embraced within the Texas maximum fare limitation, and both the State and the State commission point out that Texas authorities do not construe the Texas statute as controlling, but view the matter as one for handling by the State commission, which apparently has not been approached by respondents on the matter.—Id., 321 I.C.C. 569 (577)*.

Section 13. (4) Duty of commission where State regulations result in discrimination.—[Unchanged. See vol. 18, p. 14172.]

Historical note, vol. 3, p. 1830

Notes of Decisions

Volume 3—p. 1840; Volume 7—p. 5474; Volume 9—p. 7627; Volume 11—p. 9262; Volume 12—p. 10304; Volume 13—p. 11011; Volume 14—p. 11515; Volume 15—p. 12094; Volume 16—p. 12736; Volume 17—p. 13418; Volume 18—p. 14173; Volume 19—p. 15337.

3. Construction, generally.—[Vols. 3, 7, 9, 11-13, 15-19].—In finding the Kansas commission's intrastate rates on certain commodities to be unjust, unreasonable, and an undue burden on interstate commerce, the commission applied the correct rule of law to the problem before it. It is clear from examination of §13(4) and the entire record that whether the rates imposed by the State commission have created an unreasonable or unjust discrimination against interstate commerce is determined primarily by criteria pertaining to the overall profitable operation in interstate commerce of the railroads involved; another factor that may be considered is the likelihood, if any, that an increase in the intrastate rates may cause diversion of rail traffic in the involved commodities to truck carriers. In the final analysis it is systemwide experience that warrants the greatest consideration, because in that way the purposes of the act, to "promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation," can best be effectuated.—State Corporation Com'n of State of Kansas v. United States, 216 F. Supp. 376 (380)*.

In addition, the specific provision of §13(4)

that the commission may find without a separation of interstate and intrastate property, revenues, and expenses, and without considering in totality the operations and results thereof of any carrier or group of carriers wholly within any State, requires further emphasis on the necessary profitable operation of the interstate carriers; and provisions of §13(4) as last amended permit admission in evidence of opinions offered by the railroads' traffic experts as to effect of an increase in intrastate rates. In the circumstances, previous cases which considered the revenue from various commodities separately, and considered effect of an intrastate rate increase on the railroad's intrastate traffic in that commodity, are not controlling. A conclusion of the commission, based on supporting data, including estimates of experience railroad traffic men, that the probability of increased revenue was great enough to make rate increases a reasonable exercise of sound managerial judgment is sufficient to meet requirements of the statute. —Id., p. 380.

Subjects Covered by Provisions of Paragraph

22. Charges, other than rates and fares, generally.—[Vol. 3].—Though Missouri Pacific and Texas & Pacific request an order under §13 requiring them to maintain reserved seat charges for intrastate coach passengers on certain trains within Texas, corresponding to those applicable between Texas and out-of-State points, record does not disclose whether other trains making same runs allow passengers regular coach fares, and reserved seat service of those respondents does not now apply on intrastate traffic. There is therefore no discrimination against interstate commerce, since application of the reserved seat service to interstate and not to intrastate commerce was a matter of respondents' own choosing. Mere existence of a lesser service at a lower charge is no bar to publication of a more complete service at a higher charge.—Texas Intrastate Passenger Coach Fares, 321 I.C.C. 569 (577-8)*.

And though examiner found that Southern Pacific's practice of assessing interstate passengers a reserved coach seat charge while at same time and under like circumstances reserving coach seats for intrastate passengers without charge was unjustly discriminatory in violation of §13, investigation of practice of reserving seats for coach passengers in Texas embraces only services of Missouri Pacific and Texas & Pacific. Since Southern Pacific has not been made subject to that investigation, an order could not properly be directed against it, even assuming that the practice actually exists to extent indicated by the examiner. Moreover, only limited mention of Southern Pacific's practice, which is not in issue, was made at hearing, and in the circumstances no finding a to lawfulness thereof is made. However, it is expected that Souther Pacific and the Texas commission will not allow the failure to make a specific finding to preclude elimination of any unlawfulness that may in fact exist.—Id., p. 578

Prohibited Discriminations and Prejudices

41. Classes of——alternative application of prohibition.—[Vols. 3, 7].—Since §13(4) is couched in alternative phrasing, the commission's order in a proceeding thereunder may be based on either a finding of (1) undue preference or prejudice as between persons or localities in intrastate commerce on one hand and interstate on the other, or of (2) undue, unreasonable, or unjust discrimination against, or undue burden on, interstate commerce. Therefore, there was no requirement that the order requiring certain Oklahoma intrastate rates and charges be increased to the interstate level contain a finding as to both (1) and (2); order in issue being based on the (2) alternative, the other alternative is not involved.—Oklahoma Corporation Commission v. United States, 235 F. Supp. 803 (807-8)*.

45. Prejudicial or discriminatory relation, interstate and State——propriety of interstate rate or practice to be established.—[Vols. 3, 7, 9, 12, 13, 15, 16, 18, 19].—Prior decision required a parity in interstate and Texas intrastate coach fares as of that time but, since it did not require parity as to subsequent interstate fare increases, a disparity therein subsequently occurred. Considering respondents' substantial passenger deficits and need for revenue on their passenger service, present interstate coach fares of 3.676 cents a mile are

not in excess of a reasonable maximum; interstate and intrastate passengers are generally afforded the same service; corresponding Texas intrastate fares required to be increased to same basis as present interstate coach fares between points in that State.—Texas Intrastate Passenger Coach Fares, 321 I.C.C. 569 (571, 579)*.

Undue, Unreasonable or Unjust Discrimination Against Interstate or Foreign Commerce

50. Revenue discriminations.—[Vols. 3, 7, 9, 11-13, 15-19].—General increases authorized in Ex Parte Nos. 162 through 223 were based on needs of railroads generally, including respondents, for additional revenues to meet increased operating expenses incurred in intrastate as well as interstate transportation. Combined increase in operating expenses, including employee compensation, prices of materials, supplies, and fuel, taxes, and rents, 1960 over 1946, of class I railroads operating in Oklahoma is almost 100 percent, and costs of new equipment increased by 194 to 223 percent. Respondents have clearly shown their need of additional revenues and that intrastate rates on most of the commodities involved are lower than corresponding interstate rates, which, including authorized increases, do not exceed reasonable maxima. Operating conditions affecting the intrastate traffic concerned are no more favorable than those incident to interstate transportation thereof, and the local movements in some instances involve additional expense. Oklahoma intrastate traffic should make a reasonable contribution to respondents' increased expenses.—Oklahoma Intrastate Freight Rates and Charges, 321 I.C.C. 186 (195-7, 208)*.

Informed judgment of respondents' traffic officials as to revenue gains from increases sought on commodities moving in substantial volume is entitled to great weight. Oklahoma intrastate rates on grain, grain products, and commodities taking same rates, on sand (except industrial sand) and gravel, on broken, ground, and crushed stone and rock and related articles, on clay or shale cinders, on agricultural or crushed limestone, line, and asphalt rock and related articles, are abnormally low and unjustly discriminate agains interstate commerce. Such unlawfulness should be removed by increasing those rates to level of rates maintained by respondents on like traffic between Oklahoma and adjoining States. Such increases should result in substantial net gain in revenue, and protestants have not shown that they would be disadvantaged thereby.—Id., pp. 208, 209-10.

But, in view of the competition between coal and other fuels and decline in use of coal, likelihood of increased revenue from increase in considered intrastate rates thereon is not so great as to warrant risk of further diversion of that traffic; and increasing motor competition for transportation of industrial sand and cement impels conclusion that increases sought on those commodities would increase such diversion to an extent offsetting any benefits therefrom. And the small amount of intrastate l.c.l. traffic handled by respondents under existing minimum charge and at minimum rate on shipments accorded pickup and delivery imposes no undue burden on interstate commerce; nor is any necessity shown for increased minimum charge per car on the heavy loading aggregates, in view of rate increases prescribed thereon. Application of the ex parte increases sought to those intrastate rates and charges is not warranted.—Id., p. 208.

General increases authorized in Ex Parte Nos. 206 and 212 were based on need of railroads generally, including respondents, for additional revenue to meet increased expenses incurred on intrastate as well as interstate traffic; intrastate operating conditions in Kansas are no less favorable than for like interstate traffic, and Kansas intrastate traffic should make a revenue contribution to those operating expenses more nearly proportionate to that made prior to such authorized increases; therefore, Kansas intrastate rates on specified commodities fail to bear their fair share of increased operating expenses, and unduly burden and discriminate against interstate commerce, to extent they are lower than rates reflecting the Ex Parte 206 and 212 increases; resulting rates will be on no higher level, and in most instances will be lower, than reasonable interstate rates on like traffic, and will make a substantial revenue contribution.—

Kansas Intrastate Freight Rates and Charges, 315 I.C.C. 223 (229-234, 237-40)*.

However, since competition between coal and other fuels, including natural gas, liquid petroleum gas, and fuel oil, is more acute in Kansas than in other areas of the country, no substantial increase in revenue could be expected as result of increase in intrastate rates on bituminous coal to the interstate level; likewise, no increase is warranted in intrastate rates on refractories in absence of any showing of intrastate movements.—Id., pp. 234-7, 240.

Passenger service: [Vol. 17].—Texas intrastate coach fares, on level approximately 6 percent lower than corresponding interstate fares, unjustly discriminate against and unduly burden interstate commerce when they are the only such fares in western district that have not been brought up to the interstate level. Each transportation service should pay its own way so far as is practicable, without burdening other traffic, and record shows that Texas intrastate coach service is not doing so; prescription of 6-percent increase sought, to level of interstate coach fares found just and reasonable in 308 ICC 125, which would make contribution of the Texas coach fares to the total transportation burden commensurate with that of interstate fares to and from Texas, is warranted.—Texas Intrastate Passenger Coach Fares, 318 I.C.C. 151 (153-4, 155)*.

While future revenue effects can only be estimated from all the evidence, it does not appear that the modest increase sought will adversely affect respondents' revenues; rather, it is reasonable to believe that it will have little effect on quantum of intrastate passenger patronage. Considering that respondents' passenger operations, both interstate and intrastate, are conducted at a loss, and that additional revenue contributions are sorely needed to enable them to render adequate and efficient service, the 6-percent increase in intrastate coach fares cannot be regarded as to insubstantial to warrant the relief sought.—Id., p. 154.

And though protestants contend that increase prescribed in prior report has not increased respondents' revenues, review of such revenues by respondents over a much longer period indicates that fluctuations therein are due to many factors, including public use of rail passenger service, competition from other transportation modes, and general economic condition of the country. Implication in protestants' position that further increase sought to parity with present interstate fares reflecting two subsequent increases, one of 5 percent and one of 10 percent which supplanted former excise tax without actual increase to passengers, would in itself cause diversion of enough traffic to offset any anticipated gain, is unsupported. Respondents' evidence, based on considerable study by their officials, is convincing that proposed modest increase in fares, plus the excise tax previously in effect, will result in substantial increase in revenue and at the very least aid in arresting the downward trend in intrastate passenger revenues. Further increase sought prescribed for reasons stated in prior report.—Id., 321 I.C.C. 569 (571, 576)*.

Investigation—Procedure

56. Full hearing, requisites.—[Vols. 3, 7, 9, 12, 13, 16, 17].—Notice and hearing were not prerequisites to entry of the commission's amended order which simply makes clear the scope of its findings in a proceeding involving Oklahoma intrastate freight rates and charges; the clarifying order states explicitly what is implicit in the previous order and decision. Under §16(6) the commission may suspend or modify its orders upon such notice and in the manner it deems proper, and §17(3) gives it the power to correct inadvertent errors; however, since the order in question made no substantive change in the previous order, there is no legal basis for holding that notice and a hearing are necessary to due process.—Oklahoma Corporation Commission v. United States, 235 F. Supp. 803 (807)*.

58. Quantum and character of evidence.—[Vols. 3, 7, 9, 11-13, 15-19].—Since it is the commission, not the reviewing court, that judges the weight of the evidence, all pertinent evidence bearing on the issues in a commission proceeding under §13(4) should be submitted to it in the first instance and should not be received by the court in a suit to set aside and enjoin enforcement of the commission's order as though it were conducting a

trial de novo.—Oklahoma Corporation Commission v. United States, 235 F. Supp. 803 (806-7)*.

Evidence on which the commission based its conclusion that an increase in Kansas intrastate rates on certain commodities would not divert traffic from the railroads, but would increase railroad revenues without appreciable increase in expenses, is both documentary and direct. Exhibit presented by manager of Statistical Bureau of Western Traffic Assn. shows that any traffic diversion resulting from progressively higher rates during the 13-year period it covered was not enough to defeat purpose of the increases, i.e., production of greater revenues; that presentation was supplemented by exhibits and testimony of experienced traffic officials of five major Kansas railroads who, representing the Kansas railroad system and familiar with rates and revenues of the various companies, testified that while there might be some diversion of traffic the net result of the increases would be substantially increased revenues. Opinions of railroad traffic experts in judging effect of an increase in intrastate rates are admissible, and are substantial evidence of value.—State Corporation Com'n of State of Kansas v. United States, 216 F. Supp. 376 (381-4)*.

The question of weight of the evidence was for the commission and not for the court, and its findings of fact, supported by substantial evidence, are not subject to review; its conclusion, based on supporting data including estimates of railroad traffic experts, that probability of increased revenue was great enough to make rate increases a reasonable exercise of sound managerial judgment is sufficient to meet requirements of the statute.The commission had before it all evidence necessary for it to make a proper decision in accordance with the criteria which must be considered; consequently, its judgment must be affirmed. —Id., pp. 380, 384.

Respondents have established by convincing proof, which meets the "high standard of certainty" required by 356 US 421, that the present low level of Texas intrastate coach fares unjustly discriminates against, and casts an undue burden upon, interstate commerce; the Texas coach fares are the only such fares in the western district that have not been brought up to level of the interstate fares, and there is no indication of any substantial difference in transportation conditions within Texas and those within other western States or those affecting interstate coach traffic in that district, which would justify the difference in level of fares.—Texas Intrastate Passenger Coach Fares, 318 I.C.C. 151 (154)*.

At the further hearing the Director of rate division of the Texas commission testified and introduced three exhibits, in opposition to the intrastate fare increase sought, which testimony primarily concerns relation between the fare increases and the passenger revenues; there being some confusion in the transcript concerning admission of that evidence, the examiner concluded it might be placed in the brief to be filed subsequently, to which ruling protestants (who offered the evidence) properly excepted but they did reproduce tthe exhibits in their brief. Though much of such evidence is duplicative of that received at the original hearing, the exhibits contain matter clearly relevant to the issue on further hearing of parity with subsequent interstate increases; witness's statement explaining the exhibits is also relevant, and though certain argumentative statements therein properly belong in the brief, their inclusion in the transcript is insignificant and is insufficient reason for excluding the statement as a whole. Examiner's ruling, to extent it may be construed as excluding such evidence, reversed; the statement and accompanying exhibits received in evidence.—Id., 321 I.C.C. 569 (573-4)*.

Though examiner indicated that he gave considerable weight to fact that respondents were unable to prove that any increase in revenue resulted from 5-percent increase in Texas intrastate coach fares established in October 1962 pursuant to order in prior report, at time of further hearing in March 1963 the 1962 annual reports were not available and the first quarter of 1963 was not yet completed; respondents thus had no reportable period with which to deal. Furthermore, calculation of revenue for latter period, even if possible, would be of no material significance because the period is too short.—Id., p. 577.

Protestants' objections to certain statements of railroad officials regarding their opinion that increases sought in Kansas in-

trastate rates would result in greater revenue are based on generality of such statements, thus bear on weight to be accorded them, not their admissibility. Informed judgment of respondents' traffic officials on whether considered commodities can sustain proposed increases and thus provide substantial additional revenue is entitled to considerable weight, and witnesses' statements are supported by data showing that revenues generally have increased following application of authorized rate increases.—Kansas Intrastate Freight Rates and Charges, 315 I.C.C. 223 (225-6, 240)*.

61. Findings as to discrimination or prejudice.—[Vols. 3, 7, 12-19].—See Texas Intrastate Passenger Coach Fares, n. 22 above.

62. Order prescribing intrastate rate or practice.—[Vols, 3, 7, 9, 12, 13, 15-19].—In prescribing increases in intrastate rates corresponding to general revenue increases approved for interstate rates, to remove an undue burden on interstate commerce, the commission is not obliged to consider reasonableness of each individual rate before carrying into effect the necessary increased schedule; it may provide in its order for modification of the general order in specific situations where the general order might not be justly applicable; such provision was made in the order under review.—State Corporation Com'n of State of Kansas v. United States, 216 F. Supp. 376 (384)*.

Although, when affirmative findings and orders are issued respecting revenue increases in intrastate rates under §13(4), rates reflecting the authorized ex parte increases are generally prescribed as minima, in view of lack of uniformity with which respondents propose to apply the various ex parte increases sought in Oklahoma intrastate rates on described commodities, it is more appropriate to prescribe the increased intrastate rates as maxima; respondents may then, in exercise of their managerial discretion, apply the increases to extent deemed necessary in light of prevailing competitive conditions.—Oklahoma Intrastate Freight Rates and Charges, 321 I.C.C. 186 (209)*.

See also Texas Intrastate Passenger Coach Fares, n. 22, above.

67. Observance of order.—[Vols, 3, 7, 9, 15].—Orders of the commission apply only to carriers and do not control the action of city officials on city property.—United States v. City of Jackson, Miss., 206 F. Supp. 45 (49).

71. Province of commission and of courts.—[Vols. 3, 7, 9, 13, 15, 16, 18].—An order of the commission carries a strong presumption of validity which is not weakened by the fact that it has been challenged in court. Such orders are not to be overturned on judicial review unless based on a mistake of law, made without a hearing, exceed constitutional limits, are unsupported by evidence, or for some other reason amount to an abuse of power; the court may not substitute its own judgment for that of the administrative agency. Applying those rules, and after a complete examination of the record in the light of the commission's statutory power to require States to increase their intrastate rates, the court concludes that the commission applied the correct rule of law in deciding that certain Oklahoma intrastate rates and charges must be increased to the interstate level, and that substantial evidence supports that decision; sustained.—Oklahoma Corporation Commission v. United States, 235 F. Supp. 803 (806, 808-10)*.

The question of weight of the evidence is for the commission, not the courts. The commission was created to function as a body which, from its special character, would be best fitted to determine, among other things, whether on the facts in a given case there is unjust discrimination against interstate commerce, including the prohibited discrimination produced by intrastate rates. In such a situation, where the commission exercises its authority after hearing and proper application of rules of law, its findings of fact supported by substantial evidence are not subject to review; the court may not substitute its judgment for that of the commission.—State Corporation Com'n of State of Kansas v. United States, 216 F. Supp. 376 (384)*.

Section 13a. Discontinuance or change of certain operations or services.—[Unchanged. See vol. 18, p. 14183.]

Notes of Decisions

Vol. 18—p. 14185; Vol. 19—p. 15343.

1. Constitutionality.—[Vols. 18, 19].—There can be no question of Congress's power to legislate concerning the operation or discontinuance of trains engaged in interstate commerce; its power to authorize abandonment of an unprofitable branch line within a State was upheld in 271 US 153 as a necessary incident of freeing interstate commerce from unreasonable burdens. Such exercise of federal power is not an invasion of a field reserved to the State, because the State's power over intrastate commerce may not be exercised to the prejudice of interstate commerce, and the railroad's obligation to provide intrastate service on every part of its line within the State is subordinate to its federal duty efficiently to render transportation services in interstate commerce; because the same instrumentality serves both, Congress has power to assume control insofar as interstate commerce is involved.—Sludden v. United States, 211 F. Supp. 150 (155)*.

It was specifically held in 315 US 110 that States cannot constitutionally thwart the regulatory power of Congress when it is exercised with respect to intrastate commerce. Power to determine the manner and extent of subordination of intrastate service to the end of adequate interstate service is inherent in the United States as an incident of its power over interstate commerce; §13a(1) is constitutional and deprives neither the State nor any individual of any right guaranteed by the Constitution.—Id., p. 156.

The court adheres to its conclusion in 168 F. Supp. 324, affirmed 359 US 27, that §13a(1) is constitutional and deprives neither the State nor any individual of any right which the Constitution of the United States guarantees. —Pennsylvania R. Co. v. Sharfsin, 240 F. Supp. 233 (235-6)*.

On defendants' motion to dismiss, and taking judicial notice of decision in 211 F. Supp. 150 which held §13a(1) to be constitutional, railroad's action to restrain Pennsylvania Public Service Commission, and the members thereof individually, from enforcing unappealed State agency decision denying the railroad authority to discontinue operation of passenger trains within the State cannot be said not to set forth a cause of action; trains in question had been discontinued pursuant to §13a(1), without an investigation by the commission, prior to issuance of the decision in issue; motion to dismiss denied.—Pennsylvania R. Co. v. Sharfsin, 215 F. Supp. 493 (494, 497).

Though carrier contends that any order issued under authority of §13a requiring continuance of operations after effective date of discontinuance notice would contravene the Fifth Amendment, a Federal agency charged with administration of a Federal statute has no jurisdiction to question constitutionality of that statute.—Chicago & N.W. Ry. Co. Discontinuance, 320 I.C.C. 85 (87)*.

The court, not the commission, is the proper tribunal for determining constitutionality of §13a(1) and (2) or any other provision of the act.—Pennsylvania R. Co. Discontinuance of Passenger Service, 317 I.C.C. 111 (120).

2. Construction and interpretation.—[Vols. 18, 19].—The statutory scheme which Congress embodied in §13a prescribes precisely the same substantive standard to govern discontinuance of either interstate or intrastate operations. All that need properly be considered under this standard, as both the language and history of §13a(2) make abundantly clear, is what effect the discontinuance of the specific train or service in question will have upon public convenience and necessity and upon interstate operations or commerce; the commission correctly summed up the matter in 312 ICC 631.—Southern Ry. Co. v. North Carolina, 376 U.S. 93 (103-4)*.

Although §13a(2) was enacted at the same

time that §13(4) was amended to permit the commission to act in intrastate rate proceedings "without a separation of interstate and intrastate property, revenues, and expenses, and without considering in totality the operations or results thereof of any carrier. . .wholly within any state," and no similar language was included in §13a(2), there is no reason to assume that Congress regarded the new language as embodying a standard which had to be specifically incorporated into every statute to which it was intended to apply. In amending §13(4) as a result of decisions in 355 US 300 and 356 US 421, Congress was simply reaffirming what it conceived as the original intent thereof.—Id., pp. 98-100.

Legislative history clearly indicates that Congress, in enacting §13a(2), was addressing itself to a problem quite distinct from that reflected by overall unprofitable operation of an entire segment of railroad line; it was primarily concerned with problems posed by passenger services for which there was no longer significant public demand and which were consistently deficit-producing, thus forcing carriers to subsidize such operation out of freight profits. Holding of the lower court, that it was erroneous as a matter of law for the commission to order discontinuance of considered intrastate passenger trains without taking into account the profits from freight operations on the same line, reversed; remanded with instructions to reinstate the commission's report and order.—Id., pp. 96-7, 100-1, 105-6.

Section 13a(1) applies to any train "operating from a point in one State to a point in any other Sate," and §13a(2) applies to any train "operated wholly within the boundaries of a single State"; as appellee's passenger trains between Butler and Susquehanna Transfer operate wholly within the State of New Jersey, the statute on its face requires that in seeking to discontinue those trains it follow the procedure set forth in §13a(2). That appelle's passengers cross a State line by other conveyance (bus service into New York City operated under contract with the railroad) does not alter that conclusion; the statute speaks not of interstate commerce but of the physical limits of a train's or ferry's operations, and makes no mention of "bus."—New Jersey v. New York, S. & W. R. Co., 372 U.S. 1 (2, 4, 5 Note)*.

Any doubt as to this construction of the statute is dispelled by examination of its legislative history, which makes clear that Congress intended to, and did, leave jurisdiction over trains operating wholly within a single State with the State regulatory commissions. In setting aside the commission's order dismissing discontinuance notice filed by appellee under §13a(1) for want of jurisdiction, the district court disregarded the plain words of the statute and the pertinent legislative history; while the purpose of the statute was, as that court observed, remedial, it was conditioned by a desire to protect State jurisdiction over local operations. To ignore this was error; judgment of the lower court reversed.—Id., pp. 5, 8-9.

The purpose of Congress in enacting §13a was remedial; and, since under the statute a railroad is free to discontinue a passenger train operation or service absent an order of the commission requiring such train to be continued in operation or service "in whole or in part," apparently Congress intended to grant the commission authority to order a partial continuance even though the railroad sought to discontinue an entire run from its origin to the point of termination. Such has been the commission's interpretation in prior cases and, as it is charged with administration of §13a, its interpretation is entitled to great weight. Furthermore, neither the statute nor its legislative history suggest that the commission is limited to discontinuance sought in the original notice and cannot order continuance of part of the service. In effect, the commission required continuance "in part" of passenger train operations between Buffalo, N.Y., and Baltimore, Md., sought to be discontinued, when it ordered continuance of operations between Baltimore and Harrisburg, Pa., and, at the same time, permitted discontinuance thereof between Harrisburg and Buffalo; sustained.—City of Williamsport v. United States, 282 F. Supp. 46 (48-9)*.

Legislative history of §13a indicates that it was designed to permit railroads, at their option, to have the commission, rather than State commissions, pass on discontinuances or changes in operation or service of passen-

ger trains; however, there is nothing to suggest that Congress intended to deny judicial review of passenger discontinuances. And, agreeing with decision in 269 F. Supp. 80, the court fails to find convincing evidence that Congress intended the unusual and concededly unfair result of granting judicial review of the commission's determination solely to railroads, and not to opposing parties. Thus, as the court had jurisdiction to review the commission's action in considered §13a proceeding, District Judge could properly restrain the railroad from discontinuing the trains pending a final commission order; railroad's motion to dissolve temporary restraining order, because of lack of judicial review authority, denied.—City of Williamsport v. United States, 273 F. Supp. 899 (901-3)*.

In action to set aside the commission's order authorizing discontinuance of passenger train service within the State, it is not the function of the court to determine what effect proposed discontinuance may have on public convenience and necessity and upon interstate commerce; Congress has placed that responsibility upon the commission. The court is limited to determining whether the commission's findings are supported by substantial evidence; record is sufficient to support the commission's conclusions; sustained. —State of Montana v. United States, 202 F. Supp. 660 (662)*.

Congress did not intend to limit application of §13a to operations which, in themselves, were deficit-producing; it clearly contemplated that continuation of a service might "unduly burden" interstate commerce, even though a net loss would not result. The statute was deliberately drawn in broad flexible terms; and whether continuance of a train will unduly burden interstate commerce is a broad inquiry which excludes no relevant consideration. Where service provided by train to be discontinued will be replaced by adding to equipment, and revising schedule, of another train operating over same route and serving same points, amount of savings from such train consolidation reflects a burden which will be imposed on commerce if the consolidation is not permitted. Thus, the commission may ground its conclusion, that continuation of an operation under §13a(1) would unduly burden interstate commerce, upon the savings from train consolidation that results from the discontinuance, although the continuation would not result in net loss to carrier; complaint dismissed.—People of State of California v. United States, 258 F. Supp. 950 (952, 954-5)*.

In action to enjoin and set aside, or remand, the commission's decision permitting discontinuance of interstate passenger trains, the court must determine whether proper statutory standards were applied. The difference in language between §13a(1) and §13a(2) suggests that Congress intended separate standards, and that in case of interstate operations either a finding of undue burden or that the service not required by public convenience would support the commission's refusal to interfere with the discontinuance; however, in 376 US 93 (which involved intrastate discontinuances), the Supreme Court declared that the standards are the same. In case under review, both findings were made; however, in any case, as a practical matter, factors affecting undue burden must also be weighed in determining whether the service is required by public convenience and necessity.—State of Vermont v. Boston and Maine Corp., 269 F. Supp. 80 (84-5)*.

By §13a(1) Congress has vested exclusive dominion in the commission over proposed discontinuances of interstate trains, and it is implicit in the act that the commission has the right to act definitively by mere inaction. Unless the commission acts, the carrier may discontinue or change the service in accordance with the notice, the laws or constitution of any State, or the decision or order of, or pendency of any proceeding before, any court or State authority to the contrary notwithstanding. The commission's action in concluding not to institute an investigation into a proposed discontinuance is thus committed to its exclusive discretion and is not subject to judicial review.—Pennsylvania R. Co. v. Sharfsin, 240 F. Supp. 233 (236)*.

Carrier's authority under §13a(1) to discontinue passenger service is subject only to a discretionary power given the commission to investigate proposed service reductions and to order service continued for a year if it is found to be needed; no specific approval of

service cutbacks is ever required; and whether or not the commission will even investigate a proposed discontinuance is left to its absolute discretion. After conducting an investigation the commission has only two choices, (1) it may do nothing, in which case the carrier puts the service reductions into effect, or (2) it may make appropriate findings and order the service continued.—State of Minnesota v. United States, 238 F. Supp. 107 (111-12)*.

Primary purpose of a hearing under §13a(1) is to give the commission enough information to enable it to reach a sound judgment as to whether it should interfere with proposed cutbacks. While its findings and conclusion that service should be continued would be reviewable by the courts, if it decides not to interfere with service cutbacks, then it takes no action beyond terminating the investigation; and its decision to take no action is not reviewable. The commission's order terminating the investigation into considered train discontinuances (after concluding that value of the service was outweighed by burden on the railroad) is not an appealable order within meaning of 28 USC §1336; complaint dismissed.—Id., pp. 110, 112-13.

Section 13a(1) merely permits railroads at their option to have the commission, rather than State commissions, pass upon discontinuance or change in operation of any train or ferry not located wholly in the same State; and the commission is limited to 30 days within which it is empowered to institute an investigation and thereby acquire jurisdiction over the proposed discontinuance. Unless the commission acts within that time, the carrier may discontinue or change the service in accordance with the prescribed notice, notwithstanding the laws or constitution of any State or the decision or order of, or pendency of proceedings before, any court or State authority.—Sludden v. United States, 211 F. Supp. 150 (152-3)*.

In light of the legislative history of §13a indicating that one of its purposes was to expedite discontinuance of train service to alleviate the losses incurred in railroad passenger service, and that the intrastate portion of the service involved is an integral part of a movement in interstate commerce, discontinuance of passenger train service between Harrisburg, Pa., and Hagerstown, Md., entailing discontinuance of intrastate service between Harrisburg and the Maryland-Pennsylvania State line, was clearly within scope of §13a(1). Moreover, in view of the undisputed interstate character of the service involved, the commission's exclusive dominion of the matter is demonstrated in 271 US 153.—Id., pp. 155, 156.

The commission's action concluding not to investigate a proposed train discontinuance is committed ot its exclusive discretion and is not subject to judicial review; the court has no jurisdiction to require it to institute an investigation of a proposed discontinuance, and plaintiffs have no constitutional or statutory right to a hearing before the commission decides not to enter upon such investigation.—Id., p. 153-4.

Furthermore, §13a(1) is self-implementing: the commission, having failed to take affirmative investigatory action within the 30-day period, lost all authority to take such action and the carrier was thereupon vested with plenary power to effect the noticed discontinuance. Any order of the commission after expiration of the 30-day period would be completely gratuitous and of no consequence. —Id., p. 154.

When carrier sought discontinuance of all passenger service in §13a(1) proceeding, but at hearing counterproposed renumbering, rescheduling and continuing two pairs of trains, the commission, having jurisdiction over the matter, found continuance of considered trains, as proposed, was required; however, so far as purposes of discontinuance proceeding are concerned, scheduling, stations to be served, and numbers assigned to trains not permitted to be discontinued are matters within the discretion of management so long as the changes in scheduling and in the stations to be served do not substantially change the service being offered by the involved trains.—St. Louis-S. F. Ry. Co. Discontinuance, 327 I.C.C. 433 (434, 454, 463-5).

Although protesting labor union argues that the §13a(1) proceeding, seeking to discontinue all passenger service, was conceived and time to defeat protestants' [train porters] right to be nondiscriminatorily classified (presently being litigated in Federal Court class action)

and that, by permitting discontinuance of all passenger service, the commission would in effect ratify and approve the carrier's discriminatory policies, the cases cited in support thereof do not apply to railroad employees and do not concern the fields of fair employment practices or labor relations. No source from which the commission can derive jurisdiction over employment practices is suggested; that jurisdiction, and responsibility for enforcement of laws relating thereto, lies elsewhere. However, the position and contentions of the porters are duly considered in connection with the overall adverse effect upon employees which, of course, is a factor to be considered in determining public convenience and necessity in a §13a(1) proceeding.—Id., pp. 456-9, 465.

The provision of the 1958 amendment to the act, conferring jurisdiction on the commission to approve discontinuance of passenger trains, recognizes no distinction on basis of financial stature of the carrier requesting such relief.—Union Pac. R. Co. Discontinuance, 320 I.C.C. 493 (522)*.

Though protestants contend that prospective savings due to change in operation of one pair of trains, for which deficit operations are not shown, as result of consolidation therewith of another pair which would be discontinued, are not valid considerations in passing on a proposed discontinuance required to eliminate operating deficits, and that unless "savings" relate to actual "deficits" there can be no finding of undue burden on interstate commerce, every delegatory provision of §13a refers by specific language to the discontinuance "or change" of the "operation or service" of any train; denial of opportunity to realize appreciable savings, which would seriously prejudice public convenience and necessity, would unreasonably sanction continuance of an "undue burden," contrary to intent of the statute.—Id., p. 523.

Although a prior order of the commission required continuance of considered interstate trains for 1 year, upon expiration of that period the commission's jurisdiction expired and applicability of State law was restored. As §13a(1) makes plain, interstate trains may be discontinued in whole or part pursuant to laws of the affected States without a proceeding before the commission.—Soo Line R. Co. Discontinuance, 320 I.C.C. 337 (340).

The purpose of §13a(1) is to alleviate the financial difficulties of the railroad industry and strengthen the national transportation system by removing obstacles that railroads face in attempting to achieve economies and efficiencies through discontinuance of uneconomic and duplicative services.—Chicago & N.W. Ry. Co. Discontinuance, 320 I.C.C. 648 (656).

While the statute contemplates a prerogative in carrier management to institute a discontinuance and to effectuate it unless governmental action is interposed, it also contemplates, where the carrier invokes the commission's jurisdiction under §13a(1), that the commission shall make certain public interest findings. Therefore, since the commission is not free to decide such public issues on the basis of legalistic procedural rules, railroad's argument that protestants failed to meet their burden of proving that continued operation of considered trains was required by public convenience and necessity, which is tantamount to a contention that the investigation be discontinued and that the commission's order be predicated upon the default of protestants, is most inappropriate.—New York, N.H. & H. R. Co. Discontinuance, 320 I.C.C. 544 (546-7).

If no material disadvantage to the carrier is to be eliminated through proposed train discontinuance, the commission's decision must turn upon the effect thereof on the traveling public; and issues to be determined are (1) whether continued operation of the trains in question will constitute an unjust and undue burden on the carrier's interstate operations or upon interstate commerce, and (2) whether present or future public convenience and necessity permit the proposed discontinuance of service. Under §13a(1) the commission is required to protect interstate commerce from onerous burdens which may affect the carrier's ability to render efficient service to the public; and factors to be considered by the commission, no one of which is itself decisive or controlling, include not only financial results obtained by the carrier in providing the service proposed to be discontinued, but populations of the communities served, the use

made by the public of the service, and other means of transportation available in the areas. —New York, N.H. & H. R. Co. Discontinuance, 320 I.C.C. 466 (486).

Language of §13a(1) is clear and unambiguous as to conditions under which railroads may discontinue trains, and there is no warrant in the law for imposition of additional conditions or restrictions by the commission. Thus, discontinuance of considered trains cannot be conditioned on a requirement that carrier stop another pair of trains at a city which would be left without any rail passenger service should those trains be discontinued.—Chicago, R.I. & P. R. Co. Discontinuance of Trains, 317 I.C.C. 601 (611-12).

The commission's jurisdiction under §13a(1) over proposed discontinuance or change of train service is limited to that specifically set forth in the notice, notwithstanding services of other trains may be altered as result thereof. Thus, while proposed discontinuance of carrier's Overland passenger trains and continuance of the service by its City trains between same termini requires it to submit all facts relating to both sets of trains, furnishing of such information cannot be construed as attempt to invoke the commission's jurisdiction over the City trains; and there is no merit to argument that the commission may not make the necessary findings to permit the discontinuance subject to its jurisdiction if other trains not so subject would continue the service.—Southern Pac. Co. Discontinuance of Passenger Trains, 317 I.C.C. 519 (522-3).

Though the commission may rely on carrier's representations as to service to be rendered by the City trains in future, it may not impose any conditions on operation of those trains to ensure performance of such service. However, if it appears that such an unenforceable representation would not fully assure continuance, in whole or part, of services which should properly be continued, the commission may take appropriate action respecting the proposed discontinuance of the trains subject to its jurisdiction.—Id., p. 523.

Legislative history of §13a(1) reveals intent of Congress to supersede State jurisdiction in order to afford railroads a means of obtaining relief which it considered otherwise unobtainable. The statute being in derogation of State laws, it is incumbent on those wishing to invoke its provisions to comply strictly with its requirements, since they constitute the safeguards intended by Congress to ensure that the superseding of State authority would be pursuant to due process of law; it follows that failure to comply strictly with those requirements results neither in invoking provisions of §13a(1) nor in superseding State law. Therefore, although mere filing of discontinuance notice gives the commission authority to institute an investigation under §13a(1), it is clear from language of the statute and its legislative history that where, upon investigation, it appears that its provisions have not been effectively invoked, the commission has no power to consider or dispose of the proposal on its merits.—Chicago, M., St. P. & P. R. Co. Discontinuance, 317 I.C.C. 761 (772).

Requirement of §13a(1) that carrier post a copy of discontinuance notice at every station served by the trains is intended as one of the safeguards of due process, and language of the statute makes clear that effective invocation of its provisions requires carrier as a prerequisite to post notice at every station then being served by the trains "involved" in the proposal, and that such requirement is not fully met where posting is confined to stations in the area where service is to be discontinued. This is apparent since passengers at all points on the line may be equally affected by discontinuance of any portion of the operation of the trains. And requirement of rule 43.5(j) of commission's regulations under §13a for posting of notice at each station "involved" likewise includes every station served by the trains. As in instant proceeding carrier has not fully complied with the posting requirements, there is no pending proposal over which the commission has power to act. —Id., p. 773.

The commission's authority in a §13a(1) proceeding to require continuance or restoration of operation or service of a train is limited to the proposal described in the notice filed with it by the carrier. Upon proper invocation of that section, the authority of the States involved to act in connection with the trains in question is superseded for periods specified in the statute only to extent that operation of or

service rendered on such trains is embraced in the proposal specified in the notice filed; and the commission's jurisdiction over the operation or service involved is limited to a period of 1 year from date of order requiring continuance of such operation or service in whole or in part; at expiration of that period, the jurisdiction of any State is no longer superseded unless the procedure provided by §13a(1) is again invoked by the carrier.—Id., pp. 769-70.

Even though carrier failed fully to comply with terms of the commission's order in earlier proceeding authorizing discontinuance of its Chicago-Tacoma trains west of Butte, Mont., but requiring continuance thereof between Minneapolis and Butte, upon expiration of the 1-year period the commission lost its statutory power to exercise authority over operation of those trains and the jurisdiction of the involved States was restored. It follows that the commission has no power to order restoration of the operations and services of those trains east of Butte which were discontinued, eliminated, or modified shortly after issuance of the prior order.—Id., p. 771.

State's motion to dismiss discontinuance proceeding on ground that discontinuance of carrier's only remaining passenger service over routes described and within the State would in effect be a complete abandonment of passenger operations in the State, which would require authorization under provisions of §1(18-20), denied. Section 1(18) confers no jurisdiction over partial discontinuance of railroad service, including passenger service, and enactment of §13a did not broaden the commission's jurisdiction under §1(18), but rather made express provisions concerning discontinuance of passenger trains under the act.—Chicago & N.W. Ry. Co. Discontinuance, 320 I.C.C. 85 (86-7)*.

Contention that proposal to discontinue operation of passenger trains only between two points in a State should have been filed under §13a(2) is without merit. Where trains physically operate from a point in one State to a point in another, and equipment and passengers thereon move through from one State to a point in another without change of train at an intermediate point, the trains are interstate trains and discontinuance of any portion thereof is subject to provisions of §13a(1), nothwithstanding the fact that the portion to be discontinued is solely within the boundaries of a single State.—Missouri Pac. R. Co. Discontinuance, 320 I.C.C. 383 (385-6).

Nothing in the act requires any carrier to proceed under either §13a(1) or §13a(2) to obtain authority to discontinue any of its trains; carriers may elect to disregard both sections and rely solely on the appropriate State commission for authority to discontinue certain interstate or intrastate trains; however, if a carrier elects to rely on the State commissions for a portion of the relief desired, and on the commission for additional relief under provisions of §13a(1), the commission's jurisdiction is restricted to consideration of the specific proposals in the proceeding filed with it, and does not extend to trains not included therein.—Pennsylvania R. Co., Discontinuance, 317 I.C.C. 111 (116, 119).

But there is no merit to contention that, once having exercised election to proceed before the State body and not having received all the relief requested, the carrier cannot subsequently seek the same relief from the commission; §13a(1) accords the carrier an unrestricted right to seek relief from the commission in connection with its interstate trains, and it matters not that relief was previously sought from the State commission also exercising jurisdiction over such trains. To interpret §13a(1) as contended would negate one of the principal purposes of the statute, namely, to insure the absolute right of interstate carriers to seek relief from the commission when it could not otherwise be obtained from State regulatory commissions.—Id., pp. 117-8.

Nor is there merit to motion to dismiss petition for authority to discontinue a group of intrastate trains, on ground that Congress intended §13a(2) to apply only to discontinuance of a single intrastate train, and to reserve to State regulatory bodies the power to determine need for continuance of any group of trains. Since §13a(1) and (2) each use the words "any train" in specifying matters over which the commission is given jurisdiction, the ruling in 307 ICC 239 as to meaning of that language in a §13a(1) proceeding is applicable to instant §13a(2) proceeding. Nor does §13a(2) limit the commission's jurisdiction to

instances where the carrier's operations extend into more than one State and it seeks to discontinue trains operated exclusively in one State; language of the section is unambiguous as to jurisdiction accorded the commission in such instances.—Id., pp. 117-8.

But §13a(2) provides no alternative method of seeking authority to discontinue intrastate trains such as is provided by §13a(1) for interstate trains; the State retains original jurisdiction to authorize discontinuance, in whole or part, of trains operated solely within its boundaries, and carriers must first seek relief from the State regulatory body before petitioning the commission for relief to discontinue intrastate trains. The carrier may act on authority granted by the State body, notwithstanding its intention to invoke the commission's jurisdiction as to portions of its application that are denied by the State; carriers involved, having obtained authority from New Jersey board to discontinue certain intrastate trains, were not obligated to retain that service as a condition precedent to seeking authority from the commission to discontinue trains which the State board required them to continued.—Id., pp. 119, 120.

Railroad's presentation of its proposals respecting the remaining group of intrastate trains to the State board, and the board's denial thereof, created the precise condition on which the commission's jurisdiction under §13a(2) depends, and instant proceeding does not involve issues differing so substantially from those considered by the board as to deprive the commission of jurisdiction to consider the proposal on its merits. Moreover, though protestants argue that the board's order was a nullity because the proposals before it included one over which it had no jurisdiction, the board confined its order solely to discontinuance of the trains, over which it had jurisdiction; thus, State board's order was not a nullity and issue of discontinuance of considered trains is properly before the commission.—Id., pp. 119, 120.

Examiner's statement that, since carrier has invoked the commission's jurisdiction under §13a(2), it is doubtful whether considered intrastate trains may be discontinued without commission approval, did not imply that State authority was permanently superseded by filing of that petition. Language of §13a(2) establishes that determination of a railroad's application to discontinue or change service of an intrastate train continues to reside with the State; that the commission's jurisdiction may be invoked only after the State has failed to grant such application within 120 days; and that, although jurisdiction once acquired is not lost by subsequent State action, such action could conceivably render the §13a(2) proceeding moot.—Pennsylvania R. Co. Discontinuance of Service, 317 I.C.C. 5 (13).

Removal of one sleeping car, as opposed to removal of entire sleeping car service, does not constitute a discontinuance or change of the operation or service of a train of nature contemplated by §13a(2); and, since it is the exclusive province of the Post Office Department to determine the amount of mail service to be provided and the manner of providing it in any given area, the State commission would have no jurisdiction over removal of mail cars from a train; in absence of any objection by the Post Office Department, such action is within scope of carrier's managerial discretion. Neither commission nor State authority is necessary when a carrier wishes to make changes which are merely quantitative, rather than changes in type, on a particular train.—Pennsylvania R. Co. Discontinuance, 317 I.C.C. 737 (740-1, 744)*.

Therefore, although carrier, subsequent to the State commission's denial of authority to discontinue its Philadelphia-Harrisburg intrastate train, reduced the consist thereof by diverting one sleeping car and all head-end cars to other trains, the train whose discontinuance it now asks the commission to authorize is identical in all material respects with that considered by the Pennsylvania commission, within limits of its jurisdiction, and is subject to the commission's jurisdiction under §13a(2).—Id., pp. 740, 741.

And carrier's "ghost" trains between Philadelphia and Pittsburgh are not merely intrastate portions of interstate trains and therefore subject to §13a(1), since they connect with interstate trains of same name and number at Pittsburgh. Although "ghost" trains' passengers destined to points beyond Pittsburgh are transported in interstate commerce, to con-

strue the ultimate nature of their transportation as defining the interstate or intrastate character of the trains would broaden the commission's authority over discontinuance of intrastate trains beyond the intent of Congress in enacting §13a. The statute speaks of the physical limits of a train's operation, not of interstate commerce, and operation of the "ghost" trains is confined within boundaries of Pennsylvania; thus, under decision in 372 US 1, those trains were, at time the application was filed, and remain intrastate trains subject to provisions of §13a(2).—Id., pp. 741-2.

However, discontinuance of the Philadelphia-Pittsburgh trains may not be authorized under §13a(2) in absence of a definite and conclusive showing that the jurisdictional requirements thereof respecting State authority have been met. Their nature has been completely changed since the State commission denied authority for discontinuance of the original trains; from portions of long-haul interstate trains they have been converted to comparatively short-haul intrastate trains, differing in equipment, traffic, revenue, system feeder value, and general attractiveness to the public. The commission may not properly consider the instant proposal for their discontinuance, because it differs materially from that previously presented to the State commission. Petition under §13a(2) dismissed as to those trains for lack of jurisdiction.—Id., pp. 742-3.

If it appears that a carrier willfully downgraded service in order to justify discontinuance of a train without regard for the needs of the public, and has thereby deprived the public of a necessary and well-patronized service, it is within the commission's discretion to deny carrier's petition filed under §13a(2), on ground that public convenience and necessity do not permit the discontinuance. However, the factual situation presented does not warrant such a determination as to carrier's Philadelphia-Harrisburg train when proposed discontinuance and other changes in service are part of a consolidation plan for realization of savings in operating expenses without significant losses of traffic or revenue. Removal of one sleeping-car from that train was designed to promote efficiency of passenger operation by eliminating an unneeded duplicate service; and removal of head-end cars is asserted, without challenge, to have in furtherance of the Post Office Department's desire to have mail move on exclusive mail-express trains.—Id., 320 I.C.C. 319 (322, 323)*.

15. Procedure; notice; hearings.—[Vol. 19].—In suit to set aside the commission's order terminating investigation into railroad's proposed discontinuance of certain passenger trains, thereby allowing carrier to put the service reductions into effect, fact that the commission reached a contrary conclusion on similar evidence one year earlier is of no importance. The commission has power to change its mind as to weight to be accorded particular policies or facts so long as substantial evidence of record supports its conclusions. Moreover, force of the prior finding having expired at the end of a year, the commission was free to approach the problem anew. New evidence was introduced at the second hearing which showed persistent decline in patronage and revenue since the hearing in the former proceeding; and, there being no hope of improvement, discontinuance was permitted. Complaint dismissed.—State of Minnesota v. United States, 238 F. Supp. 107 (113)*.

After investigation and hearing in defendant railroad's proposal to discontinue operation of two passenger trains between Buffalo, N.Y., and Baltimore, Md., pursuant to its posted notices, the commission ordered continued operation of the trains between Baltimore and Harrisburg, Pa., for one year and, at the same time, allowed discontinuance thereof between Harrisburg and Buffalo; thus, the commission's action, in effect, required continuance "in part" of the operation sought to be discontinued. Plaintiff's contention that the commission is restricted to discontinuance sought in the original notice and cannot order a partial continuance is untenable, since such a limitation would not accord with the statutory purpose and is not suggested by the language, or the legislative history, of the law. Moreover, plaintiffs cannot assert prejudice as they were afforded ample opportunity to oppose the partial discontinuance. Accordingly, there being warrant in the law and the facts for the commission's findings

and conclusions, the complaint is dismissed. —City of Williamsport v. United States, 282 F. Supp. 46 (48-9)*.

Statutory requirement that notice of hearing in train discontinuance proceedings be given to the Governor of State concerned is to ensure due consideration of local interests; that purpose was fully accomplished when actual notice was received and the appropriate State agency appeared before the commission and thoroughly presented the State's position. The commission's finding that formal notice was given is supported by documentary evidence in the official record, though not recited in the transcript. In any event, actual notice was received, and formal notice, which like personal service is subject to waiver, was waived.—State of Montana v. United States, 202 F. Supp. 660 (662)*.

Failure of §13a(1) to condition a train discontinuance upon a hearing and finding that the intrastate portion of the operation is a burden on interstate commerce is not a denial of due process; plaintiffs had no constitutional or statutory right to a hearing before the commission decided not to investigate proposed discontinuance.—Sludden v. United States, 211 F. Supp. 150 (154, 156)*; and where the interstate character of the train proposed to be discontinued was undisputed, hearing to determine jurisdiction was unnecessary.—Id., p. 155.

Protestants' motion to dismiss the "applications" in §13a(1) proceeding is inappropriate, since carrier does not file an application for authority to discontinue passenger service; rather, it is required to post and file notice and submit the required statement, which allows the commission to institute an investigation. Only after hearing and appropriate findings can the commission order continuance or restoration of service or, in the alternative, discontinuance of the investigation. Grounds for the motion treated as argument of protestants that continuance of the trains should be required.—St. Louis-S. F. Ry. Co. Discontinuance, 327 I.C.C. 433 (435-6).

Protestants were not denied due process at hearing on proposed consolidation of trains. Manner in which questioned unit costs were used in the evidence was fully tested on cross-examination by each protestant desiring to do so, and, despite absence of opportunity to cross-examine the author of the underlying unit costs which were developed from basic records regularly maintained in normal course of the carrier's business, protestants' rights were fully protected. Absence of specific testimony regarding the determination by employees ultimately responsible to the departments whose chief staff members testified does not make the unit costs any less reliable; at most, protestants only suggested areas where they would substitute judgments which they prefer. No fault appears in the examiner's rulings or the development of the record. —Union Pac. R. Co. Discontinuance, 320 I.C.C. 493 (505)*.

Motion to dismiss for failure to post notice at all stations between St. Louis and Little Rock, Ark. where through service is available, denied. Since the trains to be discontinued operate only between Little Rock and Lake Charles, La. (where notices were duly filed), and through service is available on trains bearing different numbers which do not operate over the line served by trains sought to be discontinued, posting is only required at those facilities served by the specific trains involved.—Missouri Pac. R. Co. Discontinuance, 320 I.C.C. 383 (385).

Although at outset of hearings the examiner ruled, within his authority, that in view of lack of response to his inquiry as to whether any party wished to challenge carrier's assertions respecting compliance with notice and posting requirements of §13a(1) he would not entertain any questions on that issue, evidence concerning extent of carrier's compliance was admitted and near close of hearings certain protestants moved to strike the discontinuance notice from the commission's records on ground that it lacked jurisdiction because of carrier's failure to comply fully with those requirements. Even had evidence on the matter not been presented, and notwithstanding the examiner's ruling, protestants have the right to present that issue, since a jurisdictional issue may be raised at any stage of the proceedings. And since the true import of protestant's motion to strike is to question carrier's compliance with requirements of §13a(1), its substance rather than its form is considered.—Chicago, M., St. P. & P.

R. Co. Discontinuance, 317 I.C.C. 761 (764-5).

Mere filing of notice of proposed discontinuance of operation between Aberdeen, S. Dak., and Deer Lodge, Mont., of carrier's trains currently operating between Minneapolis and Deer Lodge did not confer authority on the commission to dispose of the proposal on its merits; such authority continued to depend on carrier's full compliance with all conditions prescribed in the statute. Carrier failed to comply full with posting requirements thereof when it posted notice only at stations between Aberdeen and Deer Lodge instead of at every station served by the trains; such notice is necessary because passengers at all points of the line might be equally affected by discontinuance of any portion of operation of the trains, and those east of Aberdeen might be more seriously affected by discontinuance of the Aberdeen-Deer Lodge service than those located between those points. Investigation discontinued for lack of jurisdiction.—Id., pp. 772, 773.

Posting of notice of proposed discontinuance of two trains was made during May 29-31, 1961, and it is immaterial that such notice was not found at certain facilities by an investigator of the State commission after July 2, since that proposed discontinuance date had been voided by the commission's order of June 19 instituting an investigation of such discontinuance.—Soo Line R. Co. Discontinuance, 312 I.C.C. 729 (732).

While carrier contends that, because considered trains were consolidated with a second pair between points following merger, expenses to be avoided by proposed discontinuance cannot be determined without knowing effect thereof on the second pair (for which complete financial data were not available), the information required to be filed with notice of a proposed discontinuance pertains to the particular train or service to be discontinued. Carrier should have filed with its proposal the required data for considered trains from the earliest date from which records were available, instead of only for the period when similar records were kept for the consolidated trains. However, in compliance with commission regulations, carrier has furnished an explanation for its failure to submit such information, and at the hearing furnished additional exhibits showing income, expenses, and loss in connection with the trains to be discontinued, for the proper periods. As protestants have not been prejudiced by its failure to file such data initially, dismissal of the proceeding is not warranted.—Id., pp. 731-2.

Protestant's motion to dismiss notice of discontinuance on ground that modified plan presented by carrier at hearing failed to comply with requirement of §13a(1) denied. All trains proposed to be discontinued in the notice would be so discontinued; and, so far as purposes of discontinuance proceeding are concerned, matters within management's discretion, such as addition and extensions of trains, addition of a flag stop and minute schedule changes in departure times which in no way affect the quantity of service available to the public, are lawful without any action by the commission.—Chicago South Shore & S.B.R. Discontinuance, 320 I.C.C. 440 (441-2, 445-7).

Railroad's contention that protestants to proposed discontinuance have the burden of proof under §7(c) of APA, and that they failed to prove that continued operation of considered trains is required by public convenience and necessity and operation thereof will not unduly burden interstate and foreign commerce, is tantamount to contending that the investigation be discontinued and the commission's order be predicated upon protestants' default; and that seems most inappropriate. The statute contemplates that the commission shall make certain public interst findings, in proceedings where a carrier invokes its jurisdiction under §13a(1), and it cannot be argued that the commission is free to decide such public issues on the basis of legalistic procedural rules without a record sufficient to form a substantive foundation for its findings. Moreover, record in instant case is adequate to yield the statutory findings on public convenience and necessity and on burden to interstate commerce; and without regard to questions of procedural obligations.—New York, N.H. & H. R. Co. Discontinuance, 320 I.C.C. 544 (546-7).

Although proposed discontinuance of carrier's only passenger trains between Washington, D.C., and Cleveland, Ohio, would entail

abandonment of all operation under trackage rights whereby it enters Cleveland Union Terminal, it has not applied for abandonment authority under §1(18); and though under §13a(1) the commission may not, without appropriate findings, require operation of those trains for more than 4 months from date provided in discontinuance notice, discontinuance after expiration of that period but before determination of an appropriate application under §1(18) could result in unlawful abandonment. However, the commission would still be authorized, upon making the requisite findings, to order restoration of the train service for not over 1 year; therefore, in absence of any proper basis for determining the abandonment issue, final disposition of the discontinuance proceeding is deferred pending filing and determination of abandonment application.—Baltimore & O. R. Co. Discontinuance of Service, 317 I.C.C. 371 (388-9)*.

Since petition filed by employee brotherhoods in proceeding under §13a(2) involving the same trains carrier now seeks to discontinue under §13a(1), requesting determination that an issue of general transportation importance is involved, was timely filed under regulations then in effect, due consideration thereof is warranted; the commission concludes that matters in the proceeding pertaining to application of §13a(2) and also, upon its own motion, that matters in embraced case pertaining to application of §13a(1) involve issues of general transportation importance.—Pennsylvania R. Co. Discontinuance, 317 I.C.C. 737 (738)*.

Examiner's denial of State commission's motion to dismiss carrier's petition to discontinue certain intrastate trains on ground of unconstitutionality of §13a(2), because determination of that question is the function of the courts, not the commission, affirmed. Though one protestant objects to any ruling on that motion by the hearing examiner as improper and prejudicial to protestants' right to present the question to the courts at the proper time, upon the question being raised by protestants the examiner acted properly in ruling thereon.—Denver & R.G.W. R. Co. Discontinuance of Passenger Serv., 317 I.C.C. 722 (723).

No inference should be drawn from carrier's failure to request designation of considered intrastate trains as essential by State highway department; testimony presented by it, together with agreement between it and the highway department, show that the trains were excluded by the department from the approved or essential classification solely by determination of the State Highway Commission after due consideration; that agreement, although it excluded the trains from the approved classification, expressly does not permit their removal from service without authority from the State regulatory body; accordingly, there is no basis for suggestion in recommended report that in absence of instant proceeding the operation of considered trains would have ceased on termination date of carrier's agreement with the State highway department.—Pennsylvania R. Co. Discontinuance of Service, 317 I.C.C. 5 (12).

20. Showing required and burden of proof. —[Vols. 18, 19].—The court has long recognized that the commission may properly give varying weights to overall prosperity of a carrier in differing situations which require balancing public convenience and necessity against undue burdens on interstate commerce. In many cases, the extent of the traffic, degree of dependence on the particular transportation means, and other attendant conditions, are such that the carrier may not justly be required to bear the necessary financial loss resulting from the operation; but in some cases the situation involves serious injury to directly affected communities while continued operation would impose a relatively light burden on a prosperous carrier [271 US 153]. In cases falling within latter category, such as those involving vital commuter services in metropolitan areas, the commission would err if it did not give great weight to the carrier's ability to absorb even large deficits resulting from such services.—Southern Ry. Co. v. North Carolina, 376 U.S. 93, (104-5)*.

However, in ordering discontinuance of considered intrastate trains, the commission's findings make clear that the demands of public convenience and necessity are slight, and that the situation is one falling within first category noted in the case cited; thus, it is equally proper for the commission to give little weight to factor of the carrier's overall pros-

perity in determining existence of an undue burden on interstate commerce. Action of the lower court in setting aside the commission's order, based upon its conclusion that the commission's failure to take into account carrier's profits from freight operations on the same line constituted error, reversed; proceeding remanded with instructions to reinstate the commission's report and order.—Id., pp. 105-6.

See also People of State of California v. U.S., 28 USC §2325, n. 13.

Use of considered trains by passengers has been very small and were it not for the use of such trains for movement of mail and express, losses to carrier would be staggering. However, on the basis of over a year's planning, REA has rerouted its express to other transportation companies so that the need for the trains to move express is nullified, and instituting all-rail mail service is beyond the commission's jurisdiction; therefore, on the record it would be wholly inequitable to require carrier to maintain these trains.—Chicago Great Western Ry. Co. Discontinuance, 328 I.C.C. 664 (675-6).

In view of the statutory duty placed on a common carrier railroad to transport mail as required by the Postmaster General, letter from the Post Office Department, received in evidence over protestant's objection, which stated that adequate mail replacement service would be provided if considered trains were discontinued, but did not indicate any intention to divert mail from those trains if their operation was continued, is given consideration only to show that the Department had notice of and made no objection to the proposed discontinuance.—St. Louis-S.F. Ry. Co. Discontinuance of Service, 312 I.C.C. 713 (723).

Although carrier represents that area between Glenwood, Minn., and Twin Cities will receive service from trains Nos. 9 and 10 after discontinuance of its only remaining trains between St. Paul and Portal, N. Dak., via Glenwood, the commission takes official notice that when it approved discontinuance of carrier's daylight trains between Minneapolis and Enderlin, N. Dak., about half the distance to Portal, carrier represented that communities between those points would still receive passenger and express service from trains now proposed to be discontinued. In view of those representations, and carrier's efforts before State commission to secure discontinuance of Nos. 9 and 10, no weight can be given to claim that the area between Glenwood and Twin Cities will continue to be served by those trains.—Soo Line R. Co. Discontinuance of Passenger Trains, 312 I.C.C. 729 (739).

Depreciation of property values in a community affected by proposed discontinuance is not of controlling importance in such proceedings; any conclusion that discontinuance would hinder economic growth and depreciate values in the community is largely a matter of speculation.—Pennsylvania R. Co. Discontinuance of Service, 317 I.C.C. 5 (12).

While there is doubtless room for improvement in carrier's passenger train service, evidence is not convincing that it is deliberately downgrading considered trains in order to discourage the public from using them; thus the rule announced in 79 N.E. 2d 71, cited as a precedent for rejecting a discontinuance proposal in such circumstances, is not applicable. —Chicago & N. W. Ry. Co. Discontinuance of Passenger Trains, 317 I.C.C. 21 (29).

In view of territory served, competing service available by air, rail, and bus, and development of interstate highway system between Kansas City and Minneapolis, neither advertising, different schedules, nor new equipment would increase use of carrier's only trains between those points to extent necessary to run them profitably. Carrier experimented with shorter schedules for a 4-year period without success, and any significant change in present schedules would upset arrangement which contributes about 75 percent of total revenue generated by those trains. In view of advantages offered by competing railroad between same terminals of streamlined trains operating in interterritorial service over a shorter route and affording superior accommodations, any advertising would be wasteful. And in light of present patronage of the trains, carrier believes that expense of new equipment could not be recovered. Discontinuance authorized.—Chicago Great Western Ry. Co. Discontinuance of Service, 317 I.C.C. 99 (108-9).

Although the Pennsylvania and Seashore Lines sustained substantial out-of-pocket losses during 1959-60 from operation of their joint passenger trains and Seashore's intrastate trains between Philadelphia-Camden area and southern New Jersey, those losses were incurred prior to New Jersey board's authorization of reduction of the interstate service by about 26 percent and elimination of some 45 percent of Seashore's intrastate trains, and issues in instant proceedings are not determined by unprofitableness of such previous operations. In affording the carriers some relief from financial burdens of the passenger service, while requiring continuance of an overall service which would satisfy needs of passenger traffic, particularly commuters, the State board created a new type of service involving new operational conditions; therefore the determination required in instant proceedings is whether the service as it now exists imposes any undue burden on the carriers or on interstate commerce.—Pennsylvania R. Co. Discontinuance of Passenger Service, 317 I.C.C. 111 (116, 125, 130-1).

Exhibits dealing with traffic volume, revenues, and expenses for May and June 1961 do not support carriers' contention that the burden still exists; for reasons stated, that portion of exhibits dealing with carriers' wintertime schedules cannot be considered as reflecting any particular trend in traffic volume. —Id., pp. 131-2; nor do carriers' comparisons of traffic volume on summertime trains in 1960 with that handled on same trains on 1961 establish any downward trend. As summer schedules do not become effective until about June 15, no acceptable traffic trend could be established by comparison of July 1960 averages with those for May 1961.—Id., p. 132.

In view of testimony of witness presenting them, considered exhibits do not support carriers' claim that, notwithstanding the reduction authorized by the State board, passenger service on Seashore's lines is still conducted at an out-of-pocket loss. Because of numerous deficiencies in the exhibits, they cannot be considered as providing any reliable indication of operating results on considered trains, and no other evidence to establish such results was presented.—Id., pp. 132-4.

In filing instant proceedings immediately following effective date of the State board's order requiring continuance of the involved trains, carriers did not afford themselves time to determine effect of the reduction in service on volume of traffic, or whether the reduced service could be provided without substantial loss, but based their proposals on alleged lack of substantial public need therefor and on alleged losses incurred therein, which are not established by the evidence. There is adequate evidence of existing substantial public need for transportation between points served by considered trains, and substantial use is being made of most of them; thus it is not shown that their continued operation creates an undue financial burden on either of the carriers or imposes any undue burden on interstate commerce.—Id., pp. 134, 135.

Since in a former proceeding service of the same pair of trains was ordered continued between Kansas City and Fort Worth, protestants claim they are entitled to look at entire operations of those trains rather than merely the service proposed to be discontinued between Wichita and Fort Worth. But though result of operating the entire route is relevant in determining whether operation over involved segment should be discontinued, admission of such evidence would not vary the conclusion. Prior proceeding showed a marginal operation at best for entire run, and present record shows decreased use of the trains over segment involved and that in 1961 on out-of-pocket basis the ratio of expenses to revenues was slightly higher than carrier's system passenger operating ratio and compares unfavorably with ratios for operations in Kansas. Discontinuance authorized.—Chicago, R. I. & P. R. Co. Discontinuance of Trains, 317 I.C.C. 601 (612-13).

In arriving at conclusion that continuance of certain passenger trains would unduly burden interstate commerce, the commission gave consideration to any probable effect that recent elimination of the 10-percent Federal tax on railroad fares might have on savings to be realized from the discontinuance.—Baltimore & O. R. Co. Discontinuance of Passenger Trains, 317 I.C.C. 673 (682)*.

Though it is not disputed that involved intrastate trains are operated at a loss, and the commission has never agreed with protes-

tants' contention that freight revenues from the line should be considered in determining whether continuance of the passenger service would unduly burden interstate commerce, carrier conceded that discontinuance of the trains would have little effect on its net income from interstate operations, and that it has never anticipated an appreciable profit from passenger service. Moreover, it has managed to operate the trains for the past 15 years despite the deficits incurred, and no unusually large increase in losses is indicated in periods for which financial data were presented. In view of lack of adequate alternative service, isolation of the territory, and carrier's present strong financial condition, resulting inconvenience to the tributary territory would outweigh the benefit to carrier from the proposed discontinuance. Carrier has not met its burden of proof.—Denver & R.G.W. R. Co. Discontinuance of Passenger Serv., 317 I.C.C. 722 (726, 727).

No preconceived plan on part of Nickel Plate to discourage public use of considered trains as a basis for their discontinuance is indicated. It asserts that all company personnel, including freight solicitors, attempt to sell its passenger service, that decline of travel by train is merely one stage in evolution of passenger transportation, and that lack of results from passenger service advertising campaigns of other carriers indicate inadvisability of a similar campaign by it. It does not appear that such an endeavor would materially alter the unfavorable financial results of operating the involved trains.—New York, C. & St. L. R. Co. Discontinuance, 317 I.C.C. 775 (780-1).

In determining whether continued operation of carrier's day trains between Buffalo and Chicago would unduly burden interstate commerce, estimated losses of $275,000 to $325,000 a year from their operation should be considered in relation to public need for the service. Even though carrier is relatively prosperous, it is incompatible with public interest and the national transportation policy to require it to sustain losses of that magnitude indefinitely in absence of more compelling circumstances than are shown to exist. Considering those substantial losses, the public's decreasing use of the trains and resultant dwindling of revenues, and existence of abundance of alternative service at most points, discontinuance should be authorized.—Id., pp. 785, 786.

Carrier's proposal to discontinue its Overland trains between Oakland, Calif., and Ogden, Utah, and continue all their local and through service in its City trains operating between those termini, requires consideration of both local and through service, needs during peak and off-peak seasons, consists of trains to be operated following the discontinuance, and financial results likely to be realized. No significant volume of local passengers travels in long-haul movements between the termini, or in local movements between intermediate points; local points desiring continuance of the Overland trains are unable or unwilling to afford them sufficient revenues to meet cost of providing the service; and it does not appear that through passengers will receive any less service when provided by the City trains. That there is need for improvement in carrier's system of reservation lists, has no bearing on fact that as a rule the Overland trains are not being used to capacity.—Southern Pac. Co. Discontinuance of Passenger Trains, 317 I.C.C. 519 (532, 544, 545-6).

Contrary to criticism of opposing parties that the carrier is not attempting to sell its passenger service to the public, and aside from the fact that the public has no real need for service which it must be importuned to utilize, the record shows that carrier does advertise its rail services, though on a company basis and not specifically as to passenger or freight operations, and that in case of another passenger service it sought to discontinue it spent upwards of $8,500 over a 3-week period in an effort to attract passengers, without success. Moreover, the service is certainly well-known to the public at local points on the line, and any experienced continental traveler interested in rail travel from the East to San Francisco must know of it.—Id., p. 545.

Carrier's computation of number of spaces available for pullman accommodations during a given period on its Overland and City trains out of Ogden, taken from actual records maintained by pullman conductors and porters on the trains, is entitled to greater weight than testimony of telegrapher who transmit-

ted reports prepared by ticket agent at Ogden, and may properly be relied on.—Id., p. 532.

There is little if any need for continued operation of carrier's intrastate train between Philadelphia and Harrisburg, Pa., as now constituted. Issues presented in regard to changes in consist of trains and the related revenue questions must be resolved on basis of operations lawfully existing at time the discontinuance proposal was made, rather than on previous operations. Patronage of the train is very light, it is now operated at a deficit, and all of its service can be adequately performed by other trains; continued operation is not justified.—Pennsylvania R. Co. Discontinuance, 317 I.C.C. 737 (743-4)*; quality of passenger service offered between Philadelphia and Pittsburgh will remain virtually unchanged as result of the discontinuance; although one point will not receive adequate alternate rail service, the few passengers entraining at that point do not warrant continued operation of two trains from Philadelphia to Harrisburg when a single train can otherwise provide the service required by the public.—Id., 320 I.C.C. 319 (323)*.

For reasons expressed in 307 ICC 59 and 254 ICC 745, the commission rejects contention that, before operation of certain intrastate passenger trains may be found to constitute an undue burden on interstate commerce, it must be shown that petitioner's system operations as a whole are unprofitable or that it is not receiving a fair return on a systemwide basis, considering both freight and passenger traffic.—Southern Pac. Co. Discontinuance, 320 I.C.C. 59 (80).

In presentation of public testimony, and in defining limits of cross-examination of petitioner's witnesses, the examiner properly ruled inadmissible any specific testimony concerning petitioner's trains other than the three intrastate pairs sought to be discontinued; while such testimony might have had some relevance, those rulings were clearly not erroneous in the circumstances in which made.—Id., p. 77.

Continued operation and maintenance of rail equipment and schedules for which no public convenience and necessity exists and which manifestly tends to weaken stability of a railroad necessarily constitutes an undue burden on interstate commerce. Passenger patronage on petitioner's "West Coast" trains between Los Angeles and Sacramento, its "El Dorado" trains between Oakland and Sacramento, and its evening pair between San Francisco and San Jose has declined in recent years and all three pairs have been operated at substantial deficits, notwithstanding its efforts to attract additional business by advertising and modifying its operations and service and use of modern cars adequately maintained; and no evidence is offered of any propsects of future increase in passenger patronage of those trains. Considering the two peninsula trains as an integral part of the San Francisco commuter service, their present operations constitute an unnecessary drain not only on that service but also on carrier's overall operations. As present users of considered trains would not be seriously inconvenience or left without satisfactory alternative means of travel, discontinuance is authorized.—Id., pp. 74, 78, 79-80.

While record establishes that the public has made substantial use of carrier's only remaining pairs of passenger trains between Chicago and Minneapolis and between Chicago and Mankato, Minn., it also demonstrates an overall, persistent downward trend in operating revenues and number of revenue passengers over the past 6 years. Considering carrier's financial condition, its overall losses from operations as well as from operation of those four trains, and fact that savings from proposed discontinuance would probably result in a profitable system operation, together with availability of alternate passenger service reasonably adequate to meet needs of the traveling public, conclusion is warranted that continued operation of those trains is not required and would unduly burden interstate commerce; discontinuance authorized.—Chicago & N.W. Ry. Co. Discontinuance, 320 I.C.C. 85 (95-6, 99, 104)*.

Although protestants rely on decision in 210 F. Supp. 675 to support contention that profit or loss and burden on interstate commerce must be determined by overall operations on involved lines, including freight revenues, that decision is not controlling because (1) appeal therefrom has not been decided by the Supreme Court, (2) it involved discontinuance

of an intrastate service under §13a(2), whereas instant case concerns an interstate operation subject to §13a(1), and (3) it involved a carrier with a profitable system operation, whereas instant proceeding involves a deficit or at best marginal system operation.—Id., p. 102.

Cases cited by protestants to support their contention that the impact of deficit passenger operations on freight rates does not justify proposed discontinuance of passenger service sustained the principle that in general freight-rate increase cases the commission may consider passenger deficits in adjusting freight charges, and are not persuasive under provisions of §13a(1), although carrier's overall system financial condition is a factor to be considered.—Id., p. 101.

In absence of convincing evidence that carrier is deliberately downgrading service of trains it seeks to discontinue, in order to discourage the public from using them, rule announced in 79 N.E. 2d 71 is not applicable.—Id., p. 101.

Population of communities served and the public's use of the service sought to be discontinued are factors to be considered in a §13a(1) proceeding. All categories of traffic handled by Soo Line's St. Paul-Portal, N. Dak., trains have been declining, and number of passengers per train-mile has decreased to approximately that of the crew. Though, following discontinuance of Canadian trains formerly connecting at Portal, tourist traffic and Canadian mail and express formerly handled by considered trains were diverted to other trains operating over same line between St. Paul and Glenwood, Minn., such diversion appears to have been dictated by sound managerial discretion. Area served is sparsely populated, and though upon discontinuance a 232-mile stretch between Glenwood and Carrington, N. Dak., would lack direct passenger service, the daily average of only 5 or 6 passengers originating on that segment would not justify the financial burden of operating the trains such a distance.—Soo Line R. Co. Discontinuance, 320 I.C.C. 337 (349, 350, 353, 356).

Among reasons urged against discontinuance, anticipated industrial growth is not a new factor but a continuing part of the area's economic development, which, though it has been in progress for some time, has not checked the decline in passenger or express revenues. Transportation needs of elderly residents and their visitors are meager, and any patronage generated thereby would not be enough to justify the burden on carrier of continued operation of the trains. Alleged needs of national defense industries and military installations are not substantiated by representations by military or other officials concerned; in event of increased national defense need, rail service in the area could be expanded. Considering all the evidence, including the overall showing of reasonably adequate alternative means of transportation, proposed discontinuance should be permitted.—Id., pp. 344, 356, 357.

Although conditions evoking complaints of inconvenience to passengers resulting from manner in which considered trains are operated reflect no credit on carrier's management, and indicate indifference to well-being of its patrons, the commission has no statutory authority to penalize carrier for its lack of consideration for the public's comfort; what is pertinent to proposed discontinuance is whether and to what extent the declining use of those trains is due to factors within carrier's control. During 1962 less than 100 passengers boarded the westbound train at each of 34 communities, or the eastbound at each of 32 communities, and there were at least 265 days when no-one boarded them at those points; the evidence does not indicate that this statistical picture would have been materially different had carrier been more attentive to passenger comfort.—Id., pp. 342, 351.

Whether carrier's assurances that, coincidentally with discontinuance of the Portal trains, it would inaugurate a tri-weekly mixed-train service between Portal and Glenwood (where those trains are now consolidated with others) constitute a definite commitment, or whether protestants are correct in contending that if it failed to provide such substitute service there would be no legal means of compelling it to do so, is not controlling on admissibility of evidence concerning that proposal. Such evidence is relevant as pertaining to adequacy of service available if the present trains are discontinued; its materiality and

probative value are governed by whether the record jsutifies finding that the mixed-train service would in fact be instituted as proposed. Protestants' objection to that evidence goes to its weight, not its admissibility; examiner's denial of motion to strike all such evidence, sustained.—Id., pp. 345-6.

Although none of numerous public witnesses urging continued operation of considered intercity trains were daily users of the service, their evidence shows that the trains are necessary to them for business, pleasure, religious, and educational reasons and that continued use thereof by patrons for those purposes is assured. While statistics presented did not show a population growth in involved area commensurate with the rest of the country, a decline in patronage of less than 1 percent from 1960 to 1961 does not demonstrate that the public has deserted the service; and though a larger decline was reported as between the year 1961 and the first 6 months of 1962, a comparison of unlike periods is inconclusive. Evidence as a whole shows a substantial public need for continuance of the service provided by considered trains.—Missouri Pac. R. Co. Discontinuance, 320 I.C.C. 1 (12).

Motion to strike exhibits dealing with revenue statistics and headcounts on individual trains, on ground that they were hearsay and not based on any business records prepared under supervison of witness who testified concerning them, was properly overruled; the exhibits were prepared under witness's supervision and contained the sort of information which might reasonably be expected to come to him in his official capacity as carrier's passenger traffic manager.—Boston & M.R. Discontinuance of Passenger Service, 317 I.C.C. 165 (171).

Although State agency created to study mass transportation problems in Boston metropolitan area presented testimony of its transportation analyst based on interviews with passengers using companion Boston-Albany trains proposed to be discontinued, no prepared question form was presented and no tabulation of results of his interviews was offered in evidence, nor was any inquiry made to determine if the riders were revenue passengers, or if they had purchased continuing transportation. The witness's study, though certainly a constructive undertaking, therefore cannot be given much weight in establishing facts pertaining to need for continuance of those trains.—New York Central R. Co. Discontinuance, 320 I.C.C. 364 (373-4).

Prospective passengers who must be coaxed to use a particular train service have no urgent need for it; neither carrier's failure to solicit business not its lack of adequate station facilities sustains contention that it has deliberately discouraged use of trains it proposes to discontinue; and since witnesses who use the trains indicated satisfaction with their present schedules, it is doubtful whether a change in schedules would increase patronage.—Louisiana & A. Ry. Co. Discontinuance of Service, 317 I.C.C. 155 (162).

Evidence as a whole is convincing that discontinuance of one pair of Union Pacific's trains between Los Angeles and Ogden, Utah, could eliminate direct operating deficits of over $60,000 annually, plus avoidable terminal costs of about $25,000, and that consolidation of present service of those trains with another pair, taking into consideration the probable loss of some of present patronage as well as possible loss of some eastbound mail revenue and extra expense for adding cars and other equipment to the consolidated trains, would probably result in out-of-pocket savings of some $1.37 million annually, or over $110,000 a month. Proposed rearrangement of the trains should have no appreciable adverse consequences on the traveling public, as costs to passengers would be no higher, and only minor inconveniences from schedule changes would result. On that basis, continuance of the pair sought to be discontinued and failure to institute the train consolidation would constitute a drain on carrier's financial resources which would impose an unnecessary and undue burden on interstate commerce.—Union Pac. R. Co. Discontinuance, 320 I.C.C. 493 (519, 521)*.

The situation is not altered merely because Union Pacific currently enjoys an overall satisfactory level of railroad operating profits, since, despite its financially sound condition, it has experienced continuous passenger operating deficits which are reported annually to the commission. Morevoer, it is possible that,

as result of benefits of the instant proposal, it could begin to find solutions for some of the deficiencies in its passenger train and terminal service that protestants' witnesses have criticized. However, carrier should not expect to increase the elapsed time en route and change the hour of serving particular stations without some loss of patronage; a small fraction of regular riders would be obliged to seek other transportation, and it is reasonable to believe that some passengers who regularly travel to or from Chicago or St. Louis would do likewise; it is therefore conceivable that as much as $15,000 a year of present revenues of the two pairs of trains might be lost.—Id., pp. 519, 522.

Union Pacific's present attitude of providing high quality passenger service responsive to needs of the public should not suffer by consequence of the relief afforded. While the prospective schedule disadvantage of the consolidated trains compared to the competitive transcontinental trains of the Santa Fe would be worsened in degree, the factors that now attract passengers to Union Pacific's trains despite their slower schedules would be essentially unchanged. And since offpeak periods average about 265 days a year and there is no reason to believe that substantial extra expense for added equipment would occur other than infrequently, annual out-of-pocket cost of operation of the consolidated trains should not be more than about 10 percent higher than carrier's estimate of $2.7 million. Discontinuance and change in service authorized.—Id., pp. 516, 521.

See also St. Louis-S. F. Ry. Co. Discontinuance case, n. 2 above.

The essential question in §13a(1) proceedings is what effect disctoninuance of the particular train or service will have on public convenience and necessity and on interstate operations or commerce, and principal factors to be considered are populations of the communities served, the public's use of the service involved and degree of dependence thereon, availability of other transportation services in the area, losses suffered by the carrier in providing the service, and impact of continuance thereof on its general financial condition; however, none of those factors by itself is decisive or in any way controlling. And before continuance of involved service or any part of it may be ordered, it must be found to be required by public convenience and necessity and not to unduly burden interstate commerce. Since the decision must be designed to protect interstate commerce from onerous burdens which may affect carrier's ability to provide efficient service to the public generally, needs of the entire public, as distinguished from the relatively few, must be considered.—Chicago & N. W. Ry. Co. Discontinuance, 320 I.C.C. 648 (656).

The North Western's proposed discontinuance of its overnight passenger services between Chicago and northern Wisconsin, including its seasonal trains to and from Land O' Lakes, amounting to a net discontinuance of a pair of trains between Chicago and Ashland and a pair between Milwaukee and Green Bay, is justified by the public's decreasing use of those trains, with consequent dwindling of revenues derived therefrom, resulting in substantial annual operating deficits. While protestants criticize the service provided, passenger equipment used is some of the best owned by the carrier, and operation of the sleeping cars is within jurisdiction of the Pullman Co.; some minor mechanical failures of type complained of may reasonably be expected in a run of some 450 miles. Record as a whole does not sustain allegation that carrier has deliberately tried to discourage patronage of those trains by the public.—Id., pp. 650, 664, 667.

Though protestants contend that carrier has failed to promote additional traffic for the trains, it is not incumbent on carrier to coax passengers to ride its trains: people who must be coaxed to use a carrier's services have little real need thereof. And though considered trains are principally mail and express trains, handling of mail and express is the responsibility of the Post Office Department and Railway Exp. Agency, respectively, and carrier has very little if any control over such traffic. Operation of the trains shows a declining trend in volume of mail and express, with possibility of even less mail; schedules of the trains have not been fully satisfactory to the Post Office Department, which demanded very early morning arrivals at Chicago and certain other points that carrier concluded

would not be feasible because of adverse impact on passenger traffic.—Id., pp. 650, 655, 664-5.

While vacationing and tourism are the most important industries of the northern Wisconsin area served, and economy of the entire area depends largely on continuance and expansion of those activities, carrier's determination to discontinue its overnight service to Green Bay was based on investigation which revealed that more people depend on the day trains than the overnight trains in reaching that area. Advent of the private automobile and airplane, improved highways, and scheduled airline services have so changed passenger travel that there is now only a nominal increase in train patronage during the summer months. Seasonal operation of considered trains would not be feasible because equipment would have to be provided and maintained for entire year, while depreciation and amortization thereon would be based on fewer trips provided by the limited service. Hearings did not contemplate protestants' proposal for later departure time for the daytime trains, so the record does not permit definitive comment thereon, but resulting delayed arrivals could well inconvenience patrons, particularly women and children, who now use the daytime trains; nevertheless, the suggestion is commended to carrier's managerial consideration.—Id., pp. 660, 662, 666-7.

Contention of some protestants that instant proceeding is merely the initial step in a plan to discontinue carrier's entire passenger service, with possible exception of commuter service at Chicago, is refuted by the carrier. Moreover, before any regularly scheduled through passenger train or trains may be discontinued in the future, appropriate regulatory authority from either the commission or the State having jurisdiction must first be obtained.—Id., p. 665.

A carrier subject to regulation by the commission is expected to aid in the disposition of proceedings to which it is a party by making available all pertinent facts within its knowledge, regardless of where the burden of poof lies. The Commission cannot decide public issues without a record well enough developed to form a foundation of substance to base its findings upon, without regard to questions of procedural obligations.—New York, N.H. & H.R. Co. Discontinuance, 320 I.C.C. 714 (717-8).

Both present deficiencies of the highway system between New London, Conn., and Providence, R.I., and the New Haven's financial predicament as a carrier in reorganization are factors which warrant consideration in passing upon its disposal to discontinue a set of commuter trains between those points; while neither alone would be controlling, both are considered together with all other evidence presented.—Id., p. 729

Factors to be considered in a §13a (1) proceeding, are: (1(population of the communities served, (2) the use by the public of the service sought to be discontinued, (3) other available transportation in the affected area, (4) general financial condition of the railroad, and (5) losses suffered by the railroad in providing the service. None of these factors by itself is decisive or controlling since, before commission may order continuation of the service or any part thereof, it must find from the record that it is required by the public convenience and necessity and that such continuation will not unduly burden interstate commerce.—New York, N.H. & H.R. Co. discontinuance, 320 I.C.C. 544(547,548)

Although in determining the question, the commission employs tests which have become part of due process standard, such tests are not absolute; the problem is one of balancing public need against undue burdens on commerce; in instant proceeding the carrier's lack of prosperity is a dominant factor. Evidence leaves no doubt that considered trains constitute a heavy and undue burden on interstate commerce and, in light of carrier's financial condition, savings in expense through discontinuance over loss of revenue are important; there is substantial alternate means of transportation to serve the general needs of the people in the area through existing railroad service, bus service and good highways. Operation of considered trains found not required by public convenience and necessity.Id., pp. 559-60.

In §13a(1) proceeding in which carrier sought to discontinue operation of two passenger trains between Alexandria and Lake Charles, La., the submission into evidence of

the financial results of that portion of the operation only, and not of the entire operation of those trains between Little Rock, Ark., and Lake Charles, did not inhibit the commission's disposition of the proceeding; and, since costs of operating considered trains between the Louisiana points greatly exceeded the benefits derived by the public from the operation and the savings in expenses outweighed any resulting inconvenience, discontinuance is approved.—Missouri Pac. R. Co. Discontinuance, 320 I.C.C. 383 (398-9, 400).

In view of systems losses, large and increasing losses of trains in question, the declining patronage, the abundance of adequate alternate common carrier service, continued operation of trains sought to be discontinued is not required by public convenience and necessity and would unduly burden interstate commerce and foreign commerce. In determining whether continued operation of a train or trains will constitute an undue burden upon interstate commerce it is necessary to consider the losses in relation to the need which may exist for continued operation thereof; and poor financial condition of the system is undisputed. Even though a carrier were relatively prosperous it would not be compatible with the public interest and the national transportation policy to require it indefinitely to sustain loss of the magnitude indicated in the absence of more compelling circumstances. New York Central Railroad Co. Discontinuance, 320 I.C.C. 526 (537, 540).

The problem is that of weighing the inconvenience that proposed discontinuance would cause patrons who travel between certain points served by considered trains, not only against carrier's need to be relieved of unprofitable operations, but also against the interest of the general public in maintenance of transportation services which result in uneconomical expenditures; and, burden on railroad's facilities, carrier's need to end uneconomic operation and the public's interest in efficient transportation outweigh the convenience afforded those passengers by the railroad. Furthermore, residents of the Chesterton-Porter area can be served into Chicago by two other railroads and, as shown by the evidence, the general public in area served by considered trains uses other forms of transportation. Investigation discontinued.—Id., pp. 538-9, 542.

21. Other service available.[Vol. 19].—Adequacy of alternative service is important in determining whether continued operation is required by public convenience and necessity. Though carrier's proposed inauguration, upon discontinuance of its St. Paul-Portal, N. Dak., trains, of a tri-weekly mixed-train service between Portal and Glenwood, Minn., where the present trains are consolidated with others, would not alone afford reasonably adequate service, worth of such substitute service must be evaluated in light of other alternative service available and of the area's demonstrated minuscule demand for passenger service. While a 232-mile stretch would be left without direct passenger service, that segment is nearly paralleled by another railroad; population of the area is sparse, private automobile ownership is widespread, and all towns affected are located on all-weather roads; residents of those communities would be able to travel by bus, bus-rail, bus-air, or private conveyance to nearby common-carrier stations. Overall showing is that reasonably adequate passenger service would still be available.—Soo Line R. Co. Discontinuance, 320 I.C.C. 337 (346, 354-5).

Primary importance of the Portal trains to people in the area is in their express and mail service; but Railway Exp. Agency is obligated as a common carrier to serve the affected area and is capable of doing so adequately without the trains. Though express via the mixed train would be a 2-day rather than the present 1-day or overnight service, adequacy thereof must be measured in conjunction with the express agency's ability to utilize other carriers or its own highway equipment. Evidence as a whole warrants conclusion that alternative service available for express will be as dependable, as economical to shipper, and in many cases as expeditious as that now afforded by the trains, and that from an overall standpoint proposed discontinuance will have but insignificant effect on convenience and necessity of express customers.—Id., pp. 346, 353, 357.

Responsibility for adequacy of mail service is not the railroad's burden, but rests on the Post Office Department. It is not for the commission to determine, in train-discontinu-

ance proceedings, what constitutes adequate mail service for any particular community; rather, its function is to ascertain whether continued operation of the train is required to enable the Post Office Department to discharge its duty as to the affected communities. When one of two subpoenaed officials of that department stated that it is department policy to provide equal or better mail service whenever a train is discontinued, and both expressed belief that discontinuance of involved trains would not result in inadequate mail service from the department's standpoint, conclusion is warranted that the department would provide adequate mail service to the affected communities.—Id., p. 352.

Discontinuance of one pair of North Western's passenger trains between Chicago and Ashland, Wis., its seasonal trains between Chicago and Land O' Lakes, and its train from Chicago to Green Bay, Wis., will not leave the area without service. Carrier intends to inaugurate a new train from Chicago to Milwaukee on a schedule comparable to that of the Green Bay train, also two new trains between Milwaukee and Green Bay via Sheboygan and Manitowoc, for a period of at least one year on an experimental basis, which will soften the hardship always felt by some whenever train service is discontinued or curtailed. This will leave four trains daily both northbound and southbound between Chicago and Green Bay, and scheduling of the new trains will improve North Western's service. In addition, availability of trains of the Milwaukee and the Soo Line, plus existing bus and air services, will continue to provide the Chicago-Green Bay area with ample service; and the area north of Green Bay will continue to be adequately served by North Western's daily daytime streamliner trains.—Chicago & N.W. Ry. Co. Discontinuance, 320 I.C.C. 648((656-9).

Ample passenger service in area between Minneapolis and Kansas City will remain after discontinuance of the Great Western's only trains between those termini; the Rock Island operates two trains daily in each direction, which serve Des Moines directly and other cities within reasonable driving distance of communities served by the Great Western, and also operates a daily pair of trains between Minneapolis and St. Louis; an airline provides 8 to 10 flights daily in each direction, some of which stop at intermediate points; abundant bus service is available; thus common-carrier service will be available to most of the affected communities either directly, or indirectly after a reasonable automobile trip. —Chicago Great Western Ry. Co. Discontinuance of Service, 317 I.C.C. 99 (105-6).

Remaining service of two northbound and two southbound trains on carrier's Connecticut River line, also common carrier bus service in the area, will fulfill the public's need for passenger service now provided by trains to be discontinued between Springfield, Mass., and Brattleboro or Windsor, Vt.; despite population growth in that area, considered trains are lightly patronized except for occasional movement of groups of students attending colleges along Connecticut River, and the railroad has offered to operate a Friday southbound and a Sunday northbound train at whatever time would suit convenience of the colleges, most of which are within a few miles of Springfield, where continuing service of another railroad into New York is available; in addition, the busline's willingness to expand its service both on a regular basis and on any special basis to meet the needs of the schools is supported by its action in adding to its service following a recent passenger train curtailment.—Boston & M.R. Discontinuance of Passenger Service, 317 I.C.C. 165 (174, 175).

Discontinuance of Baltimore & Ohio's only passenger trains between Washington, D.C., and Cleveland, Ohio, is warranted to eliminate continuing losses from operation when, in view of the adequate competing service available to Cleveland passengers by air, bus, other railroads, and private transportation over superhighways, it is apparent that neither schedule changes, different equipment, nor extensive public relation campaigns would materially increase use of those trains; passengers now using the trains between Washington and Akron, Ohio, would still have abailable adequate service by other B&O trains, and adequate facilities for transportation of mail to points east of Akron have been provided.—Baltimore & O. R. Co. Discontinuance of Service, 317 I.C.C. 509 (511)*.

Most of revenues from trains to be discontinued between Hope, Ark., and Shreveport, La., are derived from mail and express, for which adequate replacement service will be provided by truck; as little need is shown for the passenger service, and patronage is mostly local in character and comes primarily from area between Springhill, La., and Shreveport, service between those points by two common carrier buslines interchanging at Minden will be a reasonably adequate substitute.—Louisiana & A. Ry. Co. Discontinuance of Service, 317 I.C.C. 155 (163).

After discontinuance of its Overland trains between Oakland, Calif., and Ogden, Utah, carrier proposes to continue the same service with its City trains. While improvement in its reservation system appears to be required, careful consideration of its evidence and protestants' shows that it should, during normal off-peak periods, have ample space on the City trains to accommodate the needs of the traveling public; though consists of the City trains would be increased, they would be adequately powered and the more frequent stops required should not adversely affect on-time performance. However, relief granted to discontinue the Overland trains during other than peak periods is predicated on expectation that carrier will at all times adhere to its firm representation that at any time during the off-peak season when the consist of a City train reaches 24 cars and it has reservations for another car it will split the train.—Southern Pac. Co. Discontinuance of Passenger Trains, 317 I.C.C. 519 (532-3, 546).

Adequate service between Baltimore, Washington, and Pittsburgh will be available after discontinuance of Baltimore & Ohio's all-coach Speedliner trains, since it operates 3 other trains daily in each direction as part of its service to Chicago and the West, and 2 daily between Baltimore and Cumberland, Md., as part of its St. Louis service; also, upon discontinuance of its Cleveland trains it will operate a daily train between Cumberland and Washington. Another railroad operates 3 daily pairs of trains between the involved cities, and 2 transcontinental bus systems provide numerous daily trips, some faster than the train service. In view of losses from their operation, to require continuance of the Speedliners to accommodate a speculative increase in passengers following discontinuance of the Cleveland trains would be unreasonable; moreover, passengers can make convenient connections to and from Cleveland at Pittsburgh as well as at Washington for Florida and other points.—Baltimore & O. R. Co. Discontinuance of Passenger Trains, 317 I.C.C. 673 (679-80, 681)*.

Although certain areas west of Butte, Mont., are served exclusively by the Milwaukee's Chicago-Tacoma trains, most points on that portion of its line are served directly by the Northern Pacific or the Great Northern, or both, or are relatively short distances from points where other common-carrier passenger service is available. Only slight use is being made by the public of the service provided west of Butte, and none of the larger cities in that area except Tacoma showed interest in continued operation of the trains. Not only does Northern Pacific's service generally duplicate the Milwaukee's in that area, but its service and Great Northern's compete directly with the Milwaukee's transcontinental passenger service between Chicago and Northwest coast points, and all three provide convenient and expeditious service over their respective lines. Thus it cannot be found that public convenience and necessity require continued operation of the trains west of Butte.—Chicago, M., St. P. & P. R. Co. Discontinuance, 317 I.C.C. 691 (704, 715).

Territory between Buffalo and Chicago is amply provided with alternative means of transportation and none of communities now served by Nickel Plate's day trains will be entirely deprived of rail passenger service upon their discontinuance. While a large shipper of turkey poults may be somewhat inconvenienced by loss of parcel-post service provided with the trains, other mail service is available or will be provided, and any inconvenience to the general public is outweighed by reduction made possible in carrier's substantial losses from operation of those trains.—New York, C. & St. L. R. Co. Discontinuance of Trains, 317 I.C.C. 775 (785).

There are no adequate alternatives to service of carrier's intrastate trains between Denver and Craig, Colo. Carrier's Denver-Salt Lake City trains do not afford service to the

Bond-Craig segment of that line, and stop only at three intermediate points on the Denver-Bond segment; and since the highway does not parallel a considerable part of the line, localities on those portions are not served by busline operating in the territory. Owing to steep grades and possibility of ground blizzards, ice, and snow and rock slides on highway which provides practically the only motor access to the area west of the Continental Divide, passenger travel between the tributary territory and the rest of the State would be dependent on an extremely tenuous route if left solely to the highway.—Denver & R.G.W. R. Co. Discontinuance of Passenger Serv., 317 I.C.C. 722 (726-7).

22. Continued service needed.—[Vol. 19].—While a common carrier has a duty to provide service even at a loss, that duty is commensurate with the public's need for the service, and before continuance thereof may be ordered it must be found on basis of the evidence submitted that it is required by public convenience and necessity and that such continuance will not unduly burden interstate or foreign commerce. Where, as in case of considered trains, patronage has decreased to point where the number of passengers per train-mile barely exceeds the crew, it is obvious that public need for the trains has all but disappeared.—Soo Line R. Co. Discontinuance, 320 I.C.C. 337 (356).

Though under some circumstances a real need for a particular service may justify its continuance even at a loss to the carrier, in determining public convenience and necessity the needs of the entire public, as distinguished from the relatively few, must be the governing consideration.—Pennsylvania R. Co. Discontinuance of Service, 317 I.C.C. 5 (11).

Where the only significant use of considered intrastate trains is by students who ride on special reduced fares and have no alternative public transportation, inconvenience that discontinuance would cause that group must be weighed, not only against carrier's need to be relieved of burden of an unprofitable operation, but also against interest of the general public in maintenance of transportation services which do not result in uneconomical expenditures; record does not justify requiring continuance of considered trains at substantial loss for benefit of those students when it cannot be assumed that arrangements for alternative transportation will not be made by school authorities and the students' families.—Id., pp. 11-12.

In view of slight use made of considered trains between Wichita and Fort Worth, they do not fill any substantial public need in the territory. Few persons ride regularly and other reasonably adequate means of travel are available; carrier can hardly be expected to continue operations at a loss to provide standby service for sporadic users or for occasional use by funeral directors. Though certain communities will be deprived of rail passenger service, the majority of the public apparently prefer to use private automobiles, and it would be unfair to require continuance of service important to a relative few but little used generally.—Chicago, R.I. & P.R. Co. Discontinuance of Trains, 317 I.C.C. 601 (613, 614).

Except for slight changes in number of schedules offered by alternative modes of transportation and possibility of increase in available bus service between some points if carrier's only remaining Kansas City-Omaha trains were discontinued, the situation respecting adequacy of available substitute services remains the same as when discontinuance of same trains was disapproved in 312 ICC 765. The number of public witnesses showing interest in continued operation of those trains and the substantial use made thereof support conclusion that they meet a specific need of the traveling public which cannot be satisfactorily met by available alternative services; continued operation required for 1 year from date of report.—Missouri Pac. R. Co. Discontinuance, 320 I.C.C. 1 (10, 12).

Although continuance of certain trains of the North Western between Chicago and Ashland and between Milwaukee and Green Bay is found not to be required by public convenience and necessity, due solely to the timing as tolled by the statute their services may be discontinued during the vacation and tourist season. As the northern Wisconsin area served is a famous recreational and vacation area, and in view of the confusion that could result from discontinuance at such an inopportune time, it is hoped that the North Western will

see fit to continue its present summer schedule in order to avoid disruption of vacationers' plans. The goodwill and favorable public reaction thereto should compensate for the financial loss resulting from such continuance.—Chicago & N.W. Ry. Co. Discontinuance, 320 I.C.C. 648 (660, 667).

The commission has recognized the duty of the trustees of the New Haven to initiate procedures (which they have begun) to divest the carrier of those operations which show little promise for the future and encumber its conversion into a viable agency of public service, since long years of staggering and unabated deficits have sapped the carrier's strength and the integrity of this essential transportation facility is at stake. Goal toward which the trustees must strive is preservation and rehabilitation of the system as a whole, and the commission will examine with extreme care, and from a fresh viewpoint, all salutary measures proposed, and refrain from interposing technical rules evolved in more normal circumstances. The New Haven, under its huge overall deficit, no longer constitutes a normal rail operation and its problems no longer are amenable to solution by application of normal criteria; therefore, the commission's primary concern at this time and on this record, is, will the proposed discontinuance be beneficial to the New Haven.—New York, N.H. & R. Co. Discontinuance, 320 I.C.C. 466 (478, 479).

But evidence is not persuasive that passenger service provided on considered branch line constitutes an undue burden on interstate commerce. Carrier should fully explore all aspects of partial discontinuance (feasibility of such approach to the problem cannot now be determined from the record) before recourse is had to total discontinuance. Considering minimal nature of the service in issue, public use thereof is not insubstantial; public witnesses' testimony on the whole shows continuing need for the service and, as alternate public transportation is unavailable or inadequate at some points, public convenience and necessity require continuance thereof. However, in view of carrier's precarious financial condition, continuance of service for only 6 months, rather than statutory one year period permitted, is required. If, within that period, carrier can show that partial discontinuance would afford the relief needed, the commission will consider a petition to modify its order. On the other hand, if present appraisal of the prospects is more optimistic than is justified, carrier can again exercise its right to file a discontinuance notice.—Id., pp. 486-8.

Immediate discontinuance of New York Central's daily Boston-Albany trains is not warranted when together they are fairly well patronized despite recent decreases in number of passengers handled annually. By a concerted effort Central could improve their service in terms of greater reliability and more efficient use of equipment and personnel, to the end of attracting additional passengers, with probably little or no additional operating costs. The relatively small operating deficits of that pair of trains in past 20 months are not convincing that there is insufficient public need for their operation; financial results presented by Central are based almost entirely on limited statistical data which may not produce precise calculations, and totals shown include effect of operating decisions involving costs that could have been avoided in whole or part. Consideration of entire record is convincing that continuance of the trains should be required for at least 1 year, and that their operation, with voluntary institution of reasonable measures to improve service, will not unduly harm Central.—New York Central R. Co. Discontinuance, 320 I.C.C. 364 (375, 376).

Contrary to the general downward trend in volume of revenue passengers, patronage of the New Haven's commuter trains between New London, Conn., and Providence, R.I., has increased in the past few years despite a fare increase, and it is reasonable to anticipate that use of those trains will continue to grow. If they were discontinued, 8 of the 12 communities served would be without rail passenger service; available bus service does not satisfy commuters' requirements, and existing highway system is inadequate. Discontinuance of the morning train in particular would have profound adverse effect on a number of persons using it. But while public convenience and necessity require commuter train service to and from Providence at least for the present, it is manifest that the financial drain on the carrier must be kept at a mini-

mum until it can be determined whether the anticipated growth in traffic and greater contribution toward expenses will in fact be attained.—New York, N.H. & H.R. Co. Discontinuance, 320 I.C.C. 714 (728-30).

The hard core of the involved traffic is between Westerly, R.I., and Providence, and that traffic is on the increase. Except at one point, no adequate alternative means of travel, public or private, is available on that segment. Consideration of all pertinent factors is convincing that continuance of the commuter train service between Westerly and Providence for the statutory 1-year period is needed and will not unduly burden the carrier. And while it is incumbent on inhabitants of the communities concerned to support the trains by continuing to use them, carrier has an obligation to employ every reasonable means to limit the costs of their operation; it should explore possibility of adjustments in time schedules of its through trains to accommodate commuters and thus achieve desirable economies while preserving essential service. —Id., pp. 732-3.

However, the test week data show that less than 5 percent of passengers using the subject trains board or detrain at points in Connecticut; no Connecticut community entered an appearance at hearing, and while the State appeared and participated in cross-examination of carrier's witnesses, it offered no witnesses of its own. Carrier's other trains between New London and Providence, while not suitable for morning commuters, appear adequate for needs manifested by intermediate communities, considering the short highway distances to New London or Westerly and availability of some local bus service. That a few individuals would be inconvenienced by discontinuance of the commuter trains does not warrant a finding of need for their continued service at Connecticut points. Nor does public convenience and necessity require continuance of any Saturday service by those trains, since no witness testified to using the Saturday trains or expressed support for their continuance.—Id., pp. 731-2.

Though carrier bases proposed discontinuance of the only passenger trains on its river division between Memphis and St. Louis on alleged decline in patronage, and over a period of years the number of passengers transported and revenues received from those trains steadily declined, the decline was halted in 1959; evidence of public witnesses justifies conclusion that (1) a substantial number of passengers are still riding the trains, (2) a considerable quantity of mail and express is being handled thereon, and (3) the public demand and need for the service cannot be satisfied by substitute services; continued operation of the trains is therefore required. —St. Louis-S.F. Ry. Co. Discontinuance of Service, 312 I.C.C. 713 (727).

Discontinuance of carrier's only through trains between St. Paul and Portal, N. Dak., would deprive many towns on that 561-mile route of their only passenger-train service; some are connected only by dirt or gravel roads and have no other public transportation; proposed discontinuance would mean their complete isolation, especially during winter months. As to the remaining towns, area between Glenwood, Minn., and Twin Cities is now served by a pair of trains which carrier is seeking authority from the State commission to discontinue, and duration of that service is therefore uncertain; service afforded by other railroads between Glenwood and Portal is not an adequate substitute for considered trains, nor does available airline or common-carrier bus service meet the public need in that area; continuance of the subject trains, even at some loss, is therefore required by public convenience and necessity.—Soo Line R. Co. Discontinuance of Passenger Trains, 312 I.C.C. 729 (739, 740-1).

Discontinuance of carrier's only passenger trains between Kansas City and Omaha would leave almost all intermediate cities served without passenger train service, as parallel route of the Burlington lies east of Missouri River and serves only one of them; no adequate substitute service is available, as none of such intermediate cities has airline service, no one motor passenger carrier serves all of them and only a few are directly connected by busline, and bus schedules and routes do not permit ready connections. Considered trains are well patronized, and indication that increasing use by the public—over 18 percent increase in 1959-60—will continue is borne out by testimony of a carrier witness as to in-

creased patronage in first half of 1961; thus there is definite and substantial need for their continuance.—Missouri Pac. R. Co. Discontinuance of Passenger Trains, 312 I.C.C. 765 (774, 776).

Although in proceedings involving discontinuance of other passenger trains of the North Western it was found that combination of its remaining service with that of other railroads, buslines, and airlines would provide ample passenger facilities in the affected area, that is not true where considered trains between Chicago and Minneapolis and between Chicago and Mankato, Minn., are its only remaining trains providing service between Milwaukee and Madison, Wis., on one hand, and Minneapolis and Mankato, on the other, and without its service only four points on its lines west of Madison would have rail passenger service; particularly, discontinuance of those trains would work considerable hardship on patients of Mayo Clinic at Rochester, Minn., who depend on them for transportation.—Chicago & N.W. Ry. Co. Discontinuance of Passenger Trains, 317 I.C.C. 21 (27, 29).

Record shows that the traveling public has made substantial use of considered trains and that such use may even increase in the foreseeable future; fact that daily averages for first 5 months of 1961 are somewhat smaller than for the full year 1960 does not indicate a decrease in public use of the trains, since patronage in winter months is relatively lighter than in summer, and passenger revenues on the trains for first 10 months of 1961 indicate that the entire year will be as good if not better than 1960; the relatively large number of public witnesses evidencing an interest in continued operation of the trains, and their substantial use by the public, demonstrates a relatively large public need for the service they afford, and that substitute services are inadequate to satisfy that need; continued operation ordered for a period of 1 year.—Id., pp. 29,30.

Adequate evidence established substantial public need for continued operation of joint interstate passenger trains of the Pennsylvania and Seashore Lines and of latter's remaining intrastate trains between Philadelphia-Camden area and southern New Jersey points; no adequate substitute service is available, since bus service entails longer transit time and is subject to traffic delays during peak periods which make it unacceptable to commuters; it is conclusively shown that commuters are making regular and substantial use of the basic morning and evening trains involved, and that service of the other trains meets existing needs of the communities concerned; discontinuance of those trains would leave that New Jersey area without any adequate public transportation service; in the circumstances, order requiring continued operation of considered trains for 1 year is warranted.—Pennsylvania R. Co. Discontinuance of Passenger Service, 317 I.C.C. 111 (124, 129, 134, 135).

Though for all practical purposes services proposed to be provided by carrier's City trains between Oakland, Calif., and Ogden, Utah, after discontinuance of its overland trains would not differ in any material respect from present operation of the latter, carrier anticipates that it would be necessary, during the summer and Christmas peak periods, to split the trains. However it would not do so if in its judgment a second section was not required; and when running the eastbound City train in two sections it would be necessary for each section to be broken at Ogden and the cars moving through to Chicago and Kansas City separated and switched. Therefore, carrier is required to continue daily operation of the Overland trains during the periods June 14 through Labor Day and December 22 through January 2, for 1 year from date of order, with a consist as specified, and with schedules adjusted to coordinate movement of through cars with connecting lines at Ogden.—Southern Pac. Co. Discontinuance of Passenger Trains, 317 I.C.C. 519 (534, 547).

Continued service of the Milwaukee's Chicago-Tacoma passenger trains is needed between Minneapolis and Butte, Mont.; use thereof has been fairly substantial considering sparsely populated areas involved, and discontinuance would deprive the public of train service throughout most of that vast area, would leave some points without any form of common-carrier passenger service, and would make it difficult for many travelers to obtain adequate service; would also deprive the pub-

lic of convenient and expeditious mail and express service and adversely affect economic well-being of many communities. Continuance of that service would enable the Milwaukee to retain its rather substantial volume of traffic between Chicago and points east of Butte and also to coordinate its operations with Northern Pacific's to provide convenient connections or through-car service to and from west coast points. Public convenience and necessity requires continued operation between Minneapolis and Butte for 1 year from date of order.—Chicago, M., St. P. & P.R. Co. Discontinuance, 317 I.C.C. 691 (715-6). [See also Chicago, M., St. P. & P.R. Co. Discontinuance, 317 I.C.C. 761, n. 2 and 35 hereunder.].

Service provided by carrier's intrastate passenger trains between Denver and Craig, Colo., is not a mere standby service for use when residents of the territory do not wish to drive their automobiles; highway which provides the only motor access to the area west of the Continental Divide affords an extremely tenuous route through that mountainous territory, and service of the trains is of equal importance in preventing its reversion to the state of isolation prevailing prior to construction of the Denver-Craig line. That the territory served is sparsely populated is insufficient reason for permitting discontinuance of the trains: residents of such regions are as much in need of transportation as those of regions of denser population; inconvenience imposed on the tributary territory by proposed discontinuance would outweigh the benefit carrier would gain thereby.—Denver & R.G.W. R. Co. Discontinuance of Passenger Serv., 317 I.C.C. 722 (727).

—Feeder value:[Vol. 19].—In considering proposed discontinuance of considered Boston-Albany trains, one area of unresolved doubt concerns public need for, and value to New York Central of, their service as part of available through passenger service between Boston and points west of Albany. But though it would be unrealistic to include any arbitrary proportion of revenues produced by other trains as part of revenues assignable to the trains involved, particularly as Central's total passenger operations have consistently incurred annual losses under accepted methods of computation, resolution of that doubt in favor of Central's contentions does not alter the ultimate conclusion that continued operation of the trains for at least 1 year is required. That at least half the riders of those trains patronize continuing trains of Central is an important facet of existing public need, and mere expectation that present patrons would use Central's Boston-Chicago trains, regardless of time of day they arrive and depart, does not warrant finding that public convenience would be satisfactorily protected.—New York Central R. Co. Discontinuance, 320 I.C.C. 364 (375-6).

25. Losses from operation.—[Vols. 18,19].—Carrier's computation of losses from operation of trains it proposes to discontinue reflects methods used by it in prior discontinuance proceedings and accepted by the commission; those figures show that, even with disallowance of certain items, its net loss before interest or return on investment approximates $1 million annually. And though, since enactment of the Transportation Act of 1958, carrier has discontinued some 70 trains under provisions of §13a, thereby substantially reducing its passenger deficit and greatly improving its overall financial position, its net income for the previous year was aided more directly by a $10 million Federal income tax refund. Carrier should not be required to disburse the benefits of that refund by assuming the losses produced by continuance of the involved trains.—Chicago & N.W. Ry. Co. Discontinuance, 320 I.C.C. 648 (653, 665).

And though protestants suggest that those losses could be eliminated by a fare increase, carrier's experience indicates that such increases do not always produce additional passenger traffic. Fares on considered trains would have to be tripled to overcome the deficits now incurred in their operations; accordingly, a fare increase of magnitude needed to obliterate present operating deficits would not be feasible. Discontinuance authorized.—Id., p. 665.

Notwithstanding that substantial use has been made of Baltimore & Ohio's Speedliner all-coach trains between Baltimore, Washington, and Pittsburgh, and that it has made considerable effort to increase patronage, it has incurred substantial out-of-pocket losses in

their operation and there is no indication that patronage will increase or the losses be reduced, whereas discontinuance of those trains and rescheduling of one of its local trains from Baltimore to Washington will effect considerable savings and promote efficiency in its operations. Such losses and savings are of major importance to the carrier in view of its steady decline in net income since 1956; as adequate alternative services are available, and cost of operating the Speedliners greatly exceeds benefits derived by the traveling public and communities served by them, discontinuance is authorized.—Baltimore & O. R. Co. Discontinuance of Passenger Trains, 317 I.C.C. 673 (681-2)*.

Where financial losses from operation of considered trains have been relatively heavy and their use has been insubstantial over an extended period, their continued operation would constitute an unnecessary and wasteful service and impose an undue burden on interstate commerce; aggregate of actual costs shown, alone, for each of three specified periods was over four times the passenger revenues for corresponding periods and exceeded total revenues from passengers, mail, and express carried on involved trains; in the circumstances, profitableness of carrier's system operations is not controlling. Discontinuance authorized.—Louisiana & A. Ry. Co. Discontinuance of Service, 317 I.C.C. 155 (161, 162, 163).

Carrier has sustained substantial losses from operation of considered passenger trains, and if the service were continued further severe financial losses would be certain. Those trains have had little public support and, in view of the overall showing of reasonably adequate alternative transportation service, carrier's improved financial condition loses what significance it might otherwise have. Cost of operating the trains greatly exceeds any benefits derived by the public, and financial burden of continued operation would result in injury to carrier far outweighing the minimal adverse effect on the few who would be inconvenienced by discontinuance. In the circumstances there is no warrant for imposing such a heavy economic burden on carrier, especially in view of the almost listless response to service offered in the past and the negligible prospect of any significant increase in public need or use of the trains. Continued operation would constitute an unnecessary and wasteful drain on carrier's resources; discontinuance authorized.—Soo Line R. Co. Discontinuance, 320 I.C.C. 337 (357).

Carrier's average net system loss for 1957-62 (excluding gains from sale of lands and other one-time non-operating credits) is shown to be $1,065,667, whereas its estimated annual savings (supported by the record) from discontinuance of considered four trains would be $1,158,790 based on 1961 operations, which if spread over those 6 years would have shown average annual net income of $93,123; and on the 1961 basis those trains operated at an average daily out-of-pocket loss of $3,175. Record indicates that fare increases did not improve financial results of operation and may well have had an opposite effect; and carrier's management, acting within its responsibility, decided that advertising or other promotion efforts on the small budget it considered sound would not attract enough passengers to reduce its losses.—Chicago & N.W. Ry. Co. Discontinuance, 320 I.C.C. 85 (92, 99, 100, 102-3)*.

Though one protestant criticizes carrier for expenditures to purchase stock of another railroad, for failing to use that money and gains from sale of real estate for maintenance, additions, and betterments, and for not borrowing for those purposes under a revolving credit arrangement with a group of banks, record shows that substantial dividends were received on the stock and that use of proceeds from real estate sales was restricted by terms of mortgage thereon; those decisions were within carrier's managerial discretion under all existing circumstances, including its financial condition and outstanding debt obligations. Moreover, there is no claim that adoption of protestants various suggestions would have produced a profitable operation or, even with severe downgrading of service, would have reduced out-of-pocket loss from operation of considered trains below $597,790; conclusion is warranted that their continued operation would unduly burden interstate commerce.—Id., pp. 102, 103.

Inability of carrier's trains between Kansas City and Minneapolis to operate at a profit is

due to intense competition in the area from private automobiles, buses, airlines, and another railroad; discontinuance will permit minimum annual savings of nearly $100,000, and savings might well be substantially greater because carrier would probably retain some of the mail, express, and passenger traffic on its other trains between Minneapolis and Hayfield, Minn.; considering all circumstances, discontinuance is warranted.—Chicago Great Western Ry. Co. Discontinuance of Service, 317 I.C.C. 99 (105).

After elimination of expenses which the commission has previously held not to be avoidable out-of-pocket costs, out-of-pocket losses for 1961 from operation of carrier's Overland trains between Oakland, Calif., and Ogden, Utah, are shown to be $953,000. By providing the same service with its City trains after discontinuance of the Overland trains, substantial savings can be achieved during off-peak periods, resulting in an approximate net gain of $28,559 for a comparable year, although no savings can be expected from operation of second sections during peak travel periods (about 112 days). While such computations are not exact, conclusion is warranted that continuance of the Overland trains during other than peak periods would unduly burden interstate commerce when the same service can be continued by the City trains with substantial savings and possibly a profit.—Southern Pac. Co. Discontinuance of Passenger Trains, 317 I.C.C. 519 (539-40, 546-7).

Carrier's transfer of the through cars of the Overland trains to the City trains during a prior period of about 4 months is not shown to have had any material effect on the decline in traffic and losses in operation suffered by the Overland trains. The through car service continued unabated, and it is highly conjectural whether the increase of about an hour in arrival and departure times at Ogden caused any loss in traffic; and since the local cars remained with the Overland trains, that traffic could not have been adversely affected by removal of the through cars.—Id., pp. 543, 545.

And contention of the city of Sacramento that, since it has engaged in developments to increase carrier's freight traffic, carrier should be willing to continue passenger service of the Overland trains at a loss is an unsound basis for continuing that service.—Id., pp. 541, 546.

Baltimore & Ohio is incurring losses both in its overall passenger operations and in continuance of its trains between Washington, D.C., and Cleveland, Ohio, and though its estimate of about $304,000 net out-of-pocket savings annually from discontinuance of those trains appears somewhat overstated, savings realized would substantially exceed annual losses from that service; such losses, when weighed against the inconvenience to some 30 passengers per train per day who would not have alternate B&O service available, warrant approval of proposed discontinuance.—Baltimore & O. R. Co. Discontinuance of Service, 317 I.C.C. 509 (511)*.

Boston & Maine's proposed discontinuance of three northbound and three southbound passenger trains on its Connecticut River line between Springfield, Mass., and Brattleboro or Windsor, Vt., with resulting annual savings of at least $69,664, is warranted when, with a depleted cash position and a deficit in net working capital, it is apparent that orderly operations cannot be financially maintained; notwithstanding heavy population concentration along the line in Massachusetts, considered trains have been only lightly patronized and are operated at substantial out-of-pocket loss, and with declining patronage their continuance would only result in growth of such loss; considering the size of carrier's total deficit in net income in recent years, its financial condition requires that this drain on its resources be eliminated.—Boston & M. R. Discontinuance of Passenger Service, 317 I.C.C. 165 (172, 175).

Even if the most extreme position advocated by the State of Rhode Island in opposition to the New Haven's proposed discontinuance of a set of commuter trains between New London, Conn., and Providence were adopted, there would still be an excess of expenses over revenues. Although such excess is not great compared with carrier's annual losses in its New York City commuter operations, the State's contention that the subject operations place no burden on interstate commerce is without merit: clearly they contribute to car-

rier's overall unsound financial condition. And contention of one community, based on opinion of carrier's comptroller that it could never conduct passenger service without a public subsidy, that if the morning train is discontinued now its passengers will never receive benefit of such a subsidy, must be discounted; the matter of future public subsidy for New Haven's passenger service is much too speculative a basis for requiring continuance of the involved trains in face of the losses shown. However, discontinuance is found justified only between New London and Westerly, R.I.—New York, N.H. & H. R. Co. Discontinuance, 320 I.C.C. 714 (727, 734).

Discontinuance of carrier's only passenger trains between Red Bank and Trenton, N.J., is warranted when their operation is highly unprofitable, annual expenses including essential car costs being at least four times revenues therefrom; discontinuance will permit savings of at least $50,000 annually, as well as economies amounting to some $60,000 through simplification and elimination of signals and excess personnel; the very slight increase in patronage during 1958-60 cannot be considered indicative of any significant increase in future use, considering population growth of area served during same period; moreover, carrier sustained a systemwide passenger deficit of at least $34,000,000 in each of 10 consecutive years through 1959, and an overall deficit of $7,819,112 in 1960; in the circumstances, carrier's need to end an uneconomic operation and interest of the general public in efficient transportation outweigh convenience of the service to patrons. —Pennsylvania R. Co. Discontinuance of Service, 317 I.C.C. 5 (11, 12, 13).

See also Pennsylvania R. Co. case (317 ICC 111), n. 20, above.

The three pairs of intrastate trains carrier proposes to discontinue are at present lightly patronized, and changes in service made to effect economies have been ineffective to avert substantial losses, which in 1958 resulted in a total deficit before income taxes of approximately $587,000. The modifications of operations and service criticized by the State were instituted with specific approval or general acquiescence of the State commission, and there is no probative evidence that if the new services suggested were instituted any additional riders would have used those trains; it cannot be found that any increased expense of those items could reasonably be expected to be offset by equal or greater added revenues. And though the record warrants conclusion that carrier has made no special effort to encourage passenger travel and some of its actions may have served to discourage traffic, it cannot be found in view of the competition that a different approach would assure profitable operation of the trains involved. Discontinuance authorized.—Southern Pac. Co. Discontinuance, 320 I.C.C. 59 (76-7, 80).

Legislative history of §13a makes clear that Congress did not intend the commission to permit discontinuance of trains merely on a showing that their operation results in a loss to the carrier. Although fact that losses are being incurred is important in determining whether continued operation will unduly burden interstate commerce, magnitude of the losses must be considered in relation to need for the service and their effect on carrier's ability to continue adequate and efficient service. Evidence shows that results of operating carrier's only remaining pair of trains between Kansas City and Omaha have improved, and its passenger train operating ration had declined from 150.87 in 1958 to 118.61 in 1961. Considering the substantial public need shown for continued operation of those trains, together with economies possible through elimination of little-used parlor- and dining-car services thereon, the out-of-pocket losses from their operation do not appear so substantial as to constitute an undue burden on interstate commerce.—Missouri Pac. R. Co. Discontinuance, 320 I.C.C. 1 (10-11, 12).

Neither length of trip nor scheduling of involved trains appears to require parlor- and dining-car services to attract passengers, and those services have not been well patronized; their elimination would substantially decrease net operating losses. Reflecting discontinuance of those services, eliminating overhead and traffic expenses reported as savable, and considering increased feeder value based on the 50-percent formula and loss of revenue from the dining and parlor cars, maximum

out-of-pocket losses from operation of the trains would be $223,000 for 1960, $179,000 for 1961, and $145,000 for first 6 months of 1962; and those losses must be further reduced to reflect undeterminable amounts for depreciation and repairs on parlor car, a portion of claimed savable expenses for maintenance of way and structures, and some portion of discrepancy in feeder value now shown for 1960 and that shown in earlier proceeding involving same trains.—Id., pp. 9-10.

Carrier has sustained substantial losses in operation of its Chicago-Tacoma trains west of Minneapolis, which have had adverse effect on its system earnings, and it would continue to sustain substantial losses if operations were continued over entire run between Minneapolis and Tacoma. However, while it should be accorded some relief, solution of the problem by elimination of all service west of Minneapolis appears doubtful; though such discontinuance would eliminate most operating expenses for that service and result in some other savings, carrier would lose all revenues accruing from passengers handled over that portion of the line, a majority of whom are through travelers between Minneapolis or points beyond and northwest coast points, and would doubtless lose considerable revenues from passengers handled in its other trains between Minneapolis and Chicago. Complete elimination of the trains west of Minneapolis might thus afford only slight relief instead of substantial savings anticipated, and burden on interstate commerce would not be substantially alleviated. Discontinuance authorized between Butte, Mont., and Tacoma, Wash., only.—Chicago, M., St. P. & P. R. Co. Discontinuance, 317 I.C.C. 691 (714-5).

But while service is required to be continued for 1 year between Minneapolis and Butte, a railroad cannot continue operations at a loss indefinitely, for when such losses are substantial they are bound to affect interstate commerce adversely and if continued long enough might eventually result in carrier's insolvency. The public should be aware that if, during the 1-year period, carrier continues to experience reduced earnings from the trains and substantial losses from their operation, it may be necessary to authorize the complete discontinuance sought.—Id., pp. 714, 717.

While record clearly shows that, on a fully allocated basis, passenger operations on considered branch line are a deficit operation, the fully allocated deficit resulting from operation of a particular passenger service is not indicative of the amount of money that would be saved if the service were discontinued; whether or not proposed discontinuance would be beneficial to the carrier depends on whether expenses to be saved would exceed revenues to be lost. In §13a cases, out-of-pocket costs of operating trains in question are of primary importance; therefore, while no error can be found in carrier's estimate of revenues that would be lost by discontinuance of service on considered branch line, it is necessary to examine certain out-of-pocket expenses which it claims would be savable expenses.—New York, N.H. & H. R. Co. Discontinuance, 320 I.C.C. 466 (479).

Record is not persuasive, in the absence of probative evidence, that the loss of an average of 13 passengers per trip on each New York train connecting with branch-line train sought to be discontinued would generate savings as claimed by carrier; so far as appears on record, crew and consist of New York trains would be unchanged and no suggestion appears of any economy on main line resulting from proposed discontinuance of passenger service on the branch line.—Id., p. 483.

Dominant factor is that evidence does not establish that passenger service provided on the branch constitutes an undue burden on interstate commerce or to be more precise that discontinuance of service would remove such a burden; based on expenses found to be savable and carrier's estimate of revenues that would be lost through discontinuance, there is reason to find that the carrier's annual operating results, would at least approach the breakeven point, although this is not to say that the passenger operations on the branch would be conducted at a profit or near profit. The commission is simply recognizing that the financial posture of the carrier would differ little as a result of the proposed discontinuance from what it would be if the trains continued in operation.—Id., pp. 485-6.

While carrier has incurred out-of-pocket

losses in operation of considered trains between Chicago and Minneapolis and between Chicago and Mankato, Minn., such losses are not so substantial as to unduly burden interstate or foreign commerce, and could be reduced substantially if carrier would increase its fares to level charged by competing railroads; proposed discontinuance is not warranted at present.—Chicago & N.W. Ry. Co. Discontinuance of Passenger Trains, 317 I.C.C. 21 (30).

Although extent of the deficit is conjectural, carrier's financial data warrant conclusion that operation of considered trains has resulted in financial deficit. Burden thereby imposed on carrier and on interstate commerce must be considered in direct relation to public need for the service proposed to be discontinued, since a substantial need for the line might warrant continuance of service even at a loss; this doctrine gains importance where a "last train off" proposal is involved. Discontinuance of considered trains would deprive many towns on a 561-mile line of their only public passenger service, and service to the remainder would be inadequate; in the circumstances, financial losses incurred in their continued operation will not unduly burden interstate commerce.—Soo Line R. Co. Discontinuance of Passenger Trains, 312 I.C.C. 729 (737, 740-1).

Amount saved from discontinuance of carrier's day trains between Buffalo and Chicago would probably be somewhat less than net loss claimed by it from their operation. It is not established that amounts included for general overhead expense would be saved, expenses for locomotive repairs would be lessened by reason of new locomotives in use, and no expense would be chargeable for closed East Cleveland station; also, recent 10-percent fare increase should reduce losses by $40,000 to $50,000 a year. But though large portions of expense of joint use of terminals would probably be shifted to other trains using those facilities, this might be partly offset by increased travel on such trains as result of elimination of those discontinued.—New York, C. & St. L. R. Co. Discontinuance, 317 I.C.C. 775 (783, 784).

As considered trains are well patronized and, excluding considerations of monetary loss, their continued operation is shown to be required by public need, discontinuance should not be permitted unless operating losses which would be eliminated are of such magnitude as to outweigh the benefits from continued operation and thus unduly burden interstate commerce. Annual out-of-pocket loss which would be saved would not exceed, and would probably be somewhat less than, $168,000; as removal of those trains would leave almost all intermediate cities without passenger-train or other adequate service, and there is indication that present substantial public use of those trains will increase, the financial loss incurred in their continued operation will not unduly burden interstate commerce.—Missouri Pac. R. Co. Discontinuance of Passenger Trains, 312 I.C.C. 765 (771, 773-4, 776).

Any operating losses from considered trains are not so substantial that continued operation would unduly burden interstate commerce. In estimating savings from discontinuance no effect was given to loss of revenue that would result; in absence of showing of extent to which any of the revenues would be retained, it must be concluded that all revenues accruing from their operation would be lost; deducting amount of previous year's revenues from carrier's estimate of savings, and excluding amount claimed for joint terminal expenses, would leave carrier with a net loss as result of proposed discontinuance.—St. Louis-S.F. Ry. Co. Discontinuance of Service, 312 I.C.C. 713 (722, 727).

—Computation; out-of-pocket costs: [Vol. 19].—Where discontinuance of trains as proposed would have effect of eliminating expense of maintaining passenger station based on use, such use now required by state law so long as carrier enters city, it constitutes a savable, out-of-pocket expense; passenger station is expensive to maintain and carrier is in poor position to secure better terms. Attempts to have the law repealed or amended so as to permit the use by the carrier of less-expensive freight house as a passenger station have been uniformly unsuccessful.—New York, N.H. & H. R. Co. Discontinuance, 320 I.C.C. 466 (485).

Depreciation (including depreciation on Budd cars) is a proper out-of-pocket expense

which may be included as a savable expense upon discontinuance of trains; and a savings, reflected by item of depreciation on equipment, will be allowed where record shows that the equipment assets from trains to be discontinued may replace equipment assets being worn out elsewhere in the system or may forestall needed investment in new equipment and in maintenance for other parts of the system.—Id., pp. 480, 481; Id., 320 I.C.C. 544 (544-5).

Also, expenses related to earning dependent revenues is allowed as savable expense upon proposed discontinuance where the carrier will effect a commensurate reduction in off-branch expenses; and the commission, in a number of passenger discontinuances, has applied an arbitrary formula wherein 50-percent of the dependent revenues is taken as the system's savable beyond-the-branch expense incident to that revenue. Record is convincing that, with proposed reduction in dependent revenues, carrier will effect commensurate reduction in off-branch expenses equal to at least the amount provided by the 50-percent formula; expenses related to earning dependent revenues, allowed.—Id., 320 I.C.C. p. 566; 320 I.C.C. p. 484.

And freight train overtime is found to be a savable out-of-pocket expense where uncontroverted evidence established that that item is a direct result of operation of considered trains, and that carrier has made concerted efforts to so schedule the freight service to eliminate train delays, to no avail. In addition to delay and resulting expense to freight service which would be avoided subsequent to the discontinuance, speed and efficiency of the freight trains would be increased by the assurance that no passenger trains would be met. But where details are not of record, the commission cannot conclude that amounts shown under freight train overtime are a savable out-of-pocket expense, nor can it compute what amounts of such overtime costs, if any, may be so classified.—Id., 320 I.C.C. p. 481; 320 I.C.C. p. 557.

However, interest on investment has not been accepted as an item of savable cost in either line abandonment or train discontinuance cases although it has been characterized as a benefit that would accrue to the railroad if a branch line were abandoned, and as an indicium of additional burden on the railroad and on interstate commerce if branch is not abandoned. Return on investment is a factor used in arriving at a proper rate level, and has been classified as a cost item to be recovered in operations under the rate; but it does not follow that it is a cost which railroad will save by not operating a particular train, especially where for a long time there has been no net return from the train operation. Record is not convincing that interest on investment in Budd cars constitutes a savable out-of-pocket expense flowing from proposed discontinuance of considered passenger trains.—Id., 320 I.C.C. p. 480; 320 I.C.C. p. 555.

In consolidated proceeding wherein carrier seeks to discontinue operation of its two remaining passenger trains under §13a(1) and to abandon operations over trackage of two other carriers under §1(18), expenses for use of joint facilities were savable where the use would be completely abandoned, but not where movement of freight service would continue at the facilities.—Chicago Great Western Ry. Co. Discontinuance, 328 I.C.C. 664 (665-6, 670-1).

Only directly related expenses which may be eliminated by discontinuance of the trains in question should be included in out-of-pocket costs of providing the service. Expenses for maintenance of way and structures are not properly includible in such costs, and same conclusion is warranted as to general and traffic expenses, since little if any actual savings in such items would result from discontinuance of particular trains.—Chicago & N.W. Ry. Co. Discontinuance, 320 I.C.C. 648 (652).

In computing operating costs for purpose of showing losses from operation of particular trains, the savable costs, not allocated costs as such, should be used. Unless a particular cost will be avoided as a direct result of proposed discontinuance and not merely be reallocated and added on to other service units, it must be disregarded as immaterial. As no injuries to persons are shown to be attributable to operations between involved termini during the period studied, cost shown therefor is merely an allocation of a system expense, without any proof that elimination of consid-

ered trains would avoid any cost in that category.—New York, N.H. & H.R. Co. Discontinuance, 320 I.C.C. 714 (718-9); and as those trains operate over carrier's main line, in absence of specific evidence showing how discontinuance of one round trip a day could effect a savings on maintenance-of-way expenses, amount claimed therefor is likewise disallowed.—Id., p. 719.

The 50-percent formula for computing cost of handling passengers beyond a branch was adopted as a means of estimating savable costs associated with feeder revenues where a reasonable accurate ascertainment is not feasible and it is apparent that some perceptible saving in such expenses will necessarily follow the discontinuance; but where there is no indication that a noticeable diminution in service equipment, or personnel beyond the branch is likely to ensue, the formula would have no relation to reality. As any loss of beyond-the-segment passengers after discontinuance of carrier's commuter service between New London and Providence would not save any significant costs of continued operation of one train from Providence to Boston, unless the change in number were enough to warrant change in amount of equipment needed, use of the formula is not justified.—Id., p. 721.

Depreciation may properly be considered an avoidable expense when equipment is sold or used to release other equipment from service. While carrier admits that immediately after discontinuance the involved Budd cars would be used in the Boston-Providence service, it contends that experience shows that it will soon find other services in which to use them. It would be unrealistic to take the short-range view that use of those cars would not be immediately affected by the discontinuance; great weight must be accorded carrier's experience as testified to by its comptroller, particularly since opposing witness made no study of carrier's equipment problems. Following 320 ICC 466 and 544, depreciation expense on the Budd cars is treated as savable.—Id., pp. 722-3; and as the portion of repair expenses of the Budd cars attributable to time rather than use has much the same character as depreciation expense, that also is treated as savable—Id., p. 723.

As the cars are serviced after each arrival at New London or Boston, carrier computed unit enginehouse expenses by averaging such costs and multiplying by number of trips, and train supplies and expenses by multiplying average cost per Budd-car mile by number of miles for the subject trains, thus including part of the costs incurred to Boston. While actual avoidable costs cannot be determined, owing to nature of the operations and accounting therefor, the costs at New London would be largely avoided, and possibly some part of the Boston costs also, but it is unlikely that the amount of service, and consequently the avoidable cost, would be reduced in direct proportion to the mileage reduction. However, any overstatement of these costs due to the method used is too small to affect the conclusion as to probable savings.—Id., pp. 723-4.

Carrier's computation of revenues from the involved trains was based on two seasonal weeks in preceding year, designed to reflect savings in a representative future period. Greater weight should be given more recent experience over that of a remoter period; had more test weeks been used, the results would have had a greater degree of probability, but carrier's presentation is founded on methods recognized as furnishing reasonably reliable results. And while the revenue data are understated in making no provision for increase in number of revenue passengers in the last 2 years, any adjustment would not alter the showing that more would be saved in expenses than would be lost in revenues as result of the discontinuance.—Id., pp. 725-6.

Use of estimated unit costs in determining applicable costs of passenger car repairs, without presence of witness who devised the formulas or exercised necessary judgments to make such determinations, was not improper. Cross-examination of carrier's witnesses disclosed that the unit costs applied in each case cover only the type of power units and cars operated on the trains in question and vary accordingly; the results are admittedly approximations arrived at by reliable methods accepted in the industry, and any errors could as well be understatements as otherwise. The persons responsible for preparation of the unit factors prepare monthly studies of such

costs as part of their regular functions, and those data provide bases for information included in carrier's reports to the commission and appropriate State agencies, thus are subject to official review and criticism.—Union Pac. R. Co. Discontinuance, 320 I.C.C. 493 (504-5)*.

Actual costs of train repairs, supplies, and expenses need not be shown in discontinuance proceedings where equipment used may be interchanged with like equipment belonging to the system; computation of the various items categorized under car costs by multiplying the average rate per car-mile in same general area for the type of service considered by the number of car-miles operated each year by involved trains conforms with methods approved in other discontinuance proceedings; in same area at the time, carrier operated at least three gas-electric cars which could be and were used in considered operation, and car costs so determined are not excessive.—Pennsylvania R. Co. Discontinuance of Service, 317 I.C.C. 5 (8).

Use of representative 1-week periods in 1958 and 1960 to compute an average rate per passenger provides a reasonable approximation of actual revenues from considered trains when applied to actual passenger count for each year.—Id., p. 7.

Economies resulting from simplification and elimination of signal and crossing expenses peculiar to passenger operations are acceptable as additional savings from proposed discontinuance of only passenger trains operated on considered line; though not all of amount of wages of block operators is attributable to the passenger operation, and wages of crossing watchmen, though savable, must be somewhat offset by cost of installing new crossing devices, evidence shows that additional savings of at least $60,000 annually would be realized through simplification and elimination of existing signal and crossing facilities.—Id., p. 9.

Since petitioner is a wholly owned subsidiary of Kansas City Southern, both carriers operate in same general area, and functions and facilities of both are to a large extent closely integrated, system average costs based on combined operational costs of both are reasonably accurate and realistic for computing costs related directly to locomotive and passenger car expenses of considered trains.—Louisiana & A. Ry. Co. Discontinuance of Service, 317 I.C.C. 155 (161).

Amount of loss from operation of considered trains should not be reduced by a percentage equivalent to income tax saving which resulted therefrom; since the loss was actually incurred, it cannot reasonably be considered less because carrier's total income tax may have been less than if it had not been incurred.—Id., p. 162.

Amount for depreciation on equipment, based on evidence that the service requires ownership of two Budd cars that would otherwise not be required, was properly included in cost of operating trains proposed to be discontinued; unrefuted evidence that two units devoted to that service can be retired is further supported by fact that carrier owns 108 such cars, of which 10 or 12 are in storage, and is negotiating to sell some 25 of them.—Boston & M.R. Discontinuance of Passenger Service, 317 I.C.C. 165 (172).

While discontinuance of considered trains would, by reducing the number of cars moved in and out of Washington Union Terminal, increase the unit cost per car thereafter assessed for carrier's use of the terminal facilities, resulting increase in terminal costs was not included as an offset to estimated savings from discontinuance; however, even with such increase, carrier would still realize savings substantially exceeding annual losses from continued operation of the trains. And though discontinuance would not only shift the terminal expenses to carrier's trains still using the Washington terminal, but would also require redistribution of expense among other user carriers, such redistribution would not impose an undue burden on interstate commerce.—Baltimore & O. R. Co. Discontinuance of Service, 317 I.C.C. 371 (380)*.

Inclusion in estimate of savings from proposed discontinuance of actual amount paid for use of union station facilities at Kansas City was proper when carrier has no other passenger trains using those facilities, and as its present proportion of user charges is less than 1 percent of the total, redistribution of expense among the remaining carriers would not unduly burden interstate commerce;

moreover, any burden might be somewhat offset by some of the remaining carriers obtaining all or part of the mail, express, and passenger revenues earned by considered trains. However, joint facility expenses at Minneapolis and St. Paul terminals would not be saved, since other trains of carrier would continue to use those facilities.—Chicago Great Western Ry. Co. Discontinuance of Service, 317 I.C.C. 99 (104-5).

Joint passenger terminal expenses consisting of payments made strictly on a use basis measured by percentage of carrier's ticket sales in the terminal to total ticket sales of all carriers using the terminal are properly included in estimated savings from train discontinuance when involved trains are carrier's only trains using that terminal.—Chicago & N.W. Ry. Co. Discontinuance, 320 I.C.C. 85 (92)*.

When, in response to prior criticism of carrier's use of system average costs including both through-train passenger service and suburban service, it separated the accounts and arrived at system averages more appropriately based on through-train equipment only, computation of expenses of considered trains on such system averages is acceptable as a reasonably close approximation of actual expenses incurred in operation of those trains.—Id., pp. 93-4.

As provision of standby equipment is a proper and necessary practice in conduct of orderly and dependable passenger service, cost thereof is a proper expense item.—Id., pp. 94-5.

Since, as result of elimination of connecting Canadian trains, tourist traffic and Canadian mail and express formerly handled by carrier's St. Paul-Portal, N. Dak., trains have been moving by other trains for some 2 years, revenues produced by such traffic can no longer properly be regarded as revenues of the Portal trains. Also, for purposes of calculating the financial burden, revenues from express moving between St. Paul and Glenwood, Minn., need not be considered, since upon discontinuance of the Portal trains such traffic would move on carrier's other trains between those points.—Soo Line R. Co. Discontinuance, 320 I.C.C. 337 (349).

Although petitioner charged no expenses to considered intrastate trains for handling of free passengers, the State contends that they should be credited with constructive revenues for providing free transportation of persons engaged in petitioner's freight service. Validity of such allocation is doubtful, and should be considered an incidental effect of proposed changes in service, when not more than 5 percent of pass riders are traveling on official railroad business; upon discontinuance of those trains no noticeable new expense would be incurred for accommodation of nonrevenue passengers on other trains; and it is unlikely that any substantial number of pass riders would have used those trains if required to pay tariff fares. Any benefits which the freight service might indirectly derive from that type of transportation are too remotely connected with the issue involved and too insignificant for consideration.—Southern Pac. Co. Discontinuance, 320 I.C.C. 59 (71, 79).

And any benefits to other segments of petitioner's operations through removal of interference of considered trains with freight and other services, also savings from reduction in required operation of switch engines and yard and work trains, from earlier scheduling of freight train departures, and from reduction of time freight trains are held on branch lines to accommodate the passenger train schedules, are savings too remote and too speculative for consideration in determining whether individual trains should be discontinued.—Id., p. 69.

Evidence offered by petitioner and by the State is so contradictory, due to difference in their methods of approach, that in most instances the differences cannot be reconciled; however, determination of which method is superior is unnecessary since, even if full credit is accorded all adjustments of operating expenses proposed by the State (except the constructive fares), annual losses from the three pairs of trains involved have been large; under either method of computation, the trains are shown to have been operated at substantial deficits. But such conclusions are not to be construed as approval of every element used by either party in developing operating expenses of the trains.—Id., p. 74.

While applicant's method of computing losses claimed from operation of considered

trains differs from those approved in other discontinuance proceedings, its motion that the financial data submitted be referred to commission's cost section for analysis is denied. Irrespective of propriety of that suggestion, questions before the commission in a discontinuance proceeding are basically different from those involving cost accounting theories pertinent to rate formulation, and such a referral would not produce a sufficiently meaningful analysis or serve any useful purpose.—Missouri Pac. R. Co. Discontinuance, 320 I.C.C. 1 (5).

Apportionments of overhead expenses which include indirect labor charges and other administrative and general expenses do not constitute avoidable costs to the carrier; statistics submitted, although showing some relation between service rendered and those expenses, must be considered in light of existing competitive situation in the railroad industry, which requires the carrier to make every effort to reduce overhead expenses in the normal course of business; it is highly improbable that such expenses as administrative salaries and expenses would decrease solely as result of discontinuance of one pair of trains. —Id., pp. 7-8.

Traffic costs, like overhead, are composed of expenses not directly related to operation of individual trains. Though a portion of advertising expense incurred is applicable solely to service of the subject trains, it does not appear to be a repetitive charge, and in absence of a showing of continuing expenditures of that nature and that the individual expenditures apply to the subject service, traffic expenses are not considered. Moreover, carrier's statistics for that category tend to show a pattern similar to its passenger revenues, and decline of approximately $2 million in passenger revenue between 1956 and 1961 would dictate reduction of that class of expense.—Id., p. 8.

Expenses for maintenance of way and structures, previously not considered as savable, could vary with amount and type of service offered. Line used by considered Kansas City-Omaha trains must now be maintained for comfort and safety of high-speed passenger service, and while wear and tear of way facilities is caused by both passenger and freight service, the impact is more pronounced at high passenger speeds than at lower freight speeds. In addition, because the subject trains provide the last passenger service on the line, discontinuance would permit abandonment of passenger platforms and waiting rooms, ticket office equipment, and baggage, mail, and express equipment, maintenance of which is in the maintenance-of-way expense category. However, maintenance of bridges, trestles, and culverts are not properly includible as a savable maintenance-of-way expense.—Id., p. 8.

Although carrier asserts that use of the 50-percent formula for determining cost of handling traffic on other lines of the railroad, as previously accepted by the commission in computing results of branch-line freight operations, is unrealistic when consideration is given its passenger operating ratio and its estimate of savings, it makes no allegations regarding savings on connecting trains if those involved are discontinued; in absence of such a showing, its computations in that respect cannot be accepted as accurate.—Id., p. 9; and although certain of carrier's computations have a particular pertinence to managerial decisions and in some respects are entitled to consideration, the final results should not be accepted as accurately reflecting actual savings which would be effected by the discontinuance.—Id., p. 9.

While record is convincing that overall operation of considered trains is being conducted at substantial loss, it does not permit determination of amount thereof; fully distributed costs shown essentially represent a breakdown of the system passenger deficit determined by formulas approved for separation of costs between freight and passenger service for application to individual trains, and as such include substantial amounts of allocated expenses which would not be saved if the trains were discontinued.—Chicago & N.W. Ry. Co. Discontinuance of Passenger Trains, 317 I.C.C. 21 (24, 27).

Where all of carrier's passenger equipment is used interchangeably on all of its trains, computation of depreciation accruals for equipment on particular trains by use of applicable system average unit costs gives reasonably accurate results; however, such is not

the case where the carrier, in addition to the subject trains and similar trains operating on other routes, also operates extensively in commuter services requiring a different and more expensive type of car, which is operated over shorter routes.—Id., p. 26.

While equipment used in considered trains and depreciation accruals thereon have remained relatively constant since 1957, system average unit costs have increased more than 74 percent per locomotive-mile, and more than 106 percent per passenger-car mile, during 1957-60, apparently because of a large increase in depreciation bases, due to addition of relatively expensive equipment, and a large decrease in miles operated, due to discontinuance of passenger trains under §13a(1); thus, savings in depreciation charges from discontinuance of considered trains as shown in carrier's exhibits are grossly overstated.—Id., p. 26.

Joint facility rents may properly be included in savings from discontinuance of train service where those facilities would not be utilized by any other trains of the carrier.—Id., p. 26.

It is doubtful that any appreciable saving in joint facility expenses would result from discontinuance of one set of trains; amounts specified therefor are not savable expenses which must be considered in passing on proposed discontinuance of certain trains, as that expense would merely be shifted to other trains using the terminal and the total burden on interstate commerce would not be materially lessened.—St. Louis-S.F. Ry. Co. Discontinuance of Service, 312 I.C.C. 713 (721).

Carrier's computations involving use of formula designed to show the portion of terminal expense varying with volume of cars handled do not sustain its claim of savings; results obtained are susceptible to fluctuations depending on the base period selected, and use of the formula disregards variations in prevailing levels of employment, type of facilities provided, and number of units of equipment operated in the terminal at various periods, as well as any wage increases during period covered by the computation—all factors bearing directly on basic costs of terminal operation which usually are not affected by discontinuance of one or more trains.—Id., pp. 721-2.

Assuming use of sound and realistic ratios for the proportion of expenses which vary with traffic, it may be that use of the commission's Rail Form G formula for determining costs of passenger service will produce a reasonable approximation of expenses which would be avoided as result of abandonment of all passenger service over a given railroad; but while that formula, which allocates all system expenses associated with passenger service (both solely related and apportioned) to particular trains, is useful in appraising relative contribution of individual trains to the system, costs so allocated may not necessarily correspond to actual savings which would result from elimination of those trains; projected savings thus arrived at are too conjectural to be accepted in a discontinuance proceeding.—Missouri Pac. R. Co. Discontinuance of Passenger Trains, 312 I.C.C. 765 (771).

In absence of a showing with reasonable certainty that proposed discontinuance would reduce general expenses, including salaries and expenses of general officers and expenses for maintenance of way and structures, no amounts therefor should be included in determining out-of-pocket costs of operating particular trains; nor should amounts for return on investment in either road or equipment be included in computing operating losses.—Id., p. 772.

—Feeder value: [Vol. 19].—In determining out-of-pocket loss from operation of considered trains, credit for feeder revenue accruing to carrier's system should not be excluded; carrier concedes that annual revenues accrue to the system from transportation on other lines of passengers who ride the subject trains; undoubtedly, a major portion if not all of such revenue would be lost if they were discontinued. Cost of transporting such passengers on its other trains would not exceed, and probably would be substantially less than, 50 percent of revenue attributable to them—the factor generally approved in determining feeder value of lines proposed to be abandoned; use of that factor would reduce carrier's claimed out-of-pocket loss.—Missouri

Pac. R. Co. Discontinuance of Passenger Trains, 312 I.C.C. 765 (773).

Originally developed for use in abandonment proceedings under §1(18), the 50-percent formula has been applied in discontinuance cases also and the distinction between abandonment and discontinuance cases in this respect is one of degree only. It is an arbitrary means of establishing a cost in the absence of specific cost evidence affording a means of establishing a more accurate allocation of the cost of handling on other portions of a railroad's lines the traffic originating or terminating on a branch proposed to be abandoned, and it necessarily assumes the existence and substantiality of such costs.—New York, N.H. & R. Co. Discontinuance, 320 I.C.C. 466 (482).

However, findings in instant proceeding are not intended as a rejection of the 50-percent formula which has been followed in numerous cases where there was a transfer of equipment or of a substantial number of passengers, and the issue was not to determine the existence of avoidable expenses chargeable to that traffic but to determine a reasonable estimate thereof. Record in the instant proceeding fails to show that the handling of so few branch passengers on the main line represents an expense that discontinuance of considered trains would avoid; the 50-percent formula will continue to be applied whenever facts and circumstances warrant its use in the future.—Id., pp. 484-5.

Expenses related to dependent revenues based on 50-percent of the dependent revenues are not shown to be savable, out-of-pocket expenses in connection with proposed discontinuance; although carrier attempts to show the worth to the system of trains proposed to be discontinued relying on the 50-percent formula, finding is warranted that, from standpoint of avoidability, the cost of handling passengers who alight from branch lines and board main-line trains and vice versa and occupy seats that would otherwise be empty is very small; while a cumulative effect may be anticipated, and it is conceivable that, in conjunction with other discontinuance proceedings, a measurable effect may ultimately be had on carrier's expense of operating its remaining trains, no such effect is shown in connection with the instant proposal.—Id., p. 484.

Use of mileage prorates in computation of revenues received from passengers traveling between points on routes of trains proposed to be discontinued and points beyond does not give adequate consideration to feeder value of the trains; though such feeder value to the system is not reflected in carrier's exhibits, and amount thereof is not ascertainable from the record, savings shown should be reduced somewhat to allow for feeder value. —Chicago & N.W. Ry. Co. Discontinuance of Passenger Trains, 317 I.C.C. 21 (25).

Estimate of savings which would result from discontinuance of the Pennsylvania's and Seashore Lines' joint interstate trains between Philadelphia and southern New Jersey does not reflect any revenue losses from diversion of feeder traffic now handled by the Pennsylvania on connecting trains; latter's assumption that passengers originating west of Harrisburg, Pa., and south of Washington, D.C., would continue to use its trains as far as Philadelphia in traveling to and from New Jersey is not warranted when evidence shows that over the years large numbers of passengers have traveled on scheduled, special, or excursion trains over its main lines and Seashore's lines to or from New Jersey seashore points; elimination of all passenger service on Seashore's lines would directly affect the number of passengers handled by the Pennsylvania to and from Philadelphia, thereby depriving it of substantial revenues it now enjoys and reducing net savings from discontinuance of Seashore's passenger service.—Pennsylvania R. Co. Discontinuance of Passenger Service, 317 I.C.C. 111 (122-3).

30. Employees.—[Vols. 18, 19].—The commission has no authority to impose conditions for protection of employees who may be adversely affected as a result of a discontinuance of passenger service under §13a(1).—Soo Line R. Co. Discontinuance of Passenger Trains, 312 I.C.C. 729 (730); Missouri Pac. R. Co. Discontinuance of Passenger Trains, 312 I.C.C. 765 (767); however, the interests of railroad employees are given consideration as part of the public interest.—Southern Pac. Co. Discontinuance, 317 I.C.C. 519 (542-3); New York, N.H. & H. R. Co. Discontinu-

ance, 320 I.C.C. 466 (467); Id., 320 I.C.C. 544 (547).

Although many employees of carrier's passenger department would be adversely affected by proposed consolidation of two pairs of trains, since numerous individuals with least seniority would lose work opportunities or become unemployed, and an important factor to be weighed in discontinuance or change-of-service proposals is their consequence to the railroad's employees, the adverse effect on employees of proposed change in service would not be so drastic as to overshadow the anticipated advantages to the carrier and the public generally. Resulting elimination of job opportunities does not justify the commission's invoking of procedures to prohibit or postpone the elimination of recurring operating deficits and consolidation of the trains to achieve substantial savings.—Union Pac. R. Co. Discontinuance, 320 I.C.C. 493 (522)*.

The commission is not empowered by the provisions of §13a(1) to impose employee protective conditions as sought; labor association misconstrued the commission's action in 307 ICC 257 upon which it relies, and in which the commission, rather than imposing such a condition on a proposed train discontinuance as claimed, continued, in part, operation of specified trains which was found required by the public convenience and necessity and described the continued service to be rendered. Additionally, while the number of employees to be adversely affected by proposed discontinuance is shown on the record, the probable adverse effect upon those employees when considered with other factors does not justify the findings which commission is required to make before it may order continuation of the operations.—New York Central Railroad Co. Discontinuance, 320 I.C.C. 526 (540, 542).

While the commission has no authority under §13a(1) to impose conditions for protection of employees who may be adversely affected by a discontinuance of passenger service, such probable effects are a factor to be considered in determining whether public convenience and necessity permit the discontinuance. Although 60 employees are employed on considered trains, in the seniority rosters for their groups there are 80 between the permissive and compulsory retirement ages, and it is expected that some of them would retire voluntarily rather than take a less desirable assignment through exercise of seniority rights, materially reducing the number of affected employees. Thus, when considered with other factors discussed, probable adverse effect on employees of proposed discontinuance does not support the findings required before continued operation of the trains may be required.—Chicago & N.W. Ry. Co. Discontinuance, 320 I.C.C. 85 (103-4)*.

Although the commission is not empowered to impose employee-protective conditions in proceedings under §13a(1), a probable adverse effect on employees is a factor to be considered in reaching an ultimate determination. In view of anticipated retirements and fact that carrier is now hiring train and engine service, any loss of employment that might result from proposed discontinuance after employees have exercised their seniority rights would be of minor impact and does not warrant an unfavorable finding.—Chicago Great Western Ry. Co. Discontinuance of Service, 317 I.C.C. 99 (109).

Though the commission has no authority under §13a(1) to impose terms and conditions on a carrier to protect employees adversely affected by a passenger-train discontinuance, consideration should be given to such effects in determining whether operation of the trains is required by public convenience and necessity. But while elimination of carrier's only remaining passenger trains in area involved would cause substantial changes in job assignments and might result in some employees being furloughed or placed on the extra board, the actual adverse effects cannot be measured, and in absence of a showing of public need for the service the commission may not require operations to be conducted merely to continue employment.—Chicago, M., St. P. & P. R. Co. Discontinuance of Service, 317 I.C.C. 691 (713-4, 715).

Probable effect of proposed train discontinuance on carrier's employees is a factor to be considered in connection with public convenience and necessity. Unless saved by attrition in the work force due to other causes, discontinuance of commuter trains between New

London, Conn., and Providence, R.I., would result in elimination of one 4-man train crew, and five mechanical department employees are also involved, although it is likely that they would be assigned to other productive work. This, together with needs of the public using the trains, warrants their continuance between Westerly, R.I., and Providence.—New York, N.H. & H.R. Co. Discontinuance, 320 I.C.C. 714 (730-2).

Since no employees work on the tracks over which operation is sought to be abandoned or in or around the Omaha terminal except those required to operate the considered trains, any adverse effect on employees would result from the discontinuance, and not the abandonment of operation; and, since the commission has no authority to impose employee protective conditions in a discontinuance proceeding, no conditions are imposed.—Chicago Great Western Ry. Co. Discontinuance, 328 I.C.C. 664 (677-8).

Although the commission has no authority under §13a(1) to impose employee protective conditions in a train-discontinuance proceeding, and adverse effect on employees of discontinuance of Baltimore & Ohio's only through passenger trains between Washington, D.C., and Cleveland, Ohio, is not shown to be such as to warrant requirement of continued operation, proposed discontinuance entails abandonment of operation under trackage rights whereby the carrier enters Cleveland Union Terminal, and under §1(18) the commission may impose protective conditions in related abandonment proceeding; Burlington conditions (257 ICC 700) imposed for protection of employees who may be adversely affected by such abandonment.—Baltimore & O. R. Co. Discontinuance of Service, 317 I.C.C. 509 (512)*.

35. Orders of the commission.—[Vol. 19].—When, after investigation into railroad's proposed passenger train discontinuances, the commission decided not to interfere with the service cutbacks and to terminate the investigation, its decision to take no action is not reviewable by the courts; thus, the commission's order discontinuing the investigation is not an appealable order within meaning of 28 USC §1336; complaint dismissed.—State of Minnesota v. United States, 238 F. Supp. 107 (112-13)*.

In action seeking to enjoin and set aside, or to remand for further consideration, reports and orders of the commission permitting discontinuance of four passenger trains, function of the reviewing court is limited to determining whether those orders have support in the law and the record. Evidence concerning number of passengers using those trains, particularly at stations on considered railroad segment, and the other passenger service available in the area, supports the commission's finding that operation of considered trains was not required by public convenience and necessity; and evidence of the railroad's precarious financial condition, and of substantial cash savings that would result from discontinuance of the trains, supports its finding that their continued operation would unduly burden interstate or foreign commerce. Therefore, intent of the statute being relief of a carrier whose maintenance of uneconomic services threatens its survival and ability to provide essential services, the commission's decision to allow the discontinuance should be upheld. Orders sustained and injunction denied.—State of Vermont v. Boston and Maine Corp., 269 F. Supp. 80 (84-5, 89, 90)*.

Since the Milwaukee's notice of proposed discontinuance of its Chicago-Tacoma trains west of Minneapolis disclosed no intention to discontinue their operation east thereof or to eliminate, modify, or change any services provided thereon, the commission's authority over the trains was limited to their operation west of Minneapolis; order in 317 ICC 691 requiring continued operation between Minneapolis and Butte, Mont., for 1 year therefore made no reference to operation between Minneapolis and Chicago or to services that carrier would continue to provide on the trains. However, the commission was authorized to consider that their operation west of Minneapolis embraced service then extending to and from Chicago, with provision of specific types of service and facilities, and real import of that report and order was to permit discontinuance west of Butte, but to require continued operation east thereof for 1 year in same manner as on day notice was filed.—

Chicago, M., St. P. & P. R. Co. Discontinuance, 317 I.C.C. 761 (770).

In the circumstances, carrier cannot validly contend that, the order being silent as to matters not embraced in that proceeding, it was thereby authorized to discontinue operation of the trains between Minneapolis and Chicago and make substantial changes in type of service provided between Minneapolis and Butte, for which it obtained no authority under any of the applicable State statutes. Since it obtained no authority under §13a(1) to effect such discontinuance or changes, its action, a few days after issuance of that order, in discontinuing through service between Chicago and Butte via Minneapolis and making the described changes denied the public the service and facilities that had been found to be required by public convenience and necessity, and thereby placed it in noncompliance with terms of that order. However, since the commission's jurisdiction in that proceeding expired with expiration of the 1-year period specified in the order, it has no power to order restoration of the operations or services thus discontinued, eliminated, or modified.—Id., pp. 763, 770-1.

Section 14. Reports and decisions of commission—(1) Reports of investigation by commission.—[Unchanged. See vol. 9, p. 7636.]

Amendments, see footnotes, vol. 3, p. 1858; historical note, p. 1858.

Notes of Decisions

Volume 3—p. 1858; Volume 7—p. 5497; Volume 9—p. 7636; Volume 11—p. 9263; Volume 12—p. 10308; Volume 13—p. 11014; Volume 14—p. 11515; Volume 15—p. 12099; Volume 16—p. 12743; Volume 17—p. 13428; Volume 18—p. 14188; Volume 19—p. 15367.

1. The report; requisites.—[Vols. 3, 7, 9, 11-19].—Part II, §204(d), n. 1. See also APA, 5 USC, Reports of Commission.

A report of the commission must contain, in addition to a finding in language of the applicable statute, those basic findings essential to support the order, i.e., basic findings essential to the commission's authority to promulgate the rule or enter the order in question; basic findings required will vary with statutory authority invoked and context of situation presented. Suggestion that the commission's findings under §3 are exempt from the "basic finding" requirement is not supported by any logical reason for an exemption or by cited decisions relied on. In its reports, the commission must make the ultimate finding required by the statute in question, it must employ a correct legal test in reaching that finding, and it must make sufficiently explicit its supporting findings.—Atchison, T. & S.F. Ry. Co. v. United States, 218 F. Supp. 359 (363-6)*.

A finding of "substantial similarity of transportation conditions" is a basic one required to support the commission's ultimate finding of a §3 violation, since it is essential to the authority to so find. Although, in its report finding assailed rates unduly prejudicial and preferential, the commission made no specific supporting finding that the rate disparity existed under substantially similar transportation conditions, it considered and ruled on issues of dissimilarity involved and found that the dissimilarities relied on by the railroads were not sufficient to justify the rate disparity; sustained.—Id., pp. 366-9.

The statute does not require the commission to make detailed findings of fact except in cases where damages are awarded; it only requires the commission to file a report stating its conclusions, together with its decision and order. In other words, the commission is required only to set out ultimate, not evidentiary, facts. Inasmuch as its decision under consideration not only sets out ultimate findings but also summarizes the evidence relied on to sustain those findings, the commission has met the statutory requirements.—General

Motors Corp. v. United States, 207 F. Supp. 641 (646-7)*.

While the commission is not required to make as detailed a finding of fact as a trial court, it is not relieved of the duty to make basic or quasi-jurisdictional findings essential to validity of its order; something more than the ultimate finding that carrier failed to sustain its burden of proof is required. Grounds on which an administrative order must be judged are those on which the record discloses that the action was based.—Missouri Pac. R. Co. v. United States, 203 F. Supp. 629 (632)*.

An order of the commission which is subject to judicial review cannot be sustained unless it is supported by essential basic facts particularly stated.—Boston & M. R. v. United States, 202 F. Supp. 830 (834)*.

In view of what are at best latent ambiguities, and at worst errors of law and conclusions unsupported by or in conflict with the undisputed evidence, in the commission's report and order requiring parity of rates on import iron ore from Baltimore and Philadelphia to 17 interior points, the case is remanded for further proceedings to determine and consider (in addition to matters specified in remand of same proceeding by another district court in 207 F. Supp. 483) the probable total tonnage of such ore that will move through each port with and without parity, also the Pennsylvania's unloading and terminal costs on such traffic at Philadelphia, for comparison with amount paid by it for services at Baltimore.—Baltimore & O. R. Co. v. United States, 212 F. Supp. 13 (18, 19, 21)*.

It is not enough that some suggestion of a reason for the commission's conclusions should "lurk" in its report; reviewing court cannot uphold an order on a ground which the report has not made sufficiently plain so that the court can be sure the commission meant to act uhon it and had a factual basis for doing so. Remanded for further proceedings consistent with the court's opinion.—New York Central R. Co. v. United States, 207 F. Supp. 483 (496, 498)*.

3. Necessity for formal and precise findings in order.—[Vols. 3, 9].—In granting certificate to appellee to cure a deficiency in service due to trunkline motor carriers' refusal, under union pressure, to interchange traffic with appellee's carrier stockholders, rather than issuing a cease-and-desist order, the commission made no findings specifically directed to its choice between two vastly different remedies with vastly different consequences to the carriers and the public, nor did it articulate any rational connection between the facts found and the choice made. It addressed itself neither to the possible shortcomings of §204 procedures, to advantages of certification, nor to the serious objections to the latter, which are particularly important in the present context. Grant of the certificate was an improvident exercise of the commission's discretion.—Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (165, 167-8)*.

Section 14. (2).—[Unchanged. See vol. 9, p. 7639.]

Section 14. (3) Publication of reports and decisions; printing and distribution of annual reports.—[Unchanged. See vol. 9, p. 7639.]

Amendments, see footnotes, vol. 3. p. 1862; historical note, vol. 11, p. 9265.

Notes of Decisions

Volume 3—p. 1862; Volume 12—p. 10308; Volume 13—p. 11015; Volume 14—p. 11516.

Section 15. Determination of rates, routes, etc.; routing of traffic; disclosures, etc.—(1) Commission empowered to determine and prescribe rates, classifications, etc.—[Unchanged. See vol. 9, p. 7640, vol. 11, p. 9265.]

Amendments, see footnotes, vol. 3, p. 1864, vol. 7, p. 5500; historical notes, vol. 3, p. 1865, vol. 9, p. 7640, vol. 13, p. 11015.

Historical Note

By Executive Order 11107, Administration of Alaska Railroads, dated April 25, 1963, the Interstate Commerce Commission is given jurisdiction "to fix, change, or modify rates for the transportation of passengers and property" under the authority set forth in the Alaska Railroad Act, 38 Stat. 305, which jurisdiction had been given to the Secretary of the Interior by Executive Order No. 3861 of June 8, 1923; latter order superseded. (28 FR 4225, April 30, 1963)

Executive Order 11107 codified as Title 49, Chapter II, Part 1200 — Administration of Alaska Railroads (49 CFR §§ 1200.1 - 1200.4), 28 FR 12278, Nov. 20, 1963.

Notes of Decisions

Volume 3—p. 1869; Volume 7—p. 5501; Volume 9—p. 7641; Vol. 11—p. 9265; Volume 12—p. 10309; Volume 13—p. 11015; Volume 14—p. 11517; Volume 15—p. 12099; Volume 16—p. 12745; Volume 17—p. 13429; Volume 18—p. 14189; Volume 19—p. 15368.

Nature of Commission's Functions

28. Investigations on commission's own motion.—[Vol. 3].—Although §15(1) is the source of the commission's power to prescribe minimum reasonable rates, failure to cite §15(1) in order entered under §13(2), instituting investigation on the commission's own motion to determine lawfulness of certain rates under §1, does not bar the commission, if such unlawfulness be found, from implementing that finding by exercising its authority under §15(1) to prescribe lawful rates.—Fresh Vegetables from Tex., Calif., Ariz., and N. Mex., 319 I.C.C. 141 (156).

35. Maximum, minimum, or precise rates may be prescribed.—[Vols. 3, 7].—The commission has the power, on proper findings, to prescribe as too low a rate which, although covering long term out-of-pocket costs, fails to meet fully distributed ones; some traffic must pay for nonvariable portion of operating expenses and property taxes and meet deficits occasioned by traffic that does not pay its way. If the commission thinks a carrier should not haul particular traffic at a rate which will not contribute to such expenses, that is a judgment competent for it to make. However, it is no answer that an individual carrier will be better off with the traffic than without it; the entire transportation system must be considered and the commission may, on proper showing, utilize the minimum rate power to maximize profits for the system, so long as it does not require more than what would be a reasonable maximum rate.—New York Central R. Co. v. United States, 207 F. Supp. 483 (495)*.

41. Construction of statute.—[Vols. 3, 7].—See Arrow Transp. Co. v. Southern Ry. Co., 28 USC §2325, n. 43.

48. Jurisdiction statutory.—[Vols. 3, 7, 11, 19].—See All States Freight, Inc. v. New York, N.H. & H. R. Co., §1(6), n. 126.

Basis for Determination by Commission

72. Minimum rates.—[Vols. 3, 7, 9, 11, 13, 14, 19].—Under its statutory power to fix minimum rates, the commission can disapprove rates and thus prevent rate wars or destructive competition.—Missouri Pac. R. Co. v. United States, 203 F. Supp. 629 (635)*.

Mere threat of a rate war is not enough to support a minimum rate order if the commission ought to prevent the war; but should the commission not think it proper to prohibit a retaliatory reduction, for either lack of power or lack of good reason, it may properly fix a minimum rate in the first instance in order to ward off developments that would only result in reinstatement of existing differentials at a lower level. The commission's order requiring cancellation of reduction in rates on import ore from New York to rates the same as those from Philadelphia and Baltimore cannot be affirmed when its report goes into fear about a rate war without saying why it could not, or would not choose to, prevent one. Merely saying a rate war is possible or probable is not a sufficient answer why; an adequately supported statement that the commission would not feel able to prevent one would be.—New York Central R. Co. v. United States, 207 F. Supp. 483 (496-8)*.

While the commission has authority under §15(1) to issue a minimum-rate order in an

investigation on its own motion into lawfulness of rates under §1, it has used its minimum ratemaking power sparingly, and usually where it was necessary to prevent or stop destructive rate wars or to protect shippers and localities against unjust discrimination or undue prejudice. To use it otherwise, when cost evidence in instant investigation does not establish that involved rates on fresh vegetables are noncompensatory and therefore less than minimum reasonable, would restrain some respondents from meeting intermodal competition and benefit others who are not faced with such competition; under the circumstances there is no sufficient reason for exercising that power.—Fresh Vegetables from Tex., Calif., Ariz., and N. Mex., 319 I.C.C. 141 (159).

The Order

89. Formal requisites of order; removal of discrimination.—[Vols. 3, 7, 9, 13-15].—The commission's determination that the lowest division accepted by the railroads out of joint rail rates on grain, for movement beyond the river ports to the South, measured the discrimination found to exist against like shipments of ex-barge grain, did not require rates set at level of the divisions existing before determination of discrimination, but at any level acceptable to the railroads, so long as the same measure applied to ex-barge traffic from same port to same destination. And argument that imposition of flat rates from the ports, in effort to comply with the commission's order, discriminates against the inbound railroads ignores the commission's finding that costs of movement to the interchange point—the additional costs claimed to justify higher compensation for the outbound movement of ex-barge grain—had not been substantiated, as related to the division of the outbound carrier. Any inequity results as much from maintenance of the previous rail rate structure as from the commission's order; the commission is not required to frame its findings so as to preserve the rail rate system intact.—Chicago, R.I. & P. R. Co. v. United States, 233 F. Supp. 381 (387)*.

Argument that divisions of joint all-rail rates received on ex-rail grain from designated Tennessee River and lower Mississippi River ports to destinations in the South and in Arkansas and western Louisiana are an inappropriate basis for determining nondiscriminatory rates on ex-barge traffic is part and parcel of argument that relief sought by the bargelines would destroy the traditional grain-rate structure, which the Supreme Court emphatically rejected in 330 US 567; and in 176 F. Supp. 411, affirmed 361 US 353, the court held that in absence of a demonstrated cost differential a rail carrier from a port is entitled to no more compensation on ex-barge than on ex-rail traffic moving from transit at that port to same destination. To look to the rail haul which is displaced by the barge haul and apply ratemaking standards to determine the ex-barge rates would be futile so long as lower divisions applied on ex-rail traffic.—American Barge Line Co. v. Alabama G.S. R. Co., 316 I.C.C. 759 (771)*.

But though defendants have not overcome complainants' prima facie showing of discrimination resulting from the difference between their divisions of the joint rail rates and present rates on ex-barge traffic from same ports, the southern divisions are not in issue per se and there is no evidence of nature required by §15(6) for prescribing changes therein. Order will therefore require elimination of the existing discrimination against connecting for-hire bargelines and shippers at those ports who receive their grain by for-hire barge, without prescribing the exact method of removing it; but if divisions are used as basis of nondiscriminatory ex-barge rates, such rates from Tennessee River ports other than Chattanooga must reflect the same percentage of corresponding first-class rates as the lowest division from Chattanooga to same destination. In establishing rates pursuant to the findings, defendants may require the furnishing of a certificate showing origin area of the inbound grain or products, but no other conditions should be attached to application of the outbound rates on ex-barge traffic that do not apply to corresponding all-rail traffic.—Id., pp. 773, 774-5.

Section 15. (2) Orders of commission.—[Unchanged. See vol. 9. p. 7649.]

Amendments, see footnotes, vol. 3, p. 1901; historical note, p. 1901.

Historical Note

Rates and fares of railroads within the Alaska Railroad Act, jurisdiction of the commission, see Historical Note concerning Executive Order 11107 following §15(1).

Notes of Decisions

Vol. 3—p. 1901; Volume 7—p. 5514; Volume 9—p. 7649; Volume 11—p. 9267; Volume 13—p. 11017; Volume 14—p. 11519; Volume 16—p. 12747; Volume 17—p. 13430.

Section 15. (3) Establishment of through routes, joint classifications, joint rates, fares, etc.— [Unchanged. See vol. 11, p. 9267.]

Amendments, see footnotes, vol. 3, p. 1905, vol. 11, pp. 9267-9268; historical notes vol. 3, p. 1906, vol. 9 p. 7651.

Historical Notes

The commission recommends that parts I, II, and III be amended to authorize the commission, after investigation and hearing, when necessary and desirable in the public interest, to require establishment of through routes and joint rates between motor common carriers of property and between those carriers and carriers by rail, express, and water.—Annual Report, 1962, p. 201; renewed, Annual Report, 1963, p. 19, Annual Report, 1964, p. 69.

Rates and fares of railroads within the Alaska Railroad Act, jurisdiction of the Commission, see Historical Note concerning Executive Order 11107 following §15(1).

Notes of Decisions

Volume 3—p. 1907; Volume 7—p. 5516; Volume 9—p. 7651; Volume 11—p. 9268; Volume 12—p. 10310; Volume 13—p. 11017; Volume 14—p. 11520; Volume 15—p. 12101; Volume 16—p. 12747; Volume 17—p. 13431; Volume 18—p. 14190; Volume 19—p. 15370.

7. [Relation to]—§3(4).—[Vols. 3, 9, 18, 19].—See Western Pac. R. Co. v. United States, §3(4), n. 3.

11.—To Motor Carrier Act.—[Vol. 9].—See New York Central R. Co. v. United States, §216(c), n. 3.

20. Through routes defined.—[Vols. 3, 9, 11, 15-19].—When Southern Ry. no longer held itself out as offering through transportation service on coal over considered routes, the through routes were closed; and fact that shipments could continue to move over same route at higher combination rates would not suffice to convert the sum of the routes into through routes.—Atlantic Coast Line R. Co. v. United States, 205 F. Supp. 360 (364)*.

Whether or not a through route exists within meaning of §15(3) and (4) is a question of fact, and the test is whether the participating carriers hold themselves out as offering a through transportation service (citing 343 US 549 and 351 US 321). Through routes formerly available for movement of cotton traffic at joint rates from Mississippi Valley origins to southern territory destinations, which were restricted against application of revised joint rates by defendant's tariff provisions, were closed under §15 when the revised rates and the specific through routes retained took effect; since that date there has been no holding out by defendant as a participant in the restricted routes, such as is required to meet the test of a through route applied by the Supreme Court.—Atlantic Coast Line R. Co. v. Southern Ry. Co., 321 I.C.C. 314 (324-5)*.

Similarly, defendant's cancellation of prior joint rates on paper over certain routes is clear evidence of its intention no longer to participate in those routes on that traffic; and in face of that affirmative action the commis-

sion may not interpret as indicating a contrary intention such inferential matters as fact that those routes were still used for transportation of other commodities and that defendant did not publish any schedules specifically closing those routes, but merely prohibited application of the reduced joint paper rates thereover.—Id., 321 I.C.C. 282 (288-9)*.

Existence of combination rates on various commodities over certain routes of petitioners and Soo Line or its predecessors does not necessarily indicate that those routes were commercially open within contemplation of condition imposed on Soo Line's merger. Failure of the combination rates to move any traffic prior to the merger impels conclusion that those routes were commercially closed, particularly in case of combination rate on explosives over lines of the Milwaukee and a Soo Line predecessor, when latter's tariff contained a restriction against movement of that traffic via its interchange with the Milwaukee; in that case carrier's course of business negatives existence of a through route.—Rates, Various Commodities—Canada, Midwest, and East, 318 I.C.C. 522 (525).

22. Joint rates, fares, and charges.—[Vols. 3, 7, 9, 13-15, 17, 18].—Although Secretary of Agriculture requests prescription of through barge-rail routes and joint rates on grain moving through Tennessee and Mississippi River ports to the South, complainant bargelines do not seek such routes and evidence is insufficient for their prescription. Moreover, prescription of rates equivalent to the barge rates to the ports and defendants' divisions out of all-rail rates beyond would necessitate filing of tariffs of all barge rates not now filed, such transportation being otherwise exempt under §303(b); problems of differences in bargeload and c.l. minima, etc., would also arise.—American Barge Line Co. v. Alabama G.S. R. Co., 316 IC.C. 759 (770, 772)*.

35. Necessity or desirability in public interest.—[Vols. 3, 7, 9, 11-19].—In a proceeding under §15(3) and (7), the questions before the commission were whether closing of considered routes was consistent with public interest and whether schedules effecting the cancellations were just and reasonable. Findings of fact that rates or charges as distinguished from schedules closing the routes were just and reasonable were not required; since the routes were closed, no question was left as to rates. The commission's findings as to the questions before it were sufficient to support its order.—Atlantic Coast Line R. Co. v. United States, 205 F. Supp. 360 (364)*.

See also Western Pac. R. Co. v. United States, §15(4), n. 32.

Though §15(3) places on proponent carrier the burden of proving that closing of through routes by tariff publication is consistent with public interest, once routes are closed the burden is on the party seeking their reestablishment. Evidence that Southern Ry. tariff removing certain industries at High Point, N.C., from list of those for which reciprocal switching would be performed, thereby effectually closing through routes with complainant and its connections, required shippers and receivers to resort to truck delivery or pay Southern's switching charge, that reciprocal switching for all industries having private or assigned sidings has some value from a selling standpoint, and that competition between the carriers would be desirable, is not sufficient to meet that burden.—Absorption of Switching to or from High Point, N.C., 319 I.C.C. 522 (527).

As defendants are not shown ever to have held themselves out as ready and willing, in normal course of their businesses, to accept shipments for movement over route composed of the Pennsylvania from Pittsburgh to New York Central's float bridge at New York City, thence Central to stations within the city, and a single shipment routed thereover because of clearance difficulties does not indicate the contrary, nor is there any indication of probable future need for that route, there is no basis for a public-interest finding such as is required by §15(3) for prescription of through routes and joint rates not already in existence.—Westinghouse Electric Corp. v. Pennsylvania R. Co., 318 I.C.C. 460 (464).

36. Determination of fact by commission.—[Vols. 3, 7, 18, 19].—While §1(4) makes it the duty of every common carrier to establish reasonable through routes and just and reasonable rates with other such carriers, burden was on Southern Ry. to establish those facts in its complaint assailing Louisville & N.R.'s failure to establish with it the same joint rates

on fine coal from L&N mines to Krannert, Ga., as it had with Central of Georgia. But Southern's evidence (1) that, though L&N-Southern distances are much less than L&N-Central's, L&N-Southern rates are well above those of L&N-Central and thus unreasonably high compared with the latter, and (2) that revenues from L&N-Southern at same rates as over L&N-Central would appreciably exceed returns from latter connection, did not require the commission to make a factual determination of unjustness and unreasonableness. Refusal to accord the evidence that weight was well within range of commission judgment and thus conclusive. The commission's order dismissing Southern's complaint, sustained.—Southern Ry. Co. v. United States, 217 F. Supp. 159 (161)*.

50. Cancellation of through routes; joint rates.—[Vols. 12, 14, 15, 17-19].—The commission's findings that cancellation of certain through routes was consistent with public interest, and that schedules closing those routes were just and reasonable, were appropriate and sufficient in scope, were based on substantial evidence, and warranted in fact and law; sustained.—Atlantic Coast Line R. Co. v. United States, 205 F. Supp. 360 (364)*.

Cancellation of single-factor through rates on corn and products from certain Illinois and Indiana origins on Chicago & E.I.R. and New York Central to eastern destinations on Central and Wabash R. via Danville, Ill., and establishment of combinations of local rates to Danville and proportionals beyond on same level as combinations on Chicago under rate-break adjustment, is a change in form rather than amount of the rates and will reestablish former parity of Danville with Chicago on direct movements to the East. While establishment of single-factor rates equal to the Chicago combinations would give Danville rate equality, combinations of separate factors provide more flexibility to meet competition in origin areas; proposed rates are compensatory and otherwise lawful; approved.—Corn and Corn Products from Ill. and Ind. to the East, 319 I.C.C. 605 (609-11, 614, 618).

Although proposed cancellation of reciprocal switching to and from specified industries on respondent's tracks at Richmond, Va., on traffic on which it does not receive a line haul, would effectually close competing routes to those industries, absence of any manifest shipper interest precludes finding the routes thus closed to be needed in public interest; on the contrary, it is strong indication that their closing is consistent with public interest.—Switching at Richmond, Va., on Richmond, R. & P. R. Co., 316 I.C.C. 786 (793).

Proponent met burden of proof placed on it by §15(3) when its cost evidence shows that present rate on brick and related articles over routes proposed to be eliminated are below out-of-pocket cost for the service over such routes; noncompensatory rates cast an undue burden on other traffic, and unjust and unreasonable; rates and routes which have such and effect are not in public interest. Proposed restriction of considered rates to apply over routes in southern territory, thus eliminating application thereof at intermediate points in official territory over joint routes in which proponent participates, found lawful.—Routing—Brick—from North Carolina to Ohio, 315 I.C.C. 645 (647, 648).

Under conditions imposed on its merger, Soo Line is prohibited from doing anything that will have effect of closing, commercially or otherwise, any route which existed at time of the merger, without the commission's authorization. Through routes composed of petitioners' lines and those of Soo Line or its predecessors over which joint rates applied prior to the merger were open in contemplation of the parties, and Soo Line's failure to publish reduced rates on certain commodities, established over routes with other connecting railroads, to apply also over specified routes with the Milwaukee has effect of commercially closing latter routes in violation of the merger conditions. Soo Line should promptly comply with those conditions and advise the commission within 60 days from service of report of the action taken.—Rates, Various Commodities—Canada, Midwest, and East, 318 I.C.C. 522 (525-6).

But where prior to the merger the joint rate on pulpwood between points named did not apply via the North Western, latter has no ground for its request that such rate be applied over its lines; and other routes with petitioners were commercially closed at time of the merger when prior thereto no traffic had

moved thereover under applicable combination rates; thus Soo Line's failure to establish the reduced rates sought over those routes is not shown to violate the merger conditions.—Id., pp. 525, 526.

Seaboard Air Line's attempted justification of proposed cancellation of joint export rates on rubber tires over certain routes from Gadsden and Tuscaloosa, Ala., to Miami, and from Gadsden to Port Everglades, Fla., on ground that those rates, which were published solely to maintain long-established port relations, are mere paper rates because there is no export movement from those origins through those ports, does not meet proof requirements of §15(3); such justification has no more application to those routes than to others that would be continued, and proposal would shift the long haul from Southern as initial line-haul carrier to Seaboard as delivering carrier.—City of Wilmington v. Alabama G.S. R. Co., 316 I.C.C. 709 (721)*.

Section 15. (4) Through routes to embrace entire length of railroad; temporary through routes.—[Unchanged. See vol. 11, p. 9269.]

Amendments, see footnotes, vol. 3, 1924, vol. 11, pp. 9269-9270; historical notes, vol. 3, p. 1924, vol. 9, p. 7659, vol. 16, p. 12748

Historical Note

Rates and fares of railroads within the Alaska Railroad Act, jurisdiction of the commission, see Historical Note concerning Executive Order 11107 following §15(1).

Notes of Decisions

Volume 3—p. 1925; Volume 7—p. 5521; Volume 9—p. 7659; Volume 11—p. 9270; Volume 12—p. 10311; Volume 13—p. 11018; Volume 14—p. 11521; Volume 15—p. 12103; Volume 16—p. 12749; Volume 17—p. 13434; Volume 18—p. 14197; Volume 19—p. 15376.

Relation to Other Sections

4. Generally.—[vols. 3, 7, 19].—Under §15(4) a carrier may not be required to turn traffic over to a connecting line when to do so would require it to participate in a through route embracing less than the entire length of its line between given points, even if the route is to be established to assist a carrier to meet its financial needs; nor should the use of a route whose establishment could not be required by the commission under §15(4) be prescribed as mandatory for movement of certain commodities in a proceeding under §5(2). Requested condition on approval of agreement for continued operation of Peoria & E. Ry. as a part of New York Central system, requiring routing of certain traffic via the Pennsylvania to secure move favorable divisions to the Peoria, thereby short-hauling Central, denied.—Cleveland, C., C. & St. L. Ry. Co.—Operating Agreement, 320 I.C.C. 430 (435-6).

Though condition imposed on merger approval under §5(2) requiring survivor to establish through routes with Southern Ry. and its affiliates on Florida traffic through Jacksonville gateway at joint rates no higher than via any other gateway may require survivor to short-haul itself on some traffic originated on its lines, that condition is necessary and desirable to safeguard the overall public interest and is therefore not inconsistent with provisions of §15(4).—Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122 (182, 209)*.

9. Sec. 3(1).—[Vols. 3, 7, 14-17, 19].—Section 15(4), which recognizes the right of a carrier to its long haul, is by its express terms subordinate to provisions of §3, and protective provisions of §15(4) are withheld when a carrier's refusal to establish port equalization results in undue preference and prejudice forbidden by §3. Defendant effectively controls the rates to all of considered ports, and fact that establishment of rate parity of the prejudiced with the preferred ports would deprive it of up to 73 miles of haul, compared

with average total hauls of about 800 miles, does not preclude a finding of violation of §3. —Standard Milling Co. v. Illinois Central R. Co., 321 I.C.C. 252 (254, 260-1).

Applicability

30. Voluntary short-hauling.—[Vols. 3, 7, 9].—There is nothing unlawful about a carrier short-hauling itself on a voluntary basis, and by merely becoming a party to a tariff the carrier does not subject itself, nor hold itself out, to participate in unreasonable routes. In fact, the commission can require a carrier to short haul itself in instances where inclusion of a longer route would be unreasonable in light of the existence of another more practical and available through route.—Hygrade Food Products Corp. v. New York Central R. Co., 266 F. Supp. 946 (952)*.

32. Existing routes.—[Vols. 3, 7, 9, 12, 14, 16, 18].—As the Court noted in 382 US 237, railroads' suit alleging discrimination by defendant railroads in refusing to establish through routes between points on their lines and California points served by plaintiffs, via Portland, Oreg., on same basis as routes defendants maintain with other railroads through Portland, is not a case for the commission to decide under §15(3), (4) whether in the public interest defendants should be required to establish such routes, but whether under §3(4) they should be required to eliminate any discriminatory treatment of plaintiffs. Commission decision that public interest did not require establishment of the through routes, since they would short-haul connecting carriers without their consent and record indicated adequacy of numerous existing through routes, was based on a test quite different from, and far more favorable to defendants, than the test stated by the Supreme Court; also, record does not show that dissimilar operating conditions over considered routes, found by the commission, are such as to substantially affect defendants. Case remanded for further commission proceedings consistent with the court's opinion.—Western Pac. R. Co. v. United States, 263 F. Supp. 140 (143-5, 152)*.

34. Reestablishment of canceled routes.—[Vols. 3, 9, 18, 19].—As retained routes over which reduced joint rates on paper apply are not materially longer than those closed by defendant's restrictive routing provisions, and there is no indication that the closed routes are needed to provide adequate and more efficient or economical transportation, there is no ground for requiring defendant to short-haul itself on that traffic. Nor is there any shipper support for a finding that the routes sought to be restored are needed in the public interest or that the routing restrictions unduly prejudice shippers in violation of §3(1). As the routes over which the reduced joint rates apply appear wholly adequate to meet needs of the shipping public, there is no sound basis for a requirement under §15 that the closed routes be reopened.—Atlantic Coast Line R. Co. v. Southern Ry. Co., 321 I.C.C. 283 (289-90)*.

As certain through routes closed to cotton traffic by routing restrictions in defendant's tariff were not used extensively prior to effective date of such restrictions, the retained through routes between same points are not unreasonably long compared with those closed, and there is no shipper testimony or other indication that the retained routes are not sufficient to meet the needs of the shipping public, or that the closed routes are required to provide more efficient or economical service, there is no foundation for requiring the reopening of such closed routes under §15.—Atlantic Coast Line R. Co. v. Southern Ry. Co., 321 I.C.C. 314 (326)*.

Section 15. (5) Transportation of livestock in carload lots; services included. —[Unchanged. See vol. 9, p. 7664.]

Historical note, vol. 3, p. 1940.

Notes of Decisions

Vol. 3—p. 1940; Volume 7—p. 5530. Volume 9—p. 7664; Volume 11—p. 9271; Volume 12—p. 10313; Volume 13—p. 11019; Volume 14—p. 11522; Volume 15—p. 12105; Volume 16—p. 12751; Volume 18—p. 14199; Volume 19—p. 15377.

Section 15. (6) Commission to establish just divisions of joint rates, fares, or charges; adjustments.—[Unchanged. See vol. 9, p. 7669.]

Historical note, see vol. 3, p. 1945

Historical Note

Rates and fares of railroads within the Alaska Railroad Act, jurisdiction of the commission, see Historical Note concerning Executive Order 11107 following §15(1).

Notes of Decisions

Volume 3—p. 1946; Volume 7—p. 5537; Volume 9—p. 7669; Volume 11—p. 9273; Volume 12—p. 10313; Volume 13—p. 11019; Volume 14—p. 11523; Volume 15—p. 12106; Volume 16—p. 12752; Volume 17—p. 13437; Volume 18—p. 14200; Volume 19—p. 15378.

Constitutionality

4. Fixing divisions a legislative function.—[Vols. 3, 9].—The prescribing of divisions is a legislative function, and the commission's exercise of that power is conditioned upon its finding after a full hearing that the divisions then in force do not, or in the future will not, comply with the specified standards.—Boston & M. R. Co. v. United States, 208 F. Supp. 661 (674)*.

Construction

7. In general.—[Vols. 3, 7, 9, 12-17, 19].—In prescribing divisions of joint rail rates, the commission must give due consideration, "among other things," to the five factors listed in §15(6), i.e., (1) efficiency of carriers' operation, (2) amount of revenue required to pay their respective operating expenses, taxes, and a fair return on railway property, (3) importance to the public of carriers' services, (4) whether a participating carrier is an originating, intermediate, or delivering line, and (5) any other fact or circumstance entitling one carrier to a greater or less proportion than another of the joint rate. In prescribing new divisions of joint rates on transcontinental traffic, the commission found that none of contending groups of carriers were operated either more or less efficiently than another, and that services of all three groups were equally important to the public.—Atchison, T. & S. F. Ry. Co. v. United States, 238 F. Supp. 528 (531)*.

While the commission has broad discretion as to facts it considers in arriving at conclusions on those factors, and in evidence necessary to establish factors deemed relevant in making new divisions, the law demands that such divisions be just and reasonable. As to revenue needs of carriers concerned, the mandate of §15(6) requires a finding in terms of dollars ("amount"); and the commission must also find the dollar amount of return to the carriers resulting from the new divisions, in order to make the required determination as to whether such divisions are "just, reasonable, and equitable." Divisions made on the basis of "rate of return" are not equivalent to divisions in terms of dollars; and divisions in rates of return do not satisfy the statutory requirement.—Id., pp. 535, 539.

The court is not required to determine what evidence the commission must consider and weigh in complying with each requirement for prescribing new divisions, nor can it substitute its fact appraisal for the commission's, but once the necessary factors are determined there must be findings which show that the commission considered the financial effect of

any new divisions as to each carrier involved; §15(6) requires the finding of amount of revenue necessary to pay operating expenses, etc., "of such carriers." And the "typical evidence rule" does not operate to excuse failure to find that the divisions are just, reasonable, and equitable not only between groups of carriers involved but also as to each individual carrier in each division. Furthermore, the statute requires that the commission's findings show that it has considered carriers' revenue needs for all transportation services, including those represented by passenger deficits. By reason of insufficiency of the commission's findings, as stated, the cause is remanded to it for further proceedings consistent with the court's opinion.—Id., pp. 535-7, 539-40.

The commission's findings that assailed primary divisions of joint class and commodity rates between southern border points and official territory are and will be unjust, unreasonable, and inequitable, and prescribing just, reasonable, and equitable divisions for the future, met requirements of the language of §15(6); since the only divisions in issue were those between L & N and Coast Line, on one hand, and plaintiff northern railroads, on the other, those findings can be given no other reasonable meaning than that the present divisions are and will be unreasonable "as between the carriers parties thereto," and that the prescribed divisions are the primary divisions to be received by the L & N or Coast Line and by the northern carrier or carriers participating in transportation of the same traffic to or from points in official territory.—Boston & M. R. v. United States, 208 F. Supp. 661 (674)*.

The commission's conclusion that the fact that only two carriers of the few serving the border points were complainants was not controlling cannot reasonably be held erroneous in absence of any showing of nature and extent of interest of southern carriers not parties to the proceeding; failure of such carriers to join in the complaint did not preclude L & N and Coast Line from asserting their claim for relief; the commission's order is directed to those two and the northern railroads and does not purport to affect the division of rates between any other southern carrier and the northern lines.—Id., pp. 678-9.

In requiring that due consideration be given matters going to cost of service, the statute does not establish cost of service or any other factor as the primary criterion of fair divisions; "due consideration" is not the equivalent of "primary consideration"; the importance of any of the factors enumerated in the statute necessarily depends on the case under consideration, and evaluation of importance of the various factors in any given case is peculiarly the function of the commission.—Id., pp. 674-5.

While the commission correctly insists that there is no single test that can be applied to all divisions, §15(6) provides a series of tests, and though no one of those factors is controlling, the act requires more than lip service to be paid each of them. And though error as to weight to be given financial needs, operating costs, or other material facts is not a misconstruction of the act, and evaluation of importance of the various factors in any given case is peculiarly the function of the commission, the commission may not seize on one factor and ignore the rest.—Atchison, T. & S.F. Ry. Co. v. United States, 225 F. Supp. 584 (604)*.

In proceedings to determine and prescribe divisions the commission is not required or authorized to determine whether the joint rates are reasonable or confiscatory; its compliance with requirements of the act does not depend on level of the rates or amounts of revenue to be divided; purpose of §15(6) is to empower and require it to make divisions that colloquially are fair.—Akron, C. & Y. R. Co. v. Atchison, T. & S.F. Ry. Co., 316 I.C.C. 351 (358)*.

8. "Full hearing."—[Vols. 3, 7].—The commission's refusal to grant plaintiffs' request for oral argument did not deny them a full hearing when they were accorded full opportunity to present their defense by oral and documentary evidence, to submit rebuttal evidence, and to cross-examine witnesses; voluminous evidence was presented, and plaintiffs' briefs on exceptions and their subsequent petitions fully exploited the ample opportunities granted them to present all their arguments in writing.—Boston & M. R. v. United States, 208 F. Supp. 661 (667-8, 670)*.

10. "Among other things."—[Vol. 3].—In prescribing divisions of joint interterritorial rates as between eastern carriers and transcontinental western lines, the commission may properly consider the 1955 agreement of midwestern railroads to accept the basis prescribed in 269 ICC 765. The statute plainly empowers the commission to inquire into justification of existing divisions, whether established by commission order or by voluntary agreement, and draws a clear distinction between its evaluation of existing divisional scales and of those to be prescribed. The Supreme Court in 276 US 104 did not hold that the commission may not consider agreed divisions when prescribing a new scale, but rather that it must look, not only to the agreement and its surrounding circumstances, but also to other factors listed in §15(6). Under the very wording of the act the commission has a duty to consider a broad spectrum of factors when prescribing new divisions, and it would be unduly restrictive for the courts, in view of the plain statement by Congress that the commission shall look to many facts and circumstances, to say that one fact—an agreement of the parties—may not be considered. —Atchison, T. & S.F. Ry. Co. v. United States, 225 F. Supp. 584 (601-2)*.

The act lays down the tests of relative efficiency, public interest, terminal costs, revenue needs, and any other facts which, without regard to length of haul, would entitle one carrier to a greater or lesser proportion of the joint rate. And among the "other facts" which may be considered is cost of service of the participating carriers, which issue may be entirely different from the issue of revenue needs.—Id., p. 604.

Prescription of Divisions

22. Mode and basis of establishment affecting power to change.—[Vols. 3, 7, 9, 14-16].—Although the parties have assumed that any prescribed readjustment of primary official-transcontinental divisions would be based on use of integer scales employed during past 30 years in other interterritorial divisions cases, the transcontinental class and commodity rates, applying over maximum distances between the East and the West, are broadly grouped in both territories, and there is no practical reason for divisions reflecting 50-mile blocks for such interterritorial application, which might prove inconsistent with the rate grouping. Present group basis of divisions, observed since 1887 and last revised in 1922, is highly desirable in light of competitive conditions affecting routing of transcontinental traffic. Accordingly, the same general plan, with certain modifications in both eastern and western groups, is followed in prescribing specific primary divisions.—Akson, C. & Y. R. Co. v. Atchison, T. & S.F. Ry. Co., 321 I.C.C. 17 (26, 72, 73-4)*.

But although broad groups are now employed in divisions of rates between defined midwestern and transcontinental territories, they are less well defined than those observed in the east-west divisions and in numerous instances appear improperly related to distance; divisional scales afford an appropriate means of adjusting those intraterritorial western divisions. However, scale proposed by the midwestern lines, based on Docket 28277 scale, would not only give those complainants too large a share of revenue in light of evidence concerning cost and revenue needs, but is a technically unsound basis since the 28277 scale applies only to territory east of Rocky Mountains, in which class rates are on the Docket 28300 basis. Consistent with prescription of a higher class-rate level for mountain-Pacific territory than east thereof, a higher scale of divisional factors for that territory, but not over 10 percent higher, is justified.—Id., pp. 73, 76-7.

And special divisions resulting from agreements between midwestern and transcontinental lines, covering certain traffic subject to transit arrangements and reconsignment involving unusual out-of-line or backhaul service, may properly be excepted from the divisional basis prescribed, since they do not affect the proportions accruing to eastern railroads.—Id., p. 77-8.

—Sufficiency of evidence:—Evidence typical of carriers as a group may be accepted as prima facie evidence bearing on the proper division for each joint rate of each carrier in the group (261 US 184); and in considering divisions of numerous joint rates on traffic

passing through gateways between different territories, the commission may establish the basis for divisions between groups of carriers in the respective territories on evidence which it may reasonably deem typical and of sufficient probative weight to justify the necessary findings and the order in respect of each rate (282 US 74).—Boston & M. R. v. United States, 208 F. Supp. 661 (677)*.

There was evidence, typical in character and sufficient in quantity, of the nature of the traffic and operating conditions, and of the joint rates and bases of divisions, of complainants L & N and Coast Line on one hand, and of participating northern railroads on the other, to support the commission's prescription of the challenged basis of primary divisions of joint rates on traffic between southern border points and official territory, without the necessity of requiring specific evidence and separate adjudication in respect to each division of the joint rates between each of the two southern railroads and each northern plaintiff.—Id., p. 678.

The typical evidence rule in cases involving divisions of joint rates requires the commission to have before it, to consider, and to some extent rely on representative evidence relating to particular rates and divisions of particular carriers; it has general applicability, and has consistently required (1) information concerning individual joint rates and (2) information concerning divisions of those rates; and that rule has not been overruled, sub silencio or otherwise. [Citing 261 US 184, 265 US 274, 276 US 104, and 282 US 84.] Even when the evidence is based merely on a representative sample of all relevant traffic moving during a given period, it must relate to particular rates and divisions of particular carriers. However, the rule does not have to do with individual shipments handled by particular carriers; evidence showing volume and type of traffic moving subject to representative rates, though highly probative, is not absolutely required by that rule.—Atchison, T. & S. F. Ry. Co. v. United States, 225 F. Supp. 584 (592, 593, 597)*.

Requirement that evidence bearing on justification of each division of each rate of every carrier be before the commission deals with adequacy of information the commission is obliged to consider before issuing its order. Once the typical evidence requirement is met, the commission may use evidence of aggregate or average impact of a divisions schedule on a group of railroads as a group as a basis for its order; it properly should consider aggregate results, but it may not rely wholly or exclusively on average or aggregate data. Before it relies on such data it must make sure that the divisions formula under consideration, though seemingly just and equitable when viewed in terms of its group impact, is not so construed that its impact on any particular division of any particular rate of any particular carrier is unjust.—Id., pp. 594-5.

Requirements of the rule are manifestly not met when the commission relies wholly on evidence relative to the aggregate impact of a divisions schedule on groups of railroads as groups; such evidence, whether based on all traffic moving during a given period or only on a representative sample thereof, conceals effect which imposition of a divisions schedule may have on individual carriers which make up the group. While evidence showing the aggregate impact of a divisions formula on a group of railroads as such may be accorded some weight, it is fatally defective to accept it as a substitute for evidence representative of particular rates and divisions which could justify prescription of each division of each rate of every carrier. "Typical" does not mean "tending to show the general situation," it means "fairly representative of each rate of every carrier."—Id., pp. 592, 594.

In condemning the 500-A divisional scale as unlawful for dividing joint official-w.t.l. interterritorial rates between plaintiff transcontinental western lines and eastern railroads, the commission gave disproportionate weight to the aggregate consequence and to what to it was an apparent injustice in the aggregate. While the commission asserted that data respecting rates applicable to plaintiffs was available to it in Docket 28277, that data is not before the court; thus it cannot be accepted as fairly representative of current divisions between plaintiffs and the eastern lines. The record is devoid of any substantial evidence which would show the reviewing court that divisions applicable to plaintiffs under the 500-A schedule were unlawful; and there is no

substantial evidence showing that the commission considered evidence of any specific rates and divisions. In view of its erroneous conclusion that is was not obliged to consider evidence of specific rates, the court is not warranted in assuming that it did so.—Id., pp. 594, 599-600.

In the aggregate the impact of the 500-A schedule may indeed be unjust, but the commission did not make the required comparison of aggregate traffic evidence leading to that conclusion with evidence representative of particular divisions of particular rates which would warrant the court's endorsement of its action in declaring that divisional schedule unlawful. Order set aside and cause remanded for further proceedings consistent with the court's opinion.—Id., pp. 600, 607.

Complainant's final restatement of costs reflects relative operating conditions and, everything else being substantially equal, is sufficiently reliable for determining fair divisions on involved coal traffic. Assignment of all car costs to terminal services is proper when hauls are relatively short and weighted-average distances over the respective lines vary but little; because of conditions peculiar to coal mining, idle time is properly included in turnaround time; as complainant furnishes all cars used, use of reproduction costs, on which defendant's per diem charges are based, places both on equal footing and warrants departure from Rail Form A; use of 108.6-percent empty return ratio is proper since it specifically and directly affects complainant's costs for considered movement; and as a single commodity and limited origin area are involved, weighted-average distances used relate more accurately to actual transportation performed than simple averages, which represent hypothetical conditions.—Louisville & N.R. Co. v. Southern Ry. Co., 319 I.C.C. 639 (646-7, 653-5)*.

Complainant eastern lines' study of their costs for transportation of traffic moving to and from defined transcontinental territory, based on a single test period for October, 1953, obscures seasonal characteristics inherent in such a study, particularly in movement of perishables. Use of costs of the eastern district only, excluding the Pocahontas region, seems likely to have increased their costs somewhat; there was inconsistency in including costs of New England railroads, whose share in the traffic was only about 2 percent, while excluding the Pocahontas lines whose share was 5 percent.—Akron, C. & Y. R. Co. v. Atchison, T. & S.F. Ry. Co., 321 I.C.C. 17 (31-2)*.

Where relationship of one territory to another is of critical importance, it is requisite that any special studies be made on a comparable basis in each territory. In determining empty return ratios for boxcars in mountain-Pacific territory, defendants substituted figures developed from their own experience for those published in Rail Form A, and based their ratios for the Midwest only on data for the midwestern portions of four transcontinental lines; as no data for the East were available to them, they also used the midwestern ratios for that territory. Therefore, in order to obtain comparable data, empty return ratios shown in Rail Form A based on commission's 7-day study by territories are used in restatement of defendants' cost study.—Id., pp. 35-7; the 7-day studies, made under a commission order and based on uniform instructions to all railroads as to how they should be made, afford a more reliable basis of comparison among territories than defendants' studies.—Id., 322 I.C.C. 491 (494)*.

In lieu of Rail Form A method of computing constant costs for maintenance of way and structures and return on road-running facilities, which vary among the railroad groups when reduced to a track-mile basis, defendants used for all three territories a constant expense and return per track-mile the same as average for all miles of running track in United States. However, evidence indicates that expense per mile increases as traffic density increases, and use of United States averages per track-mile tends to overstate those constant costs in midwestern territory because of its lower-than-average density and to understate them in the other two territories because of their higher-than-average density. While defendants' underlying principle of relating constant costs to track-miles is not condemned, use of United States averages for those items ignores or even gives a reverse effect to differences in cost among the

various territories. Therefore, in the restatement those costs are computed by the Rail Form A method.—Id., 321 I.C.C., pp. 37-42.

The general principle in computing roadway costs is that, although constant cost does not vary with individual units of output, a given actual amount (body) of constant cost is valid only at a particular level of output and for a specific size of plant facility, and that when either changes substantially the actual amount of constant will be different and relation between out-of-pocket and constant costs should be analyzed for each level (density) of traffic. Information from abandonment dockets and light-density class II roads shows a definite relation between density and constant cost per mile of track, and that latter is different for each density group, the constant for the lower-density groups being smaller than for the higher-density groups.—Id., 322 I.C.C., p. 496.

Defendants' application of a uniform average expense for locomotive repairs, supplies, depreciation, and return on investment, computed on basis of locomotive-unit miles, to all three territories does not appear sound in an effort to discover territorial cost differences. Testimony for complainants indicates that locomotive-unit mile costs are substantially higher in eastern territory than in western, due partly to larger engine districts in the West, which have effect of increasing locomotive miles per day. Therefore, locomotive costs are restated on basis of the gross ton-mile method as applied in Rail Form A separately for each territory, which produces proper and more equitable results among the territories.—Id., 321 I.C.C., pp. 41-2.

On theory that differences in car-mile costs among territories are unrelated to handling of interterritorial traffic, defendants used same amount per service unit for group I costs (repairs, depreciation, etc.) in all three territories. Rail Form A, by including per diem settlements, adjusts those costs from a cars-owned basis to basis of cars serving on the road, which can result in substantial differences in dollars paid out and received; and defendants' sample of official-transcontinental traffic indicates a greater use of eastern cars in western district than the reverse. Territorial differences in car-mile costs are shown to result from actual operations and to be due mainly to geographical differences and application of same per diem rate to territorial carrier groups having different degrees of car utilization; and resulting cost differences are related to and partially caused by the traffic at issue. Differences in car-mile costs among the three territories should not be concealed by using the same cost for all; therefore, Rail Form A car-mile cost applicable to each territory is used in restatement. Id., pp. 42-4.

Though defendants limited their computation of branch-line costs on a solely related basis to branches "on which 50 percent or more of cars originated or terminated are related to transcontinental traffic," a proportion of 50 percent of such traffic on a branch cannot be accepted as indicating such a degree of dependence thereon as to support defendants' differentiation. And taking into account the broader category of commodities actually included in their car count is inconsistent with conception of a branch line used exclusively for a given purpose. Amount of such "solely related" cost is deleted in the restatement, in order to place all three territories on a comparable out-of-pocket basis.—Id., pp. 44-5; application of the "solely related" concept requires that the facilities be used and expenses incurred exclusively for the particular traffic or service and that they would be eliminated with disappearance thereof; transcontinental lines' "solely related" branch and short lines do not meet those conditions.—Id., 322 I.C.C., p. 497.

In arriving at allowance for return on investment in transportation property, consideration must be given to the proper investment base, the rate of return, and treatment of Federal income taxes, of which the first is the most important. While there is indication that long-term cost of capital is not less than the 6-percent used by defendants, that fact is principally relevant to total revenue needs; the commission's cost finding section has computed return at 4 percent after income taxes, which for many years has represented the average for class I line-haul railroads as a whole and may be regarded as proper for present purpose of cost ascertainment. And principle in rate proceedings that Federal income taxes are a proper charge to operations

and deductible as such in arriving at a fair return must be applied to divisions. Therefore, for purpose of comparison among territories, Rail Form A out-of-pocket costs reflecting a 4-percent return on elements of value are used in the restatement.—Id., 321 I.C.C., pp. 45-6.

Comparisons of net railway operating income alone are not entirely reliable in judging significance of rates of return on investment because of distortions in incidence of Federal income tax. That tax applies to nonoperating as well as operating income, and defendant mountain-Pacific roads have larger portions of "other" income than eastern or midwestern groups. Another complication is due to tax savings from accelerated amortization of cost of defense projects completed before 1956; Federal income taxes were deferred for 5 years after completion of such projects through higher-than-normal tax credits, and the tax burden will probably be increased correspondingly for the remaining life of the property. Western railroads principally received defense-project certifications, which thus indirectly tended to overstate their net income. However, adjustments to allow for such distortions can readily be made.—Id., p. 60.

But although defendants' cost studies understate costs in eastern and midwestern territories in the foregoing respects, adjustments of all other refinements to and departures from Rail Form A costs therein would have but negligible effect and would not be justified, on basis of cost data of record, in a proceeding involving such a large and varied body of traffic. Defendants' gathering studies, in particular, are a measurement of specific services rendered cars originated in the gathering areas, involving a greater than average amount of service handling, and more closely approach actual cost incurred by those cars than system average costs produced by unadjusted Rail Form A.—Id., pp. 47-9.

Although defendants contend that rejection of six components of their cost studies imposed on them an unjust burden of proof, and that the complaints should have been dismissed or their opponents ordered to produce data thought to bear on those matters, it is not clear whether the commission could lawfully or properly follow the latter course in adversary proceedings on formal complaints. While such action has occasionally been taken in investigations on the commission's own motion where it appeared necessary to assume some responsibility for the record, defendants opposed institution of an overall investigation in instant cases. Record as a whole shows existing divisions to be unreasonable and inequitable, and dismissal of the complaints would not serve justice; nor is any basis apparent for assuming that complainants withheld vital evidence merely because they had different conceptions of the nature and extent of facts to be developed. The commission's substitutions for the rejected adjustments closely reflect the record, and the restated costs are based on the cost evidence alone; defendants' cost evidence as presented could not justly be given the weight claimed by them.—Id., 322 I.C.C., pp. 493, 498.

24. Retroactive adjustment.—[Vols. 3, 7, 9, 11, 12, 14, 15, 17, 19].—Complainant seeks retroactive adjustment of assailed divisions of joint rates on lump coal, claiming that to extent those rates are on basis prescribed in 270 ICC 291 they were not removed from category of prescribed or approved rates by subsequently authorized general increases. However, language of §15(6) is plain that retroactive adjustment of divisions can be compelled only as to joint rates established "pursuant to a finding or order of the commission." Since existing rates on lump coal result from numerous general increases, application of which was expressly made merely permissive, they do not fall within that requirement; furthermore, the formal findings and order in case cited did not deal specifically with most of the movements now at issue. Assailed divisional basis has been in effect by agreement of the parties for over 40 years; since no valid grounds are shown for requiring retroactive adjustment thereof, it is denied.—Louisville & N.R. Co. v. Southern Ry. Co., 319 I.C.C. 639 (662)*.

26. Discretion of commission.—[Vols. 3, 7, 9, 12].—While the commission's discretion in matters pertaining to divisions is broad, an agency's discretionary order must be upheld,

if at all, on the same basis given by the agency. In prescribing challenged schedule of divisions of joint official-w.t.l. rates for application to eastern-transcontinental interterritorial traffic, the commission invoked only the grounds that eastern lines needed additional revenue but the scale sought by them was not a proper one. Under §8 of Administrative Procedure Act, all agency decisions must include a statement of findings and conclusions, with reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record; and the Supreme Court has emphasized that this section was intended to have teeth. That strict requirement should not be relaxed; for the court to determine whether the commission exercised its discretion within the bounds of "due consideration" expressed in §15(6), it must disclose the basis of its order and indicate basis on which it exercised that discretion.—Atchison, T. & S. F. Ry. Co. v. United States, 225 F. Supp. 584 (606-7)*.

However, even had the commission presented findings and analyses based on substantial evidence, its order would still be defective for failure to consider all the standards enumerated in §15(6); it failed to consider terminal costs, assumed equality of efficiency and public interest, found relative costs of service "unhelpful," and made no finding based on revenue needs which would justify its action. Prescription of divisional scale in issue for eastern-transcontinental traffic was unlawful because of the commission's failure to observe standards of §15(6) and of §8(b) of APA. Order set aside and cause remanded for further proceedings consistent with the court's opinion.—Id., pp. 606, 607.

Question of whether divisions of joint rail rates on transcontinental traffic in issue are just, reasonable, and equitable is for the commission, not the court; however, in prescribing those divisions, the commission's minimum duty is to give due consideration to the five factors listed in §15(6). Also, while the commission has broad discretion in such matters, its discretion can never substitute for the "findings and conclusions, as well as the reasons or basis therefor," or for the clarity of findings, required by the Administrative Procedure Act. The justness of the divisions is for the commission in the first place, but the reviewing court must be able to determine from the commission's findings, conclusions, and orders whether the mandate of the statute has been met; due to described insufficiency of the findings and conclusions, case is remanded to the commission for further proceedings consistent with the court's opinion.—Atchison, T. & S.F. Ry. Co. v. United States, 238 F. Supp. 528 (543-5, 540)*.

In determining and prescribing divisions of joint rates, the weight to be given any of the factors enumerated in §15(6) necessarily depends on the facts under consideration, and evaluation of importance of the various factors is peculiarly within purview of the commission, since the question of divisions involves the making of practical judgments rather than the solving of a problem with mathematical precision.—Louisville & N. R. Co. v. Southern Ry. Co., 319 I.C.C. 639 (657, 658)*.

32. Burden of proof.—[Vols. 3, 9, 15, 16].—Plaintiffs' argument that, since the burden in proceeding before the commission was on complainant assailing divisions of rates between southern border points and official territory to produce evidence of relative costs of handling the traffic involved, and it did introduce in evidence its own actual costs, it was also complainant's burden to adjust the average costs presented by plaintiff northern lines (defendants therein), is untenable when data necessary to make such adjustments were not available to complainant and could only be produced by plaintiffs themselves.—Boston & M. R. v. United States, 208 F. Supp. 661 (676)*.

Although eastern lines' complaint covered divisions of rates to and from intermountain territory, including eastern portion of mountain-Pacific territory not embraced in transcontinental territory as defined, there is no evidence relating specifically to intermountain divisions other than to and from Montana, and none bearing on divisions over routes through southern territory; therefore those divisions (except of rates to and from Montana, which are included in divisional basis prescribed for midwestern lines), are excluded from the findings. Interested carriers should be able to agree on modification of

such divisions in light of the findings.—Akron, C. & Y. R. Co. v. Atchison, T. & S.F. Ry. Co., 321 I.C.C. 17 (76)*.

34. The order.—[Vols. 3, 7, 9, 12, 14, 16].—Although transcontinental lines seek withdrawal of order clarifying findings and original order prescribing divisions of joint rates between transcontinental and eastern and midwestern territories, but without changing effective date thereof, claiming that the later order is invalid for failure to give the 30 days' notice required by §15(2), that order was intended merely to clarify matters discussed in original report and an additional 30 days' notice was therefore deemed not to be required. However, recognizing that omission of more specific language in the original order has caused disagreement as to effect of the clarifying order, and as several changes are being made in specific divisions, it is deemed advisable to set forth the entire findings on reconsideration and to enter a new order with an appropriate effective date, combining all divisions as originally prescribed and as now amended or supplemented. Such order does not change effective date or any other provision of the original order, but expiration thereof will be provided for upon compliance by the parties with the order now entered.—Akron, C. & Y. R. Co. v. Atchison, T. & S.F. Ry. Co., 322 I.C.C. 491 (511-2)*.

Reasonableness

40. In general.—[Vol. 3, 7, 19].—See Carolina & N.W. Ry. Co. v. United States, §1(4), n. 134.

Section 15. (7) Commission to determine lawfulness of new rates; suspension; refunds.—[Unchanged. See vol. 11, p. 9273.]

11, p. 9273.]

Amendments, see footnotes, vol. 3, p. 1957, vol. 11, p. 9274; historical note, vol. 3, p. 1958.

Historical Note

Rates and fares of railroads within the Alaska Railroad Act, jurisdiction of the commission, see Historical Note concerning Executive Order 11107 following §15(1).

Notes of Decisions

Volume 3—p. 1959; Volume 7—p. 5543; Volume 9—p. 7676; Volume 11—p. 9274; Volume 12—p. 10314; Volume 13—p. 11019; Volume 14—p. 11524; Volume 15—p. 12107; Volume 16—p. 12753; Volume 17—p. 13438; Volume 18—p. 14200; Volume 19—p. 15379.

In general

1. Jurisdiction of courts in preventing change of rates.—[Vols. 3, 7, 17-19].—See also Humble Oil & Refining Co. v. Great Northern Ry. Co., 28 USC §2325, n. 7.

That a reduced rate which was become effective upon expiration of the statutory 7-months suspension period may ultimately be found unreasonably low in violation of the national transportation policy furnishes no authority to the courts to extend the suspension period in face of the clear mandate of the statute that, if the proceeding has not been concluded and an order made by end of that period, the proposed change shall go into effect. In essence, suit to enjoin application of rates under investigation in proceeding still pending before the commission asks the court to declare that the 7-months period is inadequate; however, Congress has fixed 7 months as the maximum period of suspension, and for the courts to extend that period would in effect be amending the statute, which is beyond their power. District court's denial of appellants' motion for preliminary injunction, affirmed.—Arrow Transp. Co. v. Southern Ry. Co., 308 F. 2d 181 (186)*.

Although, during pendency of court action to set aside the commission's order approving certain reduced all-rail rates, the railroads filed new reduced rates on the same commodity between two of the same points, the commission's refusal to suspend the rates most

recently filed was a matter exclusively within its sound discretion and is not susceptible of review by the district court.—Seatrain Lines, Inc. v. United States, 233 F. Supp. 40 (47).

Authorities are divided on the question of jurisdiction of the courts to review suspension orders. However, as held in 193 F. Supp. 795, while it cannot be said that under no circumstances may a court have jurisdiction over an action to enjoin a suspension order, a suit to enjoin such an order may be entered if, but only if, complaint shows that the suspension is plainly without statutory authority or violates a clear statutory command, and that complaining party has no other available remedy. Also, it is this court's opinion that, where a prima facie case of "gross abuse" of discretion on the commission's part is presented, there would be a power to review. In instant case, plaintiff is not without available remedy; there was no gross abuse of authority, and the commission acted within its statutory power and did not violate a clear statutory command; therefore, action to enjoin order of Division 2 vacating suspension order of the Suspension Board, and to require suspension of proposed increased rate on crude oil, is dismissed.—Naph-Sol Refining Co. v. United States, 269 F. Supp. 530 (531-2)*.

When proposed rates on their face violate §4 and interim relief has been denied but the commission has not taken final action on application for permanent relief, the court may order "suspension" of the rates pending the commission's final determination, even though the maximum suspension period authorized by §15(7) has expired.—Wirthmore Feeds, Inc. v. Baltimore & O. R. Co., 221 F. Supp. 745 (747).

2. Breadth of investigation and suspension powers of commission.—[Vols. 3, 7, 9, 11, 12, 14-19].—Review of the commission's power to suspend proposed rate changes, and the legislative history of grant thereof, indicates that Congress meant to vest in the commission sole and exclusive power to suspend, and to withdraw from the judiciary any pre-existing power to grant injunctive relief. The close nexus between the suspension power and the commission's recognized primary jurisdiction to determine lawfulness and reasonableness of rates suggests that it would be anomalous if Congress which created the commission's suspension power nevertheless meant the judicial remedy to survive; Congress meant to foreclose judicial power to interfere with timing of rate changes which would be out of harmony with the uniformity of rate levels fostered by the doctrine of primary jurisdiction. And omission by Congress of express reference to interests of competing carriers and their customers does not warrant a different result; injunctive remedy is not available to petitioners.—Arrow Transp. Co. v. Southern Ry. Co., 372 U.S. 658 (662-9)*.

Moreover, undesirable consequences would necessarily attend survival of the injunction remedy; any necessary consideration by the court of applicant's claim that proposed rates are unreasonable, in disposing of an application for injunctive relief, would create the hazard of forbidden intrusion into the administrative domain. Such considerations explain why courts consistently decline to suspend rates when the commission has refused to do so, or to set aside an interim suspension order.—Id., pp. 669-70.

Section 15(7) contemplates summary action by the commission after summary hearing; and provisions of the Administrative Procedure Act do not require the commission to hold a hearing or set forth detailed reasons for refusing to suspend a proposed tariff and initiate an investigation, whether such action is that of the Board of Suspension or of Division of the commission on appeal. The commission had before it sufficient information, in the nature of briefs, financial statements and affidavits, to justify its action; and reasons set forth in the order of Div. 2 (acting as an appellate division), which vacated the Board's suspension of proposed increased rate on crude oil, are sufficient to support the commission's action. Therefore, suit to enjoin the Div. 2 order, and to require suspension of proposed rate schedule in accordance with suspension order entered by the Board, is dismissed.—Naph-Sol Refining Co. v. United States, 269 F. Supp. 530 (531-3)*.

The commission's conclusion that proposed multiple-car rates on grain from Ohio and Mississippi River crossings to the South, subject to a 240-cent minimum on movements

under 346 miles, would violate §3(1) is invalid because not predicated on basic findings supported by substantial evidence; and its finding that the level of proposed rates, with the unlawful discrimination removed, would not be adequately compensatory and thus would violate §1(5) is likewise invalid because based largely on the invalid finding under §3(1). Also, the commission's conclusion that the proposed rates must be increased in order to avoid unfair and destructive competition in violation of the national transportation policy is invalid because it violates §15a(3); it exceeds the statutory authority of the commission, and is not supported by substantial evidence; the order set aside.—Cincinnati, N.O. & T.P. Ry. Co. v. United States, 229 F. Supp. 572 (577, 579-80)*.

4. Transportation subjects which may be considered; in general.—[Vols. 3, 7, 9].—While the commission's determination that proposed reduced rate was not essential to railroads' retention of the traffic involved a prediction as to future action of shippers, it does not follow that the finding is unsupported or that the commission was without jurisdiction to make it. The commission is not to be stripped of its power to determine lawfulness of a rate because a forecast as to the future is a factor which it, in the exercise of its expert judgment, is required to consider. Atlantic Coast Line R. Co. v. United States, 209 F. Supp. 157 (159)*.

6. Considerations determining whether suspension warranted.—[Vols. 3, 7, 9, 19].—See Arrow Transp. Co. v. Southern Ry. Co., 28 USC §2325, n. 43.

7. Latitude of managerial discretion.—[Vols. 3, 7, 9, 19].—Instead of making proposed multiple-car rates on soybean cake and meal apply as through rates from country origins under a single-car origination rule notwithstanding movement of soybeans into the transit point is in single carloads, respondents could have achieved the same result by traditional ratemaking methods, such as establishing multiple-car proportional rates from the transit points; however, they chose not to do so and, in passing on lawfulness of the proposed rates, the commission is not concerned with whether the method employed by respondents to meet the situation confronting them is sound from a managerial standpoint. —Vol. Rates on Processed Meal—Midwest to Ports, 322 I.C.C. 456 (459-60).

Though from the practical viewpoint of inducing investment in grain storage and milling facilities at Pittsburgh it is impossible to discern much merit or logic in use of McGraham formula (47 ICC 409) to develop proposed rates to trunkline and New England base points, and respondents could have easily developed a more practical and consistent pattern of rates from Pittsburgh properly related to distance and to present rates from Buffalo, their choosing not to do so was within their managerial discretion and is not a matter of concern to the commission in judging lawfulness of the proposed rates.—Grain from Pittsburgh, Pa. to Eastern Base Points, 322 I.C.C. 218 (224)*.

Carriers have a right to initiate lawful rate adjustments to obtain or retain desired traffic. —Resin Plasticizers, East St. Louis-St. Louis and Chicago, 321 I.C.C. 401 (403)*.

In the face of a substantial annual deficit from express transportation of cut flowers at present rates, and considering the special service and preferred handling required on such shipments, it is within Express Agency's managerial discretion to choose the method it will use to minimize its losses and conserve its resources. Evidence is persuasive that it can improve its financial condition under proposed increased rates, and as there is no sound basis for finding that those rates exceed a maximum reasonable level for the service performed, the commission is not inclined to interfere with a course of action considered necessary by respondent to alleviate its financial difficulties. Proposed rates approved.—Cut Flowers—Throughout Continental United States, 319 I.C.C. 202 (217, 218).

That rates are published for a complete service does not prevent a carrier from offering a lesser service at a lower rate. Though proposed reduced rates on grain in multiple-car shipments in jumbo hopper cars do not apply on products, do not authorize transit or absorption of switching charges (as do the higher single-car rates), and are subject to special demurrage rules, they are published to meet unregulated truck competition and privi-

leges accorded under the single-car rates have no relation to them. Those restrictions are primarily matters of managerial discretion and are lawful.—Grain in Multiple-Car Shipments—River Crossings to So., 318 I.C.C. 641 (644, 689)*.

8. "Suspend the operation of such schedule."—[Vols. 3, 7, 14, 16, 17].—Since it is elementary that power to prescribe rates to be charged in the future is a legislative function, it would seem equally clear that the power to suspend or not suspend proposed rates involves a determination of what the rates shall be during the suspension period and is itself a legislative function.—Arrow Transp. Co. v. Southern Ry. Co., 308 F. 2d 181 (184)*.

In the process of establishing new rates, some irreparable injury to proponents or competing carriers and to portions of the public, as result of the statutory suspension provisions, appears unavoidable. Though the commission may require refunds of increases found unjustified, that power by itself has proved an inadequate remedy, and even that remedy is unavailable in case of reductions. While an unreasonably low rate found to be in violation of the national transportation policy would give rise to an action for damages under §8, that such a finding may ultimately be reached after full hearing furnishes no authority to the courts to extend the statutory 7-month period.—Id., pp. 184, 186.

Suspension Period

12. Resuspension.—[Vols. 3, 12, 14].—Upon expiration of the maximum statutory period of suspension, the court lacks jurisdiction to further suspend proposed rates in proceedings under §15(7) pending the final action of the commission. [372 US 658.]—Wirthmore Feeds, Inc. v. Baltimore & O. R. Co., 221 F. Supp. 745 (746).

13. Automatic effect given rates at end of period.—[Vols. 3, 11].—See Arrow Transp. Co. v. Southern Ry. Co., 28 USC §1337, n. 1.

14. Accounting order when rates automatically effective.—[Vol. 3].—See Flores case, §8, n. 133.

Parties

21. Respondents.—[Vols. 3, 9, 15, 17, 19].—Motion to strike portions of respondents' brief on ground of misrepresentation as to which carriers are respondents in related investigations, overruled. Rail carriers parties to the proceedings can be correctly ascertained from the record, and any misstatement on brief by any party can have no effect on the record as made.—Export Grain from Texas Points, 319 I.C.C. 16 (18).

Although it is urged that order of investigation be interpreted to include as respondents the more than 100 rail carriers participating in proportional rates on corn from Chicago to the East, the proceeding arose from independent action of Chicago & E.I.R. and the Milwaukee in canceling their participation in joint through rates from two Illinois and Indiana origin groups; it is the lawfulness of resulting combinations of their reduced local rates to Chicago and the proportionals beyond that is under investigation, and only they are properly respondents.—Corn and Corn Products from Ill. and Ind. to the East, 319 I.C.C. 568 (570).

And although interveners request prescription over other routes of reduced joint rates on same level as the combinations in issue, and respondents are willing to join in such rates on a reasonable divisional basis, concurrence of the eastern railroads would be a prerequisite. Respondents cannot compel the connecting lines to join in such reductions and, as latter are not parties to the investigation proceeding, no order may be entered requiring their concurrence.—Id., p. 572.

On reconsideration of proposed proportional rates (initial factors of combination rail-water-rail rates) on sulphur from Texas origins to Galveston, Houston, and Texas City for coastwise movement beyond, protestant Seatrain requests that certain eastern railroads be required to join in an application of the Ex Parte Nos. 162 and 166 general increases similar to respondents' application thereof in computing proposed rate on crude sulphur. However, since eastern carriers are not parties to the proceeding, a single-factor through rate cannot be prescribed.—Sulphur—

—Tex. to Tex. Ports—Coastwise Movement Beyond, 318 I.C.C. 625 (626-7)*.

Procedure

25. Issues in the investigation; in general.—[Vols. 3, 7, 9, 11, 13, 15, 19].—Carriers may, within the zone of reasonableness, adjust rates to meet competition; in cases involving rates voluntarily published by carriers to meet competition pursuant to §15(7), the issue to be decided is whether proposed rates are lawful. —Boston & M. R. v. United States, 202 F. Supp. 830 (837)*.

District court's setting aside of challenged fourth-section orders having rendered involved rates unlawful because of fourth-section departures, the court ordered their suspension; but, even assuming validity of protestant Seatrain's contention that the suspended rates discriminate against it within meaning of §3(4), mere formal designation of the remanded proceeding as one of "Investigation and Suspension" does not of itself bring into issue the substantive provisions of every section of the act, especially as such designation emanated solely in obedience to a temporary restraining order of a court. Where the issue arises under §4 the only necessary parties are the petitioning carriers and not protestant.—Iron or Steel Articles from the East to the Southwest, 321 I.C.C. 419 (422)*. [But see dissent.]

It was settled by report in I. & S. Docket No. 7768, wherein respondents proposed to cancel certain transit privileges on furfural residue, that protestant's privilege of processing such residue in transit at Verdon, Nebr., should be continued, and that question is not subject to relitigation in present proceeding on proposed increase in transcontinental rates on furfural residue further processed than screened and restriction of present rates to residue not further processed than screened. —Transit of Furfural Residue at Various Points, 322 I.C.C. 794 (805).

See also Rail-Water, Grain in Bulk, from Mo., Ill., & Ind. to Buffalo, n. 50, below.

Though both beet sugar producers supporting, and cane sugar producers opposing, proposed reduced rates on sugar from western origins to central territory complain of each other's sales practices, and latter intimate that the major portion of any increase in absorption of freight rates or diminution of net return on beet sugar is passed on to the grower, the commission has no jurisdiction over such matters; relations between sugar beet growers and processors are subject to regulation by the Secretary of Agriculture.—Sugar from the West to Central Territory, 319 I.C.C. 686 (706); and though protestants contend that alleged deficit incurred by western railroads in hauling the beets to the processing plant should be included in costs assignable to the beet sugar traffic, that issue concerns rates not involved in the investigation.—Id., p. 705; also, request that instant proceeding be held in abeyance pending decision on reconsideration in investigation of reduced sugar rates from gulf and south Atlantic ports to Ohio River crossings and Indiana is denied, since issues therein relate largely to intermodal competition, whereas issues in instant proceeding concern chiefly market and intramodal competition.—Id., p. 707.

Although protestant claims that rates from Buffalo and related origins to midwestern points, made the same as combinations to more distant points which include reduced rates from those origins to Chicago, will be on lower levels than rates from Keokuk, Iowa, to the same intermediate points, the Keokuk rates are not in issue and their levels may not be considered.—Pig Iron, Buffalo, N.Y., to Chicago, Ill., and Gary, Ind., 315 I.C.C. 601 (606)*.

Since considered TOFC rates on brass, bronze, and copper articles had been canceled before report in 314 ICC 363 was adopted, issue as to such rates had become moot; discussion and findings concerning those rates in prior report should be regarded as stricken.—Machinery and Brass, Bronze, Copper Articles from East to Tex. and La., 316 I.C.C. 557*.

27. Particular issues; reasonableness.—[Vols. 3, 7, 9, 12, 14, 16, 17, 19].—In intermode competitive rate cases, the issue of minimum reasonableness of proposed reduced rates involves two primary questions: first, whether the proposed rates are reasonably compensatory, and second, whether, if they are compensatory, they constitute destructive

competition within meaning of the act. In addition, all other relevant criteria of minimum reasonableness provided in §15a(2) and (3) should be considered in light of the facts and circumstances surrounding the proposed rates.—Reduced Transcontinental Lumber Rates, 1961, 318 I.C.C. 815 (840).

28.—Preference or prejudice.—[Vols. 3, 7, 9, 11, 19].—Since order of investigation stated that it would include "all matters and issues with respect to the lawfulness of said rates," and it is well settled that a rate may be reasonable and yet result in undue prejudice, issue of undue prejudice raised by protestants was properly before the commission notwithstanding proposed rates were shown to be well within the zone of reasonableness.—Fresh Meats, Ill., Ind., Ky., Ohio & Mo. to Points in Fla., 318 I.C.C. 5 (10).

Although restrictions on reduced rates established on grain from country origins to Twin Cities and Twin Ports, against transit and against their use as factors of through combinations to destinations beyond, were canceled or allowed to expire and the same level of rates continued with full transit privileges at Minneapolis and Duluth, issues of undue prejudice and unjust discrimination resulting from such restrictions are not rendered moot, since the restrictive rules will govern determination of charges on grain shipped from origins prior to their cancellation and subsequent thereto moved beyond those rate-break markets, and that condition will obtain for the authorized transit time of 2 years.—Wheat, Rye, and Flaxseed to Duluth and Minneapolis, 315 I.C.C. 89 (95).

See also Pennsylvania R. Co. v. United States, 216 F. Supp. 199, §13(1), n. 29.

Proposed reduced rates on iron and steel articles from points in adjacent States to Iowa destinations violate §3(1) when evidence establishes that receivers at Sioux Falls, S. Dak., and shippers at Kokomo, Ind., and Granite City, Ill., are in keen competition with shippers and receivers at points embraced in proposed adjustment, and that the proposed rates would cause a disparity to disadvantage of the former which is not justified by transportation standards. Not approved.—Iron and Steel from Ill., Ind., Kans., and Mo. to Iowa, 315 I.C.C. 403 (410).

Proposed reduction of rates from Pine Bluff, Ark., would disrupt existing rate relations with four competing origins and unduly prejudice shippers at latter points in competing in eastern markets; not approved.—Oak Flooring—Pine Bluff, Ark., to Mich., N.Y., Ohio & Pa., 315 I.C.C. 77 (78, 79).

35. Burden of proof upon the hearing; in general.—[Vols. 3, 7, 9, 11-19].—Part II, §216(g), n. 5.

Burden was upon plaintiffs (respondents in the commission proceeding) to show that proposed reduced export-import rates, which would restore equality of through ocean-rail charges that existed prior to equalization of the ocean rates in 1935, were just and reasonable within §1(5), and that they did not violate §§2 and 3 (1).—Boston & M. R. v. United States, 202 F. Supp. 830 (833, 834)*.

Railroads had burden of proving that proposed reduced ratings and rates on agricultural implements and road-making equipment would be compensatory; burden sustained when evidence showed that they would receive compensatory revenues from those rates.—Missouri Pac. R. Co. v. United States, 203 F. Supp. 629 (635)*.

Prior to enactment of §15(7) in 1910, although the commission had held that an increase in rates long maintained on traffic that was large, important, and constantly increasing would be held unjust unless satisfactorily explained, it was the general rule that the burden of showing a changed rate to be unlawful was on complainant rather than the proponent; and on its face §15(7) shifts this burden only to the proponent of rate changes, as distinguished from initial rates published for the first time for particular movement.—Animal Feed, Miss. and Tenn. to Midwest and Southwest, 319 I.C.C. 257 (259)*. [See also concurrences.]

While §15(7) places the burden of proof on respondent to show that a proposed changed rule, regulation, or practice is just and reasonable, and in most cases such a finding cannot be made unless the related rates and charges are shown to be reasonably compensatory, respondent has shown that proposed addition of Milwaukee to Chicago group on TOFC traffic to and from Kansas City is just and reasonable even though it has not shown com-

pensativeness of existing and related rates and charges. Though the rates to and from Milwaukee will no longer be determined under intermediate rule by reference to the Chicago rates, they remain unchanged, and to find that the proposed change in method of determining the applicable rates is unjust and unreasonable would benefit no-one and would deny to respondent and its shippers whatever benefit they might derive from this step in direction of tariff simplification.—Addition of Milwaukee to Chicago Group Rates—K. C., 318 I.C.C. 755 (759).

Although order instituting investigation into proposed plan II TOFC proportional rate on dairy products from Twin Cities to Chicago was entered after schedules of three respondents became effective, their becoming effective without suspension resulted from protestant motor carrier bureau's submission of incorrect information as to their effective date. Hence, though examiner was technically incorrect in stating that the commission declined to suspend those schedules, the end result is the same and burden of showing their unlawfulness is still on protestant bureau.—Dairy Products from Twin Cities to Chicago, 321 I.C.C. 720 (721).

Joint rail-water rates published by water carrier on bulk commodity: see Rail-Water, Grain in Bulk case, §307(g), n. 10.

Respondents have no burden to show lawfulness of existing rate on beer from St. Louis to Chicago, which was reduced to meet threat of private-carrier competition; and protestant submitted no evidence of unlawfulness of that rate or of like rates published to Aurora and Arlington Heights, Ill., to restore parity with Chicago, whereas respondents submitted evidence showing that all three are compensatory and no lower than necessary to meet the private competition. Approved.—Beer, in Containers, St. Louis to Arlington Heights, Ill., 316 I.C.C. 812 (815, 818, 819).

Examiner properly denied protestants' motion to dismiss suspension proceeding on ground that respondents had failed to present a prima facie case; under Rule 1.70 of Rules of Practice a hearing officer has no authority to terminate a proceeding merely on basis of a motion. Concerning the merits, the commission is not a court of law bound by strict and technical rules; record as a whole is adequate for determination of the issues.—Corn and Corn Products from Ill. and Ind. to the East, 319 I.C.C. 605 (607).

While incorporation of general increases into basic rates is highly desirable, in an investigation and suspension proceeding the burden is on respondent to prove the justness and reasonableness of the proposed rate. Respondents' only evidence in support of proportional rate on ground or refined sulphur, increased by percentages authorized in ex parte proceedings without regard to maximum holddowns is that, since there is no movement between the points concerned, there was no basing point which could be used in arriving at a rate to destination ports; such showing is inadequate support for a finding of justness and reasonableness; not approved.—Sulphur—Tex. Tex. Ports—Coastwise Movement Beyond, 315 I.C.C. 415 (417)*.

Respondent has not shown proposed multiple-car rate on fine coal from Sherwood and points in Fulton County, Ill.,to Twin Cities and Black Dog, Minn., to be reasonably compensatory when from Sherwood to Black Dog it fails to meet out-of-pocket costs by at least 17 cents, and to St. Paul exceeds such costs by only 4.5 cents; though no adequate showing of costs to Minneapolis is made, in view of the very small margin between the St. Paul out-of-pocket costs and the proposed rate it is likely that the out-of-pocket costs to Minneapolis over a greater distance and with additional handling and switching would substantially exceed the proposed rate. Not approved.—Coal from Fulton County, Ill., to Minnesota, 315 I.C.C. 627 (632).

Burden of proving justness and reasonableness of proposed increases is on respondents; proposed proportional rates on crude sulphur and salt from interior Louisiana points to Louisiana ports for coastwise movement beyond to eastern destinations, which incorporate full general increases, including maximum increases, through and including Ex Parte No. 223, result in increases in present combination rail-water-rail rates for which no justification is offered; not approved.—Sulphur from Chacahoula, La., to New Orleans, La., 315 I.C.C. 657 (658, 659).

36.——Rates increased after Jan. 1, 1910; or proposed rates.—[Vols. 3, 7, 9, 12-15].—See Increased Ratings on Plastic Games—All Territories, §1(6), n. 144.

37.——Justification of reductions.—[Vols. 3, 7, 11-13, 17-19].—Respondent has failed to meet its burden of justifying proposed reduced rate when it introduced to evidence to show compensativeness thereof—a minimum requirement in any matter involving changed rates.—Resin Plasticizers, East St. Louis-St. Louis and Chicago, 321 I.C.C. 401 (404)*.

Considering that no competitive necessity now exists for proposed reduced rates on citrus fruits and juices from Florida in view of subsequent increase in motor-water-motor rates they were designed to meet, the rail carriers now rely on the record as justification for their rates only to extent that they are not less than the corresponding Sea-Land rates, that the reduced rates are substantially lower than present rates of competing motor carriers and Sea-Land, and that the railroads have the burden of justifying them, the proposed rates cannot be found just and reasonable.—Frozen Juice and Fruit from Florida to the North, 319 I.C.C. 577 (596-7).

Reduced rates on pig iron from Lake Erie ports of Buffalo and Erie to Chicago area, and related rates from Jackson, Ohio, and Niagara Falls area, measured by common-carrier water costs shown, are lower than necessary to meet existing water competition. And though reduced rates from Neville Island and Sharpsburg, Pa., are no more than a modification of paper rates (none of the traffic having moved from those origins to considered destinations), they are made in relation to the rates from Buffalo and Jackson and should be accorded the same treatment. Cancellation ordered.—Pig Iron, Buffalo, N. Y., to Chicago, Ill., and Gary, Ind., 315 I.C.C. 601 (613-5)*.

And since proposed reduced rate on pig iron from Buffalo to Chicago was found to be unlawful because competitively destructive, maintenance of related reduced rates on a level little above out-of-pocket costs would result in unwarranted dissipation of revenue. Lacking independent justification, reduced rates published from other origins merely to meet the Buffalo rates are unduly low and therefore unjust and unreasonable.—Id., 321 I.C.C. 121 (130)*.

See also Alcoholic Liquors from N.H. and N.Y. to Tex. and La., NTP, n. 5 *reduced rates*.

Respondents proposing rate reductions to meet increased barge competition must show that the prospect of intensified competition is reasonably probable and not a mere remote possibility; however, in meeting prospective competition, carriers are not required to withhold counter-action until diversion actually takes place. Testimony of shipper of iron and steel bars from Lemont, Ill., shows that construction of improved barge-loading facilities which would necessarily increase its use of barge service is feasible and would materially reduce cost of that service; and reductions proposed from other origins, some of which also have barge service, is necessary to maintain existing rate relations and afford the competing producers equal marketing opportunities with the Lemont shipper at destinations involved. Proposed rates are amply compensatory and no lower than necessary to meet the barge competition; approved.—Steel Bars, Lemont, Ill., to Iowa, Kans., Mo., Minn., & Nebr., 319 I.C.C. 292 (302-3).

In showing that its reduced rates on grain in multiple-car shipments in jumbo hopper cars, minimum 450 tons, from Ohio and Mississippi River crossings to the South are compensatory and necessary to meet unregulated truck competition, Southern Ry. has made a prima facie case of lawfulness which protestants have not overcome; rates on that minimum approved.—Grain in Multiple-Car Shipments —River Crossings to So., 318 I.C.C. 641 (687, 688, 690)*.

Though revenues from transportation of lumber and forest products are vitally important to railroads serving Pacific coast, that being about the most important commodity group in eastbound transcontinental traffic, under present rates shippers have no incentive to optimum loading; average per-car loads have decreased substantially in past 10 years, and not even smaller cars are being loaded to capacity. Proposed reduced alternative rates from mountain-Pacific States to points on and east of a line from western boundary of the Dakotas to El Paso, Tex., will encourage heavier loading, with savings

to both carriers and shippers, as have similar incentive rates on other commodities and on lumber in other areas, since shippers apparently should have no difficulty in meeting the increased minima. Proposed rates, being compensatory and otherwise lawful, approved.—Reduced Transcontinental Lumber Rates, 1961, 318 I.C.C. 815 (821-5, 841, 847).

See also Reduced Handling Charges on Iron Ore, Marquette, Mich., §1(5), n. 664.

38.—When rates or charges increased or reduced.—[Vols. 3, 7, 11, 12, 14, 19].—In determining whether increases or reductions result from proposed rates on automobile body parts, minimum 15,000 pounds, which for distances under 360 miles are 1 to 7 cents higher than, and for longer distances the same as, rates on that minimum that were canceled July 14, 1962, revenues at the proposed rates should be compared with those yielded by present rates on 20,000-pound minimum, on which the traffic moved after July 15, 1962. On that basis the proposed rates result in reduced c.1. revenues and must be considered as reductions; and the fact that the rates were in effect at some time in the past does not change this conclusion.—Automobile Body Parts, Official & Southern Territories, 323 I.C.C. 149 (152).

42.——Shifting of burden to protestant.—[Vols. 3, 9, 19].—Motor carrier protestants, claiming detrimental effect of proposed reduced rail rates on their business, need to show not only proposed or actual harm to their income, but that they deserve protection by virtue of their being the low cost transportation mode. When protestants failed to make such showing, rail rates which were just and reasonable should not hve been canceled as being "destructive" or as precipitating a destructive rate war.—Missouri Pac. R. Co. v. United States, 203 F. Supp. 629 (635)*.

Railroads proposing rate reductions to meet motor competition do not have the burden of proving that they have any relative inherent cost advantage; if carriers show a proposed rate to be just and reasonable from standpoint of their own revenue requirements, protestants who rely on a claim of inherent cost advantage must bear the burden of persuading the commission of existence of that advantage.—Cement within Southern Terr. & from Hagerstown to So., 319 I.C.C. 465 (480); Steel Bars, Lemont, Ill., to Iowa, Kans., Mo., Minn., & Nebr., 319 I.C.C. 292 (303).

See also Terminal Charge on Order Bills of Lading Shipments, §216(g), n. 5.

50. Evidence; generally.—[Vols. , 7, 11, 15-19].—Subject to provisions of §7(d) of Administrative Procedure Act, the commission takes official notice of establishment by all respondents, after the prior report (318 ICC 641), of point-to-point single-car rates on grain from Ohio and Mississippi River crossings, also from Tennessee River ports, to southeastern destinations, made 120 percent of multiple-car rates approved therein for Southern Ry. on 450-ton minimum and subject to same restrictive rules; and, also, of subsequent establishment in lieu thereof, by railroads other than Southern, of a scale of rates reflecting generally 120 percent of the multiple-car rates, to apply between all points in southern territory. Both sets of single-car rates will be considered together in investigation in docket No. 34271.—Grain in Multiple-Car Shipments—River Crossings to So., 321 I.C.C. 582 (613-4)*.

The inadequate rates of return on the railroads in recent years are common knowledge. —Guaranteed Rates, Sault Ste. Marie, Ontario, to Chicago, 315 I.C.C. 311 (317).

Protestants' evidence concerning possible extension to other interior grain centers of proposed method of making combination rates on Danville, Ill., on corn from Illinois and Indiana origins to the East was tendered to show alleged harmful effect of the proposals on present flow of grain through Chicago market; such evidence was within scope of the proceeding and is not subject to objection on ground that it is not material; moreover, the opposition had opportunity for rebuttal.—Corn and Corn Products from Ill. and Ind. to the East, 319 I.C.C. 605 (607); and protestants' objection to interveners' evidence in support of respondents as improper rebuttal is likewise overruled; interveners were proper parties, and admission of their evidence in no way prejudiced protestants.—Id., p. 607.

Statements in respondent's reply concerning reciprocal switching practices of other railroads, general denial that certain restricted

industires are open to reciprocal switching under its present tariff, and exhibits showing number of inbound cars line-hauled by respondent to restricted industries and number switched for other railroads, are relevant to proposed cancellation of reciprocal switching at certain idustries and team tracks and are in rebuttal of protestants' testimony; motion to strike overruled.—Switching at Richmond, Va., on Richmond, F. & P. R. Co., 316 I.C.C. 786 (787).

However, protestants' motion to strike exhibits concerning respondent's nonparticipation in joint rates and routes with Chesapeake & Ohio because of past action by that line is granted; such matters are not before the commission in instant proceeding and could have no important bearing on issues raised.—Id., p. 788.

And motion to strike letters from 13 restricted industries, apparently solicited by respondent, is also granted when, since they were filed in respondent's reply statement, protestants were foreclosed from comment and request for cross-examination, in contravention of Rule 1.53 of the Rules of Practice.—Id., p. 788.

The commission's cost statements are public documents prepared from carriers' annual reports and do not purport to represent exact costs of any particular carrier, but are issued to provide general average-cost information which may be useful to carriers and others in establishment of rates; respondents' use of those studies as a guide in determining compensativeness of proposed rates is one of the purposes for which they are made availabe to the public. Witnesses using such statements are not required to have personal knowledge of the cost data set forth therein; the commission has long accepted cost studies based thereon and accorded them whatever weight the circumstances warranted. Examiner's rejection of exhibits based on data taken from such cost statements, overruled.—Steel Bars, Lemont, Ill., to Iowa, Kans., Mo., Minn., & Nebr., 319 I.C.C. 292 (302).

Objections to admission of respondent's cost exhibit on ground that various deficiencies made it unreliable and that its witness was not qualified as a cost expert go to weight rather than admissibility of the evidence.—Radios, Televisions, Talking Machines from Bloomington, 318 I.C.C. 221 (222).

Statement that shipper informed respondent that the involved traffic is now moving in private carriage is not inadmissible as hearsay when it was made by respondent's assistant general freight agent, and is in nature of information which such an official would normally obtain during course of his official duties.—Id., p. 222.

Respondent's cost studies based on selected data from records kept in regular course of business were properly admitted. Other studies objected to because persons who actually made them were not present for cross-examination were admissible when witness who testified concerning them was a cost analyst on respondent's staff and the computations were made at his direction; while actual timing or checking was done by different employees at pertinent locations on the rail line, relating and applying those service factors was the job of the witness, who had primary responsibility for computing costs. In addition, the underlying data were studied by protestant after close of the direct testimony, and it was afforded ample time to request presence of specific persons for cross-examination.—Beer, in Containers, St. Louis to Arlington Heights, Ill., 316 I.C.C. 812 (813-4).

Respondent's testimony concerning its future traffic and revenue therefrom, based in part on monthly forecasts by shippers, was properly received as an exception to the hearsay rule. Although protestants object that the shippers were not available for cross-examination and the underlying data not of record, respondent receives these reports in the regular course of its business, and the witness whose duty it is to maintain records of the reports was cross-examined by protestants.—Pipeline Rates on Propane from Southwest to Midwest, 318 I.C.C. 615 (616).

Motion to strike statement of Louisville & Nashville's chief clerk that "any testimony given by me for the L&N and other respondents is the same as would be given if an oral hearing were had," on ground that he was neither empowered nor qualified to testify on behalf of other respondents, overruled; Lousville & Nashvilee, as chairman of committee of respondent railroads, was authorized by

other respondents to prepare respondents' statement of facts and witness had access to all facts presented by him in ordinary course of his employment.—Iron and Steel Articles between Atlanta and St. Louis, 318 I.C.C. 80 (81).

Testimony of chief clerk of traffic department of railroad relating to the reasons for publishing proposed rates is admissible since the witness in course of his employment is familiar with circumstances surrounding the publication of these rates.—Sheet Steel from Chicago, Ill., to Simpsonplle, Ky., 316 I.C.C. 105 (106).

Testimony of shipper's witness that studies extending over several years comparing cost of production at Tracy, Calif., plus transportation to eastern markets, with cost at its eastern factories and movement to same markets indicate that with availability of considered reduced rate it might be able to continue expansion at Tracy, is relevant; motion to strike on ground that witness refused to present production-cost data developed in the studies relates to weight to be accorded that evidence; overruled.—Canned Goods from Pacific Coast to Eastern Points, 315 I.C.C. 769 (775).

Motion to strike testimony of respondent's witness who is an employee of supporting shipper, on ground that he was not qualified to make statements concerning shipping policy of his company, denied when respondent filed affidavit by that company's traffic manager adopting the witness's statements as his own. —Agricultural Insecticides—Heyden, N.J., to Houston, Tex., 315 I.C.C. 623*.

Motion to strike respondents' testimony relative to intention to correct certain errors in suspended schedules which would result in violations of §4, as beyond scope of suspension proceeding, overruled; protestants' position is not impaired by testimony objected to; where errors are discovered in published schedules which may cause violations of law, carriers may offer to amend, and the commission can require cancellation of any such schedules without prejudice.—Grain—K.C., Omaha & Related Origins to Lawrenceburg, 315 I.C.C. 83 (84).

Motion to strike part of protestants' exceptions and an appendix thereto on ground that they present evidentiary matters which were not seasonably filed, granted.—Corn and Corn Products, Iowa, Nebr., Minn., S. Dak. to Ill., 318 I.C.C. 291 (292).

Motion to strike protestant's statement of facts and argument on ground that respondents were served with a copy thereof 9 days after the due date and were thereby denied opportunity to reply, denied; statement was timely filed with commission in accordance with Rules of Practice and on date of transmittal a copy was mailed to respondents' attorney by first-class mail prepaid.—Clay Products, West and Southwest to Pac. Coast Ports, 315 I.C.C. 571 (572).

Exhibits submitted by one shipper, purporting to show cost of moving pig iron in its own vessels from Buffalo to Chicago, were properly excluded when witness tendering them had no personal knowledge of the underlying facts, and feasibility of that shipper's use of private carriage could not be determined. But data submitted by another shipper, showing probable cost of moving pig iron from Cleveland to Chicago in its vessel, were presented by a competent witness; though its vessel has not been used for that movement, it has carried pig iron between other Great Lakes ports, and costs shown, based on operations conducted over a long period, appear to reflect cost of considered movement with sufficient accuracy.—Pig Iron, Buffalo, N.Y., to Chicago, Ill., and Gary, Ind., 321 I.C.C. 121 (122-3)*.

Evidence concerning direct movements of imported iron ore to or from private piers of steel companies at Fairless, Pa., and Sparrows Point, Md., is irrelevant to issues of lawfulness of reduced import rates on ores from the ports of Baltimore and Philadelphia to 17 destinations in western Pennsylvania, Ohio, and West Virginia.—Iron Ore from Eastern Ports to C.F.A. Points, 321 I.C.C. 473 (477)*.; and evidence concerning "split" cargoes discharged at Baltimore, most of which tonnage went into ground storage, from which some of it may have moved to points west of involved destinations taking lower rates from Baltimore than from Philadelphia, lacks probative force as bearing on results of requiring parity of rates from those ports to the 17 points.—Id., p. 480; likewise, evidence concerning

similar split cargoes discharged at Philadelphia is remote from the issue of port parity when none of the tonnage is shown to have moved to the 17 points.—Id., p. 481.

Examiner properly excluded testimony offered to show extent of motor and barge movements of bulk cement prior to 1961, as shown by underlying work papers of 1960 edition of Bureau of Mines' Mineral Yearbook, since no witness familiar with such working papers was available for cross-examination.—Cement within Southern Terr. & from Hagetstown to So., 319 I.C.C. 465 (473).

Objections to rejection of a report of Standing Rate Committee of Western Trunk Line Committee concerning proposal of certain railroads, including respondents, to establish TOFC rates on tractors substantially similar to those in issue, on ground that matter contained therein was admissible as an admission against interest, overruled. Under the §5a agreement, right of independent action is reserved to all members and action by a rate committee is not binding on its members; therefore, no conclusion by such a committee may be construed as an admission against interest.—Tractors—T.L. & W.T.L. Territories to S.W. & W.T.L. Ter., 319 I.C.C. 758 (759).

An evidence of decline over a 5-month period in respective percentages of one tractor manufacturer's total traffic transported by rail and for-hire motor carriers from Detroit to all points in United States, and of concurrent proportionate increase in private carriage, has little probative value to show a "trend" to private carriage of tractors individually weighing 6,200 pounds or less from Detroit to the five destinations concerned, especially when during 3-month period preceding the hearing that shipper transported only 15 shipments in private to only two of those destinations.—Id., pp. 761-2, 764.

Evidence concerning amounts of divisions to be received by the participating carriers under proposed joint rail-water rates on grain, which shipper protestant seeks subpena to require, is not relevant to determination of lawfulness of the proposed rates. The divisions of a joint rate are of no concern to shippers, since the mere fact that they may be less than carriers' local rates for their respective portions of the through service does not result in unlawful discrimination, preference, or prejudice as between shippers.—Rail-Water, Grain in Bulk, from Mo., Ill., & Ind. to Buffalo, 319 I.C.C. 123 (126-7)*.

Evidence of changes contemplated by respondents in rules governing the proposed rates and establishment concurrently therewith of rates slightly higher than those under suspension, to meet objections of one shipper, was properly admitted. Such prospective changes in no way modify or change the issues in instant proceeding, which are limited to lawfulness of the suspended rates; nevertheless, scope of investigation is not limited to the degree that evidence of subsequent intention to change application of proposed rates to meet objections of particular shippers must be excluded as immaterial and irrelevant.—Id., p. 127.

And it was not improper to allow rail protestants to introduce a portion of record in another proceeding embracing testimony and exhibits by a witness for instant respondent; such a proffer is authorized by Rule 1.82 of Rules of Practice. Stated purpose of such evidence was to show inconsistencies in that witness' testimony in different proceedings, and it was proper cross-examination.—Id., p. 127.

Examiner properly rejected evidence comparing divisions of lumber rates from the South to official territory with divisions of rates from Portland, Oreg., to same destinations; divisions have no bearing on lawfulness of rates separately established for shippers, and alleged shipper discrimination is not comparable to discrimination between connecting carriers under §3(4).—Reduced Transcontinental Lumber Rates, 1961, 318 I.C.C. 815 (819); and evidence dealing with production costs of lumber in areas involved is not relevant or material in determining lawfulness of proposed rates, since the commission has no power to adjust rates from competing territories to equalize manufacturing costs.—Id., p. 820; evidence concerning 1939 selling price of lumber, taken from books of witness' predecessor company, was inadmissible when such books were not made available for inspection at hearing.—Id., p. 820; and though examiner rejected exhibits showing

cost of loading lumber into rail cars because underlying studies are not presented, such cost is otherwise sufficiently substantiated of record.—Id., p. 821.

But the examiner improperly excluded true copies of selected excerpts from transcript and verified statements appearing in Ex Parte No. 206, offered as admissions against interest, on ground that opposing parties objected and refused to stipulate those excerpts into the record. Requirement of Rule 1.82 of Rules of Practice with respect to stipulations applies only where the party proffering the testimony from another proceeding fails to furnish a true copy for the record and copies for the other parties.—Id., pp. 819-20; and water carriers' objection to admission of respondents' excerpts from cost exhibits presented in another proceeding, on ground that the sponsoring witness had not prepared the figures, had no knowledge concerning them, and presented no underlying data showing their development, is overruled; respondents state that such data were presented in rebuttal to cost data introduced by a water carrier protestant, which were also taken from that case and received in evidence as an admission against interest.—Id., p. 821.

Evidence based on commission's 1960 1-percent waybill sample was also properly received. There is no statutory prohibition against making such waybills available to competing carriers where it appears to be warranted, and allowing access to such records by a representative of a competing water carrier did not violate §§15(11) and 20(5) of the act or the Federal Reports Act of 1942.—Id., p. 819.

Cost data and evidence relating to car-mile allowances on tank cars furnished by shippers were properly excluded. Adequacy of car-mile allowances is not a subject for consideration in investigation of lawfulness of proposed rates; moreover, respondents' only expenses relating to tank-car allowances are those published in their present tariffs.—Liquefied Petroleum Gas in Jumbo Tank Cars—S.W.F.B., 319 I.C.C. 31 (32).

Excerpts of testimony of bargeline officials and others before congressional committees were properly rejected as probative evidence of magnitude of water transportation of grain; such matters constituted argument to be pressed on brief.—Grain in Multiple-Car Shipments—River Crossings to So., 318 I.C.C. 641 (646)*; but examiner improperly excluded as immaterial certain opinion testimony of a railroad cost witness concerning bargeline costing methods; such testimony by a qualified witness was proper as rebuttal opinion and comment.—Id., p. 647.

Railroad's objection to bargeline protestants' submission of water and rail costs on a fully distributed basis, and their comparisons thereof, overruled: fully distributed costs are properly a facet of intermode competitive pricing situations under §15a(3) and the national transportation policy. For like reason, documents and testimony intended to demonstrate that "public costs" for such items as public improvement of rivers and harbors should be applied to formulas for determining bargeline costs on grain traffic to Tennessee River ports were properly admitted as bearing on that issue.—Id., pp. 646, 647; and though respondent objected to protestants' numerous counsel exhibits on ground that they were not supported by any witness and no-one was available for cross-examination, all of them stem from working papers of one of respondent's witnesses and consist merely of arithmetical computations designed to show volume of grain chargeable to truck transportation, and examiner correctly ruled that the test was whether there was foundation properly in the record through sworn witnesses.—Id., p. 647.

Although proposed reduced rates on grain to the South have no application to products, evidence as to rates and rules on flour and other products forms the basis of midwestern millers' contention that the reduced rates on wheat would be lower than rates on flour, thereby unduly preferring destination mills; receipt of relevant evidence on that material issue was proper.—Id., p. 647; but examiner's refusal to permit cross-examination as to divisions of joint all-rail rates received for hauling grain from Tennessee River ports was not error; since the proposed rates apply only from Ohio and Mississippi River crossings, and equally on ex-barge, ex-truck, and ex-rail grain, evidence of railroads' divisions on ex-rail grain from the Tennessee River ports is

irrelevant and immaterial, as no rates from those ports are in issue; moreover, receipt of such evidence would presume existence of similar circumstances and conditions surrounding the services performed, which is not the case as to respondent's proposed rates for movement in jumbo hopper cars.—Id., p. 648.

Examiner properly overruled objection of a shipper protestant to testimony of a railroad witness on rebuttal, clarifying purpose and comprehensiveness of a Department of Agriculture study submitted in evidence by protestant, in which that witness participated as an official of the Department, on ground that the critical testimony was not proper rebuttal but should have been presented as part of the railroad's case in chief, particularly since protestants were denied opportuniry for surrebuttal. However, the study was not adverted to or introduced when the witness testified on another matter during the railroad's presentation in chief; since it was introduced as part of protestant's presentation in chief, criticism of it during rebuttal was proper.—Id., p. 649; and though protestants object on similar grounds to testimony by economists concerning cost theory that a private enterprise can increase its profits by pricing its services in light of marginal costs, the examiner viewed that testimony as additional expert opinion, and his ruling admitting it as part of the railroad's rebuttal was not an abuse of his discretion.—Id., p. 648.

Cost data filed in informal proceedings prior to institution of investigations but not introduced in evidence in the formal proceedings may not be considered.—Limestone from Bessemer, Ala., to Mississippi Points, 316 I.C.C. 383 (387).

Before rates may be found reasonably compensatory, they must be shown to cover out-of-pocket cost of the service and to make some contribution to overhead. Respondents' own cost evidence for considered movements shows that out-of-pocket costs exceed reduced TOFC rate in many instances and are barely below it in others; as respondents' costs are somewhat understated, the reduced rate is not compensatory; not approved.—Paper and Paper Articles from Wisconsin to Illinois, 315 I.C.C. 165 (168).

51.——Motive or intention in change.—[Vols. 3, 9, 17].—Even according full credence to respondents' estimates of direct annual losses resulting from restoration of transit privileges on furfural residue pursuant to a commission order, which estimates are found to be unrealistic and speculative, their significance in relation to proposed rate increase on furfural residue further processed than screened and restriction of present through rates to residue not further processed than screened is limited to a showing of respondents' motivation and, in a general way, a comparison of revenues claimed to have been lost with anticipated revenue benefits of the proposed adjustment.—Transit of Furfural Residue at Various Points, 322 I.C.C. 794 (803).

Though protestant cites respondent's joint reply to petitions for suspension as showing that barge rather than truck competition motivated its proposed reduction of grain rates for multiple-car shipments to the Southeast, that reply is not part of the record (see §7(d) of Administrative Procedure Act); and since suspension proceedings, under the commission's Rules of Practice, are informal and based on allegations contained in unsworn pleadings, there can be no substitute for the probative evidence adduced at the hearing. Unregulated motor carriers have increasingly depleted respondent's prospective grain revenues, and no end of the trend is in sight; considering magnitude and effect of such competition, as established of record, it is reasonable to find that the reduced rates are proposed to meet it.—Grain in Multiple-Car Shipments —River Crossings to So., 318 I.C.C. 641 (685-6)*.

Although protestant water carriers contend that proposed reduced rates and increased minimum weights on eastbound transcontinental lumber are lower than necessary to meet intercoastal competition, respondents have shown that they were not designed to meet such competition, but to increase rail revenues by inducing heavier leading. Though intermodal competition for the traffic exists, a significant part of the water carriers' traffic is noncompetitive, due to the considerably heavier weight of certain types of coastal lumber; this weight difference is important in

view of fact that the rail rates, designed to move the relatively lighter inland lumber, are published in cents per 100 pounds, whereas water rates are quoted on basis of footage regardless of weight.—Reduced Transcontinental Lumber Rates, 1961, 318 I.C.C. 815 (822, 842).

60. Cancellation by order of commission.—[Vols. 3, 7, 11, 14, 16, 19].—Although respondents contend that an order requiring cancellation of rates found to violate §3 must afford them reasonable alternatives to correct the undue prejudice, instant proceeding is not a complaint case in which prejudiced parties are seeking removal of undue preference, but an investigation instituted before the rates involved became effective; and since proposed rates have been found unlawful, they are ordered canceled. However, respondents have the right to propose new schedules, free from undue preference and prejudice, in any lawful manner they desire.—Fresh Meats, Ill., Ind., Ky., Ohio & Mo. to Points in Fla., 318 I.C.C. 5 (12).

Particular Justifications for Changes

65. Reasonableness of the proposed rates.—[Vols. 3, 7, 9, 14, 16, 18, 19].—Reasonably accurate cost data are not indispensable in determining reasonableness of proposed rates; where such data are lacking, reasonableness may be determined by other evidence, such as comparison with other rates on same or similar commodities between same or other points in same general territory.—Limestone from Bessemer, Ala., to Mississippi Points, 316 I.C.C. 383 (387).

Proposed reduced rates on packaged wine in boxcars from California and other far-western States to transcontinental groups D through J, the same for single-car shipments as jumbo tankcar rates on higher minimum and 21 cents lower on three-car shipments, are compensatory and necessary to enable California bottlers to remain competitive with midwestern bottlers. While revenue yield of the reduced rates is lower in some instances than that from other transcontinental rates, it is not unduly low or so low as to affect respondents' revenue position adversely. Neither do protestants' comparisons show the proposed rates to be too low when circumstances surrounding maintenance of the compared rates are not shown and major portion of the compared commodities are not shown to have transportation characteristics similar to packaged wine. Proposed reductions will help balance respondents' transcontinental operations, and record does not warrant assumption that they will spread to other commodities. Approved as just and reasonable.—Wine, Pacific Coast to Western, S.W.& Central States, 321 I.C.C. 683 (711-2).

Considering substantial spread between minimum revenue under proposed plan II TOFC rate and the indicated out-of-pocket cost, record is convincing that the rate will yield cost of the service under the proposal; proposed rate compares favorably with other plan II TOFC rates of proponent on beer from same origin to other destinations, and is necessary if considered traffic is to be recaptured from private carriage; approved.—Malt Liquors, East St. Louis and St. Louis to Kenosha, 315 I.C.C. 762 (763-4).

Since rail movement of magazines or periodicals from Miami to Derby, Conn., requires drayage to railhead at Miami, and shipments in boxcars must be blocked and braced, reduced rate which, with those additional costs added, equals protestant Sea-Land's rate on same 40,000-pound minimum, is not unreasonably low from a competitive standpoint, especially as shipper will still require expedited truck service at times and will continue to use Sea-Land service when expedited handling is not necessary. Lower rate proposed for 60,000-pound minimum to encourage heavier loading tends to promote efficiency. As both rates exceed fully distributed costs, they are compensatory; approved.—Magazines or Periodicals, Miami, Fla., to Derby-Shelton, 319 I.C.C. 340.

Proposed reduced rates on beet sugar from points in four origin groups in western States to a 7-State central area, on somewhat lower level than motor-competitive scale on cane sugar from eastern refineries, are compensatory when in all instances they exceed out-of-pocket costs, in most cases by so much as to indicate that they also exceed fully distributed costs, and on proposed 100,000-pound minimum will yield revenues as high or higher

than those on other commodities from and to same areas. The proposed rates generally reflect about the same percentage of first class as the reduced cane-sugar rates and, on the whole, represent an equitable adjustment which tends to restore the historic rate relationship of western processors to eastern refiners that was disrupted by the reduction of rates from the East. However, in view of protestants' assertion that some of the proposed rates may permit free storage or other transit privileges, and respondents' assertion that such is not intended, the reduced rates are approved only to extent that they do not include such privileges.—Sugar from the West to Central Territory, 319 I.C.C. 686 (690, 703, 704-5, 707).

Increase of 46 percent in volume of canned goods traffic handled by three respondents which originate about 80 percent of such traffic moving from Pacific coast to transcontinental group A, and 48 percent in volume handled by one of them, indicates that new (reduced) rate thereon, which is found to be compensatory, is reasonable; such expansion has resulted in a notably larger contribution to overhead expenses and has substantially improved respondents' net revenue position.—Canned Goods from Pacific Coast to Eastern Points, 315 I.C.C. 769 (786).

It is apparent from the wide margin between proponents' out-of-pocket costs and the proposed rates that they would in all likelihood exceed fully developed costs, and that they would return substantially more than cost of performing the service. In view of their highly compensatory nature, proposed reduced rates are above a minimum just and reasonable level, and managerial expectation of increased traffic and revenue is reasonable. Disapproved on other grounds.—Iron and Steel from Ill., Ind., Kans., and Mo. to Iowa, 315 I.C.C. 403 (406).

66.——Comparisons of car-mile and ton-mile earnings.—[Vols. 3, 7, 18, 19].—Proposed TOFC rate on iron or steel plates or sheets is reasonably compensatory for respondents' routes when car-mile revenue of 52.1 cents compares favorably with car-mile revenue yielded by numerous other TOFC rates on iron and steel articles and other commodities transported for comparable distances between same points or points in same general territory; approved.—Iron and Steel Articles between Atlanta and St. Louis, 318 I.C.C. 80 (82).

Showing that earnings under proposed reduced rate compare favorably with those for other commodities to and from various points has insufficient probative value to show that the proposed rate is just and reasonable when there is no showing that circumstances and conditions surrounding establishment of the compared rates compare favorably with those affecting the rate under consideration.—Pulpborad or Fiberboard, Fla., Ga., N.C., S. C.—Edgewater, 315 I.C.C. 434 (438).

67.——Volume of traffic.—[Vols. 3, 7, 19].—Comparisons of volume of rail shipments of lumber from the west coast and from southern pine territory to official, southeastern, southwestern, and w.t.l. territories for 1953 and 1960, but with west coast shipments limited to those from Douglas fir region and excluding shipments of western pine and plywood (which also compete with southern pine in common markets), are insufficient to warrant a finding that western lumber shippers are unable to compete effectively in the common markets at present rates.—Reduced Transcontinental Lumber Rates, 318 I.C.C. 815 (828).

And southern lumber interests' showing of decline in rail shipments from the South and Southwest in past few years, contrasted with claimed increase in rail movements of west coast lumber to same markets in same period, has little probative value when southern and southwestern producers have been trucking increasingly large quantities to markets in those territories; decrease in their rail shipments as result of such marketing practice would not necessarily represent increased competition from west coast lumber.—Id., p. 829.

68.—Rate Comparisons.—[Vols. 3, 7, 9, 15, 19].—Comparison of proposed local rates on grain and products from Pittsburgh, Pa., to trunkline and New England territories with local rates from Buffalo, N.Y., and proportional rates from Chicago and St. Louis are of little value in determinig compensativeness of the rate proposal; proportional rates are generally lower than local rates such as those

under consideration, and respondents themselves recognize that the rates from Buffalo are depressed because of various competitive factors at that point. Under the circumstances, such comparisons cannot be said to justify proposed reduced rates to Boston, Mass., and Rockland, Maine, which are admittedly noncompensatory; on reconsideration, proposed rates to Boston and Rockland found not shown to be just and reasonable.—Grain from Pittsburgh, Pa., to Eastern Base Points, 325 I.C.C. 669 (676-7)*.

Proposed reduced rate on pulpboard from Jacksonville, Fla., to Edgewater, N.J., is not shown to be reasonable merely because it compares favorably with all-rail rate on same commodity from St. Marys, Ga., to destinatins in New York and New Jersey, since competitive conditions as well as origin and destination of instant traffic are different.—Pulpboard or Fiberboard, Fla., Ga., N.C., S.C.—Edgewater, 315 I.C.C. 434 (438).

In absence of cost evidence to the contrary, proposed reduced rates on limestone are not below a minimum reasonable level when they are on same level as other joint-line rates on that commodity from same origin to other destinations and from other origins to same and different destinations, all in same general territory.—Limestome from Bessemer, Ala., to Mississippi Points, 316 I.C.C. 383 (387-8).

Costs of loading and unloading lumber should be considered in comparing total charges via transcontinental rail and intercoastal water routes; it is important to compare like with like, which cannot be done by ignoring incidental costs incurred in all-rail movements while giving full consideration to those incurred via the water route. While the record does not permit precise determination of total water charges in cents per 100 pounds, the best comparison possible shows total rail charges at proposed reduced eastbound rates to exceed comparable water costs by $2.13 to $2.90 at or near northeastern ports; requirement of any greater differential would hobble respondents' ability to transport their existing volume of lumber traffic at lower rates while increasing their net revenue. Proposed rates approved.—Reduced Transcontinental Lumber Rates, 1961, 318 I.C.C. 815 (835-7, 844).

Reduced water-competitive rates on phosphate rock from Florida to the Southwest are compensatory and just and reasonable when they are on same level as rates from same origins to other points in territories east of Rocky Mountains, and earnings thereunder compare favorably, distance considered, with those under water-competitive rates approved to three southwestern points in 298 ICC 353.—Phosphate Rock from Florida to S.W. and W.T.L. Territories, 316 I.C.C. 207 (208, 211).

70.——Cost of service—[Vols. 3, 7, 9, 16-19].—The commission had substantial basis for finding that plaintiffs' (protestants before commission) contention, that proposed rates on grain and products from Pttsburgh, Pa., to trunkline territory would adversely affect net revenues of rail proponents because they would not meet fully distributed costs, was too speculative to warrant disapproval of the rates when they exceeded proponents' out-of-pocket costs, were necessary for movement of the traffic, and would have no harmful effect on any competing carrier. There is no logic in plaintiffs' argument that railroads would fare better under existing depressed ex-lake grain rates from Buffalo than with proposed higher rates from Pittsburgh although, for most destinations, latter yield much higher ratios to out-of-pocket costs; moreover, as most grain milled at Buffalo arrives there by water, all the dire effects predicted from proposed Pittsburgh rates could occur in even greater measure if the new rail rates were not permitted to become effective. Commission decision sustained.—State of New York v. United States, 256 F. Supp. 634 (638)*.

A minimum requirement of respondents' burden of proving lawfulness of proposed reduced rates on automobile body parts is a clear showing that they are compensatory. Respondents' restated costs are substantially understated in that they do not include expense of interchanging the traffic or of returning the special shipping devices used for it, and reflect costs for wages and materials that have increased substantially since the study year. The restatements are also overstated in that switching costs are based on switching time per car, whereas the traffic moves, and is frequently switched, in multiple-car lots, with resulting economies; loss and damage ex-

pense is taken from a commission cost statement for a category of traffic that includes commodities of substantially greater value than automobile parts, on which the loss-and-damage factor would normally be higher; and the restatement ignores economies in billing resulting from fact that the reduced rates are not subject to follow-lot, marriage, maximum charge, and modified mixing rules. As the cost evidence is not detailed enough to permit revision of the restatements, the burden of proving compensativeness is not met; not approved.—Automobile Body Parts, Official & Southern Territories, 323 I.C.C. 149 (153-4).

Evidence presented on further hearing does not provide an adequate basis on which to determine whether proposed reduced rates on export cottonseed oil, minimum 60,000 pounds, are compensatory, though respondents had ample opportunity to submit evidence to meet their burden of proof, In recomputing costs, respondents used distances based on shortest routing authorized in the tariff, whether single- or joint-line; out-of-pocket costs were not developed from all the representative origins; and cost evidence (1) does not include some cost items and (2) reflects average cost of all equipment in the area rather than cost related to characteristics of the movements and equipment involved. Also, evidence is inconclusive with respect to routes over which the traffic moves; proposed rates are not shown to be compensatory; schedules required to be cancelled.—Cottonseed Oil, Shreveport, La., & Texas to Texas Ports, 323 I.C.C. 698 (701-4)*.

While restatements by respondents serving port of New York of their own studies of cost of hauling imported iron ore to Youngstown, Ohio, with substitution of service units taken from studies of actual operations by railroads serving other ports, offer no sound basis for determining actual costs of the New York lines, they demonstrate that the special studies by carriers handling the traffic resulted in lower total costs than would result from use of system averages as was necessarily done by the New York roads, which have not handled that traffic. As restated in appendixes G and H, estimated out-of-pocket costs over routes of both the New York roads are well below level of proposed rate in imported iron ore to 9 destinations in Ohio and western Pennsylvania, and that rate is therefore reasonably compensatory.—Iron Ore from Eastern Ports to C.F.A. Points, 321 I.C.C. 473 (485, 486, 487)*.

In a general adjustment involving commodity rates from and to extensive territories, the fact that a few of the proposed rates might fail to meet out-of-pocket costs would not require disapproval of the entire adjustment. Proposed reduced rates on packaged wine in single-car and three-car shipments from California and other far-western States to transcontinental groups D through J exceed out-of-pocket costs for all movements when due recognition is given overstatements in respondents' cost data; even with the overstatements, the ratio of rates to cost averages 138 percent on single-car and 113 percent on three-car shipments. And while the cost evidence is limited to California origins, rates from other origins reflect the historical pattern of transcontinental groupings and will in all likelihood be equally compensatory, particularly in view of their shorter distances to midwestern destination area. Proposed rates are not unduly low, therefore just and reasonable.—Wine, Pacific Coast to Western, S.W. & Central States, 321 I.C.C. 683 (708, 712).

Although respondents presented no cost data in support of proposed reduced rate on candy from New York City area and intermediate Pennsylvania origins to Texas points, unrebutted cost computations of protestant water carriers indicate that from the New York area the proposed rate would materially exceed, and from the Pennsylvania points would approach, full costs. Full compensativeness of that rate from latter points is apparent from fact that costs for the shorter distances from Pennsylvania must be less than for the longer distances from New York. Proposed rate is thus shown to be amply compensatory; approved.—Candy and Confectionery from N.J., N.Y., & Pa. to Tex., 321 I.C. 154 (158). [But see dissent.]

Respondents' cost studies, discussed in appendix, show that proposed rates on bulk cement, in hopper cars, from New York and Pennsylvania origins to New Jersey and New York destinations are highly compensatory even when unloading, or allowance of 35

cents per net ton to consignee in lieu thereof, is included in the line-haul obligation. Acceptance of protestants' criticisms would not significantly narrow the wide margin between revenues and costs shown; even allowing for some degree of inexactness resulting from possible misuse of destination switching charges, that margin is so great that any such error would not materially affect the favorable revenue-cost relationship. Approved.—Allowance, Unloading Cement, Covered Hopper Cars—East, 319 I.C.C. 711 (714)*.

Based on the commission's restatement of the cost data, as explained in appendix, proposed joint rail-water rates on grain are reasonably compensatory when they exceed out-of-pocket rail costs and direct water costs, including return on investment, in all instances by amounts ranging from 3 to 8 cents, indicating some contribution to overhead; moreover, customary loading in excess of the tariff c.l. minimum of 50 tons, as claimed by respondent railroad, would reduce costs somewhat.—Rail-Water, Grain in Bulk from Mo., Ill., & Ind. to Buffalo, 319 I.C.C. 123 (131)*.

Reduced alternative rate scales proposed on liquefied petroleum gas in jumbo tank cars between points in United States are compensatory on an overall basis. For distances under 600 miles, where competition is chiefly with motor carriers, the rates exceed out-of-pocket costs, including a return on investment, and make a contribution to the railroads' overhead burden; for longer distances, where the principal competition is with pipelines, they generally approximate out-of-pocket costs, including return on investment, although in some instances they fail to do so by 0.5 to 1 cent, and would in all instances cover out-of-pocket costs without return on investment. Moreover, when LPG cars now being constructed with less tare weight are used, the compensatory aspect of the rates will be improved.—Liquefied Petroleum Gas in Jumbo Tank Cars—S.W.F.B., 319 I.C.C. 31 (37-8).

Proposed reduced rates on bulk cement in southern territory are shown generally to be amply compensatory. While for shorter distances, if an interchange switching charge is included in costs as restated in light of protestants' criticisms, the rates would not meet out-of-pocket costs, a large majority of the movements would be single-line without average interchange costs, and even if a full interchange switching charge is added to the costs involved the rates clearly meet out-of-pocket costs for distances over 75 miles and are highly compensatory for distances beyond 100 miles.—Cement within Southern Terr. & from Hagerstown to So., 319 I.C.C. 465 (478).

Proposed barge-competitive rates are amply compensatory when they exceed out-of-pocket cost and in most instances exceed fully distributed costs.—Steel Bars, Lemont, Ill., to Iowa, Kans., Mo., Minn., & Nebr., 319 I.C.C. 292 (303).

Respondent's and protestants' cost data bearing on compensativeness of proposed quantity express rates on wearing apparel are largely conflicting, and evidence respecting rail car-foot-mile line-haul expense (an important factor) is inadequate for determining that issue. Since underlying data for determining that expense have been made available in pending suspension proceeding which involves largely the same parties and similar issues on certain outerwear, consistency demands that the same factor, as determined in that case, be used in determining compensativeness in instant case. Therefore, if the parties are willing to stipulate that the same facts may be used in instant case, action on the proposed rates will be deferred pending final decision in that case; if not, the commission will either decide lawfulness of proposed rates on the present record or consider reopening the proceeding for submission of additional evidence on that issue.—Aggregate Rates on Wearing Apparel—Ry. Exp. Agency, 318 I.C.C. 737 (747-8)*.

While only the original proponent of reduced rates submitted cost evidence, other evidence is convincing that operating conditions are substantially similar for all respondent carriers; as no contradictory cost evidence was submitted, conclusion is warranted that considered reduced rates are reasonably compensatory for all respondents.—Corn and Corn Products, Iowa, Nebr., Minn., S. Dak. to Ill., 318 I.C.C. 291 (293).

Restatement of costs to Southern Ry. on multiple-car shipments of grain in jumbo hopper cars, minimum 450 tons in 5 cars, from

Ohio and Mississippi River crossings to the South (discussed in appendix F) indicates that proposed reduced rates on that minimum are compensatory on an overall basis as returning significantly in excess of out-of-pocket costs. However, no specific cost evidence was offered to show compensativeness of Southern's proposed rates on minima of 900 tons in 10 cars and 1,800 tons in 20 cars; as it does not appear that there would be sufficient loading or unloading facilities or track space to accommodate so many jumbo cars at one time, such movements would involve increased switching costs at origin, destination, and intermediate yards; latter rates not approved.—Grain in Multiple-Car Shipments—River Crossings to So., 318 I.C.C. 641 (678, 684, 691)*.

Proposed through proportional grain rate is compensatory when cost study based on Rail Form A shows that it would exceed fully distributed costs (excluding passenger and l.c.l. deficits) and revenue per car is more than twice respondent's average revenue on all c.l. traffic.—Grain from Kansas City, Mo., to Nebraska and Iowa, 318 I.C.C. 31 (32).

Reduced westbound transcontinental rate on wines would yield, on the average, substantially more than fully distributed cost; respondents' cost evidence based on public statement No. 3-61 of commission's cost finding section, adjusted for type of boxcar to be used and based on average load of 56,000 pounds and actual mileages, indicates that proposed rate exceeds out-of-pocket costs by considerable sums. Even under protestants' data based on ordinary boxcars and using short-line miles plus 13 percent for circuity, proposed rate exceeds out-of-pocket and fully distributed costs by 114 cents from Chicago and 49 cents from New York; approved.—Wine and Champagne—Westbound Transcontinental, 318 I.C.C. 53 (54).

In determining whether a proposed rate is reasonably compensatory, its relation to cost of providing the service should be considered first. While the commission does not ordinarily regard as reasonably compensatory a rate which fails to cover out-of-pocket costs, the compensatory character of rates and charges may be established without showing the fully distributed cost of performing the service involved; and in absence of special circumstances rail out-of-pocket costs may be determined on the long-term basis prescribed by Rail Form A.—Reduced Transcontinental Lumber Rates, 1961, 318 I.C.C. 815 (840).

Proposed reduced alternative transcontinental rates and increased minima on lumber and related articles eastbound are reasonably compensatory when they will produce earnings ranging from 118 to 204 percent of out-of-pocket costs for loads of 70,000 to 80,000 pounds—the weights at which most of the traffic can reasonably be expected to move—at September 1961 wage and price levels, and ratios ranging from 103 to 160 percent for 55,000-pound loads. This range is well above the 100 to 126-percent range produced by incentive lumber rates approved for the west coast in 308 ICC 345; moreover, evidence indicates that a progressively larger share of the traffic will be loaded at and above the higher minimum weights which produce the most favorable ratios of revenue to out-of-pocket costs and that the tail-end tariff minimum of 55,000 pounds will become less important with retirement of the older, low-capacity boxcars.—Id., p. 841.

Respondent's cost estimates, based on Rail Form A formula adjusted to reflect costs more nearly applicable to contemplated multiple-car movement, show that proposed reduced rate on cement in bulk and in bags would yield revenues 24 percent above out-of-pocket costs for a minimum 10-carload shipment consisting of 8 covered hopper cars and 2 boxcars, and 20 percent for a shipment containing the minimum of 8 hopper cars and the maximum of 5 boxcars. Protestants' estimates based on regional averages applying almost wholly to single-car movements are not indicative or probable costs under rate proposed. On a miminum shipment of 8 hopper and 2 boxcars, proposed rate would yield compensatory minimum revenue of $122.17 per car and 90.5 cents a car-mile; approved.—Multiple-Car Rates on Cement, Evansville, Pa., to N.J., 315 I.C.C. 672 (674).

That proposed reduced rate on canned goods from transcontinental group A to mountain-Pacific States returns less than fully distributed costs, while rates from other groups exceed such costs, does not establish

that it is unjust or unreasonable; proposed rate is compensatory when it exceeds out-of-pocket costs by substantial margins; approved.—Canned Goods from Eastern Points to Pacific Coast, 315 I.C.C. 757 (761).

Substantial margin of revenue yielded by new (reduced) rate on canned goods over respondents' out-of-pocket costs as restated in appendix D, including adjustment to reflect January, 1960, wage and price levels, warrants conclusion that it is compensatory.—Canned Goods from Pacific Coast to Eastern Points, 315 I.C.C. 769 (785).

Proposed reduced TOFC rates are not shown to be compensatory when it cannot be determined from the evidence what item of loss and damage expense may properly be used in arriving at respondents' probable operating costs on involved traffic.—Cast Iron Boilers, Boyertown, Pa., to Points in Texas, 319 I.C.C. 319 (321).

Although respondent presented no evidence concerning cost of moving TOFC traffic between Kansas City and Milwaukee, no change in level of rates would result from inclusion of Milwaukee in Chicago rate group except on four specific commodity items, and to that extent there was no need for it to present cost evidence. As to those four items, on which reduced rates are proposed, protestant's cost evidence, though based largely on average costs of class I railroads in western district as developed by commission's cost finding section and therefore not precisely reflecting respondent's actual costs, is the best available. Since certain of those specific commodity rates fail to meet such out-of-pocket costs as restated, those rates are not shown to be just and reasonable and may not be approved.—Addition of Milwaukee to Chicago Group Rates—K.C., 318 I.C.C. 755 (759, 760).

While costs of individual proponent carrier are more appropriate than those based on regional averages, respondent's cost data for considered TOFC service are incomplete in that there is no way of verifying the summary data used in its cost statement. Moreover, costs are computed only for proponent carrier's direct route and, in addition to that route, proposed rate would apply over 13 other routes for distances shown to be substantially longer in some instances; proposed rate is not shown to be compensatory over any authorized route and, therefore, may not be approved.—Glassware, Illinois and Missouri to New Orleans, La., 316 I.C.C. 559 (561-2).

Proposed reduced rate is not shown to be just and reasonable when respondents have submitted no cost data to show its relation to out-of-pocket cost of handling the traffic between the points involved. Not approved.—Pulpboard or Fiberboard, Fla., Ga., N.C., S.C.—Edgewater, 315 I.C.C. 434 (438).

Proposed joint barge-rail rate on coal, in minimum lots of 5,000 net tons, from in cars at Huntington, W. Va., to in cars at points in Chicago district is noncompensatory when weighted-average out-of-pocket cost for the rail movement, as restated to reflect respondent's 1959 annual-report data, exceeds the division the railroad would receive, and that cost, added to out-of-pocket cost for the barge line, plus cost of dumping at Huntington and of transfer to rail cars at Mount Vernon, Ind., produces a through out-of-pocket cost substantially in excess of the proposed rate; not approved.—Barge-Rail Coal, Huntington, W. Va., to Chicago District, 315 I.C.C. 129 (132-3).

Where proposed rates are published as separate proportionals and respondents' revenue on contemplated movements would be provided solely by those rates, the proportionals themselves must be shown to be compensatory; respondents made no such attempt, but based their claim of compensativeness on earnings from the through rates; available evidence indicates that the proposed rates would not be compensatory in the majority of instances; not approved.—Proportional Rates on Grain, Kansas City to Chicago, 315 I.C.C. 249 (252).

71.—Value of service.—[Vols. 3, 7].—See Brandy—West Coast to Eastern Points, §1(5), n. 147.

72. Equalization of rates; as to markets, ports, points of production or consumption.—[Vols. 3, 7, 9, 18, 19].—See also Boston & M. R. v. United States, §1 (5), n. 503.

Nothing short of rate parity will permit railroads serving port of New York to participate in transportation of a bulk commodity such as iron ore in competition with railroads serving

other ports, and there is nothing peculiar to movement of imported iron ore or the rate adjustment thereon which warrants finding that undue preference and prejudice would result from application of equal rates for the longer hauls and consequently higher costs on imported iron ore from New York than from Baltimore and Philadelphia to nine destinations in Ohio and western Pennsylvania. Relative distances from competing ports are only one factor in rate equalization on export and import traffic, and costs of New York railroads on such traffic are relatively no higher than to be expected from the differences in distance; proposed reduced rates from New York are reasonably compensatory over route of each respondent serving that port; approved.—Iron Ore from Eastern Ports to C.F.A. Points, 321 I.C.C. 473 (488, 489-90)*.

Neither possible or probable diversion of traffic from, nor adequacy of existing facilities at, ports presently handling the traffic are valid reasons for denying another port an opportunity to share in the business if it can induce shippers to use its facilities. As the ports of Los Angeles and Long Beach are unable, owing to lack of requisite facilities, to compete with north Pacific coast ports for imported lumber and plywood traffic, proposed absorption of port charges at designated interior California points, when shipments are trucked thereto by shippers for storage and processing prior to rail movement to transcontinental destinations, is lawful since it will merely place the California ports on competitive equality with the north coast ports.—Absorption—Lumber & Plywood—Pac. Coast Interior Orig., 316 I.C.C. 15 (23, 25).

Reduced all-rail export rate on firebrick from midwestern origins to Pacific coast ports, proposed to restore approximate equalization of through rail-ocean transportation costs through those ports to the Far East with those via gulf ports, which had been distrupted by general increases, disapproved when relatively low earnings cast serious doubt on its compensativeness; no pertinent cost data were presented, nor was serious attempt made to show by rate comparisons that it is within zone of reasonableness; reestablishment of port equalization, however desirable in ordinary circumstance, is no substitute for adequate proof that a rate proposed for that purpose would be compensatory.—Clay Products, West and Southwest to Pac. Coast Ports, 315 I.C.C. 571 (575).

74.—Maintenance of rate adjustment.—[Vols. 3, 7, 9, 19].—Every change of a rate schedule, whether voluntary or involuntary, is a disruption pro tanto of the rate structure theretofore prevailing; plainly such a disruption without more is insufficient reason for prohibiting a change.—Liquefied Petroleum Gas in Jumbo Tank Cars—S.W.F.B., 319 I.C.C. 31 (39).

The commission has long recognized the extreme sensitivity of grain to even slight changes in freight charges, and has generally refused to approve broad territorial rate adjustments on a piecemeal basis. Considering drastic nature of Southern Ry's reduced multiple-car rates on grain in jumbo hopper cars, it is even more important not to shatter the competitive balance among carriers, shippers, and receivers of grain in the Southeast, for, though the grain rate structure may be crumbling under force of unregulated competition, it still possesses characteristics of a huge blanket in which a tug at one end is felt at the farthest extremities. It is therefore necessary to temper the disruption of marketing practices and patterns which partial regulation of transportation appears to make inevitable, by permitting other southern railroads to establish equivalent multiple-car rates on 450-ton shipments in standard cars.—Grain in Multiple-Car Shipments—River Crossings to So., 321 I.C.C. 582 (612-3)*.

76.——New method of stating rates.—[Vols. 3, 19].—See also Guaranteed Rates, Sault Ste. Marie, Ontario, to Chicago, §1(5), n. 566a.

Lawfulness of innovations in ratemaking must be determined on basis of the surrounding circumstances and conditions, including material economic as well as physical facts, in particular situations. Though application of proposed multiple-car rates on soybean cake and meal as through rates from country origins under single-car origination rule, notwithstanding movement of the soybeans into the transit point is in single carloads, constitutes a departure from normal conditions restricting multiple-car rates to shipments mov-

ing in multiple-car lots at one time from one origin, to find them unlawful for that reason would completely ignore the practical situation encountered by respondents in movements of soybeans from country elevators to transit points for processing into cake or meal. Application of the multiple-car rates under the single-car origination rule is responsive to the physical manner in which soybeans move from country origins, and considered rates are not unreasonable per se.—Vol. Rates on Processed Meal—Midwest to Ports, 322 I.C.C. 456 (458-60).

However, finding that the proposed multiple-car rates are just, reasonable, and not otherwise unlawful is tantamount to approval of a new form of ratemaking, and such finding on the unusual circumstances involved does not constitute a precedent for indiscriminate use of that form of ratemaking.—Id., p. 478.

Proposed flat rates on corn and sorghum grains from Kansas City and Omaha groups to Lawrenceburg, Ind., without transit privilege and restricted to single shipments of 20 or more carloads, are compensatory and no lower than necessary to meet barge competition; they pose no threat to traditional grain-rate structure, as competing barge lines, which now handle practically all the traffic, already have volume rates and do not provide transit or construct their rates on the rate-break plan.—Grain—K.C., Omaha & Related Origins to Lawrenceburg, 315 I.C.C. 83 (86); nor will the proposed rates cause wholesale distortions by setting up lower combinations, since they would be available for making combinations only in connection with other multiple-car rates to or from points between which they are published, and there is no indication of such a possibility.—Id., p. 86.

77a. [Reasonableness of]—Other practices.—[Vols. 7, 9, 11, 16, 18, 19].—Proposed rule of Chicago, B. & Q. R. providing for inclusion of refrigeration in line-haul rates on fresh meats and packinghouse products from and to certain points in w.t.l. territory whenever charges paid are the highest resulting from use of (1) actual weight of lading, (2) minima of 30,000, 33,000, or 36,000 pounds for cars of specified lengths, or (3) the published minima plus 3,000, 6,000, or 9,000 pounds for cars of those lengths, found just and reasonable; and outstanding orders in 215 ICC 684, 241 ICC 503, and 253 ICC 351 modified accordingly. Resulting charges are compensatory on overall basis, since the few instances in which they do not cover out-of-pocket costs are minimal in amount, and are not competitively destructive since the Burlington's rates on those commodities generally exceed those of competing motor carriers, which include refrigeration.—Refrigeration, Meats & Packinghouse Products—Midwest, 319 I.C.C. 113 (114, 118, 120).

Carrier competition at East St. Louis does not warrant present difference in treatment of East St. Louis and St. Louis elevators with respect to switching charges; the very fact of competition between St. Louis elevator on respondent's line and East St. Louis elevators justifies establishment of competitive practices in connection with the elevator having a rate disability. Grain from origins on respondent's lines or beyond, transited at East St. Louis and destined to points beyond, may be switched back to St. Louis without additional charge; proposed absorption of crosstown switching charges on grain stored at respondent's St. Louis elevator, designed to place that elevator on parity with its East St. Louis competitors, is just and reasonable when resulting rates are shown to be compensatory.—Absorption of Cross-Town Switching charges on Grain, 319 I.C.C. 776 (780, 781)*.

Rule in tariff naming proposed joint rail-water rates on bulk grain from Illinois and Indiana origins to Buffalo, that cargo must be unloaded from the lake vessel by shipper and that any charges therefor shall be for shipper's account, is not shown to be unlawful. Though under unregulated water transportation the vessel is responsible for stevedoring cost of moving the grain from its holds to marine leg of the elevator at Buffalo, power shovels used in moving the grain to the marine leg are owned by the elevator and operated by stevedores who are employees of an independent contractor. Proposed rule is comparable to those in other tariffs governing operation of lake vessels in movement of bulk commodities.—Rail-Water, Grain in Bulk, from Mo., Ill., & Ind. to Buffalo, 319 I.C.C. 123 (128)*.

And proposed modification of that rule to meet protestant's objections, under which water carrier respondent would assume responsibility for moving the grain from the vessel's holds to the marine leg and allow the elevator operator or shipper a fixed amount for use of the required power shovels and electric winches, together with concurrent increase in the proposed rates, appears unobjectionable on present record; however, when and if such modifications are filed they will be subject to procedures provided by §15(7).—Id., p. 128.

And rule in same tariff requiring payment of demurrage for vessel loading and unloading time in excess of free time allowance of 1 hour for each 900,000 pounds loaded and 600,000 pounds per hour for unloading, both computed by consecutive hours including Saturdays and Sundays, is likewise lawful when average unloading rate for Buffalo elevators is shown to exceed one million pounds an hour and shipper is notified 24 hours in advance of arrival of a vessel.—Id., p. 128.

Proposed round-trip rates on motor vehicles on trilevel flatcars, restricted to apply only when consignee of inbound shipment is also consignor of outbound, loading and unloading is at shipper's expense, return shipment is tendered within 48 hours after first 7 a.m. following arrival of inbound shipment, and shipper certifies on outbound billing that the full one-way rate was paid on the inbound shipment, found just and reasonable. Where the same commodity would be shipped in both directions, 48 hours is a reasonable allowance of time for accumulation of a return load; and restriction of proposed rates to require use of same equipment for both movements (as in other return-haul rules) would serve no useful purpose, since cars used are specially designed and will be used only for a return load of motor vehilces from destination of inbound shipments.—Motor Vehicles on Trilevel Flatcars—Chicago, 318 I.C.C. 89 (90, 92).

Railway Exp. Agency's proposed rule governing l.c.l. incentive rates on wearing apparel, providing for consolidation of shipments from one consigner to one or more consignees at one or more destinations, and applying on both prepaid and collect shipments between all express stations in United States except Alaska and Hawaii, meets a very real need of many shippers and is just and reasonable. Provision for only one shipper eliminates evils inherent in ability of carrier to manipulate consolidation to detriment of consignors or consignees, and proposed rule and resultant lower charges are not unlawful merely because freight consolidators can use them. However, though no shipper has complained of REA's practice of accepting portions of such a shipment and treating them as tendered at one time if shipper advises it that entire aggregation can be picked up at its convenience, the rule should be restricted to aggregations tendered and receipted for in a single business day.—Aggregate Rates on Wearing Apparel—Ry. Exp. Agency, 318 I.C.C. 737 (740, 744, 746, 747)*.

Rule in tariff naming proposed TOFC rates on fresh meats and packinghouse products, requiring shippers to certify on bills of lading that they are owners of the property tendered for transportation, is not justified by small shippers' fear that two or more shippers located at same origin might band together to tender two trailers at a lower rate and thus place the small shipper at a disadvantage. No sound basis appears for departure from established principle that a carrier may not make ownership of the property moved the criterion by which its charges for carriage are measured; considered rule ordered canceled from schedules otherwise approved.—Meats, Fruits, Vegetables—TOFC—Transcontinental, 316 I.C.C. 585 (594).

80. Removal of existing or potential violation of law; discrimination between persons.—[Vol. 3].—See All Commodities, New York to Baltimore and Washington, §1(5), n. 495.

81.——Preference or prejudice between localities.—[Vols. 3, 7, 9].—Proposed reduced rates on fresh meats from four Ohio River crossings and St. Louis-East St. Louis to Florida destinations would substantially change existing rate relations to the prejudice of seven competing midwestern origins, without any justifying difference in transportation conditions, since the motor and private carrier competition relied on for proposed reduction of rate level from the preferred points is substantially the same at the seven prejudiced

origins. Not approved.—Fresh Meats, Ill., Ind., Ky., Ohio & Mo. to Points in Fla., 318 I.C.C. 5 (10).

Comparison of present rates on grain and products from Buffalo and Pittsburgh to trunkline and New England territories discloses substantial and competitively disabling rate discrimination in favor of Buffalo. None of the traffic has been moving from Pittsburgh at present rates and removal of the rate barrier is a necessary preliminary to further consideration of contemplated construction of grain storage and milling facilities at that point. Comparisons with rates in effect from other origins constitutes a prima facie showing, which is not rebutted, that the proposed reduced rates from Pittsburgh are comparatively just and reasonable and not unduly prejudicial to Buffalo or other flour milling points; approved.—Grain from Pittsburgh, Pa., to Eastern Base Points, 322 I.C.C. 218 (222, 227, 229-31)*.

92. Matters peculiar to the carriers involved; revenue needs of the carriers.—[Vols. 3, 7, 9, 11, 15, 19].—See also the Cut Flowers case, n. 7, above.

One of the criteria of a reasonable minimum rate is whether the carrier would be better off from a net-revenue standpoint with it than without it. Railroads' critical need for revenue is well known and was made a matter of formal record in 311 ICC 373. Reduction of rates without any indication of prospective net gain results only in needless dissipation of revenues and an accompanying unwarranted burden on other traffic. Proposed plan III TOFC rates on tractors from and to numerous points are not shown to be justified by private-carrier competition, and threaten to cut respondents' revenues from traffic they are now handling in conventional service, since it is unlikely that shippers would pay existing rates when plan III charges for the same quantity are so much lower, even considering cost they would incur to use that service. And in addition to the threat to respondents' net-revenue position, they would incur cost of returning empty trailers at no additional compensation. Not approved.—Tractors—T.L. & W. T. L. Territories to S.W. & W. T. L. Terr., 319 I.C.C. 758 (764-5).

Even without any increase in present rail volume of eastbound lumber traffic, proposed reduced transcontinental rates and increased minimum weights would increase respondents' net revenues by $3, $13.4, or $23.4 millions dependent on whether average loads per car increased to 70,000, 75,000, or 80,000 pounds respectively, and in light of experience of some respondents with similar incentive rates on lumber on the west coast, the proposed rates should improve respondents' net revenues by some $10 million annually. Since, even without additional traffic, respondents will be better off with the reduced rates than with their present higher rates,the reductions will not burden other traffic. Approved.—Reduced Transcontinental Lumber Rates, 1961, 318 I.C.C. 815 (825, 842-3).

Respondents have established need for additional revenue they will receive from proposed general increases of 7 cents on bituminous coal and 4 cents on lignite, for all-rail movements, to offset newly incurred costs of operation during the last several years; though coal is the most important single commodity handled by the railroads as a group, rates there-on have always been on a low level in relation to other traffic, and cumulative increases previously authorized on coal and coke are the lowest on any category except fresh fruits; the small flat increases proposed thus seem fair and appropriate in light of carriers' increased revenue needs.—Increased Rates on Coal and Petroleum Coke, 316 I.C.C. 159 (163-4, 175).

Although railroads in Pocahontas region are in stronger financial condition than those in other areas, coal rates are so constructed that competition between producing areas precludes increases in eastern territory without equivalent increases elsewhere; and exemption of coal originated by Pocahontas lines from approved increases would deprive connecting lines of needed revenues.—Id., pp. 162-3.

94.——Rate wars.—[Vols. 3, 7, 9, 11, 16-19].—See New York Central R. Co. v. United States, §15(1), n. 35.

96.——Competitive desires of particular carriers.—[Vols. 3, 7, 9, 11, 12, 14-17, 19].—See also Guaranteed Rates, Sault Ste. Marie, Ontario, to Chicago, §1(5), n. 514.

Carrier-initiated rates which are compensatory and required by local competition may not be disapproved merely because they depart from an overall structure the perpetuation of which would be harmful to the proponent carriers. Competition for corn traffic from Illinois and Indiana to the East is severe, and respondent north-south lines' cancellation of participation in joint rates from certain origin groups and application of their previously reduced local rates to Chicago, resulting in lower combinations than joint rates over other routes, was a necessary and practical action to counterbalance eastern railroads' reductions in flat rates from contiguous groups; otherwise they could not continue to participate in the traffic and elevator operators on their lines would suffer irreparable loss. Resulting combinations are compensatory and only one is as low as current rates to New York from adjacent groups; there was adequate justification for respondents' action and it was not unreasonable.—Corn and Corn Products from Ill. and Ind. to the East, 319 I.C.C. 568 (571, 572-3).

And counter-reductions by east-west respondents in single-factor rates from origins on their lines in same groups were necessary to meet competition at common or cross-country points in those groups. As distances between cross-country stations on the competing north-south and east-west lines are short and corn can easily be brought to either by truck, elevator operators where reduced rates apply have a definite advantage in bidding for corn, and a rate disparity of more than a few cents is sufficient to divert the traffic to the lower-rated point. The reduced rates are compensatory and on same level as combinations maintained by the north-south lines, and none of the rates under investigation is shown to be unlawful in any respect.—Id., pp. 573-4, 575.

While a carrier need not wait until the traffic is lost before reducing rates to meet proprietary competition, where private carriage is the sole justification advanced for proposed reductions respondent must show that it is indeed real, imminent, or reasonably foreseeable with respect to the traffic involved. To attract the relatively few tractors shown to have moved in other than for-hire service, and from one origin to only two destinations, respondents proposed plan III TOFC rates from and to numerous points, which threaten to cut their revenues from traffic they are now handling in conventional service. Evidence shows clearly that respondents are now obtaining the great bulk of shipper's traffic to the specified destinations and that the volume moving or likely to move in private carriage is insignificant. Considering the lack of evidence of competitive need and the serious threat to respondents' revenues from existing rates, the proposed rates cannot be found just and reasonable; cancellation required.—Tractors—T. L. & W.T.L. Territories to S. W. & W.T.L. Ter., 319 I.C.C. 758 (764, 766).

Motor protestants' fears that proposed reduced rail rates on iron and steel articles might divert so much traffic as to render their remaining operations unprofitable do not warrant disapproval thereof. Some protestants hauling exempt commodities rely on iron and steel traffic merely for added revenue on return movements to balance their exempt operations; however, the commission's rate jurisdiction does not extend to exempt transportation, and the proposed rates may not be disapproved merely to ensure return loads to exempt commodity haulers. Other protestants depend on trip-leasing equipment from owner-drivers after latter have delivered an exempt load; but purchased transportation agreements premised on a percentage of revenue afford no sound basis for determination of cost of their operations. However, proposed rates are disapproved on other grounds.—Iron and Steel from Ill., Ind., Kans., and Mo. to Iowa, 315 I.C.C. 403 (406-7, 408).

Though respondents insist that proposed reduced rates on brandy in packages and in tank cars from Pacific coast to eastern transcontinental groups were necessary to avert further losses to private and common motor carriers, no important motor competition for transcontinental movement is shown; intercoastal water carriers, the only protestants, provide the real competition. While latter publish only package rates on brandy, the tank-car rates discourage intercoastal package traffic; and though protestants serve only the more distant points in groups A and A-1

from the Pacific coast, proposd rates to those groups are the same as to less distant groups B and B-1. Moreover, record is not convincing that present flow of traffic would be materially changed if the rates were approved; proposed reduced rates are not shown to be competitively necessary; not approved.—Brandy—West Coast to Eastern Points—Bulk & Packaged, 315 I.C.C. 21 (22, 24-5).

Section 15. (8) Shipper's choice of route to be observed.—[Unchanged. See vol. 9, p. 7689.]

Amendments, see footnotes, vol. 3, p. 2010; historical note, p. 2010.

Historical Note

Rates and fares of railroads within the Alaska Railroad Act, jurisdiction of the commission, see Historical Note concerning Executive Order 11107 following §15(1).

Notes of Decisions

Volume 3—p. 2011; Volume 7—p. 5568; Volume 9—p. 7689; Volume 11—p. 9278; Volume 12—p. 10317; Volume 13—p. 11020; Volume 14—p. 11525; Volume 15—p.12109; Volume 16—p. 12756; Volume 17—p. 13442; Volume 18—p. 14203; Volume 19—p. 15393.

Right of Shipper to Route

29. Carrier named to participate in line haul.—[Vols. 3, 7, 16].—In absence of shipper routing to the contrary, an initial carrier is entitled to its long haul and is not guilty of misrouting if the shipment is transported over the cheapest available route affording it a line haul. Shipper located on Union Pacific's tracks at Salt Lake City tendered that carrier shipments consigned to Ephrata, Wash., with no routing specified other than Union Pacific, although single-factor rates were available over routes embracing lines of two other carriers from Salt Lake City. In the circumstances, UP was not required to give up its line haul of 886 miles to Spokane, over which route a higher combination applied, in order to route the traffic over one of the lower-rated through routes.—Eaton Metal Products Co. v. Union Pac. R. Co., 321 I.C.C. 340 (341)*.

Duty to Comply with Shipper's Routing

68. Conflict between rate and route.[Vols. 3, 7, 9, 11, 15-19].—The mere fact of a conflict between the rate and route inserted in the bill of lading by shipper places a duty on initial carrier's agent to obtain full and definite instructions from shipper, and if this duty is not performed, initial carrier is required to protect the rate in effect over the cheapest route giving it a line haul. Although rate inserted by complainant did not apply over any route conforming to its routing instructions "Frisco, CB&Q," the Frisco's local agent forwarded shipments over a higher-rated joint route of those carriers without directing shipper's attention to the conflict. As at time of movement the lower rate sought applied over a not unduly circuitous route embracing the Frisco as originating carrier and over which the higher single-factor rate applying over the route of movement did not apply, shipments were misrouted by the Frisco and complainant is entitled to reparation to basis of the lower rate named in the billing.—Producers Cooperative Oil Mill v. St. Louis—S.F. Ry. Co., 322 I.C.C. 267 (268, 269, 271)*.

87. Noncompliance with shipper's routing instructions because of unusual operating conditions.—[Vols. 3, 7].—Shipments of steel plates fabricated in transit at Philadelphia and forwarded to Groton, Conn., over a route over which combination rate on Philadelphia applied, instead of over either the route specified by shipper or one of alternative routes taking the same lower transit rate, were not misrouted when inspection by carrier's agent revealed that dimensions of considered ship-

ments exceeded the maximum clearance above the rail in a tunnel on the primary tariff route named, and also exceeded the maximum clearance allowance under two bridges on each of the alternative routes. Route of movement was the only practicable route, and shipper was promptly notified of result of the inspections and of the change in routing required.—Electric Boat Division v. New York, N.H. & H.R. Co., 319 I.C.C. 83 (84)*.

89. ——Emergency routing.—[Vols. 7, 17].—Emergency routing provision of tariff naming rate applicable over route specified by shipper beyond Philadelphia did not make that rate applicable on shipments of steel plates fabricated at Philadelphia which because of their dimensions and resulting clearance difficulties were necessarily forwarded over a higher-rated route; such difficulties cannot reasonably be interpreted as included in the type of emergencies designated in that provision, such as traffic congestion, washouts, or wrecks.—Electric Boat Division v. New York, N.H. & H.R. Co., 319 I.C.C. 83 (84-5)*.

Section 15. (9), (10) Liability, delivery contrary to routing instructions; direction of unrouted traffic.—[Unchanged. See vol. 9, p. 7695.]

Historical note, see vol. 3, p. 2030.

Notes of Decisions

§15(9): Volume 3—p. 2030; Volums 9—p. 7694; §15(10): Volume 3—p. 2031.

Section 15. (11) Disclosure or solicitation of information concerning shipments unlawful; exceptions.—[Unchanged. See vol. 9, p. 7695.]

Amendments, see footnotes, vol. 3, p. 2032; historical note, p. 2032.

Notes of Decisions

Volume 3—p. 2032; Volume 7—p. 5582; Volume 9—p. 7695; Volume 14—p. 11526; Volume 19—p. 15394.

3. Disclosure of shipper's business secrets to competition.—[Vols. 3, 7].—See Commodity Statistics Reporting—Extent and Disclosure, §222(e), n. 3.

Section 15. (12) Penalty.—[Unchanged. See vol. 9, p. 7696.]

Amendments, see footnotes, vol. 3, p. 2035.

Section 15. (13) Allowance for service or facilities furnished by shipper.—[Unchanged. See vol. 11, p. 9279.]

Amendments, see footnotes, vol. 3, p. 2036, vol. 11, p. 9279; historical notes, vol. 3, p. 2036, vol. 16, p. 12758, vol. 17, p. 13444.

Historical Note

Rates and fares of railroads within the Alaska Railroad Act, jurisdiction of the commission, see Historical Note concerning Executive Order 11107 following §15(1).

Notes of Decisions

Volume 3—p. 2037; Volume 7—p. 5583; Volume 9—p. 7697; Volume 11—p. 9279; Volume 12—p. 10317; Volume 13—p. 11021; Volume 14—p. 11526; Volume 15—p. 12111; Volume 16—p. 12758; Volume 17—p. 13444; Volume 18—p. 14204; Volume 19—p. 15395.

1. Construction, in general.—[Vols. 3, 7, 9, 12, 13, 18].—Section 15(13) is not intended to require allowances unless the service provided by the shipper is within the tariff in use in the instance under consideration.—Cooper-Jarrett, Inc. v. United States, 226 F. Supp. 318 (324)*.

7. "Allowance" construced.—[Vols. 3, 11].—No allowance can be made to shipper for performing a service, avoidance of which is the consideration for a lower rate; thus, rates for plan IV TOFC service, in which shipper furnishes the trailer and flatcar, on a lower level than rates for plan II service, in which carrier provides such equipment, do not constitute an "allowance."—Freight, All Kinds, TOFC, N. J. to Chicago & East St. Louis, 316 I.C.C. 397 (398).

15. Carrier's right and duty to furnish instrumentality and service; in general.—[Vols. 3, 7, 9, 12-14, 16, 17, 19].—The act requires a carrier to hold itself out to furnish the facilities of transportation, but it is not required to furnish facilities to pick up and deliver unless it holds out to do so, and there is no violation of the law if it publishes a lower rate for carrying freight that is brought to it by the shipper, since that is not the rendering of any service under the act connected with the transportation so far as the carrier is concerned; its responsibility as a carrier under §15(13) begins when the lading is delivered to it for transportation.—Cooper-Jarrett, Inc. v. United States, 226 F. Supp. 318 (324)*.

Ordinarily, railroads must furnish cars to transport traffic offered them, and if shipper furnishes special equipment owned or leased by it the railroads must pay a reasonable amount for their use thereof. Collectively, railroads cannot escape this obligation; the law clearly requires that amounts to be retained by railroads rendering service shall reflect their use of cars furnished by others.—Cancellation of Private Car Allowances, 322 I.C.C. 565 (570)*.

Compensation to Owner of Goods

38. Cost of service as measure of allowance.—[Vols. 3, 7, 9, 19].—Although the Burlington's icing studies show that its proposed refrigeration allowances for ice and salt when considered as a single service are substantially below its cost of furnishing such service, the allowances for ice and for salt are published separately and must therefore be considered independently. Average costs to the Burlington substantially exceed its published allowance to shippers who furnish their own ice, but not to those who furnish their own salt; and while amounts paid by shippers for ice are the same as proposed allowances, amounts paid by them for salt are less than the allowance. Since allowances may not exceed the cost to shipper, proposed allowances for ice are no more than just and reasonable, but proposed allowance for salt exceeds a reasonable maximum allowance to extent it exceeds Burlington's average cost of 83 cents per 100 pounds.—Refrigeration Allowances, Midwest, West, and Southwest, 322 I.C.C. 148 (152, 153).

When respondent's cost study shows that performance of spotting services within industry's west plant would cost it an average of $1.35 per loaded car and would cost the industry an average of $1.58 per car in interchange service, proposed allowance to the industry for performing such plant switching of $1.35 per loaded car is a maximum reasonable charge to be paid by respondent; approved.—A. O. Smith Corp. Terminal Allowance, 319 I.C.C. 99 (105-6)*.

39. Allowances must not create discrimination or prejudice.—[Vols. 3, 7, 9, 11, 19].—Aside from amount and propriety of proposed allowance, which are not considered, abandonment applicant's proposal to publish an allowance on all grain trucked for movement through its main-line stations from elevators on abandoned portion of branch line, in order to alleviate any burdens resulting from abandonment, does not of itself constitute unlawful preference, advantage, concession, rebates, or discrimination.—Chicago & N.W. Ry. Co. Abandonment, 317 I.C.C. 207 (216)*.

Allowances for Particular Instrumentalities or Service

49. Privately owned cars.—[Vols. 7, 9, 13-15, 19].—That rates are published for a complete service does not prevent a carrier from offering to perform a lesser service for a low-

er rate. Since allowances are published to adjust rates established for a complete service, the allowance applying when and if the cars are furnished by shipper or consignee, tariffs providing reduced unit train rates on coal, the cars to be supplied by shipper or consignee at no expense to carrier, need not contain allowance provisions and do not, directly or indirectly, contain concealed allowances or rebates.—Natural Gas Pipeline Co. of America v. N.Y.C. R. Co., 323 I.C.C. 75 (79).

Proposal of two Chicago switching lines to cancel provisions for payment of mileage allowances on cars furnished by shippers, and on foreign-line cars subject to the allowance tariff, when moved over their lines as overhead traffic, such allowances to be paid by their parent railroads when receiving a line-haul, would deny payment of allowances for distances mileage cars move over respondents' lines unless interchanged with the parent roads or accorded intra- or interterminal switching. Insofar as the proposal would result in no mileage allowances to car owners, it would reduce compensation for mileage cars and in many instances would require owners to accept lesser compensation for furnishing facilities which respondents are obligated to furnish, or, on leased cars, compel shippers to make larger payments to meet guaranteed minimum rental agreements. The switching lines' proposal is thus in derogation of their obligation to pay mileage allowances, and the practice is violative of §1(6). Not approved.—Cancellation of Private Car Allowances, 322 I.C.C. 565 (570-1)*.

55. Switching and spotting and plant switching.[Vols. 3, 7, 9, 11-14, 16-19].—Respondent is satisfied that it could perform all switching at industry's west plant at its ordinary operating convenience, with continuous movement of cars between plant interchange tracks and loading and unloading spots, and without interference or delay due to any disability or operations of the industry, including operation of motortrucks. Considering changed conditions within the west plant, results of switching test, and other evidence of record, proposed services, measured by principles of Ex Parte No. 104, Part II, as modified in 294 ICC 705, are not in excess of team-track switching which a railroad is obligated to perform under its line-haul rates, and for performance of which by the industry respondent may lawfully pay an allowance.—A. O. Smith Corp. Terminal Allowance, 319 I.C.C. 99 (105)*.

61. Icing, refrigeration.—[Vol. 16].—Since lawfulness of the Burlington's rates on meats and packinghouse products which include refrigeration service was established in 319 ICC 113, and its allowances to shippers for ice are shown to be no more than is just and reasonable, its allowance provisions for ice are lawful; but refrigeration allowances maintained by other railroads operating in w.t.l. territory may not be approved until it is established that services for which they are published are lawfully included in the line-haul rates.—Refrigeration Allowances, Midwest, West, and Southwest, 322 I.C.C. 148 (153).

62. Trailer-on-flatcar service.—[Vols. 17, 18].—Under TOFC plan II a railroad's responsibility begins when it receives the freight at shipper's dock or place of business, and services performed by shipper must be covered by allowances credited against the plan II tariff. But the question of allowances is not pertinent to plan III and IV tariffs: as used in plan III service, trailers are containers rather than instrumentalities of transportation, and carrier's responsibility does not begin until the freight is delivered to it by the shipper; under plan IV the statutory obligation to furnish transportation begins only when the flatcars are delivered to the railroad to be put into the line-haul operation; in both cases the delivery to the carrier is not part of the transportation covered by the act for purposes of §15(13).—Cooper-Jarrett, Inc. v. United States, 226 F. Supp. 318 (322, 324)*.

Section 15. (14) Other powers of commission not excluded.—[Unchanged. See vol. 9, p. 7707.]

Amendments, see footnotes, vol. 3, p. 2070.

Section 15a. (1) Fair return—"Rates" defined.—[Unchanged. See vol. 9, p. 7707.]

Amendments, see footnote, vol. 9, p. 7707; historical notes, vol. 3, p. 2071, vol. 7, p. 5589.

Section 15a. (2) Rule of rate-making.[Unchanged. See vol. 11, p. 9281.]

Amendments, see footnotes, vol. 3, p. 2077, vol. 11, p. 9282; historical notes, vol. 3, p. 2071, vol. 7, p. 5589; vol. 11, p. 9281, vol. 12, p. 10319, vol. 13, p. 11015.

Historical Notes

By Executive Order 11107, Administration of Alaska Railroads, dated April 25, 1963, the Interstate Commerce Commission is given jurisdiction "to fix, change, or modify rates for the transportation of passengers and property" under the authority set forth in the Alaska Railroad Act, 38 Stat. 305, which jurisdiction had been given to the Secretary of the Interior by Executive Order No. 3861 of June 8, 1923; latter order superseded. (28 FR 4225, April 30, 1963)

Executive Order 11107 codified at Title 49, Chapter II, Part 1200—Administration of Alaska Railroads (49 CFR §§1200.1 - 1200.4), 28 CFR 12278, Nov. 20, 1963.

Notes of Decisions

Volume 3—p. 2077; Volume 7—p. 5590; Volume 9—p. 7708; Volume 11—p. 9282; Volume 12—p. 10320; Volume 13—p. 11024; Volume 14—p. 11528; Volume 15—p. 12112; Volume 16—p. 12760; Volume 17—p. 13446; Volume 18—p. 14206; Volume 19—p. 15399.

1. Purpose and interpretation.—[Vols. 9, 11, 13-19].—Without limiting matters which the commission may consider in determining lawfulness of a rate, Congress has specified some of the factors which it must consider; among factors specified in the need of revenue sufficient to enable carriers to provide efficient transportation service. The commission's determination that proposed reduced rate was not just and reasonable in view of the resulting loss in carrier revenue, considered in the light of railroads' critical need for increased revenues, was within its statutory powers. The commission, charged with the duty of carrying out the national transportation policy, was both empowered and justified in making a decision that would not reduce the contribution of considered traffic to plaintiffs' net revenues; sustained.—Atlantic Coast Line R. Co. v. United States, 209 F. Supp. 157 (159-60)*.

Plaintiffs' contention that the commission failed to consider §15a(2) and the national transportation policy, in its approval of Erie-Lackawanna's proposed reduced multiple-car rates on iron ore, is without merit. The commission report shows that factors referred to in §15a(2), being related to those in the national policy, were considered in connection with the contention that proposed rates would threaten the iron ore rate structure and therefore be a destructive competitive practice; and that, based on evidence before it, the commission found the proposal did not constitute a destructive competitive practice. Although cases decided under §15a(2), which plaintiffs cited, might support a commission decision to disapprove the proposed rates, they do not compel such a result; moreover, the commission found that earlier decisions cited were not controlling in that they were distinguishable on their facts.—Baltimore & O. R. Co. v. United States, 249 F. Supp. 712 (718-9)*.

Nor does the record support plaintiffs' second contention, that the commission relied on §15a(3) in making its decision and that, in relying thereon, it treated a statute which was intended to apply to intermodal competition as modifying the law applicable in rail intermode cases. While the commission, in discussing "destructive competitive practice," cited cases involving intermodal competition and the application of §15a(3), that term is one found in the national transportation policy which is specifically applicable to all other provisions of the act; and in that discussion, the commission frankly stated that recent cases dealing with the question primarily involved intermodal competition, but that several criteria had evolved which were relevant to disposition of the proceeding before it.

Record is not convincing that the commission improperly applied §15a(3) to the controversy merely because it discussed the criteria to be considered in determining "destructive competitive practice." The commission's decision is found unlawful in all respects; complaint dismissed.—Id., pp. 719-20.

Defendant's unit train rates on steam coal from Lynnville Mine, Ind., to Hammond, Ind., conditioned on a minimum annual volume, are not shown to have adversely affected revenues of other railroads competing for transportation of coal to consignee's electric generating plant, or to have precipitated a rate war. Competing railroads have submitted no evidence of adverse effects on their traffic, and such a conclusion may not be merely assumed. Moreover, other carriers may make rate reductions, which may or may not be influenced by the assailed rates, without the result necessarily being a rate war unlawful under §15a(2) or (3).—Natural Gas Pipeline Co. of America v. N.Y.C. R. Co., 323 I.C.C. 75 (84).

Effect of §22, see Tennessee Products & Chem. Corp. case, §22(1), n. 2.

2. Effect of rates on movement of traffic.—[Vols. 9, 11-19].—Assuming, without in any way deciding, that (considerations of undue preference and prejudice aside) the commission could lawfully have disapproved proposed grain rates if it found they would adversely affect net revenue of proponent railroads, as plaintiffs urge, the court has grave doubts whether, in empowering the commission to prescribe a rate as unduly low, Congress meant to require it to examine the wisdom of proponents of rates which yield more than out-of-pocket costs when there is no threat of injury to competing carriers, the traffic will not move at higher rates, and when protestants' sole substantial claim is that, because of effect on other traffic, proponents of the rates would be better off if new movements of traffic did not occur; indeed, the implication of §15a(2) is to the contrary. However, since the commission considered and rejected plaintiffs' contention that proposed rates would disadvantage the railroads, and there is substantial basis for its decision, that question need not be specifically decided.—State of New York v. United States, 256 F. Supp. 634 (637-8)*.

Although §15a(2), a part of the rule of ratemaking, concerns the commission's power to prescribe rates, which is not directly involved in determination of lawfulness of proposed multiple-car rates on iron ore, the factors referred to therein are related to those set forth in the national transportation policy and are considered in connection with protestants' contention that the proposal threatens the existing rate structure on that commodity and is therefore a destructive competitive practice prohibited by that policy.—Iron Ore from Cleveland, Ohio, to Ohio and Pennsylvania, 323 I.C.C. 746 (753)*.

4. Honest, economical, and efficient management.—[Vols. 9, 11, 14-19].—See Grain in Multiple-Car Shipments—River Crossings to So., NTP, n. 5 *Competition and ratemaking.*

5. Earnings of carriers; carrier credit.—[Vols. 9, 11-18].—One of the criteria of a reasonable minimum rate is whether carrier would be better off from a net-revenue standpoint with it than without it. Railroads' critical need for revenue is too well known to require discussion, and establishment of lower rates without any indication of prospective net gain results only in needless dissipation of revenues and accompanying unwarranted increase in burden on other traffic.—Tractors—T.L. & W.T.L. Territories to S.W. & W.T.L. Ter., 319 I.C.C. 758 (765).

Future revenue effects cannot be determined with certainty, but must be based on prediction and estimate; the commission must exercise its judgment on all the evidence as to the probable revenue effects of a rate increase.—Texas Intrastate Passenger Coach Fares, 318 I.C.C. 151 (154)*.

Section 15a. (3) Competitive rate-making.—[Unchanged. See vol. 18, p. 14209].

Notes of Decisions

Volume 18—p. 14209; Volume 19—p. 15400.

2. Construction and interpretation.—[Vols. 18, 19].—See also NTP, n. 5 *Destructive competition, Inherent advantages.*

In view of the legislative history of §15a(3), there can be no doubt that purpose of the statute was to permit railroads to respond to competition by asserting whatever inherent advantages of cost and service they possessed. Moreover, Congress did not consciously or inadvertently defeat that purpose when it included therein a reference to the national transportation policy; principal reason for that reference was to emphasize the power of the commission to prevent railroads from destroying or impairing the inherent advantages of other modes of transportation. —I.C.C. v. New York, N.H. & H. R. Co., 372 U.S. 744 (757-8)*.

Congress did not regard the setting of a rate at a particular level to constitute an unfair or destructive competitive practice simply because that rate would divert some or all traffic from a competing mode; such an interpretation would be inconsistent with the mandate of the national policy to preserve inherent advantages of each transportation mode; §15a(3) made it clear that something more than even hard competition must be shown before a particular rate can be deemed unfair or destructive. Reference in the statute to the national policy was to prevent a carrier from impairing or destroying inherent advantages of a competing mode by setting a rate, below its now fully distributed costs, which would force a competitor with a cost advantage on particular transportation to establish an unprofitable rate in order to attract traffic.—Id., p. 759.

The commission's rejection of TOFC rates in issue, which it found to be compensatory, and its requirement of a differential over rates of coastwise carriers is not consistent with the mandate of §15a(3); its insistence that those rates be held up to a particular level to protect coastwise carriers' traffic cannot be justified on basis of the national transportation policy. Decision of the commission is not supported by the record; judgment of the district court vacated, and the cause remanded to the commission for further proceedings consistent with the Court's opinion.—Id., pp. 758-64.

The court having found invalid the commission's conclusion that the level of proposed multiple-car rates on grain from Ohio and Mississippi River crossings to the South would be inadequately compensatory and thus violative of §1(5) if undue prejudice found to result from proposed 240-cent minimum on movements under 346 miles were removed, the commission's conclusion that the proposed rates must therefore be increased 16 percent to avoid unfair and destructive competition in violation of the national transportation policy is likewise invalid and must be set aside because it violates §15a(3), exceeds the commission's statutory authority, and is not supported by substantial evidence in the record.—Cincinnati, N.O. & T.P Ry. Co. v. United States, 229 F. Supp. 572 (577, 578, 580)*.

Decision disapproving compensatory rail rate reduced to meet barge-truck competition could not be held to accord with the law if, by an unjustified use of the "fully distributed" costs of the barge-truck mode as the floor for the reduced rail rate, the commission was holding up the rail rate "to protect the traffic" of another transportation mode in contravention of the objectives and purposes of §15a(3). The court does not mean to imply that there may not be situations where the commission has power, under §15a(3) and the national policy, to prohibit reduced rail rates even though they are compensatory, but it does suggest that Congress has expressed a clear intent that reduced compensatory rates should be allowed; therefore, in disapproving such rates, the commission must state a rational basis for comparing "fully distributed" costs of the two modes to determine which has an

inherent cost advantage and, also, it should set forth adequate reasons to support tis choice of that standard to measure the relative efficiency of the competing carriers in providing considered service.—Louisville & N. R. Co. v. United States, 268 F. Supp. 71 (75-7, 82-3)*. [But see 392 US 571.]

The commission's finding that plaintiffs' all-commodity boxcar rates constitute a destructive competitive practice under §15a(3) is not adequately supported on the record. That term was meant to be applied only in context of competition between different modes of transportation and not for the purpose of supporting the classification provisions of the act, and the differential prohibition of §15a(3) was intended to be qualified only when factors other than normal incidents of fair competition intervene. Issues of the case should never have been framed under §1(6), nor should the meaning of the national policy, referred to in §15a(3), have been distorted to supplement it. The commission's order set aside.—New York, N.H. & H. R. Co. v. United States, 221 F. Supp. 370 (376)*.

Prohibition in §15a(3) against artificial differentials in rates of competing transportation modes may not be nullified merely because it will have an adverse effect on traffic of a competing carrier; "inherent advantage" and "destructive competitive practice" factors of the national transportation policy, not shown to be present, are the only two factors which may justify such an artificial differential. Even though railroad, as the low-cost mode, could afford to lower its rate to such an extent that motor carriers might find themselves priced out of the particular market, that factor alone would not justify qualification of the statutory prohibition, in absence of wrongful and unlawful cutting of rates below reasonable returns.—St. Louis-S.F. Ry. Co. v. United States, 207 F. Supp. 293 (297, 298)*.

The commission's finding that, although compensatory, proposed reduced rail and motor rates on cigars were not just and reasonable and setting of higher rates, with the rail rate 24 cents less than the motor to offset added cost of loading and unloading incidental to use of rail service, was motivated by erroneous concept that it was necessary to establish rates that would enable each mode to share the traffic on equal footing. While in the eyes of defendants and motor carrier intervenors the rates in issue seem most fair and equitable to all, practical effect of the commission's order is to stifle competition, rather than encourage fair competition among the carriers, in derogation of terms of §15a(3); order annulled and set aside.—Id., pp. 295, 298-9.

See also Baltimore & O. R. Co. v. United States, §15a(2), n. 1.

Inasmuch as the commission found that proposed reduced rail ratings on agricultural implements and road-making equipment were compensatory for proponents and that record did not permit determination of the low cost transportation mode for the traffic, its decision and order requiring cancellation of those ratings because they amounted to destructive competition injurious to various motor carriers is erroneous and reflects a misinterpretation of the law as amended by §15a(3). Competition is destructive and unlawful only when rates are so low as to harm proponents thereof, or so low as to deprive a competitor of his inherent advantage of being the low cost mode. In demonstrated absence of any destructive competition, railroads should not be precluded from asserting their inherent advantage of being able to haul increasingly heavy loads at reduced rates; the commission's order set aside.—Missouri Pac. R. Co. v. United States, 203 F. Supp. 629 (632-3, 635, 636)*.

In absence of showing of a destructive competitive practice or whether railroads or barge lines are entitled to an inherent advantage as the low-cost transportation mode, the commission's order requiring artificial increase of proposed all-rail rate on pig iron, published to meet exact cost of barge service and shown to be compensatory, by adding thereto amount of charges for switching and weighing at origin, could not be justified. While those switching and weighing charges are part of total cost of rail-barge movement, they are absorbed by shipper; almost all of considered traffic moves over barge lines and will continue so to move under the order. Under such circumstances, rates of one carrier may not be held up to a particular level to protect traffic of another mode of transporta-

tion; the commission's order set aside.—Pennsylvania R. Co. v. United States, 202 F. Supp. 584 (586)*.

Even before enactment of §15a(3) the commission recognized that a regulated carrier should not be prevented from meeting the major competition of unregulated carriers in order to protect another mode's minor participation in the traffic; and it has since frequently found, where private or unregulated transportation is the predominant competitive mode, that the indirect or incidental competitive injury inflicted by reduced rates upon regulated modes falls short of being destructive within meaning of the act.—Grain in Multiple-Car Shipments—River Crossings to So., 321 I.C.C. 582 (605)*.

Supreme Court's discussion in 372 US 744 of the relation between §15a(3) and the national transportation policy respecting destructive competition is particularly pertinent where by protestant water carriers' own showing rail respondents' proposed rate on candy to Texas, the same as protestants' rate from New York-New Jersey origins and substantially below their rates from Pennsylvania points, materially exceeds full costs from the New York City area and from Pennsylvania origins approaches them; full compensativeness of that rate from latter points is apparent from fact that costs for the shorter rail distances from Pennsylvania must be less than for the longer distances from New York. As the proposed rate is not unprofitable and is not shown genuinely to threaten continued existence of a transportation service uniquely capable of filling a transcendent national defense or other public need, there is no basis in law or fact for prescription of a differential to protect water protestants from the rate competition involved.—Candy and Confectionery from N.J., N.Y., & Pa. to Tex., 321 I.C.C. 154 (159). [But see dissent.]

And since the reduced all-rail rate is reasonable and neither competitively destructive nor discriminatory against the water lines, and rail rates between involved origins and destinations and the ports, though reflecting higher percentages of first class than the reduced rate, are not shown to be unreasonably high, there is no justification for prescription of either reduced proportionals to and from the ports or joint rail-water-rail rates sought by Seatrain Lines. To hold otherwise in the circumstances would constitute "umbrella" ratemaking, unfairly handicapping respondents. —Id., p. 161.

See also Igert v. United States, §4(1), n. 173.

Whether relief should be granted from order in 251 ICC 405 prescribing minimum differentials in ocean-rail under all-rail rates on pipe from official territory to the Southwest must be considered in light of §15a(3), since relation of rates of competing modes is involved, and rate bases required by that order impose a continuing limitation on rail respondents' exercise of their managerial discretion to meet competition where they find it. Even though Seatrain's participation in the traffic may be substantially reduced if the differentials are not continued, that alone does not constitute destructive competition; restated rail and water costs do not indicate which is the low-cost mode for entire origin and destination areas considered, and even if the cost advantage were found to lie generally with Seatrain, it does not appear that mere vacation of the order would unduly impair that advantage.—Wrought Pipe to the Southwest, 319 I.C.C. 310 (317)*.

On the present record, considered in light of 372 US 744, a requirement that all-rail rates on involved traffic be differentially higher than rates in connection with water movements is unsupported by sufficient evidence of cost, service, national defense, or other public need; and in view of changed conditions since the order was entered, to require rail respondents to continue participating in ocean-rail rates that reflect the prescribed minimum differentials would be contrary to §15a(3). Order vacated to extent it requires such differentials.—Id., pp. 317-8.

Proposed reduced barge-competitive rates on iron or steel bars are amply compensatory, and to require respondents to hold their rates at a higher level to protect the water carriers would be contrary to purpose and effect of §15a(3), especially when, owing to lack of adequate bargeline cost data, the bargelines cannot be found to have any inherent advantage that would be impaired or destroyed. [Citing 372 US 744.] At present level, respon-

dents are able to attract only 10 percent—compared with bargelines' 90 percent—of total annual tonnage moving from considered origin, and proposed rates are no lower than necessary to enable them to obtain a greater share of the traffic and increase their reveneus; approved.—Steel Bars, Lemont, Ill., to Iowas, Kans., Mo., Minn., & Nebr., 319 I.C.C. 292 (303-4).

See also All Commodities, New England to Chicago and St. Louis, NTP, n. 5 *Competition and ratemaking.*

Legislative history of §15a(3) makes clear that the purpose thereof was to permit carriers to meet competition by asserting whatever inherent cost and service advantages they possess; also, that reference was made therein to the national transportation policy to prevent carriers from destroying or impairing the inherent advantages of others. [372 US 744.]—Alcoholic Liquors from Md., N.J., N.Y., and Pa. to Fla., 319 I.C.C. 323 (328).

Even though the 70,000-pound rates of both rail respondents and Sea-Land on involved Florida citrus traffic are shown to exceed at least out-of-pocket costs, the record is inadequate to determine their relative cost and service advantages, and neither in opposition to the other has established which is entitled to a rate differential or parity. However, as Sea-Land's recently increased rates are not unreasonably high, and the railroads do not now attempt to justify their reduced rates except to extent that, with refrigeration charges added, they are no lower than corresponding Sea-Land charges, equalization of the rail and Sea-Land rates at that level would appear justified. The reduced rail rates, though not competitively destructive, are substantially lower than present motor or Sea-Land rates and are not shown to be just and reasonable.—Frozen Juice and Fruit from Florida to the North, 319 I.C.C. 577 (595-7).

Under §15a(3) rates may not be held up to any particular level to protect the traffic of any other mode, giving due consideration to objectives of the national policy. Proposed rail incentive class rates on traffic rated class 35 or higher, published to meet private and contract motor carrier competition, are not shown to be competitively destructive when average thereof on shipments rated class 100 and class 45, computed at weights 20 percent in excess of applicable minima of 10,000 and 24,000 pounds, exceeds rates maintained by protestant motor common carriers subsequent to filing of the proposed schedules.—Incentive Class Rates—Between Official & Southern Ter., 319 I.C.C. 448 (455).

Proposed joint rail-water rates on grain, designed to prevent further diversion from rail to unregulated motor or water transportation, need not be related to existing all-rail rates. Though competition between all modes is intense, there is no evidence that the proposed rates constitute a destructive competitive practice by impairing or destroying the inherent advantages of a competing carrier. While the proposed rates may result in lower revenues, they are reasonably compensatory, and are not below a minimum reasonable level when there is no evidence that the carriers would be better off without them than with them.—Rail-Water, Grain in Bulk, from Mo., Ill. & Ind. to Buffalo, 319 I.C.C. 123 (132)*.

Fully distributed costs for rail and water carriers, and comparisons thereof, may properly be considered as a facet of intermode competitive pricing situations under §15a(3) and the national transportation policy.—Grain in Multiple-Car Shipments—River Crossings to So., 318 I.C.C. 641 (646-7)*.

In determining whether a rate is lower han a reasonable minimum, §15a(3) requires consideration of facts and circumstances attending movement of the traffic by respondent. Proposed reduced motor rate, substantially higher than rail boxcar rate, is needed for respondent to attract any of considered traffic even where expedited motor service is desired; approved.—Alcoholic Liquors from Eastern Points to South Dakota, 318 I.C.C. 195 (198).

Since §15a(3) directs the commission to consider the facts and circumstances attending movement of the traffic by the carrier to which the rate is applicable, and cancellation of considered reduced rates on coal to Florida points would compel proponents to forgo the traffic, although it can be handled with advantage in existing southbound trains, and would pose a serious threat to northbound movement of phosphate rock, those rates should not be condemned as less than reasonably

compensatory merely because they fail to produce the return on investment in road and equipment normally considered in computation of out-of-pocket costs.—Coal from Southern Mines to Tampa and Sutton, Fla., 318 I.C.C. 371 (384, 385, 390).

Reduced rail TOFC rate on garden hose on same level as Sea-Land rate between same points is not competitively destructive in contravention of standards of §15a(3) when Sea-Land is not shown to be the low-cost mode, and the proposed rate is compensatory and is not shown to threaten continued existence of a service uniquely capable of filling a transcendent national defense or other public need.—Garden Hose & Electric Cable from N.J. or R.I. to Tex., 319 I.C.C. 227 (228, 229)*.

A reading of the national transportation policy together with §§ 1(5), 15(1), and 15a, especially in conjunction with the declared policy requiring recognition and preservation of inherent advantages, impels conclusion that to find that clearly compensatory TOFC plan III rates, and rail portions of plan V rates, on automobiles are competitively unfair or destructive—the railroads being the low-cost mode for that traffic as compared with motor carriers—would ignore the specific prohibition of §15a(3) that rates of a carrier shall not be held to a particular level to protect the traffic of any other mode; that result would follow whether the level is the same as or different from that of the competing mode. —Motor Vehicles from Kansas City to Ark., La., and Tex., 318 I.C.C. 301 (320).

Assailed TOFC rates which are not shown to be noncompensatory or otherwise unlawful may not be disapproved merely because they are below the level of rates of a competing mode; to do so would be tantamount to finding that they must be increased to a higher level to protect the traffic of another mode of transportation.—Middlewest Motor Freight Bureau v. Great Northern Ry., 316 I.C.C. 443 (447).

Though extent, if any, by which enactment of §15a(3) altered preexisting law is a matter of dispute, Congress did not intend to lessen intermodal competition, and the commission must interpret the general statutory commands and its own precedents in light of new competitive conditions and forces. Thus, in implementing the revised rule of ratemaking on a case-by-case basis, the commission has held that regulated carriers must be allowed considerable leeway in meeting unregulated competition; that failure of proponent of a reduced rate to show its fully distributed costs is not necessarily fatal; and that carriers claiming to be victims of destructive competition have some affirmative responsibility to establish their own costs. An though, in endeavoring to ascertain whether a reduction is proposed primarily to injure competitors or to achieve some commendable economic aim, the subjective intent of carriers can seldom be proven by direct evidence, it is generally possible, in light of all attendant facts and circumstances, to draw reasonable inferences as to whether a particular adjustment is predatory in character.—Meats, Fruits, Vegetables—TOFC—Transcontinental, 316 I.C.C. 585 (593-4).

The only reasonable inference from instant record is that proposed TOFC rates were not designed to destroy competition of regulated motor carriers, but to meet growing competition of private and illegal for-hire carriers and regain traffic lost over the years. Respondents' solution involved investment of millions of dollars in 85-foot flatcars and mechanically refrigerated trailers, and use thereof in a controlled two-way operation to minimize empty mileage; it now appears that they can afford to pass along some of resulting economies to their shippers; thus, proposed rate reduction would have been a rational economic decision even in absence of competition by regulated motor carriers. Moreover, protestants made no effort to show their costs for handling considered traffic, thus it cannot be determined whether or to what extent they could minimize diversion through rate reductions of their own, or whether condemnation of the proposed rates would be in public interest or solely in interest of protecting the high-cost mode of transportation.—Id., pp. 593, 594.

A tariff rule established by one mode of transportation, otherwise lawful and peculiarly adapted to its operating methods, may not be condemned simply because it might result in some competitive disadvantage to another

mode of carriage.—Pipeline Demurrage & Minimum Shipment Rule on Propane, 315 I.C.C. 443 (448).

The commission may not prevent respondents from establishing just and reasonable rates in order to preserve the present division of traffic between the various modes of transportation; otherwise, normal and healthy competition would be eliminated, contrary to intent of §15a(3) and the national transportation policy.—Iron and Steel from Ill, Ind., Kans., and Mo. to Iowa, 315 I.C.C. 403 (408).

Moreover, since the commission's rate jurisdiction does not extend to exempt transportation, it may not prevent establishment of reduced rail rates on iron and steel articles in order to insure a return load to haulers of exempt commodities; such action would encourage expansion of exempt carriage and unduly increase the burden on regulated carriers. Proposed rates disapproved on other grounds.—Id., pp. 408, 410.

In 293 ICC 133, the commission found that, consistent with objective of the national transportation policy to preserve inherent advantages of the respective modes of transportation, a reasonable rate adjustment on manufactured tobacco would be accomplished by establishing and maintaining motor rates no lower than corresponding rail base rates; proposed reduced t.l. rate on cigarettes from and to points in the same area, which would be lower than minimum level prescribed therein, not approved.—Cigarettes from Richmond, Va., to Baltimore, Md., 316 I.C.C. 68 (70).

While §15a(3) provides that a carrier's rates may not be held up "solely" to protect traffic of another mode of transportation, it specifically directs that due consideration be given objectives of the national transportation policy, which include preservation of advantages of each mode, promotion of sound economic conditions among the several carriers, and avoidance of destructive competition; thus, that section does not require approval of reduced rail rates which, though above out-of-pocket costs, are lower than necessary to meet existing water competition and threaten continued existence of the water service.—Pig Iron, Buffalo, N.Y., to Chicago, Ill., and Gary, Ind., 315 I.C.C. 601 (614)*.

On reconsideration, approval of the rate in issue from Cleveland, Ohio, to Chicago, and that from Toledo to Chicago and Gary, Ind., is warranted. However, the reduced rates on pig iron from Erie, Buffalo, and Niagara Falls area to Chicago area may not be approved when they would force protestant lake carrier to establish unprofitable rates to remain competitive and thus would impair or destroy its inherent cost advantage.—Id., 321 I.C.C. 121 (129-30)*.

Similarly, giving due consideration to objectives of the national transportation policy, respondents' contention that they should not be forced to cancel fully compensatory rates reduced to meet competition of unregulated motor carriers is not supported by adequate showing of any substantial diversion of considered traffic to such carriers; on the contrary, evidence is convincing that the reductions would result in destructive competition with intercoastal water carriers.—Brandy—West Coast to Eastern Points—Bulk & Packaged, 315 I.C.C. 21 (22, 25).

Section 16. Orders of commission and enforcement thereof—(1) Award of damages.—[Unchanged. See vol. 9, p. 7718.]

Amendments, see footnotes, vol. 3, p. 2129; historical note, p. 2129.

Notes of Decisions

Volume 3—p. 2129; Volume 7—p. 5611; Volume 9—p. 7718; Volume 11—p. 9287; Volume 12—p. 10321; Volume 14—p. 11531; Volume 15—p. 12115; Volume 16—p. 12765; Volume 17—p. 13450; Volume 18—p. 14209.

Section 16. (2) Proceedings in courts to enforce orders; costs; attorney's fees. —[Unchanged. See vol. 11, p. 9287.]

Amendments, see footnotes, vol. 3, p. 2135; vol. 11, pp. 9287-9288; historical note, vol. 3, p. 2135

Notes of Decisions

Volume 3—p. 2136; Volume 7—p. 5613; Volume 9—p. 7720; Volume 11—p. 9288; Volume 12—p. 10321; Volume 13—p. 11026; Volume 14—p. 11531; Volume 15—p. 12115; Volume 16—p. 12766; Volume 17—p. 13450; Volume 18—p. 14210; Volume 19—p. 15404

2. Enforcement of reparation orders by the courts, in general.—[Vols. 3, 7, 9, 11, 15, 17-19].—While governing statutes are subject to more than one interpretation, a commission order awarding reparations to a shipper is unquestionably reviewable by the courts and, in 337 US 426, similar orders were held reviewable in direct proceedings. A summary of pertinent statutes points out that §16(2) actions for enforcement of reparation orders and §17(9) suits to set aside commission orders are quite distinct proceedings, with different venue restrictions and different procedures; moreover, shipper bringing a §16(2) action has certain procedural advantages that may well be lost or impaired if carriers may attack the reparation order in a §17(9) direct review proceeding. In determining when and in what proceeding a railroad may challenge a commission reparation order, the court holds that carriers may obtain full review by defending shipper's §16(2) action and that policy underlying that section precludes them from obtaining review in a forum other than that chosen by the shipper. But no obstacle is found to carriers' bringing a §17(9) cross-proceeding in the forum shipper selects, should they so desire.—I.C.C. v. Atlantic Coast Line R. Co., 383 U.S. 576 (583-9, 602)*.

In determining where review of the order under attack is to occur, three conclusions are established as guideposts: (1) respondents have ample opportunity to obtain full review of the order through defense of shipper's enforcement action (filed in New York district court and held in abeyance pending outcome of instant case), (2) allowing respondents alternative of bringing direct review proceedings would substantially impair shipper's §16(2) right to select a convenient forum, and (3) limiting review of the order to the enforcement action would not be likely to result in disparity in treatment of shippers. Accordingly, as the reparation order was not accompanied by a cease-and-desist order, respondents may obtain review thereof only in the court where shipper filed its enforcement action—or where the shipper seeks review. Proceeding under review was not brought in the enforcement court; thus, the district court erred in entertaining respondents' §17(9) suit to enjoin and set aside the order and judgment of the Court of Appeals sustaining its decision must be reversed.—Id., pp. 578-9, 602-6.

This statute deals only with a suit brought to enforce payment by a carrier of money which the carrier has been ordered to pay; it is not applicable to a suit brought to recover overcharges on freight shipments.—Montgomery Ward & Co. v. Roy Stone Transfer Corp., 220 F. Supp. 137 (140)*.

In action to enforce order of the commission awarding plaintiff reparations which defendants declined to pay, fact that carriers were prevented from charging and collecting lawful reduced rate during period that injunctive order of the federal court (which the parties agree was erroneous) was in effect does not mean that defendants may retain overcharges which, due to the order, they were required to collect during that period. To permit such retention would result indirectly in establishing a rate by court order for the period in question; courts may not engaged in any semblance of ratemaking whatsoever, either direct or indirect, and have no power to establish rates.—Humble Oil & Refining Co. v. Great Northern Ry. Co., 212 F. Supp. 747 (752-6).

In such action, based on alleged overcharges, it is unnecessary for plaintiff to show damage from collection of higher rate in is-

sue; there is a distinct difference under the statute between a claim for overchages and one for damages. Plaintiff has paid cash out of pocket that should not have been required of it, and there is no question as to its proximate loss. [Citing 245 US 531.]—Id., p. 756.

In shipper's action to enforce reparation order of the commission on shipments from Grand Rapids, Minn., to Des Moines, Iowa, based on finding Des Moines to be an "intermediate point" over two routes from Grand Rapids to Chicago within tariff intermediate rule, the court must conclude that those routes are unreasonable and, therefore, incapable of invoking intermediate point rule. The commission has generally granted reparation in cases involving such a rule if the indirect route is not more than 50 percent circuitous compared with the short-line route; however, in 212 F. 2d 812, that commission test was rejected and reparation denied on ground of unreasonableness of a route involving 35 percent circuity. Accordingly, circuity over the routes in question being 45 and 37 percent, respectively, routing rail traffic from Grand Rapids to Chicago via Des Moines is unreasonable; such unreasonable routing cannot invoke intermediate rule so as to entitle plaintiff to rate sought; thus, the reparation order is contrary to law. Complaint dismissed.—Blandin Paper Co. v. Great Northern Ry. Co., 265 F. Supp. 761 (762-3)*.

3.——Jurisdiction.—[Vols. 3, 7, 11-13, 19].—Scope of judicial review, in shipper's suit to enforce order awarding it reparation and carriers' cross action to set aside the order, is determined by whether the issue presented is within the commission's primary jurisdiction. As the only question presented for review is the propriety of the commission's decision that commodity rates (rather than class rates charged) applied on plaintiff's shipments by virtue of intermediate rule in the commodity tariff, the issue raised is solely a question of tariff construction, and hence one of law. The tariffs involved are not easily comprehended and construed; but the court may not abdicate its responsibility to insure that the commission construes tariffs in accordance with the law merely because the question of construction is difficult to resolve. The court, in the exercise of its independent judicial function, can decide the principal issue involved, i.e., whether the commission's determination to apply the commodity tariff was an unlawful construction of that tariff.—Hygrade Food Products Corp. v. New York Central R. Co., 266 F. Supp. 946 (948-9)*.

4.——Venue.—[Vols. 3, 9].—Shipper has a broad choice of venue in proceeding involving its initial complaint to the commission (alleging unreasonableness of rail rates) which culminates in a §16(2) suit to enforce the commission's order awarding reparations. Under the statute, if carrier fails to comply with the reparation order, shipper has the right to file suit for enforcement thereof in either federal or state court; moreover, Congress has provided certain procedural advantages for the shipper, in such suit, to discourage the carrier's harrassing resistance to the reparation order. Actions under §16(2) for enforcement of reparation awards and §17(9) actions to set aside a commission order are distinct proceedings with different venue restrictions and different procedures; thus, while venue in district courts is determined by 28 USC §1398, restriction therein does not apply to suits commenced under §16(2), as that statute containes its own venue provisions.—I.C.C. v. Atlantic Coast Line R. Co., 383 U.S. 576 (580, 583-6)*.

8. Findings and order of commission prima facie evidence.—[Vols. 3, 7, 9, 11, 12, 15, 18, 19].—In action to enforce the commission's order awarding reparation to plaintiff shipper because of inapplicability of rates charged by defendants, under §16(2), the facts set forth in the commission's findings and order are prima facie evidence of the facts therein stated.There being no dispute thereof, the commission's findings are adopted as properly stating the facts.—Hygrade Food Products Corp. v. New York Central R. Co., 266 F. Supp. 946 (948)*.

12.——Review of evidence by court.—[Vols. 3, 7, 9, 11, 15, 16, 18].—In action to enforce the commission's order awarding plaintiff reparations based on higher rate, rather than lawful reduced rate, which defendants were required to collect during period injunctive order of the Oregon district court was in effect, whether or not facts relied on by defendants with respect to the injunction constitute a

defense is the real issue. Plaintiff's objections to introduction of evidence relative to the injunction are overruled; all evidence submitted will be considered.—Humble Oil & Refining Co. v. Great Northern Ry. Co., 212 F. Supp. 747 (751).

Section 16. (3) Limitation of actions.—[Unchanged. See vol. 18, p. 14210.]

Historical notes, vol. 3, p. 2149, vol. 13, p. 11058.

Notes of Decisions

Volume 3—p. 2151; Volume 7—p. 5620; Volume 9—p. 7727; Volume 11—p. 9291; Volume 12—p. 10322; Volume 13—p. 11026; Volume 14—p. 11532; Volume 15—p. 12116; Volume 16—p. 12766; Volume 17—p. 13451; Volume 18—p. 14212; Volume 19—p. 15405.

2. In general; construction and interpretation.—[Vols. 7, 9, 12, 17-19].—Provision of §16(3) that all actions at law by carriers subject to Part I for recovery of charges must be begun within 3 years from accrual of the cause of action relates only to suits in court for recovery of unpaid charges or undercharges, and cannot possibly apply to an investigation instituted by the commission under §13(3) and (4), upon petition of carriers seeking increases in intrastate rates corresponding to those authorized in interstate rates.—Oklahoma Intrastate Freight Rates and Charges, 321 I.C.C. 186 (207)*.

A statute of limitations does not confer any right of action, but restricts the period within which the right, otherwise unlimited, may be asserted. Such statutes, legislatively enacted, are founded on the general experience of mankind that valid claims are not neglected, and that a lapse of years without any attempt to enforce a demand creates a presumption against its original validity.—Plaswood Corp. v. Alton & S.R., 321 I.C.C. 434 (441).

6. Jurisdictional nature of limitations.—[Vols. 3, 7, 9, 12, 13, 15, 16, 18].—Section 16(3) is not the ordinary statute of limitations, to be invoked or waived as a defendant may elect; in limiting the power of the commission to consideration of claims filed within the periods therein defined, it is jurisdictional, and before an award of reparation may be made it must affirmatively appear that complaint has been seasonably filed. Since the statute therefore need not be pleaded, Rule 1.35 of Rules of Practice is inapplicable and does not foreclose defendants from offering evidence on the matter even though they did not plead the statute as a defense until they filed their brief.—R. M. Hollingshead Corp. v. Alton & S. R., 319 I.C.C. 86 (86-7).

8. Laches.—[Vols. 3, 9, 15].—Although 5 telegraphic informal complaints and one written one were filed within the statutory period, complainants failed to confirm the telegraphic complaints by submission of written complaints accompanied by sufficient copies for service on all defendants, and failed to correct deficiencies in the mailed informal complaint when called to their attention, prior to filing of formal complaint nearly 10 years later, following declination of other informal complaints. Because of failure over such a long period to perfect the 6 specified informal complaints in manner requested by the commission, complainants are estopped by the equitable doctrine of laches from raising issue of unreasonableness of rates charged on shipments covered thereby, which were included in the formal complaint.—Plaswood Corp. v. Alton & S.R., 321 I.C.C. 434 (439-40, 442).

Tolling the Statute

22. Acts sufficient to toll statute, in general.—[Vols. 3, 7, 9, 12, 14, 15, 17-19].—Motion to dismiss complaint on ground that complainant had abandoned its §6 allegation, and that registration of shipments on the special docket did not stay running of the statute as to issues under §§1 and 4 which were raised for the first time in formal complaint, overruled. Registration of the shipments was not under any particular section of the act and was sufficient to

stay running of the statute as provided in Rule 1.25(e) of the Rules of Practice.—Hygrade Food Products Corp. v. Atlantic Coast Line R., 318 I.C.C. 501 (502)*.

26.——Special docket application.—[Vols. 3, 7, 9, 12, 15, 17-19].—Overcharge claim on certain shipments, first made in formal complaint filed 4 years after delivery, is barred by §16(3)(c); special-docket application seeking authority to make reparation on ground of unreasonableness did not include claim of overcharges on those shipments, and no informal complaint was filed. Moreover, while issue of reasonableness ordinarily embraces applicability, the special-docket application referred solely to the rate east of Chicago, whereas the overcharged claim pertains to rates west of Chicago and is directed against carriers performing the transportation east of Chicago, none of which was named as defendant in special-docket application.—Wertheimer Cattle Co., Inc. v. Chicago, B. & Q. R. Co., 318 I.C.C. 167 (168).

Complaints

30. In general.—[Vols. 3, 7, 14, 18].—Even if formal complaint had been filed within 6 months after declination of informal complaint, it did not stop the running of the statute because it did not comply with Rules 17(b), 25(b), and 29 of the commission's Rules of Practice, which require signing and verification by an executive officer of complainant corporation and that formal complaints supply the data required of informal complaints by Rule 25(f); as that complaint was filed some 6 years after shipments moved, it follows that all shipments covered thereby are now barred.—Atlantic Coast Line R. Co. v. United States, 213 F. Supp. 199 (204, 205)*. [But see Thomson Phosphate Co. v. Atlantic Coast Line R. Co., 282 F. Supp. 698, aff'd 434 F. 2d 180.]

Complaint assailing rates on grain shipped on and between March 8, 1956 and Oct. 22, 1958 was filed on Sept. 22, 1959; complainant presented a list of numbers of claims for overcharges filed with defendants, showing date each claim was submitted and disallowed, but failed to identify shipments and delivery dates thereof. As no affirmative evidence is presented showing that the statute has been tolled, the commission's jurisdiction is limited to shipments delivered or tendered for delivery within the statutory period prior to filing of formal complaint provided by §16(3) and 1958 amendment thereof.—Farmers Union Grain Term. Assn. v. Canadian Natl. Rys., 315 I.C.C. 559 (560)*.

32. Definiteness.—[Vols. 3, 7, 9, 15, 17].—The particular shipments sought to be embraced in all of the informal complaints and the pending special docket cannot be determined with definiteness; the 12 proceedings listed by complainant appear to include some duplication of shipments; to extent allegations in the informal complaints and shipments covered thereby are not the same as those in the formal complaint, their consideration is barred.—Lakeland Hide & Leather Co. v. Atlantic Coast Line R., 316 I.C.C. 303 (304).

34. Informal complaints.—[Vols. 3, 7, 9, 11, 12, 15, 17, 18].—Informal complaint which sought reparation on shipments "during the past two years" and did not specify a single shipment by any identifying reference failed to satisfy requirements of Rule 25(b) of the commission's Rules of Practice; thus all shipments allegedly covered thereby are barred.—Atlantic Coast Line R. Co. v. United States, 213 F. Supp. 199 (202, 205)*. [But see Thomson Phosphate Co. v. Atlantic Coast Line R. Co., 282 F. Supp. 698, aff'd 434 F. 2d 180.]

Formal Complaints Based on Informal Proceedings

50. In general.—Vols. 3, 7, 9, 15, 18, 19].—Although payment of reparation to complainant pursuant to special docket order terminated informal complaint as provided by Rule 25(e) of the commission's Rules of Practice, complainant, 2 years later, requested reopening of the informal complaint by letter which contained no additional fact basis as required by Rule 25(f); the commission's perfunctory reopening of the informal complaint was therefore improper, and for that reason subsequently filed formal complaint was likewise barred.—Atlantic Coast Line R. Co. v. United States, 213 F. Supp. 199 (203, 205)*; effect of the commission's letter, stating that the

informal complaint was reopened "as originally filed," could at most be to reopen it only as to shipments prior to March 14, 1946, which is the way it was originally filed; and the commission failed to apply the language of its letter when it accepted formal complaint covering shipments in 1950 and prior years.—Id., pp. 203, 204. [But see Thomson Phosphate Co. v. Atlantic Coast Line R. Co., 282 F. Supp. 698, aff'd 434 F. 2d 180.]

52. Broadening informal complaints.—[Vols. 3, 7, 9, 13, 15-17].—Although overcharge claims and informal complaints tolled the statute as to applicability of assailed rates, they did not do so with respect to any other section of the act; thus, since formal complaints were filed more than 2 years after delivery of shipments, consideration of the allegation of unreasonableness is barred.—Sioux City Foundry & Boiler Co. v. Chicago, B. & Q.R. Co., 318 I.C.C. 13 (14).

54. Filing within six months after informal proceedings closed.—[Vols. 3, 7, 9, 11, 15, 17, 19].—As complainant submitted no additional facts with its request for a second reopening of its informal complaint (made 2 days after the commission's final declination thereof after first reopening) as required by Rule 25(f) of the commission's Rules of Practice, the second reopening and declination by the commission did not comply with Rule 25(f). Therefore, formal complaint covering shipments not embraced in the informal complaint as originally submitted (which was scope of first reopening), filed more than 6 months after the commission's first letter of declination, but within 6 months after its second such letter, was barred by §16(3)(b).—Atlantic Coast Line R. Co. v. United States, 213 F. Supp. 199 (203-4, 205, 206)*. [But see Thomson Phosphate Co. v. Atlantic Coast Line R. Co., 282 F. Supp. 698, aff'd 434 F. 2d 180.]

Claims for Damages Other Than Overcharges—Subparagraph (b)

80. Claims against carriers for damages other than overcharges, in general.—[Vols. 3, 7, 15-17, 19].—Section 16(3)(b) is jurisdictional and limits the commission's power to consider a complaint since it destroys the right as well as the remedy, it must be strictly construed, and it follows that Rule 25 of the commission's Rules of Practice must also be strictly construed. Payment of reparation to complainant in 1950 pursuant to special-docket order terminated informal complaint as provided in Rule 25(e), and formal complaint filed in 1956 covering shipments in 1950 and prior years was therefore barred by §16(3)(b) and the informal complaint did not stay the running of the 2-year limitation period.—Atlantic Coast Line R. Co. v. United States, 213 F. Supp. 199 (204-5)*; formal complaint was also barred by complainant's acceptance of further payment "in full" in 1955, which terminated and compromised whatever might then have been left of the informal complaint, and it could no longer stay the statute of limitations contained in §16(3)(b).—Id., p. 205. [But see Thomson Phosphate Co. v. Atlantic Coast Line R. Co., 282 F. Supp. 698, aff'd 434 F. 2d 180.]

In light of their legislative history, subparagraphs (b) and (d) of §16(3) have consistently been interpreted as providing that, regardless of whether undercharges are collected or action brought by carrier in 2 years or 3 years, shipper may file complaint for reparation on grounds of unreasonableness within 90 days after such charges are paid or action begun.—Foremost Food & Chemical Co. v. Alton & S. R., 318 I.C.C. 35 (38); where no court suit was filed by carrier within 3 years from date shipment was delivered, complainant has no liability for undercharges beyond that period.—Id., p. 38.

Accrual of Cause of Action—Subparagraph (e)

106. Time of accrual of cause of action, in general.—[Vols. 3, 7, 12].—Time periods fixed by §16 are jurisdictional and limit the commission's power to consider complaints thereunder; under §16(3)(b) a claim for recovery of damages not based on overcharges must be filed with the commission within 2 years from date the cause of action accrues upon delivery of tender thereof, and the 2-year period means 2 years from delivery to ultimate destination, not from delivery to consignee. In arguing that unloading of shipments determines the beginning of the limita-

tion period, complainants confuse provisions of §16 with carrier's duty under §1(3) and (4) to provide transportation services. While "transportation" in §1(3) includes delivery, transportation subject to regulation actually begins when the merchandise is placed in carrier's possession, and to constitute valid delivery it is essential that the car be surrendered physically or constructively to consignee at destination at a proper place and time—at industry's siding, public team track, or other agreed place. Under §16(3)(e), the cause of action on involved shipments accrued on dates they were delivered or tendered to consignees.—Plaswood Corp. v. Alton & S.R., 321 I.C.C. 434 (436-7).

Complaint assailing rate charged on Government shipments of crude rubber from port of New York to Pauline, Kans., did not put in issue shipments still in storage at Pauline under §22 transit arrangement, following decision in 166 F. 2d 98 that a carrier's right to sue on a transited shipment did not accrue until 1 year after actual delivery, when applicable rate became known and collectible; applicable rate on complainant's shipments remaining in storage cannot be determined until either complainant reships the rubber from Pauline or the transit privilege, which has been extended to 9 years, expires.—United States v. Atchison, T. & S.F. Ry. Co., 315 I.C.C. 259 (262).

Section 16. (4), (5).—[Unchanged. See vol. 9, p. 7739, vol. 11, p. 9293, vol. 15, p. 12120.]

Amendments, see footnotes, vol. 3, p. 2177; historical note, vol. 3, p. 2135; §16(5), vol. 3, p. 2178, vol. 12, p. 10324, vol. 14, p. 11533.

Notes of Decisions

Volume 3—p. 2177; Volume 7—p. 5645.
§16(5): Volume 3—p. 2178; Volume 7—p. 5646; Volume 17—p. 13454.

Section 16. (6)-(11).——[Unchanged. See vol. 9, 7740.]

Amendments, see footnotes, vol. 3, p. 2179; vol. 3, pp. 2182-2185; historical notes, vol. 3, pp. 2183, 2185, 2186.

Notes of Decisions

Volume 3—p. 2179; Volume 7—p. 5647; Volume 9—p. 7740; Volume 11—p. 9293; Volume 16—p. 12768.

§16(8): Vol. 3—p. 2183; §16(6): Vol. 18—p. 14216; Volume 19—p. 15408.

§16(6). 1. In general.—[Vols. 3, 7, 9, 16, 18].—Though plaintiff (who controls carrier to be acquired) urges that the commission, after first disapproving proposed acquisition, lacked power to change its decision or grant extention of time for consummation of the transaction when and as approved, especially over his protest that it should not honor acquiring carrier's application for hearing or relief unless joined in by him, he was not the applicant for §5 approval; acquiring carrier and its controlling stockholder were the applicants. Under the statute, the commission has great latitude respecting rehearing and timeliness; with proceedings pending before commission, district court, and State court, there was every reason why, for protection of plaintiff and all others, time for consummation should be extended until legal rights of parties to the original contract are judicially determined and the transaction either closed or abandoned. Plaintiff's appeal thus fails on its merits.—Walker v. United States, 208 F. Supp. 388 (394-5)*.

§16(6). 2. Necessity of notice to parties.—[Vol. 3].—See Oklahoma Corporation Commission v. United States, §13(4), n. 56.

Regulations of the Commission

32 FR 10794, July 22, 1967, Part 107a: Administrative Collection of Enforcement Claims, new Part 107a, adopting regulations published in 4 CFR Parts 101 trhrough 105, added, effective Aug. 1, 1967.

Section 16. (12) Proceedings to enforce orders other than for payment of money—[Unchanged. See vol. 11, p. 9294.]

Amendments, see footnotes, vol. 3, p. 2186, vol. 11, p. 9294; historical note, p. 2186.

Notes of Decisions

Volume 3—p. 9192; Volume 9—p. 7743; Volume 11—p. 9295; Volume 13—p. 11027: Volume 14—p. 11533; Volume 15—p. 12121; Volume 17—p. 13455; Volume 19—p. 15409.

10. Jurisdiction of Federal courts.—[Vols. 3, 14, 17].—In action to set aside the commission's order dismissing plaintiff's complaint before it, it is not a proper function of the reviewing court to probe mental processes of the decision-making agency; just as a judge cannot be subjected to such scrutiny, integrity of the administrative process must be equally respected. [Citing 304 US 1 and 313 US 409.] Review is upon the record made before the commission; to allow the commission's findings to be attacked or supported in court by new evidence would substitute the court for the administrative tribunal.—Walled Lake Door Co. v. United States, 31 F.R.D. 258 (260).

12. Capacity of commission to sue.—[Vol. 3].—The Attorney General has standing to bring suits to enjoin enforcement of State passenger segregation statutes, to restrain and remove unconstitutional interference with and burden upon interstate commerce; insofar as the actions involve violations of part I and the commission's order in 297 ICC 335 involving rail terminals, either the commission or the Attorney General may maintain the actions under provisions of §16(12).—United States v. Lassiter, 203 F. Supp. 20 (24).

See also United States v. City of Jackson, Miss., n. 16, below.

16. Parties defendant.—[Vols. 3, 13].—Interstate Commerce Act, as amended by the Elkins Act, has behind it the full force of the Commerce Clause giving the statute the broadest possible sweep of Congressional power. The United States has standing, with and without statutory authorization, to bring action against city, city officials, and interstate carriers seeking injunctive relief against racial segregation in passenger terminals in the city. Considering provisions of §§16(12) and 222(b), the Elkins Act, and 28 USC §2322, there is no question as to the Government's and the commission's standing to sue defendant carriers and, by implication, those statutes provide a basis for instant action against noncarrier defendants.—United States v. City of Jackson, Miss., 318 F. 2d 1 (8-10)*.

Statutory power to enforce substantive provisions of the law must carry with it the power to make such enforcement effective; in instant case, enforcement can be made effective only if relief is granted against noncarrier defendants who are causing the carriers to violate the statutes; and, there need be no community of interest between carriers and noncarriers sought to be enjoined. District court's failure to issue injunction against carriers and noncarriers constituted an abuse of judicial discretion; reversed and remanded with instructions that injunction sought be issued.—Id., pp. 10, 17.

42. Order of commission.—[Vols. 3, 9, 14, 17].—In actions involving minimum rental and sale prices for facilities at railroad's food terminal, the order of the commission, which required the railroad to cease and desist from providing space and facilities in the terminal to shippers and receivers of freight at less than a fair rental therefor, was not applied retrospectively. The court considered the situation as it existed on the effective date of the commission's order.—Birmingham Food Terminal, Inc. v. Southern Ry. Co., 205 F. Supp. 640 (642)*.

44. Order of court.—[Vol. 3].—While the court recognizes the merit of railroad's contention that tenants of its food terminal should be compelled to pay the difference between the rent each actually paid and that which the court finds that the railroad is compelled to charge and collect under the commission's order in 308 ICC 609, under the circumstances, and in the exercise of the court's discretion, such tenants are required to pay, and the railroad to collect, the new rents from first of the month in which the judicial decision was made rather than from effective date of the commission's order.—Birmingham Food Terminal, Inc. v. Southern Ry. Co., 205 F. Supp. 640 (645)*.

Section 16. (13) Copies of schedules, tariffs, contracts, etc., kept as public records; evidence.—[Unchanged. See vol. 9, p. 7744.]

Amendments, see footnotes, vol. 3, p. 2202; historical note, p. 2186.

Notes of Decisions

Volume 3—p. 2202; Volume 16—p. 12769; Volume 17—p. 13455.

10. Production of record by commission.—[Vols. 16, 17].—Plaintiff's motion, in action to set aside the commission's order dismissing its complaint against railroads, for an order requiring the commission to produce certain documents is denied and the commission's objections to interrogatories concerning those documents is sustained. Documents in issue, all of which are internal memoranda, staff recommendations, and instruments of similar nature, are privileged because they are an integral part of the decision-making machinery of an administrative agency; just as memoranda between a judge and his clerk are privileged, privilege of considered documents arises not from their content but from their nature, i.e., internal working papers of the commission. In any event, those documents are irrelevant, since in reviewing an administrative order the court must base its decision solely on evidence in the record.—Walled Lake Door Co. v. United States, 31 F. R. D. 258 (259-60).

Section 17. Commission procedure; delegation of duties; rehearings—(1) Divisions of commission; organization; composition.—[Unchanged. See vol. 11, p. 9295.]

Amendments, see footnotes, vol. 3, p. 2213, vol. 11, p. 9295-9296; historical notes, vol. 3, p. 2213.

Section 17. (2) Reference of matters to divisions, individual commissioners, or boards.—[Unchanged. See vol. 11, p. 9296.]

Amendments, see footnotes, vol. 11, p. 9296; historical notes, vol. 3, p. 2213, vol. 11, p. 2927, vol. 15, p. 12121, vol. 16, p. 12769, vol. 17, p. 13456, vol. 19, p. 15410.

Historical Note

It is recommended that §17(2) be amended so as to authorize the commission to delegate to qualified individual employees, including transportation economists and specialists, those matters which have not involved taking of testimony at a public hearing or submission of evidence by opposing parties in the form of affidavits.—Annual Report, 1963, p. 13; renewed, Annual Report, 1964, p. 65-6.

Notes of Decisions

Volume 18—p. 14216; Volume 19—p. 15410.

1. In general.—[Vols. 18, 19].—The contemporaneously enacted paragraphs of §17 should be construed in pari materia.—Malone Freight Lines, Inc. v. United States, 204 F. Supp. 745 (748)*.

See also Hart v. I.C.C., §5(2), n. 110 *Certificate under §207.*

Regulations of the Commission

27 FR 3830, Apr. 20, 1962: Assignment of Work, Business and Functions, item 11(c) of the Organization Minutes relative to Operating Rights Review Board, amended, effective Apr. 21, 1962.

27 FR 9997, Oct. 11, 1962: Assignment of Work, Business and Functions, item 7.4(a) of the Organization Minutes relative to Temporary Authorities Board, amended, effective day after date of order.

28 FR 198, Jan. 8, 1963: Operating Rights Review Board, specification of types of cases in which the board may make determinations, effective on date of order.

28 FR 896, Jan. 30, 1963: Assignment of Work, Business and Functions, items 4.4(p) and 7.5(a) of the Organization Minutes amended, effective Jan. 30, 1963.

28 FR 7693, July 27, 1963: Central and Field Organization (27 FR 2424), under section 3 Bureau Organization; item (c)(1) revised, new item (c)(4) added, item (d) amended, and item (k) revised, effective on date of order.

28 FR 8013, Aug. 6, 1963: Assignment of Work, Business, and Functions, item 6.2 (Chairman of the Commission) is amended by adding paragraph (e), effective Aug. 12, 1963.

28 FR 8185, Aug. 8, 1963: Assignment of Work, Business, and Functions, items 4.2(j) and (w) and item 7.11(b)(1) of the Organization Minutes amended, effective on date of order.

29 FR 3027, March 5, 1964: Assignment of Work, Business and Functions; Assignments to Boards, item 7.11(c) Operating Rights Boards, amended, and Item 8.4, under heading Rehearings and Further Proceedings, amended. Also, Appendix C is revised, all effective on date of order.

29 FR 3683, Mar. 24, 1964: Description of the Central and Field Organization, revised current description dated Jan. 1, 1964.

29 FR 4935, April 8, 1964: Assignment of Work, Business, and Functions, Item 2.4 of the Organization Minutes, under the heading Divisions of the Commission, amended, effective on date of order.

29 FR 11401, Aug. 6, 1964: Organization; Assignment to Boards, Item 7.11(a)(1) amended, effective on date of order.

29 FR 12331, Aug. 27, 1964: Description of the Central and Field Organization (29 FR 3683), miscellaneous amendments.

29 FR 12503, Sept. 1, 1964: Organization Minutes, under the heading Assignment of Duties to Individual Commissioners, Item 6.3(f) is revised.

29 FR 14517, Oct. 22, 1964: Organization Minutes, Item 6.3(m) amended, Item 6.5(c) added, and Item 6.6 renumbered as 6.7 and new Item 6.6 added, effective on date of order.

29 FR 16846, Dec. 8, 1964: Organization Minutes, under the heading Assignment of Duties to Individual Commissioners, item 6.2(c) is amended.

29 FR 17020, Dec. 11, 1964: Organization Minutes, under the heading Terms, Duties, and Responsibilities of Chairman, Vice Chairman, and Senior Commissioner present, Item 3.8 amended; and under the heading Committees of the Commission, Item 5.2(a), (b), and (c) deleted.

30 FR 2628, Feb. 27, 1965: Finance Review Board, specification of types of cases in which the board may make determinations, effective March 1, 1965.

30 FR 5723, Apr. 22, 1965: Organization Minutes, Item 6.3 Vice Chairman of the Comission, paragraphs (a), (b), (c), (d), and (k) are amended and, under the heading Assignment to Boards, a new Item 7.13 Accounting and Valuation Board is added.

30 FR 8246, June 26, 1965: Organization Minutes, Item 6.3 Vice Chairman of the Commission, new paragraph (n) added; and Item 9.1 amended, effective on date of order.

30 FR 9788, Aug. 5, 1965: Organization Minutes, miscellaneous amendments under (a) heading "Assignment of Duties to Divisions" and (b) heading "Assignments to Boards" so as to reflect changes in assignment of work resulting from the commission's reorganization of its headquarters staff, effective on date of order.

30 FR 10069, Aug. 12, 1965: Central and Field Organization, revised current description dated July 31, 1965.

30 FR 11013, Aug. 25, 1965: Central and Field Organization (30 FR 10069), Bureau of Enforcement, §(i) revised.

30 FR 11189, Aug. 31, 1965: Organization of Divisions and Boards and Assignment of Work, Business and Functions, revised, effective on date of order.

30 FR 12559, Oct. 1, 1965: Organization Minutes, paragraph (b) of Item 6.3 and Item 7.13 of Organization Minutes (30 FR 11189) amended, effective on date of order.

31 FR 242, Jan. 7, 1966: Organization Minutes, paragraph (aa) of Item 4.4, and paragraph (c) of Item 7.7 of Organization Minutes, as amended, (30 FR 11189 and 12559) further amended to reflect changes in assignment of work resulting from Presidential Reorganization Plan No. 3 of 1965, effective on date of Order.

31 FR 9248, July 6, 1966, Organization Minutes, paragraph 1 of item 4.2(t) and paragraph 2 of item 74(a) relating to Organization of Division and Boards and Assignment of Work (30 FR 11189, 12559, 13302, 31 FR 242, 2762) amended as set forth, effective on date of order.

31 FR 9529, July 13, 1966, Organization Minutes, Assignment of Duties; Item 4.2(t) and Item 7.4(a) amended as set forth, in connection with initial decision-making responsibility of Temporary Authorities Board in applications for temporary authority by water carriers and, also, those received as a result of a strike; effective on date of order.

31 FR 12693, Sept. 28, 1966, Organization Minutes, Assignment of Duties; Item 3.12 is redesignated as Item 3.13 and Item 3.12 is added reading as set forth, effective on date of order.

31 FR 13099, Oct. 8, 1966, Organization of Divisions and Boards and Assignment of Work, Business and Functions, paragraphs 0 and t of item 4.2 amended; and item 7.4(c) amended, effective on date of order.

32 FR 431, Jan. 14, 1967, Organization of Division and Boards and Assignment of Work: In connection with giving Review Boards jurisdiction to approve withdrawal of exceptions, to enter effective orders, and to stay recommended orders and vacate such stay, Organization Minutes (30 FR 11189, 12559, and 13302; and 31 FR 242, 4762, 9529, 12693, 13099, and 14025), are further amended as follows: Item 7.6(d), Item 7.11(c), and Item 7.12, revised.

32 FR 7105, May 10, 1967, Organization: Operations Boards, Item 7.7 of Organization Minutes is vacated and reserved, and Item 7.8 of Organization Minutes is amended, to reflect transfer of the commission's safety functions to Department of Transportation and the reassignment of certain remaining functions.

32 FR 8000, June 2, 1967: Organization of Divisions and Boards and Assignment of Work, Organization Minutes, Items 4.2, 4.3, 4.4, 6.3, 8.4 and 8.6 amended, and Items 6.5(c) and 6.6 deleted, to reflect transfer of safety functions to Dept. of Transportation and recent amendments to Items 7.7 and 7.8.

32 FR 8784, June 20, 1967: Organization Minutes, with a view to conferring general jurisdiction on all Review Boards, Items 7.6, 7.11, 7.12, 8.4, 8.5, and 8.6 are further amended.

32 FR 8690, June 16, 1967: ICC Central and Field Organization [supplemental to ICC Organization Minutes], revised current description published.

32 FR 10127, July 8, 1967: Organization Minutes, miscellaneous further amendments to reflect the new organization of the Office of Proceedings.

32 FR 10955, July 26, 1967: ICC Central and Field Organization (32 FR 8690), Items 2(d), 3(f), and 3(g) revised, effective on date of order.

32 FR 14627, Oct. 20, 1967: Organization Minutes (30 FR 11189), as amended, Item 6.4 is amended to indicate that appeals from hearing officers on requests for discovery will be disposed of by Chairman of respective division.

33 FR 4067, Feb. 20, 1968: Organization Minutes, as amended, Item 4.2(a) and Item 7.12 further amended by order of Feb. 13, 1968.

33 FR 5780, April 13, 1968: Central and Field Organization (32 FR 8690, as amended), Item 1(a) amended to show current addresses of certain area offices, deletion of listings for three area offices, and addition, in Region 1, of two area offices, effective on date of order.

33 FR 7795, May 28, 1968: Organization Minutes, as amended, present Item 7.3 is redesignated as Item 7.3(a) and new paragraph (b) is added thereto; Item 7.6 is further amended by adding thereto paragraph (d) as set forth, both amendments by order of April 3, 1968.

Section 17. (3) Conduct of proceedings; seal, oaths; quorum; rules.— [Unchanged. See vol. 11, p. 9297.]

Amendments, see footnotes, vol. 3, p. 2208, vol. 11, pp. 9297-9298; historical notes, vol. 3, p. 2208, vol. 11, p. 9298, vol. 15, p. 12121.

Notes of Decisions

Volume 7—p. 5657; Volume 12—p. 10324; Volume 14—p. 11534; Volume 15—p. 12122; Volume 16—p. 12770; Volume 17—p. 13456; Volume 18—p. 14217; Volume 19—p. 15411.

1. Authority of commission to control procedure before it.—[Vols. 3, 7, 9, 14-16, 19].— Under broad delegation of procedural rule-making authority, which authorizes the [Federal Communications] commission to conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice, that com-

mission was empowered to promulgate a rule of procedure (in investigation proceeding which it initiated) requiring public proceedings except where proponents of a request for *in camera* treatment demonstrated a need therefor. And, that commission did not abuse its discretion in applying such procedural rule and rejecting respondents' request for confidential treatment of material in documents required to be produced by subpena duces tecum issued by presiding officer in the investigation proceeding.—FCC v. Schrieber, 381 U.S. 279 (289, 294, 298-90). [Not arising hereunder.]

See also Soo Line R. Co. v. United States, §5(2), n. 111, and Chicago, B. & Q. R. Co. v. New York, S. & W. R. Co., APA, 5 USC *Examiners*.

1a.—To correct errors.—[Vol. 18].—See Oklahoma Corporation Commission v. United States, §13(4), n. 56.

Although motions to strike in whole or in part applicants' exceptions to joint board's recommendations in their Alaska "grandfather" applications are in certain respects well placed, the pleadings give impression of a personal vendetta between counsel, reflection of which cannot be tolerated in proceedings before the commission. Attention of those responsible is called to canons 25, 29, and 38 of the Code of Ethics for Practitioners, and they are admonished to observe the same under penalty of disciplinary action.—Al Renk & Sons, Inc.—Alaska "Grandfather" Application, 89 M.C.C. 91 (93-4).

6. Objectionable matter.—[Vols. 15-19].—While applicant may have been somewhat strenuous in its contentions, language of its exceptions is not objectionable; motion to strike denied.—Porter Transp. Co. Extension, 91 M.C.C. 178 (179).

Regulations of the Commission

27 FR 7640, Aug. 2, 1962, Part 6: Fees for copying, certification, services, etc., paragraph (h) of §6.1 amended, effective on date of order.

28 FR 7397, July 19, 1963, Part 6: Fees for copying, certification, services, etc., paragraph (h) of §6.1 amended, effective on date of order.

29 FR 8418, July 3, 1964, Part 6: Fees for copying, certification, services, etc., paragraph (h) of §6.1 amended, and the Commission's policy regarding reproduction of copies of transcript from any source other than the official reporter stated, effective on date of order.

30 FR 8968, July 16, 1965, Part 6: Fees for copying, certification, services, etc., §6.1 Charges, paragraph (h) amended, effective on date of order

Section 17. (4) Powers of divisions, boards, etc.; effect of orders, etc—[Unchanged. See vol. 11, p. 9298.]

Amendments, see footnotes, vol. 3, p. 2218, vol. 11, pp. 9298-9299; historical note, vol. 3, p. 2213.

Notes of Decisions

Volume 11—p. 9299; Volume 12—p. 10325; Volume 14—p. 11535; Volume 15—p. 12123; Volume 17—p. 13457; Volume 18—p. 14218.

Section 17. (5) Findings, etc., of commissioner or board; accompanying statement and recommended order; copies to parties; exceptions; recommended order as commission's order.—[Unchanged. See vol. 11, p. 9299, vol. 19, p. 15414.]

Amendment, see footnote, vol. 11, p. 9299; historical note, p. 9300.

Notes of Decisions

Volume 11—p. 9300; Volume 12—p. 10325; Volume 13—p. 11028; Volume 14—p. 11535; Volume 15—p. 12123; Volume 16—p. 12771; Volume 17—p. 13457; Volume 18—p. 14218; Volume 19—p. 15414.

10. Reopening on commission's own motion.—[Vols. 11-15, 17].—There is no question that the commission is empowered to reopen and reconsider determinations previously made; but though no specific court decisions are found on the commission's authority to reopen and reconsider its order after it has become subject of a court proceeding, in cases cited the court's approval of stay of its proceedings pending commission reconsideration was apparently obtained prior to the commission's order reopening the proceedings before it. However, the commission's reopening of proceedings while they are subject of judicial review, without prior request of or notice to the court, is insufficient reason of itself for the court's holding the commission's subsequent order void and of no effect. Even though such action by the commission may be offensive to the tradition and rules whereby lower courts are unable to act in their matters once they are pending on appeal, and courts may expect the courtesy of prior notice from the commission, the reviewing court is reluctant to hold that they may demand it.—Atchison, T. & S.F. Ry. Co. v. United States, 231 F. Supp. 422 (427)*.

Nevertheless, this practice of the commission contravenes the basic constitutional principles of separation of functions and due process of law. The act of defending in court an agency's judicial determination is executive, not judicial, and it is arbitrary and unfair when, to perfect that defense, an ex parte reconsideration of a judicial determination is made. It is also arbitrary and unfair, and a denial of due process, when a judicial branch of a regulatory agency, without notice to the appellant and an opportunity to be heard, may change and adjust its judicial position to facilitate a victory by its executive branch for its original judicial determination; such a situation might well demand of the court that it hold the report and order on reconsideration void and of no effect.—Id., p. 428.

Such action might be justified in instant case had plaintiffs not agreed by stipulation that further proceedings in the district court be stayed pending the commission's reconsideration of its original order. Although that agreement postdates the commission's ex parte action, plaintiffs are estopped from complaining that such action was arbitrary or unfair, and also from complaining that its "amplification" of its original order under guise of reconsideration was arbitrary and a denial of due process. Moreover, due consideration of all facets of the matter is convincing that no prejudice to plaintiffs has resulted from the manner in which the commission handled its "reconsideration," and that the drastic action which might be taken in a more appropriate case is not justified.—Id., pp. 428, 429.

See also Central Pac. Ry. Co. Control, §5(2), n. 45 *Conditions imposed*, and §5(9), n. 10.

15. Recommended order; effect; stay.—[Vols. 12-16, 18, 19].—There is a distinction between the time when an order of the commission becomes effective and the time when it is administratively final. Railroad's filing of a petition, requesting further hearing and an extension of time for filing exceptions, within 30 days from date of recommended order disapproving its proposed discontinuance of interlocking stayed the effective date of the recommended order. Therefore, the commission was not bound by the recommended order, although the petition was not disposed of within 30 days from its date, since there is no commission rule or any law that requires disposition of a petition for rehearing within 30 days of service of a recommended order. And, in postponing the time for filing exceptions, the commission acted within its discretionary statutory power.—Legge v. United States, 244 F. Supp. 878 (880-1)*.

The most cursory examination of examiner's report in consolidated application proceedings reveals the exact basis and reasons for the examiner's recommendations; the report amply reviews the evidence, sets forth detailed findings of fact, and in all other respects complies with requirements of Administrative Procedure Act. Even if the report could have discussed the evidence in greater detail or expanded the findings of fact, this is not required where the report contains findings which apprise the court of the essential basis of the commission's decision. The examiner having complied with his duty under §8(b) of APA to include a statement in his report, it was permissible for the commission

to affirm and adopt the examiner's report as it did.—North American Van Lines, Inc. v. United States, 217 F. Supp. 837 (842)*.

Though petitions of two applicants (in consolidated proceeding) seeking reopening, and leave to file exceptions to the examiner's recommended order, were filed after the recommended order had become effective by operation of law, issues raised by those petitiona are related to and should be disposed of concurrently with those in the other embraced proceedings; therefore, applicants' late-filed exceptions are accepted for filing as petitions for reconsideration.—Mollerup Van Lines, 95 M.C.C. 338 (339)*.

Practitioner who participated in both initial and further hearings on control application as an interested party did not file exceptions to examiner's report and recommended order after the prior hearing and did not seek reconsideration of the prior report; as his subsequent petition for leave to file exceptions does not set forth reasons justifying his failure to timely file such exceptions, it is denied and the exceptions rejected.—Roush—Control—Southern California Freight Lines, 90 M.C.C. 459 (460)*.

20. Employee boards, function of.—Since, by virtue of the 1961 amendment to §17(5), the commission has statutory power to authorize reconsideration of an examiner's recommended report and order by an employee board designated for that purpose, the court cannot agree with contention of plaintiffs (protestants in motor carrier application proceeding) that the commission abrogated its adjudicatory responsibility and delegated its decision-making process to its Operating Rights Review Board when it referred the applicant's exceptions to examiner's proposed report and order to that board for review.—Trailways of New England, Inc. v. United States, 235 F. Supp. 509 (511-12)*.

And inasmuch as neither plaintiffs nor the commission viewed the board's determinations as administratively final, the commission neither abdicated its decisional function to the board nor departed from representations it made to Congress in support of the 1961 amendment, i.e., that opportunity would be afforded for review of an employee board's action by the commission or an appellate division thereof. Indeed, Division 1 of the commission, convened as an appellate tribunal, reviewed the board's determinations and sustained them as consonant with the evidence and the law; thus, it was through the division, rather than the board, that the commission finally spoke. An opportunity was, therefore, afforded for a review of the employee board's action.—Id., p. 512.

Plaintiff's doubt of the commission's power to exercise §5 jurisdiction through its Finance Review Board is without merit. In disapproving proposed purchase transaction, the commission approved the board's findings and conclusions, that the transaction had not been shown to be consistent with public interest, by adopting them; clearly such procedure is permissible under §17(5) as amended Sept. 14, 1961.—Tank Lines, Inc. v. United States, 236 F. Supp. 354 (356)*.

Section 17. (6) Rehearing, reargument, or reconsideration of decisions, orders, and requirements.— [Unchanged. See vol. 11, p. 9301.]

Amendments, see footnotes, vol. 11, p. 9301; historical notes, vol. 3, p. 2204, vol. 9, p. 7745, vol. 11, p. 9302.

Notes of Decisions

Volume 11—p. 9302; Volume 12—p. 10326; Volume 13—p. 11029; Volume 14—p. 11536; Volume 15—p. 12124; Volume 16—p. 12771; Volume 17—p.13458; Volume 18—p. 14219; Volume 19—p. 15414.

10. Rehearing; reconsideration.—[Vols. 11-19.—On appeal from judgment of three-judge district court, limited to validity of the form of the judgment, which set aside the commission's order dismissing appellee's complaint alleging undue preference and prejudice of assailed rail rates, that portion of the lower court's judgment which instructs the commis-

sion to grant relief to appellee, and precludes it from reopening the remanded proceeding for receipt of additional evidence relevant to question of whether the rates in issue are in fact unreasonably preferential in violation of §3(1), is an improper limitation on the commission's duty to reconsider the entire case. Accordingly, the judgment is vacated and proceedings remanded to the district court with instructions to remand to the commission for further proceedings consistent with that court's opinion.—United States v. Saskatchewan Minerals, 385 U.S. 94 (95)*.

Although §1(15) authorizes the commission to dispense with a preliminary hearing in connection with issuance of emergency car service orders, the act nevertheless permits an affected carrier to file a petition for "rehearing, reargument or reconsideration" in advance of effective date of the order, and this automatically stays implementation of the order until the commission has ruled on the petition. Thus, when railroad failed to avail itself of that option and did not contest validity of Service Order No. 947 until after commencement of suit against it for civil penalties for alleged violations thereof, the commission was afforded no opportunity to reconsider its order in the light of affected carrier's specific criticism; such opportunity to reconsider and to determine whether railroad objections are of sufficient substance to overcome need for immediate action or call for revision, is even more valuable because the §1(15) order was issued without notice and hearing.—United States v. Southern Ry. Co., 380 F. 2d 49 (51-2, 54-5)*.

That the commission has no power to review an appellate division decision, even if the proceeding involves an issue of general transportation importance, is made clear by §17; provisions of §17(5), (6), (7) and (9) show clearly that when Congress used "division" it did not mean to include an "appellate division," and that when it meant to refer to an "appellate division" it used that precise term. Moreover, legislative history of §17 confirms the fact that Congress never intended that the commission should review a matter once it was decided by an appellate division to which it had been referred. The commission has the choice in the first instance whether it or an appellate division will act on an application for reconsideration; but once the matter is referred to an appellate division and it has acted, under the statute that is the end of the matter so far as the commission is concerned. Any review of the decision thereafter can only be had by a court.—Transamerican Freight Lines, Inc. v. United States, 258 F. Supp. 910 (913-5, 916-7, 919)*.

Rule 101(a)(4) of the commission's Rules of Practice, seemingly recognizing administrative finality of an appellate division decision, expressly states that a petition requesting a finding that a question of general transportation importance is involved shall not be considered an application for reconsideration; nevertheless, it also states that such a finding may be made by the commission "on its own motion." Under Rule 101(a)(4), once the commission determines that an issue of general transportation importance is involved and decides to review an appellate decision, all semblance of its finality is lost, and the purpose of the statute is defeated; therefore, since the rule is inconsistent with the statute, it can be given no effect.—Id., p. 918.

In action to set aside the commission's order denying plaintiffs' petition for reconsideration of ex parte approval of transfer of motor carrier operating rights under §212 (b) and the transfer rules, and denying their request for oral hearing, nothing of record shows an abuse of the commission's discretion; such petitions and requests are addressed to the sound discretion of the commission and its denial thereof may be reversed only on a clear showing of abuse of discretion. Plaintiffs' explanation as to why evidence they sought to present could not be submitted in affidavit form does not justify vacating the commission's order; and mere allegations in a petition unsupported by evidence are insufficient to create need for a hearing of any kind; sustained.—A. L. Root Transportation, Inc. v. United States, 280 F. Supp. 152 (156-7)*.

While the commission's order denying plaintiff's (protestant) petition for reconsideration of decision granting authority to defendant motor carrier did not specifically refer to second complaint (filed after recommended report and order was filed), although plaintiff asked that findings therein of subsequent vio-

lations be considered with particular reference to applicant's fitness to receive a certificate, it is apparent from the whole record that the commission was conversant with the second complaint and recommended findings therein, and that its decision was to dispose of the application and its collaterals finally. On the petition for reconsideration the commission had all of plaintiff's arguments and the full record of the case before it, and the detailed Division 1 opinion adequately covered the subsequent violations; while second complaint might have been mentioned affirmatively, it was substantially covered by the scope of the decision. Grounds advanced for reconsideration did not call for reversal of Division 1; complaint dismissed.—Public Service Coordinated Transport v. United States, 247 F. Supp. 985 (986-8)*.

Argument that it was unreasonable for the commission to grant a rehearing of its original decision in complaint proceedings after the long interval that elapsed between the original decision and reopening of the proceedings is refuted by provision of §17(6) that any party, subject to such limitations as the commission may establish, may "at any time" apply for rehearing or reconsideration of the same or any matter determined in a decision or order. The words "any time" mean "any" time, and not "within a reasonable time." Obviously, Congress intended to confer on the commission the flexible power to change its decisions after rehearing at any time.—United States v. I.C.C., 221 F. Supp. 584 (589)*.

In addition to the continuing jurisdiction to modify or rescind its prior orders granted to the commission by Congress and approved by the courts, in instant case the commission actually exercised such authority by specifically delaying the effective date of its orders (including the order under review, which granted control authority previously denied), within which period the various parties filed the various applications for reconsideration which ultimately brought the litigation before the court. The commission did not abuse its discretion in reconsidering the merits of the controversy in light of exception made in an earlier case to its policy against splitoff of interstate from corresponding intrastate rights; an application by instant defendants as plaintiffs, prior to their having called such exception to the commission's attention, might well have resulted in the court's dismissal of their petition for not having exhausted the administrative remedies before the commission, or in a remand to it for the purpose of considering the exception.—Alamo Exp., Inc. v. United States, 239 F. Supp. 694 (698)*.

The fact that the commission reconsidered the control application in light of that exception without a three-judge court having said it should do so does not make its action in so doing arbitrary. Finding no abuse of discretion in the commission's applying a recognized exception which had not earlier been called to its attention, the court has no reason to reverse or remand; on the contrary, self-correction of its own errors through the use of judicial inventiveness and imaginative resourcefulness should be the aid of a well-run administrative agency. The order sustained. —Id., p. 698.

Administrative rehearings are not matters of right but of pleas to discretion; and the discretion to be invoked is that of the body making the order, not that of the reviewing body. The granting or denial of petitions for rehearings are matters for the discretion of the commission.—Legge v. United States, 244 F. Supp. 878 (881)*; and commission determination with regard thereto will not be disturbed except on a clear showing of abuse of discretion. As there is no showing of abuse of discretion, denial of plaintiffs' motions for rehearing, or for reconsideration, was not in error.—Tank Lines, Inc. v. United States, 236 F. Supp. 354 (356)*; Oklahoma Corporation Commission v. United States, 235 F. Supp. 803 (807)*; Melman v. United States, 231 F. Supp. 503 (507)*; Black Ball Freight Service v. United States, 223 F. Supp. 191 (198-9)*; Atlantic Coast Line R. Co. v. United States, 209 F. Supp. 157 (160)*.

In accordance with the decision in 225 F. Supp. 973, plaintiffs' contention that the division which had decided the merits of the case, acting as an appellate division, could not properly entertain and pass on their petition for reconsideration of the report and order of that division, is not tenable.—Chief Freight Lines Co. v. United States, 230 F. Supp. 79 (81)*.

Commission order denying reconsideration

is not at variance with statutory mandates. The examiner's proposed report set forth his findings of fact in some details; the reviewing board expressly adopted his statement of facts and elaborated its conclusions; and appellate division of the commission, in turn, denied reconsideration on the ground that findings of the board were in accordance with the evidence and applicable. The Division was not bound to a choice of the examiner's contrary conclusions if those of the board were supported by the evidence; nor was it required to restate the board's report which clearly it adopted as its own; sustained.—Trailways of New England, Inc. v. United States, 235 F. Supp. 509 (512)*.

See also Deioma Trucking Co. v. United States, APA, 5 USC, *Reports*.

Congress, in recognition of the consistent holdings of the courts that rehearings before administrative bodies are addressed to their own discretion, in §17(6) invested the commission with authority to adopt rules regulating applications for rehearing; under that section the commission has power to make rules or orders confining the right to apply for rehearing, reargument, or reconsideration to proceedings involving issues of general transportation importance, where the order was entered by the commission or a division; but even though no issue of general transportation importance is involved, the right so to apply may not be thus confined where the matter was referred to an individual or a board under provisions of §17(2).—Malone Freight Lines, Inc. v. United States, 204 F. Supp. 745 (749, 754)*.

Analysis of paragraphs (1)-(9) of §17, construed in pari materia, is convincing that the commission did not exceed its statutory authority in amending Rule 101(a) of its Rules of Practice to limit administrative review, in proceedings not announcedly involving issues of general transportation importance, to determination, with administrative finality, by the same division which made the prior decision, acting in an appellate capacity.—Id., pp. 748-50.

Amendment of rule 1.101 of the Rules of Practice (so as to make final a division decision which has adopted a hearing examiner's decision unless a matter of general transportation importance is involved) while plaintiff's petition for modification and interpretation of its certificate was pending did not unlawfully deprive plaintiff of its right to file a petition for reconsideration by the entire commission, although hearing on the interpretation petition was held only one day after effective date of the amendment. The general rule is that amendments touching only procedure apply to pending actions; rule 1.101 is entirely procedural and therefore could properly be applied to all pending cases. Plaintiff has not shown a question of general transportation importance and therefore is not entitled to reconsideration by the entire commission.—Keystone Motor Exp., Inc. v. United States, 228 F. Supp. 793 (799-800)*.

Though plaintiff contends that the commission conducted application proceeding in a cursory manner by permitting the decision of two members of Division 1 to stand (one having dissented) without a rehearing by the entire commission, it does not assert that the commission's action was illegal or did not conform to its Rules of Practice. Under §17(6) the commission has specific authority to render division decisions final and, by its general rules, to restrict the right to file petitions for reconsideration of division decisions by the entire commission to cases involving "an issue of general transportation importance." Plaintiff's petition to have instant proceeding declared to involve such an issue was denied; the commission's action sustained.—Clark Transport Co. v. I.C.C., 233 F. Supp. 839 (842-3)*.

Since the commission had determined that railroad abandonment proceeding did not involve issues of general transportation importance, prior to appellate division's adoption without change of the hearing examiner's recommended report and order therein, appellants' contention that the commission's regulation (Rule 101 of the Rules of Practice) denying them a right to file a motion for a rehearing is unlawful because its power to take such steps under §17(6) does not extend to cases involving general transportation importance, and that theirs was such a case, is without merit.—State of Arizona v. United States, 220 F. Supp. 337 (342)*.

See also Davis & Randall, Inc. v. United States, APA, 5 USC, *Hearing.*

There is no merit in plaintiff's contention that consideration and disposition of his petition for reconsideration by the division, acting in an appellate capacity, which had determined that certain of his operations were for-hire transportation (for which operating authority is required) denied him due process of law. As the commission is a quasi-judicial administrative agency exercising judicial functions in its licensing and enforcement activities, reconsideration or review of its decision is not essential to due process provided due process was accorded in the original determination. Due process was accorded plaintiff in the proceedings in the first instance and, as there is no constitutional right to appeal to all or a majority of the commission, his claim of deprival of due process cannot be sustained.—Studna v. United States, 225 F. Supp. 973 (980-1)*.

Since the commission's order authorizing plaintiff's proposed stock ssue subject to the challenged condition was administratively final under Rule 1.101(a) of its Rules of Practice, the Secretary's refusal to file plaintiff's petition for reconsideration was proper under the commission's revised procedure limiting the right to apply for reconsideration.—Chicago, S.S. & S.B. R. v. United States, 221 F. Supp. 106 (110)*.

Except in a single instance distinguished by extraordinary circumstances, it has been consistently held that petitions for rehearings before administrative bodies are addressed to their own discretion. Administrative consideration of evidence always creates a gap between closing of the record and promulgation of the administrative decision, particularly where the issues are difficult, the evidence intricate, and consideration of the case deliberate and careful; it is therefore a rule almost of necessity that rehearings are matters, not of right, but of discretion, and that the discretion invoked is that of the body making the order, not a reviewing body (322 US 503); and only a showing of the clearest abuse of discretion could sustain an exception to that rule (327 US 515).—Suburban Transit Corp. v. United States, 215 F. Supp. 717 (721-2, 725, Note 9)*.

That the commission, in denying plaintiff's application and granting authority sought to a different applicant, acted on evidence 2-1/2 years old, and that its decision was the third in a row of different decisions on same record, do not in themselves give rise to any right to reopening of the record for rehearing. It was clearly within the commission's competence to weight plaintiff's allegations as to changes in conditions and circumstances since close of hearing against matters alleged in answer filed by the successful applicant, and examination of the petition and answer discloses no reason for finding that the commission, in denying plaintiff's request for rehearing, ruled arbitrarily and capriciously. Viewed individually or as a whole, the circumstances alleged by plaintiff, including character of its operations under temporary authority granted after the record was closed, are not of a level of importance that would deprive the commission of exercise of its discretion.—Id., pp. 725-6.

Moreover, although plaintiff, at the time it successfully sought review by the commission of the decision of Division 1, had been operating under the temporary authority for nearly 6 months and had ample opportunity to accumulate the evidence now proffered, it did not then petition for reopening but only for reconsideration and oral argument. Carriers should not be allowed to reopen the case for introduction of evidence available for production months before the commission acted; in the circumstances, plaintiff cannot now complain of the commission's exercise of discretion in denying its petition; the commission's orders sustained.—Id., p. 726.

Petitions for rehearings before administrative agencies are addressed to the sound discretion of the agencies and only a showing of the clearest abuse of discretion can suffice to overturn their denial. The commission's Rule of Practice 1.101(b) provides that a petition seeking to introduce evidence must show that the evidence is not cumulative and that there is reason why it was not previously introduced; thus there is a substantial burden on petitioner. The courts have held that summary denial of such a petition in the words "no sufficient cause" is adequate and that further findings and conclusions are unnecessary if it is clear that the commission gave due consid-

eration to the petition; the commission's order denying plaintiff's initial petition for further hearing to present additional evidence shows that it did so.—Colorado-Arizona-California Exp., Inc. v. United States, 224 F. Supp. 894 (901-2)*.

The evidence plaintiff now seeks to introduce on rehearing is substantially the same as was rejected by that order; it is not explained why the proffered evidence was not available at the hearing, and no showing is made to support allegation that plaintiff was prejudiced by combining the hearing with hearings on applications of two larger carriers. Inasmuch as the primary "changed circumstance" relied on by plaintiff—cancellation of a competitive interline arrangement—apparently occurred before the hearing, it cannot be said that the circumstances have taken any unexpected turn. Nor does evidence of plaintiff's operations under temporary authority or of grants of temporary authority to other carriers have any logical bearing on issue of whether plaintiff sustained its burden of showing public convenience and necessity at the hearing. It is clear that the commission gave consideration to the substance of plaintiff's petition, and its denial thereof was not an abuse of discretion.—Id., p.902.

Petitions for rehearing or reconsideration are addressed to the sound discretion of the commission, and denial thereof is not open to question unless a clear abuse of such discretion is shown. Summary denial of petition for rehearing in application proceeding, for the purpose of showing certain changes in the transportation situation, in the words "no sufficient cause" is clearly acceptable. It is not within the court's power to determine whether a different result might have been reached had the proffered evidence been submitted for rehearing.—Watkins Motor Lines, Inc. v. United States, 243 F. Supp. 436 (443)*; a claim of new evidence will not justify a holding that denial of rehearing was an abuse of the commission's discretion.—Campus Travel, Inc. v. United States, 224 F. Supp. 146 (149)*; similarly, in the absence of "good cause shown," denial of plaintiff's application to reopen its "grandfather" proceeding (closed in 1943), and the commission's refusal to waive application of rules 1.101(e) and 1.102 of its Rules of Practice did not constitute an abuse of discretion. Commission order sustained.—Cardinale Trucking Co. v. United States, 232 F. Supp. 339 (347-8)*.

The commission's denial of plaintiff's petition for further hearing on the issue of interpretation of its certificate was not an abuse of discretion; plaintiff presented no satisfactory explanation for its failure to adduce "additional evidence" of technological nature at the original hearing. Moreover, it is not probable that additional technological evidence would have affected the commission's ultimate decision.—U. S. A. C. Transport, Inc. v. United States, 235 F. Supp. 689 (692, 694)*.

In action to set aside decision and order of the commission holding that motor carrier authority sought was within exemption of §203(b1), since plaintiffs' late-filed petition for (1) leave to intervene, (2) waiver of rule 101(e) of the Rules of Practice, and (3) reopening and reconsideration showed good cause and was based on averments reasonably pertinent to issues therein, and since plaintiffs were diligent in acting when they acquired knowledge of the order, the commission abused its discretion when it denied their petition. Judgemnt for plaintiffs.—National Bus Traffic Ass'n. v. United States, 212 F. Supp. 659 (661-2)*.

See also Tidewater Express Lines, Inc. v. United States, §203(b), n. 60.

Though abandonment and trackage rights applications were filed separately, they involved interrelated matters and were decided by Finance Board on a consolidated record; thus, railway labor association, as intervener in the trackage rights proceeding but not in the abandonment proceeding, was qualified as a party to petition for reconsideration of the board's order authorizing abandonment without imposition of employee-protective conditions.—Seaborad Air Line R. Co. Trackage Rights, 312 I.C.C. 797 (799)*.

In seeking further hearing as alternative to reconsideration of its extension application, applicant proposed to introduce three classes of evidence pertaining to through-trailer operations between United States and Mexico, and attached copies of pertinent letters to Department of Commerce and from a Mexi-

can Government agency as appendixes to its petition. As the commission's order denying reconsideration and reopening the proceeding for further hearing indicated as reason therefor that the matters set forth in the appendixes merited consideration on their merits, and subsequent orders did not indicate that scope of the further hearing would be broadened to receive evidence on other matters, the examiner, under Rule 1.101(b) of Rules of Practice, correctly confined the receipt of evidence to the three grounds specified in applicant's petition.—Yellow Transfer Freight Lines, Inc., Extension, 94 M.C.C. 153 (158)*.

Request made during course of application proceeding, that it be designated one involving an issue of general transportation importance, denied as premature. Rule 1.101(a)(4) of Rules of Practice, which provides the only method of bringing such a request before the commission, authorizes filing of petition for such designation within 15 days from final decision of a division or appellate division, and specifically provides that petitions seeking this relief will not be entertained at any other stage of the proceeding.—M. D. Cressy Co., Inc., 91 M.C.C. 211 (214).

To warrant further hearing, petitioner must set forth specifically the new evidence to be produced, show that that evidence would likely produce a different result, and satisfactorily explain reasons for not producing it at the original hearing. While petitioner alleges that it would present evidence that supporting shipper could not obtain service from certain carriers at a date subsequent to the hearing, record is convincing that no relevant new evidence would be produced which would alter the results in extension proceeding; therefore, petition for further hearing is denied.—Wilson Bros. Truck Line, Inc., Extension, 94 M.C.C. 426 (428).

Petition for further hearing for purpose of introducing verified statement of a new witness (which was prepared a month after oral hearing for cross-examination) concerning preparation of cost analyses on a computer, in general, denied. Under modified procedure, petitioner is required to submit all his evidence at one time; furthermore, verified statement sought to be introduced does not show that cost analysis stricken from instant record was prepared by the new witness or under his direction; nor does it appear that evidence to be adduced at such further hearing would require conclusions different from those reached in the proceeding.—Aggregate Weight Provisions on Paper, Mass. to N. Y., N.J., 323 I.C.C. 525 (530-1).

As 17 applications for authority to serve two new plants whose traffic is primarily controlled by supporting shipper seek same authority, present practically identical issues, are all supported by same shipper, and can be more fully considered simultaneously than separately, petition for reconsideration of order consolidating them for consideration and disposition in a single report is denied.—Steel Transp. Co., Inc., Extension, 92 M.C.C. 387 (389).

Although exceptions in one of three related extension proceedings were filed subsequent to effective date of amended Rule 1.101 of the Rules of Practice (providing for administrative finality of decision of a division of the commission which does not reverse, modify, or change the initial report and recommended order), because of the nature of issues involved, including reappraisal and restatement of requirements and policies governing grants of motor carrier authority to Railway Exp. Agency, that proceeding is reopened for reconsideration on protestants' petitions, along with the other two.—Railway Exp. Agency, Inc., Extension, 91 M.C.C. 311 (312, 313, Note 4)*.

15. Reopening; scope.—[Vols. 13-16, 19].—Unless a clear abuse of its discretion is shown, the courts do not overturn the commission's determination in disposing of petitions seeking to reopen a proceeding in order that additional evidence may be submitted. As there is nothing of record to suggest that the commission abused its discretion in denying plaintiffs' petition, or that it did not weigh amply the supporting claims in the affidavit accompanying the petition, there was no error in its denial of reopening to receive additional evidence; sustained.—Trailways of New England, Inc. v. United States, 235 F. Supp. 509 (515)*.

Although plaintiff (protestant) did not petition for reopening of application proceeding to change a portion of certificate allegedly

granted by mistake until some 14 months after the certificate became final, both the petition and its application for waiver of rule 101(e) of Rules of Practice set forth facts which if found true would require the commission to reopen the proceeding to allow plaintiff to adduce evidence in support of its position and to be heard in opposition to grant of the challenged authority. Plaintiff acted diligently when it first acquired knowledge of order granting the certificate, and its petition for reopening showed good cause; moreover, at the court's instance it produced witnesses to show that it was in position to prove the truth of its allegations concerning circumstances giving rise to the claimed mistake. In summarily refusing, without a hearing, to waive rule 101(e) the commission acted arbitrarily and did violence to an established principle of law. Order denying the petition set aside and the cause remanded with directions to waive rule 101(e), grant the hearing requested, and make a factual determination on the matters alleged by the petition.—James J. Williams, Inc. v United States, 241 F. Supp. 535 (537-8, 539)*.

The commission neither abused its discretion, nor acted arbitrarily, capriciously, or unlawfully, in refusing to reopen motor carrier purchase proceeding for rehearing solely to determine whether, in view of pending application of another carrier to acquire control of vendee, shippers would continue to support reactivation of vendor's dormant rights and operation under the unified rights by a carrier other than vendee. Shippers amply demonstrated their support of vendee's new and improved service under vendor's rights, pursuant to temporary authority and, on the record alone, conclusion is justified that they are interested only in movement of their goods by the best service available; they are not interested in a name or ownership; and they would use the service offered under revival of vendor's rights whether it is continued by vendee or by applicant in the control proceeding. The commission's decision is sustained.—Commercial Motor Freight, Inc. v. United States, 276 F. Supp. 264 (267-8)*.

Plaintiff's petition for reopening of railroad control proceeding for further consideration and modification of order entered therein in 1923, alleging that one of conditions imposed on control approval and the agreement subsequently entered into by control applicants for purpose of embodying those conditions were now unreasonable and unlawfully discriminatory against it, raised issues relating to preferential solicitation and distribution of traffic betwen the control applicants, and attacked such preferential solicitation as improper or illegal under several sections of the statute as well as the antitrust law. The origin and authority for those practices being contained in both the challenged condition and the agreement, they are in reality but two aspects of the same matter; thus there was only one general issue before the commission, although in somewhat different contexts.—Denver & R.G. W. R. Co. v. I.C.C., 229 F. Supp. 249 (251, 253-4)*.

The order reopening the control case did not restrict the issues, and the examiner developed all issues raised and apparently received evidence on them. Following the decision in 376 US 375, the commission should have disposed of the entire matter, rather than consider the condition separately from the agreement on a procedural basis, and should have passed on validity of the agreement as well as actions of the parties thereto; disposition of the proceeding is incomplete. Remanded for further proceedings consistent with the court's opinion.—Id., pp. 253-4.

The commission's decision not to reopen hearings in investigation into railroad's proposed discontinuance of certain passenger trains, for purpose of taking additional evidence, is a matter on which it has considerable discretionary power; there is no showing that the discretion was abused. Complaint dismissed.—State of Minnesota v. United States, 238 F. Supp. 107 (113)*; similarly, motion to reopen the hearing on discontinuance of passenger train service within the State for presentation of further evidence is addressed to the discretion of the commission. And, in light of largely cumulative nature of evidence proffered, there was no abuse of that discretion.—State of Montana v. United States, 202 F. Supp. 660 (662)*.

The commission did not abuse its discretion by refusing to reopen the hearing in purchase proceeding for limited purpose of introduc-

tion of additional evidence to show lack of unlawful control and of dormancy. Unlawful control was charged at the hearing, at which time plaintiffs could have offered their proof, and evidence claimed to be "newly relevant" fails to undermine the trial examiner's findings as to dormancy.—Lombard Bros., Inc. v. United States, 226 F. Supp. 905 (908-9)*.

"Grandfather" clause rights determined many years ago should not be reopened or modified except when there is definite and positive evidence that a miscarriage of justice has occurred. On the evidence before it, the commission's conclusion that shipments of general commodities shown to have been transported eastbound by plaintiff's predecessor from the points in question were not substantial was a reasonable one, and that evidence did not disclose any miscarriage of justice which would justify or require that the "grandfather" proceeding be reopened. The commission's refusal to reopen the "grandfather" proceeding, sustained.—Keystone Motor Exp., Inc. v. United States, 228 F. Supp. 793 (798-9)*.

If the commission's challenged interpretation of plaintiff's "grandfather" authority in fact narrows the scope of authority to which plaintiff was entitled by its "grandfather" operations and which its "grandfather" certificate was intended to cover, plaintiff should petition the commission to reopen the "grandfather" proceeding.—Mitchell Bros. Truck Lines v. United States, 225 F. Supp. 755 (759)*.

None of the three major grounds relied on by Florida East Coast warrants reopening of proceeding on proposed merger of Seaboard Air Line and Atlantic Coast Line for further hearing to determine extent of alleged unlawful common control of applicants resulting from actions specified; even if facts alleged were substantiated at a hearing, they would not establish a violation of §5(4). Moreover, in addition to injunctive relief granted East Coast from applicants' action in denying it the use of jointly owned terminal and interchange facilities at Jacksonville after its employees went on strike, condition imposed on merger will prohibit survivor from refusing to handle empty or loaded cars destined to or received from competing carriers. Considering also the fact that East Coast could have raised the §5(4) issue at oral argument, petition for further hearing is denied.—Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122 (136, 138)*.

Reopening of released-rates application, to determine whether order granting the relief sought was unlawful in light of decisions in 53 MCC 157 and 311 ICC 515, placed applicant on notice that continuance of that authorization depended on differentiating its justification from those cases. The reopened proceeding was plainly not intended to be a vehicle for denunciation of applicant's tariff, and it understandably made no effort to justify the symmetry of its rate structure or appearance of its tariffs. The key to pleading and notice in the administrative process is adequate opportunity to prepare; but applicant had no notice that the sweep of the reopening order would be as broad as the examiner's interpretation thereof.—Wearing Apparel, Accessories, Piece Goods—Shulman, Inc., 321 I.C.C. 1 (3-4).

Furthermore, the examiner placed on applicant the burden of showing that any relief it should obtain should be greater than that granted its principal competitor. The principal competitor was not a party of record in instant proceeding or in the cases cited in the order, and it would be anomalous to place such a burden on applicant when the party adversely affected is apparently uninterested and the extent of relief granted it is unknown and not of record. Inquiry is therefore limited to scope of order reopening the proceeding.—Id., p. 4.

Reopening of proceeding on transfer of water carrier rights for hearing and further consideration, a year after approval, did not mean that the commission would determine the application de novo, disregarding fact that no-one seasonably opposed it, that the transaction was duly consummated, and that third persons have relied thereon in dealing with transferee.—Pittsburgh Towing Co.—Certificate Transfer—Zubik, 317 I.C.C. 661 (666)*.

Inasmuch as §5a application proceeding was reopened solely for oral hearing on alleged curtailment of right of independent action of parties to the agreement, petitioners' request that (if it finds the previously ap-

proved agreement for joint consideration of matters pertaining to interchange of equipment does not guarantee users the right to make independent announcements) the commission withdraw its approval of the agreement, without prejudice to amendment thereof proposed by petitioners, goes beyond scope of the reopening of the proceeding.—National Motor Equipment Interchange—Agreement, 316 I.C.C. 448 (451-2)*.

Orders reopening transfer proceeding under §212(b) and instituting investigation under §5(7) were broad in their sweep and, pursuant to §5(a)(3) of Administrative Procedure Act, respondents were informed by letter that the Bureau of Inquiry and Compliance would show, among other things, that the transfer proceeding contained false and fraudulent information designed to conceal the real party in interest and the purchase price. In light of those letters respondents received adequate notice, well in advance of hearing, of issues to be raised by the Bureau. Moreover, where adequate notice is given, the commission has inherent power to determine whether the transfer order was properly entered; evidence of happenings before and at time of the transfer order was therefore properly admissible, and in considering such evidence the examiner did not exceed scope of those orders.—Kowalsky's Exp. Service—Control and Merger, 93 M.C.C. 272 (277-8).

Order reopening purchase proceeding for further hearing, solely for presentation of evidence to show specifically any adverse effects on particular employees within meaning of reservation of jurisdiction in the order of approval, is clear and explicit and may not be construed as meaning that petitioner is only required to show by example that injury has occurred and why such injury is likely to continue, as basis for imposition of specific protective conditions. Limitation therein pertains only to admissibility of evidence at the further hearing and does not preclude the division from modifying its prior order to delete, substitute, or add conditions, where deemed necessary or unnecessary, for protection of employees within meaning of §5(2)(c). (See 58 MCC 133 and 75 MCC 147).—Midwest Buslines, Inc.—Purchase—American Buslines, Inc., 90 M.C.C. 173 (184-5)*.

See also Central Pac. Ry. Co. Control, §5(2), n. 45 *Conditions imposed*, and §5(9), n. 10.

Though applicant originally sought authority to transport gilsonite in bags from Bonanza, Utah, to Creston, Wyo., for interline movement beyond, in its petition for reconsideration it stated that movement in bags from Bonanza is declining appreciably and that it now seeks authority only for bulk movements. As the gilsonite transported in bulk to supporting shipper's facilities at Craig, Colo., would come to rest there for bagging and then be shipped on to Creston and points beyond, two separate movements would be involved. Applicant is already authorized to perform the transportation of bagged shipments that shipper now desires, hence only bulk movements need be further considered.—Bonanza Trucking Co., Extension, 94 M.C.C. 620 (622)*.

Applicants, having failed to avail themselves of opportunity to present at hearing on purchase and related §207 applications the evidence they now seek further hearing to introduce, are not entitled to have the proceeding reopened for that purpose.—Prichard Transfer, Inc.—Purchase—Weiss, 93 M.C.C. 535 (542).

In view of the long pendency of consolidated complaint proceedings, the Pennsylvania commission's requests for reopening of the records or for further hearings, to admit new evidence and evidence claimed erroneously excluded, are denied. Most of the excluded evidence consisted of opinion testimony which may have been technically admissible but would have had no appreciable bearing on the outcome; and it is doubtful that any of the new evidence to be adduced would have any bearing on the commission's conclusions.—Pennsylvania Public Utility Comm. v. Jones Motor Co., 89 M.C.C. 605 (611-12)*.

Although the commission has held that a "grandfather" certificate may be challenged by a successor in interest, it has denied reopening of "grandfather" proceedings where too much time had elapsed; it is 23 years since challenged "grandfather" rights were granted, during which time neither the "grandfather" applicants nor any of four successive transferees prior to petitioner sought any re-

consideration or extension thereof; analysis of abstract of shipments submitted in the "grandfather" proceeding indicates that no enlargement of those rights would be warranted upon reconsideration and that no miscarriage of justice has occurred; reopening denied.—Keystone Motor Exp., Inc.—Investigation of Operations, 89 M.C.C. 567 (570, 574)*.

20. Reversal, change, or modification.—[Vols. 16, 17].—See Walker v. United States, §16(1), n. 1.

Section 17. (7) Reversal or modification after rehearing, etc.—[Unchanged. See vol. 11, p. 9304.]

Amendment, see footnote, vol. 11, p. 9304; historical notes, vol. 3, p. 2204, vol. 9, p. 7745.

Notes of Decisions

Volume 12—p. 10328; Volume 13—p. 11030; Volume 14—p. 11539; Volume 15—p. 12126; Volume 16—p. 12773; Volume 17—p. 13460; Volume 18—p. 14220; Volume 19—p. 15417.

10. Modification, reversal, of orders by appellate division or full commission.—[Vols. 12-19.—While no section of the act states, *in haec verba* that an Appellate Division may reconsider its own actions, the reviewing court believes that appellate division had the power to reconsider and reverse its own order summarily affirming denial of motor carrier authority by Operating Rights Review Board. Provisions of §17, and of other sections of the act which authorize the commission to suspend or modify its orders, have been interpreted as giving it continuing jurisdiction to suspend, reconsider, or modify its orders even in absence of a petition for reconsideration; and, as stated in 340 US 419, "the certificate is the final act or order that validates the operation." The court sees no reason why, if the commission has such continuing jurisdiction, an appellate division doing the commission's work should not have the same power; such a division is merely sitting in lieu of the full commission for reasons of administrative efficiency. Both logic and sound policy require that the Appellate Division be empowered to reconsider its own actions, at least prior to actual issuance of the certificate.—Resort Bus Lines, Inc. v. I. C. C., 264 F. Supp. 742 (744-5)*.

Plaintiffs' attack on the commission's order granting control authority denied by order in a prior report on same proceeding, and on its order denying reconsideration of the order of approval, as being in excess of its authority is without merit. The Interstate Commerce Act itself, in §17(6) and (7) and §221(b), gives the commission a continuing jurisdiction over its orders, thereby allowing it to modify and even rescind a great number of them at any time. There appears to be no cutoff date, such as is found in the National Labor Relations Act, after which the commission may not modify or rescind its orders, and such action by it has been sustained by the courts. The commission had authority to reopen for reconsideration and to rescind or modify its prior orders, and did not abuse its discretion in doing so in the case under review.—Alamo Exp., Inc. v. United States, 239 I.C.C. 694 (697-8)*.

In view of the history of the litigation and the record before the commission and the court, the commission's final action in approving the proposed control cannot be deemed unreasonable. The mere fact that it had found in its original report that such control would not be consistent with public interest did not prevent it from later finding that it would be, in view of the subsequent considerations brought to bear before it. If supported by substantial evidence, the commission's final order cannot be attacked solely because it may be, or seems to be, inconsistent with findings in other proceedings before it. While the course of the litigation has been long, complex, and at times uncertain, there is nothing in the record to justify a reversal of the commission's orders, or a remand to it for any further consideration. Sustained.—Id., pp. 696, 698.

The whole commission is vested with authority to reverse, change, or modify a decision of a division of the commission [§7(a) of

Administrative Procedure Act and §17(6), (7) of Interstate Commerce Act]; and there is no requirement that in doing so the commission shall specify the weight given to any item of evidence or fact, or disclose the mental operations by which its decisions are reached. Decision-and-order which reversed a decision on reconsideration of division 1 and effectually reinstated its original decision partially denying plaintiff's application was reached upon the first consideration by the whole commission; that decision adequately adopted a prior reasoned report which had set out a sufficient basis for the action taken, and there was no necessity for further explanation as to the cause of the commissioners' votes.—Curtis, Inc. v. United States, 225 F. Supp. 894 (901-2)*.

There is no substance to plaintiff's contention that consideration, and disposition with administrative finality, of his petition for reconsideration by the division in an appellate capacity which made the initial decision, in accordance with rule 1.101(a)(3) of the commission's Rules of Practice, violates due process because an appeal to the very body which made the determination from which the appeal is taken is no appeal at all. Motions or petitions for rehearing or reconsideration have long been addressed without thought of constitutional infirmity to the court or judge which, or who, decided the case in the first instance; no reason appears why applications of the same kind to a commission cannot be similarly addressed (151 F. Supp. 367). Due process was accorded plaintiff in the commission proceedings in the first instance and, since there is no constitutional right to an appeal to all or a majority of the commission, his claim of deprival of due process cannot be sustained.—Studna v. United States, 225 F. Supp. 973 (980-1)*.

Petition requesting that matters complained of be declared issues of general transportation importance within Rule 1.101(a)(2) of Rules of Practice, filed to assure complainant's right of appeal to entire commission, denied, since exceptions to proposed report were filed before effective date of order setting up the new appeals procedure, and the parties retain all rights of appeal that existed prior thereto.—United States v. Oklahoma City-Ada-Atoka Ry. Co., 316 I.C.C. 731 (732)*.

Respondent in investigation proceeding, initiated to determine whether it was engaged in unlawful operations, could have appealed commission decisions in four other application proceedings in which it appeared as protestant, and in which collateral determination was made that its authority to serve points "in Connecticut, Pennsylvania, New Jersey, and New York within 100 miles of Columbus Circle" restricted its territory in all 4 States, on the ground that its claimed right to serve the entire 3 States first named precluded a grant of duplicating authority. However, such conclusionary findings do not control outcome of the investigation; apparently, no exhaustive study of scope of respondent's authority was made in the four cited proceedings because (unlike instant proceeding) the scope of that authority was a collateral issue.—T. I. McCormack Trucking Co., Inc.—Investigation, 89 M.C.C. 5 (10-11)*.

Section 17. (8) Stay of decisions, etc., not effective at time of application for rehearing, etc.—[Unchanged. See vol. 11, p. 9304.]

Amendment, see footnote, vol. 11, p. 9304; historical note, vol. 11, p. 9304.

Notes of Decisions

Volume 17—p. 13460; Volume 19—p. 15418.

2. Construction and interpretation.—[Vols. 17, 19].—In delegating to the commission special power in connection with issuance of railroad car special orders and with reference to declaring an emergency, Congress did not overlook administrative and judicial safeguards, such as the right to ask the commission for a rehearing, reargument, or reconsideration and, if dissatisfied with administrative review, then to seek judicial relief. Thus, one wishing to challenge validity of service order of the Safety and Service Board must first seek administrative relief from an appellate division of the commission; and applica-

tion for such relief would automatically stay effect of the order until the issue is administratively determined by that division. In fact, such an application is required before statutory provisions for judicial review by a three-judge district court become effective.—United States v. Southern Ry. Co., 364 F. 2d 86 (91-2).

See also United States v. Southern Ry. Co., 380 F. 2d 49, §17(6), n. 10.

Where the order of a division, individual commissioner, or board has not become effective when an application for rehearing is made, the order must be stayed pending disposition by the commission or appellate division; however, mere filing of application for rehearing does not relieve the carrier from the duty of observing an order, and in absence of a special order of the commission the persons affected are required to obey the order complained of.—Malone Freight Lines, Inc. v. United States, 204 F. Supp. 745 (749-50)*.

When railroad's petition seeking further hearing and extension of time for filing exceptions was filed within 30 days after service of recommended report and order, finding that its proposed discontinuance of interlocking system should be disapproved, it stayed the effective date of the recommended order, even though the order extending time for filing exceptions was not entered until several days after the running of the exceptions filing period.—Monongahela Connection R. Co. Modifications of Systems, 325 I.C.C. 160 (161)*.

Section 17. (9) Judicial relief from decisions, etc., upon denial or other disposition of application for rehearing, etc.—[Unchanged. See vol. 11, p. 9305.]

Historical note, see vol. 11, p. 9305.

Notes of Decisions

Volume 14—p. 11539; Volume 15—p. 12126; Volume 16—p. 12774. Volume 17—p. 13461; Volume 18—p. 14220; Volume 19—p. 15418.

2. Construction and interpretation.—[Vols. 14-19].—On question of when and in what proceedings a railroad may challenge a commission order awarding reparation to a shipper claiming injury because of carrier's violation of the act, federal district courts have jurisdiction of both §16(2) and §17(9) suits, under §1336 of the Judicial Code, but venue is determined by 28 USC §1398. And a summary of relevant statutes points out that §16(2) actions for enforcement of commission reparation awards and §17(9) actions to set aside commission orders are quite distinct proceedings, with different venue restrictions and different proceedings. Moreover, Congress gave certain procedural advantages to shippers bringing §16(2) actions that might well be lost or impaired if carriers may attack the reparation order in a §17(9) direct review proceeding. Accordingly, language and purposes of the two provisions (which clearly are subject to more than one interpretation) have to be harmonized.—I.C.C. v. Atlantic Coast Line R. Co., 383 U.S. 576 (580-6)*.

While a narrow, but important, category of cases is concerned, (1) it is conceded that if a commission reparation order is accompanied by a cease-and-desist order, carrier may obtain immediate review of the cease-and-desist order pursuant to §17(9); and such review will ordinarily determine validity of the finding of violation on which the reparation order is founded. Second, even when a cease-and-desist order is not joined, the reparation order will be subject to direct review when no other means of securing review is available, regardless of whether review is sought by shipper (337 US 426), or carrier (363 US 202). Therefore, essential question is to what extent those cited decisions (wherein party seeking review could not obtain it in a §16(2) suit, either directly or by interposition of a defense) compel allowance of respondents' direct review action. Taking a middle course, the court concludes that carriers may get full review by defending a §16(2) action and that policy underlying §16(2) precludes carriers' obtaining review in a forum other than that

chosen by shipper. But there is no obstacle to carriers' §17(9) cross-proceeding in forum chosen by shipper, should they desire to bring one.—Id., pp. 586-9.

Unquestionably, the order under attack is subject to review by the courts; and the three conclusions reached must serve as guideposts in deciding where such review is to occur, i.e., (1) respondents have ample opportunity to secure review of the order through defense of shipper's enforcement action, (2) allowing them the alternative of bringing direct review proceedings would substantially impair shipper's §16(2) right to select a convenient venue, and (3) contrary to protestants' contention, limiting review to the enforcement action would not be likely to result in disparity in treatment of shippers. Therefore, since the reparation was not accompanied by a cease-and-desist order, respondents may obtain review thereof only in the court where shipper filed its enforcement action (held in abeyance pending outcome of instant case)—or where shipper seeks review of the order. The district court erred in entertaining respondents' §17(9) action and judgment of the Court of Appeals sustaining that decision must be reversed.—Id., pp. 578-9, 602-6.

See also General Motors Corp. v. United States, 28 USC §1336, n. 2.

Requirement in the statute that administrative and judicial review be applicable to all cases of suits to enforce, enjoin, suspend or set aside an order of the commission has direct reference to 28 USC §2321, in which Congress directed that procedure in such cases required creation of a three-judge court; and Congress having provided administrative and judicial procedures, the prescribed procedures are exclusive, although the exclusiveness may not have been expressly provided for. Thus, in action to recover penalties for railroad's alleged violations of the commission's car service order, district court lacked power to inquire into validity of the order in question when the railroad had failed to seek review by a three-judge court on issue of validity of the order, in accordance with provisions of 28 USC §§2321-2325. Lower court's conclusion that the order was invalid, set aside and cause remanded.—United States v. Southern Ry. Co., 364 F. 2d 86 (91-2, 93, 96).

Though findings and resulting orders in investigation by the commission to determine applicability of rates charged on shipments of household goods during certain periods because of an error in tariffs then in force were declaratory in nature, they followed an adversary proceeding in which the critical question was sharply disputed. The commission ruled against respondents in the administrative proceeding and found certain past charges made contrary to that ruling to be in violation of §217(b) of Interstate Commerce Act; it then ordered the proceeding discontinued, which, following denial of rehearing, constituted a final order.—National Van Lines, Inc. v. United States, 326 F. 2d 362 (367)*.

On balance, under the standards of 307 US 125, the commission's declaratory order is subject to and ripe for review by the district court. Such a determination, made under statutory safeguards, cannot be said to have no legal effect: based on that order, the Government has already made deductions from payments due certain carriers, and others will be liable for refunds of overcharges in large aggregate amounts. Thus the order has an immediate and practical impact on the carriers; touches vital interests of carriers and shippers alike: and determines a right or obligation so that legal consequences will flow from it. Further, by not making the refunds the commission finds should be made, the carriers have already been found to be in continuing violation of §217(b), which could jeopardize their certificates or permits to do business.—Id., pp. 373-4.

If review is denied, validity of the subject ruling will have to be litigated in a multitude of suits, either for refund from the Government of payments deducted on basis of the order, in which case the commission's ruling could serve as prima facie evidence against the carriers, or in defense of actions by shippers for refunds of such overcharges, in which case the commission report (incorporated in the final order) would be available to the courts for their guidance; such suits could be tried in numerous courts, resulting in an undesirable flood of litigation. In its present posture the order has not removed any uncertainty, and until it is changed by the commission or judicially reviewed by a court the con-

fusion will continue. Order of the district court dismissing carriers' class action seeking review of the commission's order, reversed and the cause remanded for a hearing on the merits.—Id., pp. 373-4.

Purpose of the statute is to require a party aggrieved by administrative action to exhaust his administrative remedy before filing an action in the courts; it not only requires exhaustion of all administrative remedies, but specifies the point at which such remedies have been exhausted. The administrative remedy is exhausted when an application for reconsideration of commission decision complained of is denied or otherwise disposed of by the commission or an appellate division, depending on whether the commission has retained such application or referred it to an appellate division; denial of the application by either terminates all of a litigant's rights before the commission. Thereafter his only remedy lies in the courts.—Transamerican Freight Lines, Inc. v. United States, 258 F. Supp. 910 (915)*.

In action to set aside the commission's order denying plaintiff's application for motor carrier authority, record before the court is sufficient to entitle plaintiff to review of the order and, insofar as exhaustion of administrative remedies is concerned, additional efforts to secure a rehearing by the entire commission were unnecessary. The commission proceeding and order were administratively final when, after plaintiff filed exceptions to the examiner's report and recommended order, Division 1 entered its order which affirmed and adopted the examiner's findings and conclusions and denied plaintiff's application; and plaintiff was not required to file a petition under Rule 101(a)(4) of the Rules of Practice requesting a finding of an issue of general transportation importance, and ultimately a rehearing before the entire commission, prior to seeking judicial review.—Meat Packers Exp., Inc. v. United States, 244 F. Supp. 642 (645)*.

This section does not speak in terms of jurisdiction, but merely is designed to require exhaustion of administrative remedies before resort to the courts. Decision of appellate division in railroad abandonment proceeding was administratively final, pursuant to Rule 101 of the commission's Rules of Practice, when it did not reverse, change, or modify any of the hearing examiner's conclusions, or his ultimate decision, and no issues of general transportation importance were involved. While the commission's regulations prohibiting applications for rehearing by entire commission in such cases are valid and binding, and in those cases administrative remedies are exhausted at an earlier stage in the proceedings, the courts may be resorted to when such remedies are exhausted. Appellants followed a reasonable and prudent course when they filed suit in court on the assumption that the division's decision did not change the examiner's opinion, and at the same time filed a motion for rehearing before the commission on assumption that the decision did result in a change.—State of Arizona v. United States, 220 F. Supp. 337 (341)*.

See also Atlantic Coast Line R. Co. v. United States, 17(6), n. 10

Section 17(9) does not speak in terms of jurisdiction, but is designed to require exhaustion of the administrative remedies provided by the section and the rules of procedure governing applications for rehearing (which the commission was expressly authorized to adopt), before resorting to the courts.—Malone Freight Lines, Inc. v. United States, 204 F. Supp. 745 (750)*. [But see dissent.]

Under Rule 1.101(a) of the commission's Rules of Practice, plaintiff has done everything in its power to exhaust its administrative remedy, and defendants concede that it has done so, when its petition for reconsideration of decision of Division 2, finding its proposed reduced rates not shown to be just and reasonable, was denied by the same division acting as an appellate division; order complained of was clothed with finality by that rule as amended, and plaintiff's suit seeking judicial review is not premature.—Id., pp. 747, 748, 750.

Thus there is not involved the utter lack of jurisdiction which the court should notice sua sponte; that §17(6) authorizes the commission to deny the right to apply for rehearing, reargument, or reconsideration in proceedings not involving matters of general transportation importance does not make §17(9) operate to forbid judicial review of minor orders denied administrative review, though final; had Con-

gress intended such a result, it would have found simple, clear language to express it.—Id., p. 754.

Order incorporating the commission's findings on complaint, that plaintiff's "Route 77" service over Garden State Parkway in East Orange and Bloomfield, N.J., was not authorized by its outstanding certificates, and also those in extension application authorizing that service, together with letter from the commission advising plaintiff that its other operations should conform to that interpretation, imminently affect plaintiff's property rights in its other operations. While it would be expedient to conclude that grant of authority for the Route 77 service rendered moot the issue of plaintiff's unauthorized operation thereof, to do so would ignore its right to protect its property rights in its other operations and certificates thus imminently affected. Under such circumstances plaintiff should not be denied opportunity for review of the commission's determination on ground that the prime issue is now moot; expediency at such a price is too costly.—DeCamp Bus Lines v. United States, 224 F. Supp. 196 (199-201)*.

The court cannot permit the form of the order to control the issue of reviewability or allow it to obscure the practical effect which the order, together with the commission's subsequent directive, might entail. The order imparts administrative finality: the determination is not a general abstract declaration but a specific concrete adjudication; both order and letter were directed to plaintiff, requiring it to refrain from using its certificates contrary to the commission's interpretation and to conform its operations thereto; thus they contemplate future effect. Since certain of plaintiff's rights are now fixed by that interpretation, it would not be speculative, in light of the letter, to assume further commission action in event of plaintiff's noncompliance. Disregard of the commission's adverse action would entail threat of civil and criminal penalties, while compliance may unduly burden plaintiff. The commission's determination imposes a cloud on plaintiff's rights in use of its certificates and endangers its business investment therein. In light of 307 US 125, 351 US 40, and 363 US 202, the findings and conclusions incorporated in the order are reviewable.—Id., p. 201.

Plaintiffs' late-filed petition to intervene in application proceeding in which none of them participated showed good cause and was based on averments reasonably pertinent to issues therein and did not broaden them; the commission's order denying their petition was a final order; plaintiffs having exhausted their administrative remedies, the court has jurisdiction in action to set aside the commission's decision and order in the application proceeding.—National Bus Traffic Ass'n. v. United States, 212 F. Supp. 659 (661)*.

Validity of the commission's deviation rules and orders issued thereunder, insofar as they authorize use of regular alternate routes as deviations, are no less subject to judicial review than ones determining rates or rights to certificates; such orders, giving plaintiff's competitor a right which it did not have before and which plaintiff asserts adversely affects its operations, are not mere abstract declarations. In order authorizing plaintiff's competitor to use a shorter alternate route between two cities, the commission made no specific determination that any of criteria established by it as prerequisite to such authorization had been satisfied, but merely found generally that requirements of the deviation rules had been met; neither the parties nor a reviewing court can determine whether such an order has a rational basis in fact. That order and order denying plaintiff's petition for reconsideration must be set aside; case remanded for further proceedings consistent with the court's opinion.—Greyhound Corp. v. United States, 221 F. Supp. 440 (443, 445)*.

Motor carrier, in its action to set aside the commission's order suspending certain tariffs filed by it, found not entitled to relief when it has not exhausted its administrative remedies. Record indicates that, the tariffs having been suspended, plaintiff failed to petition for reconsideration of the suspension order as provided by Rule 200(b) of the Rules of Practice; this was essential before review could be sought in the court. Complaint dismissed, and temporary restraining order vacated.—W.J. Digby, Inc., of Iowa v. United States, 246 F. Supp. 335 (336)*.

Although plaintiff labor unions admittedly had actual notice of the challenged decision

and order of the commission one week prior to effective date thereof, and it is likely that they knew of the proceeding earlier because of the necessarily wide publicity given to the trade by Middle Atlantic Conference's complaint, they made no request to the commission for rehearing, and the record clearly shows that they took their chances in the court rather than appearing before the commission. Under various decisions, notably 303 US 41 and 327 US 540, it must be held that plaintiffs have not exhausted their administrative remedies and therefore have no standing to seek judicial review; complaint dismissed.—Teamsters Joint Council 40 (J.C.) v. United States, 238 F. Supp. 301 (306-7)*.

Neither the commission's order giving notice that it had concluded not to enter upon an investigation of proposed train discontinuance, nor its order denying petition for reconsideration of such decision, qualifies as an "order" subject to judicial review or relief within meaning of §17(9); neither action was final, both were completely gratuitous and in effect of no more technical signicance than informal statements of commission policy.—Sludden v. United States, 211 F. Supp. 150 (154)*.

Section 17. (10) Reference of administrative matters to examiners.—[Unchanged. See vol. 11, p. 9305.]

Section 17. (11) Intervention of representatives of employees.—[Unchanged. See vol. 14, p. 11540.]

Notes of Decisions

Volume 14—p. 11540; Volume 17—p. 13462; Volume 18—p. 14221.

2. Intervention by representatives of employees.—[Vols. 14, 17, 18].—Railway Labor Executives' Assn. had an absolute right under §17(11) to become a party to abandonment proceeding at the time of filing of the application.—Seaborad Air Line R. Co. Trackage Rights, 312 I.C.C. 797 (799)*.

Section 17. (12) Admission to practice before commission.—[Unchanged. See vol. 11, p. 9305.]

Historical notes, see vol. 11, p. 9306, vol. 12, p. 10328, vol. 13, p. 11031, vol. 14, p. 11541, vol. 15, p. 12128, vol. 16, p. 12775, vol. 17, p. 13462.

Historical Note

Public Law 89-332, Nov. 8, 1965, 79 Stat. 1281, provides that any person who is a member in good standing of the bar of the highest court of any State, possession, territory, Commonwealth, or the District of Columbia may represent others before any agency (as agency is defined in §2(a) of the Administrative Procedure Act), with exception of the Patent Office, upon filing with the agency a written declaration that he is currently so qualified and is authorized to represent the party on whose behalf he acts; but that the law may not be construed to (1) grant or deny the right to represent others to any person not so qualified, (2) authorize or limit discipline (including disbarment) of persons appearing in a representative capacity before any agency, (3) authorize a former officer or employee of an agency to represent others where such representation is prohibited by law or regulation, or (4) prevent an agency from requiring a power of attorney as a condition to settlement of a controversy involving the payment of money.

Notes of Decisions

Volume 11—p. 9306; Volume 12—p. 10329; Volume 14—p. 11541; Volume 16—p. 12776; Volume 17—p. 13462; Volume 19—p. 15419.

CONSULT THE TABLE OF CASES WHENEVER A CITATION IS FOLLOWED BY AN ASTERISK

1. Admission; suspension; disbarment.—[Vols. 11, 12, 14, 16, 17, 19].—Inasmuch as the federal statute expressly permits the Commissioner of Patents to authorize practice before the Patent Office of nonlawyers, and the Commissioner expressly granted such authority to individual who had not been admitted to practice law before the Florida or any other bar, that State may not prohibit practitioner from performing within the State tasks incident to preparation and prosecution of patent applications before the Patent Office, even though preparation and prosecution of such applications for others constitutes the practice of law within State statute. The State may not deny to those failing to meet its own qualifications the right to perform functions within the scope of the federal authority.—Sperry v. Florida, 373 U.S. 379 (383, 384-5). [Not arising hereunder.]

Four years of college are not required of nonlawyer applicants to practice before the commission, including 2 years which are creditable toward a bachelor's degree at a recognized college as an absolute minimum; technical education, training, or experience may be substituted for the remaining 2 years of college education. Examinations for such applicants are conducted semiannually at the commission's field offices in selected cities.—Annual Report, 1965, p. 11.

Although Bureau of Inquiry and Compliance stipulated only that if respondent practitioner had called witnesses to attest to his character they would have testified that he had a good reputation for honesty, integrity, and truthfulness, and though the Bureau was not required to present witnesses against respondent, it is noteworthy that not a single witness appeared at hearing to testify against him; and the factual data from purchase and investigation proceedings in which he appeared as counsel, on which the Bureau relied, fail to establish a prima facie case of misconduct. Respondent has therefore not been shown to have violated the Code of Ethics for Practitioners.—In re Kahn, 323 I.C.C. 706 (708).

While the record does not expressly show that complainants' counsel's misquotations of court and commission decisions were deliberate, they clearly were either deliberate or the result of inexcusable negligence. Counsel is admonished to abide by Canon 29 of the Commission's Canons of Ethics, which specifies that it is not candid or fair for a practitioner knowingly to misstate or misquote the contents of a paper or the language or effect of a decision or textbook.—B. G. Anderson & Co. v. Atlantic Coast Line R. Co., 319 I.C.C. 224 (226).

Though examiner cannot be blamed for feeling aggrieved because applicant's counsel, in consideration of certain protestants' withdrawal of their opposition, offered amendment (which the examiner accepted) restricting proposed operation to peddle service, and supported its acceptability at hearing, notwithstanding the entire commission had rejected such a restriction on authority granted same applicant in 79 MCC 279, careful examination of the record fails to support examiner's conclusion that applicant's counsel deliberately misled him or any party or prospective party to the instant proceeding.—Fox-Smythe Transp. Co. Extension, 88 M.C.C. 57 (58-60).

Counsel's explanation in exceptions that he did not recall the report cited at time he stated on the record that the commission had not rejected such limitation in any proceeding involving his client is rendered credible by fact that counsel for some of protestants were also unaware of the action in that proceeding although they or their law partners participated therein; moreover, carriers which the examiner found were misled have assured the commission that they were not; and finally, applicant's present certificate issued subsequent to that proceeding carries forward peddle service restrictions contained in prior certificates.—Id., p. 60.

Serious questions concerning propriety of conduct of purchase applicants' counsel in prosecution of the §5 and §210a(b) applications involve his possible complicity in a scheme to generate fraudulent operations under vendor's dormant rights so as to facilitate their transfer; his failure to investigate the matter of forged freight bills after their discovery at initial hearing; his continued urging, at continued hearing 14 months thereafter, that credence be given exhibit of vendor's representative shipments based on forged

documents; and his failure as a practitioner to observe standards of conduct prescribed by the Code of Ethics, including but not limited to his obligation to restrain his clients from committing improprieties and to endeavor to rectify acts of fraud or deception perpetrated by them upon the commission, or, failing that, to place the matter before competent authorities and terminate his relation with such clients.—Calore Exp. Co., Inc.—Purchase—T. W. Waterman Co., Inc., 93 M.C.C. 291 (298).

Mega, another practitioner, was present at discussions between the parties and their attorney and was entrused with preparation of the exhibit designed to withstand the charge of dormancy, and though his testimony and that of other witnesses differed widely in characterization of his role in perpetrating the fraud upon the commission, the evidence, viewed objectively, compels conclusion that he was aware of his participation in accomplishing unlawful common control of the two carriers. The record is accordingly referred to the commission's vice chairman for his consideration and appropriate action with respect to both applicants' counsel and Mega.—Id., pp. 296, 297, 298.

See also Dixie Ohio Exp., Inc., Investigation case §206(b), n. 15 *Notice*.

Requested postponement of hearing on certificate application because of unavailability of shipper witnesses having been denied, respondent practitioner refused to accept that ruling and sent applicant's president to represent it but did not himself attend the hearing, under a plan intended to elicit the hearing examiner's sympathy and obtain a favorable ruling of postponement. Respondent should have been present so that he could take exception to any ruling of the examiner which he considered prejudicial to his client's interests and thus provide a basis for court review thereof in manner specified by statute. His attitude violated his duty under canon 2 of the code of ethics for practitioners to maintain a respectful attitude toward the commission, and his attempt to thwart the commission's order violated canon 7, which states that no practitioner should render any service or advice involving disloyalty to the law or disrespect of its official ministers.—In re Bernard, 323 I.C.C. 649 (654-5).

Although when respondent was advised that the petition for postponement had been denied he was fully aware that applicant would be unable to present a competent witness to support the facts recited in the application, he did not advise the commission or any protestant of the situation; his so-called strategy dictated otherwise. Canon 23 specifically rules out any manner of fraud or chicane in support of a client's cause, and respondent's conduct falls within the law dictionary definition of chicane as the use of tricks or artifice. Respondent's course of action caused unnecessary expense and inconvenience to the commission which arranged the hearing and to the other parties who attended it at the appointed time and place; and his behavior lacked the candor and fairness required by canon 29.—Id., p. 655.

And although at time of issuance of the final report on the merits of the application the commission was not aware that respondent's absence from the hearing was deliberate, and neither the code of ethics nor the Rules of Practice provide that counsel's absence from an assigned hearing is a violation thereof, nor is there necessarily any disrespect, dishonor, disloyalty, deception, or public betrayal in a counsel's absence from a hearing, when the absence is deliberate for purpose of "strategy" or "tactics," as admitted by respondent in subsequent court proceeding seeking to set aside the commission's orders, it is culpable behavior that should not be condoned.—Id., pp. 655-6.

Additionally, though application was denied without prejudice to filing of a new application, respondent did not do so, but instead filed a proliferation of petitions for reconsideration and sundry other motions over a period of a year. This course of conduct showed lack of proper respect for the commission's rules and procedures designed to facilitate disposition of matters before it without infringing on due process; such conduct not only delays disposition of matters in the proceeding immediately concerned, but also wastes valuable time that could be spent in consideration of other proceedings. However, in view of respondent's 20 years as a practi-

tioner and absence of any prior disciplinary proceedings against him, his right to practice before the commission should not be revoked; but his lack of professional conduct warrants an official censure.—Id., p. 656.

Consideration of all the evidence warrants finding that respondent practitioners' allegations of improper and unethical conduct on part of hearing examiner and defendants' counsel were made without any real or tangible basis and were reckless in nature and not consonant with canons 2, 23, 25, 29, and 38 of the Code of Ethices for Practitioners; giving due consideration to respondents' age, experience, and previous unblemished records as members of the commission's bar for some 32 years, their improper and unprofessional conduct, showing lack of respect for the hearing examiner, a fellow practitioner, and the commission, warrants adverse criticism in form of censure; order of censure entered.—In Re Willette and Partridge, 315 I.C.C. 359 (364).

Though in his answer to show-cause order respondent Partridge appears to deny joining in the allegations advanced by respondent Willette, his action subsequent to filing of his petition for reopening of the complaint proceeding shows that he intended to join therein; a newspaper article appearing 2 days after date of his petition refers to a matter in issue at the hearing, calls public attention to the charges against the examiner, and embodies and extensive quotation from a statement by Partridge; those statements, which appeared in the public press inconsistently with canon 28 of the code of ethics, clearly demonstrate that he joined in Willette's allegations.—Id., p. 364.

The commission has ample jurisdiction to inquire into the conduct of respondents as class B practitioners when in their dealings with a shipper and in their solicitation practices they held themselves out as practitioners, and intermixed their status as such with their business of auditing freight bills; their agreement with shipper contained a promise to handle the matter of a rate reduction to the point of submitting documents to the commission; many of their subsequent letters to the carriers were signed by respondent Axelrod in his capacity as a practitioner; and solicitation letters they sent out carried a clear implication that they were in position to handle matters that could only be handled by a practitioner.—In Re Pollack and Axelrod, 315 I.C.C. 391 (3, 399).

Moreover, it is entirely within the realm of the commission to inquire into a course of action, private or otherwise, which tends to cast doubt on the overall fitness or qualifications of a practitioner to represent others before it; even before effective date of requirement of Rule 1.13 of Rules of Practice that practitioners conform to the code of ethics of the practitioners' association, respondents were chargeable with knowledge of the code under former Rule 71(b) and were required at least to uphold the spirit thereof; it would be anomalous to hold that class B practitioners, though having the same privileges before the commission as attorney practitioners, have a lesser degree of responsibility.—Id., p. 398-9.

Respondents' services for the shipper under their agreement required only 45 hours of study and of preparation and handling of correspondence, reflecting no unusual effort or learning; their efforts had no material effect on establishment of lower rates on shipper's traffic, and, though notified thereof, they did not participate in any hearings conducted in connection with revision of classification basis on shipper's commodity; while they may have been entitled to some fee, their valuation of their services at almost $9,000 and their attempts to collect that amount cannot be condoned.—Id., pp. 394-5, 399; also, while they did not personally draft complaint in their suit to collect that fee (which was dismissed) and are not shown to be culpably responsible for false allegations therein, they received a copy of it immediately after it was filed and did nothing during pendency of the matter to correct the untrue allegations.—Id., p. 395.

Respondents' advertising and solicitation letters improperly called attention to their status as practitioners, and while basic purpose of those letters was doubtless to obtain auditing accounts, such accounts could have ripened into proceedings before the commission; even if, by choice, respondents never went beyond rendition of an auditing service, their reference to their practitioner status was

misleading and not in keeping with the dignity of their calling as practitioners.—Id., p. 399.

While respondents' conduct indicates a serious disregard of ethical principles, in view of the death of respondent Pollack and the previous unblemished reputation of both, disbarment of respondent Axelrod should not be imposed; however, in view of the lack of respect shown for the dignity of his profession and of the commission, and because of his unprofessional conduct, adverse criticism in form of censure is warranted. Order of censure entered.—Id., p. 399.

Regulations of the Commission

30 FR 731, Jan. 22, 1965: Admission to Practice of Persons Who Are Not Attorneys At Law, notice of Dec. 1, 1954, as revised Feb. 1, 1955, further revised, effective March 1, 1965.

30 FR 15306, Dec. 10, 1965: Notice of Interim Rules - Attorneys Representing Others Before the Commission, effective pending issuance of amended rules following enactment of Public Law 89-332.

Section 18. (1), (2). Employees; expenses, of commission.—[Unchanged. See vol. 9, p. 7756, p. 7757.]

Historical Notes

By §303(c) of Public Law 88-426, 78 Stat. 400, Aug. 14, 1964, it is provided: Level III of the Federal Executive Salary Schedule shall apply to the following offices and positions, for which the annual rate of basic compensation shall be $28,500:*** (24) Chairman, Interstate Commerce Commission.

By §303(d), same act, it is provided: Level IV of the Federal Executive Salary Schedule shall apply to the following offices and positions, for which the annual rate of basic compensation shall be $27,000: *** (62) Members, Interstate Commerce Commission.

Memorandum from The President to the Heads of Executive Departments and Agencies, dated May 2, 1963, Preventing Conflicts of Interest on the Part of Special Government Employees; 28 FR 4539, May 7, 1963.

Executive Order 11222, dated May 8, 1965, Prescribing Standards of Ethical Conduct for Government Officers and Employees; 30 FR 6469, May 11, 1965.

Notes of Decisions

§18(2): Volume 3—p. 2222; Volume 9—p. 7757.

Regulations of the Commission

31 FR 2718, Feb. 15, 1966, Part O: The Commission, §§0.1 and 0.5 redesignated as Subpart A—General. New Subpart B—Cannons of Conduct, §0.735-11 through §0.735-30, added, pursuant to E. O. No. 11222 and 5 CFR Part 735, effective on publication in Federal Register.

31 FR 3344, Mar. 3, 1966, Part O: The Commission, Subpart B—Canons of Conduct, miscellaneous amendments to Appendix I (31 FR 2718), effective on publication in Federal Register.

31 FR 4519, Mar. 17, 1966, Part O: The Commission, Subpart B—Canons of Conduct, miscellaneous amendments to Appendix I (31 FR 3344), corrected.

Section 19. Office and sessions.—[Unchanged. See vol. 9, p. 7757.]

Notes of Decisions

Volume 19—p. 15420.

Section 19a. Valuation of property of carriers.—[Unchanged. See vol. 9, p. 7758.]

Amendments, see footnotes, vol. 3, pp. 2224-2228, vol. 7, pp. 5669-5670; historical notes, vol. 3, p. 2228, vol. 7, p. 5671, vol. 15, p. 12129, vol. 16, p. 12777.

Historical Notes

Under Executive Order 11107, Administration of Alaska Railroads, dated April 25, 1963, giving the Interstate Commerce Commission jurisdiction "to fix, change, or modify rates for the transportation of passengers and property" under the authority set forth in the Alaska Railroad Act, 38 Stat. 305, the commission, in determining justness and reasonableness of such rates,

shall exclude for valuation purposes the portion of capital investment allocated to national public purposes by the Secretary of the Interior. (28 FR 4225, April 30, 1963)

The commission recommends that §19a be amended so as to eliminate requirements that the commission determine the present value of land, and the valuation of property held by carriers for purposes other than use in common carrier service; ascertain and report the amount, value, and disposition of aids, gifts, grants, and donations and the amount and value of concessions and allowances made by carriers in consideration thereof; and so as to make optional the requirement that the commission keep informed of changes in the quantity of property of carriers following completion of original valuation thereof.—Annual Report, 1962, pp. 199-200; renewed, Annual Report, 1963, p. 18; Annual Report, 1964, p. 66-7.

By Note on the contents page of Vol. 57 Val. Rep. (page III), it was announced that, effective with the closing of that volume, the printing of annual pipeline valuation reports would be discontinued. Only initial (basic) pipeline valuation reports will be printed in the future; and they will be included in the Finance Reports series of ICC Reports, beginning in Vol. 320.

Notes of Decisions

Volume 3—p. 2232; Volume 7—p. 5671; Volume 9—p. 7762; Volume 11—p. 9307; Volume 12—p. 10329; Volume 13—p. 11032; Volume 14—p. 11542; Volume 15—p. 12129; Volume 16—p. 12777; Volume 17—p. 13463.

Pipe Lines

328. Oil.—[Vols. 9, 11].—The oil contained in a carrier's pipeline system, although it may be equivalent in volume to oil purchased by the carrier, is nevertheless oil tendered for transportation and is in transit and, as such, is not to be inventoried and valued as property used for transportation purposes. Carrier's claim that its operating oil supply should be included in the valuation of common carrier property, rejected.—Jayhawk Pipeline Corp., 324 I.C.C. 779 (781-2).

An operating supply of products, in instant case liquified petroleum gas, is maintained in carrier's pipeline so that the product offered for shipment at origin is made available immediately to shipper at carrier-owned distribution terminal; it is purchased primarily as a traffic arrangement in the interest of assuring rapid delivery at distribution terminals. This applies whether the carrier is publicly owned, or is shipper owned. Under the commission's accounting rules, cost of the operating supply is includible in an asset account entitled "Operating Oil Supply," apart from cost of tangible property used in common carrier service. The operating supply is not in the category of common carrier property used for transportation purposes; carrier's operating supply of liquified petroleum gas is not to be inventoried and valued as property used for transportation purposes.—Mid-America Pipeline Co., 320 I.C.C. 787 (788-9).

Regulations of the Commission

28 FR 4304, May 1, 1963, Part 155: Uniform System of Records and Reports of Property Changes; Common Carriers Subject to Part I; Valuation Order No. 3, Second Revised Issue and Revised Supplement No. 5 to said order, miscellaneous amendments, effective June 1, 1963.

30 FR 13262, Oct. 19, 1965, Part 160: Reporting of Data for Initial Pipeline Valuations, §160.103, effective 30 days after publication.

31 FR 11180, Aug. 24, 1966, Part 150: Corporate History: Aids, Gifts, Grants, and Donations, Valuation records and reports, revoked, effective 30 days after publication in Federal Register.

31 FR 11181, Aug. 24, 1966, Part 151-Land Schedules and Industrial Tracks, Valuation records and reports, revoked, effective 30 days after publication in Federal Register.

31 FR 11181, Aug. 24, 1966, Part 155 Uniform System of Records and Reports of Property Changes; Common Carriers, Valuation records and reports §§155.19, §§155.20 and 155.22 revoked, effective 30 days after publication in Federal Register.

31 FR 11181, Aug. 24, 1966, Part 157 Inventory of Records, Valuation records and reports, revoked, effective 30 days after publication in Federal Register.

31 FR 12601, Sep. 24, 1966, Part 155: Uniform System of Records and Reports of Property Changes; Common Carriers, Valuation records and reports, correction (31 FR 11181), amended by revoking §§155.0 (f) thru (m) both inclusive, 155.19, 155.20 and 155.22, effective 30 days after publication in the Federal Register.

Section 20. Reports, records, and accounts of carriers; mandamus; liability of initial carrier for loss, etc.—(1) Reports from carriers, lessors, and associations.—[Unchanged. See vol. 15, p. 12130.]

Amendments, see footnotes, vol. 3, p. 2511, vol. 11, p. 9309, vol. 15, p. 12130; historical notes; vol. 3, p. 2512, vol. 9, p. 7776, vol. 11, p. 9309, vol. 12, p. 10330, vol. 13, p. 11032, vol. 14, p. 11543.

Notes of Decisions

Volume 13—p. 11033; Volume 15—p. 12130; Volume 16—p. 12777; Volume 17—p. 13465.

3. Periodical and special reports.—[Vol. 16]—See Commodity Statistics Reporting—Extent and Disclosure, §220(a), n. 5.

6. Carriers, lessors, subject to section.—[Vols. 13, 15, 17]. [Former §20(1), n. 6, v. 3, 7, 9]—Although merger of railroad system's parent holding company into a new Delaware corporation is not subject to §5(2) and, therefore, the new company may not be subjected to accounts and reports provisions of the act under §5(3), upon consummation it will be subject to, and must comply with, provisions of §20(1-10) in lieu of the old company to the extent provided by order in debt adjustment proceeding, 254 ICC 239. The mere change of situs by the old company for purpose of acquiring some benefit not available under laws of the State of original incorporation does not deny the commission the jurisdiction assumed in the debt adjustment proceeding.—Delaware & Hudson Co. Merger, 317 I.C.C. 177 (180).

Regulations of the Commission

28 FR 975, Feb. 1, 1963, Part 120: Annual, Special or Periodical Reports; §120.12, Annual Report Form C, as modified, prescribed for Class II railroads commencing with reports for year ended Dec. 31, 1962.

28 FR 1424, Feb. 14, 1963, Part 120: Annual, Special, or Periodical Reports; §120.14 Form prescribed for lessors to railroads, Annual Report Form E, Railroad Lessor Companies, prescribed for reports commencing with year ended Dec. 31, 1962.

28 FR 1509, Feb. 16, 1963, Part 120: Annual, Special or Periodical Reports; §120.11 Form prescribed for class I railroads, Annual Report Form A prescribed for reports commencing with year ended Dec. 31, 1962.

28 FR 11782, Nov. 5, 1963, Part 122: Monthly and Quarterly Operating Reports; §122.3, Operating statistics, Quarterly Report Forms OS-A, Train and Yard Service, OS-B, Revenue Traffic, and OS-C, Motive Power and Car Equipment, prescribed for reports commencing with the three months beginning with January 1, 1964.

28 FR 10711, Oct. 4, 1963, Part 123: Freight Commodity Statistics, miscellaneous amendments of regulations governing commodity statistics and reports of railroads, carriers by water, and electric railways, as to traffic and reports for year beginning Jan. 1, 1964.

28 FR 12318, Nov. 21, 1963, Part 120: Annual, Special, or Periodical Reports, §120.21 Annual reports of electric railways, Annual Report Form G (Electric Railways) prescribed for use commencing with year ended Dec. 31, 1963.

28 FR 13310, Dec. 7, 1963, Part 120: Annual, Special or Periodical Reports, §120.31 Annual reports of express companies, Annual Report Form H (Express Companies) prescribed for use commencing with year ended Dec. 31, 1963.

28 FR 13747, Dec. 17, 1963, Part 120: Annual, Special or Periodical Reports, amended by adding thereto §120.71 Piggyback traffic statistics—rail. Effective with reports for first quarter of 1964.

29 FR 351, Jan. 15, 1964, Part 120: Annual, Special or Periodical Reports, §120.70 Annual reports of refrigerator car lines owned or controlled by railroad companies, Annual Report Form B-1 prescribed for use commencing with reports for year ended Dec. 31, 1963.

29 FR 104, Jan. 4, 1964, Part 123: Freight Commodity Statistics, §123.6 Public inspection—railroad reports, added; and §123.52 Commodity codes required, modified and amended, as to reports required to be filed for quarter and year beginnign Jan. 1, 1964.

29 FR 1469, Jan. 29, 1964, Part 120: Annual, Special or Periodical Reports, §120.61 Annual reports of carriers by pipeline, Annual Report Form P prescribed for use commencing with year ended Dec. 31, 1963.

29 FR 2699, Feb. 26, 1964, Part 120: Annual, Special or Periodical Reports, §120.12 Form prescribed for Class II railroads, Annual Report Form C prescribed for use commencing with year ended Dec. 31, 1963.

29 FR 2947, Mar. 4, 1964, Part 120: Annual, Special or Periodical Reports, §120.11 Form prescribed for Class I railroads, Annual Report Form A prescribed.

30 FR 648, Jan. 20, 1965, Part 120: Annual, Special or Periodical Reports, §120.14 Form prescribed for lessors to railroads, Annual Report Form E, Railroad Lessor Companies prescribed for use commencing with year ended Dec. 31, 1964.

30 FR 885, Jan. 28, 1965, Part 120: Annual, Special or Periodical Reports, §120.21 Annual reports of electric railways, Annual Report Form G (Electric Railways) prescribed for use commencing with year ended Dec. 31, 1964.

30 FR 795, Jan. 26, 1965, Part 120: Annual, Special or Periodical Reports, §120.12 Form prescribed for Class II railroads, Annual Report Form C prescribed for use commencing with year ended Dec. 31, 1964.

30 FR 831, Jan. 27, 1965, Parts 124 and 126: §124.1 Waybills and §126.1 Classification of carriers for reporting purposes, paragraph (a), modified and amended, effective Jan. 1, 1965.

29 FR 12077, Aug. 25, 1963, Part 123: Freight Commodity Statistics, §123.6 Public inspection—railroad reports, amended; and §123.28 Public inspection—water carrier reports, and §123.44 Public inspection, electric railway reports, added, effective on date of order.

30 FR 140, Jan. 7, 1965, Part 121: Separation of Operating Expenses between Freight and Passenger Services, miscellaneous amendments required by recent changes in accounting rules and reporting requirements, effective as to reports for the year 1964.

30 FR 485, Jan 14, 1965, Part 123: Freight Commodity Statistics, §§123.6, 123.28, and 123.44 modified and amended, effective on date or order.

30 FR 583, Jan. 16, 1965, Part 120: Annual, Special or Periodical Reports, §120.61 Annual reports of carriers by pipe line, Annual Report Form P (Carriers by Pipe Line) prescribed, effective on date of order.

30 FR 1983, Feb. 12, 1965, Part 120: Annual, Special or Periodical Reports, §120.11 Form prescribed for Class I railroads, Annual Report Form A prescribed for use commencing with reports for year ended Dec. 31, 1964.

30 FR 13375, Oct. 21, 1965, Part 120: Annual, Special or periodical reports; §120.11, Railroad Annual Report Form A prescribed for use commencing with reports for year ending Dec. 31, 1965.

30 FR 13785, Oct. 29, 1965, Part 10: Uniform System of Accounts for Railroad Companies; §108 Other Passenger-train, effective Jan. 1, 1966.

31 FR 4210, Mar. 10, 1966, Part 120: Annual, Special or Periodical Reports, §120.12 Railroad Annual Report Form C, prescribed for Class II railroads commencing with reports for the year ending Dec. 31, 1965.

31 FR 9741, July 19, 1966, Part 120: Annual, Special or Periodical Reports, §§120.9 Class I Railroads, added, effective on date of order.

Section 20. (2) Period covered by and time for making reports; oaths for reports.—[Unchanged. See vol. 11, p. 9310.]

Amendments, see footnotes, vol. 3, p. 2528, vol. 11, p. 9310; historical notes, vol. 3, p. 2529, vol. 9, p. 7781, vol. 12, p. 10330.

Historical Note

The commission recommends, in view of the prohibitions in 28 USC §1001, that §20(2) be amended so as to eliminate the mandatory oath provision therein, and that such requirement be made discretionary with the commission.—Annual Report, 1964, p. 72.

Notes of Decisions

Volume 3—p. 2529.

Section 20. (3) Uniform system of accounts.—[Unchanged. See vol. 11, p. 9311.]

Amendments, see footnotes, vol. 11, p. 9311.

Historical Note

Under Executive Order 11107, Administration of Alaska Railroads, dated April 25, 1963, giving the Interstate Commerce Commission jurisdiction "to fix, change, or modify rates for the transportation of passengers and property" under the authority set forth in the Alaska Railroad Act, 38 Stat. 305, the commission, in determining justness and reasonableness of such rates, shall exclude for cost finding purposes the portion of capital investment allocated to national public purposes by the Secretary of the Interior. (28 FR 4225, April 30, 1963)

Notes of Decisions

Volume 3—p. 2512; Volume 7—p. 5793; Volume 9—p.7777; Volume 11—p. 9311: Volume 12—p. 10331; Volume 13—p. 11033; Volume 14—p. 11543; Volume 15—p. 12131; Volume 16—p. 12778; Volume 17—p. 13465; Volume 18—p. 14223; Volume 19—p. 15422.

16. In general.—[Vols. 3, 7, 9, 12-14].—Rule authorizing carriers to prepare and publish financial statements in reports to stockholders and others (except in reports to the commission) based on generally accepted accounting principles for which there is authoritative support, provides that any variance from prescribed accounting rules is clearly disclosed in footnotes to the statement, adopted as reasonable, in public inter-

est, and not unduly burdensome on carriers. —Financial Statements Released by arriers, 315 I.C.C. 507 (509).

18. Adjustment of accounts.—[Vols. 3, 7, 15].—It would be inequitable to require New York Central, as a condition on approval of its continued operation of Peoria & E. Ry., to account for and pay interest on monthly intercompany balances generated by current-year operations, as that would entail virtual closing of the Peoria's books each month, including recording of appropriate adjustments; in view of possibility that during any given month expenses could exceed revenues, use of a 12-month period for computation of the intercompany balance payable is reasonable. However, immediately after close of each year the cash amounts generated by the operations become a debt of Central, and interest thereon should be payable from date the amount becomes certain, and be remitted shortly thereafter; such settlement should be accomplished within 60 days after the close of the year in which the intercompany amount was created.—Cleveland, C., C. & ST. L. Ry. Co.—Operating Agreement, 320 I.C.C. 430 (437).

24. Depreciation accounting.—[Vols. 3, 7, 11, 13-15].—New York Central's practice, in operating the Peoria & E. Ry., of recording expenditures for purchase of equipment for account of the Peoria in advances payable account, rather than charging them to depreciation balances, is not unfair to the Peoria's minority stockholders or bondholders, since interest on both accounts accrues at same rate; furthermore, as depreciation is an operating expense to be considered in computing yearly intercompany balances, no interest on such amounts should be payable during the year the depreciation accrues. However, amounts in the account recording the depreciation balances and the account titled advances for expenditures for equipment should be balanced off at end of each year, and those amounts, as well as balances in other intercompany accounts (less amounts necessary to meet expenditures required to be made after the close of the year), should be paid to the Peoria at end of each calendar year, on or before 60 days from that date.—Cleveland, C., C. & St. L. Ry. Co.—Operating Agreement, 320 I.C.C. 430 (436, 437).

31. Taxes.—[Vols. 3, 7, 9, 12, 15].—Though the commission's accounting rules require that income taxes be recorded as tax expenses in year when the tax becomes payable, and not in an earlier year, showing of deferred Federal income taxes, resulting from accelerated depreciation, in computing net income in financial statements is commonly recognized among nonregulated industries as being in accord with generally accepted accounting principles; after careful consideration it is concluded that treatment of tax deferrals in financial statements in carriers' reports to stockholders or otherwise released to the public need not conform strictly with corporate books of accounts maintained under the accounting regulations or with their filed reports. Rule adopted therefore provides that any variance from the prescribed accounting rules be disclosed in footnotes to the statements.—Financial Statements Released by Carriers, 315 I.C.C. 507 (509).

Though shortened tax-depreciation guideline lives authorized by Internal Revenue Service will result in much larger tax-depreciation deductions in early years of service lives of facilities than book depreciation computed under commission accounting rules, neither that nor investment tax credit permitted by Revenue Act of 1962 warrants changes in present accounting rules or the commission's statement of policy dated February 9, 1959, that actual Federal income taxes payable for each year, based on effective tax regulations for the year, shall be recorded in the tax accounts of carriers' books of account and in financial statements. But present requirement for disclosure in carriers' annual reports of tax reductions for accelerated depreciation will be extended to apply to those attributable to tax-depreciation guideline lives, as well as investment tax credit.—Accounting for Federal Income Taxes, 318 I.C.C. 803 (805, 807-8).

Regulations of the Commission

28 FR 4302, May 1, 1963, Part 10: Uniform System of Accounts for Railroad Companies, miscellaneous amendments, effective June 1, 1963.

28 FR 11478, Oct. 26, 1963, Part 10: Uniform System of Accounts for Railroad Companies, miscellaneous amendments, effective Dec. 1, 1963.

28 FR 12749, Nov. 30, 1963, Part 20: Pipe Line Companies; Uniform System of Accounts, regulations revised, effective Jan. 1, 1964.

29 FR 18426, Dec. 25, 1964, Part 10: Uniform System of Accounts for Railroad Companies, miscellaneous amendments, effective Jan. 1, 1965.

30 FR 2662, March 2, 1965, Part 10: Uniform System of Accounts for Railroad Companies, General Instructions amended to conform to revised designation of carriers as between Class I and Class II, effective on date of order.

NOTE: For recodification, see 49 CFR, Editorial Note, 32 FR 5606, April 5, 1967.

32 FR 13136, Sept. 15, 1967, Part 110 [formerly Part 10]: Uniform System of Accounts for Railroad Companies, miscellaneous amendments pertaining to extraordinary and prior period items in determining net income, effective Jan. 1, 1967.

32 FR 13927, Oct. 6, 1967, Part 120 [formerly Part 20]: Pipeline Companies; Uniform System of Accounts, regulations amended, effective Jan. 1, 1967.

32 FR 15484, Nov. 7, 1967, Part 114 [formerly Part 14]: Electric Railways: Uniform System of Accounts, miscellaneous amendments pertaining to extraordinary and prior period items, effective Jan.1, 1967.

Section 20. (4) Depreciation charges.—[Unchanged. See vol. 11, p. 9313.]

Amendments, see footnotes, p. 9313.

Notes of Decisions

Volume 3—p. 2534; Volume 7—p. 5807; Volume 9—p. 7786; Volume 11—p. 9314; Volume 13—p. 11035; Volume 15—p. 12132; Volume 16—p. 12779; Volume 18—p. 14224; Volume 19—p. 15423.

Section 20. (5) Forms of accounts, records, and memoranda; access to records, etc., by commission or agents.—[Unchanged. See vol. 11, p. 9315, vol. 15, p. 12133.]

Amendments, see footnotes, vol. 3, p. 2533, vol. 11, pp. 9315-9316; historical note, vol. 3, p. 2534.

Regulations of the Commission

29 FR 16087, Dec. 2, 1964, Part O: The Commission, §0.5 Credentials required by special agents, accountants, and examiners, paragraphs (c), (d), (e), (f), and (g) amended, effective on date of order.

29 FR 19107, Dec. 30, 1964, Part O: Order of Nov. 24, 1964 (29 FR 16087) corrected to substitute "accountants" for "accounts" wherever latter appears therein.

Section 20. (6) Persons furnishing cars or protection against elements; access to and forms of records, etc.; reports.—[Unchanged. See vol. 11, p. 9317.]

Historical notes, vol. 12, p. 10332, vol. 14, p. 11545, vol. 15, p. 12133, vol. 16, p. 12780, vol. 17, p. 13466.

Regulations of the Commission

28 FR 1960, Feb. 28, 1963: Retention periods, records, persons which furnish cars to railroads, 49 CFR 110.104.

29 FR 3088, Mar. 5, 1964: Same retention periods reference.

30 FR 3163, Mar. 6, 1965: Same retention periods reference.

31 FR 4067, Mar. 8, 1966: Same retention periods reference.

32 FR 3664, Mar. 2, 1967: Same retention periods reference.

NOTE: For recodification, see 49 CFR, Editorial Note, 32 FR 5606, April 5, 1967.

32 FR 14392, Oct. 18, 1967, Part 124 [formerly Part 24]; uniform System of Accounts for Refrigerator Car Lines, miscellaneous amendments pertaining to accounting treatment of extraordinary and prior period items, effective Jan. 1, 1967.

33 FR 4067, March 1, 1968: Record Retention Guide, XXIV Interstate Commerce Commission [Revised] 1.7 Persons furnishing cars to railroads, 49 CFR Part 1225.

Section 20. (7)-(10) Penalties; false entries; Persons furnishing cars, etc.—[Unchanged].

§20(9). 1. Mandamus to compel compliance with this chapter or supplementary statutes.—[Vol. 3].—Since §20(9) is limited to enforcement of the commission's orders against a carrier, it is not applicable to city and city official defendants.—United States v. City of Jackson, Miss., 206 F. Supp 45 (48).

Regulations of the Commission

§20(7): 28 FR 1960, Feb. 28, 1963: Retention periods, records, refrigerator car lines and railroad companies, 49 CFR 110.7; electric railway companies, 49 CFR 110.31; sleeping car companies, 49 CFR 110.50; express companies, 49 CFR 110.70; pipeline companies, 49 CFR 110.87.

29 FR 3088, March 5, 1964: Same retention periods references.

30 FR 3163, March 6, 1965: Same retention periods references.

30 FR 11524, Sept. 9, 1965, Part 110: Destruction of Records, §110.50 Sleeping car companies (23 FR 2128), correction of heading for consistency of format.

30 FR 12250, Sept. 24, 1965, Part 110: Destruction of Records, miscellaneous amendments of regulations governing destruction of records of railroad companies, electric railway companies, sleeping car companies, and express companies which are necessary in order to implement recent amendment of competitive-bidding regulations, effective on publishcation in the Federal Register.

31 FR 4066, Mar. 8, 1966: Retention periods, records, refrigerator car lines and railroad companies, 49 CFR 110.7; electric railway companies, 49 CFR 110.31; sleeping car companies, 49 CFR 110.50; express companies, 49 CFR 110.70; pipeline companies, 49 CFR 110.87.

32 FR 3664, Mar. 2, 1967: Same retention periods references.

32 FR 10794, July 22, 1967, Part 107a: Administrative Collection of Enforcement Claims, new Part 107a, adopting regulations published in 4 CFR Parts 101 through 105, added, effective Aug. 1, 1967.

33 FR 4067, March 1, 1968: Records Retention Guide, XXIV Interstate Commerce Commission [Revised] 1.1 Refrigerator car lines, and 1.2 Railroad companies, 49 CFR Part 1220; 1.3 Electric railway companies, 49 CFR Part 1221; 1.4 Sleeping car companies, 49 CFR Part 1222; 1.5 Express companies, 49 CFR Part 1223; and 1.6 Pipeline companies, 49 CFR Part 1224.

Section 20. (11) Liability of initial and delivering carrier for loss; limitation of liability; notice and filing of claim.—[Unchanged. See vol. 9, p. 7794, and vol. 11, p. 9322.]

Amendments see footnotes, vol. 3, p. 2552; historical note, p. 2555.

Notes of Decisions

Volume 3—p. 2559; Volume 7—p. 5818; Volume 9—p. 7796; Volume 11—p. 9323; Volume 12—p. 10333; Volume 13—p. 11036; Volume 14—p. 11546; Volume 15—p. 12134; Volume 16—p. 12780; Volume 17—p. 13467; Volume 18—p. 14225; Volume 19—p. 15424.

3. Purpose.—[Vol. 3].—The principal function of the Carmack Amendment is to permit a shipper in interstate commerce o bring an action against an initial carrier to recover for damages to a shipment of goods whether such damages occurred while the goods were in hands of initial carrier or a connecting carrier.—L. E. Whitlock Truck Service, Inc. v Regal Drilling Co., 333 F. 2d 488 (490, 491).

See also J & H Flyer, Inc. V. Pennsylvania R. Co., n. 36, below.

Purpose of the second Cummins amend-

ment (1916) to §20(11) was to restore the law of full liability as it existed prior to the Carmack amendment of 1906; practical result of railroads' publication of rates with extremely low released values and extremely high rates where there were no released values had been that shippers had a choice of rates in name only, because the full-value rates were prohibitively high, and thus were effectually compelled to use the low-value rates and accept relatively small amounts for loss or damage to their shipments.—Released Rate Rules —National M. Freight Classification, 316 I.C.C. 499 (509)*.

4. Effect.—[Vol. 3].—The statute has two undisputed effects crucial to the issue in action brought in State court to recover for damages to melons shipped from Rio Grande City, Tex., to Chicago, Ill.: first, it codifies the common-law rule that a carrier, though not an insurer, is liable for damage to goods transported by it unless it can show that the damage was caused by an act of God, the public enemy, an act of shipper, public authority, or the inherent vice or nature of the goods; and second, it declares unlawful and void any rule, regulation, or other limitation purporting to limit that liability.—Missouri Pac. R. Co. v. Elmore & Stahl, 377 U.S. 134 (137-8)*.

Effect of the Carmack Amendment was to codify the common law rule of carrier's liability for all loss or damage to shipments excepting only that due to acts of God, public enemy, and those arising from inherent nature of goods transported or resulting from fault of the shipper; it was also a rule of common law that as to those excepted causes of damage a carrier could nevertheless be held liable if it were negligent. Thus, carrier was liable for damages whether negligent or not if the loss or damage was not due to the excepted causes; it could not escape liability simply by showing absence of negligence on its part.—L. E. Whitlock Truck Service, Inc. v. Regal Drilling Co., 333 F. 2d 488 (491).

Applicability of Paragraph

8. Carriers, transportation, subject to paragraph.—[Vols. 3, 7, 9, 16-18].—Mere publication of a tariff does not of itself make the publisher a common carrier or make every service it performs a part of common carriage with consequent common carrier liability; and fixing point at which common carrier liability begins or ends is not dependent on requirement of filing the tariff but is a matter for the courts and the common law.—Republic Carloading & Distrib. Co. v. Missouri Pac. R. Co., 302 F. 2d 381 (386)*.

See also Sawyer & Co., Inc. v. Atchison, T. & S.F. Ry. Co., n. 30, below.

On traffic handled by water carrier operating under authority from Maritime Commission between Seattle and Seward in connection with land carriers operating between Seward and interior Alaska points and/or between Seattle and points in the 48 contiguous States, liability for loss and damage to shipments is determined, as to the land transportation, under §20(11), and as to the water transportation under the Carriage of Goods by Sea Act (46 USC §§1300-1303).—Alaska Freight Lines, Inc., v. Puget Sound Tug & Barge, 94 M.C.C. 376 (378).

Bills of Lading

15. Nature and function.—[Vols. 3, 7, 9, 19].— See Holford v. Louisville & N. R. Co., n. 115, below.

20. Uniform bills of lading; domestic and export.—[Vol. 3].—Shipment of plums was not transported and delivered to plaintiff with "reasonable dispatch" within meaning of that term in Section 2 of the "contract, terms, and conditions" of the uniform straight bill of lading; delay of 2 days was unreasonable and unexcused, therefore a wrong.—Great Atlantic & Pacific Tea Co. v. Atchison, T. & S.F. Ry. Co., 224 F. Supp. 903 (903, 905)*.

24. General construction of clauses limiting liability.—[Vols. 3, 19].—Carrier transporting perishable goods is not precluded from limiting its liability, by bill of lading and protective tariff provisions, to liability for negligent failure reasonably to carry out shipper's instructions; §20(11) provides simply that a carrier cannot limit its liability for damages caused by the carrier.—Trautmann Bros. Co. v. Missouri Pac. R. Co., 312 F. 2d 102 (104).

Only in case of misdelivery, negligent injury, loss or similar misfortune does a valuation clause in the contract of carriage come into

use; the limitation clause is designed for and does survive a breach of the contract, and the limitation of liability must apply where carrier is negligent or fails to follow shipper's instructions, or it is meaningless.—Minneapolis Soc. of Fine Arts v. Railway Exp. Agency, 213 F. Supp. 129 (133) [Not arising hereunder.]

Liability of Carriers

30. In general.—[Vols. 3, 7, 9, 13-19].—Part II, §219, n. 10.

In action to recover from carrier for damage to a shipment of melons, shipper established its prima facie case when it showed delivery in good condition, arrival in damaged condition, and the amount of damages; burden of proof was then on carrier to show both that it was free from negligence and that damage to the shipment was due to one of the excepted causes which relieve a carrier of liability. The court is aware of no new rule of federal law governing a carrier 's liability for spoilage and decay of perishables, similar to the "livestock rule," which absolves carrier from liability upon proof that it exercised reasonable care and complied with shipper's instructions.—Missouri Pac. R. Co. v Elmore & Stahl, 377 U.S. 134 (138-40)*.

Nor do rules 130 and 135 of the Perishable Protective Tariff, relied on by carrier, reflect any such change in the federal law; neither rule refers to presumptions or burdens of proof imposed by law, and it is clear (from the history underlying their adoption) that it was not the commission's intention in approving those rules to modify or reduce the common-law liability of a carrier.—Id., pp. 140-2.

The general rule of carrier liability being based on the sound premise that the carrier has peculiarly within its knowledge all facts and circumstances on which it may rely to relieve it of liability, the law casts upon it the burden of the loss which it cannot explain or bring within the statutory exceptions relieving it from liability. Carrier does not lack adequate means to inform itself of condition of goods at time it receives them from shipper and, while it has possession, it is the only one in position to learn what actually damaged shipment entrusted to its care. Judgment of State court against carrier, affirmed.—Id., pp. 136, 143-4.

At common law a carrier was not liable for damage occasioned by inherent vice or nature of goods transported in absence of negligence; however, under the Carmack amendment and rules of the Perishable Protective Tariff, upon proof of the perishable nature of goods involved the carrier is relieved of its insurer's liability. Thus, in the case of perishable goods, carrier's burden is not to prove that damage resulted from inherent vice of the goods, but to prove its own compliance with tariff rules and shipper's instructions. Lower court properly regarded shipment of frozen food as perishable for purpose of determining carrier's liability for damage; shipper's prima facie case that its shipment was delivered to the railroad in good order was met by latter's proof of shipment's perishable character and of its compliance with tariff requirements and shipper's instructions; since shipper then failed to show that, notwithstanding such apparent compliance, railroad failed to use due care, it is not entitled to recover for damages because part of the shipment was not frozen upon arrival.—Larry's Sandwiches, Inc. v. Pacific Electric Ry. Co., 318 F. 2d 690 (692-3).

A common carrier is not absolutely liable for spoilage or deterioration during course of shipment. So long as carrier has discharged its duty of reasonable care, it is not liable for damages occasioned solely by inherent nature, or vice, of goods shipped; nor is it liable for damages caused solely by acts or direction of shipper. Under governing perishables protective tariff, railroad's liability was limited to liability for negligent failure reasonably to carry out shipper's instructions; melons shipped were prone to spoilage, cars were re-iced at regular stations, and defendant, having no knowledge of shipper's pre-cooling operations, was under no duty to re-ice at origin of shipment; defendant was not negligent, hence did not contribute to spoilage of complainant's shipment of melons.—Trautmann Bros. Co. v. Missouri Pac. R. Co., 312 F. 2d 102 (104-5).

Lower court's finding that steel sheets, shipped in open gondola car on "Shippers load and count" bill of lading, rusted in transit

as result of shipper's failure to properly prepare the goods for shipment in such a car, and that the damage to the goods was within the exceptions from liability on part of the carrier contained in the Bills of Lading Act, and its judgment in favor of the railroad, affirmed.—Solway Metal Sales, Ltd. v. Baltimore & O. R. Co., 344 F. 2d 568 (569-70).

Under the Carmack Amendment, initial carrier is liable for damage to property moving in interstate commerce under a through bill of lading whether in its possession or that of a connecting carrier, and delivering carrier is equally liable. In action for damage to goods transported, a justiciable issue of fact is established when plaintiff shows that the goods were delivered to initial carrier in good condition and arrived in damaged condition; carrier sued then has the burden of proving that the damage was caused solely by an Act of God, the public enemy, inherent vice or nature of the commodity, or an act of shipper, After plaintiff makes a prima facie showing of damage to the shipment and carrier shows that the loss or damage arose from act of the shipper, plaintiff must prove that some act of the carrier concurred in or contributed to the damage before carrier can be held liable.—Minneapolis, St. P. & S.S.M. R. Co. v. Metal-Matic, Inc., 323 F. 2d 903 (905-6).

Defendant is not liable for damage to shipment of machinery which moved on straight bill of lading containing a "shipper's load and count" clause; the machinery was not skidded as required by railroad's tariff rules (although shipper knew of the skidding requirement and skidding was its prior regular practice), shipper improperly loaded the two cars used, thereafter closed and sealed the cars, and delivered them to initial carrier for movement. Shipper is conclusively bound by carrier's tariff rules, and parol evidence cannot be received to vary terms thereof; therefore, although initial carrier's inspector, before the cars were closed and sealed, inspected the shipment and reported that it was in good order, that act did not waive shipper's liability for failure to skid the shipment as required by the tariff. Defendant's liability cannot in anywise be premised on waiver of carrier rules and regulations or on shipper's reliance on the inspection before the cars were sealed.—Id., pp. 906-8.

In suit to recover for damage to delicate electronic equipment, loaded by plaintiff in van of a motor truck, a finding that goods were undamaged when delivered to the railroad could have been predicated only on speculation and conjecture. The loaded truck was already padlocked and secured on a flatcar when received by defendant, and the bill of lading said nothing about contents of the truck. Those circumstances relieved the railroad of any obligation to ascertain contents of the truck or whether they were properly packed for rail shipment; further, they placed on plaintiff the burden of proving that the packaged contents were properly loaded and secured within the truck for rail shipment. Trial judge's finding that plaintiff did not meet that burden is supported by the records; sustained.—Armour Research Found. of Ill. Institute of Technology v. Chicago, R. I. & P. R. Co., 311 F. 2d 493 (494)*.

Defendant has no common-carrier liability for loss of considered forwarder l.c.l. shipments, lost after unloading onto platform at its freight house (part of which was leased to plaintiff forwarder) and before they were loaded into rail cars or trucks by railroad employees for outbound haul or by local draymen for local delivery. Plaintiff had acknowledged delivery of inbound shipments, but had not delivered shipments into carrier's possession for immediate transportation, nor issued complete shipping instructions; no outbound bills of lading had been issued. Thus, so far as relation between plaintiff as shipper-consignee and carrier is concerned, interstate shipment had ceased or had not begun when loss occurred. Defendant's unloading services were performed at shipper's request in accordance with its tariff naming charges therefor, and not in its capacity as a common carrier. District court's judgment in favor of defendant, affirmed.—Republic Carloading — Distrib. Co. v. Missouri Pac. R. Co., 302 F. 2d 381 (384-7, 389)*.

Moreover, agreement covering plaintiff's lease of part of the depot, including use of the platform for temporary accommodation of freight actually or constructively in its possession, provided that freight on which defend-

ant received no road haul should at all times be deemed to be in plaintiff's possession, that plaintiff would be liable for loss and damage to freight being handled from highway truck to highway truck, and that loss or damage to freight on the platform would be the liability of the party having possession thereof under provisions of the agreement. Thus, under the lease terms, plaintiff at all times had possession of considered shipments and their loss was its responsibility.—Id., pp. 383, 387.

See also J & H Flyer Inc. v. Pennsylvania R. Co., n. 36, below.

Defendant railroad, as a common carrier, owed a duty to plaintiff, as shipper, to exercise reasonable care in handling considered shipment and to perform all required transportation services without negligence. And under the Carmack Amendment, a carrier, although not an absolute insurer, stands liable for damage to goods which it transports unless it can show its freedom from negligence and that the damage was caused by an Act of God, acts of a public enemy, public authority, an act of shipper, or an inherent vice or the nature of the goods. See 377 U.S. 134. Therefore, when plaintiff consignee established a prima facie case by showing delivery of the shipment to carrier in good condition, arrival in damaged condition, and the amount of damages, and defendant railroad failed to show by a preponderance of credible evidence either that it was free from negligence or that the damage was due to one of the excepted causes relieving it from liability, plaintiff is entitled to recover damages in the amount specified.—Sarno v. Southern Pac. Co., 277 F. Supp. 628 (631).

Carriers are charged with knowledge of information and instructions contained in their own freight bills. Though originating carrier's freight bills showed shipment of green corn, consigned to delivering carrier as agent with instruction to hold for disposition by shipper, as top-iced by shipper, with instructions to reice if delayed, they negligently failed to carry out shipper's reicing instructions after shipment arrived at destination. Under applicable tariff provisions respecting cars held for orders and the agreement of the parties as contained in the bill of lading, the carriers were responsible as carriers, not as warehousemen, from time shipment arrived at destination through the period of free time for unloading; and as shipper informed them of the consignee before expiration of the free time, the carrier continued to be responsible as a carrier until placement of the property for delivery at consignee's dock, and as such was also responsible for compliance with shipper's instructions to reice the load if delayed. —Skaggs v. Midland Valley R. Co., 233 F. Supp. 1004 (1005, 1007-8).

Under a fair and proper interpretation of those instructions, carriers would be responsible for checking the shipment and reicing as necessary until shipment was delivered to dock of the party entitled to receive it for unloading, and certainly through the free-time period. As the spoilage occurred prior to expiration of that period, defendant is liable for the loss, and it has not shown that the loss was due to any of the five causes relieving it from liability. Judgment for plaintiff.—Id., p. 1008.

In view of the carrier's duty to deliver freight shipped at the destination designated in the bill of lading, defendant railroad is liable to shipper and receiver of cement for breach of contract by virtue of its misdelivery of considered car; and error in routing instructions on bill of lading prepared by shipper does not relieve carrier of its duty to deliver at designated destination, nor permit it to change to destination. However, contrary to plaintiffs' contention, a negligence action will not lie where the only duty breached is one created by contract; therefore, since the only duty breached was railroad's duty to deliver under a contract of carriage, the court need not consider rules of law governing the measure of damages in tort actions. Accordingly, under §20(11), defendant is liable to plaintiffs for the value of the shipment plus the freight charges as damages which (having been within contemplation of the parties when the contract was made) might naturally be expected to follow a breach of the contract of carriage. —Marquette Cement Mfg. Co. v. Louisville & N. R. Co., 281 F. Supp. 944 (947, 950-1).

Defendant railroad found liable to seller of goods for full value of considered shipment, moved under order-notify bill of lading, when railroad delivered the shipment to agent of

purchaser of the goods without simultaneously receiving the bill of lading; as the shipment was subsequently stolen from its premises, purchaser refused to honor bank draft drawn on it for payment; and the bill of lading was returned to plaintiff-seller who made timely claim for loss upon the railroad. Inasmuch as purchaser's agent did not have or surrender the covering order bill of lading at the time of delivery, as required by specific provision on face thereof, the railroad had no right to deliver the shipment to him. However, pursuant to indemnity bond of purchaser and its surety, agreeing to hold the railroad harmless for delivering shipments covered by order bills of lading without surrender of such bills, railroad is entitled to indemnification from defendant insurance company as surety.—Capitol Packing Co. v. Smith, 270 F. Supp. 36 (37-40).

Plaintiff is not entitled to recover under the Carmack amendment for unreasonable and unexcused delay in transportation and delivery of a shipment of plums when it has not shown that it suffered any actual loss, damage, or injury as result thereof. Nor is plaintiff entitled to recovery under the common-law concept of damages, since the basic principle underlying common-law remedies is that they shall afford only compensation for the injury suffered.—Great Atlantic & Pacific Tea Co. v. Atchison, T. & S.F. Ry. Co., 224 F Supp. 903 (907)*.

Railroad's motion for summary judgment, in action brought under§20(11) for alleged damages to shipment of cantaloupes, must be allowed. The statute imposes liability for loss and damage to goods only upon initial carrier receiving goods from consignor for shipment or on the final carrier delivering shipment to consignee, and imposes that liability only in favor of the lawful holder of a bill of lading or receipt for the shipment. Accordingly, when plaintiff did not allege or show that it was the holder of a bill of lading or receipt for considered shipment, while defendant affirmatively showed by uncontradicted affidavits that it was neither the receiving nor delivering carrier, defendant is entitled to judgment.—Sawyer & Co., Inc. v. Atchison, T. & S.F. Ry. Co., 282 F. Supp. 791.

Though neither Government bill of lading nor plaintiff motor carrier's freight bill indicated that plaintiff was either initial or delivering carrier of shipment intended for movement in piggyback service under its contract with railroads, the Government withheld revenue from plaintiff on account of claim for loss of the shipment on line of connecting railroad, and because the railroad was willing to settle with plaintiff within limit of their indemnity agreement, plaintiff, not knowing that the Government's claim was over twice that amount, effected settlement. Plaintiff did not voluntarily choose to accept responsibility for the total loss to the Government and did not waive its immunity from liability under the Carmack amendment, and by undertaking to settle with the railroad at fault did not become liable for such claim, owing to the involuntary character of its action induced by the Government's retention of revenues earned in carriage of other goods.—Riss & Co. v. United States, 213 F. Supp. 791 (796-7, 799).

Deviation doctrine of liability is of purely admiralty origin and is not applicable in cases arising under the Interstate Commerce Act (citing 87 F. Supp. 691, 189 F. 2d 939).—Minneapolis Soc. of Fine Arts v. Railway Exp. Agency, Inc., 213 F. Supp. 129 (132).

Section 20(11) restates the common-law rule that a common carrier is ordinarily an insurer against loss, damage, or injury to property committed to it for transportation, and declares any limitation of liability or recovery to be unlawful and void; authority granted the commission, under exception therein, to grant partial exemption from full liability by released-rate orders is discretionary.—Released Rate Rules—National M. Freight Classification, 316 I.C.C. 499 (508-9)*.

31. Initial carrier.—[Vols. 3, 7, 9, 11, 14, 15, 17, 19].—In consignee's action to recover from railroad as initial carrier for damages to shipment of tomatoes from Merced, Calif., to Boston, Mass., plaintiff proved a prima facie case by evidence showing that (1) the tomatoes were grade "U.S. No. 2" and in good condition when delivered to defendant, (2) car was properly iced and re-iced during movement and, on arrival, temperature conditions therein were excellent, (3) rough handling by carrier caused shipment to be in subgrade

condition when delivered, and (4) amount of the damages. Therefore, since defendant failed to prove by a preponderance of credible evidence either that it was free from negligence or that the damage resulted from any of the excepted causes (see 377 U.S. 134) relieving a carrier from liability, plaintiff is entitled to recover damages from defendant railroad in the amount specified.—Sarno v. Southern Pac. Co., 277 F. Supp. 628 (629-31).

In accepting shipment tendered to it at Middletown Air Force Base, Pa., and delivering the loaded trailer either to railroad yard or to plaintiff motor carrier's terminal for loading on rail car for piggyback movement to Oklahoma under plaintiff's contract with railroads, short-haul motor carrier serving Middletown acted in its own right and not as agent for plaintiff, which lacked authority to serve Middletown. Government bill of lading correctly named the short-haul carrier as initial transportation company, Middletown as shipping point, and the short-haul carrier "via" plaintiff as route of shipment; plaintiff was not the initial carrier or liable as such for loss of shipment during rail movement, and fact that it furnished trailer used by the short-haul carrier did not make it such. Freight bill issued by plaintiff, which referred to the Government bill of lading and to the short-haul carrier's interest, did not indicate that plaintiff was the initial carrier, and any such assumption by Government accounting authorities was not justified under the facts and the applicable law.—Riss & Co. v. United States, 213 F. Supp. 791 (795-7, 798, 799).

Although he undertook to issue shipper a bill of lading covering considered shipment, local trucker's relation to the shipment was too slight to make him the initial carrier when he had received the goods from shipper for repacking and further handling and later hired authorized common carrier to transport them to interstate destinations, but performed no transportation; he was essentially a shipper as to the line-haul carrier hired, even for Carmack Amendment purposes. Activity and function of the trucker was similar to that of a non-consolidating freight forwarder who assumes carrier responsibility toward shipper and a shipper status, rather than initial carrier status, toward line-haul carrier who performs the transportation services.—Flanzbaum v. M & M Transp. Co., 203 F. Supp. 365 (367, 369-70)*.

32. Intermediate carrier.—[Vols. 3, 7, 9, 15, 19].—A carrier not named in the bill of lading but receiving possession of the cargo is liable as a connecting carrier; failure to name it in the bill of lading is unimportant.—Riss & Co. v. United States, 213 F. Supp. 791 (799 Note 2)*.

33. Delivering carrier.—[Vols. 3, 16, 19].—The Carmack amendment did not change common-law rule that a delivering carrier is one who receives actual or constructive possession of shipment for delivery to consignee; one who might have or would have received possession of an interstate shipment for delivery, but did not because of its damage or destruction while in hands of a connecting carrier, is not the delivering carrier.—Riss & Co. v. United States, 213 F. Supp. 791.

While Government bill of lading (on shipment intended for piggyback movement under plaintiff's contract with railroads) designated routing "via" plaintiff, it did not indicate that plaintiff was the delivering carrier nor purport to impose on it liability as anticipated delivering carrier. Plaintiff never received actual or constructive possession of the shipment, which was destroyed while on line of connecting railroad; it is not established that plaintiff would have made delivery to consignee had the cargo not been destroyed; thus, plaintiff was not the delivering carrier or liable as such within contemplation of §20(11).—Id., pp. 795-7, 798, 799.

See also Condakes v. Smith, n. 115, below.

36. For baggage.—[Vols. 3, 14-16, 19].—Use of redcap's services in furtherance of an interstate journey is a carrier-passenger relationship within the domain of federal law. Consequently any attempt by defendant to limit liability for loss of contents of jewelry salesman's sample case, which was being handled by railroad's redcap when it disappeared, must comport with terms of the Carmack amendments as amended by the Cummins amendments. Although defendant did not give the prospective passenger proper notice of a limitation of liability for hand baggage, if redcap was negligent in leaving hand truck on which he placed the case unattended

for the brief interval during which it disappeared, it was equally negligent for the salesman, in disregard of his employer's instructions and his practice, to let the bag out of his sight. Lower court's dismissal of the complaint affirmed.—J & H Flyer Inc. v. Pennsylvania R. Co., 316 F. 2d 203 (204-5).

Since §20(11) was not intended to confer new substantive rights on shippers, but instead to confer new remedial rights, any primary or substantive right which flow therefrom are not new, but are determined by reference to common-law doctrines; and at common law a carrier is liable as an insurer for loss to those goods which it holds itself out to handle. Carriers serving passengers are liable as insurers of passengers' baggage, but only as bailees for a passenger's property which is not "baggage" and contents of which is not disclosed; merchandise for sale, such as jewelry in the salesman's sample case, clearly is not "baggage." That rule should extend to redcaps, whose services are obviously those of assisting passengers with their baggage, and not of independent transportation; thus, since its redcap was not notified of valuable contents of the case, defendant is not liable as an insurer for loss of the jewelry which disappeared while left unattended on redcap baggage truck in railroad station.—Id., p. 205.

37. Negligence.—[Vols. 11-19].—Railroad is liable for value of wine contained in one tank of two-tank private car, shipped full from California but found empty when it reached consignee's tracks at Bronx Terminal Market, since it still held the car as a carrier during time it was placed on holding tracks awaiting placement on consignee's tracks, latter tracks being filled when car arrived. Defendant notified plaintiff promptly by telephone of arrival of car, and freight bill was mailed the next day, but that did not effect actual delivery under applicable tariff (providing that delivery of private car is complete when it is placed on a private track with due notice to consignee) when city owned the holding tracks and leased them to the railroad, not to consignee. And since tariff provision for written notice of placement of the car must be strictly complied with, railroad did not effect a constructive delivery when freight bill relied on as notice failed to state the holding location, and indeed was dated from a station a mile away from Bronx Terminal.—Eastern Wine Corp. v. New York Central R. Co., 355 F. 2d 30 (31).

Moreover, even if defendant was not holding the car on hold tracks as a carrier, it was at least a warehouseman bound to use ordinary care. And, in view of nature of the bonded cargo, railroad's failure to notify consignee of successive instances of seals on car doors being found broken by its employees or otherwise trying to protect the cargo after the first break, other than by notice to city police, breached its duty of ordinary care. Therefore, it is unnecessary to determine whether the wine was stolen during a period when defendant as a carrier still had an insurer's responsibility, or after it ceased to hold as a carrier and commenced to hold as a warehouseman or bailee for mutual benefit; in either case the railroad is liable for the loss.—Id., pp. 31, 32.

In suit to recover damages for loss of part of tank-car shipment of tung oil caused by leakage while in railroad's possession, plaintiff made out a prima facie case by showing delivery of shipment to carrier in good condition, subsequent damage and loss in transit, and amount of resulting damage. Burden then shifted to carrier to prove both that it was free from negligence and that the cargo damage was due to one of statutory exemptions relieving it from liability. Defendant's evidence failed to show that loss was due to shipper's act or default in furnishing a defective car when opinion of its witness (who inspected car 11 days after oil was lost), that break in car was due to defect in the metal, is not justified by his qualifications. Moreover, while record shows no specific negligence of carrier, it is conceded that spillage occurred during switching operation in rail yard and that break could have resulted from jostling effect of coupling when car was "kicked" down the track. As it failed to satisfactorily or convincingly bear either of the burdens of proof imposed on it, railroad is liable for damages in amount shown.—United States v. Gulf, M. & O.R. Co., 259 F. Supp. 704 (707-9)*.

In view of decision in 377 US 134, there is no merit in contention that, because plaintiff's shipment was perishable, carriers are liable

for loss or damage only upon plaintiff's proving them guilty of negligence in handling it.—Skaggs v. Midland Valley R. Co., 233 F. Supp. 1004 (1006).

Carriers are charged with knowledge of information and instructions contained in their own freight bills. Originating carrier's billing showed shipment of green corn, consigned to delivering carrier as agent with instruction to hold for disposition by shipper, as top-iced by shipper, with instruction to reice if delayed; it was also furnished copy of Government inspection certificate containing information as to loading and icing of the corn. Thus, when shipment originated, carriers had knowledge of nature of the load and that 31,000 pounds of ice had been placed in the car, 10,000 pounds on top of the load; and by inspection made nearly 4 days later at destination they had information that at least half of the top ice had melted and only 1,000 pound remained in body of the load. They were also charged with reicing if shipment was delayed, yet they waited another 3 days before reopening the car to inspect the load and reice, at which time it is definite by their own testimony that the top of the load was visible, the top icing having melted away. This was a negligent failure to properly carry out shipper's reicing instructions.—Id., pp. 1005, 1007.

40. Measure of damages.—[Vols. 15-19].—See also Zimmerman v. Allied Van Lines, Inc., §219, n. 30.

Though unexcused 2-day delay in transportation and delivery of shipment of plums was a wrong, there was no physical damage to, or deterioration of, the plums and they were sold at the same retail price as if delivery had been 2 days earlier; therefore, plaintiff cannot look to retail prices as a measure of damages. And fact that the wholesale price dropped during that period would not be a logical and proper criterion, since the plums were shipped for retail sale, and the retail and wholesale market price levels move independently of each other. Nor is the replacement value theory applicable, since plaintiff did not purchase substitute plums in wholesale market at the time it should have received considered shipment; to apply that criterion where no actual loss was suffered would result in unjust enrichment of plaintiff. Measure of damages urged is indefinite, uncertain, and bears no relation to the facts; cause dismissed.—Great Atlantic & Pacific Tea Co. v. Atchison, T. & S.F. Ry. Co., 224 F. Supp. 903 (905, 909)*.

Released Rates and Ratings

66. General released-rates order.—[Vol. 19].—Although railroads' application for a general released-rates order stated that it was filed on behalf of all carriers parties to the rail classifications, which name freight forwarders as participants, at the hearing rail applicants disclaimed any intention that proposed rules should apply to property delivered by shippers to forwarders. In view thereof, application is considered modified so as to apply only to rail parties to the classifications; such modification precludes application of proposed rules to a forwarder as a transportation agency, but not as a shipper.—Released Rate Rules—National M. Freight Classification, 316 I.C.C. 499 (501)*.

The commission is aware that many new improved articles of high value have come into existence during past several decades, many of which fall within scope of classification and tariff descriptions established many years ago for articles of relatively low value, and that it is impractical to revise commodity descriptions generally to reflect current values of all the various types of articles transported; nevertheless, proposed rules restricting application of all existing class ratings and rates in railroads' uniform freight classification and in national motor freight classifications to property (other than ordinary livestock and articles already subject to released rates) the value of which has been agreed upon or declared in writing by the shipper as not exceeding amounts named in the rules, are not justified by evidence of record.—Id., pp. 500, 513-4.

The proposals would have far-reaching effects on shippers by rail and motor: expensive revisions in their billing, pricing, and invoicing would be necessary; for many the packing of shipments so that their value could be ascertained would be impracticable, since in many instances value is not known until after shipment moves and invoicing begins; showing value for all shipments would delay

deliveries and increase pilferage; thus, the proposals would add considerably to shipper costs, cause much confusion in compliance, and greatly disrupt established business practices throughout the country. Moreover, if shipment were tendered without a statement of value, shipper would assume a portion of the common-carrier liability as an insurer in event its value exceeded the maximum allowed; and if unlimited common-carrier liability were desired, shipper (to be fully insured) would have to pay excess-value charges if the value exceeded the stated maxima.—Id., p. 512.

In addition, applicants have failed to prove reasonableness of the proposed rules, either as to the affected traffic as a whole or as to any particular commodities; there are many commodities or groups named in the classification as to which no evidence was submitted either individually or on a representative basis. Many articles are fairly uniform in value, so that the carrier knows with reasonable certainty the liability it assumes when it accepts a shipment for transportation; on such articles there is no sound basis fo maintaining rates subject to limited-liability provisions. To approve the proposed rules on the inadequate evidence submitted would in effect be delegating to the carriers statutory authority which was delegated only to the commission. Proposed rules do not conform to provisions of §20(11); applications denied.—Id., pp. 513, 514.

67. Released rates and ratings, lawful if authorized.—[Vols. 3, 12, 14, 16-19].—The authority granted the commission to modify the general rule of common-law liability, as restated in §20(11), by granting partial exemption from full liability for loss or damage to shipments in those cases where rates depending on and varying with declared or released values would, in its judgment, be just and reasonable under the circumstances surrounding the transportation, is discretionary; and Congress quite certainly intended that authorty to be used sparingly.—Released Rate Rules—National M. Freight Classification, 316 I.C.C. 499 (508-9)*.

The commission is not unmindful of the problem confronting rail and motor carriers in limiting their common-law liability as insurers against loss or damage to property of exceptionally high value, particularly where such high value is not known in advance and is not apparent when shipments are tendered; however, disapproval of proposed general released-rate rules for application to all traffic (with a few exceptions) moving under existing rail or motor class rates or ratings does not preclude the maintenance of rates dependant upon declared or released values on such high-value commodities, upon a showing of need therefor in appropriate proceedings in accordance with the standards approved in prior released rate proceedings such as those cited.—Id., p. 514.

70. Justification by carrier.—[Vols. 3, 7, 19].—To justify issuance of released-rate orders, carriers must show that susceptibility of the traffic to loss or damage is comparatively high and that wide range in value of the commodity makes amount of any possible claim difficult to estimate; while such data may be presented on a representative basis, it is essential that applicants for relief bear this burden of proof. Despite extensive evidence submitted to support proposed rail and motor rules for application of released rates to all class-rate traffic except ordinary livestock and articles already taking released rates, no such showing is made. Proposed limits of value were fixed largely on broad generalities and assumptions without sound basis, and proportion of applicants' total traffic that would be affected is not shown, estimates of both motor and rail applicants being mere guesses unsupported by probative evidence. Record not only fails to establish reasonableness of the proposed rules for commodities specifically mentioned, but no evidence of reasonableness, individually or on a representative basis, is submitted for many commodities or groups named in the classifications which are within purview of those rules.—Released Rate Rules—National M. Freight Classification, 316 I.C.C. 499 (509-10, 512, 513)*.

In addition to a showing of susceptibility of the traffic to loss and damage, there must also be evidence of frequency of claims and their ratio to transportation revenue, on an industry-wide basis, from the freight subject to claims; such evidence is extremely meager, and there is no showing that applicants have

had any difficulty in obtaining adequate insurance coverage or that present cost of such insurance is unreasonably high, both of which are also important considerations. Applicants have not sustained their burden of proving reasonableness of the proposed rules, either as to the affected traffic as a whole or as to any particular commodity to which the rules would apply.—Id. pp. 513-4.

76. Duty to advise shipper of choice of rates.—[Vols. 3, 16].—While shipper difficulties in complying with proposed general released-rate rules on class-rate traffic are insufficient alone to condemn the rules, they are a factor entitled to consideration. Released rates usually give shipper a choice of unlimited common-carrier liability at the higher rates, or limited liability in consideration of reduced charges, and to obtain the lower rate shipper by a fair and reasonable declaration binds himself to accept for damage claim purposes an amount not exceeding that declared or agreed. Under proposed rules, in tendering a shipment at existing class rates without a statement of value, shipper would assume a portion of the common-carrier liability as an insurer if its value exceeded the maximum allowed; and if unlimited liability were desired, shipper, to be fully insured, would have to pay excess charges on values above the stated maxima. Proposed rules would add considerably to shipper costs, would disrupt established business practices throughout the country, and are not shown to be just and reasonable. Not approved.—Released Rate Rules—National M. Freight Classification, 316 I.C.C. 499 (512)*.

Actions

115. In general; time for.—[Vols. 3, 9, 13-19].—In forwarder's action to recover value of shipments lost after unloading on platform at railroad's freight depot following inbound line haul by a motor carrier or connecting railroad, the fact that defendant railroad raised as a defense the limitation period specified in §20(11) and the Uniform Bill of Lading did not constitute an admission that it acted as a common carrier in performing the unloading, since that defense was an alternative one which could come into play only if defendant's unloading services were found to have been performed in a common-carrier capacity.—Republic Carloading & Distrib. Co. v. Missouri Pac. R. Co., 302 F. 2d 381, 387, 388)*.

See also Armour Research Foundation case, n. 30, above.

In action against delivering carrier for recovery of loss resulting from damage in transit to shipment of cantaloupes from a point in Mexico to Boston, Mass., complaint which alleges delivery of shipment in Mexico to initial carrier under a uniform straight bill of lading (no reference to any other bill of lading appearing) fails to state a cause of action under §20(11) for which relief may be granted. The court notes, also, that plaintiffs do not allege that they are holders of the bill of lading, or that they are owners of any interest in considered shipment; absent such allegations, no claim for which relief may be granted is stated. Accordingly, defendants' motion to dismiss the complaint for lack of jurisdiction, and for failure to state a claim against defendants for damage to the shipment, granted.—Condakes v. Smith, 281 F. Supp. 1014 (1015).

Shipper's suit against railroad for damages to shipments of brick, made pursuant to a uniform bill of lading, was barred under provision of Uniform Bill of Lading when it was not filed within two years and one day from date of railroad's letter unequivocably denying the damage claim, although the suit was filed less than two years after railroad's subsequent letter stating that, after further investigation, the initial disallowance was adhered to. In considering the time requirements under the Uniform Bill of Lading, numerous authorities have strictly construed the applicability and have held that they cannot be tolled by waiver or estoppel. Carrier cannot waive or be estopped to assert bill-of-lading requirements as that would permit discrimination which is prohibited by law; and, while those rules may seem harsh as applied to plaintiff's case, the court has no alternative but to follow them; judgment in favor of defendant.—Holford v. Louisville & N.R. Co., 266 F. Supp. 408 (408-9).

See also Sawyer & Co., Inc. v. Atchison, T. & S.F. Ry. Co. n. 30, above.

Since a railroad's transactions are multitudinous, and to prevent discrimination, the act

requires it to give shipper a bill of lading and requires shipper to give notice of a claim to the railroad as provided therein; these are substantial statutory requirements. Bill of lading covering plaintiff's shipment (damaged in transit) provided as a prerequisite to recovery that claims must be filed in writing within 9 months after delivery. Requirement of a written claim is an easy one, of which plaintiff was well aware; its filing not only enables railroad to make a full and complete investigation, but it is the orderly and uniform way to inform the carrier of a claim against it and that compensation is expected; further, it prevents discrimination and misunderstanding which can result from oral arrangements. Plaintiff's supplemental invoice, describing work required to repair the machine shipped, is not a claim sufficient to inform the railroad the plaintiff is presenting a claim for damages and expects recompense.—Lucas Mach. Div., New Britain Mach. Co. v. New York Central R. Co., 236 F. Supp. 281 (282, 283).

If the courts recognized estoppel, the fact that defendant's claim agents came to plaintiff's plant to examine and photograph the damaged machine and instructed plaintiff to repair it and inform defendant of the cost thereof might conceivably estop the railroad's defense of plaintiff's suit. However, review of federal decisions shows clearly that a written notice, however informal, must be filed with defendant railroad and that latter does not waive that requirement and is not estopped where (1) it actively negotiated with plaintiff for settlement of the claim, (2) oral claim for damages was made, or (3) the railroad had investigated and had actual knowledge that damage had occurred. It has also been held that for a carrier to waive, or be estopped from asserting, the bill-of-lading requirements would permit discrimination prohibited by law. Therefore, since no sufficient claim for damages was filed with defendant, its motion for summary judgment is granted.—Id., pp. 282-3.

116. Venue.—[Vols. 3, 18].—While action to recover cost of repairing trailer allegedly delivered in damaged condition following defendant's piggyback transportation thereof is within purview of 28 USC §1337, thereby giving the Federal district court original jurisdiction, it is also controlled by §20(11) which grants concurrent jurisdiction both to the district courts and to State courts. Plaintiff chose to institute suit in a State court and since the matter in controversy does not exceed $3,000, exclusive of interest and costs, it may not be removed therefrom to the Federal court; remanded to the State court.—Eazor Exp. v. Pennsylvania R. Co., 214 F. Supp. 695 (696-7).

See also First Flight Co. case, §20(12), n. 1.

117. Jurisdiction.[Vols. 3, 7, 11, 15, 18, 19].—It is a fundamental principle of the law of jurisdiction that a sovereign has personal jurisdiction over any defendant within its territorial limits, and that it may exercise that jurisdiction by any of its courts able to obtain service upon the defendant; thus, the United States is deemed to have personal jurisdiction over any defendant within the United States. While federal court jurisdiction is governed by the due process clause of the Fifth, rather than that of the Fourteenth, Amendment to the Constitution, modern Fourteenth Amendment precedents permit exercise of jurisdiction over any defendant having such minimum contacts with the State that the exercise does not offend traditional notions of fair play and substantial justice; and the Supreme Court has left no doubt that the material constitutional inquiry concerns contacts, not with physical territory of the court, but with the sovereignty of which the court is an arm, which in the case of federal courts is the United States.—First Flight Co. v. National Carloading Corp., 209 F. Supp. 730 (736-8).

Section 20. (12) Recovery by initial or delivering carrier from connecting carrier.—[Unchanged. See vol. 14, p. 11548.]

Amendments, see footnotes, vol. 3, p. 2614, vol. 14, p. 11548; historical note, p. 2614.

Notes of Decisions

Volume 3—p. 2614; Volume 11—p. 9324; Volume 12—p. 10333; Volume 15—p. 12138; Volume 19—p. 15431.

1. Recovery over by initial carrier.—[Vols. 3, 11, 12, 15, 19].—Apart from bill of lading he undertook to issue to plaintiff shipper, relation of local trucker, who hired defendant carrier to transport shipper's goods, to considered shipment was too slight to make him the initial carrier; initial and connecting carrier relationship contemplated by the statute did not exist as to the shipment. Therefore, plaintiff shipper may not recover in his action (in the right of the local trucker as initial carrier) against line-haul carrier as connecting carrier for amount of his unpaid judgment against trucker for damages to his goods allegedly sustained while being transported by defendant line-haul carrier.—Flanzbaum v. M & M Transp. Co., 203 F. Supp. 365 (370-1)*.

In a third-party suit against a connecting carrier under §20(12), requirement of §20(11) that suit be brought in a district in which defendant has a line of railroad does not apply. Also, since the great weight of authority deems a third-party suit ancillary to the original suit for purposes of venue, the usual venue requirements need not be met as to a third-party defendant. Therefore, motion of the Santa Fe to dismiss third-party suit brought against it by forwarder (defendant in shipper's suit brought in Eastern District of Tennessee for recovery of damages to shipment handled by Santa Fe as underlying connecting-carrier), on ground that it is neither incorporated in nor licensed to do (or doing) business in Tennessee, overruled.—First Flight Co. v. National Carloading Corp., 209 F. Supp. 730 (733).

Although the Santa Fe is incorporated in another State and maintains an office in Tennessee only for solicitation of traffic, the third-party suit against it may not properly be regarded as a diversity case. Since the original complaint is based at least partly upon a federal question under §20(11), as is the third-party complaint under §20(12), these federal claims confer jurisdiction upon the District Court to entertain the nonfederal aspects of the case under the concept of pendent jurisdiction, and no additional basis of jurisdiction, such as diversity of citizenship, is required; similarly, once jurisdiction of the principal suit is established, under the concept of ancillary jurisdiction no additional basis of jurisdiction is required to sustain a third-party suit.—Id., p. 735

Under the basic principle that a sovereignty has personal jurisdiction over any defendant within its territorial limits and may exercise that jurisdiction by any of its courts able to obtain service upon the defendant, the court may exercise jurisdiction over the Santa Fe. Santa Fe is incorporated within, and does business throughout much of, the United States; there are thus the requisite minimum contacts with the United States, and service has been made upon an acknowledged Santa Fe agent within the territorial limits of the court's process. The venue privilege is not open to Santa Fe as a third-party defendant, and while defending the suit in Tennessee may cause it some inconvenience, that consideration has no bearing on the issue of personal jurisdiction and is nothing like a denial of due process.—Id., pp. 736, 740.

Section 20a. Securities of carriers; issuance, etc.—(1) Carrier defined.—[Unchanged. See vol. 15, p. 12138.]

Amendments, see footnotes, vol. 15, p. 12138; historical notes, vol. 4, p. 2615, vol. 9, p. 7800, vol. 12, pp. 10218, 10330, vol. 13, pp. 10937, 11032, vol. 14, p. 11423.

Historical Note

The commission recommends that §20a be amended so as to expressly exempt from the commission's jurisdiction thereunder, securities issued by States, municipalities, or other governmental bodies which are carriers as defined in part I or part II of the act.—Annual Report, 1964, p. 60.

Notes of Decisions

Volume 4—p. 2617; Volume 7—p. 5824; Volume 9—p. 7800; Volume 11—p. 9324; Volume 12—p. 10334; Volume 15—p. 12139; Volume 19—p. 15432.

1. Carriers subject to section.—[Vols. 4, 7, 9, 15, 19].—Since Bi-State Development Agency of Missouri-Illinois Metropolitan District is not a carrier subject to the act, nor authorized to control any such carrier, any commission jurisdiction over its proposed bond issue must be on the ground that it is a "corporation organized for the purpose of engaging in transportation" as a rail or motor carrier subject to the act. And though the agency was created as "a body corporate and politic," use of those terms does not necessarily imply existence of a corporation within the meaning of a particular statute. Moreover, while it is authorized to issue bonds, and the proposed bond issue is designed to finance creation of a public passenger transportation system in the district, the commission's exercise of jurisdiction over such bond issue, prior to the agency's actually becoming a carrier subject to commission jurisdiction, would be foreign to and would serve none of the general purposes of the act. Application dismissed.—Bi-State Development Agency of Mo.-Ill. Met. Dist., Bonds, 317 I.C.C. 641 (642-4).

Upon consummation of purchase by the State of Vermont, pursuant to enactment of the State legislature, of an abandoned line of railroad for lease to and operation by a new railway corporation, the State does not become a carrier subject to the act merely by virtue of its ownership of the properties. Therefore, subsequent issuance by the State treasurer of negotiable bonds and promissory notes authorized by the legislature to reimburse the State treasury for cost of acquiring the line is not subject to the commission's securities requirements.—State of Vt. and Vermont Ry., Inc., Acquisition and Op., 320 I.C.C. 609 (616)*.

3. Electrically operated carriers.—[Vols. 4, 7, 9, 11].—District court's ruling that Hudson & Manhattan was an interurban electric railway within exemption of §77 of Bankruptcy Act was solely a determination as to the particular statute applicable to its reorganization, and it does not follow that such exempt status must be maintained under Interstate Commerce Act; considering all factors, particularly its long and continuing participation in joint passenger operations with Pennsylvania R., the Hudson does not fall within exemption of §20a(1), and application for issuance of securities by its successor corporation in reorganization and new subsidiary of latter created to conduct its transportation operations must be considered on the merits.—Hudson & M.R. Co. Trustee Abandonment, 312 I.C.C. 701 (703-4)*.

6. Holding companies.—[Vols. 4, 9, 12].—Although merger of railroad system's parent holding company into a new Delaware corporation is not subject to §5(2) and therefore the new company may not be subjected to securities provisions of the act under §5(3), upon consummation it will be subject to, and must comply with, provisions of §20a(2-11) in lieu of the old company to extent provided by order in debt adjustment proceeding, 254 ICC 239; mere change of situs by the old company for purpose of acquiring some benefit not available under laws of State of original incorporation does not deny to the commission the jurisdiction assumed in the debt adjustment proceeding.—Delaware & Hudson Co. Merger, 317 I.C.C. 177 (180).

While reincorporation under laws of another State creates a new corporation, the commission must look to the result intended, or the substance of the acts rather than the mere form; a new corporation succeeds to the rights, and becomes liable for the obligations, of the old where circumstances warrant conclusion that former is merely a continuation of latter and therefore the same person in law; reincorporation under Delaware laws without change of identity of corporate object, directors, or stockholders justifies such a finding. Reasons found in the debt adjustment proceeding for considering the old company a carrier for accounting and securities purposes will continue to exist as to the new, and securities considered therein will become an obliga-

tion of that company upon consummation of merger.—Id., p. 180.

See also Texas & Pac. Ry. Co.—Control—Kansas, O. & G. Ry. Co. case, §5(3), n. 10.

Section 20a. (2) Issuance of securities; assumption of obligations; authorization.—[Unchanged except July 24, 1965 amendment below. See vol. 9, p. 7801].

By act of July 24, 1965, §1, 79 Stat. 263, paragraph (2) was amended by striking the period at the end, inserting in lieu thereof a colon, and adding the proviso set forth below.

***Provided, That nothing in this section is to be construed as applying to securities issued or obligations or liabilities assumed by the United States or any instrumentality thereof, or by the District of Columbia or any instrumentality thereof, or by any State of the United States, or by any political subdivision or municipal corporation of any State, or by any instrumentality of one or more States, political subdivisions thereof, or municipal corporations.

Cross Reference

Section 3 of Public Law 87-527, July 10, 1962, 76 Stat. 142, provides that all power and authority granted therein to the Texas and Pacific Railway Company [to acquire securities or stock of, or property from, any other carrier, and to increase its capital stock of $75,000,000 to not more than $100,000,000 of capital stock outstanding] shall be subject to the provisions of the Interstate Commerce Act and any Acts supplemental thereto.

Historical notes, see vol. 4, p. 2615, vol. 9, p. 7801, vol. 12, p. 10330, vol. 14, p. 11549, vol. 16, p. 12784, vol. 17, p. 13472.

Notes of Decisions

Volume 4—p. 2621; Volume 7—p. 5826; Volume 9—p. 7802; Volume 11—p. 9325; Volume 12—p. 10334; Volume 13—p. 11038; Volume 14—p. 11549; Volume 15—p. 12139; Volume 16—p. 12784; Volume 17—p. 13472; Volume 18—p. 14299; Volume 19—p. 15433.

2. Purpose.—[Vol. 4].—The dominant purpose of the financial provisions of §20a is to maintain a sound structure for support of railroad credit to aid in developing a national transportation system. Indirectly, these provisions were also designed to protect the investing public against faulty or dishonest financing which could dissipate railroad resources, and thus to promote confidence of investors in railroad securities.—Chicago, S.S. & S.B. R. v. United States, 221 F. Supp. 106 (108)*.

Construction

10. Construction, generally.—[Vols. 4, 7, 9, 11, 19].—See Walker v. United States, §5(2), n. 110 *Securities*.

13. "Issue" of securities.—[Vols. 4, 7, 9, 11-13, 15, 18, 19].—Although, upon consummation of merger whereby a new Delaware corporation will replace railroad system's present parent holding company, the new company will be subject to securities provisions of the act to same extent as the old company was subjected thereto by order in 254 ICC 239, since the old company is still in existence the new company's issuance of 1,000 shares of $1 par value common stock, all of which are owned by the old company, did not require authority from the commission.—Delaware & Hudson Co. Merger, 317 I.C.C. 177 (181).

24. Conditions imposed, generally.—[Vols. 11, 17, 18].—It is clearly within the commission's power to attach conditions to its orders authorizing issuance of securities: the very language of §20a expressly empowers it to grant an application with such modifications and on such terms and conditions as it deems necessary or appropriate. And the guiding standards of §20a which emphasize the discretionary character of the commission's regulatory powers authorize it to impose any

condition relevant to the purposes of maintaining the financial integrity of the railroads and the preservation of a national system of transportation.—Chicago, S.S. & S.B. R. v. United States, 221 F. Supp. 106 (108)*.

Imposition on authority for plaintiff's issuance of stock to its employees under an option plan of a condition that the stock be sold for not less than its par value per share is supported by substantial evidence and was not arbitrary or capricious. That requirement has a reasonable relation to the commission's duty to maintain the integrity of railroad securities; in imposing it the commission performed an administrative function, and the court may not substitute its judgment on that critical issue. On the evidence before the commission, a minimum option price was a condition having a rational basis in the record as a whole, and the court has no right to eliminate from the order a condition which the commission has found requisite to its determination that the stock issue is in public interest; the order sustained.—Id., pp. 109-10.

Notwithstanding policy stated in 295 ICC 782 against approval of bond issues not redeemable at any time on payment of a reasonable premium, applicant urges that it must compete for its funds in same money market with industrial and utilities issues restricted against call for an initial 5-year period. As interest rates have not since improved, necessity found in Finance Docket No. 22140 (Aug. 9, 1952) for inclusion of redemption restrictions in order to obtain benefit of advantageous interest rates remains valid. Proposed bond issue subject to initial 5-year redemption restriction, approved.—Illinois Term. R. Co. Bonds, 317 I.C.C. 595 (599-600).

General Considerations

45. Public interest generally.[Vols. 4, 7].—See also Greyhound Corp. Stock, §214, n. 2.

Application by noncarrier corporation which controls a motor carrier and a forwarder for authority to issue stock in exchange for stock of another noncarrier, under merger agreement providing for prior acquisition by the latter of all assets of an affiliated motor carrier except its certificates, certain vehicles, and $5,000 cash, and reserving that carrier's right to continue its operations, denied; proposed transaction would result in common control of two motor carriers, which requires approval under §5(2), and in absence of such authorization applicant's issuance of capital stock to effectuate the transaction would not be for a lawful object or compatible with public interest.—Yale Exp. System, Inc., Stock, 90 M.C.C. 241 (242-3, 244-5).

Bonds: Purpose of Issuance

72a. [Retirement]—Sinking funds.—[Vols. 9, 11-13, 18],—Since after merger of Atlantic Coast Line into Seaboard Air Line the merged company will have substantially greater average annual net income than Coast Line now has, to require it to apply Coast Line's present sinking-fund requirements for retirement of its outstanding bonds would not only be unduly burdensome, but would provide for payments substantially exceeding amounts payable under present indentures on basis of Coast Line's present earnings. Proposed modification indenture, providing for a reasonable increase in sinking-fund payments to be made by the merged company on Coast Line's series A, B, C, and D bonds, sufficient to redeem annually an aggregate principal amount of $1,801,000 of the bonds, is fair to both merging carriers and to affected bondholders; approved, contingent on consummation of merger.—Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122 (199)*.

75. Payment of claims, generally.—[Vols. 4, 7, 9].—Authority granted successor corporation in reorganization of Hudson & Manhattan to issue not over $10,038,100 principal amount of first-mortgage, 20-year, 6-percent bonds to debtor's senior bondholders in partial payment of their claims to principal and interest, on basis of $340 principal amount of new bonds per $1,000 original face amount of debtor's first-mortgage and refunding mortgage bonds.—Hudson & M. R. Co. Trustee Abandonment, 312 I.C.C. 701 (705)*.

76. Payment, refund, or exchange for notes.—[Vols. 4, 7, 9, 12].—Issuance of not over $8,750,000 principal amount of first-mortgage 4-5/8 percent sinking fund bonds, series A, due Dec. 1, 1987, to provide funds for pay-

ment of note on which there is a balance of $8,500,000 due Dec. 15, 1962, authorized.—Illinois Term. R. Co. Bonds, 317 I.C.C. 595.

Stock: Purpose of Issuance

103. Exchange for other stock.—[Vols. 4, 7, 9, 11, 18, 19].—Authority granted Seaboard Air Line, on behalf of proposed merged company, to issue not exceeding 3,839,345 shares of common stock, $20 per value, and scrip certificates for fractional shares, in conversion and exchange for 1,554 shares of $100-par-value preferred stock and 2,700,481 shares of no-par common stock of Atlantic Coast Line, based on exchange ratios of 1.42 to 1 for Coast Line common stock and 3 to 1 for preferred.—Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122 (145, 191-2, 214).

In connection with approved merger of Boston & Maine R., Boston & Maine Corp. is authorized to issue shares of capital stock of $1 par value each for common and $100 for preferred, in number equal to shares of capital stock of the railroad issued and outstanding or in its treasury immediately prior to the merger, to be exchanged on a share-for-share basis; also, after merger, to issue shares of capital stock necessary to provide for employee stock purchase and stock option plans of the railroad in effect at time of merger.—Boston & Maine Corp. Merger, 320 I.C.C. 290 (299).

Issuance by new Delaware corporation of not over 1,630,959 shares of $1-par-value common stock to be exchanged for a like number of shares of no-par-value capital stock of railroad system's present parent holding company, for purpose of effecting merger, authorized.—Delaware & Hudson Co. Merger, 317 I.C.C. 177 (182, 183).

Issuance by Pennsylvania R. of not exceeding 367,391 shares of its $10-par-value common stock, to be exchanged for publicly owned stock of Lehigh Valley R., authorized.—Pennsylvania R. Co.—Control—Lehigh Valley R. Co., 317 I.C.C. 139 (142, 152).

106. Payment for railroad properties, rights, and franchises.—[Vols. 4, 7, 9, 11-14, 17-19].—Cadillac & Lake City Ry. Co., a newly organized carrier corporation, authorized to issue not exceeding 2,000 shares of common stock of par value of $10 each, of which 1,020 shares will be issued to its parent company (900 shares in consideration for assignment of the purchase agreement covering considered line of railroad) and the remaining 980 shares will be sold to rail fans, other interested individuals, and the general public.—Cadillac & Lake City Ry. Co. Acquisition and Operation, 320 I.C.C. 617 (620-1, 623.)

Authority granted Georgia & F. Ry., a new subsidiary of southern Ry., for issuance without competitive bidding of not over 25,000 shares of no-par-value common stock in substantially equal proportions to Carolina & N.W. Ry., Live Oak, P. & G. R., and South Georgia Ry. (also Southern subsidiaries), for a total consideration of $2,500,000, to be used to finance, in part, acquisition of physical properties, franchises, and rights of Georgia & F. R.—Georgia & F. Ry. Co.—Acquisition—Georgia & F.R., 317 I.C.C. 745 (747, 754).

107. Provision for working capital.—[Vols. 4, 7, 9].—To obtain working capital, Vermont Ry., concurrently authorized to lease a railroad line to be purchased by the State of Vermont, is authorized to issue not over 9,500 shares of $100-par-value common stock within 2 years from date of order; any shares remaining unissued at the end of that period will require additional authorization.—State of Vt. and Vermont Ry., Inc., Acquisition and Op., 320 I.C.C. 330 (335)*.

109. Payment of claims.—[Vols. 4, 7, 9].—Authority granted successor corporation in reorganization of Hudson & Manhattan to issue not over 590,476 shares of class A stock of $10 par value to debtor's senior bondholders in partial payment of their claims to principal and interest, on basis of 20 shares per $1,000 original face amount of debtor's first-mortgage and refunding mortgage bonds; also, to issue not over 58,849 shares of class B stock of $10 par value to debtor's junior bondholders for their claims, on basis of 3-1/2 shares per $1,000 face amount of debtor's adjustment income mortgage bonds.—Hudson & M.R. Co. Trustee Abandonment, 312 I.C.C. 701 (705)*.

114. No par value stock.—[Vols. 4, 7, 9, 17, 19].—Authority granted new subsidiary created to conduct debtor's railroad operations

under reorganization plan to issue not over 1,000 shares of no-par-value common stock f stated value $3,200 per share, to be issued directly to its parent company, debtor's successor in reorganization, to represent latter's right to all the new company's assets in event of its liquidation.—Hudson & M.R. Co. Trustee Abandonment, 312 I.C.C. 701 (705)*.

Notes

122. Payment for railroad properties, rights, and Franchises.—[Vols. 4, 7, 9, 12, 18, 19].—Cadillac & Lake City Ry. Co., a new corporation, authorized to issue a secured promissory note in principal amount not exceeding $39,750, bearing interest at not more than 6 percent per annum, to be used with $250 cash downpayment, to finance acquisition of branch line railroad which applicant will operate for prospective tourist traffic.—Cadillac & Lake City Ry. Co. Acquisition and Operation, 320 I.C.C. 617 (618, 623).

Authority granted Reading Co. to issue 5 serial promissory notes bearing interest at 5 percent per annum, in total principal amount of $450,000 payable over a period of 5 years, to finance purchase of Lehigh & S.R. System. As the properties are to continue under lease to Jersey Central, with the rental payable to the former owner, Reading will receive no immediate return on its investment, and payment of the principal portion of the purchase price over a 5-year period will allow it to absorb the cost of acquisition without unduly burdening its cash situation or significantly adding to its fixed charges.—Reading Co.—Purchase—Lehigh & S.R. System, 317 I.C.C. 633 (639).

Assumption of Obligation or Liability

175. Assumption of obligations, generally.—[Vols. 4, 7, 9, 11, 17-19].—When, under terms of applicants' agreement with bank which lent money to their subsidiary, they would assume liability on unsecured note issued by the subsidiary to the bank, it is immaterial that the agreement was executed as an instrument separate from the note or that it provides that funds necessary to discharge the subsidiary's obligation, if needed, will be advanced to it for payment on the note rather than paid directly to the bank by applicants. Applicants' obligation is clear, and assumption thereof requires the commission's approval.—Pennsylvania R. Co. Assumption of Obligation, 320 I.C.C. 111 (113).

176. Subsidiaries' or affiliated companies' obligations.—[Vols. 4, 7, 9, 11-15, 19].—Assumption of obligation and liability by Pennsylvania R. and Reading Co. for payment of principal and interest on unsecured 4-1/2-percent long-term note dated April 27, 1963, issued by their subsidiary Pennsylvania-Reading Seashore Lines to a bank, in principal amount of $3,600,000, authorized.—Pennsylvania R. Co. Assumption of Obligation, 320 I.C.C. 111.

187. Predecessor companies' obligations.—[Vols. 4, 7, 11, 19].—Authority granted Seaboard Air Line, incidental to merger approval, to assume all obligations and liabilities of Atlantic Coast Line (liquidating carrier) outstanding as of effective date of merger, including those contingently guaranteed by Coast Line either solely or jointly with other carriers.—Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122 (145, 213)*.

Assumption by new holding company, as successor to railroad system's present parent corporation, of obligation and liability as obligor or guarantor of (1) the old company's first and refunding mortgage 4-percent bonds due 1963, in principal amount not exceeding $14,822,000, (2) Albany & S.R. first consolidated gold 2-3/4-percent bonds due 1971, in principal amount not exceeding $8,305,000, and (3) Albany & S.R. 4-1/2-percent general mortgage bonds due 1975, in principal amount not exceeding $2,718,600, authorized.—Delaware & Hudson Co. Merger, 317 I.C.C. 177 (183).

Regulations of the Commission

29 FR 11127, July 31, 1964, Part 56: Issuance of Securities, Assumption of Obligations, and Filing of Certificates and Reports, entire 49 CFR Part 56 revised, effective Oct. 1, 1964.

30 FR 11210, Sept. 1, 1965, Parts 51 and 56: General Instructions and Issuance of Securities, Assumption of Obligations, and Filing of Certificates and Reports, §51.8 revoked, and §56.3 Procedure and §56.6 Reports amended, effective Oct. 15, 1965.

Section 20a. (3) Scope of commission's authority.—[Unchanged. See vol. 9, p. 7826.]

Historical notes, see vol. 4, p. 2615.

Notes of Decisions

Volume 4—p. 2673; Volume 7—p. 5864; Volume 14—p. 11550; Volume 18—p. 14233.

Section 20a. (4) Form and contents of applications; oath and signature.[Unchanged. See vol. 9, p. 7826.]

Historical Note

The commission recommends, in view of the prohibitions in 18 USC §1001, that §20a(4) be amended so as to eliminate the mandatory oath provision therein, and that such requirement be made discretionary with the commission.—Annual Report, 1964, p. 72.

Notes of Decisions

Volume 4—p. 2680; Volume 7—p. 5866; Volume 12—p. 10339; Volume 14—p. 11551; Volume 16—p. 12785; Volume 17—p. 13476.

Section 20a. (5) Disposition of securities described in application, etc.[Unchanged. See vol. 9, p. 7827.]

Section 20a. (6) Notice of application to governors of States; intervention; hearings.[Unchanged. See vol. 9, p. 7827.]

Notes of Decisions

Volume 4—p. 2685; Volume 16—p. 12786; Volume 18—p. 14233; Volume 19—p. 15437.

1. Right of State authorities to be heard.—[Vols. 4, 16].—See Brotherhood of Locomotive Engineers v. United States, §1(19), n. 14.

2. Right to be heard, generally.—[Vols. 4, 19].—There is no evidentiary support for plaintiff's contention that it was denied procedural due process of law by the commission's failure to grant it a hearing. The administrative record shows that plaintiff never requested a hearing or offered to introduce evidence to prove that the challenged condition imposed on authorization of its proposed stock issue was not proper, as required by Rule 1.101(b) of the commission's Rules of Practice. As §20a(6) clearly makes hearings on such matters discretionary with the commission, plaintiff was not entitled to hearing as a matter of right.—Chicago, S.S. & S.B. R. v. United States, 221 F. Supp. 106 (110)*.

Section 20a. (7) Jurisdiction of commission as exclusive and plenary.—[Unchanged. See vol. 9, p. 7828.]

Notes of Decisions

Volume 4—p. 2686; Volume 7—p. 5867; Volume 17—p. 13476; Volume 19—p. 15438.

2. Jurisdiction under this section.—[Vols. 4, 7, 17, 19].—Although the States had long regulated issuance of securities by interstate carriers, the jurisdiction conferred on the commission by §20a is exclusive and plenary, and carriers may issue securities without se-

curing approval by any authority other than the commission. Provisions of §20a relating to finance and management show on their face the clear intent of Congress to occupy completely the field of railroad securities regulation; the commission has proceeded on this basis, and the constitutional validity of the power under which it operates has been upheld.—Chicago, S.S. & S.B. R. v. United States, 221 F. Supp. 106 (108)*.

Common carrier's purchase of trucks and trailers under a conditional sales contract or a chattel mortgage is a single act requiring, at most, that one governmental authority pass upon legality thereof, following the same theory as applicable to issuance of stocks and bonds. Approval power rests with the Federal Government when interstate commerce is involved; and the court previously found that debtor carrier was engaged in interstate commerce. The Federal Government has preempted the field of interstate carrier financing, and mere fact that it does not exercise its authority in all phases thereof does not permit one or more States to step into the area of federal inactivity.—In re Independent Truckers, Inc., 212 F. Supp. 402 (406)*.

The commission's jurisdiction to determine applications for authority to issue securities is exclusive and plenary and independent of all other State or Federal authority, and it is not divested of authority to hear new applications merely because related proceedings are pending on appeal.—Central Freight Lines, Inc., Note, 90 M.C.C. 246 (247)*.

The commission's exercise of jurisdiction over issuance of securities by State agencies created to own and operate various types of public projects, but not actually carriers subject to its jurisdiction, would be foreign to and would serve none of the general purposes of the act. Moreover, the commission's jurisdiction under §20a(7) is exclusive and plenary; while some such agencies may have powers broad enough to authorize general transportation operations, including operations by rail or motor vehicle, an intention to supersede such an agency's exercise of sovereign powers should not be implied prior to its actually subjecting itself to the commission's jurisdiction by seeking to engage in transportation subject to the act.—Bi-State Development Agency of Mo.-Ill. Met. Dist., Bonds, 317 I.C.C. 641 (644).

Section 20a. (8) Guaranty of securities.[Unchanged. See vol. 9, p. 7828.]

Notes of Decisions

Volume 4—p. 2688.

Section 20a. (9) Issue of short-term notes; certificate of notification; proviso.—[Unchanged. See vol. 9, p. 7829.]

Notes of Decisions

Volume 4—p. 2689; Volume 7—p. 5868; Volume 9—p. 7829; Volume 17—p. 13476.

Section 20a. (10) Reports by carriers as to securities or proceeds.—[Unchanged. See vol. 9, p. 7830.]

Section 20a. (11) Securities issued contrary to law void; effect; penalty.—[Unchanged. See vol. 9, p. 7831.]

Notes of Decisions

Volume 4—p. 2692; Volume 7—p. 5869; Volume 9—p. 7832; Volume 14—p. 11551; Volume 16—p. 12786; Volume 17—p. 13476; Volume 19—p. 15438.

3. Discipling issuers of void securities.—[Vol. 4].—Section 20a(11) includes penal provisions, and well established principles of law require that such provisions not be enlarged by implications or extended to persons or cases not plainly within the meaning of the language employed. The commission's exercise of jurisdiction over issuance of securities by a bi-State agency created to own and operate various public projects, but not actually a carrier subject to commission jurisdiction, would be foreign to and would serve none of the general purposes of the act.—Bi-State Development Agency of Mo.-Ill. Met. Dist., Bonds, 317 I.C.C. 641 (644).

Section 20a. (12) Restrictions on actions of officers and directors; penalty.—[Unchanged. See vol. 9, p. 7832.]

Historical Note

It is recommended that §20a(12) be amended so as (a) to eliminate necessity for prior approval of the commission for a person to hold position of officer or director of more than one carrier when such carriers are in a single integrated system lawfully operated under common control, and (b) that the prohibition against "any person" holding position of officer or director of more than one carrier applies to holding of such positions by different members, officers, employees, or directors of the same firm, co-partnership, corporation, association, or joint stock association, or to representation of a person on board of directors of more than one carrier through an agent or nominee.—Annual Report, 1963, p. 15-6; Annual Report, 1964, p. 67-8.

Notes of Decisions

Volume 4—p. 2693; Volume 7—p. 7832; Volume 11—p. 9332; Volume 12—p. 10340; Volume 13—p. 11041; Volume 15—p. 12141; Volume 17—p. 13477.

Section 20b. Modification of railroad financial structures.—(1)-(13).—[Unchanged. See vol. 14, p. 11551, vol. 18, p. 14233.]

Notes of Decisions

Volume 15—p. 12142; Volume 16—p. 12787; Volume 17—p. 13478; Volume 18—p. 14235; Volume 19—p. 15439.

Section 20c. Recordation of railroad equipment trust agreements and other evidences of equipment indebtedness.—[Unchanged. See vol. 16, p. 12788.]

Historical note, vol. 17, p. 13481.

Regulations of the Commission

31 FR 16318, Dec. 21, 1966, Part 57: Recordation of Documents, §57.3(b) amended; §57.4(d) and (e) redesignated as §57.4(e) and (f), respectively, and a new §57.4(d) added; and new §57.5(e) added, effective 30 days from date of order.

Section 21. Annual reports of commission.—[Unchanged. See vol. 9, p. 7833.]

Amendments, see footnotes, vol. 4, p. 2695, vol. 9, p. 7833.

Section 22. Restrictions; quotations of rates for United States Government.—[Unchanged. See vol. 11, p. 9333, vol. 12, p. 10340, vol. 17, p. 13482, vol. 18, p. 14236.]

Historical Note

The commission recommends that §22 be amended so as to permit performance of services for governmental bodies free or at reduced rates only to extent such services (1) are performed during time of war or national emergency, or (2) involve transportation which is exempt from economic regulation under parts II and III of the act.—Annual Report, 1964, p. 61.

Notes of Decisions

Volume 4—p. 2700; Volume 7—p. 5875; Volume 9—p. 7836; Volume 11—p. 9336; Volume 12—p. 10341; Volume 13—p. 11042; Volume 14—p. 11560; Volume 15—p. 12153; Volume 16—p. 12790; Volume 17—p. 13482; Volume 18—p. 14237; Volume 19—p. 15441.

2. Interpretation, in general.—[Vols. 4, 7, 9, 11, 17, 19].—Section 22, which has been extended to apply to all forms of regulated common-carrier surface transportation service, allows a carrier to accord preferential rates for certain movements if it so desires; it does not require such rates.—Interpretation of Govt. Rate Tariff—Eastern Central, 323 I.C.C. 347 (349)*; furthermore, nothing prevents a carrier from requiring whatever it considers adequate to show that transportation service requested qualifies for the special rates which §22 permits, but does not require, it to establish.—Id., 332 I.C.C. 161 (165)*.

Special quotations allowed under §22 are set apart from the usual tariff rates, even though they are "rates" in a broad sense, inasmuch as they are only limitedly subject to regulatory jurisdiction, are not applicable on normal commercial traffic, and do not form a part of the general rate structure; also, a carrier may establish such quotations but cannot be required to do so. Therefore, since relief from antitrust laws under §5a(9) is conditioned on the commission's approval of provisions of a §5a rate agreement, and a procedure which might be appropriate for normal rates or tariff provisions is not adequate for discussion and submittal of §22 quotations, it is necessary that petitioner amend its agreement to establish appropriate procedures for joint action regarding §22 rates, and that those procedures be approved by the commission, in order for it to claim the §5a(9) relief from antitrust laws.—Southern Motor Carriers—Agreement, 323 I.C.C. 396 (397-9)*.

Insofar as §1 prohibits the charging of rates below a minimum reasonable level, it is obviously inconsistent with §22. No rate could be lower than "free," and §22 does not prevent free carriage; therefore, §1 places no limit on §22 quotations, and the same rationale applies to questions of unreasonableness, destructive competition, and revenue needs considered in light of §15a(2) and the national transportation policy.—Tennessee Products & Chem. Corp. v. Louisville & N.R., 319 I.C.C. 497 (501); however, §22 is permissive, and a carrier cannot be forced to give a reduced rate thereunder, or to give a similar reduction elsewhere simply because it has chosen to avail itself of the permissive treatment accorded by law. Nor can it be forced to raise the level of its §22 quotation or to cancel such a quotation voluntarily given; the plain language of §22 precludes such action.—Id., p. 502; as to unjust discrimination under §2 or undue preference under §3(1), the object of §22 was to settle beyond doubt that the discrimination in favor of persons therein named should not be deemed unjust (145 US 263).—Id., p. 501.

Authorized Reductions

5. Government bodies; United States.—[Vols. 4, 7, 9, 13, 15-19].—Federal procurement statutes, which provide for negotiation of special rates for transporting household goods of federal employees at government expense, are comparable to provisions of §22 which allow the United States to obtain preferred rates. Georgia regulation which does

not permit a rate for mass intrastate transportation of household goods, and which requires carriers to quote schedules of rates approved by the State commission, is opposed to the federal procurement policy of negotiating rates and, accordingly, must give way. By reason of the Supremacy Clause, a State is without power to provide the conditions on which the Federal Government will effectuate its policies. Once those policies have been determined, it is the court's function to enforce them.—United States v. Georgia Public Service Commission, 371 U.S. 285 (292-3)*.

The United States may contract with railroads for transportation at reduced rates and, in dealing with it, carriers need not as a general rule abide by their published tariffs; thus, if a §22 quotation reveals intention that it may be so used, it may be combined with another quotation rate to produce an aggregate lower than the through tariff rate. And since the Government may receive preferences, a quotation rate may conceivably also be combined with a local tariff rate if the quotation is designed to be used in that manner.—Great Northern Ry. Co. v. United States, 312 F. 2d 901 (903).

Therefore, the Government may not aggregate §22 quotation rate from origin of considered shipments to Seattle with local tariff rate beyond, under aggregate rule in tariff publishing a through rate to destinations, since that rule refers to separately established rates in tariffs on file with the commission and the §22 quotation was not so filed. Provision in item 4 of the quotation, that shipments would be subject to all other rules "which in any way increase or decrease the amount to be paid," does not indicate that it was to be considered a rate on file with the commission within meaning of aggregate rule of the through tariff. Rates under land-grant equalization agreement applied on those shipments; plaintiff is entitled to recover amounts recouped after audit by the Government pursuant to 49 U.S.C. §66.—Id., pp. 904, 905.

By agreement of the parties charges on shipments which moved under the §22 quotation to Seattle, over a route through their ultimate destinations, and were backhauled upon reconsignment are to be computed according to rule 14 of plaintiff's reconsignment tariff, which provides for application of the combination of tariff rates to and from the reconsignment point as maximum. Purpose of that rule was to permit aggregation of favorable rates in case of reconsignment, and in view of item 4 of the quotation, which also provides that shipments will be subject to all charges and allowances respecting reconsignment, the maximum charge should be computed using the quotation as if rule 14 were included therein and the quotation should be treated as a tariff for that purpose. Thus, the Government may combine the quotation rate and the local tariff rate for the backhaul to compute the maximum charge; plaintiff is not entitled to recover on those shipments.—Id., p. 905.

And although the parties negotiated agreement that tariff provision allowing 10 days' free time on export shipments would apply to Government shipments to the port of Mukilteo, Wash., there was no clear understanding as to shipments which like those involved were diverted to an inland destination and subsequently reshipped to Mukilteo under a new bill of lading. Moreover, plaintiff's final reply to the Government's request for inclusion of such shipments was received after movement of considered shipments and was not retroactive; thus, there was no final §22 agreement as to the free time allowance on those shipments.—Id., pp. 909, 910.

There being no single-factor through rate between origin and destination of its shipments, the Government seeks application of a combination of the published tariff rate for part of the movement and a §22 quotation rate for the other part; but that quotation contains no express provision that it may be used in combination with tariff rates and there is no indication that it was designed to be so used. However, though rule 14(c) of the commission's Tariff Circular 20 restricting combination rates to filed tariff rates does not by itself apply to an unregulated §22 quotation, item 6 of the quotation involved refers to all rules "which in any way increase or decrease the amount to be paid on any shipment"; the tariff circular rule has such an effect and must be considered as incorporated in the quotation; defendant's counterclaim as to shipments involved, dismissed.—Id., p. 911.

See also Great Northern Ry. Co. v. United

States, Govt. Traffic, §66, n. 1.

Since the United States may contract with railroads for transportation service at reduced rates, in dealing with it carriers need not as a general rule abide by their published tariffs; thus, when §22 quotation reveals intention that it may be so used, it may be combined with another quotation rate to produce an aggregate lower than the through tariff rate and, conceivably, a quotation rate may also be combined with a local tariff if the quotation is designed to be used in that manner. However, in order to combine a §22 quotation with another or with a regular tariff provision, the intention of the parties to accomplish that purpose must be apparent either by express provision or by necessary inference.—Gulf, M. & O. R. Co. v. United States, 312 F. 2d 921 (925).

When a transit privilege is expressly authorized in a §22 quotation, all conditions and limitations therein prescribed must be strictly observed. Express terms of two considered quotation series, each containing a transit privilege, vary so completely in limitations of traffic covered and transit privilege as to rebut any inference that they are complementary or that the transit privielge in one is subject to combination or interchange with that in the other. There is no provision in either quotation that provisions of one, including transit privilege, may be combined with those of the other; nor do the facts indicate an intention of the parties that either could be combined with the other for the purpose of combining different traffic covered, and the different transit-stop privileges in each, to accomplish a through-export rate from origin to port destination. The Government's computation of charges on basis of such a through-export rate does not comply with limitations of either or both quotations; charges assessed by plaintiff are correct.—Id., pp. 922-3, 924, 925-6.

There is no indication in the commission's report, which approved proposed amendment of motor carriers' Government Rate tariff so as to permit application of §22 rate quotations on shipments moving on commercial bills of lading containing endorsement stating that the transportation is for the government and that the cost will be reimbursed directly by the government, that it had considered the problems that could arise from use of such a bill of lading. Parties opposing proposed amendment presented to the commission (both by way of argument and by submission of verified statements of facts) the practical problem facing carriers in connection with determining proper, and indeed legally authorized, application of §22 rates to transportation performed pursuant to a commercial bill of lading so endorsed; this is a problem of great concern to entire transportation industry, yet nowhere in the report does the commission refer to that problem. Therefore, the case is remanded to the commission.—Middle Atlantic Conference Nat. Motor Frt. Traffic Ass'n v. United States, 265 F. Supp. 448 (449, 452-4)*.

Also, the decision does not indicate that the commission considered, evaluated and rejected plaintiffs' forceful and plausible argument that proposed endorsement is not practicable and that its implementation entails impossible policing difficulties, with the danger that some shippers would take advantage of reduced rates to which they are not entitled; accordingly, the court cannot assume that it did so, nor can the court supply necessary underpinnings for such a conclusion. On remand the commission will have an opportunity to bring its expertise to bear on this question; and, should it again approve proposed tariff amendment, it may also wish to clarify its holding concerning proper language of an endorsement on a commercial bill of lading sufficient to qualify a shipment moving thereunder for application of §22 rate quotations. —Id., p. 454.

Cancellation notice in supplements to rate bureau §22 rate quotations on household goods issued by plaintiff's respective tariff publishing agents for account of member carriers, pursuant to powers of attorney from carriers, effectively cancelled plaintiffs' previously filed individual rate tenders to the Department of Defense; both supplements, in addition to publishing higher rates for all carriers, specifically cancelled and superseded all individual rate tenders previously filed by the carriers. All member carriers were informed that their individual rates would cease to apply on effective date of the new uniform §22 quotations; no members objected to such changes and, after approval thereof by the

Government, the new common rates went into effect. Plaintiffs' individual rates having been cancelled by their respective agency supplements, rates published therein applied on considered shipments of household goods for the military which moved on Government bills of lading.—United Van Lines, Inc. v. United States, 353 F. 2d 741 (742-4).

Nor did such blanket cancellation notices in the supplements violate the commission's regulation requiring that a new quotation or tender which supersedes a prior one shall cancel the prior document by number. The cancellation notices which stated that all rate tenders previously filed by individual carriers were cancelled, sufficiently complied with that regulation; listing of some 1,700 numbers to be cancelled would be quite an onerous task for the tariff publishing agents; and use of the word "all" in the cancellation accomplished the same result.—Id., pp. 745-6.

Charges on household goods shipment from Washington, D.C., to Hawaii, which moved through port of Los Angeles on government bill of lading, should be based on rate via that port rather than on rate applicable via Norfolk, Va., as claimed by defendant. Plaintiff's service tender, required by the government to be filed, designated certain west coast ports as its ports for Hawaiian export and did not name Norfolk; required rate tender filed by movers association for its members, including plaintiff, named jointly filed rates applicable through nearest port and designated the west coast ports and Norfolk. As rate tender does not express the entire shipping agreement, since it does not state services intended to be covered by the rates, it should be read in light of provisions of the service tender; both tenders became part of the shipping contract. Plaintiff entitled to recover amount deducted by defendant, based on rate via Norfolk, on post audit.—Dean Van Lines, Inc. v. United States, 310 F. 2d 740 (741-2).

By becoming a party to §22 quotation of rates tendered to the United States, which contains rates on household goods between points within United States and points in Germany, plaintiff motor carrier brought itself within purview of §204a; thus, its claims for undercharges on that part of its transportation of Government shipments of household goods which occurred entirely within Germany, submitted more than 3 years after payment of its bills, are barred by 3-year statute of limitations in §204a. Considered shipments moved on through Government bills of lading which referred to the §22 quotation and covered complete movement from origin to destination; plaintiff undertook to provide transportation pursuant to the quotation, and fact that it rendered part of the service as agent of another does not change its carrier status. Carrier's action, based on a single bill-of-lading contract for a unified carriage, cannot be split or divided for purpose of maintaining separate suits on the various individual parts; nor can a party divide the grounds of recovery for successive suits in a single cause of action.—Von Der Ahe Van Lines, Inc. v. United States, 358 F. 2d 999 (1000-2).

Whether lower alternative rate named in plaintiff's §22 Quotation No. 52 on a "truckload minimum weight" of 50,000 pounds applied to a volume minimum, on which charges for many of considered shipments were computed, is a question of contract interpretation to be decided under Federal law. The fundamental rule that prior negotiations are merged into written contracts and that parole evidence cannot be admitted to vary terms of the written agreement, even though the writing is silent on the matter concerned, governs. While plaintiff's letter offered the lower rate on a "volume minimum weight," the quotation (submitted after subsequent oral discussions) says nothing about a volume minimum weight and, since it is not ambiguous, parol evidence to show that that rate was based on a volume minimum weight will not be considered. However, although plaintiff erroneously underbilled the Navy for many of considered shipments, its claim for additional freight is barred by the 6-year statute of limitations (28 USC §2501).—Baggett Transp. Co. v. United States, 319 F. 2d 864 (865-6, 868).

Plaintiff's Quotation No. 69, issued shortly before expiration date of No. 52, provided for alternation of the No. 52 rates where lower charges resulted, and also provided by cross-references for application of rule 10 of National Motor Freight Classification, which excludes weight of dunnage from computation of charges. Since the alternative provi-

sion incorporating No. 52 in no way limited duration of such incorporation, it was incorporated into No. 69 for the life of the latter. And since dunnage was not mentioned in No. 52 or in discussions preceding No. 69, such incorporation did not make No. 52 subject to rule 10 with respect to dunnage. Plaintiff was entitled to charge for weight of dunnage under Quotation No. 52 throughout the life of No. 69; and the same conclusion applies to Quotation No. 85, which likewise does not mention dunnage. But plaintiff was not entitled to charge for dunnage under Quotations Nos. 69 and 109, which refer to dunnage by incorporation and cross-reference.—Id., pp. 866-7, 871-2.

Under U.S. Government Rate Quotation and provisions of Western Classification No. 75, incorporated in the §22 quotation by reference, rate on scrap named in applicable classification item, rather than lower commodity rate in the quotation on "cartridge cases, empty, returned," was properly assessed on government's shipments described by its agents in bills of lading as "scrap noibn, having use for resmelting." Commodity shipped was compressed bales or bundles of pieces of brass, the items being compacted cartridge shells, going for resmelting; worn out metal articles reduced to other than their original form and shipped for resmelting are properly described, classified, and rated as scrap metal, rather than as the original article itself.—United States v. Francis, 320 F. 2d 191 (193-4, 196).

While some questions exist as to whether the government requested exclusive use of equipment for two shipments, which were covered by bills of lading containing notations as to specific kind and size of units of carrier equipment ordered and furnished, testimony does not warrant finding error in lower court's holding that the bill of lading notation was an appropriate annotation of a request for exclusive use of the equipment within the §22 quotation item pertinent to shipper's exclusive use of carrier's equipment.—Id., pp. 194-5, 198-9.

However, when weights of individual components of mixed shipments of explosives with other commodities were shown on the respective bills of lading, carrier's charge for entire shipment at higher rate applicable on one of the articles, rather than at rate applicable to each portion thereof as provided in item of the §22 quotation, was erroneous. That those bills of lading, prepared and signed by government's agents, contained statement as to rate and minimum (the rate charged) and also statement of waiver to move by truck does not support carrier's contention that a new and different contract for those shipments was entered into; no tender or quotation of rates for those shipments was specifically submitted. Lower court erred in holding that a price posted on the bill of lading by the government is a valid offer which contractually binds it if accepted; in determining whether agreement on rates had been reached, notations on bills of lading should only be considered evidence of whether or not there was an offer and acceptance.—Id, pp. 193, 194, 196-8.

On further consideration, the qualifications previously expressed in connection with declaratory determination that carriers might charge lower §22 rates, normally available only to the Federal Government, on shipments made by government contractors (whether on commercial or government bills of lading) if the government subsequently completely reimburses the contractor directly, remain unchanged. However, in light of the practical problems in policing proper application of §22 rates, and in order to be able to follow through on a shipment and determine (at a later date) whether total or merely partial reimbursement is involved, more information must be included on the face of bills of lading, i.e., government contract number, government agency, agency supervisor involved, and name of contractor. Therefore, approval of bill-of-lading endorsement as originally presented by motor carrier association is withdrawn and, in lieu thereof, new declaratory determination is made that special §22 rates will be permissible on traffic moving on commercial bills of lading endorsed as set forth.—Interpretation of Govt. Rate —Eastern Central, 332 I.C.C. 161 (162-5)*.

Tennessee Valley Authority is entitled to application of §22 rates on coal traffic of its Electric Power Division, notwithstanding benefits therefrom are passed on to consum-

ers of electricity in the area and no monetary benefit from the reduced rates flows into United States Treasury. Tennessee Valley Authority is constitutionally created, is an instrumentality of the Federal government performing an important governmental function, and has broad responsibility to carry out congressionally authorized functions and policy in a single integrated effort. Since its bill of lading is in acceptable form and it bears the charges, it is the sole direct beneficiary of the reduced rates, and fact that third parties may benefit ultimately from cheaper electricity after the coal has been used is not controlling. Its constitutional authority to dispose of electrical energy property of United States was recognized in 297 U.S. 288; such energy may properly be interchanged with neighboring utilities. Tennessee Valley Authority and its Electric Power Division are clearly within scope of "United States" as used in §22(1).—Tennessee Products & Chem. Corp. v. Louisville & N. R., 319 I.C.C. 497 (499-500).

Moreover, §22(2) specifies which quotations or tenders of traffic must be filed, and, whereas §22(1) speaks of "the United States," §22(2) refers to "the United States Government, or any agency or department thereof"; Tennessee Valley Authority is such an agency. Also, since §22(2) was enacted, the commission has accepted numerous filings on Tennessee Valley Authority's behalf, and Congress has been fully aware of its enjoyment of such rates; it would require cogent reasoning, which complainants have not offered, to endanger such acceptances, or those of the Federal government generally, at this late date. Congress has sanctioned the policy of negotiating rates for shipment of Federal property and has entrusted procurement officers with discretion to determine whether existing rates will be accepted or negotiations undertaken for lower rates; the commission may not interfere with this policy.—Id., pp. 500, 503.

And a complaint under §1 or §3(1) will not lie against a rate established on government traffic by a §22 quotation; §22(1) states that "nothing" in Part I shall prevent the handling of property free or at reduced rates for the United States, and the Supreme Court has interpreted this as exempting government traffic from the rate provisions of the act (355 U.S. 534). Congress has thus seen fit to accord preferential treatment to government traffic, and such action may not be presumed to be an idle gesture. Whether such treatment is as it should be is for Congress to decide, and it has not changed the law in that regard. The Tennessee Valley Authority traffic in issue moves on its billing, at rates it is permitted by statute to negotiate with the carrier, and it bears the charges; complainants' interest is therefore essentially indirect and complaint is in effect an attack on present-day justification of §22. However, the commission may not change the law directly or indirectly, but may only enforce it; complaint assailing §22 rates accorded Tennessee Valley Authority on coal from western Kentucky but not from complaining southern Tennessee mines, dismissed for lack of jurisdiction.—Id., pp. 501-2, 503.

Even assuming arguendo that jurisdiction does lie, the allegedly preferential rates, which are substantially higher, both relatively and absolutely, than complainants' rates, are not shown to violate §3. And as to complainants' allegation of violation of the antitrust laws, §22(2) provides for the antitrust relief afforded by §5a(9). Nevertheless, due consideration of the anittrust laws discloses no inconsistency with their expressed policy, especially as any possible inconsistencies therewith would depend largely on a positive finding on the §3 issue.—Id., p. 507.

Statutory and Common-Law Remedies Not Abridged

60. Savings clause as to existing remedies; interpretation.—[Vols. 4, 7, 9, 11, 18, 19].—Pursuant to clause which preserves existing common-law and statutory remedies, the act does not override common law rights of carriers save insofar as it does so expressly. Although, under §3, carriers are obligated to exchange freight between their lines and lines of connecting carriers, they cannot be forced to do so without prepayment (or security for payment) of rates and charges thereon; and nothing in the act specifically prohibits—after due notification of an intention to do so—a connecting carrier's demand upon a delin-

quent carrier for transportation charges before accepting or releasing a consignment.—Southern Ry. Co. v. Flournoy, 301 F. 2d 847 (854).

Regulations of the Commission

27 FR 7512, July 31, 1962: Drouth Order 60, transportation of livestock feed and hay to specified counties in Pennsylvania, New Jersey, and New York at reduced rates, until Oct. 23, 1962, authorized.

27 FR 7813, Aug. 7, 1962: Drouth Order 60, Amd't. 1, amends Drouth Order No. 60 by adding thereto specified counties in the three States, effective on date of order.

27 FR 8149, Aug. 15, 1962: Drouth Order 60, Amd't. 2, amends Drouth Order 60 by adding thereto two Pennsylvania counties specified, effective on date of order.

27 FR 8567, Aug. 25, 1962: Drouth Order 61, transportation of livestock feed and hay to specified counties in Missouri at reduced rates, until Nov. 20, 1962, authorized.

27 FR 8603, Aug. 28, 1962: Drouth Order 62, authorizes transportation of hay to six counties in Kentucky at reduced rates until Nov. 23, 1962.

27 Fr 8752, Aug. 31, 1962: Drouth Orders Nos. 60-62 (No. 60 Amdt. 3, No. 61, Amdt. 1, No. 62, Amdt. 1), extends expiration dates of those orders to, and including, March 31, 1963, effective on date of order.

27 FR 8846, Sept. 5, 1962: Drouth Order 61, Amdt. 2, amends Drouth Order 61 by adding thereto 13 named counties in Missouri, effective on date of order.

27 FR 8902, Sept. 6, 1962: Drouth Order 60, Amdt. 4, amends Drouth Order 60 by adding thereto 20 named counties in Ohio and 11 named counties in Tennessee, effective on date of order.

27 FR 8932, Sept. 7, 1962: Drouth Order 62, Amdt. 2, amends Drouth Order 62 by adding thereto 24 named counties in Kentucky and 4 named counties in Georgia, effective on date of order.

27 FR 9193, Sept. 15, 1962: Drouth Order 62, Amdt. 3, amends Drouth Order 62 by adding thereto the 15 Mississippi counties and 19 Louisiana parishes listed.

27 FR 9237, Sept. 18, 1962: Drouth Order 60, Amdt. 5, amends drouth Order 60 by adding thereto the 3 Pennsylvania and 32 Tennessee counties specified.

27 FR 9295, Sept. 19, 1962: Drouth Order 62, Amdt. 4, amends Drouth Order 62 by adding thereto the 14 Maryland counties listed.

27 FR 9489, Sept. 25, 1962: Drouth Order 62, Amdt. 5, amends Drouth Order 62 by adding thereto the specified counties in Arkansas, Kentucky, and Missouri, and the Louisiana parishes listed.

27 FR 9490, Sept. 25, 1962: Drouth Order 60, Amdt. 6, amends Drouth Order 60 by adding thereto the specified counties in Tennessee and West Virginia.

27 FR 9633, Sept. 28, 1962: Drouth Order 62, Amdt. 6, amends Drouth Order 62 by adding thereto the Alabama, Illinois, Ohio, and Tennessee counties listed.

27 FR 9856, Oct. 5, 1962: Drouth Order 62, Amdt. 7, further amends Drouth Order 62 by adding thereto the specified counties in Kentucky and Missouri and the Louisiana parishes listed.

27 FR 10059, Oct. 12, 1962: Drouth Order 62, Amdt. 8, further amends Drouth Order 62 by adding thereto the specified counties in Georgia, Pennsylvania, and North Carolina.

27 FR 10139, Oct. 16, 1962: Drouth Order No. 62, amendment 9, further amends Drouth Order 62 by adding the Alabama, South Carolina, and West Virginia counties listed.

27 FR 10236, Oct. 18, 1962: Drouth Order No. 60, Amdt. 7, further amends Drouth Order 60 by addition of the Alabama, Arizona, and Arkansas counties listed.

27 FR 10378, Oct. 24, 1962: Drouth Order No. 60, Amdt. 8, further amends Drouth Order 60 by adding the Alabama and West Virginia counties named.

27 FR 10779, Nov. 3, 1962: Drouth Order No. 60 Amdt. 9, further amends Drouth Order 60 by adding 41 counties named in Alabama, Arizona, Minnesota, and Mississippi.

27 FR 11364, Nov. 17, 1962: Drouth Order No. 60, Amdt. 10, further amends Drouth Order 60 by adding thereto three Texas counties named.

27 FR 12467, Dec. 15, 1962: Drouth Order 60, Amdt. 11, amends Drouth Order 60 by adding thereto 13 specified counties or portions thereof in Mississippi, New Mexico, and West Virginia, effective on date of order.

27 FR 12785, Dec. 27, 1962: Drouth Order 60, Amdt. 12, amends Drouth Order 60 by adding thereto 16 specified counties in Alabama, Michigan, and Texas, effective on date of order.

27 FR 12785, Dec. 27, 1962: Drouth Order 60, Amdt. 13, amends Drouth Order 60 by adding thereto Harney County, Oreg., effective on date of order.

28 FR 391, Jan. 15, 1963: Drouth Order 60, Amdt. 14, amends Drouth Order 60 by adding thereto Medina County, Tex., effective on date of order.

28 FR 622, Jan. 23, 1963: Disaster Order No. 7, Transportation of Livestock Feed and Hay to State of Florida at reduced rates, requested by Secretary of Agriculture because of recent freeze, effective on date of order.

28 FR 708, Jan. 25, 1963: Drouth Order 60, Amdt. 15, amends Drouth Order 60 by adding thereto specified counties in Utah, effective on date of order.

28 FR 1092, Feb. 2, 1963: Drouth Order 60, Amdt. 16, amends Drouth Order 60 by adding thereto three Minnesota counties and one Texas county, effective on date of order.

28 FR 1323, Feb. 9, 1963: Drouth Order 60, Amdt. 17, amends Drouth Order 60 by adding thereto four North Carolina counties, effective on date of order.

28 FR 1396, Feb. 13, 1963: Drouth Order 60, Amdt. 18, further amends Drouth Order 60 by adding thereto the specified counties and parishes in Louisiana, Mississippi, Nevada, and New York, effective on date of order.

28 FR 1397, Feb. 13, 1963: Drouth Order 60, Amdt. 19 and Drouth Order 62, Amdt. 10, further amends Drouth Orders 60 and 62 by adding to each the commodity cotton seed hulls to destinations and designated Alabama counties, effective on date of order.

28 FR 1494, Feb. 15, 1963: Drouth Order 60, Amdt. 20, further amends Drouth Order 60 by adding thereto one Alabama and one Texas county, effective on date of order.

28 FR 1704, Feb. 21, 1963: Drouth Order 62, Amdt. 11, amends Drouth Order 62 to include transportation of livestock feed at reduced rates to drouth area in Kentucky, effective on date of order.

28 FR 2320, March 9, 1963: Drouth Order 60, Amdt. 21, further amends Drouth Order 60 by adding thereto the named 21 counties in Alabama, 5 counties in Georgia, and 3 parishes in Louisiana, effective on date of order.

28 FR 2375, March 12, 1963: Drouth Order 60, Amdt. 22, further amends Drouth Order 60 by adding thereto the specified counties in Minnesota, Mississippi, Nevada, and Utah, effective on date of order.

28 FR 2547, March 15, 1963: Drouth Order 60, Amdt. 23, further amends Drouth Order 60 by adding thereto the 81 counties in Georgia listed, effective on date of order.

28 FR 7205, July 12, 1963: Drouth Order 63, transportation of hay and livestock feed at reduced rates to the 34 Mississippi counties named, effective on date of order.

28 FR 7624, July 26, 1963: Drouth Order 63, Amdt. 1, amends Drouth Order 63 by adding thereto the 61 Virginia counties listed, effective on date of order.

28 FR 8231, Aug. 9, 1963: Drouth Order 63, Amdt. 2, further amends Drouth Order 63 by adding thereto the 14 Mississippi counties listed, effective on date of order.

28 FR 8268, Aug. 10 1963: Drouth Order 63, Amdt. 3, further amends Drouth Order 63 by adding thereto the 8 Virginia counties listed, effective on date of order.

28 FR 10824, Sept. 19, 1963: Drouth Order 63, Amdt. 5, further amends Drouth Order 63 by adding thereto the 20 Maryland counties and 17 North Carolina counties listed, effective on date of order.

28 FR 10765, Oct. 5, 1963: Drouth Order 63, Amdt. 6, amends Drouth Order 63 by adding thereto the 18 North Carolina counties listed, effective on date of order.

28 FR 11834, Nov. 6, 1963: Drouth Order 63, Amdt. 7, amends Drouth Order 63 by adding thereto the 29 Pennsylvania counties listed, effective on date of order.

28 FR 12150, Nov. 14, 1963: Drouth Order 63, Amdt. 8, amends Drouth Order 63 by adding thereto the 42 Oklahoma counties and the 97 Texas counties listed, and extending expiration date of the order to April 30, 1964, effective on date of order.

28 FR 13330, Dec. 7, 1963: Drouth Order 63, Amdt. 9, further amends Drouth Order 63 by adding thereto the 205 counties in the States of Arkansas, Maryland, Missouri, New Jersey, Oklahoma, Texas, Virginia, and West Virginia listed in appendix, effective on date of order.

29 FR 19269, Dec. 31, 1964: Disaster Order No. 8, transportation of hay to the State of Montana at reduced rates, requested by Secretary of Agriculture because of recent heavy snowfall, effective on date of order.

30 FR 182, Jan. 7, 1965: Disaster Order No. 8, Amdt. 1 (Corrected), order also applies as to destinations in North Dakota counties listed.

30 FR 870, Jan 27, 1965: Disaster Order No. 9, Northwestern Pac. R. Co., et al., reduced rates on c.l. freight to and from disaster area in California north of Longvale, Calif., effective on date of order.

30 FR 1140, Feb. 3, 1965: Disaster Order 9, Amdt. 1, order amended so as to apply on traffic to or from certain Southern Pac. R. Co. stations, effective on date of order.

30 FR 2169, Feb. 17, 1965: Disaster Order 9, Amdt. 2, order further amended so as to apply on traffic to or from Northwestern Pac. R. stations south of Longvale, Calif., to and including Fulton, Calif., effective on date of order.

30 FR 2292, Feb. 19, 1965: Disaster Order 9, Amdt. 3, order further amended so as to apply on certain traffic moving to or from Grants Pass, Oreg., effective on date of order.

30 FR 2364, Feb. 20, 1965: Disaster Order 10, Camas Prairie R. Co., transportation of lumber and forest products at reduced rates from disaster (due to floods) area in Iowa until March 1, 1965.

30 FR 3303, March 10, 1965: Disaster Order 9, Amdt. 4, second ordering paragraph of Disaster Order 9, as amended, further amended to read as set forth, effective on date of order.

30 FR 4775, April 14, 1965: Disaster Order 9, Amdt. 5, Northwestern Pac. R. Co., extends expiration date of Disaster Order 9 from present Apr. 21, 1965 to May 31, 1965.

30 FR 7264, May 29, 1965: Disaster Order 9, Amdt. 6, further extends expiration date of Disaster Order 9 from May 31, 1965 to June 16, 1965.

30 FR 9895, Aug. 7, 1965: Drouth Order No. 64, transportation of hay at reduced rates to certain counties in Vermont, until May 31, 1966, permitted.

30 FR 11259, Sept. 1, 1965: Drouth Order 64; Amdt. 1, Drouth Order 64 amended to include the 43 counties in Pennsylvania listed in appendix.

30 FR 11790, Sept. 15, 1965: Drouth Order 64, Amdt. 2, Drouth Order 64 further amended to include the 46 counties in New York listed.

30 FR 13669, Oct. 27, 1965: Disaster Order 11, transportation of hay to State of Louisiana at reduced rates because of hurricane Betsy, until May 31, 1966, authorized.

31 FR 13156, Oct. 10, 1966: Drouth Order 65, Transportation of Hay at reduced rates to certain counties in the State of Pennsylvania, until May 31, 1967, authorized.

CONSULT THE TABLE OF CASES WHENEVER A CITATION IS FOLLOWED BY AN ASTERISK

31 FR 15000, Nov. 29, 1966: Drouth Order 65, amdt. 2, Transportation of Hay at reduced rates to certain counties in the State of Uthah, until May 31, 1967, authorized.

32 FR 768, Jan. 21, 1967: Drouth Order 65, Andt. 3, Transportation of Hay at reduced rates to certain North Carolina counties, until May 31, 1967, authorized.

32 FR 15862, Nov. 17, 1967: Disaster Order 12, transportation of hay at reduced rates to disaster area in Texas, until March 31, 1968, authorized.

Section 23. Mandamus to obtain equal facilities for shippers.—[Unchanged. See vol. 4, p. 2821, vol. 11, p. 9336.]

Historical note, see vol. 4, p. 2821; for amendments, see footnotes, vol. 4, p. 2821, vol. 11, p. 9336.

Notes of Decisions

Volume 4—p. 2822; Volume 7—p. 5898; Volume 10—p. 8264; Volume 11—p. 9336; Volume 14—p. 11560; Volume 15—p. 12154; Volume 19—p. 15444.

2. Jurisdiction of courts.—[Vols. 4, 10, 14, 19].—District court lacked jurisdiction to issue orders in the nature of mandamus to compel defendant railroad to furnish sufficient, but not less than eight, empty boxcars daily for loading of soybeans at plaintiff's grain elevator and to remove filled cars from plaintiff's siding and replace them with empty ones, when there was no finding of discrimination as between shippers similarly situated and plaintiff concedes that none exists. Issue to be determined, i.e., reasonableness of railroad's method of car distribution for seasonal loading during a car shortage, is for the commission to decide; orders in question were entered without prior reference of the matter to the commission. Reversed and cause remanded to dissolve temporary restraining and injunction orders.—Spence v. Baltimore & O. R. Co., 360 F. 2d 887 (888-91).

Doctrine of primary jurisdiction generally requires that a court not assume jurisdiction to decide controversy involving a question that is within jurisdiction of an administrative agency prior to decision by such agency thereon where the question demands (1) the exercise of administrative discretion requiring experience, knowledge, and services of the agency; (2) the determination of technical and intricate matters of fact; and (3) where uniformity of ruling is essential to comply with purposes of regulatory statute administered. Therefore, under that doctrine, application to the commission would be prerequisite to maintenance of plaintiff's suit for mandatory injunction to require railroad to provide certain service (i.e., to deliver and pick up coal cars as needed and requested) beyond that which plaintiff presently receives, since the question of the reasonableness of rail service is a matter for the commission's initial determination. Suit dismissed.—Elgin Coal Co., v. Louisville & N. R. Co., 277 F. Supp. 247 (249-50)*.

Mandamus will not lie to require a public official or agency to perform discretionary acts; the commission's decision not to enter upon an investigation of proposed train discontinuance being within its discretionary power under §13a(1), the court has no jurisdiction to require it to do so.—Sludden v. United States, 211 F. Supp. 150 (154)*.

See also Robbins V. United States, §207(a), n. 9.

5. Necessity for prior determination by commission.—[Vols. 4, 7, 10, 15].—The issue to be decided in shipper's action to compel railroad to furnish boxcars, i.e., reasonableness of defendant's method of car distribution for seasonal loading during a car shortage, is one to be decided by the commission. When, without prior reference of the matter to the commission, lower court entered orders in nature of mandamus directing defendant to furnish specified number of empty cars for loading at plaintiff's grain elevator, the court engaged in an administrative investigation of available cars in the area, found that defendant had a number of obsolete cars on hand

and enjoined it for failure to supply cars requested by one particular shipper. Shortage of rail cars is a national problem currently under investigation by the commission; and the orders in question might create the very discrimination in distribution of available cars which the commission must strive to avoid. Reversed and remanded.—Spence v. Baltimore & O. R. Co., 360 F. 2d 887 (888-91).

In shipper's suit for mandatory injunction to require railroad to provide certain service beyond that plaintiff presently receives, the issue of reasonableness of car service furnished by the railroad to plaintiff, raised by allegation that railroad has failed and refused to deliver and pick up coal cars as needed and requested by plaintiff while at the same time providing prompt and adequate car service at all other coal tipples in the area, was a matter for initial determination by the commission.—Elgin Coal Co. v. Louisville & N.R. Co., 277 F. Supp. 247 (249, 250)*.

Section 24.—[Restated in §11 and §18. See vol. 4, p. 2723.]

Section 25. Safety appliances, methods, and systems.—[Unchanged. See vol. 9, p. 7843, vol. 11, p. 9337.]

Amendments, see footnotes, vol. 9, p. 7843, vol. 11, p. 9337; historical notes, vol. 4, p. 2737, vol. 13, p. 11042, vol. 14, p. 11560, vol. 15, p. 12155, vol. 16, p. 12791, vol. 17, p. 13486.

Notes of Decisions

Volume 4—p. 2738; Volume 7—p. 5884; Volume 9—p. 7847; Volume 11—p. 9337; Volume 12—p. 10342; Volume 14—p. 11561; Volume 15—p. 12155; Volume 16—p. 12791; Volume 17—p. 13486; Volume 18—p. 14239; Volume 19—p. 15444.

2. Construction and purpose of section.—[Vols. 4, 7, 9, 11, 14, 16-19].—In action to set aside order approving railroad's proposed discontinuance of considered interlocking plant, record does not support plaintiff's argument that the commission misconstrued objectives of §25 and the Safety Appliance Act and imposed an unnecessary peril to life and limb upon railroad employees. It is apparent that the commission did not refuse to consider all the risks involved, and that it made a finding of safety which is supported by the evidence. Moreover, there is nothing in the Safety Appliance Act which would prevent the commission from finding that applicant railroad had "made the requisite showing and that the application should be granted," as that finding is supported by the record. Complaint dismissed.—Legge v. United States, 244 F. Supp. 878 (880, 882)*.

Section 25 is the only authority delegated to the commission that has any bearing on prevention of rail-highway grade-crossing accidents. However, §25 contains no provision for protection of vehicular traffic at grade crossings; it applies only to signals and other similar appliances or systems used for safe and speedy movement of trains and prevention of collisions: it is intended to apply to train movements as such and does not authorize prescription of rules for movement of motor vehicles over railroad tracks. Both §25 and §1(21), which empowers the commission to require railroads to provide safe and adequate facilities for performing car service and to require extension of rail lines to provide service, limit the commission's jurisdiction to matters relating to operation of trains, and neither those nor any other existing statute confers any jurisdiction over railroads concerning highway grade-corssing matters. The commission therefore has no jurisdiction to require installation of protective signals, gates, or other devices at grade crossings.—Prevention of Rail-Highway Grade-Crossing Accidents, 322 I.C.C. 1 (46-8)*.

6. Automatic stops.—[Vols. 4, 7, 14-19].—Discontinuance of automatic intermittent train-stop system on petitioner's line between Newark, N.J., and Sayre, Pa., is justified by

discontinuance of all passenger service and great reduction of traffic density, and by improvements in locomotive and train equipment and in signal and braking equipment; trains are well spaced and operated at moderate speeds and physical characteristics of involved line are not so unfavorable as to cause any significantly difficult operating conditions; system now in use does not operate on the fail-safe principle, and faulty inductors may contribute to violations of signals and in turn to accidents; on balance, evidence is convincing that continuance of that system is not required, and that proposed automatic block signal system will provide adequate protection and safety.—Automatic Train Control Devices [Lehigh Valley R. Co.], 315 I.C.C. 663 (664-5, 668-9, 671)*.

In reaching this conclusion the commission has borne in mind the pendency of proceedings in which Pennsylvania R. seeks to acquire control of petitioner, and possibility of some increase in traffic over the line if such control should be authorized and consummated; however, traffic density on the line, even if increased, would still fall far short of that existing when the train-stop system was ordered installed, and its retention should not be required for that reason alone.—Id., p. 671.

14. Particular installations of devices required; test; approval.—[Vols. 4, 7, 9, 15-19].—In action against railroad for alleged violations of the commission's safety appliance regulations, fact that switch in question, established for purpose of temporarily moving work equipment from defendant's main line to point where new track was being constructed, was spiked and out of service, and that defendant had established safety measures to protect the switch, was no defense to violation of those regulations; the rules seem to be absolute and defendant could not substitute its judgment for that of the commission. Defendant could have applied for relief from the regulations, but did not do so; and that the commission, on application, had approved another railroad's deviation from regulations governing track relays did not excuse defendant's violation thereof.—United States v. Southern Ry. Co., 206 F. Supp. 562 (563).

Authority granted to discontinue automatic train control installation on petitioner's line between Etowah, Tenn., and Corbin, Ky.; considered installation is obsolete, expensive to maintain, and unnecessary for safety of operations. New wayside signals have been installed which give all indications as to broken rails, rockslides and similar interference that can be given by cab devices; present system causes inefficiencies in train speeds as the cabs have only two-indication devices whereas the wayside signals have a third indication permitting an intermediate speed not allowed under two-indication cab system. Under today's conditions, the commission would not require installation of the considered train-control system on the line involved; and adequate protection and safety will continue under petitioner's proposal to discontinue archaic installations.—Automatic Train Control Devices (Louisville & N.R. Co.), 325 I.C.C. 163 (164-7).

18. Signal and interlocking systems.—[Vols. 9, 11, 12, 15-19].—Proposed discontinuance of considered interlocking, in area where applicant conducts only a slow speed switch operation, approved. All operations are conducted on yard tracks at not more than 12 miles an hour, and are prepared to stop short of other movements, obstruction, or improperly lined switch; movement density, though still great, causes no problem under such circumstances. Employee dislike of hand-thrown switches is no ground on which to retain an interlocking; nor does weather appear important in determination of instant matter.—Monongahela Connecting R. Co. Modifications of Systems, 325 I.C.C. 160 (161-2).

Removal of automatic trainstop system between two named points and automatic cab-signal system between two other points on considered middle-of-the-line segments of petitioner's main line, approved. While lines under consideration are important frequently used main lines, train density thereover is significantly down in passenger movements and even freight movements, though still fairly heavy, are somewhat fewer. More important, however, operating conditions, wayside signals, and other circumstances on the lines have improved materially since the systems were installed in the mid-1920's and, as shown, the total picture currently adds up to

adequate protection and safety without the systems sought to be removed.—Automatic Train Control Devices, 323, I.C.C. 793 (796-7, 801-2). (Erie-Lackawanna R. Co.)

Proposed modification of Calwa interlocking of Atchison, T & S.F. Ry. and Southern Pac. Co. near Fresno, Calif., by change from local tower control to remote control from dispatchers' office at Fresno will continue to afford adequate safety protection, since basic engineering facts showing control of the signals, impossibility of their displaying aspects for conflicting moves, and existence of adequate communications are sufficient to satisfy applicants' burden of proof respecting the point of control, and nearness to crossing of signals relocated as proposed is not shown to present any safety problem.—Atchison, T. & S.F. Ry. Co. Modifications of Systems, 319 I.C.C. 1 (4-5, 7).

Applicant proposing to remove one track of an 11-mile segment of line that had been washed out and to substitute a traffic control system in lieu of present block signal system on the remaining track has the burden of convincing the commission that safety of operation over the line involved would not be significantly diminished, and a record on which the fundamental issue of safety can be determined with assurance is a prerequisite to approval. Applicant has not met this burden in satisfactory manner; involved segment is not only curvy and subject to severe weather conditions, impairing visibility, but is also subject to rock slides, washouts, and other track obstacles due to the terrain, the weather, and type of industries in the area, and it does not appear that proposed change from 2-mile to 11-mile signal spacing would maintain adequate protection. Safety of railroad operations is not a matter to be taken lightly, and applicant's failure to reply to protestants' exceptions suggests a lack of concern. Application denied.—Monongahela Ry. Co. Modifications of Systems, 319 I.C.C. 753 (755, 757).

Discontinuance of automatic block signal system on a 3.5-mile segment of applicant's San Pedro line, with incidental modifications of interlocking, and operation under yard rules or orders of train dispatcher, is justified when conditions have changed greatly since installation of the system and its purpose of expeditious movement of a heavy volume of traffic is no longer applicable; passenger and box motor services have been discontinued, and remaining freight traffic can safely be handled in manner proposed.—Pacific Electric Ry. Co. Modifications of Systems, 315 I.C.C. 381 (383-4).

Discontinuance of manual block signal system on applicant's Saginaw branch will not materially affect safety, since passenger service has been discontinued and number of trains operated has decreased; trains are presently being operated safely under timetable and train orders on other branches where topography, weather conditions, and train density are similar; applicant's flagging and other operating rules, including 10-minute spacing of trains, will provide adequate protection for normal operations. However, as the Saginaw branch may be used as a detour for passenger trains, approval is conditioned on installation and operation of a manual block system whenever such trains are operated thereover in detour movements.—New York Central R. Co. Modifications of Systems, 315 I.C.C. 73 (76).

Automatic block-signal and traffic-control systems have certain features not available where trains are operated by timetable and train orders, and are generally installed to facilitate safe movement of trains where traffic density is comparatively high; relative degree of protection afforded by the respective methods depends on a number of factors, including traffic density, speed, grades, curves, and weather conditions.—New York Central R. Co. Modifications of Systems, 315 I.C.C. 113 (115).

Decrease in number of freight trains and discontinuance of passenger service on applicant's Sandusky branch tends to minimize need for continuance of automatic systems when adequate protection is provided by flagging and other operating rules; trains are now operated with apparent safety on other branches where topography, weather conditions, etc., are similar; approval of proposed discontinuance of signal systems is warranted provided applicant continues present normal operations where only one train is operated in

the territory at any one time. However, while no change in traffic pattern is presently contemplated, operation of additional trains over the Sandusky branch may be desirable in future; should that occur, and occasional detour movements be continued, additional protection would be necessary; approval is therefore conditioned on installation and operation of a block-signal system whenever more than one train is operated at any one time on considered line.—Id., p. 116.

While operation by timetable and train orders where train density is light is under normal conditions a safe method for operation of trains, each case seeking authority for such movement is decided on its own merits.—New York Central R. Co. Modifications of Systems, 315 I.C.C. 194 (197).

Considering terrain, weather conditions, method of proposed operation, and present traffic density, discontinuance of traffic control system, and associated changes in interlocking, on line between Toledo and Berwick, Ohio, is warranted provided no change is made in existing traffic pattern; however, should traffic density increase in any substantial amount, approval of operation by timetable and train orders would not be warranted, since trains operate in most cases in opposing directions and, while normally meeting at Fostoria, could meet at any available point; applicant, though not anticipating any such change, admits its possibility; application granted on condition that a block-signal system be installed and operated if and when existing traffic pattern, as set forth in 304 ICC 643, is changed by addition of a train or trains other than occasional extras, or whenever a passenger train is detoured between those points.—Id., p. 197-8.

Regulations of the Commission

29 FR 13606, Oct. 3, 1964, Part 136: Installation, Inspection, Maintenance, and Repair of Systems, Devices, and Appliances, §136.410 Locking, hand-operated switch, revised, effective on date of order.

31 FR 2380, Feb. 4, 1966, Part 136: Installation, Inspection, Maintenance, and Repair of Systems, Devices, and Appliances, Part 136 amended to read as set forth, effective March 31, 1966.

32 FR 927, Jan. 26, 1967, Part 135: Discontinuance or Material Modification of Signal Systems, instructions governing applications, issued March 15, 1954 (15FR 1530), as revised, reissued, and codified as New Part 135, §135.1 through §135.20, effective Feb. 15, 1967.

32 FR 3059, Feb. 18, 1967, Part 135: Effective date of order published in 32 FR 927 is extended to April 1, 1967.

32 FR 5624, April 6, 1967, Part 235 [formerly Part 135]: Discontinuance or Material Modification of Signal Systems. In view of pleading filed by Association of American Railroads, and since considered matter will be responsibility of Dept. of Transportation beginning April 1, 1967, order of Jan. 10, 1967 (32 FR 927) is vacated and set aside and the matter transferred to Dept. of Transportation for disposition.

NOTE: For recodification, see 49 CFR, Editorial Note, 32 FR 5606, April 5, 1967.

Section 26. Short Title.—[Unchanged. See vol. 11, p. 9339.]

PART II

INTERSTATE COMMERCE ACT; MOTOR CARRIERS

Chapter 8, Title 49, U.S. Code

Section 201. [*§301 U.S.C.*] ***Short Title.***—[Unchanged. See vol. 11, p. 9339.]

Amendment, see footnotes, vol. 11, p. 9339.

Section 202. (a) [§*302 U.S.C.*] Application of provisions.—[Unchanged. See vol. 11, p. 9339.]

Amendment, see footnotes, vol. 11, p. 9339.

Cross Reference

By provision of Executive Order 11340, dated March 30, 1967 (32 FR 5453, April 1, 1967), the date on which the Department of Transportation Act takes effect is April 1, 1967.

Notes of Decisions

Volume 15—p. 12158; Volume 16—p. 12795; Volume 17—p. 13489; Volume 19—p. 15453.

1. Constitutionality.—[Vols. 15, 16].—See Cardinale Trucking Co. v. United States, 28 USC §2325, n. 42.

2. Construction and interpretation.—[Vols. 15, 16, 19].—The Motor Carrier Act is a highly remedial statute, and its terms are broad and comprehensive enough to bring within them all those who, no matter what form they use, are in substance engaged in the business of transportation of property on public highways for hire; and, being remedial, it should be liberally interpreted to effect its evident purpose.—I.C.C. v. Dudgeon, 213 F. Supp. 710 (714); I.C.C. v. Interstate Auto Shippers, Inc., 214 F. Supp. 473 (476).

In enacting Part II of the act, Congress established a comprehensive plan for regulating the carriage of goods by motor truck in interstate commerce. By §206 it required that common carriers secure certificates of convenience and necessity before engaging in interstate commerce; by §216(b) it directed property carriers "to establish, observe, and enforce just and reasonable rates, charges, and classifications"; and by §217(a) it directed carriers to file with the commission and print and keep open to public inspection tariffs showing all such rates and authorized the commission to reject any tariff not in consonance therewith.—W. J. Dillner Transfer Co. v. United States, 214 F. Supp. 941 (944-5).

There can no longer be any doubt that the commission has full power over regulation of both vehicles and facilities of common carriers engaged in interstate commerce. [See 222 US 20 and 332 US 422.] Order prescribing regulations to prevent race discrimination between passengers deals expressly with vehicles and terminal facilities when used in interstate commerce and is therefore an order regulating vehicles and facilities of interstate commerce; any incidental effect on strictly intrastate matters, such as may flow from economic necessity to use the same vehicles and facilities in intrastate as well as interstate transportation, cannot prevent the commission's exercise of its recognized right to regulate interstate commerce.—State of Georgia v. United States, 201 F. Supp. 813 (815)*.

Exercise of the commission's regulatory jurisdiction has no effect on the right of individual respondent, found to be jointly participating in unauthorized for-hire transportation, under Idaho community property statutes. Even though described arrangements for leasing respondent's vehicles are proper and necessary to her accumulation of an estate separate from that of her husband, she cannot avoid, on the basis of State community property statutes, the jurisdiction vested in the commission over interstate carrier operations.—Zirbel Transport, Inc., Investigation and Revocation, 91 M.C.C. 705 (707, 709-10).

The Montana Supreme Court has no jurisdiction to determine respondent's rights under the Interstate Commerce Act; Congress has left such determinations to the commission and the Federal Courts.—Daniels—Investigation of Second Proviso Eligibility, 88 M.C.C. 357 (363)*.

Insofar as Federal Aviation Agency's assertion of plenary power over Dulles International Airport under Second Washington Airport Act, including power to regulate operation of for-hire motor transportation at such facilities, extends only to transportation covered by the taxicab and air-passenger exemptions, no conflict can arise between the power

of that agency and that of the commission.—A.B. & W. Transit Co. Extension, 88 M.C.C. 175 (179, 184).

As to certain operations shown to be needed and not covered by any exemption, FAA concedes that it is mandatory under §206(a)(1) of Interstate Commerce Act that carriers with which it may contract for such service hold certificates from the commission, and it does not assert power to oust the commission from selection of the carrier or carriers to be authorized. Therefore, in view of its apparent willingness to permit operation of the selected carriers at Dulles Airport, the question of its authority to exclude authorized motor carriers from operation thereat need not be considered. Nor is there any reason to question FAA's exercise of the normal police or proprietary function incident to efficient handling of passengers and carriers at a busy terminal.—Id., pp. 179, 184.

As to matter of the franchise fee and other excersises of power assertedly beyond the normal proprietary or police function, the commission states, as it did in 30 MCC 618, that all selected applicants are under obligation to comply with all lawful requirements of the FAA, without attempting to add any penalties or sanctions within the commission's power to those asserted by the FAA itself.—Id., p. 184.

Section 202. (b) [*§302(b) U.S.C.*] **State regulation of intrastate commerce.**—[Unchanged except by act of Sept. 6, 1965, Pub. L. 89-170, §2, 79 Stat. 648, which designated existing provisions as paragraph (1) and added paragraph (2), below. See vol. 11, p. 9340.]

(2) The requirement by a State that any motor carrier operating in interstate or foreign commerce within the borders of that State register its certificate of public convenience and necessity or permit issued by the Commission shall not constitute an undue burden on interstate commerce provided that such registration is accomplished in accordance with standards, or amendments thereto, determined and officially certified to the Commission by the national organization of the State commissions, as referred to in section 205(f) of this Act, and promulgated by the Commission. As so certified, such standards, or amendments thereto, shall be promulgated forthwith by the Commission and shall become effective five years from the date of such promulgation. As used in this paragraph, "standards or amendments thereto" shall mean specification of forms and procedures required to evidence the lawfulness of interstate operations of a carrier within a State by (a) filing and maintaining current records of the certificates and permits issued by the Commission, (b) registering and identifying vehicles as operating under such certificates and permits, (c) filing and maintaining evidence of currently effective insurance or qualifications as a self-insurer under rules and regulations of the Commission, and (d) filing designations of local agents for service of process. Different standards may be determined and promulgated for each of the classes of carriers as differences in their operations may warrant. In determining or amending such standards, the national organization of the State commissions shall consult with the Commission and with representatives of motor carriers subject to State registration requirements. To the extent that any State requirements for registration of motor carrier certificates or permits issued by the Commission impose obligations which are in

excess of the standards or amendments thereto promulgated under this paragraph, such excessive requirements shall, on the effective date of such standards, constitute an undue burden on interstate commerce. If the national organization of the State commissions fails to determine and certify to the Commission such standards within eighteen months from the effective date of the paragraph, or if that organization at any time determines to withdraw in their entirety standards previously determined or promulgated, it shall be the duty of the Commission, within one year thereafter, to devise and promulgate such standards, and to review from time to time the standards so established and make such amendments thereto as it may deem necessary, in accordance with the foregoing requirements of this paragraph. Nothing in this paragraph shall be construed to deprive the Commission, when there is a reasonable question of interpretation or construction, of its jurisdiction to interpret or construe certificates of public convenience and necessity, permits, or rules and regulations issued by the Commission, nor to authorize promulgation of standards in conflict with any rule or regulation of the Commission.

Historical Note

The commission urges early enactment of legislation which would provide for the voluntary establishment of greater uniformity in State requirements for registration of operating authorities of interstate motor carriers.—Annual Report, 1964, p. 74.

Notes of Decisions

Volume 9—p. 7862 [par. (c)]; Volume 11—p. 9340; Volume 2—p. 10343; Volume 13—p. 11043; Volume 14—p. 11562; Volume 15—p. 12159; Volume 16—p. 12797; Volume 17—p. 13490; Volume 18—p. 14242; Volume 19—p. 15453.

5. State regulation and taxation.—[Vols. 9, 11-19].—Congress may direct that federal regulation occupy only a limited portion of an activity being conducted in interstate commerce; and the Commerce Clause does not wholly withdraw from the States the power to regulate local matters with respect to which Congress has not exercised its power, even though such State regulation may affect interstate commerce. However, by enacting the Motor Carrier Act which contains certain exceptions as to its applicability, Congress intended the federal regulation and the exceptions to occupy the entire field; and intended that trucks hauling nonmanufactured agricultural products in interstate commerce should not be regulated at all, except as to safety of operation and equipment. Attempt of Kansas commission to assert jurisdiction over rates for intrastate movement of shipments of unprocessed grain in interstate commerce had commercial aims; and, by the Motor Carrier Act, the Federal Government has preempted regulation of those carriers.—State Corporation Commission v. Bartlett & Co., Grain, 338 F. 2d 495 (498-9)*.

In action against State commission to enjoin arrests of owner-drivers of equipment leased by them to plaintiff which operates as a "cooperative association" under the Agricultural Marketing Act (the arrests having been made because owner-drivers did not hold operating authority either from the State or the commission and not because they violated any State laws or regulations as to physical operation of the trucks), immediate problem involved was compliance with State laws; however, since the State statutes recognize the right to engage in any interstate transportation authorized by federal law, a federal

question is presented. Whether considered owner-driver trucks come within "agricultural cooperative" exemption of §203(b5) is a legal question on which the courts will ultimately have to rule; nevertheless, instant case is one which initially calls for expertise of the commission in making findings of fact and perhaps fashioning a policy expressed in terms of a legal standard. This does not suggest an intrusion by the Federal Government into the State domain, because of the language of the State statutes.—Agricultural Transp. Ass'n of Texas v. King, 349 F. 2d 873 (875-6, 883-5).

Since the commission's order prescribing regulations prohibiting race discrimination by regulated interstate motor passenger carriers deals expressly with vehicles and terminal facilities when used in interstate commerce, it is not an order regulating the subject matter of intrastate commerce; to extent that such regulation of interstate vehicles and facilities affects strictly intrastate matters, such effect is incidental; any such effect resulting from economic necessities of operation of the motor carrier industry cannot prevent the commission's exercise of its recognized right to regulate interstate commerce. However, nothing in the order or in the court's decision touches in any way power of the State commission to regulate purely intrastate motor transportation in any manner heretofore legally open to it.—State of Georgia v. United States, 201 F. Supp. 813 (815)*.

Prior to the Motor Carrier Act of 1935 a State, in absence of congressional legislation dealing directly with the subject, could (1) adopt regulations to promote safety on the highways and conservation in their use, provided the indirect burden imposed on interstate commerce was not unreasonable, and (2) impose a fair and reasonable nondiscriminatory tax as compensation for use of its highways; but it did not have authority to issue "interstate" certificates of public convenience and necessity, since that would involve determination by State officials of adequacy of existing facilities for conducting interstate commerce, a test peculiarly within the province of federal action.—Daniels v. United States, 210 F. Supp. 942 (946)*.

In the Motor Carrier Act Congress adopted a comprehensive plan for federal control and regulation of the carriage of goods by motor truck in interstate commerce, so all-embracing that the former power of States was greatly reduced; no power at all was left in States to determine what carriers could or could not operate in interstate commerce. Exclusive power of the federal government to make this determination is shown by §206(a), which describes the conditions under which Interstate Commerce Commission may issue certificates of convenience and necessity; and an exemption authorizing a State commission to issue interstate certificates to carriers who have no corresponding intrastate rights would produce a result contrary to the policy of the act.—Id., pp. 946, 950-1; and 35 F. Supp. 136 held that it is beyond the constitutional power of a State to permit or prohibit interstate carriage on grounds of public convenience and necessity.—Id., p. 948.

As the enabling statute prohibits the commission's regulation of motor carriage in intrastate commerce, in making a declaratory determination as to lawfulness of tariff rules providing for stoppage to unload intrastate portion of a mixed shipment of interstate and intrastate traffic tendered on one bill of lading, its conclusions in no way affect the States' exclusive jurisdiction over intrastate commerce. Issuance of a bill of lading covering both intra- and interstate commerce cannot broaden the commission's jurisdiction: bill of lading is a receipt for the goods and a contract to transport and deliver it; and to extent that it is a contract for carriage of intrastate commerce it is governed by laws of the particular State having jurisdiction. A volume of mixed inter- and intrastate commerce thus tendered does not become wholly interstate in character merely because the intrastate portion is unloaded under a stopoff rule, and the commission may not prescribe a tariff rule that would have effect of providing rates or charges on intrastate commerce.—Central States Motor Freight Bureau, Inc., Petition, 319 I.C.C. 745 (747-8, 749, 751)*.

And so far as the jurisdictional issue is concerned, that finding applies with equal force to contract as to common carriers.—Id., 321 I.C.C. 726 (729)*.

It is not the function of the commission to

determine the validity of State laws applicable to motor carriers authorized by it to engage in the transportation business; the Supreme Court not only accepts but is bound by the construction given to State statutes by the State courts.—Bowman Transp., Inc.—Purchase—A. W. Hawkins, Inc., 90 M.C.C. 303 (306).

While the commission recognizes the right of a State court to interpret State certificates, Montana Supreme Court's dictum that the Motor Carrier Act would not affect State interstate certificates granted prior thereto would apply only to whatever rights respondent might have under Montana law by virtue of such a certificate.—Daniels—Investigation of Second Proviso Eligibility, 88 M.C.C. 357 (363)*.

Grant of alternate operating-convenience route within Missouri between Kansas City and St. Joseph to carrier whose existing route is through Kansas should present no unique or difficult problem in enforcing the commission's regulations, nor interfere with enforcement of pertinent laws and regulations by the States concerned; applicant is not now operating unlawfully, and there is no indication that purpose of application is to enable it to circumvent State laws or regulations, nor have the respective States expressed any interest in that regard.—Capitol Truck Lines, Inc., Extension, 88 M.C.C. 212 (217).

Since regulations prescribed to remove unjust discrimination between interstate passengers in racial segregation of seating in buses and use of terminal facilities are limited to facilities operated in interstate commerce and services connected therewith, and do not apply to operation of vehicles by interstate carriers when transporting passengers solely in intrastate service, there is no interference with legitimate exercise of the exclusive jurisdiction reserved to the States by §202(b) to regulate intrastate commerce.—Discrimination—Interstate M. Carriers of Passengers, 86 M.C.C. 743 (748, 753)*.

That compliance with the rules may for economic reasons compel a carrier to provide non-segregated facilities for its intrastate as well as its interstate passengers presents no legal impediment to prescription of rules necessary to remove unjust discrimination against interstate commerce. Moreover, federal courts have held under the equal protection clause of the Fourteenth Amendment that States have no power to regulate intrastate transportation by requiring segregation of intrastate passengers on vehicles or in use of terminal facilities. [142 F. Supp. 707, affirmed 352 US 903; 328 US 373.]—Id., p. 748.

6. ——Protection of highways and traveling public, interstate commerce.—[Vols. 9, 11, 12, 16-19].—Requirement that for-hire motor carriers operating in interstate or foreign commerce report accidents occurring in their intrastate operations, including those involving vehicles and drivers used exclusively in intrastate commerce, in no way abridges or interferes with exclusive power of the State to regulate intrastate commerce; however, carriers who at no time engage in interstate or foreign commerce, or whose operations therein are sporadic or occasional, should not be required to report intrastate accidents.—Qualifications of Employees and Safety of Operations, 91 M.C.C. 141 (145-6)*.

Since §192.3 of the commission's safety regulations requires motor carriers to abide by valid State highway regulations, and violations of State maximum weight laws may be considered in determining a carrier's fitness, it must be assumed that certificated carriers are aware of their obligations when they publish minimum weights for rate proposals with limitations on the number of vehicles to be used; and mere mention of State weight laws and fact that they are complex does not indicate that violations thereof would automatically follow. However, if the minimum weight is so unrealistic that it cannot be met without an obvious violation of State maximum weight laws resulting, the rate should not be approved. Proposed rate on alcoholic liquors, minimum 96,000 pounds in not more than two trailers, which requires minimum loadings of 48,000 pounds, is not shown to be unlawful when protestants admit that no violation of State laws would occur if respondent uses city tractors in pickup and delivery service.—Alcoholic Liquors, Detroit, Mich., to Long Island City, 319 I.C.C. 404 (408-9).

20. Operation in intrastate commerce.—[Vols. 9, 11, 19].—From the commission's findings of fact, which are supported by sub-

stantial evidence, conclusion is inescapable that plaintiff's only purpose in routing l.t.l. shipments originating at and destined to points in Maryland over a route through Delaware is to attempt to make legal, by converting into interstate shipments, shipments in intrastate commerce for which plaintiff lacks authority from the Maryland commission. That such a purpose is in bad faith and a subterfuge warranting a cease-and-desist order was settled in 219 F. Supp. 43, affirmed 375 US 452. And no logical basis other than subterfuge is shown for use of the circuitous route through Delaware. There being no factual or legal errors in the commission's order denying plaintiff's petition for a declaratory order, the complaint seeking injunctive relief is dismissed.—Service Trucking Co., Inc. v. United States, 239 F. Supp. 519 (521-2)*.

The evidence as a whole overwhelmingly justifies conclusion that plaintiffs' operations between named Pennsylvania points over authorized interstate routes tacked at points in New Jersey are not logical and normal operations through their headquarters, but artificial, contrived arrangements designed to obtain desirable Pennsylvania intrastate business within the rightful jurisdiction of the State commission. [The Jones Motor Co. case, 218 F. Supp. 133, distinguished.] In the full sense of the word, plaintiffs' considered operations are subterfuges, and the commission's issuance of cease-and-desist orders conformed to the mandate of the national transportation policy to cooperate with State authorities; the commission's orders sustained.—Hudson Transp. Co. v. United States, 219 F. Supp. 43 (49-50)*.

Grant of authority from two Illinois points to points in same State does not authorize any intrastate operations but only portions of through interstate movements.—Kindsvater Extension, 92 M.C.C. 131 (134).

Motor transportation of athletic teams and related organizations between Ames, Iowa, and the Des Moines airport, arranged and paid for by Iowa State University, involves operations only between points in that State when, though the teams are actually traveling between Ames and points outside Iowa, there are no through routes or common arrangements between the participating carriers and, insofar as applicant is concerned, the trip is an intrastate movement for which no authority from the commission is required. Under governing precedents, a passenger's intention to continue or complete an interstate journey is not controlling as to the inter- or intrastate character of motor-carrier operations where his written contract with carrier is for intrastate movement; and that is true even when the transportation agreement is made by a third party. Proposed operations are not in interstate or foreign commerce; and are not subject to the Motor Carrier Act. Application dismissed,—Midwest Transp. Inc., 98 M.C.C. 362 (363-4).

Vendor's intrastate certificate (used as basis of interstate operations) must be interpreted in light of the policy established by the issuing State.—Liquid Transporters, Inc.—Purchase—Black, 93 M.C.C. 423 (428, note).

No logical reason appears for petitioner's routing of otherwise intrastate l.t.l. freight between points in Maryland over a route via Bridgeville, Del., other than the fact that it lacks intrastate authority to transport it. That such routing is not motivated by considerations of economy and efficiency is obvious, considering circuity of the Bridgeville route, that petitioner maintains its terminal and break-bulk point at Federalsburg, Md., rather than at Bridgeville, and that only shipments moving between Maryland points without a prior or subsequent interstate movement are routed through Delaware; moreover, petitioner uses the direct all-Maryland routes for nonregulated Maryland intrastate traffic and for shipments to Maryland points already in the stream of interstate commerce. In the considered operations, petitioner is attempting in bad faith to convert to interstate commerce traffic which, but for such routing, is actually intrastate commerce subject to the laws of Maryland; those operations are conducted as a subterfuge to evade the State laws and are not authorized by petitioner's certificate.—Service Trucking Co., Inc.—Declaratory Order, 94 M.C.C. 221 (225, 226)*.

Where in absence of State regulation defendants, in transporting freight moving between Pennsylvania points without a prior or subsequent interstate movement, would use the normal and direct routes, their transporta-

tion of such freight over routes through New Jersey authorized by their interstate certificates is a bad-faith attempt to convert what is essentially intrastate commerce into interstate and thus defeat the regulatory laws and policies of the Commonwealth of Pennsylvania; such operations, being intrastate in character though physically interstate, are subject to State regulation.—Pennsylvania Public Utility Comm. v. Hudson Transp. Co., 88 M.C.C. 745 (748, 750)*.

Though the commission has no jurisdiction over intrastate commerce, cooperation between the Federal Government and the several States is woven by necessary implication into very fabric of the Motor Carrier Act and is expressly required by the national transportation policy; that requirement is sufficiently definite and essential to support a complaint filed on behalf of a State and the issuance of an appropriate compliance order. Whether or to what extent enforcement action under Pennsylvania laws would be ineffective or unduly time consuming need not be considered, since the act clearly contemplates that, under circumstances like those involved, the Federal power be made available to supplement that of the States.—Id., pp. 748, 750.

Regulations of the Commission

31 FR 16567, Dec. 28, 1966, Part 177b: Standards for Registration of Certificates and Permits with States, new Part 177b setting forth regulations governing registration of interstate authority with the several States, added, effective 5 years from date of the order (Dec. 14, 1966).

Section 202. (c) [*§302 (c) U.S.C.*] Incidental transportation exempt under part II.—[Unchanged. See vol. 11, p. 9342.]

Amendments, see footnotes, p. 9342.

Historical Notes

By Executive Order 11107, Administration of Alaska Railroads, dated April 25, 1963, the Interstate Commerce Commission is given jurisdiction "to fix, change, or modify rates for the transportation of passengers and property" under the authority set forth in the Alaska Railroad Act, 38 Stat. 305, which jurisdiction had been given to the Secretary of the Interior by Executive Order No. 3861 of June 8, 1923; latter order superseded. (28 FR 4225, April 30, 1963)

Executive Order 11107 codified as Title 49, Chapter II, Part 1200 — Administration of Alaska Railroads (49 CFR §§1200.1 - 1200.4), 28 FR 12278, Nov. 20, 1963.

Notes of Decisions

Volume 11—p. 9343; Volume 12—p. 10344; Volume 13—p. 11043; Volume 14—p. 11562; Volume 15—p. 12159; Volume 16—p. 12798; Volume 17—p. 13491; Volume 18—p. 14244; Volume 19—p. 15455.

5. In general.—[Vols. 11-19].—In action to set aside the commission's order granting interstate authority to intervening defendant for transportation of passengers between Northhampton and Williamsburg, Mass., there emerges for the first time the question as to whether a certificate is permissible when all proposed interstate transportation as to which there is supporting evidence will be within a terminal area of certified carriers and under arrangements with them; the court ought not to make a decision on that question, even if it be a question of law, until the point is raised before and considered by the commission. In remanding the case for further action, however, the court does not intend to confine the commission to considering whether on the record as it now stands §202(c) precludes issuance of a certificate; the commission is not precluded from permitting presentation of further evidence.—Interstate Busses Corp. v. United States, 259 F. Supp. 577 (580-1)*.

Motor operations in Anchorage, Alaska, area in connection with prior or subsequent

water and rail movements to and from "Outside" are in interstate or foreign commerce and not exempt from licensing provisions of the act under §202(c), since the connecting carriers are not subject to the act.—Al Renk & Sons, Inc.—Alaska "Grandfather" Application, 89 M.C.C. 91 (96, note).

Though proposed plan V TOFC rates ostensibly offer joint motor-rail-motor service, essentially they provide for a rail line-haul only, with motor pickup and delivery within terminal areas, which under commission precedents is considered incidental to the line haul and performed for the line-haul carrier within meaning of §202(c)(2). While the commission is not bound by stare decisis to same extent as the judiciary, and the proposed rates may not violate the letter of §202(c)(2), approval would encourage filing of common-carrier applications by motor carriers operating wholly within terminal areas in order to enter into joint rates with line-haul carriers; in view of the questions of statutory interpretation and regulatory policy thus raised, the more responsible course for the present is to adhere to the established precedents. Since there is no proof that respondent motor carrier would perform any line-haul service under the proposed rates, they may not be found lawful.—Rubber Articles, Philadelphia to Ill., Ky., Mich., & Mo., 319 I.C.C. 632 (635, 637, 638).

Collection and delivery: [Vols. 16, 19.—Collection or delivery service means only intracity or intraterminal transportation performed in picking up and gathering together at origin, or in distribution at destination, of shipments prior or subsequent to, and incidental to, an intercity or intercommunity line-haul movement.—Joint Northeastern Motor Carrier Assn., Inc. v. Creger, 91 M.C.C. 494 (496).

Section 202(c) partially exempts from regulation those motor carrier operations conducted by regulated water carriers, within their terminal areas, in performance of collection, delivery, and transfer services; and, in contrast to commercial zones, terminal areas are the terminal areas of the carriers. Although, in 54 MCC 21, the terminal area of motor carriers and forwarders at any given municipality was defined as being coextensive with the commercial zone thereof, no such general rule has been promulgated with respect to terminal areas of rail or water carriers. Therefore, questions as to maximum permissible limits of the terminal areas of such carriers must be determined upon the facts in each case.—Sause Bros. Ocean Towing Co. v. W. R. Chamberlin & Co., 91 M.C.C. 199 (202).

While a water carrier's terminal area is not necessarily coextensive with the port district of area served, it is generally not less extensive than the port district; also, the extent of the port district is good evidence to show reasonableness of carrier's terminal operations. Therefore, defendant water contract-carrier's terminal area at ports of Crescent City, Calif., and Brookings, Oreg., may extend at least to the territorial scope of those port districts which, apparently, is beyond the commercial zone of each city. Accordingly, since the Brookings area is found to be within defendant's Crescent City terminal area, its motor transportation of lumber originating at Brookings (about 30 miles away) to Crescent City for movement by water to southern California ports is not shown to be unauthorized motor carriage conducted beyond maximum permissible limits of the terminal area wherein pickup and delivery service may be performed as incident to the line-haul water operations.—Id., pp. 201, 203-4.

See also Motor Transp. of Property Incidental to Air, §203(b), n. 40.

Commercial zones: [Vol. 12].—See also Lattavo Bros., Inc. case, §203(b), n. 60 *Territorial operating authorities*, below.

Since defendant's authority to serve Philadelphia commercial zone as its terminal area stems from its authority for its Philadelphia-Newtown Square, Pa., route, it may pick up or deliver freight therein only when incidental to a line haul over that route, and may not do so in connection with a movement over its Trenton, N.J.-Holyoke, Mass., route by virtue of fact that commercial zone of an off-route point appurtenant to latter route overlaps a corner of the Philadelphia zone. But if commercial zone of an authorized point on or appurtenant to the Trenton-Holyoke route overlapped the Philadelphia municipal limits, it could pick up or deliver shipments within those limits incidental to a line haul over that route.—Joint Northeastern Motor Carrier

Assn., Inc. v. Creger, 91 M.C.C. 494 (496).

Express Agency: [Vols. 11, 13, 16, 19].—Though definition of motor common carrier operations in §203(a)(14) excluded interstate operations of an express company only to extent they were previously subject to Part I, and decision in 201 ICC 755 appears to limit the commission's jurisdiction over express companies under Part I to services immediately associated with line-haul movements by rail or water-and-rail, the reason for including express companies in Part I was to protect the public in all instances where express traffic moved and, therefore, it would appear that the commission had jurisdiction over all local express service, particularly to further its legitimate interest in those services actually associated with rail or water-rail movements. —Railway Exp. Agency, Inc., Extension, 91 M.C.C. 311 (336-7)*.

However, findings in 21 MCC 161 lead to conclusion that terminal accessorial services associated with an independent line-haul movement by motor vehicle, which is not within scope of §1(1), were not considered to be subject to regulation prior to enactment of §203(a)(14), but became subject through enactment of Part II. Furthermore, an express company, notwithstanding its independent status as a common carrier subject to Part I, may not utilize regulated carriers to provide any service for which they lack specific authority; thus, whether operating under its own certificates or using services of an authorized independent motor carrier, Railway Exp. Agency is bound by all limitations inherent in such operating authority, including any restricting pickup and delivery service to a defined motor carrier terminal area.—Id., p. 338.

In view of REA's decreasing use of passenger trains and increasing reliance on line-haul motor transportation, this state of the law tends to foster unnecessary legal complications in what should be a relatively simple carrier-shipper relationship, since, unless effect and applicability of various provisions of the law are coordinated, the maximum pickup and delivery zone at a given community incident to a line-haul shipment by an express carrier such as REA would seem to vary depending on whether the line haul is by rail or motor. To remove this probable uncertainty the matter is referred to Division 1 for institution of an appropriate proceeding to define the terminal area of an express company as that type of carrier is regulated by the act as a whole—Id., p. 338.

In stating in 91 MCC 311 that it did not desire to maintain a situation wherein Railway Exp. Agency's pickup and delivery zones at a given community would vary according to whether the line haul was by rail or by motor vehicle, and in referring the matter to division 1 for investigation to resolve that issue, the commission did not absolve REA of its duty to comply with existing law as therein construed, and did not imply that the ultimate decision might favor the maximum zone that REA wishes to serve. Until some change is found to be required, after full consideration of interests and rights of motor carriers and the general public, as well as proper application of the controlling statutes, REA is bound to follow the law as it now stands. The issue is closed insofar as current proceedings are concerned, and REA is cautioned that nonadherence in its motor-carrier operations to limits set forth in 54 MCC 21 will constitute illegal operation.—Railway Exp. Agency, Inc., Extension, 92 M.C.C. 657 (658-9).

When conducting motor carrier operations over its own certificated highway routes, Railway Exp. Agency's pickup and delivery service is restricted territorially by commercial zone limitations fixed in 54 MCC 21.—Railway Exp. Agency, Inc., Extension, 92 M.C.C. 487 (489).

When REA operates pursuant to its interstate certificates, its pickup and delivery service as a motor carrier is limited under part II of the act to commercial zone and terminal area limitations applicable to all motor carriers and not, as applicant contends, to terminal areas established by its tariff publication as a carrier subject to part I. Therefore, since Loring Air Force Base is not within the terminal area of any point on the route sought, it is not a point of service within scope of the application; specific authority to serve the base as an off-route point is required.—Railway Exp. Agency, Inc., Extension, 98 M.C.C. 75 (76-7, 78); for the same reasons, grant of authority sought would not

enable REA to serve Robins Air Force Base even though the record is presuasive that its failure to specifically name the base as a point of service was merely an inadvertent error.—Id., 91 M.C.C. 887 (889-90)*.

"For" line-haul carrier: [Vol. 12].—Since a transfer, collection, or delivery service performed within the terminal area for a line-haul carrier is regarded as incidental to the line-haul operation, and performed for the line-haul carrier within meaning of §202(c)(2), such service must be performed under line-haul carrier's tariff rather than under joint through rates to which applicant and the line-haul carriers would be parties. Though both supporting carriers expressed a wish to use applicant's service within their Seattle terminal on a "concurrence basis" implying a joint-rate agreement, such an agreement is not permissible under commission precedents. While applicant proposes to render a transfer service within the terminal area of line-haul carriers serving Seattle, that operation can be performed only as an agent for or under contractual arrangements with those carriers; consequently, proposed service falls within exemption provisions of §202(c)(2).—Ric's Transfer Co., Inc. Extension, 96 M.C.C. 366 (369).

Forwarders: [Vols. 11, 12, 19].—See also Panther Cartage Co. case, §203(b), n. 40.

Since respondents are found to be providing, jointly and in concert, an unauthorized for-hire freight forwarding service in violation of §410(a), it follows that motor-carrier operations conducted in their behalf by respondent cartage company within terminal areas of Miami and Fort Lauderdale, Fla., are also unlawful; cease-and-desist order entered.—Federal Shippers Assn., Inc.—Investigation, 316 I.C.C. 523 (527)*.

Motor carriers: [Vol. 11].—Pickup and delivery operations performed by a railroad subsidiary for itself, either prior or subsequent to a line-haul by motor vehicle, even though such line-haul is performed as a substitute for rail service, are governed by findings in the Terminal Area case, 54 MCC 21, which apply to a certificate or permit issued under Part II to "any motor carrier"; the statutory intent is clear that such transportation be considered part of, and be regulated in same manner as, the motor transportation to which it is incidental; there is therefore no merit to arguments that such subsidiary's terminal area service in connection with its own line-haul operations should be either greater or less than that authorized in the Terminal Area case.—New York Central Transport Co.—Modification, 89 M.C.C. 389 (399).

Under modification of railroad subsidiary's certificate permitting substituted all-highway service within each of 12 defined key-point zones, it may serve all points in commercial zones of break points between adjacent zones, including points actually located in other zones.—Id., p. 413.

Passenger carriers: [Vols. 16, 19].—Although passenger carriers are not excluded from benefits of §202(c), terminal area pickup and delivery service is not ordinarily a concomitant feature of a passenger carrier's operating practice, especially insofar as transportation of passengers rather than package express is concerned. Unlike property carriers, whose terminal areas are normally coextensive with commercial zones of municipalities, terminal areas of passenger carriers are confined to corporate limits of the points they serve. In originating charter parties at points adjacent to those he is authorized to serve, applicant has been operating unlawfully although apparently in good faith.—Rose Extension, 86 M.C.C. 723 (724).

While applicant is limited in handling express as a passenger carrier to pickup and delivery within corporate limits of municipalities it serves, if it were granted separate authority sought for transportation of express in pup semitrailers drawn by passenger-carrying vehicles it would be entitled to provide pickup and delivery within the commercial zones of the involved municipalities.—Continental Southern Lines Extension, 88 M.C.C. 547 (549).

Railroads: [Vol. 11].—Under Part I, terminal areas may be varied and extended according to character of the commodity and the necessary pickup operations and practices incident to tendering it for rail transportation. Also, as held in 53 MCC 614, where a railroad that is providing exempt motor service within two contiguous terminal areas desires to serve

both areas from a single station, such operation would be a bona fide collection and delivery service within meaning of §202(c), provided the single terminal area was defined in its tariff so as to include the geographical scope of the operation.—Sause Bros. Ocean Towing Co. v. W. R. Chamberlin & Co., 91 M.C.C. 199 (202).

No general rule corresponding to that of 54 MCC 21 for motor carriers and forwarders has been promulgated respecting limits of terminal areas which may be served by railroads; terminal areas of stations on a railroad's line are described in its filed tariffs, and it can and does change the limits of its pickup and delivery zones through republication of its tariffs. When a motor carrier (including a subsidiary) performs pickup and delivery service as agent for, or under contractual arrangement with, the railroad immediately prior or subsequent to a rail movement, it may perform such service at all points within the rail terminal area as defined in the railroad's tariffs, even though beyond the terminal area (coextensive with the commercial zone) as defined in the cited case.—New York Central Transport Co.—Modification, 89 M.C.C. 389 (398, 399).

And proceeding in which railroad subsidiary seeks to eliminate certain key-point restrictions for purpose of establishing Flexi-Van service through the retained key points is not the proper forum for modifying or permanently fixing the territorial limits of terminal areas in which it may perform transfer, collection, or delivery service for the parent railroad.—Id, p. 399.

Terminal area of a railroad at a point embraces all points in the area within which it performs bona fide collection, delivery, or transfer service, including points beyond a municipality that are specifically described in the railroad's tariffs. And since Oakbrook, Ill., outside the Chicago commercial zone, is within the terminal area described in railroad's plan II TOFC tariff, its motor carrier subsidiary can serve that point under the §202(c)(2) exemption as the railroad's agent without specific motor carrier authority. Also, while rail-subsidiary applicant would require motor carrier authority in order to provide proposed Chicago-Oakbrook service in its own right unrelated to its parent's rail service, the proposed delivery service (in connection with plan III TOFC service) cannot be regarded as wholly separate from its rail parent's line-haul TOFC service. In the peculiar circumstances presented, services provided under plans II and III, although different in form, are the same in substance and plainly are inseparable; therefore, in conjunction with the parent railroad, proposed motor carrier operations may be conducted under the terminal area exemption.—New York Central Transport Co. Extension, 99 M.C.C. 94 (96-7, 100-101)*.

Terminal areas: [Vols. 12, 13, 16-19].—Enlargement, see Chicago, Ill., Commercial Zone case, NTP, n. 5 *Exemption.*

In sustaining the commission's decision limiting area at certain Florida points within which complainant intercoastal water carrier may conduct terminal area service by motor vehicle, the court does not imply that in every instance the "terminal area" limits under §202(c)(1) must identically correspond with the area in which local transportation is exempt under §203(b8); permissible terminal area limits at a particular point for a particular carrier may be smaller or larger than the area defined in §203(b8). Nevertheless, the "terminal area" limitation and the commercial zone area are kindred concepts since, in each case, the statutory exemption from certification pertains to transportation of a local type. Terminal area limitation imposed by the commission represented proper exercise of its judgment in a field in which it is particularly qualified to speak and is consistent with the purpose of Congress in enacting §202(c)(1).—Sea-Land Service, Inc. v. United States, 222 F. Supp. 558 (564)*.

See also Law Motor Freight, Inc. v. C. A. B., §203(b), n. 40.

Inasmuch as no general rule (corresponding to that in 54 MCC 21 for motor carriers and forwarders) has been promulgated with respect to terminal areas of rail or water carriers, questions concerning maximum permissible limits of the terminal areas of such carriers must be determined on the facts in each case; and, as stated in 82 MCC 395, the maximum permissible extent of a carrier's terminal area will depend largely on the character of

the community served, regardless of whether the prior or subsequent line haul is performed by motor, rail, or water.—Sause Bros. Ocean Towing Co. v. W. R. Chamberlin & Co., 91 M.C.C 199 (202, 203).

Transfer service: [Vols. 16, 18].—Under the §202(c)(2) partial exemption of transfer, collection, and delivery services performed for regulated carriers within terminal areas, applicant clearly can perform a transfer service for supporting line-haul motor carriers within Seattle, Wash., terminal area, and thus within the entire commercial zone of that city, without specific authority from the commission when acting as an agent or under contractual arrangements with those carriers. Application was filed because of the decision in the Easton case, 68 MCC 64, that a transfer service between all points in the New York City commercial zone could not be performed under the §202(c)(2) exemption, that decision was predicated on a unique situation where the terminal area, having been specifically defined, was not coextensive with the New York City commercial zone. In instant proceeding, however, unlike the New York City situation, the Seattle terminal area of supporting motor carriers is coextensive with commercial zone of that city. Application dismissed.—Ric's Transfer Co., Inc., Extension, 96 M.C.C. 366 (368-9).

Water carriers: [Vols. 11, 12, 15, 19].—A water carrier's terminal area is not necessarily coextensive with port district of the area served, but it is generally not less in territorial extent, and extent of the port district is good evidence to show reasonableness of a water carrier's terminal operations, maximum permissible extent of which depends largely on character of the community served.—Sause Bros. Ocean Towing Co. v. W. R. Chamberlin & Co., 91 M.C.C. 199 (203).

Points beyond commercial zones or port districts of Crescent City, Calif., and Brookings, Oreg., are not shown to be geographically, economically, and industrially separate communities independent of the respective ports, and trucking of lumber from such points to Crescent City in connection with coastwise movement beyond, by defendants authorized to serve both ports, does not exceed permissible limits of their terminal areas. Coastal area between these ports is sparsely populated and dependent on the lumber industry, Oregon shippers aided building of the Crescent City port and have used it for many years, and large area of port district of Brookings, which is not a public port accessible to self-propelled vessels, indicates its special character. That two port districts are involved does not affect character of considered two-State area as a single terminal area.—Id., pp. 203-4.

Moreover, one defendant holds specific authority to transport lumber as a contract carrier and cannot participate in joint rates or interline movements; to narrowly construe its terminal area would render its services entirely dependent on motor transportation since practically all sources of lumber are beyond commercial zone of Crescent City, and would defeat purpose of the act to preserve a national transportation system by water, as well as destroy flexibility previously found desirable.—Id., p. 204.

Section 203. (a)(1)-(9). [*§303 U.S.C.*].—[Unchanged. See vol. 9, p. 7867; vol. 15, p. 12161.]

Amendments, see footnotes, vol. 14, p. 12161.

Notes of Decisions

§203(a)(9): Vol. 9—p. 7867; Vol. 11—p. 9345; Vol. 13—p. 11044.

5. Express company; in general.—[Vols. 9, 11, 13].—Railway Exp. Agency's increasing use of line-haul motor transportation has placed a current emphasis on service subject to regulation under Part II, and in light of prior commission decisions, particularly 201 ICC 755, 21 MCC 161, and 91 MCC 311, it cannot be deemed to be unaware of the dis-

tinction between express business handled in connection with rail and water service under Part I and that related to highway transportation under Part II. No ambiguity in that respect now exists, and further consideration of that issue in proceedings involving REA's express service is unnecessary and undesirable.—Railway Exp. Agency, Inc., Extension, 92 M.C.C. 657 (658).

Section 203. (a)(10) [*§303(a)(10) U.S.C.*] **Interstate commerce.—** [Unchanged. See vol. 9, p. 7869; vol. 19, p. 15459.]

Notes of Decisions

Volume 9—p. 7869; Volume 11—p. 9346; Volume 12—p. 10346; Volume 13—p. 11044; Volume 14—p. 11564; Volume 15—p. 12161; Volume 16—p. 12802; Volume 17—p. 13493; Volume 18—p. 14247; Volume 19—p. 15459.

5. Interstate commerce defined.—[Vols. 9, 11-19].—Goods ultimately destined for shipment to another State acquire the character of interstate commerce as soon as they begin their journey, even though there is a temporary break in transit in the State of origin; and such halt in transit is an incident of the interstate movement. Thus, when grain purchased by appellee at its country elevators or other interior Kansas points was moved by truck to its River Rail Elevator at Kansas City, Kans., (where it was graded, tested, and deposited in special bins and held exclusively for resale to customers located outside Kansas), and was in fact eventually shipped to out-of-State purchasers, the truck shipment to River Rail was but the commencement of the movement to ultimate destinations in another State; therefore, truck movement from origins to River Rail is shipment in interstate commerce.—State Corporation Commission v. Bartlett & Co., Grain, 338 F. 2d 495 ((497-8)*.

The essential character of transportation classifies it either as interstate or intrastate; and the intention formed prior to shipment fixes its essential character. When intention which produces the movement is known, incidents of transportation become insignificant and need not be considered in determining whether the transportation is intra- or interstate. Ordinarily that question is determined by what is actually done and not by any mere billing or plurality of carriers, and where commodities are in fact destined from one State to another a rebilling or reshipment en route does not of itself break continuity of the movement or require that any part be classified differently from the remainder.—Great Northern Ry. Co. v. Thompson, 222 F. Supp. 573 (582).

Whether commerce is interstate or intrastate in character is a question of fact, determined primarily from the origin and destination, the intent of the parties, continuity of movement in accordance with such intent, and consideration of all circumstances surrounding the transaction. Mere billing or forms of contract do not determine the nature of inter- or intrastate commerce, and movement of a shipment including both intrastate and interstate traffic on a single bill of lading does not transform intrastate portion into interstate traffic. Nor, where intrastate portion of such a shipment is unloaded at a point in the origin State under a stop-in-transit rule, can a single-shipment concept confer an interstate character on the entire movement; "shipment" merely denotes the subject matter of transportation, and it is the "transportation" contemplated which determines the interstate or intrastate character of the shipment.—Central States Motor Freight Bureau, Inc., Petition, 319 I.C.C. 745 (748, 749)*; and, so far as jurisdiction is concerned, that finding applies with equal force to contract as to common carriers.—Id., 321 I.C.C. 726 (729)*.

Respondents' argument that the commission lacks jurisdiction in investigation into lawfulness of motor carriage of property having a prior or subsequent movement by air-

craft, because its jurisdiction is expressly limited to commerce defined in §203(a)(10), rejected. Although statutory definition of interstate commerce does not specifically mention commerce moving partly by air, and §203(a)(10) does not specifically confer authority to determine what motor operations fall within partial exemption of §203(b7a), the very extent of the commission's duty to administer, execute, and enforce the act incontrovertibly depends on, and is limited by, the scope of any exemption from regulation provided in the act; there must of necessity be included in those duties the power to determine scope of any partial exemption.—Film Transit, Inc., and Air Dispatch, Inc.—Investigation, 98 M.C.C. 145 (148, 149).

See also Midwest Transp., Inc., case, §202(b), n. 20.

Ohio intrastate motor carrier's continuous movement, in for-hire carriage, of shipments picked up at points within Pennsylvania portion of shipper's plant (the plant being astride the Ohio-Pennsylvania line) and moved over shipper's private roads across the State line to the Masury, Ohio, gate of the plant, thence over public highways to Ohio destinations, is transportation in interstate commerce and subject to certificate and permit requirements of the act. Therefore, even though the public highways used are wholly within Ohio, petitioner may not lawfully engage in such transportation unless and until it obtains an appropriate interstate certificate or permit.—Lattavo Bros., Inc.—Petition for Interpretation, 98 M.C.C. 767 (768-9).

Service provided by respondent California passenger carrier, through his "lease" of buses to passenger groups desiring transportation to points outside California, with drivers regularly employed in his authorized intrastate charter service, and the subsequent transportation, amounts to no more than an interstate charter operation. Essential nature of the service provided is not altered by provisions of the lease designed to place ostensible control in the hands of the passenger group; moreover, considering the entire picture, it is apparent that purpose of the leasing plan is to avoid regulation under the act. Respondent has been and is engaged in interstate transportation of passengers, in charter operations, without appropriate authority.—Roesch Investigation of Operations, 91 M.C.C. 824 (825-6).

Transportation between western New York and New York City commercial zone is in interstate commerce, since unique location of New York City practically requires passage through Pennsylvania or New Jersey to reach it from western New York; also, certain New Jersey points are in the New York commercial zone.—Hollebrand, 88 M.C.C. 685 (688)*.

In determining whether rail movement of cement from mill to silo storage and subsequent motor distribution to shippers' customers constitutes a single continuing movement, essential character of the commerce must be considered; under criteria of 71 MCC 17, the major manifestations of shippers' intent at time of shipment establish that the continuity has been broken and that there are two separate and distinct movements; at time of initial movement no shipment or part thereof is allocated to any consignee; such shipments are generally made for purpose of replenishing shippers' supply at the silos, and for economy and convenience in effecting subsequent distribution.—New England Transp. Co. Extension, 88 M.C.C. 703 (707).

Between State points: [Vols. 11, 19].—Plaintiff's truck movement of reels of electric cable (manufactured in and shipped by rail from Bonham, Texas) from its railheads in north central North Dakota to designated ballistic missile sites in that area was transportation in interstate commerce when it was part of the entire movement from Bonham to the missile sites. Prior to shipment the manufacturer stenciled coded designation identifying its exact installation site on each reel, and the entire movement from Bonham to the site was under plaintiff's control. Temporary delay and transshipment at the railhead did not cause break in continuity of the transportation; nor was continuity affected by consignee's right of inspection and rejection at the railhead or by separate motor carrier billing therefrom to ultimate missile site.—Great Northern Ry. Co. v. Thompson, 222 F. Supp. 573 (582-4).

The evidence does not precisely reveal character of barge movement of cement from

Hannibal, Mo., to St. Louis, which is subsequently moved therefrom by truck to other Missouri points; however, even assuming that the barge movements were in interstate commerce, interstate character thereof would end at shipper's St. Louis storage facility unless there had been a prior decision that the cement was destined for other Missouri points and it did not come to rest in the St. Louis facility.—L. A. Tucker Truck Lines, Inc. v. United States, 215 F. Supp. 261 (264)*.

However, shipments moving by truck from St. Louis to southeast Missouri points beyond Perryville, Mo., over the most direct route, which traverses Illinois between the bridges at St. Louis and Perryville, would constitute shipments in interstate commerce.—Id., p. 265.

The commission has not previously dealt specifically with question of whether motor transportation of airline passengers (whose line-haul air journey is interstate) between an airport and another point in the same State is in interstate commerce; however, in cases where the issue was raised, it has consistently held that regardless of passengers' intention to continue or complete an interstate journey, a carrier of passengers operating wholly within a State, selling no through tickets, and having no common arrangements with connecting out-of-State carriers, is not engaged in interstate commerce; and that view is supported by the courts. No reason to depart from the precedents in prior decisions is shown in proceeding concerning application of the §203(b7a) exemption; further, no overriding necessity—in the public interest—is found to claim that one-State incidental-to-air passenger carriage is in interstate commerce. Therefore, the question must be answered generally in the negative; however, adoption of a specific or all inclusive rule thereon does not seem practical and is not undertaken.—Motor Transp. of Passengers Incidental to Air, 95 M.C.C. 525 (529, 536-7)*.

Although both Washington National and Dulles International Airports are in Virginia, motor service between them is interstate in character because the natural route traverses Columbia Island, a portion of the District of Columbia.—A.B. & W. Transit Co. Extension, 88 M.C.C. 175 (183).

It has long been established that for-hire motor transportation by one carrier within confines of a single State, when preceded or followed by for-hire transportation by another carrier across a State line, may be transportation in interstate commerce subject to part II; the question is determined by essential character of the commerce involved—the most important factor being the presence or absence of a fixed and persistent intent of shipper that his goods move to a destination in another State.—Motor Transportation of Property Within a Single State, 94 M.C.C. 541 (549-50)*.

However, not all commerce is transportation; under principles of 298 US 170 transportation begins only at the point where shipper tenders his goods to a for-hire carrier. Therefore, when a for-hire motor carrier transports within a single State property which has moved from, or will move to, points beyond that State in private motor carriage, such for-hire movement is not transportation in interstate commerce subject to economic regulation under Part II, but is in intrastate commerce. Any inconsistent conclusions in earlier cases cited and others of similar import are accordingly overruled.—Id., pp. 550, 551.

Transportation for prime contractors of out-of-State shipments from rail stations in 8 North Dakota counties to missile-launching sites in those counties is in interstate commerce when, although shipments do not move on through bills of lading, it is shippers' fixed and persisting intention at time of shipment that they be delivered at the missile sites, and the motor part of the movement is an integral element in a continuous transportation service.—Maas Transport, Inc., Extension, 92 M.C.C. 581 (584)*.

Interstate character of ex-rail shipments did not end with storage in applicant's warehouse in Queen's County, N.Y., prior to delivery; fact that consignee's plant is in Westbury, Nassau County, N.Y., and its customers are in Nassau County warrants conclusion that at time shipments left origin it was contemplated by shipper, consignee, and applicant that the ultimate destination would be points in Nassau County rather than applicant's warehouse in Queens.—Paul Marckesano & Sons, Inc., Extension, 86 M.C.C. 727 (732).

Common- and private-carrier operation: [Vols. 12, 13].—Initial barge movement of considered cement traffic from Hannibal, Mo., to shipper's St. Louis plant could be in interstate commerce because Illinois would be traversed in the channel of the Mississippi River; still if private barges of supporting shipper were used, the initial movement would not be the first leg of an interstate shipment.—L. A. Tucker Truck Lines, Inc. v. United States, 215 F. Supp. 261 (263-4)*.

Fundamental principles of 298 US 170, that not all commerce is transportation, that transportation begins only when merchandise has been placed in possession of a carrier subject to economic regulation, and that a shipper is not such a carrier, are not altered in dealing with part II instead of Part I, for though part II extends to proprietary operations for purpose of safety regulation, it does not subject shippers to economic regulation. Therefore, under Part II, transportation must be considered as beginning at the point where shipper tenders his goods to a for-hire carrier. If delivery is then made at a point in the same State, the relevant transportation is not interstate transportation, even if it is preceded or followed by a private-carrier movement across the State line.—Motor Transportation of Property Within Single State, 94 M.C.C. 541 (550-1)*.

But while the case cited does not permit combination of for-hire transportation wholly in one State with physically interstate carriage by an owner for purpose of subjecting the former to economic regulation, there may be situations where Congress has intended that the otherwise separate private and for-hire movements be combined to establish Federal jurisdiction over the whole for purposes unrelated to economic regulation, such as matters relative to employment of drivers of private motor carriers operating within a single State in transportation of traffic moving to or from such State in motor common carriage.—Id., pp. 550-1.

Intent: [Vols. 11,12].—From time of purchase of grain at country elevators and other interior points in Kansas and truck movement therefrom to appellee's River Rail Elevator at Kansas City, Kans., until it was sent to out-of-State buyers, activities in connection therewith were performed in furtherance of a clear intent that the grain would ultimately be delivered outside Kansas; an original intent to move the grain in interstate commerce is demonstrated, and deposit and handling at River Rail did not change interstate character of the truck movement to that elevator.—State Corporation Commission v. Bartlett & Co., Grain, 338 F. 2d 495 (497-8)*.

Whether particular commerce is interstate or intrastate is to be determined by essential character of the commerce, and an important factor in ascertaining such character is the fixed and persisting transportation intent of the shipper at time of shipment, as ascertained from all circumstances present. As to specific quantities of involved chemicals which are sold when rail movement begins, it reasonably appears that the traffic will be under a continuing intention for ultimate delivery to specific customers at a specific point in Texas beyond rail terminals, and in performing such distribution, applicants will be participating in through movement from origins beyond Texas, and their operations, to this extent, will be interstate commerce. The commingling of intrastate and interstate cargoes does not change their status.—Ryder Tank Line, Inc., Extension, 91 M.C.C. 497 (500).

Intrastate: [Vols. 11-13, 19].—Where, following interstate movement by rail from production plants to shipper's silos, cement is stored and allocated or distributed to consignees from storage only after specific sale is made, subsequent motor transportation from silo distribution points to consignees located within the same State is in intrastate commerce because the shipments to the silos have come to rest following rail delivery. To extent that proposed transportation of cement would be intrastate, therefore, application must be dismissed.—Schwerman Trucking Co. of N.Y., Inc., Extension, 94 M.C.C. 683 (688).

Evidence of applicant's movements of stove oil within Alaska does not indicate that they were other than intrastate movements from storage at Valdez to Fairbanks; thus such shipments on their face were in intrastate commerce and not relevant to its "grandfather" application for interstate authority between points in Alaska.—Alaska Freight

Lines, Inc., 94 M.C.C. 200 (204).

No authority is required by Atlanta warehouse company for delivery of stored goods to owners within Atlanta commercial zone, since by storage the goods transported are removed from the flow of interstate commerce.—Atlanta Bonded Whse., Inc., 91 M.C.C. 104 (105, 106).

A passenger carrier operating wholly within a State, selling no through tickets and having no common arrangements with out-of-State carriers, is not engaged in interstate commerce; nor is intent of the passenger to continue on an interstate journey controlling where his written contract with the carrier is for an intrastate movement. Those principles are no less applicable where the contract for transportation is made by a third party; thus, although Labor Department arranges for considered transportation of migrant workers to ultimate destinations, movement of such passengers by applicant from reception center in El Paso to El Paso bus terminals is local and intrastate in nature, even though some of them may be bound for interstate points, in absence of any common arrangement between applicant and other carriers for interchange of passengers, or any coordination of applicant's dual activities as a local and a line-haul carrier.—Moore Service, Inc., Extension, 89 M.C.C. 180 (181, 182).

20. Operation between Alaska and other States.—As applicant, in order to perform authorized operation between Alaska and United States border points in Washington and Idaho, must move through Canada, it must comply with all requirements of that country and its Provinces to extent pertinent, and, under specific provision of §203(a)(10), no requirement under Part II can conflict therewith. However, under additional provisions of §203(a)(10) it must observe the rates and practices requirements of Part II as to the entire transportation.—Lynden Transfer, Inc., 92 M.C.C. 797 (802).

Section 203. (a)(11) [*§303(a)(11) U.S.C.*] Foreign commerce defined.

[Unchanged. See vol. 17, p. 13494.]

Amendments, see footnotes, vol. 15, p. 12162-3; vol. 17, p. 13494.

Notes of Decisions

Vol. 11—p. 9348; Vol. 12—p. 10347; Vol. 13—p. 11045; Vol. 14—p. 11564; Vol. 17—p. 13494; Vol. 18—p. 14251; Vol. 19—p. 15461.

5. Foreign commerce, in general.—[Vols. 11-14, 17-19].—Prior to Alaska's admission as a State, motor transportation between a point in Alaska and a point in what was then the United States, to extent it took place within the United States, was, under §203(a)(11) as amended, foreign commerce and was subject to regulation by the commission; therefore, applicant could at that time have transported Alaskan shipments only to the extent of its outstanding operating authority.—Trans-American Van Service, Inc., Extension, 94 M.C.C. 248 (251-2).

Canadian applicant's motor transportation of bananas from Seattle, Wash., to international boundary ports of entry in Idaho, Montana, and Washington is part of a through movement in foreign commerce from Costa Rica to Calgary, Alberta, Canada; shipments originate in Costa Rica, move to Seattle by boat where they are loaded directly into applicant's trucks, and transported by applicant to Calgary receivers; also, there is a continuing intention of shippers that the bananas move from Costa Rica to Calgary. Therefore, under the provisions of §203(a)(11), proposed motor transportation is not subject to the permit or certificate requirements of the act.—B-Line Fast Freight, 94 M.C.C. 702 (703).

Even to extent that proposed motor transportation of imported salt cake from Jacksonville, Fla., to various points in the State would take place entirely in Florida, it would in large part involve through movements in foreign commerce inasmuch as 75 percent of the salt cake is preconsigned by the importer to particular buyers; authority from the commission is required.—Petroleum Carrier Corp. Exten-

sion, 89 M.C.C. 139 (140)*.

When traffic is transported from a United States origin to one of applicant's Canadian terminals by a connecting carrier, and the fixed and persisting intent of shipper at time of shipment is that the traffic move without significant interruption from the United States origin to a Canadian destination, the entire movement, including transportation by applicant from its Canadian terminal to the Canadian destination over a route through the United States, is in foreign commerce for which authority is required, and any portion of the movement which traverses the United States is subject to full economic regulation by the commission. But when applicant transports shipments which actually originate in Canada and subsequently traverse United States highways to reach their ultimate Canadian destination, the transportation over United States highways is within exemption of §203(a)(11). —East-West Transport, 88 M.C.C. 352 (354-5).

Motor operations between Haines and other Alaska points north and west thereof necessitate traversal of Canada and thus are subject to the act.—Al Renk & Sons, Inc.—Alaska "Grandfather" Application, 89 M.C.C. 91 (96, note).

Principle that a passenger carrier operating wholly within a State, selling no through tickets and having no common arrangements with out-of-State carriers, is not engaged in interstate or foreign commerce is equally applicable where the contract for transportation is made by a third party; although Labor Department arranges for transportation of migrant workers with both Mexican railroad and applicant busline, the carriers have no through routes or common arrangement whereby either sells tickets for transportation in both countries; therefore, although the workers are actually engaged in a journey from Mexico to a point in Texas, applicant's transportation of them from international bridge to reception center in El aso is intrastate transportation and not in foreign commerce.—Moore Service, Inc., Extension, 89 M.C.C. 180 (181).

Section 203. (a)(12) [*§303(a)(12) U.S.C.*] **Highway defined.**—[Unchanged. See vol. 9, p. 7871.]

Notes of Decisions

Volume 17—p. 13495: Volume 19—p. 15461.

Section 203. (a)(13) [*§303(a)(13) U.S.C.*] **Motor vehicle defined.**—[Unchanged. See vol. 11, p. 9349.]

Amendments, see footnotes, vol. 9, p. 7871, vol. 11, p. 9349.

Notes of Decisions

Volume 13—p. 11045; Volume 15—p. 12163; Volume 17—p. 13495; Volume 19—p. 15462.

2. "Motor vehicle" defined.—[Vols. 13, 15, 17, 19].—See Continental Southern Lines Extension, case, §208(d), n. 1.

Section 203. (a)(14) [*§303(a)(14) U.S.C.*] **Common carrier defined.**—[Unchanged. See vol. 11, p. 9349.

Amendment, see footnote, vol. 11, p. 9349.

Notes of Decisions

Volume 9—p. 7871; Volume 11—p. 9349; Volume 12—p. 10347; Volume 13—p. 11046; Volume 14—p. 11564; Volume 15—p. 12163; Volume 16—p. 12803; Volume 17—p. 13495; Volume 18—p. 14252; Volume 19—p. 15462.

1. Common carrier defined.—[Vols. 9, 11-19]. —See also §203(a)(15), n. 1.

In performing driveaway of automobiles under contracts with individual owners, defendant is a common carrier as defined in §203(a)(14) when his advertisements constitute a holding out to the general public; drivers are not only selected by him, but are necessarily under his supervision and control as agents or employees during course of the transportation; he furnishes substantially all facilities for, and performs substantially all functions of, transportation of such automobiles in interstate commerce; by his holding out, as well as his verbal representations to each owner, he establishes an expectation on the owner's part that he assumes to perform a transportation service; and for each automobile transported he charges and receives from the owner a definite sum of money, receipt of which is compensation within meaning of Part II.—I.C.C. v. Teeter, 228 F. Supp. 479 (480, 482).

Defendant who furnishes substantially all facilities for, and performs substantially all functions of, transporting automobiles in interstate commerce for individual owners, in driveaway service, is a motor common carrier as defined in the statute; such operations are subject to certificate provisions of §206(a).—I.C.C. v. Dudgeon, 213 F. Supp. 710 (715); in substantially identical case, defendants have assumed characteristic burdens of the transportation business and are a common carrier. —I.C.C. v. Interstate Auto Shippers, Inc., 214 F. Supp. 473 (477).

Whether a transportation agency is a common carrier depends, not on its corporate charter or declared purposes, but on what it does; defendant, though ostensibly chartered as an employment agency furnishing drivers to shippers, actually engaged in unauthorized for-hire transportation of motor vehicles as a common carrier, holding out to the general public by letters, advertising, solicitation, and rate quotations, and providing a complete transportation service anywhere in the United States for any shipper willing to pay its price. —United States v. Aides, Inc., 211 F. Supp. 122 (124, 125).

Nonstock corporation whose sole activity is and has been the transportation of property for compensation, which obtains its traffic through "agency agreements" with known truckers, and which performs over 90 percent of the total value of its transportation service for canneries, meat packinghouses, produce dealers, and other persons not engaged in farming operations and does not attempt to determine whether shippers submitting traffic to it are engaged in farming operations, is a common carrier as defined in §203(a)(14) and not a cooperative association within exemption of §203(b5).—I.C.C. v. Nelson Cooperative Marketing Association, 209 F. Supp. 697 (699-700, 701).

Operations conducted by applicant in Alaska are those of a motor common carrier; it has terminals at Seattle, Wash., and at Anchorage and, under arrangements with certain U.S. mainland carriers, undertakes to transport household goods between Seattle and points in Alaska. Shipments tendered at Seattle are placed in applicant's vans or containers and forwarded by water to Alaskan ports, principally Seward, where most of them are transferred to the Alaska Railroad and transported by it to Anchorage or Fairbanks from which points they are moved to storage or distributed to destination. Shipments to Anchorage area and the Kanai Peninsula are handled through applicant's terminal and moved in its vehicles, whereas shipments to Fairbanks, or ports other than Seward, are tendered to local motor operators for distribution; the reverse procedure is followed on shipments originating in Alaska and destined to States on the mainland. Accordingly, as a result of described operations, applicant has qualified as a motor carrier within meaning of §206(a)(5) of the act.—Alaska Van & Storage Co., Inc., 94 M.C.C. 381 (383-4)*.

In transporting nonexempt commodities by motor vehicle for some 65 to 100 shipper members for "charges" or "rates," defendant shipper association has been performing an unauthorized common carrier service for compensation, even if such rates or charges were only reimbursement for operating expenses rather than profitmaking.—Natl. Motor Frt. Traf. Assn., Inc. v. Internatl. Shippers, 94 M.C.C. 440 (446-7).

See also Cahaba Steel Co. case, §203(c), n.2.

Vendee's transportation of petroleum products under contract-carrier rights it seeks to purchase would be common carriage. The service proposed is not unique, and vendee is now providing a similar service as a certificated common carrier in the same territory; also, though authority from only one point is involved, the limitation as to origin point does not limit the service to that for a single shipper, since service from that point may be performed for and at the direction of any number of consignees. Vendee's proposed operation would be that of a common carrier.—Ruan Transport Corp.—Purchase—Hillside Transit Co., Inc., 90 M.C.C. 523 (525-6).

Proposed transportation of commercial papers and business records is common carriage when the commodities involved have no intrinsic value, though their loss might be considered catastrophic by some shippers; ordinary vehicles would be used and services offered (such as pickup after normal working hours) are not unique, but are often provided for customers by common carriers; further, applicant seeks authority to serve the entire business and financial community, within territorial limits. Also, while proposed transportation of sales audit media for one shipper and of exposed and processed film and prints for another could be performed under continuing contracts, there would be no exclusive assignment of vehicles, nor would the service be designed to meet those shippers' distinct needs. All operations proposed operations require only prompt and dependable service and are therefore common carriage.—Southern Couriers, Inc., Extension, 94 M.C.C. 111 (115); for the same reasons, proposed expeditious, nonscheduled, door-to-door service for banking, business, and photography establishments is common, not contract, carriage. —Woody, 94 M.C.C. 759 (762).

Proposed service is common carriage when shipper's basic desire is for a carrier that will have equipment available when required to supplement its present available service, and expedited service with multiple deliveries, for which it asserts a "distinct need," is of type regularly performed by common carriers.—Huston, 92 M.C.C. 374 (377).

Contract-carrier applicant failed to establish that his proposed service offers a bona fide economic advantage to shipper under the "distinct need" alternative of §203(a)(15) when, though arguing that six specified services (not performed by common carriers) meet the "distinct need" test, he will not assign vehicles to shipper's exclusive use for continuing periods of time; availibility of equipment will depend on volume of shipments transported to destination territory of applicant's outstanding permit. Shipper will not use applicant's proposed services unless his charges are less than transportation costs incurred by shipper in its proprietary operations; and there is no evidence that proposed rate reflects any economies, or that it is economically feasible. Proposed operation is common, rather than contract, carriage for which no need is shown.—Harris Extension, 94 M.C.C. 227 (229-30).

Where a proposed operation does not meet either test of contract carriage laid down in §203(a)(15), the logical conclusion is that it is actually that of a common carrier.—Hagen Extension, 92 M.C.C. 479 (484); proposed transportation of meats and packinghouse products is common carriage when the physical transportation requires no service not normally performed by protesting common carriers for other shippers of those commodities, and proposed peddle delivery service to smaller consignees does not differ materially from that frequently afforded by transporters of perishable commodities.—Id., p. 485; similarly, proposed transportation of frozen foods, which does not meet either of the alternative requirements of §203(a)(15), is common carriage. Applicant would not assign vehicles to shipper's exclusive use, nor does proposed service meet a "distinct" need of shipper; and apparently, applicant would

offer service to any shipper willing to contract with it, thus in effect holding out service to the public generally, as do common carriers. —Nationwide Carriers, Inc., Extension, 89 M.C.C. 675 (679-80).

Since evidence adduced pertains to transportation needs of the lumber industry rather than distinct needs of individual shippers, operation proposed is common carriage.—Goodman Motor Transport Co., Extension, 91 M.C.C. 206 (210).

Evidence is convincing that, despite its practice of operating only under contracts, respondent holds itself out to any and all shippers who desire service within the scope of its relatively narrow territorial and commodity authority; consideration of factors enumerated in 82 MCC 777 compels conclusion that its services are not intrinsically different from those of common carriers; in the circumstances, its contracts with 19 individual shippers, some of whom are competitors, must be regarded as a holding out of service to the general public within meaning of §203(a)(14). —Tar Asphalt Trucking Co., Inc., Conversion, 88 M.C.C. 443 (445)*. Sustained, Tar Asphalt Trucking Co. v. United States, 208 F. Supp. 611 (614)*.

Inasmuch as, in its proposed delivery service for an air freight forwarder from Cleveland airport to points beyond terminal areas of the line-haul air carriers, applicant would ultimately serve the general public rather than the forwarder, its proposed operations would be those of a common carrier.—Panther Cartage Co. Extension, 88 M.C.C. 37 (42).

Armored truck: [Vol. 12].—Transportation by armored-car operators of business records and documents, which requires neither special vehicles nor special protective measures, is common carriage; such special services as pickup after normal working hours are not unique and are often provided by common carriers for their customers. Also, expansion by armored carriers generally into new fields, such as transportation of film, dental and optical supplies, and precision instruments, which likewise requires only prompt and dependable service, is indicative of carriers' willingness to offer a small-package delivery service to any shipper willing to support an application and contract with them; and since the net effect is that carrier is holding out its service to the public generally, such a delivery service is more consistent with common than with contract carrier status.—Armored Carrier Corp. Extension, 92 M.C.C. 336 (360, 361).

Coordinated rail-motor operation: [Vol. 15]. —Railroad subsidiary's handling of merchandise or other commodities which are, at the time, in custody of railroad or express companies, as distinguished from unlimited direct-to-the-public service, has long been recognized as a form of common carriage; present record warrants no different conclusion.—Pacific Motor Trucking Co. Extension, 89 M.C.C. 81 (86).

Holding out: [Vols. 11, 12].—Statutory definition of a common carrier stresses not what a person does but what he holds himself out to do; the holding out is important not only because of significance historically given it but because, even if the performance does not match it, the promise may have the adverse effect of existing carriers which underlines the requirement of a certificate. Defendant's advertisement of its business, that of providing drivers for "driveaway" transportation of an automobile owner's private car to place where the driver wishes to go, and its actual operation thereof, can..ot be reconciled with its claim of being merely an intermediary between owner and driver. Since defendant fixes rate owner must pay driver and sets all terms of their relationship, its position differs from that of an ordinary employment agency; and in view of its holding out and actual operations, the commission rationally could, and would, conclude that defendant led its customers to believe that it, not the drivers, was getting their cars from one place to another, and that it was in fact operating as a common carrier.—I.C.C. v. AAA Con Drivers Exchange, Inc., 340 F. 2d 820 (825, 826)*.

Advertisements of his business to the general public by defendant, engaged in transporting automobiles for owners in driveaway service, constitute a holding out of an automobile transportation service within meaning of §203(a)(14).—I.C.C. v. Dudgeon, 213 F.Supp. 710 (714); I.C.C. v. Interstate Auto Shippers, Inc., 214 F. Supp. 473 (477).

See also Service Associates case, §203(c), n. 3.

Number of shippers: [Vols. 11, 19].—Upon the execution of its seventh contract, applicant has reached that stage in its development at which addition of another contract would require a finding that it has ceased to serve only the limited number of persons permitted by §203(a)(15), and its operations would become those of a common rather than a contract carrier.—Umthun Trucking Co. Extension, 91 M.C.C. 691 (696, 697); likewise, grant of additional contract-carrier authority to applicant, authorized to serve seven contract shippers, would place him in a position of serving more than "one or a limited number" of shippers. However, since type of service supporting shipper requires is no more specialized than that provided by common carriers for other shippers faced with similar merchandising problems, and applicant is willing to accept common carrier authority, application is treated as one for a certificate. —Major Extension, 94 M.C.C. 652 (655)*.

Special service: [Vols. 11, 12, 19].—That plaintiff's equipment is peculiarly essential for the type of commodity transported does not negate its status as a common, as distinguished from a contract, carrier; its equipment was designed for a type of product produced by a class of customers rather than for the special requirements of a particular product of a single customer, and its specialized service may be held out to all members of the public who have occasion to ship products for which such specialized equipment is appropriate.—Tar Asphalt Trucking Co. v. United States, 208 F. Supp. 611 (614)*.

The only limitation by definition upon transportation which a motor common carrier may provide is that it be held out to the public generally. Other than the limitations in its certificate with respect to commodities, territory, and the like, no restriction is imposed on manner in which it may perform its physical operations, provided the same service is made available to all who desire to use it; thus, a common carrier may provide a variety of specialized services and may even assign vehicles to exclusive use of any customer desiring it, provided only that if offers the same service to all.—Moyer, 88 M.C.C. 767 (772).

Although applicant is presently serving one shipper only, he proposes to serve an undisclosed number of additional shippers and his single tractor-trailer until will apparently not be assigned to exclusive use of any one. Nor is the service designed to meet shipper's "distinct need" since it in no way differs materially from that normally offered by irregular-route common carriers of refrigerated or chilled commodities. Basic requirements for proposed transportation of dairy products—suitable equipment when needed, trained personnel and multiple deliveries—are regularly provided by motor common carriers; thus proposed service is common rather than contract carriage.—McGiffen, 91 M.C.C. 555 (556-7).

Although proposed transportation of experimental and display machinery and equipment for a manufacturer is highly specialized and contract carriers provide such service, common carriers are not forbidden to do so and often must do so to remain in business; proposed service is common carriage.—Donaldson Transfer Co. Extension, 89 M.C.C. 651 (652)*.

1b. —Operation by lease or other arrangement.—[Vols. 9, 11-19].—Applicant who uses tractor-trailers leased from owner-operators, but exercises direction and control over the vehicles and drivers, assumes responsibility both to shippers and to the general public, issues bills of lading and publishes tariffs of rates and charges for the traffic carried, and pays the vehicle owners a percentage of the charges collected, is a common carrier.—Hale Distributing Co., Inc., 89 M.C.C. 361 (363)*.

Using primarily leased equipment in its transportation of bananas for a number of shippers, applicant supervised loading of traffic, required progress telephone calls, diverted shipments in transit, paid claims for spoilage, paid the Federal transportation tax from 1953 until its repeal, and paid fines for violation of overweight laws. Compensation was usually on a percentage of revenue, but applicant has leased equipment on a flat sum basis, and at times the flat sum exceeded the revenue; such transportation is common carriage by applicant.—White's Trucking Service, Inc., 91 M.C.C. 454 (456, 457).

A person holding out a transportation service to the public, and in fact providing such a

service, cannot negate his status as a carrier merely by utilizing casual operators and disclaiming responsibility and control over the operations. There is no significant or substantial difference between respondent's operations and those found to be unauthorized common carriage in 77 MCC 365; essentially respondent, for compensation and as a regular practice, provides owners with driveaway transportation of their automobiles from Cleveland to stated destinations and holds his service out to the public by advertisements in local newspapers and in a telephone directory listing under "Automobile Transport Companies."—Spencer—Investigation of Operations, 88 M.C.C. 243 (245)*.

Though in form respondent merely brings together automobile owners and casual operators who then come to a mutual agreement and perform their respective duties, in practice the net result of the transactions is that owners receive driveaway service, drivers are paid for their driving, and respondent profits from providing transportation service for the owners. Facts that respondent owns and operates no vehicles of his own, employs no professional drivers, and does not instruct those used concerning the commission's regulations, together with other facts of record, affect quality of transportation service offered and not the nature of the service itself; those conditions afford no basis for holding that considered transactions among the parties are such as to render the common-carrier definition of §203(a)(14) inapplicable to respondent's operations.—Id., pp. 245-6.

Section 203. (a)(15) [*§303(a)(15) U.S.C.*] **Contract carrier defined.**—[Unchanged. See vol. 11, p. 9360; vol. 18, p. 14254.

Notes of Decisions

Volume 9—p. 7882; Volume 11—p. 9360; Volume 12—p. 10350; Volume 13—p. 11047; Volume 14—p. 11566; Volume 15—p. 12165; Volume 16—p. 12804; Volume 17—p. 13496; Volume 18—p. 14254; Volume 19—p. 15467.

1. Contract carrier defined.–[Vols. 9, 11-19].—Nonprofit corporation transporting property of its shipper members is a contract carrier when it is reimbursed for its services at scheduled rates and charges. Doctrine of the Schenly case (61 F. Supp. 981, aff'd 326 US 432), that "compensation" as used in the statutory definition does not necessarily involve an element of profit but may in some circumstances involve merely reimbursement for expenses of operation, is applicable; the evidence supports the district court's finding that applicant performed its transportation services for "compensation"; affirmed.—Shippers Cooperative, Inc. v. I.C.C., 308 F. 2d 888 (889,892)*.

In determining that appellant is a contract rather than a private carrier, its corporate status may not be disregarded where those in control have deliberately adopted the corporate form to secure its advantages and no violence is done to the legislative purpose by treating the corporate entity as a separate legal person. One who has created a corporate arrangement as a means of carrying out his business purposes does not have the choice of disregarding the corporate entity in order to avoid the obligations laid on it by the statute for protection of the public.—Id., pp. 892-3.

See also Cahaba Steel Co. case, §203(c), n. 2.

Legislative history of the 1957 amendment of §203(a)(15) and enactment of §212(c) clearly evinces congressional intent to preserve the basic distinction between common and contract carriers and to overcome effect of holding in 350 US 409 that a contract carrier is free to aggressively solicit new business within limits of its permit. Of the three criteria of contract carriage established by that amendment, the basic test, to which all contract carriers must conform, is transportation "under continuing contracts with one person or a limited number of persons"; the remaining cei-

teria, assignment of vehicles for a continuing period of time to exclusive use of each person served, and furnishing of service designed to meet the distinct need fo each individual customer, are stated in the disjunctive, and compliance with either, coupled with compliance with the basic test, is sufficient to bring a carrier within the statutory definition of a contract carrier.—P. Saldutti & Son, Inc. v. United States, 210 F. Supp. 307 (310-11)*.

It is for the commission to determine, under the facts in each case, whether a carrier serves a limited number of shippers, and if the commission's findings on this issue are supported by substantial evidence and in accord with applicable law, the court will not disturb them. The commission gave consideration to all relevant factors bearing on the issue of "limited number"; there is substantial evidence to support its conclusion that plaintiff does not operate under continuing contracts with a limited number of persons within meaning of §203(a)(15) and that its operations are those of a common carrier. While plaintiff's failure to meet the basic criterion makes unnecessary a consideration of the other two, the commission's conclusions that it failed to meet either of those tests are likewise supported by substantial evidence.—Id., pp. 311-2.

Under §203(a)(15) as amended in 1957, one of the tests of contract carriage is the furnishing, under continuing contracts, of "transportation services designed to meet the distinct need of each individual customer." That language is plain and unambiguous: the contracts are to furnish transportation services, and only such services are to meet the distinct needs of the customers; the reference to transportation services restricts and limits the language which follows. Nothing in the legislative history of the 1957 amendment indicates that Congress meant to give contract carriers the advantages which would ensue from furnishing nontransportation services.—National Trailer Convoy, Inc. v. United States, 227 F. Supp. 730 (732, 734)*.

To qualify as a contract carrier under the statute, as amended in 1957, an applicant must satisfy the fundamental test of transportation "under continuing contracts with one person or a limited number of persons"; all contract carriers must conform to that test. However, since the other two statutory criteria are stated in the disjunctive, once the basic test is met the applicant qualifies if he either (1) assigns vehicles for a continuing period of time to the exclusive use of each contract shipper, or (2) furnishes transportation service designed to meet distinct need of each such shipper. Therefore, the commission having recognized that plaintiff (applicant) satisfies the basic test and the "exclusive assignment of vehicles" one, there was no burden upon it to show shipper's"distinct need" because it comes within the statutory definition under the other alternative.—Meat Packers Exp., Inc. v. United States, 244 F. Supp. 642 (646, 647-8)*.

While the commission must also determine whether, under §209(b), issuance of the permit applied for would be consistent with the public interest and the national transportation policy, the term "distinct need" in §203(a)(15) is not the same as, and cannot be used interchangeably with, the determination to be made under §209(b); and, due perhaps to a confusing of distinct need under §203(a)(15) with the criteria in §209(b), the commission adopted a too narrow a basis in making its evaluation. In finding that services applicant (palintiff) would render could not be deemed designed for certain distinct needs of its shipper, the commission did not properly apply the statute and the effect of its decision was to place on applicant a greater burden of proof than was required; order set aside, and case remanded to the commission for further proceedings consistent with the court's opinion.—Id., pp. 648, 651-2.

Applicant for permit must show that it meets statutory definition of a contract carrier, i.e., one who engages in transportation "under continuing contracts with one person or a limited number of persons" either (1) by assigning vehicles for a continuing period of time to the exclusive use of each person served or (2) by furnishing services designed to meet the distinct needs of each customer, but not both alternatives. Plaintiff (applicant) would serve only one shipper-consignee under a continuing contract and it also satisfied the "exclusive assignment of vehicles" test; therefore, it was error for the commission to

require applicant to satisfy the distinct need alternative, to place burden of proof in that respect on it, and to make an adverse finding of no distinct need under such alternative definition. However, having qualified under either alternative, an applicant may not rest his case; issuance of permit sought must be justified under the five criteria of §209(b).—Midwest Truck Lines, Ltd. v. United States, 269 F. Supp. 554 (558, 560-1)*.

And, while evaluation of §209(b) criteria regarding "nature of the service proposed" involves the question of need for proposed services, the term "distinct need" in §203(a)(15) is not the same as, and cannot be used interchangeably with, the determination to be made under §209(b). It seems clear that the commission's unnecessary conclusion of no distinct need for plaintiff's proposed service under the §203(a)(15) definition was carried forward to its §209(b) evaluation, since that conclusion was the primary reason for denying the application, and such unnecessary no-distinct-need finding may well have provided a prejudicial coloration by the commission of the §209(b) criteria. Report and order set aside, and case remanded for further consideration consistent with the court's opinion.—Id., pp, 561, 567.

Proposed operations qualify as contract carriage under the second test of §203(a)(15) when supporting shipper has shown a distinct need for the type of transportation service which applicant proposes. Round-robin movement of frozen foods and pallets and emergency shipments of plant supplies and equipment necessitate availability to shipper of an "on-demand" service rendering prompt and expeditious transportation between its cold-storage warehouses and processing plants 24 hours a day and 7 days a week. Moreover, applicant proposes to serve the sole supporting shipper under a continuing contract, and his expressed intention to seek additional contracts with three producers which route their traffic through that shipper's warehouses does not alter that fact.—Jacobs Extension, 96 M.C.C. 87 (92, 93)*.

Proposed service is contract carriage when applicant would serve only five shippers and its proposal contemplates the furnishing of a transportation service designed to meet their distinct needs.—Russell Transfer Co., Inc., 95 M.C.C. 412 (419); and when applicant's proposed service—in backhauling of traffic to presently served shipper's manufacturing plants on return trips from destination States of shipper's outbound freight—is tailored to be an integral part, and extension, of contract carrier service now being performed for the same shipper, it qualifies as a "service designed to meet a distinct need" within the alternative requirement of §203(a)(15). Thus, though vehicles would not be assigned to shipper's exclusive use, proposed service satisfies the statutory definition of contract carriage.—H. H. Follmer Contract Hauling, Inc., Extension, 94 M.C.C. 276 (277-8); also, proposed service is contract carriage when applicant would assign vehicles exclusively to supporting shipper's traffic and the service, designed to meet shipper's particular problems, is identical to that it now provides at that shipper's other stores.—A. B. C. Exp. Co. Extention, 94 M.C.C. 386 (389-90)*.

Although applicant does not intend to assign his vehicles for a continuing period to supporting shipper's use, but merely to "spot" one or two vehicles at shipper's plant and use his vehicles on a rotation basis, he has met the alternative criterion of contract carriage in proposing a service closely coordinated with shipper's fluctuating production and sales efforts, and keyed to the expeditious deliveries and multiple dropoffs required by shipper's business. Moreover, while application is unrestricted as to contracting shippers, his proposal involves provision of service for a single shipper and therefore meets the "one person or a limited number of persons" requirement of the contract carrier definition. And his trip-leasing of vehicles to other carriers for return trips has no significance in determining contract carrier nature of his proposal.—Toomey, 95 M.C.C. 331 (335-6).

The service applicant proposes is contract carriage; he performs daily operations, picking up meats in N.Y.C. about 2 A.M. and delivering them to shipper's stores by 6 A.M. Applicant serves only supporting shipper herein, and assigns his one vehicle to shipper's exclusive use. In addition, applicant performs certain extra services; he inspects meat for quality, and informs the shipper if it

doesn't meet his standards; applicant has keys to shipper's stores, and places deliveries inside. Applicant must also frequently contact various stores of shipper to make sure that the one with the most immediate need gets preferred service. Granted.—Muzzillo, 94 M.C.C. 563 (564).

While applicant's proposed service does not show that he intends to assign equipment to supporting shipper on a continuing basis, he guarantees that his equipment will be available for shipper's exclusive use during its principal shipping seasons. While the proposal might not satisfy the first alternative requirement of §203(a)(15) proposed operation is contract carriage, nevertheless, because applicant proposes a distinctive transportation service, designed specifically to meet the particular transportation requirements of his supporting shipper.—Feagin, 94 M.C.C. 695 (696).

The first consideration in determining contract-carrier status is the number of shippers served, and though "limited number" as used in the statute is a relative term and it is impossible to establish any hard-and-fast limit to the number a contract carrier properly may serve, among factors to be considered are the different types of commodities transported, number of permits under which the carrier operates, territory in which the operation is conducted, and similarity in services that the carrier performs under its effective continuing contracts. Armored-car operations involving highly specialized protective services in transportation of money and other valuable items were correctly classified as contract carriage in 77 MCC 433, and where carrier providing them limits its operations to those performed under contract with a clearly definable class of shippers, such as banks or banking institutions, it may properly be found to comply with the requirement of service for a limited number of persons.—Armored Carrier Corp. Extension, 92 M.C.C. 336 (358, 359).

However, transportation of business documents and other items of little or no intrinsic value, in which prompt and dependable service is all that is needed and no special protective measures or special equipment are required, is not within sphere of services so specialized as to warrant finding that proposed contract carriage of such items meets the "limited number of persons" requirement even in absence of a limitation to the actual persons to be served. That requirement can be satisfied by limitation of service to a class of persons, whether by defined or inherent limitation, only where the service involved is unusually specialized and unique to the point of admitting of no other treatment.—Id., p. 360. [But see dissent.]

And there is nothing in transportation of film, or of dental or optical supplies, as proposed or performed by certain armored-car operators, which suggests that it is contract carriage, when there is no assignment of vehicles to exclusive use of contracting shipper and only prompt and dependable service is required; those carriers serve all their contracting shippers in same manner, and their services are not designed to meet the distinct need of each individual customer. These conclusions do not preclude applicants or any other carrier from receiving contract carrier authority to transport commodities similar to those involved, provided criteria of §203(a)(15) are satisfied; but carriers are cautioned that those statutory limitations cannot be defeated by creation of separate commonly-controlled companies which individually may qualify as contract carriers but which collectively provide service to the general public or to that part of it having need thereof. —Id., pp. 361, 362.

Since proposed service, consisting of repetitious transportation of about eight scheduled truckloads of staple grocery items from California suppliers to shipper's three destinations in Washington, has no characteristics which would render it unique or specialized with reference to shipper's needs and the type of service normally and regularly provided by existing carriers, it is not a service designed to meet "distinct need" of the shipper within the §203(a)(15) requirements. However, applicant will assign equipment to shipper's exclusive use on the northbound movements to Washington destinations and, to make its operation economically feasible, intends to transport exempt commodities southbound to California points since shipper has no southbound movements. Such one-way assignment of equipment, where backhaul is within the

§203(b6) exemption, is assignment of equipment to an applicant's contracting shipper as contemplated by the statute. Therefore, on the basis of assignment of equipment, proposed operation comes within the statutory definition of contract carriage.—Interstate Distributing Co., 91 M.C.C. 36 (38-40)*.

Applicant serves only two shippers, under continuing contracts, and assigns and will continue to assign vehicles to exclusive use of each; and considering in addition the dangerous nature of the explosives traffic involved, safety considerations, coordination required in making jobsite deliveries, and use of conveyors in loading and unloading, proposed service is obviously within the amended definition of contract carriage.—H. Messick, Inc., Extension, 89 M.C.C. 209 (214)*; and though applicant's present alternation of equipment between those two shippers is not a "dedication" as contemplated by the act, upon grant of present application it intends to assign vehicles to supporting shipper's exclusive use at its three plants. Proposed service, coordinated to meet that shipper's particular requirements, is that of a contract carrier.—Id., 91 M.C.C. 585 (586-7)*.

Even though applicant does not propose to assign vehicles to contracting shippers' exclusive use, his provision of a highly specialized service, including delivery of lumber to out-of-the-way and often almost inaccesible oilfields and stringing of lumber through those oilfields for roadbuilding purposes, satisfies the alternative requirement of a service designed to meet each shipper's distinct needs. Moreover, his proposed practice of daily telephone consultation with shippers, assuring them of having equipment available promptly on call, comes close to accomplishing same result as assignment of vehicles.—Sears, 92 M.C.C. 602 (606).

Proposed service in transportation of cheese, which ensures multiple pickups keyed to numerous manufacturers' production patterns in response to fluctuating purchase requirements of contracting shipper's customers, may properly be deemed one designed to meet shipper's distinct and particular needs, when there is no suggestion that any other shipper of cheese in the area who can satisfactorily use common carrier services has requirements identical with or even similar to those shown; and that grant will enable applicant under 7 permits to serve a total of 4 shippers all engaged in related activities in same geographical area is not inconsistent with "limited number of persons" requirement of §203(a)(15). In view of that conclusion, applicant's contemplated use of trip-leased equipment for movements to the West, which would not be assigned to shipper's use "for a continuing period of time," has no significance.—Nationwide Carriers, Inc., Extension, 92 M.C.C. 1 (4-5)*.

Applicant will continue to be a contract carrier when it proposes merely to extend its operation for one of shippers it already serves under continuing contracts, and service offered is responsive to that shipper's distinct needs.—Manfredi Motor Transit Co. Extension, 92 M.C.C. 471 (473)*; even though applicant would not dedicate equipment to that shipper's exclusive use.—Tractor Transport, Inc., 88 M.C.C. 117 (121); and proposed service for a comparatively small automobile manufacturer and its subsidiary, in addition to the major automobile manufacturer and two government agencies already served, would not be sufficient of itself to change applicant's status as a contract carrier.—K. W. McKee, Inc., Extension, 89 M.C.C. 777 (783).

When applicant proposes to serve only three shippers through assignment of specific vehicles to each, and those shippers state that they desire and need that type of service, proposed operation is contract carriage, and use of vehicles to perform intrastate transportation of grain as a backhaul would not affect exclusiveness of assignment to the shippers using them for outbound movements.—Redland Oil Co., Inc., 91 M.C.C. 771 (775).

Applicant will be a contract carrier when it will serve a single shipper under a continuing contract and will assign all its equipment to that shipper's exclusive use. Since the second requirement of the definition in §203(a)(15) is in the alternative, such assignment of vehicles is sufficient to require evaluation of the application in accordance with the criteria of §209(b) even if the proposed operation satisfied no distinct need of the supporting shipper.—Bursch Extension, 91 M.C.C. 953 (955)*.

Applicant now serves only two shippers; as this number would not be increased and half of applicant's motor vehicles are used only in the service of supporting shipper, proposed service is that of a contract carrier as defined in §203(a)(15).—Capital Exp., Inc., Extension, 91 M.C.C. 819 (822).

Corporate respondent, a purported shippers' association found to have been performing an unauthorized transportation service for its members, cannot divest itself of a carrier's mantle by leasing vehicles separately for each shipment, when it has direction and control over them; as its membership list is composed of a limited number of shippers and there is no evidence of a holding out to the general public, its operation is contract carriage.—Western Shippers Assn., Inc.—Investigation, 88 M.C.C. 575 (577).

Applicant proposes to serve only one shipper and, while he will dedicate only 5 out of 8 tractors to shipper's exclusive use, the others will be held in reserve, and applicant in effect is guaranteeing that 5 tractors will be continually dedicated to shipper's exclusive use and stationed at its plant; such service constitutes contract carriage.—Trushenski, 91 M.C.C. 502 (505).

Applicant's proposed transportation of meat, in temperature-controlled equipment with overhead "tram" rails and switches, for shipper of mainly "kosher" products which require extra precautions in handling, is contract carriage and applicant's personalized service as "house carrier" is designed to fulfill supporting shipper's distinct needs. Proposed service will replace a proprietary trucking operation; applicant will assign all of its vehicles to shipper's exclusive use and will provide a closely integrated service of the expeditious type required.—Garmarc Transp. Co., Inc., 91 M.C.C. 489 (490, 491-2)*.

Proposal by railroad subsidiary to provide exclusive service under contract with a single shipper, and to assign vehicles to shipper's exclusive use for continuing period of time, is that of a contract carrier.—Pacific Motor Trucking Co. Extension, 91 M.C.C. 61 (63).

Proposed transportation of imported canned goods and sugar is contract carriage when applicant proposes to serve a limited number of shippers or consignees under contract, to assign equipment to their exclusive use for continuing periods, and to furnish services meeting their distinct needs, such as coordination of pickups and deliveries with shippers' desires, often on extremely short notice, inspection of the merchandise at piers by trained personnel, sorting of cases of canned goods according to code numbers, and recoupment and return of shipments rejected for damage.—Beatty Motor Exp., Inc., Extension 89 M.C.C. 190 (192, 193-4).

Though §203(a)(15) defines a contract carrier as one serving "one person or a limited number of persons," Congress apparently did not intend the commission to set any arbitrary "exact-number" limitation on shippers that a contract carrier may serve; to the contrary, §209(b) provides that permits shall specify "the number or class" of persons authorized to be served, and 82 MCC 536 held that "limited number" is a relative term without particular significance except in relation to the carrier's overall operations. Applicant's supporting shippers—a department-store corporation, its numerous subsidiaries, and its concessionaires—being generally all of one class, may be regarded as a "limited number of persons" within meaning of §203(a)(15), and in performing service for such shippers applicant would be a contract carrier within definition therein.—S. Klein Trucking Corp., 89 M.C.C. 53 (56).

Though the statutory criteria of contract carriage in §203(a)(15) do not provide an arbitrary demarcation between common and contract carrier operations, they provide a substantive yardstick. "Limited numbers," as used therein to denote persons who may be served, is a relative term without significance unless compared to carrier's overall operation; a large number of shippers of a limited class may constitute a "limited number of persons" if the service is tailored to specialized needs of members of that limited class. But when there is no "limited class" relation among supporting shippers other than their requirement of refrigerated equipment, their transportation needs otherwise vary in significant respects, and no specially tailored service would be provided or is shown to be needed, proposed operations fail to meet that test.—Connell Transport Co. Extension, 91

M.C.C. 113 (121, 122).

The substance of the arrangements and not their form determines whether there is an "exclusive assignment" of vehicles; where there is substantial evidence of dedication of vehicles to a shipper's use under a continuing arrangement whereby they will be constantly available to that shipper, carrier's use of the equipment for a backhaul, such as of unregulated commodities, does not destroy the "assignment for exclusive use" within §203(a)(15). When applicant has for years provided one contracting shipper a service tailored to its distinct needs, and essentially all of its unregulated transportation has been performed for that shipper, proposed transportation of that shipper's traffic to additional destinations will continue to be contract carriage.—Id., p. 121.

Though use of equipment for a backhaul movement of exempt commodities does not of itself destroy the exclusive assignment of vehicles to a shipper, use of the same equipment in regulated service for others, as where applicant would perform contract carrier service for another shipper on return, precludes applicant from contending its vehicles are assigned to exclusive use of the contracting shipper for a continuing period of time; and the same conclusion is applicable, a fortiori, where applicant serves the general public on return movements as a common carrier of nonexempt commodities.—Huston, 92 M.C.C. 374 (376); likewise, applicant does not meet that test when, though his refrigerated trailer would purportedly be "on consistent call for service" of supporting meat shipper, he intends to use the same vehicle at times to balance his operation by transporting machinery for another contracting shipper. Nor does proposed service satisfy the alternative test of meeting a distinct need of the shipper; basically, shipper desires expeditious service on meats; statutory criteria of contract carriage are not met.—Shaw Extension, 92 M.C.C. 118 (120); Hulme Extension, 91 M.C.C. 575 (580).

The statute requires a contract carrier to serve a "limited number of persons," and applicant, presently serving seven shippers and proposing to serve an additional one, is admonished to adhere to the principles enunciated in 91 MCC 691 to assure that its operations do not expand to the point where it is serving the public generally.—Oyler Motor Transit Co., Inc., Extension 94 M.C.C. 638 (641); however, assuming that proposed service meets that requirement of the definition, it meets one of the alternative requirements of the statutory definition as to nature of the service, inasmuch as equipment will be assigned to supporting shipper's exclusive use. Therefore, the application will be evaluated in accordance with criteria in §209(b).—Id., p. 641.

Since effective date in 1957 of amended contract carrier definition in §203(a)(15), applicant has filed a total of 30 permit applications, of which 11 were either filed or granted in or subsequent to April 1962. To date, he has been granted a total of 12 permits authorizing service for 7 different shippers, and by present and 2 other applications he seeks authority to serve 3 more shippers. The pattern of expansion followed by applicant since 1957 and accelerated since April 1962 clearly demonstrates his intent to offer service to the public generally; instant application must therefore be denied because execution of another contract would enable him to serve more than the "limited number." of persons permitted by §203(a)(15).—Major Extension, 92 M.C.C. 316 (318-9)*.

The "limited number of persons" requirement of the contract-carrier definition, being relative, can be satisfied by limitation of service to a class of persons, whether by defined or inherent limitation, but only where the service involved is so unusually specialized or unique as to permit no other treatment. Proposed transportation of commercial papers used in banking operations for a large number of shippers is not thus specialized and cannot be considered contract carriage, since the involved commodities have no intrinsic value and their transportation does not require that they be guarded or transported in special vehicles or otherwise involve the protective services characteristic of armored carrier operations.—Southern Couriers, Inc., Extension, 94 M.C.C. 111 (114-5); Woody, 94 M.C.C. 759 (762).

The term "limited number" in §203(a)(15) is a relative term without significance unless

compared to carrier's overall operations. As an isolated instance, applicant's proposal to serve a single shipper, and to assign specific equipment to shipper's exclusive use for a continuing period of time, would be contract carriage; however, in less than 4 years of operation, applicant has accumulated eight separate grants, including one as a common carrier, has been authorized to serve seven shippers under contracts, and has filed three applications that are not yet decided. Thus, in spite of its concentration on service for only two industries, the pattern of expansion and enlargement followed demonstrates clearly that applicant's purpose is to offer service to any shipper willing to contract with it, and it is in effect holding out its services to the public generally as do common carriers.—Umthun Trucking Co. Extension, 91 M.C.C. 691 (694, 696).

Some contract carriers, providing highly specialized services, may properly serve more than seven shippers; however, those whose services do not possess a high degree of specialization are put on notice that attempts to expand their operations by offering service to more than six or eight shippers will be carefully scrutinized to insure that they are not serving more than the limited number permitted by §203(a)(15). A carrier whose operations enlarge so that it serves more than a limited number of persons may seek conversion to common carrier status through an appropriate §207 application.—Id., pp. 696-7.

Shippers association's unlawful for-hire motor carriage was not that of a contract carrier, since in transporting freight for some 65 to 100 members it did not serve a "limited number" of shippers.—Natl. Motor Frt. Traf. Assn., Inc., v. Internatl. Shippers, 95 M.C.C. 440 (447).

In defining a contract carrier as one which operates under contracts with one or a limited number of persons, the act does not specify an arbitrary number of contracts which must not be exceeded; this figure is within the commission's jurisdiction to fix. Whether a carrier serves a "limited number" of shippers must be determined from all the facts and circumstances surrounding a particular operation or type of motor carrier service; among factors to be considered are the different types of commodities transported, number of permits held by the carrier, territory in which its operations are conducted, degree of specialization required by nature of its shippers' business, and degree of similarity in services performed under its effective continuing contracts.—P. Saldutti & Son, Inc., Conversion, 89 M.C.C. 338 (340)*.

Although respondent operates in a limited area, it serves a variety of shippers, performs varied transportation services, handles a number of dissimilar commodities, and operates several different types of vehicles, and in operating under contracts with at least 20 shippers it does not serve a limited number of persons, or a limited class of customers within principle of 77 MCC 433. In spotting vehicles at shippers' plants and providing certain types of trailers for certain shippers, it does not dedicate particular vehicles to individual shippers and thus does not assign vehicles to exclusive use of each person served; and incidental services performed for shippers are not of such nature that they may be performed only by a contract carrier. Thus respondent's operations do not conform to the contract carrier definition, but are those of a common carrier.—Id., pp. 340-1.

Essential distinction between common and contract carriage is the presence or lack of a holding out to serve the public generally; in exercising its right to select shippers it will serve, a contract carrier, if it is not to breach the line of demarcation between contract and common carriage, must affirmatively stand aloof to the lure of a public calling by restricting its service to one or a limited number of persons. These statutory limitations cannot be defeated merely by creation of separate commonly controlled transportation corporations, which may individually qualify as contract carriers but collectively provide service to the general public or to that part of the public having need therefor; in such circumstances the resulting public service adds a new competitive operation not shown to be required by present or future public convenience and necessity.—Best Transport, Inc., 88 M.C.C. 147 (158)*.

Both the commission and the courts have consistently held that corporate entities may be disregarded when necessary to permit the

proper exercise of regulatory power; it is the substance and not the form of the arrangement that is determinative of the issues involved. Accordingly, in determining whether operations performed or proposed by a number of commonly controlled carriers constitute, in fact, common or contract carriage, the collective scope and character of the operations in issue, as well as the total number of shippers served by all carriers operating under common control, must be considered. Only by thus disregarding the corporate fiction can the legislative purposes underlying the functional restrictions imposed by statute on contract-carrier service be effectuated.—Id., p. 158.

Transportation of exempt commodities as a backhaul does not violate the concept of assignment of vehicles to shipper's exclusive use for a continuing period as required by the statute; thus, contrary to common-carrier protestants' assertions, proposed operation is that of a contract carrier. However, since performance of single-line service is not functionally related to contract carriage as such, but is a type of service performed by common and contract carriers alike, proposed rendition of single-line service may not be considered as an undertaking to provide a specialized service tailored to meet shipper's distinct need without concomitant showing that shipper has an actual need for such service.—Minnesota Trucking, Inc., 94 M.C.C. 58 (60, 61).

Any proposed contract carrier operation must first be examined to determine whether it meets requirements of the new definition in §203(a)(15). Although the Supreme Court in 368 US 81 emphasized the "distinct need" test, the "exclusive assignment of vehicle" requirement may not be ignored, but must continue also to be applied in appropriate circumstances; where proposed operation does not meet either test, logical conclusion is that it is actually that of a common carrier as defined in §203(a)(14).—Moyer, 88 M.C.C. 767 (770).

Where supporting shipper requires multiple delivery service for handling of small shipments consigned to several customers in a single vehicle, and prompt deliveries of short-notice orders are necessary to avert shutting down of customer's production line, proposed service closely integrated with shipper's manufacturing operations and keyed to its and its customers' production schedules, which would be virtually a part of shipper's organization, is a personalized service which can properly be described as designed to meet shipper's particular and distinct needs.—Id., pp. 778-9.

And notwithstanding applicant's statement in exceptions that proposed service is designed to meet shipper's distinct needs "as distinguished from * * * assignment of equipment," purport of the record as a whole is that applicant will assign vehicles to shipper's exclusive use within meaning of the contract-carrier definition; even though he proposes to use vehicles only southbound in shipper's service and they may be used for movement of exempt commodities on return, they will be considered as assigned to contracting shipper's exclusive use. [86 MCC 637.] Since applicant would serve only two shippers, service proposed is within definition of §203(a)(15).—Id., p. 773.

Proposed operation cannot be found to be that of a contract carrier within the statutory definition; record fails to show that applicant would assign vehicles to each shipper's exclusive use under a continuing contract, or that she has any firm arrangements for such dedication of equipment; also, applicant has no contracts with supporting shippers concerning terms, charges, or amount of traffic to be transported. Moreover, since it cannot be determined from the record whether vehicles assigned to a shipper for its outbound movements would be assigned to the same shipper on return, or would be returned empty for that shipper's exclusive outbound use, evidence is not convincing that applicant would be in a position to assign equipment for a continuing period of time to each shipper's exclusive use.—Fogleman Extension, 94 M.C.C. 671 (673-4).

Nor has applicant shown that proposed service is designed to meet shippers "distinct need" under the statutory alternative. The shippers desire a carrier which will provide flexible and expeditious single-line service, with multiple pickups and deliveries for less-than-truckload shipments. There is nothing

distinctive or specialized about such service; on the contrary, it is one regularly provided by common carriers and supporting shippers are using motor common carriage. The mere possibility of low-cost transportation, predicated on a series of uncertainties, does not make the proposed service distinctive.—Id., p. 675.

Respondent's operations do not meet criteria of amended contract-carrier definition when, with possible exception of two tank trailers which were set aside for use of two shippers for respondent's convenience (because of nature of commodities transported), it does not dedicate vehicles for a continuing period of time for exclusive use of each person served; its services, as conducted under 19 continuing contracts, are not restricted to a limited number of shippers, and are similar to those offered by many common carriers of like commodities. Issuance of certificate in lieu of permits, authorized.—Tar Asphalt Trucking Co., Inc., Conversion, 86 M.C.C. 756 (757)*; and respondent's use of heating units and pumps with extra long hoses is not indicative of a distinctive or specialized service.—Id., 88 M.C.C. 443 (445)*.

There is nothing distinctive in nature of service proposed or shown to be needed by supporting shipper that would require finding it could only be performed satisfactorily by a contract carrier.Though applicant contends that his proposed minimum rate meets the "distinct need" test, he has not sustained burden of proving that service contemplated offers a bona fide economic advantage to shipper. Proposed rate is not shown to reflect any economies or advantages inherent in contract carriage or to be economically feasible, since it is predicated largely on return hauls of exempt agricultural commodities, which might not materialize, and if such movements were not available or were less than anticipated proposed operation would be unprofitable. Applicant has met neither test of contract carriage.—Hagen Extension, 92 M.C.C. 479 (485).

Applicants proposed transportation of certain agricultural implements does not meet the criteria of contract carriage when his statement that he intends to assign at least one vehicle to shipper's exclusive use is not supported by any other evidence; he intends merely to spot equipment at shipper's plant site—a normal service of any common carrier; considering also his certificated authority under which he may transport agricultural machinery for same shipper, it does not appear that there would in fact be an exclusive assignment of vehicles for a continuing period. Moreover, shipper's only special desire is that open-top vans be furnished, which does not constitute a "distinct need" in the contract carrier sense. Proposed service is common carriage.—Kindsvater Extension, 92 M.C.C. 131 (133).

Although application was filed under §207, at the hearing alternative expanded contract carrier authority was requested; commission's decision relevant to §203(a)(14) and (15) determines whether operation is that of common or contract carrier rather than form in which application is filed. The overall physical operations proposed determine whether application should be treated as one seeking authority pursuant to §207 or to §209; in view of lack of evidence pertaining to alternative proposal, application is treated as one seeking common carrier authority.—Goodman Motor Transport Co., Extension, 91 M.C.C. 206 (209).

Private carrier seeking authority for one-way contract-carrier operation would operate its vehicles interchangeably to move considered traffic to the four supporting receivers; this does not constitute dedication of equipment as contemplated by the statutory definition of contract carriage; nor does the proposed service appear to be specialized; however, neither common- nor contract-carrier operation by applicant would be consistent with public interest.—Ralph A. Veon, Inc., 88 M.C.C. 279 (280)*.

Proposed transportation of cement does not conform to the contract carrier definition since applicant's equipment would not be assigned for a continuing period of time to shipper's exclusive use, nor is the service designed to meet shippers' distinct need since it would consist only of single-line transportation of cement by tank trailer or flat-bed; moreover, 86 MCC 447 found that public interest requires issuance of common rather than contract carrier authority to motor car-

riers serving the cement industry as a whole.—Reaveley, 91 M.C.C. 604 (606-7).

Applicant would not be a contract carrier when he would not assign equipment to shipper's exclusive use, proposed service is not designed to meet a distinct need of shipper or its customers, and the only aspect which might be considered specialized—loading and unloading of disassembled pipe organs—is to be performed by shipper's employees.—LeTarte, 91 M.C.C. 158 (160).

Picking up and returning repossessed automobiles to dealers is not a contract carrier operation within §203(a)(15), since it involves only a driveaway service, which by definition calls for furnishing of a driver only, so that there can be no dedication of equipment; nor do supporting shipper's needs require a specialized kind of service for which common carriers are unsuited.—Morris, 89 M.C.C. 386 (387).

Applicant's proposed service for two new shippers would not be contract carriage when, though it professes willingness to dedicate equipment to their exclusive use if required, both shippers specifically disclaim any need for such exclusive use, and no distinct needs of those shippers that applicant would be required to serve are demonstrated.—E. W. Bohren Transport, Inc., Extension, 89 M.C.C. 266 (267).

Proposed service wherein applicant would not assign vehicles to shipper's exclusive use, and which is not shown to be designed to meet any distinct need of shipper or to be different from service that protestant common carrier is authorized and equipped to perform, does not meet the test of contract carriage; but other proposed service, in which applicant would serve a single shipper through assignment of vehicles to to that shipper's exclusive use, is that of a contract carrier.—Sears, 89 M.C.C. 173 (176).

Owner-operator service: [Vols. 9, 11, 19].—In performing operations solely with equipment leased from owner-operators, applicant does not exercise the degree of control or responsibility necessary to establish bona fide for-hire operations as a contract carrier. Applicant owns no terminal or equipment; employs no personnel except its president, a part-time bookkeeper, and the president's son; does not pay for insurance; maintains no real safety program respecting drivers other than its asserted right to "fire" those who prove unsatisfactory; does not select, pay, or in any genuine sense direct drivers of the leased vehicles; and has no means of assuring that equipment will be available for any substantial period of time.—T. P. Trucking Co., Inc., Extension, 91 M.C.C. 764 (768).

Section 203. (a)(16) [*§303(a)(16) U.S.C.*] **Motor carrier defined.**—[Unchanged. See vol. 9, p. 7885.]

Notes of Decisions

Volume 11—p. 9363; Volume 12—p. 10352; Volume 13—p. 11048; Volume 14—p. 11566; Volume 15—p. 12166; Volume 16—p. 12805; Volume 19—p. 15473.

1. Construction and interpretation.—[Vols. 11-16, 19].—Whether applicant, who owns no motor vehicles and proposes to provide service with equipment leased, with drivers, from a nonaffiliated company, would actually control, direct, and assume responsibility for proposed operations, so that its status would be that of a carrier by motor vehicle, is highly questionable.—Spruance Extension, 91 M.C.C. 864 (867).

See also the Schirmer Transp. Co. case, §203(c), n. 3.

Section 203. (a)(17) [§*303(a)(17) U.S.C.*] Private carrier defined.— [Unchanged. See vol. 9, p. 7885.]

Notes of Decisions

Volume 9—p. 7885; Volume 11—p. 9363; Volume 12—p. 10352; Volume 13—p. 11049; Volume 14—p. 11567; Volume 15—p. 12166; Volume 16—p. 12085; Volume 17—p. 13497; Volume 18—p. 14258; Volume 19—p. 15473.

5. Private carrier defined.—[Vols. 9, 11-19]. —See also §203(c), notes.

In appeal from district court's denial of injunction against motor carrier of exempt agricultural commodities and certain shippers to whom carrier leased its trucks on return trips to haul nonexempt commodities, under trip-lease arrangements whereby shippers formally leased carrier's trucks for carriage of their shipments from the distant points back to considered destination, the question at issue is controlled by decision in 368 US 370. The trial court made specific findings of fact which resolved the basic factual issues touching on control, direction and domination of the transportation by the "lessee" and as to substance of the operation, all favorable to appellees; that determination cannot be found erroneous; affirmed.—I.C.C. v. Piedmont Sales Co., 330 F. 2d 351

Appellant nonprofit corporation is a "person" as defined in §203(a)(1) and as used in §§203(a)(15) and (17) and 209(a); therefore, when the facts show that it is operating as a contract carrier within meaning of Part II, it cannot be a private carrier.—Shippers Cooperative, Inc. v. I.C.C. 308 F. 2d 888 (892, 893)*.

The two tests of private carriage applied by the commission and adopted by the Supreme Court in 368 US 370 require finding, first, that no person other than the shipper has any right to control, direct, and dominate the transportation, and second, that no person is in substance engaged in the business of transporting property for hire. Both tests must be satisfied, and the test of substance supplements the test of control to such an extent that even a finding of shipper control does not in itself suffice to render the transportation private carriage.—I.C.C. v. Moore, 236 F. Supp. 168 (173).

Defendant nonprofit shippers association cannot be classified as a private carrier exempt from economic regulation under the act when the facts of record clearly show that it was engaging in interstate transportation of property for its shipper members for compensation. See 326 US 432 and 308 F. 2d 888.—I.C.C. v. International Shippers Ass'n of New Jersey, Inc., 249 F. Supp. 66 (69)*.

In defining a particular motor carrier operation it is the substance, rather than the form, that is important; from the outset the commission has correctly interpreted the statutory definitions as importing that a purported private carrier who hires the instrumentalities of transportation from others must—if he is not to utilized a licensed carrier—assume in significant measure the characteristic burdens of the transportation business.—I.C.C. v. Arpel, Inc., 211 F. Supp. 370 (373).

No particular incident of the legal relationship determines who is the employer of the driver; payment of wages does not establish that fact, but merely aids in determining who has the power of control, which is the controlling consideration. In considered operations under purported "trip leases," most of shippers' and consignees' contacts with the drivers were for payment only of a sum designated by defendants after delivery of a shipment; the relation between defendants and drivers was in substance that of employer and employee, with defendants delivering ancillary instructions as to the method of payment of the drivers. Defendants' business is that of a for-hire carrier shallowly cloaked with a subterfuge arrangement purporting to represent private carriage. Furthermore, defendants' claim of private carriage finds no support in the fact that some shipments transported consisted of exempt agricultural commodities.—Id., pp. 373-4.

Although plaintiff contends that shipper-lessees exercise direction and control over details of the transportation performed with

vehicles leased from and drivers supplied by plaintiff, the Supreme Court in 368 US 370, in considering a substantially similar factual situation, expressly affirmed the commission's consistent position that such control falls far short of establishing that the shipper-lessees are engaged in private carriage. That decision is controlling, and, there being rational basis for the commission's conclusion that considered operation was for-hire carriage by lessor rather than private transportation by shippers, it is affirmed.—John J. Casale, Inc. v. United States, 208 F. Supp. 55 (56, 59-60)*.

In order that transportation be private carriage, it must appear that it is performed by a bona fide "owner, lessee, or bailee" who is not a "common carrier" or a "contract carrier" (as those words are used in §203(a)(17)), and within the scope, and in furtherance, of a primary business enterprise (other than transportation) of the person engaged in such transportation (§203(c)). The test of compensation is not the criterion for determining whether considered transportation is in fact that of a private carrier. The commission was clearly justified in concluding that plaintiff's Plan 2 transportation to the West Coast of automobiles owned at the outset by west coast dealers was not private carriage; sustained.—Studna v. United States, 225 F. Supp. 973 (975-6, 979, 983-4)*.

Defendant corporation, engaged in the business of servicing and repairing oil and gas wells in several States, was a private carrier of property within meaning of the statutes pertaining to the commission's power to regulate safety of operations of interstate motor carriers. While pumping equipment transported was permanently mounted on defendant's trucks, that equipment and the auxiliary portable equipment transported on its pump trucks constituted "property," was owned by defendant, and was transported by it in interstate commerce in furtherance of its well-servicing commercial enterprise.—Harshman v. Well Service, Inc., 248 F. Supp. 953 (954, 958, 960)*.

Hauling activities of corporation in transporting its own merchandize in vehicles leased from carrier of exempt agricultural commodities, under a bona fide lease arrangement, were those of a private carrier; such activities were not changed from private carriage merely because the lease arrangement called for lessor to use the units when lessee did not need them or because drivers of the trucks, although employees of lessee, were obtained from among lessor's experienced drivers.—I.C.C. v. Schultz Transit, Inc., 207 F. Supp. 749 (751-4).

Under plan II-1/2 TOFC service, in which the railroad furnishes the trailers but leases them to shipper or consignee for the movements to and from the railroad ramps, the transportation subject to regulation does not begin until shipper has performed the pickup service at origin, and ends when consignee accepts delivery of the trailer at the railroad ramp at end of the rail line-haul. Shipper and consignee perform the pickup and delivery services themselves and during such times the shipment is under their control; terminal pick-up and delivery operations thus performed are private carriage and need not be confined to the origin and destination terminal areas.—Foodstuffs, Macon, Ga., to Florida, Indiana, Kentucky, Ohio, 321 I.C.C. 132 (134-5).

Though the Supreme Court held in 368 US 370 that mere vesting of control in shipper is not in itself determinative of whether operation by a shipper with leased equipment is private carriage and that the test of substance applied by the commission in more recent cases transcends the limited concept of "control" enunciated in 27 MCC 191, emphasizing that a shipper wishing to transport his own goods must assume in significant measure the characteristic burdens of transportation, the Court did not conclude that the commission must abandon consideration of control in favor of a "characteristic burdens of transportation" test, but only that the commission may and has supplemented its "control" test with other factors; in essence, the test is one of substance involving evaluation of all relevant factors.—Lovell—Investigation of Operations, 92 M.C.C. 728 (733, 736).

And while that decision imposes a sharp limitation on purported private carriers who seek to avoid the characteristic burdens of transportation, there is no indication therein or in subsequent commission decisions that a shipper is precluded under every circumstance from performing bona fide private car-

riage with leased vehicles; the Court recognized, at least implicitly, that there may be a genuine leasing and employment arrangement. Under ordinary circumstances a lessee of vehicles divests itself of the burdens of capital investment and risk of premature depreciation or catastrophic loss; hence, while those factors must be considered as part of the total picture, they are not in themselves controlling.—Id., p. 734.

Substance of operations now conducted by two shippers with vehicles leased from respondent establishes that they are bona fide private carriage for which no authority is required. Shippers have exclusive control of the vehicles leased to them; drivers are shippers' employees and are directed by them in their duties; notwithstanding drivers' past connections with respondent and his role in assisting them to obtain positions, shippers in fact exercise their responsibility of complete control over them. Respondent owns, furnishes, and maintains the equipment and assumes costs of operation and vehicle insurance, while shippers pay for public liability and property damage insurance, drivers' salaries, and withholding assessments, keep drivers' logs and medical certificates, and supervise the physical operations. However, the parties are cautioned that their lease agreements should include a minimum amount of annual rental.—Id., pp. 735-6.

In determining whether a particular operation is bona fide private carriage or some form of unauthorized transportation decked out in the trappings of private carriage, each case must be decided on its own particular facts.—Jackson and Plunkett—Investigation of Operations, 88 M.C.C. 671 (672).

Partnership whose primary business is operating oil company's bulk plant at Aiken, S.C., and acting as its sales agent in that area is a private carrier in transporting the oil company's products from Port Wentworth, Ga., to Aiken. If it pruchased the products at Port Wentworth, both transportation to the bulk plant and transportation direct to customers in Aiken area would be private carriage; the act does not permit a different conclusion merely because carrier is bailee, not owner, of the property; §203(a)(17) does not limit the right of private carriage to property transported by owners.—Id., pp. 676, 679; and oil company's payment of a hauling allowance that may yield the partnership some profit above cost of transportation does not preclude a finding of private carriage; existence of an identifiable transportation charge is not determinative of carrier status (93 F. Supp. 517); congressional committees reporting on present language of §203(c) disclaimed any intent to interfere with operations of private carriers even though a charge is made.—Id., pp. 677, 679.

Section 203(a)(17) does not limit the right of private carriage to property transported by the owner thereof, but includes property of which the transporter is the lessee or bailee, subject to the primary business test prescribed in §203(c).—Car Services, Inc., 92 M.C.C. 595 (599-600).

The mere taking of title to shipments transported does not establish private carriage.—Meinerz Creamery Co.—Investigation of Operations, 88 M.C.C. 77 (85); thus, in investigation into respondent's transactions in the purchase and resale of sugar, the fact that respondent is the clear owner of property being transported is not sufficient to establish that its carrier operations are those of a private carrier. Moreover, that is the normal practice in unauthorized transportation of sugar and other fungible commodities; and if it were not for the mechanics of taking title to the sugar transported, there could be no question but that respondent is engaged in for-hire transportation.—Utley Lumber Co., Inc., Investigation of Operations, 94 M.C.C. 458 (463-4).

In distinguishing between bona fide private carriers and their impersonators (buy-and-sell operators who attempt to camouflage unauthorized transportation with the forms of bona fide private carriage), the commission is aided by certain common-sense indicia; the principal indicia, as summarized in 82 MCC 651, repeated.—Smith Grain Co., Inc., Investigation of Operations, 86 M.C.C. 767 (769-70).

In determining whether a particular arrangement results in private or for-hire carriage, the overall picture and all salient factors must be weighed, including documents purporting to establish the legal relationship

and the actual practices of the parties in conducting the operations. In order for considered operations to constitute bona fide private carriage, respondent shippers must control, direct, and dominate them as well as assume the characteristic burdens of private carriage; also, the part played by other respondents must not in any way constitute their engagement in interstate or foreign transportation for hire.—Transport Rental Systems, Inc., Investigations, 94 M.C.C. 402 (409).

Thus, when meatpacker respondent, with the aid and assistance of vehicle leasing company and respondent purporting to furnish drivers to shippers, actually furnished both equipment and drivers to shipper respondents in order to obtain a backhaul for its proprietary operations, and the record is not conclusive that the equipment or drivers were subject to direction or control of anyone else during any of considered movements of shipper respondents' goods, those operations were for-hire, rather than private, carriage; and since respondents' vehicle leasing company and furnisher of drivers jointly took part in the plan of operations, former actually acts as instrumentality which brings together private carriers desiring a remunerative backhaul and shippers seeking inexpensive transportation service without concomitant responsibilities inhereint in true private carriage.—Id., pp. 410-11.

Who has the right to control, direct, and dominate performance of the service usually determines whether the respondent is the bona fide agent or employee of shipper respondents conducting private carriage, or whether he is unlawfully performing service as a for-hire carrier. It is the economic realities behind the arrangements, not their form, which is crucial in determining the status of the operations; and the purpose of regulation cannot be frustrated by creation of employer-employee or a principal-agent relationship when, in fact, the transportation is under exclusive control and domination of respondent rather than shippers.—Kapke Investigation of Operations and Practices, 91 M.C.C. 377 (385, 386).

Therefore, regardless of the terms of employment or agency agreements, under which considered transportation is ostensibly conducted by respondent shippers as private carriage, such transportation is for-hire carriage provided by respondent when the shippers enjoy use of interstate motor service, are guaranteed a fixed cost for such transportation service, and are totally disassociated from the risks and obligations normally incident to private carrier status.—Id., p. 386.

Tests which determine whether lease and use of equipment by shipper result in proprietary operation or whether lessor is providing shipper with a for-hire service are: (1) whether exclusive control is vested in shipper, and (2) whether lessor is in substance engaged in interstate transportation. Lease of equipment with drivers to shipper raises a presumption that lessor has control, to rebut which the parties have burden of showing shipper's exclusive right to direct and control the transportation.—Zirbel Transport, Inc., Investigation and Revocation, 91 M.C.C. 705 (708); notwithstanding purported leasing arrangements, respondent shipper does not exercise exclusive control over its alleged "private" carriage, nor has it assumed any significant burdens which are inherent in establishment of real private carriage.—Id., p. 709.

In determining whether a particular arrangement between a shipper and the owner of equipment used to transport that shipper's product results in private or for-hire carriage, all fact and circumstances surrounding the transaction must be weighed; essentially, the issue is who has the right to control, direct, and dominate performance of the service. Hence, although all facts and circumstances are helpful in shedding light on the real nature of the questioned operations, two significant guideposts are (1) the equipment by which the transportation is accomplished, and (2) the driver thereof.—G & W Transfer Co., Inc.—Investigation of Operations, 89 M.C.C. 251 (253)*.

Transportation purportedly performed by shipper under leasing arrangement is for-hire carriage by lessor rather than bona fide private carriage when it assumes no responsibility for compliance with commission's safety regulations and has practically nothing to do with the vehicles except to order their use when it has products to ship, and shifting of drivers back and forth between it and lessor

negates any claim that they are its full-time employees.—Schultz Transit, Inc., Investigation of Operations, 89 M.C.C. 305 (309)*.

Given the basic circumstances of leased vehicles used solely to fulfill transportation requirements of shipper-lessee, the primary question is who has the exclusive right to and does actually control, direct, and dominate the transportation performed; a basic element in resolving that question is relation of the drivers of the leased vehicles to the lessor for, where exclusive control by shipper over his drivers is lacking, the transportation service cannot be said to be under shipper's exclusive domination and direction, and hence is not legitimate private carriage.—Frost Motor Exp., Inc., 89 M.C.C. 155 (157); and in absence of a showing to the contrary, a lease of equipment with drivers by a carrier to a shipper raises a presumption that the transportation is performed by the carrier for compensation and thus is subject to regulation.—United Retail Merchants' Stores, Inc.—Investigation, 89 M.C.C. 183 (185-6).

To have exclusive right to direct and control the transportation service, shipper must control that significant instrumentality of commerce, the driver. Under master leasing agreement covering respondent shipper's use of vehicle owner's equipment from time to time for movements from California to Washington, shipper's "sole right to discharge and/or hire" drivers is illusory, since it is not obligated to employ the vehicle owner at all, and agreement can be terminated on 10 days' notice. Driver's identity may be unknown to shipper until termination of the haul; there is no negotiation for amount of driver's wages, except that they are presumably covered by the lump sum paid the vehicle owner; and since shipper has no control over the southbound movement, it cannot determine in advance the driver's availability under hours-of-service regulations for the northbound trip.—Id., p. 186

Directing the carrier to appear at point A for loading of commodities to be delivered at point B is the extent of shipper's interest and responsibility until delivery of the cargo; carrier assumes responsibility for maintenance of the vehicle, payment of the driver, protection of the public, and safe delivery of the goods; shipper assumes nothing more than liability for transportation charges under the contract. In no instance do the owner-operators or their drivers stand in relation of servants to the shipper-lessee as master; rather, the equipment owners act in capacity of independent contractors who from time to time perform a designated service for a lump-sum payment; such operation is for-hire carriage by respondent carriers, not private carriage by shipper.—Id., p. 187.

In determining status of a purported private carrier operation with leased vehicles, substance thereof rather than its contractual form must be considered; all facts and circumstances surrounding arrangement between shipper and owner of equipment used to transport that shipper's products must be weighed to determine whether it constitutes legitimate private carriage. One test is who has the right to control, direct, and dominate performance of the service, and the most useful indicator is relation of the drivers to the owner of the vehicles; while respondent shipper exercises some control over drivers of leased vehicles, their more vital economic relation is with the owner-lessor, to whom they look for continued employment; under the leasing arrangement, the equipment must be redelivered to lessor in California upon completion of westbound movement, at which time drivers revert to its complete control; also, shipper has no right to divert equipment to destinations not on a relatively direct route to California, or to use it to transport other than edibles, thus does not possess exclusive right of direction and control normal to private carriage.—Center America Corp.—Investigation of Operations, 88 M.C.C. 740 (742-3).

In addition, use of a "substantiality" test turning on extent of assumption of the usual economic burdens of private carriage was approved in 368 US 370. According to the economic criteria emphasized therein, respondent shipper has shifted to lessor such characteristic burdens as the large capital investment in equipment, with risk of premature depreciation or loss, risk of a rise in variable operating costs such as repairs and maintenance, and risk of nonutilization of high-priced equipment—in short, has attempted to acquire transportation at a fixed and definite

cost from lessor, while maintaining that it is the transporter of westbound shipments. Acceptance of that contention would so blur distinction between private and for-hire carriage as to frustrate effective regulation of the latter, contrary to declared intention of Congress.—Id., p. 743.

In determining whether a particular arrangement between a shipper and the owner of equipment used to transport that shipper's products results in ligitimate private carriage by the shipper or in unlawful for-hire carriage by the equipment owner, the recitations of the duties of each party, no matter how closely they conform to requirements established in previous decisions concerning purported private carriage, must yield to consideration of the actual operations of the parties; and, given the basic circumstance of leased vehicles used solely to fulfill shipper-lessee's transportation requirements, the most useful indicator is relation of the drivers to lessor of the vehicles.—Huffman—Investigation of Operations, 88 M.C.C. 437 (440).

Regardless of lease terms charging shipper with duty to employ and pay drivers and confering sole control over them, shipper does not have exclusive right to control the transportation service performed when in fact lessor recommends the drivers to be employed and has thus far recommended only those who formerly worked directly for him; lessor also determines which driver should be assigned to each particular trip, prepares the entire payroll, and acts as an indispensable intermediary in distribution of the checks drawn by shipper. Mere transfer of the same drivers to shipper's payroll, without some positive showing that shipper has assumed their sole direction and control, does not establish that the service performed is private carriage.—Id., pp. 441, 442.

Section 203. (a)(18) [*§303(a)(18) U.S.C.*] **Broker defined.**[Unchanged. See vol. 9, p. 7887.]

Notes of Decisions

Volume 9—p. 7887; Volume 11—p. 9365; Volume 12—p. 10354; Volume 13—p. 11050; Volume 14—p. 11567; Volume 15—p. 12167; Volume 16—p. 12806; Volume 17—p. 13498; Volume 18—p. 14259; Volume 19—p. 15478.

1. Broker defined.—[Vols. 9, 11-19].—A broker is not a carrier; no other conclusion is possible when broker definition in §203(a)(18) is read in conjunction with definition of a motor common carrier in §203(a)(14). Although a broker of round-trip tours controls the itinerary and tour schedule, the carrier has actual control of and responsibility for the physical operation and maintenance of equipment throughout the tour; the important difference, clearly recognized in language of §211(a), is that a broker's function is, not to provide transportation in sense of performing or engaging therein, but to arrange for its provision by authorized motor carriers.—Auch Inter-Borough Transit Co. Extension, 88 M.C.C. 455 (457-8).

Corporate respondent, a purported shippers' association, and individual respondents who acted as its agents, did not unlawfully engage in brokerage of transportation by procuring a separate equipment lease for each shipment transported, when the corporation was treated as the carrier by its shipper members, was identified as the carrier on most of the bills of lading, and bore risk of loss or damage in all instances, thus performing a transportation service for its members.—Western Shippers Assn., Inc.—Investigation, 88 M.C.C. 575 (577).

Section 203. (a)(19 [*§303(a)(19) U.S.C.*] "Services" and "Transportation."

—[Unchanged. See vol. 9, p. 7890.]

Notes of Decisions

Volume 9—p. 7890; Volume 11—p. 9368; Volume 12—p. 10355; Volume 13—p. 11050; Volume 16—p. 12807; Volume 17—p. 13498; Volume 18—p. 14260; Volume 19—p. 15479.

1. Services and operations distinguished.—[Vols. 9, 11, 12, 19].—Consideration of §203(a)(19) together with language of the Supreme Court in 364 US 454 indicates that service as well as physical characteristics should be considered in determining what type of passenger terminal facility is contemplated by the act and will be subject to regulations prohibiting the utilization, in connection with transportation in interstate commerce, of terminal facilities of which the use of all or any part is segregated on the basis of race, creed, color, or national origin.—Discrimination—Interstate M. Carriers of Passengers, 86 M.C.C. 743 (750, 751)*.

Clearly, those regulations would not apply to every independently operated roadside restaurant at which a bus stops solely to pick up or discharge occasional passengers, or to every independently operated drugstore or other ticket agent which does nothing more for benefit of the carrier's passengers than sell tickets and post schedules; but if in addition to selling tickets the agent offers or provides terminal services and facilities for the comfort and convenience of interstate passengers, such as a public waiting room, restroom, or eating facilities, the premises where those services and facilities are made available should be considered part of the carrier's terminal facilities.—Id., p. 751.

2. Transportation defined.—[Vols. 2, 11-13, 16-19].—Part I, §1(3)(a), notes.

The commission's extension of the principle it established in connection with delivery of new automobiles, that delivery of a single car under its own power was no less "transportation" subject to the statute than was the use of one car for towing or carrying others, to cases where an automobile was not being transported for sale but merely for convenience of the owner has been sustained by the courts. [214 F. Supp. 473, aff'd 323 F. 2d 367.]—I.C.C. v. AAA Con Drivers Exchange, Inc., 340 F. 2d 820 (824)*.

Some needs of shippers relate to transportation and some do not; the property transported must be readied for use or sale; activities pertaining to sale are beyond the scope of transportation, while those pertaining to use may or may not be within the realm of transportation. Delineation of what are transportation services, which may be considered in determining shipper's needs for proposed contract carrier service, is peculiarly within the competence and expertise of the commission; it should make the determination in the first instance.—National Trailer Convoy, Inc. v. United States, 227 F. Supp. 730 (734)*.

Assuming that the issue of whether operations in issue are "transportation" was properly before the court, there can be no doubt that automobile wholesaler's described activities in connection with driveaway movement from Kansas City, Mo., to the West Coast of automobiles owned at the outset by west coast dealers constitute transportation within the meaning of the statute.—Studna v. United States, 225 F. Supp. 973 (975-6, 983)*.

Reference in §203(a)(19) to vehicles "used" in transportation in interstate commerce is not equivalent to "only while being so used"; such construction would be a limitation which Congress has not seen fit to impose, and in application of safety regulations would be a disservice to the need for public safety on the highways. It is more reasonable, and in conformity with expressed Congressional intent, to give "used" its fair, ordinary meaning; thus it is wholly immaterial whether a vehicle operated by a for-hire interstate carrier was empty at time of a particular violation, or was engaged in intrastate commerce, or loaded with unidentified cargo moving between unknown points, or unengaged in any operation. Proof that the vehicle was one used in inter-

state commerce in ordinary sense is all that is required to bring it within the commission's jurisdiction.—United States v. Pioneer Motor Service, Inc., 204 F. Supp. 611 (612-3).

As a carrier-owned pallet is property used in transportation of shipper's freight under pallet exchange agreement between named shipper and certain motor common carriers, it is clearly within definition of "transportation" and "services" and is subject to regulation. Though the agreement indicates that title to the pallets remains in original purchaser even after exchange, the pallets are unmarked and as a practical matter would not be identifiable after exchange; also, the agreement provides that when a pallet becomes worn out it shall be replaced by the party then in possession. Under the circumstances, title passes with each exchange, and carrier would always be transporting its own pallets.—Legality of Pallet Exchange Agreement—Kraft, 322 I.C.C. 439 (441-2).

Transportation subject to the commission's jurisdiction includes receipt of a shipment from consignor and its delivery to consignee, whether or not either one takes place at a point located on a public road; reference to public highways in §§206(a) and 209(a) does not limit the commission's jurisdiction over receipt and delivery services performed in connection with interstate transportation.—Lattavo Bros., Inc.-Petition for Interpretation, 98 M.C.C. 767 (769).

Under Part II as under Part I, transportation begins only when merchandise has been placed in possession of a carrier subject to economic regulation; as a shipper is not a carrier subject to economic regulation, transportation must be considered as beginning at the point where shipper tenders his goods to a for-hire carrier, even though he has previously moved them in private carriage. See 298 U.S. 170.—Motor Transportation of Property Within Single State, 94 M.C.C. 541 (550)*.

Proposed interchange of TOFC traffic by applicant railroad with another railroad at a point on latter's line instead of at a point also on applicant's line, to shorten applicant's prior or subsequent haul under its motor-carrier authority for substituted service, is a transportation service at the proposed interchange point.—Green Bay & Western R. Co. Extension, 91 M.C.C. 363 (366).

Stationing of storage or nursing tanks at farms which lack suitable tanks for receipt of liquid fertilizer is an integral part of the transportation service provided on that commodity when in many instances the only feasible method of delivery is to pump the liquid fertilizer from the line-haul vehicle into applicant's nursing tanks. But spreading of such fertilizer at the farms by use of self-propelled tanks is a separate and distinct nontransportation service.—Delaware Exp. Co. Extension, 92 M.C.C. 718 (721, 722, 723).

Contract carrier's proposal in extension application to allow retention of its trailers at jobsites for up to 14 days for storage of nitro carbo nitrate is an accessorial service equivalent to dedication of equipment at destination, and is clearly a transportation service within meaning of the act; otherwise, the commission would be unable to determine lawfulness of trailer retention charges or to establish rules and regulations respecting such charges. Such service is distinguishable from common-carrier proposals to provide such nontransportation services as spreading asphalt in road construction work or washing and repairing foreign cars.—H. Messick, Inc., Extension, 92 M.C.C. 293 (299-300)*.

Authority is not required for interstate transportation of passengers in special or charter operations on behalf of mortuaries. See 72 MCC 708.—Canzano, 95 M.C.C. 568 (570)*.

The solicitation, as such, wouldn't be part of a transportation service. Handling of cash letters and microfilm to and from Chicago for banks in Indiana in a service whereby defendant furnishes a messenger who travels by bus or taxi between banks to pick up items, thence to station to use rail service between South Bend and Chicago, is not transportation within meaning of the act. Public carriers used by the messengers at no time have custody or control over the transportation of said items; on the contrary, the messengers have full custody and are accountable to the defendant for safe handling of the commodities. If it isn't transportation within meaning of the act, it goes without saying it wouldn't be subject thereto.—B.D.C. Corp. v. Armored Carrier Corp., 94 M.C.C. 486 (487-8).

Section 203. (a)(20)-(21) [§*303(a)(20)-(21) U.S.C.*] Interstate operation; Foreign operation.—[Unchanged. See vol. 9, p. 7893.]

Section 203. (a)(22), (23) [§*303(a)(22,23) U.S.C.*] Migrant farm workers.—[Unchanged. See vol. 17, p. 13499.]

Section 203. (b) [§*303(b) U.S.C.*] Vehicles excepted from operation of law.—[Unchanged, except by the Dec. 17, 1963 amendment below. See vol. 18, p. 14260.]

By Public Law 88-208, Dec. 17, 1963, 49 Stat. 545, paragraph (b) was amended by changing the period at the end thereof to a semicolon and adding the following:

* * *or (10) the emergency transportation of any accidentally wrecked or disabled motor vehicle in interstate or foreign commerce by towing.

Historical Note

The commission recommends that §§203(b5) and 402(c) be amended to provide that agricultural cooperatives and shipper associations, respectively, shall be entitled to exempt status thereunder only upon application and proof of eligibility. Also, that §203(b6) be amended so as to limit application of the agricultural and other commodity exemptions to providing direct assistance to farmers, ranchers, and fishermen in transportation of their products to local markets, and to provide appropriate grandfather rights for carriers now operating under the exemptions.—Annual Report, 1962, pp. 201, 202; both renewed, Annual Report, 1963, p. 19; recommendation as to §§203(b5) and 402(c) renewed.—Annual Report, 1964, p. 76.

Notes of Decisions

Volume 9—p. 7894; Volume 11—p. 9371; Volume 12—p. 10356; Volume 13—p. 11051; Volume 14—p. 11567; Volume 15—p. 12169; Volume 16—p. 12807; Volume 17—p. 13499; Volume 18—p. 14263; Volume 19—p. 15480.

1. Constitutionality.—[Vol. 9].—Plaintiff must establish that he was possessed of property in the constitutional sense and that he was deprived of it by order of the commission without an opportunity to be heard, in order to show that the commission's orders (ruling on his applications for (1) "grandfather" rights under §7(c) of Transportation Act of 1958 and (2) a certificate for authority to transport commodities not within ambit of his "grandfather" request) amounted to unconstitutional deprivation of property. Although not expressly stated, language used in the *Milk Transport* case, 190 F. Supp. 350, aff'd per curiam, 368 U.S. 5, makes it clear that no unconstitutional deprivation of property occurred with the passage of the 1958 statute; Congress could include or exclude any commodities from the "grandfather" clause, or could have refused to include any "grandfather" clause in the 1958 amendment. By enacting that statute, Congress clarified and defined the scope of the agricultural exemption, which was its prerogative; and the commission merely exercises reasonable control over plaintiff's operations, of a type and character sanctioned by the Supreme Court in 284 U.S. 248. Complaint dismissed.—Hughes v. United States, 278 F. Supp. 11 (14-16, 18-20)*.

2. Construction and interpretation.—[Vols. 12, 13, 15-19].—Legislative history of §203(b) shows that Congress intended, by the exception in §203(b6), that trucks hauling nonmanufactured agricultural products in interstate commerce be not regulated at all as to matters other than safety of operation or equipment standards. That statutory exception from regulation prevails as against the Kansas commission's attempt to regulate motor carriers hauling, between Kansas points, shipments of unprocessed grains which are moving in interstate commerce.—State Corporation Commission v. Bartlett & Co., Grain, 338 F. 2d 495 (498-9)*.

Motor carrier engaged solely in transportation of agricultural commodities, and therefore partially exempt from regulation under §203(b6), is not exempt from keeping driver's daily logs.—United States v. Handfinger, 364 F. 2d 800 (801-2).

Exception from regulation under §203(b6) extends to all transportation of exempt agricultural commodities, even in "tainted" vehicles, except in mixed loads with non-exempt products; and, prior to 1958 amendment to the statute, the courts held that the exemption covered otherwise exempt commodities in a fresh frozen state. However, plaintiff is not entitled to "grandfather" authority under §7(c) of Transportation Act of 1958 for continuance of its transportation of frozen fruits, berries, and vegetables under its "agricultural commodities" and "farm produce" authorities issued prior to enactment thereof, since such certificates only permit transportation of those items in mixed loads with non-exempt commodities; such mixed load transportation was already regulated prior to the 1958 act; and language and legislative history of that act supports the conclusion that §7(b) therein does not save plaintiff's authority to continue such transportation.—Lester C. Newton Trucking Co. v. United States, 264 F. Supp. 869 (874-6)*.

See also Air Dispatch, Inc. v. United States, n. 40, below.

Insofar as Federal Aviation Agency's assertion of plenary power over Dulles International Airport under the Second Washington Airport Act, including power to regulate operation of for-hire transportation at such facilities, extends only to transportation covered by the taxicab and air-passenger exemption, no conflict arises between the power of that agency and that of the commission.—A. B. — & W. Transit Co. Extension, 88 M.C.C. 175 (179, 184).

20. Casual, occasional, reciprocal transportation.—[Vols. 9, 11, 12, 15, 17-19].—Exemption of §203(b9) does not apply to corporate and individual defendants' business of nationwide transportation of automobiles for owners, in driveaway service, because of repetitious nature of the operations; during previous calendar year defendants entered into about 1,500 "driveaway agreements," of which a substantial number involved interstate transactions.—I.C.C. v. Interstate Auto Shippers, Inc., 214 F. Supp. 473 (475, 476).

See also I.C.C. v. AAA Con Drivers Exchange, Inc., case, §203(c), n. 3.

Defendant, although ostensibly an employment service furnishing drivers to shippers of motor vehicles, actually held out and provided a complete transportation service for compensation anywhere in the United States for any shipper willing to pay its price; thus, it was a common carrier engaged in transportation as a regular occupation or business and, as such, was not within exemption of §203(b9).—United States v. Aides, Inc., 211 F. Supp. 122 (125).

Respondent's occasional transportation of automobiles as "good will" to west coast dealers who have purchased them in Kansas City area is not within exemption of §203(b9); he admittedly retains the $25 deposit of each driver as compensation for these activities; moreover, that section applies only to persons "not engaged in transportation by motor vehicle as a regular occupation or business," and respondent admittedly engages therein on a regular basis.—Studna Investigation of Operations, 88 M.C.C. 52 (55)*.

See also Service Associates case, §203(c), n. 3.

30. Transportation in national parks and reservations.—[Vols. 9, 11, 12, 14, 15].—As operations authorized between Washington, D.C., and Dulles International Airport and between latter and National Airport, though clearly requiring authority from the commission, will be conducted in part over segments of George Washington Memorial Parkway, over which the Secretary of Interior exercises administrative control through the office of National Capital Parks, carriers operating over that highway must comply with present and future regulations through which the control of the Secretary is exercised.—A.B. & W. Transit Co. Extension, 88 M.C.C. 175 (184).

32. Transportation of school children.—[Vols. 9, 19].—Although defendant asserts that a substantial portion of its charter service found to be beyond scope of its incidental charter rights under §208(c) is performed for schools, such transportation is not within the

§203(b1) exemption of schoolbuses; such transportation is exempt only when it is an integral part of the school's educational program and is provided by the regular schoolbuses, whereas defendant's operations are conducted with vehicles used as regular buses in a commercial interstate passenger operation and not vehicles "employed solely in transporting school children and teachers to or from school."—Brunswick Transp. Co., Inc.—Revocation of Certificate, 91 M.C.C. 899 (904-5).

Transportation of school children and their teachers in connection with school-related activities on trips sponsored by school authorities is within scope of §203(b). While language of that exemption is not entirely clear, "school" as used in the abstract refers, not to a building, but to a body of students and teachers. Schooling today encompasses more than classroom instruction, and to find that the transportation exempted is limited to that to and from school buildings, and does not embrace transportation to places of historical or cultural interest unless the school building serves as one terminus of the trip, would preclude performance by schoolbus operators who are the natural persons to whom school authorities would look to for such transportation. Such a result would be contrary to public interest and would create regulatory problems without really benefiting certificated passenger carriers.—Keller, 94 M.C.C. 238 (240-1)*.

40. Transportation incidental to aircraft transportation.—[Vols. 11, 14, 15, 17-19].—Civil Aeronautics Board acted properly in applying criteria in its own regulations for determining air carriers' pickup and delivery zones, and in not considering itself bound by the commission's criteria of a "terminal area," in authorizing air freight forwarder to perform surface pickup and delivery transportation "in connection with air transportation" between Boston, Mass., and Nashua, N. H., 34 miles apart. In effect, CAB published new ground rules, since result of the order is to declare Nashua within the Boston pickup and delivery area so that all air carriers and air forwarders may, on approval of tariffs filed, operate similar surface transportation; however, in holding that CAB applied proper standards, the court does not imply that the commission is bound to rule that Nashua is within the Boston terminal area for the purpose of granting exemptions under §203(b7a) of its statute.—Law Motor Freight, Inc. v. C.A.B., 364 F. 2d 139 (140, 142, 145). [Not arising hereunder.]

The CAB published its regulations and procedures in concert with the commission; and the system, devised to avoid interagency conflict (particularly that arising out of CAB's interpretation of "services in connection with * * * air transportation" and the commission's interpretation of services "incidental to transportation by aircraft) while preserving agency sovereignty, is to give CAB the first judgment, which shall be given non-conclusive respect by the commission. Furthermore, the commission not having been called on for its decision as to the matter in controversy, there is not even a conflict between administrative actions.—Id., pp. 140, note, 145.

In remanding investigation proceeding to the commission for further findings of fact to support its conclusion that considered motor carrier operations of plaintiff, between Greater Wilmington (Del.) Airport and Baltimore, Md., do not fall within the incidental-to-air exemption, the court does not hold that the commission's apparent policy of holding "incidental" to transportation by aircraft all motor transportation within 25 miles of a particular airport is unreasonable or outside of the commission's discretion. However, a clear finding of fact should have been made to substantiate the final determination that plaintiff is not entitled to the §203(b)(7a) exemption claimed. If after full consideration, the commission finds facts justifying its determination, its order should be affirmed; the court retains jurisdiction pending such consideration and determination.—Zantop Air Transport, Inc. v. United States, 250 F. Supp. 623 (626)*.

In view of the commission's report on reconsideration, following remand for further findings of fact to support its conclusion that plaintiff's motor carrier operations were not within the §203(b7a) exemption, which amplified and affirmed its prior decision, as well as its written statement (requested by the court) indicating what specific findings of fact sup-

port its determination of the exemption issue, the court concludes that the commission's definition of incidental-to-air motor transportation is within the limits of statutory authority and, also, that its findings that plaintiff's operations do not fall within such exemption are supported by substantial evidence. Accordingly, the commission's decisions and orders are affirmed; complaint dismissed with prejudice.—Id., 272 F. Supp. 265 (266-7)*.

Action challenging the commission's regulations governing exempt incidental-to-air motor transportation, adopted pursuant to §203(b7a), insofar as the rules exempt transportation performed in emergencies. The commission correctly interpreted the statute when it held, in 95 MCC 71 and 95 MCC 526, that motor transportation of property and passengers performed in bona fide emergencies was "incidental" to transportation by aircraft, and therefore exempt; and that such emergency transportation was not substituted motor-for-air line-haul service even though it extended from one airport to territory normally served by another. The commission's differentiation of emergency situations is not arbitrary or capricious, but on the contrary is amply warranted; and inter-city trip, which is not generally "incidental" to an air trip, is inescapable when an emergency occurs and usual local landing is impossible; and the airline absorbs cost of such trip and does not further hinder shippers or passengers.—National Bus Traffic Association v. United States, 249 F. Supp. 869 (871-2)*.

Also, it is legally significant that considered statute has been amended several times since the commission's conclusion in 48 MCC 310, which dealt with the same issue, that sporadic and irregular operations, emergency in character, furnished at airline's expense as a substitute for impossible or impracticable air transportation and not as a complement of, but subordinate to, regular air service, were within the §203(b7a) exemption; such longstanding administrative interpretation, applying to a substantially re-enacted statute, is deemed to have received congressional approval and has the effect of law. See 380 US 678. While construction of "incidental" in the statute might not call for "expertise" wisdom, nevertheless the commission is probably far more aware than a court of the overall considerations applicable to classify a particular motor trip as being within the incidental-to-air exemption; and the courts should be slow to overturn such administrative decisions.—Id., p. 872.

The court views "incidental" as meaning a minor adjunct to the prime matter, of lesser significance, but related and necessary to complete effectuation of the matter in chief. Surely the final phase of the journey on land from an airport to the city where the air trip ends is incidental to transportation by air; and it is immaterial whether it is the usual short trip or a longer trip necessitated by an emergency; such a journey is not of such overall significance that it must be deemed outside the word "incidental" to the air trip. There is no doubt that an emergency situation justifies specialized treatment; the commission's orders, in all respects, sustained..—Id., p. 873.

The commission clearly had jurisdiction to determine the extent of the statutory exemption provided by §203(b7a) and to regulate plaintiff's operations beyond scope of the exemption as so defined. The line of demarcation between exempt and unexempt service is equally important for purposes of application of permissible regulations to motor carriers and for the withholding of impermissible ones by the commission. The commission has the broad power under §204(a)(6) to administer and enforce the provisions of Part II, and to make all necessary orders and prescribe rules, regulations, and procedures for that purpose. Determination of the area of exemption through case-by-case adjudication, or by general rule subject to case-by-case application is within the commission's competence; and no real dissonance appears, in theory or in practice, between the voices of the commission and the Federal Aeronautics Board in this area, taking into consideration their respective objectives and functions in view of the national transportation policy.—Wycoff Co., Inc. v. United States, 240 F. Supp. 304 (308-9)*.

Movements of freight by motor carriers "incidental to transportation by air" within contemplation of the statute must mean something different than motor carrier movements preceding or following air transportation: the

required relationship to air transportation must be "incidental," and in considering the meaning of the exempting language it is proper and necessary to consider the nature and circumstances of the air transportation, including the holding out of its extent by the approved tariffs of the airlines. A movement incidental to air transportation must be incidental to some particular air transportation, not merely to the broad system of air traffic as a whole, and one of the relevant circumstances would seem to be its context with the regulatory plan to which the airline in question is subject. Though this is not the only possible factor, and indeed is not accepted as such by the commission's regulation defining the transportation embraced by the exemption (49 CFR 210.40), it is a relevant circumstance historically, practically, and conceptionally, and its application in plaintiff's case cannot be deemed irrational.—Id., p. 311.

Similar recognition of the limited meaning of the term "incidental to air transportation" in relation to the actual operations of the airlines goes far toward answering plaintiff's contention that the regulation—which limits the exempt zone to the terminal areas of the direct air carriers as provided in tariffs accepted by the Aeronautics Board—must be specially tailored for areas where airports, particularly those receiving jet aircraft, are widely spaced. Congress could not have meant by the exemption to fill the gaps between airports, however extended, by a wholesale substitution of unregulated motor carrier service. The exemption covers handling of airfreight by motor carriers only to the extent that this can reasonably be deemed incidental to air transportation facilities and services in actual operation; to allow a motor carrier by virtue of any claimed exemption from regulation to transport shipments any distance so long as they have prior or subsequent movements by aircraft could only result in the rapid deterioration of effective motor carrier regulation in interstate commerce.—Id., p. 311.

While the Aeronautics Board ordinarily does not approve tariffs that provide for terminal deliveries beyond 25 miles from an airport, the commission has recognized that inflexible mileage restrictions should not be imposed, but that the relation of airline tariffs approved by the board to incidental transportation services furnishes at least a general practical guide, subject to reevaluation by the commission under special circumstances. The definition of the exempt zone, as applied to plaintiff's transportation of airfreight to or from Salt Lake City Airport, was not unreasonable or arbitrary, and even its exclusion of a large industrial plant located slightly beyond 25 miles from the airport and hence not included in approved airline tariffs cannot be called arbitrary or capricious in view of the entire record. Since the decision under review rests on a rational basis, was justified by adequate findings of fact supported by substantial evidence, and was in keeping with persuasive historical and practical considerations, the informed discretion of the commission must be upheld.—Id., pp. 310, 311.

Since the commission has jurisdiction to regulate all motor common carriers engaged in movement of goods in interstate commerce with regard to qualification and hours of work of carrier employees and the safety regulations and equipment standards to be met by carriers, and also has authority to economically regulate all motor vehicles used in interstate commerce except when used exclusively in incidental-to-air transportation of goods, determination of scope of that exemption must logically fall on the commission. Whether that determination is accomplished on an ad hoc basis or by use of the rule making power does not alter the right to make the determination.—Air Dispatch, Inc. v. United States, 237 F. Supp. 450 (453)*.

No conflict has arisen between the commission and the Civil Aeronautics Board as to regulations adopted by the commission to govern such exempt transportation; nor have those regulations been attacked as an unreasonable exercise of power vested in the commission; therefore, inquiry into substance of the regulations would be premature. Finding that the commission has jurisdiction to define scope of the §203(b7a) exemption is dispositive of litigation attacking its statutory authority to promulgate the regulations in issue.—Id., pp. 451-3.

To come within scope of the incidental-to-aircraft exemption of §203(b7a), motor transportation must be confined to transportation

in bona fide collection, delivery, or transfer service of shipments which have been received from, or will be delivered to, an air carrier as part of a continuous movement under a through bill of lading covering, in addition to the air line-haul movement, the collection, delivery, or transfer service performed by motor carrier.—Motor Transp. of Property Incidental to Air, 95 M.C.C. 71 (85)*.

It is immaterial whether a shipment moves under the billing of a direct air carrier or an air freight forwarder as far as the operation of the exemption is concerned. Since the Federal Aviation Act classifies both as air carriers, and an air freight forwarder is considered by the C.A.B. to be an air carrier, rules governing participation of air freight forwarders in air-motor transportation make no distinction between direct and indirect air carriers. A substantial portion of air freight forwarder traffic moves to or from points beyond the terminal areas of air carriers, with shippers being charged air forwarder rates between air terminals and motor carrier's published charges between air terminal city and ultimate origin or destination; such forwarder service is similar to that furnished by direct air carriers through connection with regulated motor carriers; and the motor movement beyond airline terminal areas is not within the §203(b7a) exemption.—Id., pp. 72-3, 88-90.

Geographical limits within which exempt transportation may be performed are not fixed specifically but, as held in 61 MCC 595, motor carriage to be exempt must be performed within terminal area established by the line-haul air carrier in tariffs filed with the CAB. However, since many airfreight users' plants are outside present terminal zones established in air carriers' tariffs, and geographical limit of the §203(b7a) exemption would automatically expand should the CAB allow air carriers to extend their terminal areas, the commission should retain some control in order to ensure that the exempt transportation is truly "incidental" to air carriage. Therefore, regulations adopted (reflecting the definition in 61 MCC 595) provide that, either upon the commission's own motion or on petition of any interested person, a proceeding may be instituted looking toward individual determination or definition of geographical extent of the §203(b7a) exemption at a particular point.—Id., pp. 76-8, 85-7.

It is not advisable to set any specific mileage limit within which substituted motor-for-air transportation in emergency situations, such as those due to bad weather or equipment failure, would fall within the statutory exemption. It is stressed, however, that such motor transportation must be truly emergency in character, and must be caused by conditions beyond control of the air carrier, in order to be exempt under §203(b7a); over-solicitation of available cargo space does not constitute such an emergency situation; nor does fact that airport cannot receive jet planes clothe an operation to and from nearest jet airport with the character of an emergency. Decision as to what constitutes an emergency situation must be made by direct air carriers in the interest of public safety.—Id., pp. 75, 87-8.

Incidental-to-aircraft transportation of passengers, unlike the transportation of property, is exempt under §203(b7a) even though not arranged or paid for by the line-haul air carrier or provided under a through ticket; but it may not involve a motor movement of too great a distance. While prior or subsequent movement by a line-haul carrier is fundamental to the concept of incidental transportation, it is equally fundamental motor carriage must be distinguishable from line-haul motor transportation; hence, incidental-to-air motor carriage of passengers must not involve a movement over so great a distance as to be characteristic of an independent journey approaching in significance (rather than being subordinate to) the prior or subsequent air journey.—Motor Transp. of Passengers Incidental to Air, 95 M.C.C. 526 (528-9, 533)*.

And unlike such exempt transportation of property, which must be limited to that performed within line-haul air carriers' terminal areas established in tariffs filed with CAB, the necessary definiteness provided by such tariff filings can, with respect to transportation of passengers, be provided effectively only by setting precise limits to the geographical extent of the exemption. Data of record is convincing that motor passenger service for a distance in excess of 25 miles takes on the char-

acter of a line-haul operation, as distinguished from the customary terminal service; therfore, prescribed regulations governing the incidental-to-air motor carriage of passengers set a radius of 25 miles of the pertinent airport as a geographical limit to the exemption; however, all portions of the commercial zone of any municipality, or any part of which is within such 25-mile radius, will be deemed to lie within the exempt zone and, as was done in 95 MCC 71, provision is made for individual determination of the exempt zone at a given airport where such action is shown to be justified.—Id., pp. 533-5.

But, following the reasoning and decisions in 48 MCC 310 and 95 MCC 71, no specific mileage limit is fixed for substituted motor-for-air transportation of passengers in emergency situations; such transportation must be truly emergency in character; and determination that an emergency exists rests with officials of the air carrier.—Id., pp. 529, 537-8.

In view of modus operandi of both the airlines and limousine operators, to require that exempt passenger transportation entail through ticketing or travel at the air carriers' expense would render virtually all interstate limousine service subject to certificate and permit requirements of the act. Such a requirement, long after passage §203(b7a), would disrupt airport transportation services, and seems unnecessary because of economic and practical considerations which should limit the service to that performed as an adjunct to line-haul air transportation. Nor is a requirement applicable to movement of freight necessarily appropriate to the transportation of passengers.—Id., p. 535.

Consideration of dictionary definitions of "incidental" together with prior interpretations of the §203(b7a) exemption, as applicable both to passenger and property carriers, is persuasive that Congress must have intended "incidental to transportation by aircraft" to mean something more than "having an immediately prior or subsequent movement by aircraft." It could be argued, on analogy with §203(c), that such "incidental" transportation must be performed within a reasonable terminal area of the air carrier and be limited to a bona fide terminal, as distinguished from line-haul service. The CAB proceeding to determine zones within which air cargo carriers may provide pickup and delivery service, and the commission's pending rulemaking proceeding involving incidental-to-air transportation, are both limited to transportation of property; a similar rulemaking proceeding will be instituted to determine scope of the §203(b7a) exemption with respect to transportation of passengers.—Hatom Corp., 91 M.C.C. 725 (729-30)*.

For those reasons, no determination should be made in instant application proceedings of area in which the exemption of §203(b7a) might apply to passenger operations; however, because applicants' proposed limousine service involves distances of 26 to 65 miles, none of the proposed operations should at this time be found to fall within the geographic scope of that exemption.—Id., pp. 731, 733.

To come within the incidental-to-aircraft exemption of §203(b7), collection, delivery, or transfer service in vicinity of Salt Lake City Airport on shipments moving on the direct (line-haul) air carrier's bill of lading must be confined to points named in such carrier's Salt Lake City Airport terminal area tariff as filed with CAB; and if shipments move under billing of an air forwarder (an indirect air carrier), such service must be confined to points in the forwarder's Salt Lake City Airport terminal area tariff.—Wycoff Co., Inc., Extension, 89 M.C.C. 369 (371)*.

Since an air freight forwarder is in effect an indirect air carrier and has been so defined and classified by Civil Aeronautics Board, and the line-haul movement of the freight is performed by an air carrier, the freight is "air freight" whether tendered to delivering motor carrier by a direct air carrier or by an air freight forwarder.—Panther Cartage Co. Extension, 88 M.C.C. 37 (41).

Following decision in 61 MCC 587 that the reasonable terminal area of an air carrier is that established by such carriers in their tariffs filed with CAB, "incidental" motor operations confined solely to transportation between the terminal area points and the airport city named in the air freight forwarder's tariff are legitimate collection, delivery, and transfer services, provided such pickup and delivery points are not beyond the limits of the nal area established by the air carrier which

performs the air portion of the line-haul transportation; conversely, if the motor operations extend beyond the limits of the terminal area established by the line-haul air carrier, such operations are line-haul motor operations not within the §203(b7a) exemption even though conducted to points named in the air forwarder's tariff.—Id., pp. 40, 41.

Since the exemption of §203(b7a) speaks of transportation by motor vehicle when incidental to transportation by "aircraft," rather than by "air carriers," and following a strict interpretation of exemptions, interpretation limiting areas in which motor transportation (including that performed for air freight forwarders) is partially exempt to the terminal areas of the air carriers whose aircraft perform the air line-haul is entirely proper; any broader interpretation would, without justification of record, serve only to divert traffic from authorized motor carriers. Accordingly, any points named in supporting air forwarder's tariff which are within the terminal areas of air carriers, serving the Cleveland airport may be served by applicant without authority from the commission, and those which are not, may not be so served.—Id., p. 41.

Following principle established in 48 MCC 310, proposed motor service between Cleveland and the Columbus, Dayton, and Akron airports, limited to occasional emergency shipments transported at the air forwarder's expense and arising from inability of the line-haul air carrier to accept the shipments for air transportation because of airplane overloads or adverse weather conditions, is likewise within exemption of §203(b7a).—Id., p. 41.

Assuming that each of supporting air forwarders has filed with CAB its own tariff providing rates between Bradley Air Field, Conn., and surrounding terminal area points, that the same rates apply at such points as to and from Bradley Air Field, and that pickup and delivery services performed by applicant are included in such rates, applicant's transportation of shipments tendered by the forwarders under their bills of lading for collection, delivery, or transfer requires no authority from the commission if such terminal area points are not beyond limits of the terminal area established by the air carrier that performs air portion of the line-haul transportation.—Special Delivery, Inc., Extension, 88 M.C.C. 275 (276).

And occasional movements between Bradley Air Field and five other airports in Massachusetts, New York, and New Jersey, arising from inability of airlines to accept shipments for air movement because of inclement weather or airplane overloads, are likewise within exemption of §203(b7a) if the air forwarders' tariffs list such other airports, shipments move on the forwarders' bills of lading, and they absorb applicant's charges. However, authority is required for proposed transportation for supporting forwarders of parcels from Bradley Air Field to the other five airports on a regular basis and, also, of parcels and baggage between Bradley Air Field and points in Connecticut and western Massachusetts not designated as terminal area points in the forwarders' tariffs.—Id., pp. 276-7.

Transportation of a shipment received from or delivered to an air carrier as part of a continuous movement under a through air bill of lading is "incidental" to transportation by aircraft when it is limited to a bona fide collection, delivery, or transfer service within a reasonable terminal area of the air carrier; such a reasonable terminal area was found in 61 MCC 587 to be that established by the air carriers in their tariffs filed with Civil Aeronautics Board, on assumption that CAB would reject any publication resulting in unreasonable enlargement of such terminal area. —Air Cargo Terminals, Inc., Extension, 88 M.C.C. 468 (469).

And if traffic is tendered to the motor carrier by an air freight forwarder (an indirect air carrier) under such forwarder's bill of lading, the motor operations are considered legitimate collection, delivery, or transfer if confined to such points named in the forwarder's tariff as are not beyond limits of the terminal area of the direct air carrier which performs the air portion of the line haul.—Id., p. 470.

Motor operations in Anchorage, Alaska, area in connection with prior or subsequent air movement from or to "Outside" may or may not be exempt under §203(b7a); see 61 MCC 587 and 88 MCC 37.—Al Renk & Sons, Inc.—Alaska "Grandfather" Application, 89 M.C.C. 91 (96, note).

Though applicant may operate under the

air-passenger exemption in transporting between Washington, D. C. and National and Dulles-International Airports (and between those airports) persons having an immediately prior movement, or intending an immediately subsequent movement, by air, that exemption does not extend to persons who will not themselves travel by air, even though they have good reason to utilize proposed limousine service.—A.B. &W. Transit Co. Extension, 88 M.C.C. 175 (179, 182-3).

Respondent air carrier's motor transportation of property, having a prior or subsequent movement (to or from Detroit) by air, between Greater Wilmington (Del.) Airport and Baltimore, Md., 65 miles, does not fall within partial exemption of §203(b)(7a), but is a separate line-haul motor operation for which authority is needed. Motor transportation, to be within that exemption, must be a bona fide collection, delivery, or transfer of shipments, within a reasonable terminal area of the air carrier as construed in 61 MCC 587 and 95 MCC 71. Record clearly shows that respondent does not serve Detroit-Baltimore shippers by use of the airport serving Baltimore, but seeks to link the Wilmington Airport to the Baltimore area in an inter-community line-haul service which requires appropriate authority; and respondent's argument that it needs a broader terminal area for an efficient Detroit-Baltimore airline service is not material to determination of lawful scope of the statutory exemption.—Zantop Air Transport, Inc.—Investigation of Operations, 102 M.C.C. 457 (462-3)*.

As established in 61 MCC 587, and other prior decisions, motor transportation of property in order to come within statutory exemption of §203(b7a) must be confined to transportation in bona fide collection, delivery, or transfer service, of shipments received from or to be delivered to an air carrier as part of a continuous movement under a through air bill of lading covering, in addition to line-haul movement by air, the collection, delivery, or transfer service by motor carrier. While not defining geographical limits of such exempt carriage, cited case clearly distinguishes motor transportation on behalf of, and within terminal area of, an air carrier from transportation which, though essentially part of a through air-motor service, extends beyond air carrier's terminal area and must be considered an independent line-haul motor service; former being within the exemption while latter is not; and terminal areas ordinarily are those established by air carriers in tariffs filed with the C.A.B. And those criteria have been applied uniformly since the cited decision.—Film Transit, Inc., and Air Dispatch, Inc.—Investigation, 98 M.C.C. 145 (150-1).

Motor carrier respondent does not deny that it has transported, without specific authority, a large volume of traffic between Memphis airport and numerous points located outside air freight-forwarder respondent's terminal areas as established in valid tariffs on file with C. A. B. Designation in that manner of points to be served through motor carrier collection and delivery service has long been regarded as the most basic characteristic of a true "incidental-to-air" operation; and if, as respondents urge, determination of such terminal areas is reserved by statute solely to the C. A.B., it would have been a simple procedure for the air forwarder to file with that agency an appropriate tariff naming all points presently at issue. That requirement not having been met, it is clear that under the most liberal interpretation of §203(b7a), and irrespective of distances involved, the questioned motor transportation is not within the "incidental-to-air" exemption. Respondent has been, and is, engaged in unlawful line-haul motor carriage; cease and desist order entered.—Id., pp. 151-2.

Although the incidental-to-aircraft exemption of §203(b7a), insofar as property carriers are concerned, is being reexamined in a rule-making proceeding, for purpose of expeditious disposition of instant application the issues are treated in light of 61 MCC 587, which found that the exemption embraces only bona fide collection, delivery, or transfer of shipments received from or delivered to an air carrier as part of a continuous movement under a through bill of lading covering that service as well as the air line-haul, and 83 MCC 229, which found that while a pickup and delivery service may be essentially a part of a through air-motor service, it is not incidental-to-air within the exemption unless it is performed for or on behalf of an air carrier.—

Con-Ov-Air Air Freight Service, Inc., 92 M.C.C. 526 (527-8).

While airlines' agency which arranges for motor pickup and delivery for its members lists the seven involved points in Middlesex County, N.J., among those receiving such service on shipments moving to or from New York City airports, a substantial portion of applicant's service is performed on behalf of, and pursuant to arrangements with, shippers and consignees rather than air carriers; and though the traffic normally moves on a single airline waybill to or from shipper's or consignee's place of business, applicant's charges are separately itemized, and it advances those charges to the air carriers on shipper's behalf. Such operation is independent line-haul service outside scope of the exemption.—Id., pp. 528-9.

Although applicant seeks authority between two airports and points apparently within terminal areas of air carriers serving them, the service proposed will not be incidental to transportation by aircraft within exemption of §203(b7a) when he will transport shipments under his own bills of lading and not as agent for the one tendering him the traffic.—Nickerson, 88 M.C.C. 186 (188).

45. Operation by or for agriculture cooperative associations.—[Vol. 19].—Appellant cooperative (organized for primary activity of transporting its members' farm products and supplies) being a "cooperative association as defined in the Agricultural Marketing Act," its trucking operations are exempt from economic regulation by the commission under §203(b5); and such cooperative does not lose its statutory status by engaging in an activity other than its primary activity, so long as such other activity is incidental to the primary one and necessary to its effective performance. Nothing in the legislative history of §203(b5) indicates that Congress intended to limit the type of commodity hauled or otherwise condition the exemption granted therein; absence of a commodity limitation in §203(b5) contrasts with presence of such limitations in the preceding and following §203(b) exemptions, and conclusion that the difference was deliberate is strengthened by fact that provisions of §203(b4a) and §203(b5) were initially stated as clauses in a single sentence.—Northwest Agricultural Coop. Ass'n v. I.C.C., 350 F. 2d 252 (253-5, 256)*.

Appellant's transportation of non-farm products and supplies was incidental and necessary to its farm-related transportation both in character and amount—incidental because limited to otherwise empty trucks returning from hauling member farm products to market, and producing a small return in proportion to its income from farm-related transportation; necessary because it is not economical to operate trucks empty on return trips, and because the additional income is no more than necessary to render performance of its primary farm transportation financially practicable. Appellant is not engaged in a "general trucking business"; its trucking operation, viewed as a whole, is a farm service performed jointly by its members for themselves; therefore, since considered return haul transportation did not deprive it of its character as a "cooperative association" under the Agricultural Marketing Act, it retained its right to the §203(b5) exemption.—Id., pp. 255, 257.

Defendant cooperative association is not entitled to exemption under §203(b5) when it does not meet definition of such an association set forth in the Agricultural Marketing Act; its sole business is for-hire motor transportation of property for members and nonmembers, a substantial part of transportation it performs for members involves processed materials and is not related to their activities as farmers, and it does not meet requirement of that definition as to amount of business transacted for members and nonmembers. The carriage of dressed and frozen meats and packinghouse products for shipper members in their capacities as packinghouses, of cattle for a member in its capacity as a cattle dealer, and of fruits for two members in their capacities as motor carriers, not being related to farming activities of those members, is not "member business" within that statute. The cooperative does not qualify as a bona fide agricultural cooperative association.—I. C. C. v. All American Association, 281 F. Supp. 18 (20-22).

Even if shipper association to which defendant purportedly trip-leased vehicles with drivers were found to be an exempt coopera-

tive association within purview of §203(b5), any such exempt status would not redound to defendant's benefit in considered transportation of an unauthorized commodity because (1) as an authorized carrier it is specifically prohibited by §207.6(a) of the commission's leasing regulations from leasing to any private carriers or shippers, and (2) the purported leases were totally illegal by their very provisions so that the vehicles involved were not "controlled and operated" by the cooperative as required by §203(b5), but were in fact operated under defendant's control.—United States v. Lowther Trucking Co., 229 F. Supp. 812 (815).

Defendant cooperative association is not entitled to exemption under §203(b5) when it does not meet definition of such an association set forth in the Agricultural Marketing Act; it does not deal in farm products or supplies, does not control and operate vehicle in for-hire transportation service for farmer members, and does not meet requirement of that definition as to amount of business transacted for members and nonmembers. While five farmers are its incorporators, members, officers, and directors, the cooperative was organized by two individuals and their wholly owned vehicle leasing company so their vehicles could "keep rolling"; those two individual defendants sign all the cooperative's checks, determine all matters of policy and detail, and manage all the transportation; farmer members are not familiar with its business and transportation, and no service is rendered for them individually. The cooperative does not qualify as a bona fide agricultural cooperative association; it exists in name only and is a fictitious sham.—I.C.C. v. Iowa Cooperative Assn., 236 F. Supp. 873 (875-6, 877-8).

And defendant hog slaughtering plant was not incorporated as and does not qualify as an agricultural cooperative association. It is an ordinary commercial business corporation and was formed as a civic endeavor for promotion of industrial development of the community. While many of its stockholders are farmers, each stockholder has many votes as shares of stock owned, and there is no limitation on the rate of dividend that may be paid. Nor is the plant eligible for membership in defendant cooperative since it does not raise or feed hogs, and all those slaughtered by it are purchased from outside sources. As used in statutory definition of such a cooperative, "farmers" includes not only individuals, but also corporations, partnerships, and other business entities; however,such persons (whether natural or corporate) must be engaged to some extent in the common pursuit of farming in order to qualify for membership in a lawfully constituted cooperative; the slaughtering plant is not a farmer and is not engaged in agricultural production.—Id., pp. 876-7.

See also Agricultural Transp. Ass'n of Texas v. King, §202(b), n. 5.

Whether defendant nonstock corporation is entitled to operate under the agricultural cooperative exemption of §203(b5) depends on whether it qualifies under the Agricultural Marketing Act, which requires that it be owned and controlled by farmers acting together for their mutual benefit to promote the merchandising of their farm products, or in purchasing, distributing, furnishing, etc., farm supplies or farm business services; such an association may not deal in farm products, supplies, or business services with or for nonmembers in an amount greater in value than the total amount of such business transacted by it with or for members.—I.C.C. v. Nelson Cooperative Marketing Assn., 209 F. Supp. 697 (700).

A "farmer" is a person, natural or corporate, actively engaged in farming operations to some extent; and persons or corporations engaged in businesses such as canneries, meat packinghouses, dealers in produce, and the like, do not qualify as farmers solely because farm products are used by them as raw materials in their manufacturing processes. Similarly, manufacturers of farm implements and farm supplies do not qualify as farmers merely because their products may be used on a farm or by a farmer. Thus, business transactions with such nonfarming entities is not member business for purposes of the Agricultural Marketing Act. The commission's views as to qualifying criteria of a bona fide cooperative association and nature of the service it may provide, expressed in 86 MCC 5, are persuasive and entitled to special consideration,

particularly in light of the absence of legal precedents.—Id., pp. 700-1.

Under the precepts of the Agricultural Marketing Act, transportation performed by a cooperative association must directly benefit the farming operations of its members, regardless of whether the services are performed for members or nonmembers. Transportation of canned goods from canneries to grocers and chain stores, of processed meats from packinghouses to meat dealers, of cheese from brokers to distributors, and other transportation which is not necessary to farming activities of farmer members are activities in which even a bona fide cooperative association may not rightfully engaged.—Id., p. 701.

Accordingly, defendant does not qualify as such an exempt cooperative association, since (1) it is not a producer-controlled association, its operations being controlled and managed by three individuals not engaged in any farming activities related thereto; (2) its primary purpose is not the marketing of farm products of, of the furnishing of farm business services to, its members, and its sole activity in transportation for compensation which it mostly performs for canneries, packinghouses, and other persons ineligible for membership; and (3) the value of its dealings in services with or for nonmembers or "members" who are actually ineligible exceeds that of its dealings with eligible members, being over 90 percent of the total value of its transportation, and it does not attempt to determine whether shippers submitting traffic to it are engaged in farming operations.—Id., pp. 699-700, 701.

50. Carriage of livestock, fish, agricultural commodities.—[Vols. 9, 11-19].—Since "agricultural commodities" are those products, whatever they might be at any point of time, which are exempt under §203(b6) when they are carried in straight loads, the purpose of an interstate certificate to transport agricultural commodities can only be to authorize transporation of those items in mixed loads with non-exempt goods. Accordingly, acceptance of the commission's interpretation that coverage of the "agricultural commodities" class in such certificates remains fixed as of time of issuance thereof is difficult because, as judicial or legislative changes are made in items encompassed within the §203(b6) exemption, it is arguable that there are corresponding changes in coverage of "agricultural commodities" certificates.—Lester C. Newton Trucking Co. v. United States, 264 F. Supp. 869 (876)*.

Transportation of fresh hog carcasses, which the court finds are fresh meat for which a degree of refrigeration is required, is not within the agricultural commodity exemption of §203(b). While dressed poultry was held to be an exempt agricultural commodity, not manufactured, in 113 F. Supp. 599, in amending the statute since that time Congress specifically incorporated into §203(b6) the commission's Administrative Ruling No. 107 which shows: Meat and meat products, fresh, frozen or canned—not exempt. Although live hogs are ordinary livestock when they are shipped into defendant slaughtering plant, after they are killed and processed as described they are no longer ordinary livestock; they have become meat, or as variously described, fresh pork, dressed pork, fresh hog carcasses, etc., having lost their exempt status as "ordinary livestock." Furthermore, the parenthetical phrase "(not including manufactured products thereof)" in §203(b6) does not modify "ordinary livestock" but relates only to "agricultural (including horticultural) commodities" therein.—I.C.C. v. Iowa Cooperative Assn., 236 F. Supp. 873 (878-9).

See also I.C.C. v. Schultz Transit, Inc., §203(c), n. 3.

Dehydrated alfalfa meal was classified as nonexempt by the commission's Administrative Ruling No. 107, which Congress adopted in the 1958 amendment of §203(b6), and transportation thereof requires appropriate authority. Defendant had at least constructive knowledge of the nonexempt status of that commodity by virtue of its possession of Ruling 107, and its unauthorized transportation thereof under purported trip-leases of vehicles with drivers to a shipper association violated §206(a) when, under terms of the "leases," such operations were in fact conducted under its control.—United States v. Lowther Trucking Co., 229 F. Supp. 812 (814, 815, 817).

See also Atchison, T. & S.F. Ry Co. v. United States, §204(e).(f). n. 2.

Any authorized interstate motor carrier may engage in transportation of exempt commodities without affecting its status as a for-hire carrier under the act.—Briggs, 92 M.C.C. 707 (716).

Exemption of grain truckers from licensing and rate regulation by §203(b6) does not indicate any intent of Congress to isolate them from competition.—Grain in Multiple-Car Shipments—Rvier Crossings to So., 318 I.C.C. 641 (685)*.

Application of the test enunciated in 351 US 49, wherein the Supreme Court considered the issue of manufactured agricultural products, makes it clear that casien is not an exempt agricultural commodity, but a manufactured product thereof. It is produced from milk which is precipitated by adding an acid, then washed, pressed, disintegrated, dried, and pulverized; after such processing, it no longer retains a substantial identity with its source commodity. Casien is a distinctive name; its use, for example, as an ingredient in paint and plastics, is different from the origin product; and its size, shape, value, texture, chemcial composition, and properties give casien a character distinctive from milk. Also, unlike exempt powerdered milk, which has retained its substantial identity and can be returned to the origin product merely by adding water, casien is not even soluble in water and cannot be returned to the origin product. Therefore, casien is not an exempt agricultural commodity under provisions of §203(b6); petition for declaratory order denied.—Cossitt Motor Exp., Inc.—Powdered Milk and Casien, 96 M.C.C. 557 (558-9).

It has been an established rule since long before passage of the Transportation Act of 1958 that the combining of exempt and nonexempt commodities in mixed shipments is unlawful without appropriate authority. See 166 F. 2d 116 and 186 F. 2d 400.—Hughes, 89 M.C.C. 471 (477)*.

Though the 1958 amendment of §203(b6) specifically incorporated Administrative Ruling No. 107 for purpose of establishing status of commodities therein listed as exempt or nonexempt, second proviso of the amended section establishes status of a number of commodities classified otherwise in that ruling; thus, to extent that the listing in Ruling 107 deviates from language of that proviso, it must yield. While language of the amended section is not entirely clear, since it embraces a number of specific commodities, general effect of that in the second proviso pertaining to fish and shellfish is to broaden the exemption to include cooked as well as fresh seafoods, and the legislative history indicates intent of Congress to exempt such commodities as deviled crabs, clams, or lobsters, codfish cakes, salamon croquettes, and the like. —Id., pp. 484-5.

Transportation of prepared food products such as frozen french-fried potatoes is not exempt from certificate and permit requirements of the act; and mere presence of such a "regulated" commodity in mixed shipments with "otherwise exempt" commodities has been found to destroy the "exempt" status of the latter, thus subjecting all commodities in the mixed shipments to full economic regulation.—Home Transfer & Storage Co., 88 M.C.C. 223 (229-30)*; similarly, while grain is an "exempt" commodity within §203(b6) and may lawfully be transported in straight t..l. shipments without authority from the commission, applicant is cautioned that it may not transport grain in mixed shipments with commodities subject to the permit or certificate requirements of the act.—Burton Trucking, Inc., Extension, 94 M.C.C. 790 (792).

Wooden bolts are "cut to length" sections of a felled tree and therefore unmanufactured agricultural commodities within definition in 52 MCC 511; likewise firewood, which is designed for destruction and is split from a bolt without regard to form or shape, solely to reduce the bolt to billets of size suitable for the ordinary wood-burning combustion chamber, is within the exempt category. But shingles made from bolts, and shakes of handsplit and resawn type, which are products of machine work, are manufactured products; and shakes made entirely by hand but split to predetermined dimensions, with purpose of producing an article of lasting specific utility, are as certainly an article "made for use from raw or prepared material," within definition of "manufactured" in 283 US 1, as similar articles made by machinery; thus, transportation of either shingles or shakes requires authority from the commission.—Everett—Investiga-

tion of Operation, 88 M.C.C. 784 (787-8).

Act of 1958: [Vol. 19].—Decision in 315 US 475 requires that the commission reconsider the grant of certificate which substantially curtailed appellant's prior operations (in the proceeding on its application for "grandfather" authority under §7(c) of Transportation Act of 1958 to transport frozen fruits, berries, and vegetables and frozen seafoods and poultry when transported therewith) in the light of appellant's status as a common carrier, its demonstrated ability to perform the service, and the transportation characteristics and marketing pattern of considered seasonal agricultural products.—Willis Shaw Frozen Exp., Inc. v. United States, 377 U.S. 159*.

The commission's conclusion, on reconsideration of "grandfather" application proceeding under §7(c) of Transportation Act of 1958, that shipments handled during and since 1954 should be considered (but traffic handled prior to 1954 was too remote to be considered) did not arbitrarily restrict applicant's evidence; and its adoption of a four growing season cut-off period as a reasonable period for determining the scope and continuity of applicant's operations on and since the critical date is not arbitrary nor an abuse of agency discretion. By affording an agricultural-commodity carrier a four season cut-off, the commission assures that he will not be penalized for a bad crop year, while also maintaining the public interest in regulating all transportation that does not meet the statutory "bona fide operation" criteria. Also, in accordance with guidelines relating to "holding out" as developed in 315 U.S. 475, the commission correctly considered and evaluated applicant's holding out and solicitation in connection its actual service during the "grandfather" period. Sustained.—Hughes v. United States, 278 F. Supp. 11 (17, 20-21)*.

Decisions concerning "grandfather" clause in the Motor Carrier Act of 1935 are applicable to cases arising under §7(c) of Transportation Act of 1958; and in administering such a clause, as established in 315 US 15 and 315 US 315, the test or standard is the scope of bona fide operations on the statutory cut-off date and since that time. Thus, maximum extent of a carrier's "grandfather" rights under the 1958 statute is fixed by the extent of his operations on May 1, 1958. Operations subsequent to that date are relevant for limited purpose of showing continuance thereof, but no new rights may be acquired by such subsequent operations.—Denton Produce, Inc. v. United States, 270 F. Supp. 402 (405-6)*.

The commission's order granting in part, and denying in part, plaintiff's "grandfather" application for authority to transport bananas from Gulf ports is amply supported by evidence of its operations, including shipments transported and origins and destinations thereof, during the period from January 1957 to December 1959. Therefore, although urged by plaintiff, it would not be proper to remand the case for commission consideration of new operations, begun after entry of order under review, since those operations would not support grant of additional authority requested. To now order reopening, for consideration of such new operations, is not justified; moreover, to do so would be to require the commission to consider remote and irrelevant operations. Authority granted plaintiff was proper in all respects, and that not granted was properly denied; complaint dismissed.—Id., pp. 406-8.

Congress has entrusted to the commission the delineation of territorial scope of motor carrier authority to be granted, and the judgment required is highly expert; only where the error is patent may a reviewing court say the commission transgressed. Thus, in carrier's action to set aside commission orders granting, in part, its application under §7(c) of Transportation Act of 1958 for "grandfather" authority to transport frozen fruits, berries, and vegetables, the court must review evidence submitted by applicant upon which the commission determined the extent of its bona fide operation as contrasted with mere holding out; and, as did the full commission on reconsideration, the court review will include shipments transported in 1956 and, also, will treat the three commodities involved as having been handled in a single commodity class.—Lester C. Newton Trucking Co. v. United States, 264 F. Supp. 869 (877-9)*.

Upon detailed consideration of the evidence of record (analyzed from standpoint of the three areas of operation plaintiff seeks to have authorized) and comparison of authority

sought in each area with that granted by the commission on evidence of shipments not only actually handled but also authorized to be transported under "general commodities" and "frozen foods" clauses in certificates then held by plaintiff (applicant), the court concludes that the commission's decision as to scope of the "grandfather" authority to be granted may not be disturbed. Temporary stay of the commission's order dissolved and the action dismissed.—Id., pp. 879-85, 886.

Evidence sustains the commission's partial denial of plaintiff's application under §7(c) of Transportation Act of 1958 for "grandfather" authority to transport considered commodities in straight or mixed loads from origins in 27 States to points in 39 States and the District of Columbia. Careful review of the whole record, in light of criteria set forth in 315 US 475, does not show that the commission transgressed in imposing restrictions on geographical scope of the operations with respect to areas of origin and destinations; due consideration was given to plaintiff's status and performance as a common carrier of a restricted number of commodities, transportation characteristics and marketing patterns of the seasonal agricultural products involved, and to carrier's demonstrated ability to perform the described services, as required by decision in 377 US 159, in placing restrictions on commodities plaintiff may carry between the several origins and destinations. Commission orders delineating scope of plaintiff's "grandfather" authority are in accord with the applicable law and supported by substantial evidence; complaint dismissed.—Colonial Refrigerated Transp., Inc. v. United States, 255 F. Supp. 999 (1002-4)*.

If plaintiff is correct in its contention that origins and destinations of the perishable commodities it transports change frequently and unpredictably from year to year in the normal course of business, the commission's failure to consider data covering the years 1955, 1956, 1959, and 1960 has prevented plaintiff from obtaining a determination with regard to the full scope of its service and its unpredictable and fluctuating nature. Should such evidence support a conclusion that plaintiff's operation was area-to-area, the commission's authorization of point-to-point service would change its character in a manner not authorized by law; statewide authority is not the only alternative if the operation was from market area to market area, with stops for pickup and delivery at shifting points within the areas. The commission should have considered the proffered evidence for what bearing it might have on the character of plaintiff's operation; remanded for rehearing in conformity with the court's opinion.—Hale Distributing Co. v. United States, 221 F. Supp. 266 (269, 279)*.

In granting plaintiff only point-to-point "grandfather" authority for transportation of frozen fruits, berries, and vegetables, the commission largely ignored the factor of his holding out, coupled with showing of representative service, which should have been considered under principles of 315 US 475. As to origin territory, the facts of plaintiff's business, particularly his small size and the fluctuating character of the frozen-foods traffic, justify application of the area-of-service concept applied by the commission in other cases; the test used therein to find an area-wide pattern of service—that of widespread service to a representative number of points—should be applied. This does not necessarily require grant of statewide origin authority: for example, countywide authority might be considered.—Jarman v. United States, 219 F. Supp. 108 (112-4, 115-6)*.

Plaintiff's service from the origin area as a whole should determine the destination territory; to base such authority on a point-to-point analysis of shipments from each shipping point used is the sort of pulverization forbidden by the Supreme Court. As to return service, shipments from any point in the destination territory to the whole origin area should be taken into account; this does not require grant of area-wide return authority, but geographically close points should be treated as a unit. Thorough reconsideration of plaintiff's application is needed; case remanded for rehearing and further consideration in accordance with the court's views.—Id., pp. 114, 117, 118.

Purpose of "grandfather" provisions of §7(c) of Transportation Act of 1958 was to assure those entitled to its benefits a substantial parity between future operations and prior

bona fide operations; and actual and substantial, rather than merely potential, service is the standard by which applicant's claim to such rights must be tested. However, once "common carrier" status is established, a carrier holding itself out to transport a group of commodities, and showing actual ability to perform the service held out, is entitled to "grandfather" authority to transport the entire group of commodities between all points and areas authorized in absence of commission findings, supported by substantial evidence, that it had limited its holding out between certain points or areas. The mere fact that carrier did not transport all or every commodity between all points and areas served does not justify limiting commodities to be transported in the future.—Willis Shaw Frozen Exp., Inc. v. United States, 256 F. Supp. 257 (263-4)*.

The commission failed to apply the principles of 315 US 475 when, in determining scope of plaintiff's (applicant) "grandfather" authority to transport frozen fruits, frozen berries and frozen vegetables, it undertook to evaluate the carrier's holding out and ability to provide service without sufficient findings as to transportation characteristics and marketing pattern of the agricultural commodities involved. Although considered commodities were not treated as a single commodity class, the commission report discloses no basis or explanation for its findings in that respect; the commission should at least point out wherein the frozen fruits, berries and vegetables hauled by plaintiff differ from those found to comprise a single commodity class in 211 F. Supp. 280. Therefore, since the commission on remand failed to comply with the Supreme Court's mandate in 377 US 159, its conclusions are set aside and the case is remanded for further consideration.—Id., pp. 264-5.

Section 7 of Transportation Act of 1958 conferred no prescriptive operating rights upon plaintiff because of its transportation of crude rubber prior to enactment thereof. Since only the eleven commodities specified in the second proviso of §7(a) were "made subject" to part II by enactment of that statute, §7(c) thereof provided "grandfather" rights only for carriers of those eleven commodities, not including crude rubber, which had been "exempt" and were being specifically made "not exempt."—Midwest Emery Freight System, Inc. v. United States, 202 F. Supp. 229 (233-5)*.

The Congressional intention in amendment of 1958 was to determine the agricultural exemption at its then level, and then to accomplish a roll-back to remove certain articles from the exemption; to accomplish the former, Congress specifically adopted the commission's Administrative Ruling No. 107 as determinative of what was or was not then exempt, and to effect the latter listed 11 specific types of commodities, including "frozen vegetables," that had been held to be within the exemption and would be returned to regulation. The "grandfather" rights conferred by §7(c) of the 1958 act pertain only to those 11 commodities whose transportation was thus expressly made subject to regulation under Part II.—Lester C. Newton Trucking Co. v. United States, 209 F. Supp. 600 (603-4)*.

Ruling 107 provides that "cooked" vegetables are not exempt and were not exempt prior to the 1958 amendment; it also provides that fresh frozen vegetables were exempt prior to that amendment under the authoritative ruling of the Home Transfer case (141 F. Supp. 599, affirmed 352 US 884); both provisions are of equal weight and validity and both must receive full recognition by the court. However, the Home Transfer case did not hold that "frozen vegetables" as such were exempt, but only that those which were merely blanched or heated to point of inactivation of the enzymes and then quick-frozen had not changed their character as fresh vegetables. This constitutes the line of demarcation and gives effect to each provision of the statute; any other conclusion does violence to the express Act of Congress.—Id., pp. 604-5.

The commission is the expert in the field of transportation and its judgment is entitled to great deference because of its familiarity with conditions of the industry it regulates. In adopting the Supreme Court's view in the Home Transfer case, it concluded that cooking vegetables beyond the point of inactivation of the enzymes and then freezing them brings them within the classification of "cooked vegetables" which Congress has said are not (and were not) exempt. That con-

struction of the statute cannot be considered unreasonable; if the result is to fragmetize the industry, it is due to the act of Congress itself, and the remedy must there be sought.—Id., p. 605.

The commission further set out three criteria which it indicated might be applied in the future as to agricultural products in general. Each of the specific frozen vegetables mentioned in the proceedings before the commission and now before the court comes within the first criterion; the court agrees with the commission's opinion that those commodities were not exempt prior to the 1958 amendment and therefore are not entitled to benefits of the "grandfather" clause. With respect to commodities other than those specifically considered, application of those criteria may more properly be presented directly upon a hearing on a cease-and-desist order if such occasion arises.—Id., pp. 605-6.

Basic to a right to haul a particular product under a §7(c) "grandfather" certificate is the requirement that the product must have been an exempt agricultural commodity prior to passage of the 1958 Act and that it was made nonexempt by that Act. Though all products transportated by plaintiff are now nonexempt, whether all were exempt prior to the 1958 statute is another question, which it is not the court's function to determine in the first instance; the precise delineation of an enterprise which seeks the protection of the "grandfather" clause has been reserved for the commission, and within reasonable limits it is for the commission to determine the scope of that delineation.—Ballentine Produce, Inc. v. United States, 209 F. Supp. 679 (683)*.

The commission's arbitrary selection of January 1, 1957, for determining remoteness of transportation of all 11 comodities covered by the Act of 1958, some of which have nothing in common, precludes due consideration of their varying transportation characteristics. In determining plaintiff's "grandfather" rights for bananas and frozen fruits, berries, and vegetables, the commission improperly refused to consider evidence of operations before that date. Those commodities are subject to all the unpredictable factors affecting crops, and practical effect of such refusal was to limit proof of plaintiff's operations prior to May 1, 1958, to one crop season; considering nature of those crops, that short period was not a fair test of the true scope of plaintiff's operations. Under the precept of 315 US 475 to consider a "grandfather" applicant's past operations as a whole, plaintiff should have been permitted to show nature and extent of its operations for a sufficient period prior to 1957 to prevent any distortion of the true pattern of its activities.—Frozen Food Exp. v. United States, 219 F. Supp. 131 (137-9)*.

The commission also improperly refused to consider evidence of plaintiff's holding out and solicitations throughout the "grandfather" period; those factors were not irrelevant or unimportant in determining nature and extent of its bona fide operations; and decisions in 315 US 15 and 475 and 211 F. Supp. 280 support the rule that proper holding out and solicitation are standards to be considered in hearings on "grandfather" applications. Both plaintiff's holding out and solicitation during the entire "grandfather" period and its operations prior to 1957 were proper standards the commission was required to consider, and its failure to consider either one of them was enough alone to invalidate its order. The commission's order set aiide and proceeding remanded for further proceedings consistent with the court's opinion.—Id., pp. 137, 139-40.

Although plaintiff cites 211 F. Supp. 280 in support of its claim that frozen fruits, frozen berriers, and frozen vegetables should be treated as one commodity class as a matter of law, decision therein was reached as a finding on a fact issue, based on the proof in that record; and while the language of the act may not foreclose a fact issue on this matter, nothing therein indicates that those commodities must be treated as one class. But, though there was no proof in plaintiff's application proceeding raising any fact issue on that question, there could be a relationship between that aspect and the holding-out and solicitation issues, and it should be open for proof and further consideration on remand.—Id., p. 140.

Movement of frozen fruits, berries, and vegetables is seasonal and greatly dependent on weather, crop, and market conditions; the traffic moves from and to points where cold

storage facilities are available, and those locations change from season to season; plaintiff's services were primarily on l.t.l quantities, requiring multiple pickups and deliveries at locations which change from time to time. One plaintiff held out to serve all origins in Tennessee, its operations followed the storage point changes dictated by shippers' requirements, and it provided multiple pickup service at 8 widely scattered points; the proof shows that the characteristics of its operations from Tennessee during the critical period entitled it to statewide authority for outbound traffic and that the commission, in limiting "grandfather" authority to two origins, acted arbitrarily and without supporting evidence.—Winter Garden Co. v. United States, 211 F. Supp. 280 (286)*.

Though the record shows that destination points constantly change with changes in prices, marketing practices, and consumer demand, the sole test employed by the commission was predominance of movement, without regard to changing characteristics of the traffic; while its grant of destination points and return territory allowed is supported by the evidence, it abused its discretion in rejecting evidence of plaintiffs' 1956 operations as too remote from the critical date. Seasonal and changing nature of the traffic made consideration of the 1956 shipments crucial; the commission's refusal to consider 1956 shipments denied plaintiffs their statutory right to prove that, in their bona fide operations, changes in origin and destination points were frequent and were attributable to special characteristics of the traffic. Characteristics of the business, properly applied, dictate grant of some additional authority, geographically, to both plaintiffs.—Id., pp. 286-8, 290.

Frozen fruits, frozen berries, and frozen vegetables have the necessary similarities in transportation and marketing characteristics and are sufficiently related to qualify as "a whole class" within ruling in 315 US 475 that the commission may not atomize a "grandfather" applicant's prior service where there is substantial evidence that he was in bona fide operation as a carrier of "a whole class or classes of property." Those foods were processed in same plants, required same transport facilities, and were delivered to warehouses having freezer facilities; all three were actually hauled in mixed truckloads; insofar as plaintiffs held out to carry those items, they should be treated as belonging to the same class. And one plaintiff's withdrawal of its application as to frozen fruits does not invalidate the tests to be applied; it should be permitted to haul frozen berriers and/or vegetables to any point within scope of its authority.—Id., pp. 288, 289.

The commission exceeded its statutory authority in requiring separation of plaintiffs' private and for-hire operations; §7(c) of the 1958 act, which spells out the standards to be applied in disposing of "grandfather" applications, contains nothing that authorizes such restriction. Plaintiffs' bona fide operations as conducted on the statutory date were primarily in l.t.l. quantities consisting of a mixture of their own frozen foods and frozen foods owned by and carried for others; segregation of those operations would drastically change their basic character and thus not assure to plaintiffs the substantial parity between future and past operations required by the "grandfather" clause (315 US 15); plaintiffs have the right to continue to mingle their private and for-hire operations without restriction.—Id., p. 291.

The requirement of §7(c) that an applicant prove bona fide operation on and after May 1, 1958, subjects applicants only to §210, which prohibits dual control of a common and contract carrier unless it is found consistent with public interest, but does not prohibit control of a common or contract carrier by a shipper engaged in private carrier operations; and while the commission has viewed a shipper's control of or interest in a motor carrier applicant as bearing on the applicant's fitness to conduct the proposed operation, it has recognized that fitness is not an issue in "grandfather" proceedings.—Id., p. 291.

In view of the decision in Willis Shaw Frozen Exp., Inc. v. United States, 256 F. Supp. 257, involving an application for "grandfather" authority under §7(c) of Transportation Act of 1958, that absent a finding to the contrary, supported by substantial evidence, a carrier holding itself out to transport a group of commodities and demonstrating its ability to perform the service held out, is entitled to

authority to transport those commodities as a single class notwithstanding its failure to transport all or every commodity between all points and areas, reevaluation of the evidence in proceeding on applicant's "grandfather" application under that statute is required; and, on further hearing, the entire record is considered.—Querner Truck Lines, Inc., 102 M.C.C. 616 (617, 618)*.

Considering characteristics of transportation services rendered by applicant prior and subsequent to the critical date, and viewing the proceeding in light of applicant's status and performance as a common carrier, scope of the "grandfather" authority to which it is entitled, commoditywise and territorially, is determined with full consideration of its common-carrier undertaking in light of the overall pattern of its past operations. Applicant's demonstrated ability is evaluated within the context of distinguishing substantial operations from incidental, sporadic, or infrequent service; and territorial authority is granted where record shows similar characteristics of service to areas having some cohesion in an ecconomic and transportation sense and that applicant has served a sufficient number of points in each area. Prior findings modified and certain additional authority is granted, conditioned on applicant's surrender of its previously issued certificate for cancellation.—Id., pp. 618-20.

On reconsideration, and in light of the commission's recent review of the statutory standards of §7(c) of Transportation Act of 1958, particularly with respect to remoteness of shipments, applicant is entitled to somewhat broader grant of "grandfather" authority under that act for transportation of bananas from East Coast ports. Overall pattern of applicant's operation (including such factors as shifting origin points and all shipments transported, both before and after Jan. 1, 1957), when viewed in the light of the standards of 315 US 475, shows an undertaking by applicant, as supported by representative shipments, to serve all three involved origin ports to active customer locations in shipper's sales territory. However, paucity or complete lack of shipments to some destinations shipper claims to be active does not support grant of "grandfather" authority; granted in part.—M. D. Cressy Co., Inc., 98 M.C.C. 160 (162-4)*.

For similar reasons, and since applicant has transported frozen fruits, frozen berries, and frozen vegetables as a single commodity class, "grandfather" authority under the 1958 act to transport those commodities, broader than that heretofore granted, is justified when, notwithstanding substantial reductions in vehicles operated and shipments transported in 1960 (attributable in large measure to its cessation of unauthorized operations), applicant continued to hold itself out to provide service as formerly to the best of its ability. Mere holding out is not itself sufficient, but as applicant accompanied its holding out with substantial service performed both prior and subsequent to the critical date, a more liberal view of scope of its "grandfather" operations is warranted; however, evidence as to shipments transported from and to points in the 20 States involved justifies grant of authority only from and to specified points in the States named.—Refrigerated Service, Inc., 98 M.C.C. 218 (220-24)*.

See also Kendall Co. case, §206(a)(1), n. 50.

"Grandfather" applicant must establish that it has been engaged in bona fide transportation of commodities for which authority is sought, on and since May 1, 1958, except for interruptions beyond its control; a "bona fide operation" connotes actual service rather than mere holding out, and substantial as distinguished from sporadic service. Unless substantiality of operations involved reflects an area-wide pattern of service, only authority between points actually served both on and continuously since the critical date is comprehended. Thus, since statewide authority should not be granted under a "contiguous area of service" concept where there has been no service at all or an area-wide pattern of service is not shown, grant in the prior report must be narrowed to more properly reflect applicant's actual transportation activities.—M & M Produce Co., Inc., 91 M.C.C. 183 (184-5)*; similarly, intent to conduct operations is not enough to meet the "bona fide operation" test. Traffic pattern shown does not justify statewide authority; granted for commodities transported and points shown to have been served before and since the critical

date.—Northwest Fisheries Transp., Inc., 89 M.C.C. 324 (326)*.

To justify a grant of territorial "grandfather" authority, there must be a reasonable showing of bona fide operations from and to representative points throughout the territory sought. In the light of the criteria specified, record justifies statewide authority from one origin to three States; as to remainder of applicant's operations, only point-to-point authority is warranted.—Denton Produce, Inc., 89 M.C.C. 301 (302)*.; likewise, while applicant seeks statewide "grandfather" authority to transport bananas from Miami and Tampa, Fla., to 34 States and the District of Columbia, it has served multiple destinations in only four States named, and is entitled to territorial authority to points in Tennessee only on and east of named highway. Outside those States, continuous operations warrant a grant to eight specified points; also, despite a gap in service, there appears to have been a continuous operation from Miami to three other named points; granted accordingly.—White's Trucking Service, Inc., 91 M.C.C. 454 (458-9).

In light of the criteria connoting a "bona fide operation" required by the statute, applicant is not entitled to "grandfather" authority from Oregon and Washington to Colorado when no service was performed from Oregon during a 3-year period commencing prior to the "grandfather" date and none from Washington during a 2-year period subsequent to that date. Such interruptions cannot be overlooked by viewing those operations together with applicant's bona fide operations from California, under an area-of-service concept; to be properly so considered, evidence must show past and continuous operations from representative points throughout a growing area; and record discloses a fatal lack of diversity and continuity in applicant's service from those two States. Moreover, Washington-Oregon points previously served are over 450 miles from those served in California, which further dispels any semblance of oneness in applicant's operation from the coast States. Granted in part.—W. J. Digby, Inc., 89 M.C.C. 122 (123-4)*.

Although "bona fide operations" is not susceptible of exact definition, the commission has construed it to mean substantial, as distinguished from incidental, infrequent, or sporadic, service. Application of that criterion warrants grant of "grandfather" authority to applicant for transportation of frozen fruits, berries, and vegetables between points and areas specified; other operations claimed do not meet the statutory criteria because they were either infrequent or sporadic, or lack the requisite continuity of performance both on or before and since the critical date. —Watkins Motor Lines, Inc., 92 M.C.C. 455 (458)*.

Applicant has conducted a substantial and continuous territorial operation in transportation of frozen fruits, berries, and vegetables from western New York to numerous points scattered throughout New Jersey, Pennsylvania, and Ohio; likewise, operations to points in Maryland, Massachusetts, and Virginia in transportation of frozen fruits, and in transportation of frozen vegetables to Massachusetts, have been territorial in scope; consistency requires grant of statewide authority to latter three States as well as to the first-mentioned three; that applicant did not object to proposed grant of specific-point authority to certain States should not be considered a waiver of his rights, which are statutory.—Hollebrand, 88 M.C.C. 685 (687)*.

And a lapse in service of 6 months or more to certain points does not mean that the operation is not continuous as to those points; overall, applicant's operations were never interrupted, and a lapse of 13 months in service at a specific point has been found not to preclude grant of authority to serve it.—Id., p. 687.

Applicant was in bona fide operation as a for-hire carrier of bananas during the critical period, although the major portion of his transportation was performed for a broker who ships to wholesale outlets and he sometimes supervised loading of bananas at New Orleans for the broker and in return obtained the best loads it had to offer, when he was not an employee of that shipper and consignees paid the transportation charges. Granted in part.—Holomon, 92 M.C.C. 8 (13).

Railroad protestants' contention that shipments of frozen fish and poultry in mixed truckloads with frozen fruits, berries, and vegetables are not covered by the "grandfath-

er" provisions of §7(c) of Transportation Act of 1958 was explicitly rejected by the commission in 82 MCC 755.—Hale Distributing Co., Inc., 89 M.C.C. 361 (365)*.

Inasmuch as applicant was granted specific authority in 1957 to transport agricultural commodities in mixed shipments with nonexempt commodities, and the decision in 141 F. Supp. 588, aff'd 352 US 884, held that frozen fruits and vegetables were "agricultural commodities" the transportation of which was exempt from economic regulation under §203(b6), the certificate since its issuance has authorized transportation of mixed loads of frozen fruits, berries, and vegetables. Therefore, since the amendment of §203(b6) by Transportation Act of 1958 has not affected that authority, applicant may lawfully continue such operations.—Chesapeake Motor Lines, Inc., 89 M.C.C. 237 (239-40).

As to applicant's other claimed operations, which were not conducted pursuant to any of its existing authority, evidence does not show the continuity of service required (except in transportation of frozen fruits, berries, and vegetables from Jersey City and Philadelphia to Baltimore) to support a finding that applicant has been in bona fide operation on and since the critical date. Applicant is not entitled to "grandfather" rights to provide service which it has merely held out, but has not actually performed. Granted in part.—Id., p. 240.

"Grandfather" right to transport exempt commodities in mixed shipments with those made nonexempt by the 1958 amendment (as to which "grandfather" rights are confirmed) is not established by showing of transportation of about a dozen such loads prior to the statutory date, when there is no proof that applicants were participating in such traffic after that date, thus the evidentiary requirement as to subsequent continuous operation is not met.—Produce Transport Dispatch, 88 M.C.C. 198 (200)*.

Under the "interim" provisions of §7(c) of Transportation Act of 1958, a mere showing of past operations is insufficient; applicant must establish that continuance of such operations is required by public convenience and necessity. Furthermore, authority granted must be restricted to service actually provided during the interim period from May 1 to August 12, 1958; therefore, shipments handled prior to May 1 have no probative value. And the provisions allowing continuance of operations pending determination of an "interim" application refer only to those actually conducted during the "interim" period.—Yeary Transfer Co., Inc., Extension, 88 M.C.C. 473 (477, 478).

Also, finding in applicant's "grandfather" application proceeding, 84 MCC 469, that no "grandfather" rights may be granted for transportation of banana puree, is equally applicable to "interim" authority sought therefor.—Id., p. 475, note.

The commission's consistent construction of the "grandfather" provisions of §7(c) of the Transportation Act of 1958 as extending solely to the 11 commodities specifically named in §7(a) thereof was approved in 190 F. Supp. 350, affirmed 368 US 5.—Hughes, 89 M.C.C. 471 (477)*.

Shipments handled in 1953 and 1954 are too remote from the statutory date to support a grant of "grandfather" authority.—Cox, 89 M.C.C. 545 (548)*; and shipments handled prior to January 1, 1957 are too remote from the statutory date to have any probative value in determining "grandfather" rights.—Home Transfer & Storage Co., 88 M.C.C. 223 (226)*.

Banana shipments transported prior to Jan. 1, 1957, are too remote to support finding that applicant was in bona fide operation on May 1, 1958. While principal shipper may have relied on availability of applicant's service to and from whole area involved, grant of "grandfather" authority must be based on actual service and not mere holding out. Applicant handled involved traffic from only 3 ports and grant to serve other ports would be completely gratuitous; service to New England destinations not sufficient to warrant statewide authority; granted in part.—M. D. Cressy Co., Inc., 91 M.C.C. 211 (215-16).

And "grandfather" authority to originate shipments at airports is denied when applicant has never performed this type of service and apparently never contemplated it until filing of exceptions, nearly 4 years after statute under which it claims to be entitled to such authority.—Id., p. 215.

Although applicant transported numerous shipments of bananas in private carriage, his claim for "grandfather" authority is based only on shipments for which there is an identifiable transportation charge and upon which Federal transportation tax was paid. Presumption is strong that remaining shipments, including those originally claimed by applicant's general manager, were transported in private carriage and applicant has not demonstrated that he transported them as a for-hire carrier; moreover, all for-hire shipments to Wichita, Kans., were transported after the critical date and authority for this point must be denied; granted in part.—Lowrance, 91 M.C.C. 440 (442, 443)*.

General manager's application denied because he failed to show any operations as for-hire carrier; shipments he claimed to have transported were obtained through his position as an employee of another applicant who performed the actual motor carrier service involved.—Id., p. 441, 442.

Language of §7(b) of the Transportation Act of 1958 is plain and obviously evolved out of the complex history of conflicting commission and court interpretations of §203(b6); in amending §203(b6) to exclude from the partially exempt group certain commodities, among them frozen fruits, berries, and vegetables, which the commission originally considered subject to requirements of part II, Congress recognized the effectiveness of outstanding authorities granted on proof of public need or consistency with public interest. Applicant may therefore continue transporting frozen fruits and vegetables under its existing authority to transport "general commodities" and "frozen fruits and vegetables."—Home Transfer & Storage Co., 88 M.C.C. 223 (227-9)*.

But since applicant's authority for "fruits and vegetables" has been specifically interpreted not to embrace frozen fruits and vegetables, and thus never authorized transportation of property returned to economic regulation by the 1958 act, §7(b) is inapplicable thereto; there is no indication in the 1958 act or its legislative history that Congress intended in any manner to alter the commission's past interpretation of such authority and accord to carriers holding such authority additional rights predicated neither on a showing of past bona fide operation under §7(c) nor on a past showing of public need or consistency with public interest. In addition, since prepared food products such as frozen french-fried potatoes are not within exemption of §203(b6), and their inclusion in a shipment with exempt commodities renders the entire shipment subject to the act, no "grandfather" rights accrued to applicant from any shipment wherein such prepared foods were transported without appropriate authority.—Id., pp. 229-30.

While the term "bona fide operation" is incapable of precise definition, it is recognized as contemplating substantial as distinguished from sporadic or infrequent operation. A finding of past bona fide operation depends to some extent on nature of the traffic handled and the routes and territories involved in its transportation; however, since a mere holding out is insufficient to warrant such a finding, applicant should be granted "grandfather" authority only to extent justified by its actual operations on and continuously since May 1, 1958. Lists of representative shipments of commodities involved handled by applicant prior and subsequent to the critical date, and submitted by it in support of "grandfather" authority sought, discussed and analyzed; granted in part.—Id., pp. 229-33.

Fish, including shellfish: [Vols. 16, 19].—Inasmuch as the second proviso of §203(b6), added by the Act of 1958, specifically exempts cooked or uncooked (including breaded) fish or shellfish, whether frozen or fresh, if not otherwise treated for preserving, and some of such commodities were listed in Administrative Ruling No. 107 as nonexempt, the Bureau of Motor Carriers issued Administrative Ruling No. 110 interpreting No. 107 in the light such amendments and listing nine fish or seafood commodities which in its opinion must now be considered exempt. Though many commodities listed in Ruling No. 110 contain ingredients other than fish or shellfish, legislative intent of Congress as evidenced by history of the 1958 amendment is in harmony with opinions shown in ruling No. 110; the fish and shellfish commodities listed as exempt from economic regulation in Ruling No.

110 are correctly so designated.—Hughes, 89 M.C.C. 471 (485-6)*.

While seafood or fish dinners involve packaging of ordinarily nonexempt commodities such as cooked vegetables in the same container, the main ingredient is the fish course, and the accompanying food items are complementary and secondary; so long as the fish dinners share a common initial wrapper or container, and retain the characteristics of a fish or seafood dinner in the usual sense, the exemption applies; however, the same items (other than fish or seafood) moving in separate packages in the same vehicle would come within principle of 84 MCC 393 and the exemption would not apply.—Id., p. 486.

Applicant's representations that it handled frozen fish and fish products in the same vehicles with frozen fruits and frozen vegetables, in the absence of more definite evidence or identification of specific shipments, is not sufficient to justify issuance of authority to handle fish in mixed shipments with commodities for which authority is sought under the "grandfather" provisions of Transportation Act of 1958.—Northwest Fisheries Transp., Inc. 89 M.C.C. 324 (327)*.

Fruits, juices, and vegetables: [Vols. 18, 19].—Since transportation of fresh or green fruits and vegetables in straight truckloads is within exemption of §203(b6) and no operating authority therefor is required from the commission, there can be no violation of certificate requirements of the act in transportation of intrastate shipments thereof between Pennsylvania points over authorized routes through New Jersey and Delaware.—Pennsylvania Public Utility Comm. v. Jones Motor Co., 89 M.C.C. 605 (609, 612)*.

Livestock; poultry; products thereof: [Vols. 16, 19].—Since poultry is a so-called exempt agricultural commodity, motor transportation thereof is only subject to economic regulation when moving with regulated commodities. And while applicant seeks authority to transport poultry and poultry byproducts (in addition to prepared foods, including frozen foods), all of shipper's examples of latter commodity are poultry products. Commodity description "poultry when moving in mixed loads with prepared foods" is sufficiently broad to embrace frozen and unfrozen poultry when moving in mixed loads with either frozen or unfrozen prepared foods; granted accordingly.—Blythe Extension, 96 M.C.C. 546 (549).

As Administrative Ruling No. 107, incorporated into the statute by the 1958 amendment, lists poultry feathers as "Exempt," transportation of that commodity is not subject to economic regulation when not moved in the same vehicle with other regulated commodities; and, while Ruling 107 contains no specific reference to poultry blood or offal, since those commodities are natural byproducts of processes by which fowl is killed and readied for sale as dress poultry, they are found similarly exempt. Ruling No. 107 lists dressed poultry, fresh or frozen, as "Exempt," although processing beyond removal of blood and offal is frequently involved; and, thus, it would seem illogical to find poultry blood and offal are not exempt (because they cannot be considered unmanufactured agricultural commodities) while at the same time the statute clearly states that ultimate end products of the same and added processing, i.e., dressed poultry, are exempt under §203(b6). It is significant also, though not controlling, that two informal opinions of the Bureau of Motor Carriers stated that poultry offal is an exempt agricultural commodity. Proposed transportation of considered commodities is within the §203(b6) exemption; application dismissed.—Labertew Trucking, Inc., Extension, 96 M.C.C. 370 (371-2).

55. Transportation under common control, management, etc.—[Vols. 9, 11-15].—While prior commission findings, that the "common arrangement" for through transportation excepted from the §203(b8) exemption is an arrangement between carriers, are consistent with the Supreme Court's holding in the Munson case, 283 US 43, that the common arrangement between rail and water carriers contemplated by §1(1)(a) must be one between the carriers themselves, §203(b8) is not limited by its own terms to carriers as is §1(1)(a); therefore, neither the cited case nor the past commission decisions govern the issue presented concerning scope and applicability of the exception in §203(b8) to pickup and delivery services rendered within a commercial zone for a shipper association which,

as a freight forwarder, is expressly excluded from regulation.—Atlanta Bonded Whse., Inc., 91 M.C.C. 104 (108-9).

Obviously, the primary intention of Congress in enacting amendments to the act, which added §§203(b7a) and 202(c) and later included terminal area services performed for regulated forwarders in §202(c), was to exempt purely local terminal operations from the licensing requirements of part II and, absent some clear manisfestation of Congressional intent, the commission would not be justified in extending those requirements to local cartage operators; moreover, while a relatively narrow interpretation of §203(b8) is indicated, a restrictive interpretation of the exception therein does not make the language nugatory. Thus, since nothing in §203(b8) indicates that the excluded common arrangement must be between carriers subject to the act, local pickup and delivery operations come within the exception where the "common arrangement" has been effected by a carrier not subject to regulation.—Id., pp. 109-10.

However, the exception should not be construed to include arrangements with shippers who have no beneficial interest in the goods transported, such as a bona fide unincorporated shippers' association which is not a carrier and has no existence apart from its shipper members. Applicant's local cartage operations within Atlanta commercial zone, under arrangements with a shipper "co-op" which is such an association, are performed as a matter of law for the individual shipper members—the co-op acting as their agent in perfecting the common arrangements for continuous carriage—and, therefore, are within the §203(b8) exemption.—Id., pp. 110, 111.

When a carrier performing the line-haul intercity transportation of a pool truckload also performs the intracity assembly or distribution of the individual shipments, the entire movement is under common control, management, or arrangement for continuous carriage, and the portion performed within the commercial zone is subject to regulation under the act, including publication provisions of §217 and those of §216 dealing with justness and reasonableness. But where there is no such common arrangement for continuous carriage, a local carrier which picks up or delivers freight within a commercial zone under an arrangement made by it with an individual shipper or receiver is within the §203(b8) exemption, even though such shipper or receiver had also arranged for the prior or subsequent line-haul movement by a regulated mode of transportation. Under such circumstances regulated carriers may compete with exempt carriers for the same traffic.—Distribution Rates in Eastern Central Terr. Cities, 319 I.C.C. 410 (414-5).

56. Wrecked vehicles, emergency towage.—Applicant carrier is operating within the "emergency" exemption of §203(b10) when towing accidentally wrecked or disabled motor vehicles from, and their replacements to, the site of the wreck or disablement; however, distinct authority is required for the transportation, although by wrecking equipment, of tractors or trailers to points where the wrecked or disabled vehicles have been transported subsequent to the accident and, also, for any further movement of such wrecked or disabled vehicles, since such later transportation is too remote from the "emergency" towing to which the exemption is aimed.—Arrow Towing Service Corp., 98 M.C.C. 436 (439).

In amending §203(b) by addition of subsection (10), the congressional purpose was to permit more rapid, efficient, and flexible towtruck service by exempting from economic regulation the emergency transportation of accidentally wrecked or disabled motor vehicles by towing; and, to extent that authority is sought for such emergency movements, proposed operations are exempt from the certificate and permit requirements of the act. Also, it seems clear that transportation of replacement vehicles, incidental to the emergency transportation, was similarly exempt by that amendment since, if the purpose of its enactment is to be realized, provisions must be made for movement of replacement vehicles to actual site of the wreck or disablement; transportation of replacement vehicles is often an integral part of the specifically exempt operations and thus is closely akin to other situations where the commission has found incidental transportation not to require specific authority; to require such specific authority

would, in most instances, nullify Congress' intent to exempt the emergency transportation.—Werner, 95 M.C.C. 387 (390-2).

However, proposed transportation of stolen and repossessed vehicles is not within that exemption.—Id., p. 392; Hovanes, 95 M.C.C. 504 (505-6); nor is proposed normal, or nonemergency, transportation of wrecked or disabled motor vehicles by use of wrecker equipment exempt.—Reilley's, Inc., 95 M.C.C. 608 (610-1); Heckinger, 95 M.C.C. 668 (670-2); similarly, proposed service for wrecked or disabled automobiles, not by towing, but by movement on applicant's platform wrecker-carrier truck is not within the §203(b10) exemption.—Flora, 95 M.C.C. 673 (674-5).

60. Commercial zones.—[Vols. 9, 11-19].—The commission's denial of one protestant's petition to reopen commercial zone proceeding for the purpose of considering whether §203(b8) exemption extended to Rockville, Md. (through extension of Washington, D.C. zone to include Rockville and its environs) should be removed, not such an error as would require remand of cases under review for further commission proceedings on that issue. None of the protesting carriers raised or even suggested the possibility of removal from exemption and, though numerous petitions for reconsideration and oral hearing were filed, only one contained a petition to reopen for consideration of removal. Furthermore, no showing was made by that petitioner, or any of plaintiffs in actions to set aside the commission decisions, as to the actual economic effect and impact upon them of the extension of the Washington zone—an indispensable requirement for removal from exemption. Orders of the commission sustained.—Tidewater Express Lines, Inc. v. United States, 281 F. Supp. 995 (997)*.

See also Sea-Land Service, Inc. v. United States, §202(c), n. 5*Terminal*.

A commercial zone exists about a municipality as an economic fact and the commission's function in a proceeding defining commercial zone limits is to recognize economic boundaries which already exist. While industrial growth and development of an area will sometimes alter commercial zone boundaries, zone boundaries will not be altered in order to foster development which has not occured; and any need for additional service in considered area, which petitioners seek to have included in Pittsburgh, Pa., commercial zone, must be established in a proper appplication proceeding. In view of the geographic considerations (including the area's distance from Pittsburgh and its separation from Beaver County portion of the present zone by a natural boundary) together with the absence of specific data linking commerce of the area with that of the base municipality, redefinition of the Pittsburgh commercial zone is not warranted; petition denied.—Commercial Zones and Terminal Areas, 96 M.C.C. 180 (183)*.

Extension of St. Louis-East St. Louis commercial zone to include new industrial park area (Tree Court Industrial Park) on western boundary thereof is justified when business firms formerly located in St. Louis, or within the present commercial zone, have relocated in the industrial park because of unavailability of suitable sites within the zone limits; those firms continue to receive basically the same utility, transportation, banking, and other municipal business services as they did at their former locations; and their employees reside in St. Louis or within present zone limits. In view of the trade practices, use to which considered area is put, and the geographical and political considerations, inclusion of the new industrial park within the commercial zone is warranted. In order to simplify new zone description and avoid interpretive problems, commercial zone is redescribed to include the park and certain undeveloped areas surrounding it.—St. Louis, Mo.—East St. Louis, Ill., Commercial Zone, 105 M.C.C. 193 (196-7)*.

Although Kansas City, Mo., and two contiguous municipalities had recently extended their corporate limits, the Kansas City, Mo.-Kans. commercial zone was not automatically enlarged by such corporate boundary changes since that zone had been specifically defined in prior commission reports and, unlike most commercial zones, not determined under the mileage-population formula. However, in view of provisions of §203(b8), it is not necessary to go into commercial characteristics of the recently incorporated areas in order to include them within the redefined Kansas City zone; also, a fourth municipality, which be-

came contiguous to Kansas City by reason of latter's extended corporate limits, is found to be commercially a part of the base municipality by reason of its contiguity within terms of the statute and because of the intraterminal character of transportation between it and Kansas City.—Kansas City, Mo.—Kansas City, Kans., Commercial Zone, 100 M.C.C. 75 (82-3)*.

However, with respect to four other communities proposed to be included within the Kansas City zone, those points are geographically separated from industrially developed areas within the present zone and they function as independent municipalities which offer industry the essential municipal and business services on which commercial growth depends. Therefore, since commercial and industrial activity in those four communities is not sufficiently related to the base municipality so as to make them, as an economic fact, commercially a part of Kansas City, inclusion of those communities in the redefined commercial zone is not warranted.—Id., pp. 84-5.

On reconsideration, redefinition of Baltimore, Md., commercial zone to include narrow industrial corridor, 1.5 by 4 miles, recently rezoned for commercial use, is justified in view of the accelerated industrial and commercial development therein. Industry's attention has been directed to the corridor because of unavailability within present zone of land suitable for development of sites desired by firms seeking access to the Baltimore market. While a commercial community of interest with the base municipality, not just with another point within existing zone, must be shown to warrant a zone expansion, manifest business orientation of the 55 firms and industries located in the corridor is toward Baltimore; commercial zone redefined in certain respects.—Commercial Zones and Terminal Areas—Baltimore, 99 M.C.C. 572 (576-7)*.

For determination of effect on pre-existing commercial zones and terminal areas of the annexation by Orange, Tex., of a narrow semicircular strip of land in Orange and Jefferson Counties that encloses a large unannexed area, a rulemaking proceeding could be instituted to define specifically the commercial zone of each point served by defendants in those counties; however, that would require redefining commercial zones of all municipalities contiguous to, or served by carriers whose terminal areas encompass a portion of, present municipality of Orange; and such proceeding would necessarily embrace not only points served by defendants, but also points served by other carriers which may, or may not, be the same as those served by defendants. Also, since commission rules provide that carriers authorized to serve unincorporated points have a right to serve points within a defined area based on the mileage-population formula, the problem of determining those service points which would enable authorized carriers to reach the annexed strip appears to be an impractical, if not impossible, administrative task.—Central Freight Lines, Inc. v. East Texas Motor Freight, 96 M.C.C. 150 (155)*.

Removal of exemption, see NTP, n. 5.

Boundaries: [Vols. 15, 18].—Selective territorial descriptions of commercial zones, such as a deviation from a county line to include a particular shopping center, are not generally proper.—Cincinnati, Ohio, Commercial Zone, 88 M.C.C. 789 (794, note)*.

The boundary of a commercial zone is an economic fact to be determined on basis of existing conditions. Area approximately 2 miles square, between present western boundary of St. Louis-East St. Louis commercial zone and a proposed circumferential expressway and south of a line formed by Chicago, R.I. & P. right-of-way and Dorsett Road is unquestionably being utilized for industrial purposes and should be included in that zone. While that area, as described in terms of existing or proposed roads as boundaries, will encompass some undeveloped land, this is more desirable than using boundaries which arbitrarily excise small portions of that developing industrial area.—St. Louis, Mo.-East St. Louis, Ill., Commercial Zone, 96 M.C.C. 691 (696-7)*.

Although proposed redefinition of St. Louis-East St. Louis commercial zone to include a portion of the Village of Cahokia, Ill., which is contiguous to and commercially integrated with Monsanto, Ill., located within the zone, would encompass some 250 acres of undeveloped land, readily ascertainable boundaries must be selected; and in general

the addition of bizarre boundaries to a relatively uncluttered perimeter should be avoided. The boundaries proposed by petitioners meet both of those objectives and, therefore, should be adopted.—Id., 95 M.C.C. 519 (523)*.

Carriers affected: [Vol. 14].—While enlargement of Philadelphia commercial zone to include a large part of Fort Washington Industrial Park will increase the number of carriers who may serve that area and thus compete with carriers now authorized to serve the industrial park, existence of a commercial zone must be recognized as an economic fact, and considerations respecting availability of existing service are therefore not material to determination of whether the present zone should be enlarged.—Philadelphia, Pa., Commercial Zone, 94 M.C.C. 172 (178)*.

Commercial zone defined: [Vols. 14, 15].—Exemption of §203(b8) contemplates an area within which motor transportation can be considered essentially intraterminal in nature, rather than line-haul. The commission does not create or establish such an area; it exists about a municipality by reason of trade practices, uses to which the area is put, and geographical and political considerations.—Chicago, Ill., Commercial Zone, 88 M.C.C. 329 (333)*.

Extent of the zone adjacent to and commercially a part of a given point is not an issue to be decided in relation to any public need for the exempt transportation. A commercial zone is not "established" or "created" by the commission, but already exists by reason of trade practices, uses to which a proposed area is put, and geographical and political considerations; and the boundary of a zone is an economic fact to be determined on basis of existing conditions. Thus, neither a shipper's desire to have transportation services available to it exempt from regulation, nor a land developer's attempts to enhance value of his property, nor the adequacy of existing services, is a proper factor for consideration. On the other hand, where newly developing industrial areas are as an economic fact a part of the commercial zone, the inclusion of undeveloped areas embraced thereby, parts of which can be used for additional industrial sites, is warranted.—St. Louis, Mo.-East St. Louis, Ill., Commercial Zone, 96 M.C.C. 691 (695-6)*.

While intervening carrier's opposition to extension of St. Louis-East St. Louis commercial zone (because it fears a diversion of some of its traffic) is not ignored, it is well settled that commercial zones exist about any municipality as an economic fact; hence, in defining the limits of a zone it would be error on the commission's part to consider instead the potential effect on operations of a protesting motor carrier.—Id., 95 M.C.C. 519 (523-4)*.

Construction generally: [Vols. 16-19)].—Provisions of §203(b8) establish no basis of obtaining determination of the single-State exemption under §204(a)(4a), but rather establish a clear exclusion of application of part II to transportation in interstate commerce which takes place wholly within a municipality, contiguous municipalities, or commercial zone thereof, in absence of administrative determination that such transportation should be regulated; and exclusion of §203(b8) is operative only if the carrier is lawfully engaged in intrastate commerce over entire length of its interstate routes.—Flanzbaum v. M & M Transp. Co., 203 F. Supp. 365 (368-9)*.

Local terminal trucker performed no transportation under "arrangement for continuous carriage" beyond the local area; his activity in receiving goods from shipper for repacking and further handling and later engaging authorized common carrier to transport those goods to interstate destinations, although involving assumption of common carrier responsibility to shipper, does not of itself impose the duty to obtain a motor carrier certificate.—Id., p. 369.

The existence of a zone adjacent to and commercially a part of a municipality such as Washington, D. C. is an economic fact which the commission must recognize in construing the §203(b8) exemption and, for that reason, identification of the boundaries of such a zone must be made independently of any consideration of the effect of such determination on the parties. Thus, in passing on petition seeking expansion of the Washington commercial zone so as to include city of Rockville, Md., and its environs, arguments raised by several

motor carriers authorized to serve both Washington and Rockville that they should not be exposed to increased competition from exempt haulers are inapplicable; likewise, the arguments by shippers and line-haul carriers tending to show need for direct service by latter to Rockville are of no weight in the determination on whether the commercial zone should be expanded.—Washington, D. C., Commercial Zone, 98 M.C.C. 106 (111)*.

A commercial zone is not "established" or "created" by the commission, but already exists by reason of trade practices, uses to which the area is put, and geographic and political considerations, and the limits thereof are an economic fact to be determined on basis of existing conditions. Extent of a particular zone is not an issue to be decided in relation to any public need which may or may not exist for the transportation service which would be partially exempted from regulation thereby; nor is the desire of a shipper or shippers to avoid economic regulation by having included within the zone facilities which are planned to be constructed or maintained a proper factor for consideration.—Chicago, Ill., Commercial Zone Extension—Sag Area, 94 M.C.C. 568 (570)*; Cincinnati, Ohio, Commercial Zone, 88 M.C.C. 789 (794)*.

Existence of a commercial zone about a particular point is an economic fact, and the statutory partial exemption from regulation is independent of any need for the exempted transportation or for enlargement of terminal areas of line-haul carriers authorized to serve the municipality. Metropolitan areas defined by the Census Bureau, which are principally geographical groupings rather than economic units, and exempt areas created by State authorities, which are based on intrastate considerations not involving interpretation of the statutory requirement that the area involved be "adjacent to and commercially a part of" the base municipality, are likewise irrelevant factors in determining existence of a commercial zone.—Syracuse, N.Y., Commercial Zone, 92 M.C.C. 100 (104)*.

No authority is required for delivery within Atlanta commercial zone, to consignees named in shippers' manifests, of pool-car or pool-truck shipments forwarded to applicant warehouse company by individual out-of-State shippers, since the service is performed at direction of the individual shippers.—Atlanta Bonded Whse., Inc., 91 M.C.C. 104 (105, 106).

And since, in considering applicant's pick-up of freight consigned to a "co-op," there is no warrant in fact or law for distinguishing between the co-op as a bona fide unincorporated shippers' association and individual members thereof, that service also is within exemption of §203(b8). Though applicant is employed and paid by the co-op, its members have not lost their identity as shippers, and in dealing with the co-op as their agent applicant's services are performed as a matter of law for the individual shippers.—Id., p. 111.

Doe Run, Ky., is neither a town nor an unincorporated community and therefore has no commercial zone, since it has no post office, the area is entirely rural, and the name is officially shown on map prepared by State highway department with cooperation of U.S. Bureau of Public Roads as being only the designation of a creek extending some 5 miles south from its mouth on Ohio River. Its designation as an origin point in certificates issued vendee apparently intended to authorize service from a plant on west bank of the creek, the origin of the commodities described. Such authority therefore does not permit service from vendee's terminal located at a highway intersection some 2.75 miles from the plant site.—Liquid Transporters, Inc.—Purchase—Black, 93 M.C.C. 423 (428-9).

Since Westbury, N.Y., is not within New York City commercial zone and continuity of interstate movement of ex-rail shipments is not broken by applicant's storage thereof prior to delivery, transportation of such shipments to Westbury from its terminal facility in Queens is not exempt from regulation.—Paul Marckesano & Sons, Inc., Extension, 86 M.C.C. 727 (732).

Contiguous municipalities: [Vols. 14, 18, 19].—Ordinance of Orange, Tex., annexing a circular strip of land enclosing a large unannexed area declares that the annexed strip is for all purposes a part of the city of Orange; that strip reaches within 5 miles of Beaumont, which under the commission's regulations has a commercial zone extending 5 miles beyond its corporate limits; thus, a part of Orange is

within service area of carriers operating out of Beaumont, who under the commercial zone rules may serve the entire city of Orange. In outlining those rules the commission acted in a quasi-legislative capacity, and carriers subject to them have a right to expect that they will be observed; the commission should not in instant case set aside its former rulings, because such action is in nature of a retroactive proceeding which may work a hardship on those affected. The commission's ruling that carriers authorized to serve Beaumont may not serve Orange by virtue of the annexation, set aside and the case remanded for further proceedings.—Yellow Transit Freight Lines, Inc. v. United States, 221 F. Supp. 466 (466-7, 468)*.

Authority to serve Rochelle Park, N.J., permits service at Lodi, N.J., which is contiguous to Rochelle Park and, therefore, within the commercial zone thereof; however, since Moonachie, N.J., is at least 3.5 miles from Rochelle Park, it does not fall within latter's commercial zone.—Connell Transport Co., Inc., Conversion Application, 95 M.C.C. 312 (315).

Under the formula established in 46 MCC 665, applicant authorized to serve all intermediate points on and within 2 miles of highway between Lewistown and Harrisburg, Pa., may serve points within corporate limits of Harrisburg if any part of that municipality falls within commercial zone of any such intermediate point; such implied authority, however, does not authorize service, including interchange of freight, at points beyond corporate limits of Harrisburg.—Noerr Motor Freight, Inc., Extension, 89 M.C.C. 589 (591).

Carrier claiming right to operate from Knoxville, Tenn., under authority to serve the nearby point of Warcer has burden of showing that Knoxville is within the commercial zone of Warcer, since if Warcer has less than 2,500 population and is not within 2 miles of any part of Knoxville, the latter may not be served. As Warcer is not shown on latest Road Atlas and evidence does not show its distance from Knoxville, the claimed right is not established.—Blue Ridge Transportation Co., Inc., Extension, 89 M.C.C. 616 (619).

Distance from a base point: [Vols. 17, 19].—By virtue of the annexation by Orange, Tex., under Texas law, of a narrow semicircular strip enclosing a large unannexed area, the strip so annexed became part of the municipality of Orange "for all purposes." Therefore, defendants authorized to serve Beaumont and other nearby Texas points may serve Orange because it is a municipality included within the commercial zones of those points under the mileage-population formula, a portion of the annexed strip being within the mileage radii of those points as specified in the formula. And those commercial zones also include Pinehurst and West Orange, in the unannexed area, because under the commission's regulations the commercial zone of the base municipality, such as Beaumont, includes municipalities wholly surrounded by a municipality (Orange) which is in the base municipality's commercial zone by virtue of a portion of the Orange municipal limits being within 5 miles of Beaumont. Defendants' terminal areas, which are coextensive with the commercial zones of those Texas points they are authorized to serve, therefore include Pinehurst and West Orange as well as Orange.—Central Freight Lines, Inc. v. East Texas Motor Freight, 96 M.C.C. 150 (157)*.

However, as the unannexed area is largely unincorporated, defendants authorized to serve Beaumont and the other nearby base municipalities may not serve that unincorporated area except to the extent that it is within the commercial zone of the base municipality as determined by the mileage-population formula. Thus, a carrier specifically authorized to serve Beaumont may serve as part of its terminal area only that portion of the encircled unincorporated area which is within 5 miles of the Beaumont city limits; and carriers authorized to serve Orange may serve all municipalities wholly surrounded by Orange, all others any part of which is within 4 airline miles of Orange, and all unincorporated areas within 4 airline miles of Orange measured both from the inside and from the outside limits of the annexed strip.—Id., pp. 157-8.

Since the commercial zone of Rochelle Park, N.J., under the mileage-population formula, extends only 3 miles from its corporate limits, Moonachie, N.J., which is at least 3.5 miles therefrom is not within that commecial zone.—Connell Transport Co., Inc.,

Conversion Application, 95 M.C.C. 312 (315).

Expansion and enlargement of limits: [Vol. 16].—Since it is consistently recognized that a commercial zone is an economic fact or condition existing because of trade practices, uses to which the area is put, and geographical and political considerations, the same matters must be considered in connection with enlargement or redefinition of a particular zone. The city of Pueblo, Colo., is fully responsible for maintenance and upkeep of a 3,500-acre area sought to be included in the Pueblo zone, consisting of an airport and some 810 acres available for industrial sites; a number of concerns are doing business in that area, and all persons employed therein reside in Pueblo or immediately adjacent areas; inclusion of entire area is warranted.—Commercial Zones and Terminal Areas, 92 M.C.C. 753 (755)*.

The commission has never hesitated to make appropriate adjustments in commercial zone boundaries whenever it appears that industrial development or other changed conditions have altered the character of an area so as to bind it more closely to the base municipality. The growing number of Washington, D. C. firms attracted to the Tyson's Corner, Va., area, its immediate proximity to the present zone boundary and, also, to a beltway located almost entirely within the zone, are factors indicating that considered area is economically a part of Washington and that traffic moving between Washington and the area is intraterminal rather than line-haul transportation; therefore, limits of the Washington commercial zone should be extended to include the 2-square mile area about Tyson's Corner described.—Washington, D. C. Commercial Zone, 95 M.C.C. 305 (308-9)*.

The industrial development underway at Fort Washington Industrial Park in Upper Dublin Township, Pa., is clearly related to Philadelphia. A portion of the development is already within the Philadelphia commercial zone, and Philadelphia firms predominate among companies which have located in the larger section now outside the zone, their principal reason for so locating being the lack of sufficient land within the zone to permit construction of the low level, "horizontal" structures deemed necessary for economical operation of their businesses. Nature of the traffic also favors inclusion of considered area in the zone: opposing carriers now serving the industrial park have failed to establish line-haul character of their Philadelphia-Fort Washington traffic; on the contrary, the evidence indicates that transportation between Philadelphia and the industrial park is intraterminal in nature. Boundaries of the Philadelphia zone should therefore be redefined to include that portion of Upper Dublin Township where industrial development has taken or is about to take place.—Philadelphia, Pa., Commercial Zone, 94 M.C.C. 172 (177-8)*.

Enlargement of Chicago commercial zone to include a 4-mile strip of land at confluence of three waterways which serve Chicago proper, which already contains three industrial plants and encompasses large terminal dock and storage facilities as well as rail connections with accommodation for 300 to 400 cars, is warranted since its proximity to Chicago makes the area a strategic location for commercial and industrial development. Substantial quantities of commodities in great variety move to the area from the Chicago zone as presently defined, and shippers using storage facilities in the area also maintain operations in the existing zone; this interdependence of commercial and industrial operators in the two contiguous areas is significant as showing that the considered site is in fact industrially developed and commercially related to Chicago to an extent justifying its inclusion within the commercial zone thereof.—Chicago, Ill., Commercial Zone Extension—Sag Area, 94 M.C.C. 568 (569-70, 571)*.

That the actual industrial site at junction of the three canals is separated from the existing Chicago zone boundary by a forest preserve does not preclude the redefinition sought. It is clear that commercial development along those canals at any location nearer to the existing zone than that proposed as made impossible by existence of the forest preserve, and possibility that land for commercial expansion could have been found within the existing zone boundaries is of no real relevance.—Id., p. 571.

Redefinition of Syracuse commercial zone is warranted to include a new industrial center being developed in area largely beyond the 5-

mile radius authorized by the mileage-population formula, and just beyond a lake extending northwest from Syracuse and New York Thruway running east-west just north of the lake. Area involved is clearly commercially a part of Syracuse, being the only area northwest of the city having adequate power and other facilities for commercial needs; other industrial facilities occupy intervening areas along the highway route beside the lake, and transportation between the industrial center and points in existing commercial zone is essentially intraterminal in nature.—Syracuse, N.Y., Commercial Zone, 92 M.C.C. 100 (101, 104)*.

Evidence warrants inclusion in St. Louis-East St. Louis commercial zone of a portion of proposed Missouri area east of projected circumferential expressway approximately 1-1/2 miles west of present western boundary of the zone. In addition to 10 of 11 supporting shippers whose plants are or shortly will be located in that portion of the proposed area south of a line including the Chicago, R.I. & P. right-of-way, numerous other industries are situated therein, and there is no question that those industries look to the zone for their banking needs, maintenance and service, and public utilities, that their employees reside within the existing zone limits, and that such portion, in light of its proximity to the present zone, is being utilized for industrial development. However, the portion north of that line, including plant of one supporting shipper located almost 2 miles north of the Rock Island right-of-way, is patently not a part of the development area and is excluded from redefinition of the zone.—St. Louis, Mo.-East St. Louis, Ill., Commercial Zone, 96 M.C.C. 691 (693, 696)*.

The portion of Cahokia, Ill, sought to be included in St. Louis-East St. Louis commercial zone shares a common boundary with Monsanto, which is in Illinois portion of the zone, and is wholly within a 5-mile radius of both St. Louis and East St. Louis post offices. While there has been no unusual industrial development in the area such as would normally indicate its commercial integration with the base municipalities, the composition of a particular commercial area can sometimes be unique and, then factors normally considered as prompting a redefinition of the zone limits may be superseded by one or more factors which have a particular relevance to the special situation.—Id., 95 M.C.C. 519 (521, 523)*.

The situation at Cahokia is anomalous: both petitioners maintain large industrial establishments located partly within the present zone, yet the definition of that zone erects an artificial barrier between a portion of each industry and those points determined to be commercially a part of St. Louis-East St. Louis. The loading terminal of one is actually astride the zone boundary, and although barge facilities of the other's pipeline terminal are in Monsanto, its storage tanks are in the considered portion of Cahokia. In the particular geographical circumstances involving those petitioners there is no justification for dividing their properties and excluding portions of them from the zone; proposed expansion of the zone is therefore warranted. And though a portion of the pipeline property is used as farmland, it is not large, and petitioner's holding of it is consistent with future development of its terminal facility; therefore, that tract is also included in the redefinition.—Id., pp. 521, 523.

Notwithstanding absence of the normal indicia of an outlying community's commercial integration with a base municipality, record as a whole justifies inclusion of considered Butler County area within limits of Cincinnati commercial zone. Replacement and expansion of terminal facilities for motor carriers interchanging freight at Cincinnati is of primary importance to the city's commercial development, and availability of suitable locations is limited by traffic congestion and by increasing assignment of industrial land to other uses such as new highways. Unique accessibility of considered area to highways now under construction makes it a logical choice for terminal purposes, promoting efficiency and reducing congestion; as the terminals will be used only by carriers authorized to serve Cincinnati, and interchange of line-haul freight can be accomplished only under such authority, the area in which the terminals will be located must be deemed commercially a part of Cincinnati.—Cincin-

nati, Ohio, Commercial Zone, 92 M.C.C. 180 (182)*.

Although the State of Ohio has included in Cincinnati intrastate commercial zone a portion of the area sought to be included in the interstate zone, since that determination was made by a different regulatory body which may well have employed different criteria, the scope of the intrastate zone can have no bearing on whether definition of the interstate zone should be enlarged. Also, in view of the rather large area involved, evidence that certain specific areas are to some extent commercially dependent upon Cincinnati is not sufficient to demonstrate that the extensive area described should be within commercial zone thereof; supporting evidence of record is too meager to warrant the zone expansion sought. —Id., 88 M.C.C. 789 (793, 794-5)*.

Although the normal indicia of an outlying community's commercial integration with a base municipality are lacking as to Bridgeview and Hickory Hills, Ill, both should be included in Chicago commercial zone when their unique accessibility to Illinois Toll Road makes them logical choices for location of projected truck terminals which, by avoiding movement of over-the-road equipment into the city, will promote efficiency and reduce congestion; expansion and replacement of such facilities is of primary importance to commercial development of Chicago, but availability of suitable locations is limited by congestion and increasing assignment of industrially zoned land to other uses; and as the terminals will be used only by carriers serving Chicago, who can interchange line-haul freight only because of such authority, the described areas must be held to be commercially a part of Chicago.—Chicago, Ill., Commercial Zone, 86 M.C.C. 735 (739)*.

In view of the uniquely desirable features of the acreage involved, postponement of enlargement of the zone until actual terminal construction has taken place would serve no useful purpose, but would undoubtedly impede the progress of construction, and is not warranted by the evidence.—Id., p. 739-40.

In determining whether the Chicago commercial zone should be expanded to include the village of Elk Grove, Ill, consideration of the mileage-population formula prescribed in 46 MCC 665 would be inappropriate because of the specific exception for Chicago on account of unusual conditions prevailing there. And possible effects on operations of protestant motor carriers are likewise not a proper consideration, though such evidence would be important in determining whether the exemption should be removed in whole or in part.—Id., 88 M.C.C. 329 (333)*.

While Elk Grove has been incorporated and has experienced a marked population growth, including a large number of residents employed in Chicago, that is a natural and expected development (common to suburban communities throughout the country) and has not been recognized as a determinative factor in defining commercial zones generally; its industrial growth is not directly related to Chicago; and since volume and types of present or anticipated traffic moving between Elk Grove and Chicago are not shown, none of such traffic may be considered as intraterminal. Far from integrating it with Chicago, Elk Grove's residential and industrial development establish it as an independent, self-reliant community linked by expressways to numerous shipping and receiving points of which Chicago is only one. Therefore, extension of Chicago commercial zone to include Elk Grove is not warranted.—Id., pp. 333-4.

While the commission has prescribed precise boundaries for commercial zones previously determined by mileage-population formula, because of changes in the political or geographical situation or in growth of the area, in each case some extraordinary event was involved, such as construction of new transportation facilities, need to direct industrial development in a particular direction, or establishment of a large industrial complex at a particular point, which is dependent on and considered a part of the base point. No such element is present in area sought to be included within commercial zone of Nashville; that area contains only one large industrial facility, which has been located there for several years, and its relation to economic life of Nashville is not clear. Since determination of a commercial zone must reflect a situation existing as an economic fact, present redefinition of the Nashville zone is not war-

ranted.—Nashville, Tenn., Commercial Zone and Terminal Area, 92 M.C.C. 73 (75-6).

Intrastate transportation: [Vols. 15, 19].—While a Missouri intrastate regular-route carrier may serve commercial zones or areas defined by State law only under specific grants, authority granted by the commission to serve specified points also authorizes service (without a separate grant) to the commercial zones of such points, unless territorial limitations are imposed. Indeed, a carrier authorized to serve a point has implied obligation to serve the commercial zone thereof; and while vendee may serve commercial zones of only four Missouri points under its intrastate authority, to withhold authority to serve zones of other points, in granting certificate for continuance of its former single-State operations, would be inconsistent with that principle, difficult for shippers to interpret in light of general practice of other interstate carriers, and difficult to police—all inimical to the general public interest. Certificate granted therefore contemplates service to commercial zones of all authorized points, with service to St. Louis zone restricted to the Missouri portion thereof.—Dodds Truck Line, Inc.,—Purchase—Strain, 93 M.C.C. 229 (236, 238).

Municipality: [Vols. 14, 17-19].—The commission has no power to set aside an ordinance of a municipality by saying that the ordinance doesn't mean what it declares itself to mean. Ordinance of Orange, Tex., annexing a circular strip of land reaching within 5 miles of Beaumont and enclosing a large unannexed area declares that the annexed land is for all purposes part of the city of Orange. Even if the city acted arbitrarily and capriciously in thus extending its borders, in attempting to determine the correct boundaries of Orange for purposes of the commercial zone rules the commission extended its quasi-judicial power beyond any conferred on it by Congress. The commission's ruling that the annexed strip should not be considered part of the municipality of Orange, set aside and the case remanded for further proceedings consistent with the court's opinion.—Yellow Transit Freight Lines, Inc. v. United States,221 F. Supp. 466 (468)*.

Since the Borough of Lansdale, Pa., is incorporated and has a local government providing governmental services, it is a municipality within meaning of §203(b8) and, based upon the population, its commercial zone includes all areas within 3 miles of the corporate limits. Therefore, opposing motor carrier holding authority to serve the borough may serve supporting shipper's new plant, located within 2.5 miles of corporate limits thereof, as a point within the borough commercial zone.—Dealers Transit, Inc., Extension, 98 M.C.C. 297 (302).

"Townships" or other political entities into which a county is subdivided for administrative purposes are not municipalities having commercial zones, as defined in 46 MCC 665, when they do not possess such population density, society, and commerce as is found in incorporated municipalities to which the statute refers. Therefore, authority to serve all intermediate points on route traversing the county does not permit service, under the commercial zone definition, at a plant site that is located four miles from the highway but within a township contiguous to a township lying along the authorized route.—Cross Transp., Inc., Interpretation of Certificate, 91 M.C.C. 51 (53).

It is neither practical nor feasible to amend the definition of municipality in 49 CFR 170.16 in order to determine the extent of the commercial zone of Orange, Tex., or those of adjacent Texas municipalities, as enlarged by that city's annexation of a narrow semicircular strip of land enclosing a large unannexed area. Problems raised by Orange's annexation procedures appear to be local in nature and to apply, at a maximum, to only four areas in Texas. Furthermore, Texas has recently amended its statutes concerning annexation procedures of "home rule" municipalities, and future annexation of a strip of the nature and proportion annexed by Orange appears to be precluded by the new procedures. Not only would formulation of a special rule, or amendment of the present regulation, to cover the limited situation presented be difficult, it at all possible, but interpretations which could flow therefrom could cause greater administrative problems than those sought to be resolved. Therefore, although result of application of the present rule may be other

than the commission intended or than what it is believed Congress intended in enacting §203(b8), that in itself does not justify changing an otherwise sound regulation.—Central Freight Lines, Inc. v. East Texas Motor Freight, 96 M.C.C. 150 (155-6)*.

Texas allows certain of its municipalities to annex territories encompassing areas not annexed, and there is no question that under Tecas law the territory thus annexed by any municipality so empowered becomes part of that municipality "for all purposes." And while New England type townships have been excluded from the statutory meaning of "municipality" (even though such townships may be municipalities under laws of the State in which located), that interpretation of the statute is not available with respect to Orange and other similar Texas municipalities. In view of the impracticability of defining on an ad hoc basis the commercial zone of each city in the area involved, or in determining indirectly the terminal areas of carriers serving unincorporated municipalities therein, there is no other course but to dismiss the complaint to the extent that defendants can provide the challenged service under their existing authorities.—Id., p. 156.

New England-type towns: [Vols. 17-19].—Applicant may not serve East Millinocket, Maine, as a point within commercial zone of contiguous township of Medway; while authority to serve a New England point which is the name of both a "town" and a community within that town has been construed as conferring the right to serve all points in the town unless certificate specifically indicates otherwise, and applicant's authority to serve the named point "Medway" includes all points in the town of Medway, it may not serve points beyond the territorial limits of that town, since New England type towns were specifically excluded from the term "municipality" in 46 MCC 665, and therefore have no commercial zone.—Border Exp., Inc., Extension, 88 M.C.C. 491 (493).

Passenger carriers: [Vols. 16, 19].—Terminal areas of passenger carriers are confined to corporate limits of their authorized points, unlike those of property carriers which are normally coextensive with municipal commercial zones; thus, since defendant's authority to transport passengers between New York City and Long Branch, N.J., authorizes it to serve all areas within Long Branch municipal limits, it may leave such municipal limits and operate for about 25 feet over a private road (which originates within those limits) so as to render service to an area within the Long Branch limits which cannot otherwise be reached. The commission's jurisdiction is confined to the use of public highways; and as defendant enters on the private roadway within its authorized territory, it does not violate the commission's regulations in performing service beyond the municipal limits by use of that private road; such determination, previously made as to property carriers, is applicable for the same reasons to passenger carriers.—Asbury Park-N. Y. Transit v. New York, K., L. B. Bus Line, 95 M.C.C. 452 (454-6).

Population basis: [Vol. 18].—See Dealers Transit, Inc., Extension case, under *Municipality*, above.

Territorial operating authorities: [Vols. 16-19].—Certificates which grant authority limited to a described territory do not authorize service to any point outside that territory, even though the point in question may be within commercial zone of a municipality within the described territory.—United States v. W. J. Dillner Transfer Co., 315 F. 2d 107 (109).

Although vendee's Missouri intrastate authority specifically authorizes it to serve the St. Louis commercial zone, its past interstate service in the St. Lous area under former single-State proviso must have been confined to Missouri points, since the State regulatory authorities have no power to authorize operations in the Illinois part of the defined St. Louis-East St. Louis commercial zone, and furthermore, any operations by vendee across the State line would have nullified its right to claim benefit of the proviso. Therefore, certificate granted vendee under §207 for continuance of its former proviso operations authorizes service only at Missouri points in that zone; and following unification of those rights with vendors' rights between St. Louis and Arkansas it may transport shipments from, but not to, all points in the zone.—Dodds Truck Line, Inc.—Purchase—Strain, 93

M.C.C. 229 (236-7, 238).

A grant of authority to serve Neville Island, an island in the Ohio River near Pittsburgh, is territorial in scope and, thus, applicant's authority to serve it is not broadened by the commercial zone concept. "Neville Island" is merely a geographic expression, not an incorporated municipality or an unincorporated community; therefore, applicant may serve only the territorial island itself and may not serve Pittsburgh as a point within claimed "commercial zone" thereof.—Lattavo Bros., Inc., Extension, 89 M.C.C. 600 (602-3)*

On reconsideration, however, applicant's authority to serve "Neville Island" is regarded as being ambiguous, inasmuch as it cannot be determined with absolute certainty whether the words were intended to describe a community located on the island, or all points on the island itself as a specifically defined territory. The situation is analogous to that which prevails with respect to New England-type towns; in such cases a point name, which describes both a New England town and a community within that town, has been construed as authorizing service at all points within the New England town; by analogy, then, applicant's authority should be construed as territorial, encompassing all points on the island but having no terminal area beyond that island. Therefore, although southernmost tip of the island is only a little over a mile from the Pittsburgh municipal boundary, applicant may not use Pittsburgh as a common point for tacking its regular and irregular-route rights on the theory that it is within a commercial zone or terminal area of Neville Island.—Id., 91 M.C.C. 643 (644, 645-6)*.

Unincorporated urban communities: [Vols. 14, 19].—"Unincorporated community" means those settlements or aggregations of homes and businesses which, though without local governments or definite corporate limits, are similar from a transportation standpoint to incorporated communities wherein bona fide collection, delivery, or transfer service—incidental to intercity or intercommunity line-haul transportation—is performed. While the existence or lack of a post office of the same name is of some significance in determining status of unincorporated areas, that is not the only criterion; commercial zone of such an area (and terminal area of carriers serving it) can be defined by reference to its recognized business center.—Cross Transp., Inc., Interpretation of Certificate.—91 M.C.C. 51 (55-6).

Therefore, since Levittown, Pa., is a housing development which, though having one overall name, bears no more similarity to a municipality from a transportation standpoint than does a military reservation, it does not comprise an unincorporated community of the type contemplated by 54 MCC 21. Levittown has no business center and, while it has a post office of the same name, presence of a second post office with a different name indicates that it is not regarded locally as a unified geographical point; moreover, commercially and politically its residents look in several different directions for shopping, governmental services, and transportation and, thus, there is no "community" of Levittown with respect to those functions. Therefore, Levittown has no commercial zone which may be measured by the distance from post office of that name.—Id., pp. 54, 56-7.

Since authority to serve all intermediate points on U.S. Highway 11 between Mattawamkeag and Ashland, Maine, includes the unincorporated community of Medway which is located on the highway, applicant may, under the mileage-population formula, serve all points within 2.5 miles of the post office in that community, whether they are within or without the "town" of Medway.—Border Exp., Inc., Extension, 88 M.C.C. 491 (493).

See also Public Service Coordinated Transport v. Red Arrow, case, §212(a). n. 1.

Particular Zones, by Name

Chicago, Ill.: Existing zone redefined to include a narrow strip of land about 4 miles long, extending southwesterly from Willow Springs in the zone along banks of Chicago Sanitary and Ship Canal and Illinois and Michigan Canal, including junction of those waterways with Calumet Sag Channel.—Chicago, Ill., Commercial Zone Extension—Sag Area, 94 M.C.C. 568*.

Zone adjacent to and commercially a part of the city, contemplated by §203(b8), enlarged and redefined so as to include the villages of Bridgeview and Hickory Hills, Cook

County, Ill.—Chicago, Ill., Commercial Zone, 86 M.C.C. 735 (739, 741)*.

Cincinnati, Ohio: Boundaries of commercial zone as previously defined, modified to include described portion of Butler County, Ohio.—Cincinnati, Ohio, Commercial Zone, 92 M.C.C. 180 (182-3)*.

Order redefining the commercial zone limits in Ohio and Kentucky, and enlarging the zone in certain respects, revised by redescribing zone boundaries so as to exclude all of Florence, Ky., except that portion lying within industrial site of the Northern Kentucky Industrial Foundation, from the commercial zone.—Id., 94 M.C.C. 766 (768).

Houston, Tex.: As result of city ordinance modifying the eastern corporate boundary of Houston and de-annexing certain lands, the municipalities of Baytown, La Porte, and Lomax, situated along the Houston Ship Channel and formerly included in the Houston commercial zone, are now beyond that zone as computed under the mileage-population formula. Since the entire area from Houston to the channel mouth is for all practical purposes one solid industrial complex, and the record evidences the closely knit civic, economic, social, and political relationship of Houston and those three municipalities, they form a single integral community. Definition of the Houston commercial zone to include Baytown, La Porte, and Lomax in addition to the area included under the commercial-zone formula is therefore warranted.—Houston, Tex., Commercial Zone, 92 M.C.C. 325 (339)*.

Kansas City, Mo.—Kansas City, Kans.: In order to correct ambiguity in description of the zone in prior report, which was inadvertently created by following language in a previous description, the commercial zone description, as clarified, is restated in full. And since the entrace to Lake City Arsenal is not a point within the zone area, the arsenal should not be construed as a part of the commercial zone.—Kansas City, Mo.—Kansas City, Kans., Commercial Zone, 103 M.C.C. 19 (20)*.

New York City, environs: Restoration of exemption (removed in 53 MCC 451) to embrace transportation of traffic between defined Kearny, N. J., area and New York zone as originally defined in 1 MCC 665, limited to that having prior or subsequent rail movement, is warranted when Pennsylvania R. is the only major railroad serving New York area whose TOFC terminal is outside the exempt (original) zone, and is handicapped by fact that shippers using its plan III TOFC service must employ certificated motor carriers to move their trailers to and from its Kearny terminal, whereas those using like service of its competitors can use unregulated carriers whose charges are lower; extension of exempt zone will enable it to compete, in its plan III service, on same equality it now enjoys in respect of plan II and boxcar service.—New York, N.Y., Commercial Zone, 88 M.C.C. 336 (338, 339)*.

The Pennsylvania is an important segment of rail transportation between eastern port cities and the Midwest, and its continued strength and vigor is of legitimate interest to the commission. Also of legitimate concern is whether denial of its petition would be other than a temporary benefit to protestants; the Pennsylvania owns land within the exempt zone, as well as a bridge giving access thereto from Kearny, and upon denial would extend its Kearny terminal into that zone, thereby leaving the regulated motor carriers in no better position trafficwise than if its petition were granted.—Id., pp. 339, 340.

Orange, Tex.: By virtue of Orange's annexation, under Texas law, of a narrow semicircular strip enclosing a large unannexed area, the strip so annexed became part of the municipality of Orange "for all purposes." Therefore, carriers holding specific authority to serve Orange may serve that strip, all municipalities wholly surrounded by Orange, and, under the mileage population formula, all other municipalities any part of which is within 4 airline miles of Orange, and all unincorporated areas (including those encircled) within 4 airline miles of Orange, measured from its corporate limits both from the inside limits of the annexed strip and from the outside limits thereof.—Central Freight Lines, Inc. v. East Texas Motor Freight, 96 M.C.C. 150 (158)*.

Philadelphia, Pa.: Fort Washington Industrial Park, located just outside Philadelphia commercial zone at Fort Washington

Interchange with Pennsylvania Turnpike in Upper Dublin Township, is clearly related commercially to Philadelphia, Definition of the present zone in terms of township boundaries does not provide for industrial development along that major transportation artery; therefore, as transportation between Philadelphia and the industrial park is intraterminal in character, the Philadelphia zone is redefined to include that portion of Upper Dublin Township where industrial development has taken or is about to take place.—Philadelphia, Pa., Commercial Zone, 94 M.C.C. 172 (177-8)*.

Pueblo, Colo.: Commercial zone redefined to include, in addition to all points within a 4-mile radius of the corporate limits, entire area, consisting of about 3,500 acres, known as Pueblo Memorial Airport.—Commercial Zones and Terminal Areas, 92 M.C.C. 753 (756)*.

St. Louis, Mo.-East St. Louis, Ill.: Commercial zone redefined to include an area in Missouri approximately 2 miles square, immediately west of present western boundary of such zone.—St. Louis, Mo.-East St. Louis, Ill., Commercial Zone, 96 M.C.C. 691*.

In the particular geographical circumstances presented, limits of the commercial zone are redefined and extended to include described portion of the village of Cahokia, Ill., which is contiguous to and industrially integrated with Monsanto, Ill., located in the Illinois portion of present zone.—Id., 95 M.C.C. 519 (523-5)*.

Syracuse, N.Y.: Commercial zone redefined to include, in addition to the radial area authorized by the mileage-population formula, points beyond the 5-mile radius in the unincorporated towns of Geddes and Van Buren, as described.—Syracuse, N.Y., Commercial Zone, 92 M.C.C. 100 (105)*.

Washington, D. C.: Commercial zone limits redefined to include Rockville, Md., and environs, an area which, as an economic fact, is commercially a part of Washington. Although trade practices and uses to which that area was put were not previously such as to warrant conclusion that it was commercially a part of Washington, the commercial and industrial area of Rockville has become virtually indistinguishable from the area immediately south thereof which is within the zone as presently described; also, consideration of the nature of the traffic, shown to be intraterminal transportation of the type intended to be covered by the §203(b8) exemption, favors inclusion of Rockville within the zone limits. —Washington, D. C., Commercial Zone, 98 M.C.C. 106 (111-112)*; for similar reasons, further extension of the commercial zone boundary to include 0.4-square mile area immediately north of boundaries as last redefined, where Sears Roebuck & Co's new warehouse and distribution center is located, is justified.—Id., 103 M.C.C. 256 (257-60)*.

Commercial zone limits redefined to include a 2-square mile area about Tyson's Corner, Va., which has become economically a part of the Washington metropolitan area.—Id., 95 M.C.C. 305 (308-9)*.

Regulations of the Commission

27 FR 4810, May 22, 1962, Part 170: Commercial Zones, §170.1 New York, N.Y., revised, effective June 22, 1962.

27 FR 9329, Sept. 20, 1962, Part 170: Commercial Zones, §170.22 Cleveland, Ohio, revised, effective Oct. 22, 1962.

27 FR 10296, Oct. 20, 1962, Part 170: Commercial Zones, §170.22 Cleveland, Ohio, commercial zone description corrected since it has been rendered inaccurate as to area formerly known as Willoughby Township and now known solely by names of its eight constituent parts, effective Oct. 22, 1962.

28 FR 2236, March 7, 1963, Part 170: Commercial Zones, §170.7 Cincinnati, Ohio, commercial zone description revised, effective April 12, 1963.

28 FR 2685, March 19, 1963, Part 170: Commercial Zones, §170.34 Houston, Tex., added, describing Houston commercial zone, effective Apr. 22, 1963.

28 FR 5579, June 6, 1963, Part 170: Commercial Zones and Terminal Areas, amended by adding §170.56 Pueblo, Colo., describing Pueblo commercial zone, effective July 11, 1963.

28 FR 14268, Dec. 25, 1963, Part 170: Commercial Zones and Terminal Areas, §170.6 Philadelphia, Pa., commercial zone description revised, effective Jan. 26, 1964.

29 FR 105, Jan. 4, 1964, Part 170: Commercial Zones, §170.6 Philadelphia, Pa., revised (corrected order), effective Jan. 31, 1964.

29 FR 2543, Feb. 18, 1964, Part 170: Commercial Zones, §170.7 Cincinnati, Ohio, revised, effective 30 days from date of service of order.

29 FR 3363, Mar. 13, 1964, Part 170: Commercial Zones, §170.7 Cincinnati, Ohio, redefined and enlarged commercial zone revised, effective Mar. 13, 1964.

29 FR 3769, Mar. 26, 1964, Part 170: Commercial Zones, §170.2 Chicago, Ill., commercial zone redefined, effective May 18, 1964.

29 FR 6283, May 13, 1964, Part 210: Exemptions, §210.40 Motor transportation of property incidental to transportation by aircraft, added, effective June 24, 1964.

29 FR 7425, June 9, 1964, Part 170: Commercial Zones, Chicago, Ill., extension, order of Mar. 12, not having become effective, it is stayed by filing of petition for reconsideration.

29 FR 7510, June 11, 1964, Part 170: Commercial Zones, Chicago, Ill., Extension, order of March 12, 1964 reinstated, the petition for reconsideration having been denied, effective, July 20, 1964.

29 FR 7511, June 11, 1964, Part 170: Commercial Zones, §170.4 Washington, D.C., revised, effective July 20, 1964.

29 FR 9539, July 14, 1964, Part 170: Commercial Zones, §170.4 Washington, D.C., order (29 FR 7511) corrected.

29 FR 11129, July 31. 1964, Part 170: Commercial Zones, §170.3 St. Louis, Mo.-East St. Louis, Ill., commercial zone redefined, effective Aug. 28, 1964.

29 FR 11183, Aug. 4, 1964, Part 210: Exemptions, §210.45 Motor transportation of passengers incidental to transportation by aircraft, added, effective Sept. 15, 1964.

29 FR 13074, Sept. 18, 1964, Part 210: Exemptions, §210.45 Motor transportation of passengers incidental to transportation by aircraft, effective date of order (29 FR 11183) postponed from Sept. 15, 1964 to Oct. 30, 1964.

30 FR 795, Jan. 26, 1965, Part 170: Commercial Zones, §170.3 St. Louis, Mo.-East. St. Louis, Ill., commercial zone redefined, effective Feb. 26, 1965.

30 FR 2401, Feb. 24, 1965, Part 170: Commercial Zones, §170.4 Washington, D.C., commercial zone redefined, effective March 26, 1965.

30 FR 2712, March 3, 1965, Part 170: Commercial Zones, §170.4 Washington, D.C., boundaries of zone (30 FR 2401) corrected.

30 FR 3163, Mar. 6, 1965: Retention periods, records, motor carriers exempt under §203(b) of IC Act, 49 CFR 191.10, 194.3, 194.6, 195.8, 195.9, 196.2, 196.7.

30 FR 7248, May 29, 1965, Part 170: Commercial Zones, order of Feb. 5, 1965 redefining Washington, D.C., commercial zone (30 FR 2401, 2712) reinstated, effective July 6, 1965.

30 FR 11757, Sept. 15, 1965, Part 170: Commercial Zones, §170.57 Warren, Ohio, added, effective 30 days from date of service of order.

30 FR 13263, Oct. 19,1965, Part 170: Commercial Zones, §170.21 Baltimore, Md., revised, effective Nov. 15, 1965.

30 FR 14493, Nov. 19, 1965; Part 170: Commercial Zones, §170.21 Baltimore, Md., effective date of order of Sept. 29, 1965 (30 FR 13263) stayed pending disposition of petition for reconsideration.

30 FR 14529, Nov. 20, 1965, Part 210: Exemptions, §210.45 Motor transportation of passengers incidental to transportation by aircraft, amended by adding thereto paragraph (d) Exempt zones and operations—(1) Dulles and Friendship International Airports. Effective Dec. 20, 1965 [100 M.C.C. 58].

30 FR 14853, Dec. 1, 1965: Part 170: Commercial Zones, §170.8 Kansas City, Mo.-Kansas City, Kans., Commercial Zone limits redefined, effective Dec. 31, 1965.

30 FR 17169, Dec. 31, 1965; Part 170: Commercial Zones, §170.8 Kansas City, Mo.-Kansas City, Kans., effective date of order of Nov. 12, 1965 (30 FR 14853) stayed pending disposition of petition for reconsideration.

31 FR 829, Jan. 21, 1966, Part 170: Commercial Zones, §170.21, Baltimore, Md., order of Sept. 29, 1965 (30 FR 13263) reinstated, effective March 3, 1966, the petition for reconsideration having been denied.

31 FR 4067, Mar. 8, 1966: Retention periods, records, motor carriers exempt under §203(b) of IC Act, 49 CFR 191.10, 194.3, 194.6, 195.8, 195.9, 196.2, 196.7.

31 FR 8312, June 14, 1966, Part 170: Commercial Zones, §170.10 Davenport, Iowa; Rock Island and Moline, Ill., Order Sep. 8, 1960 vacated, revised order substituted, effective July 18, 1966.

31 FR 7392, May 21, 1966, Part 170: Commercial Zones §170.7 Cincinnati, Ohio, Order March 5, 1964 vacated, revised order substituted, effective June 20, 1966.

31 FR 14080, Nov. 3, 1966: Part 170: Commercial Zones, §170.8 Kansas City, Mo-Kansas City, Kans., Commercial Zone limits redefined, effective Nov. 25, 1966.

32 FR 76, Jan. 6, 1967, Part 170: Commercial Zones, 170.4 Washington, D.C., revised, effective Feb. 10, 1967.

32 FR 3664, Mar. 2, 1967: Retention periods, records, motor carriers exempt under §203(b) of IC Act, 49 CFR 191.10, 194.3, 194.6, 195.8, 195.9, 196.2, 196.7.

32 FR 3884, March 9, 1967, Part 170: Commercial Zones, §170.4 Washington, D.C., order of Dec. 16, 1966 (32 FR 76) not having become effective, and petition for reconsideration having been filed, order is stayed pending disposition of the petition, effective on date of order.

NOTE: For recodification, see 49 CFR, Editorial Note, 32 FR 5606, April 5, 1967.

32 FR 9231, June 29, 1967, Part 270 [formerly Part 170]: Commercial Zones, §270.3 St. Louis, Mo.-East St. Louis, Ill., revised; commercial zone limits redefined, effective July 21, 1967.

32 FR 13930, Oct. 6, 1967, Part 270 [formerly Part 170]: Commercial Zones, §270.8 Kansas City, Mo.—Kansas City, Kans., revised; commercial zone limits redefined, effective Nov. 1, 1967.

NOTE: For Republication and Redesignations of Regulations, see 32 FR 20003, Dec. 20, 1967.

CONSULT THE TABLE OF CASES WHENEVER A CITATION IS FOLLOWED BY AN ASTERISK

33 FR 698, Jan. 19, 1968, Part 1048 [former Part 270 formerly Part 170]: Commercial Zones, §1048.7 Cincinnati, Ohio, commercial zone limits of Cincinnati revised, effective March 1, 1968.

33 FR 4067, Mar. 1, 1968: Retention of records, exempt carriers, transferred to Dept. of Transportation.

33 FR 4626, March 16, 1968, Part 1048 [former Part 270 formerly Part 170]: Commercial Zones, §1048.3 St. Louis, Mo.-East St. Louis, Ill., commercial zone limits redefined, effective May 6, 1968.

33 FR 6771, May 3, 1968, Part 1048 [former Part 270 formerly Part 170]: Commercial Zones, §1048.26 Minneapolis-St. Paul, Minn., commercial zone limits redefined, effective June 3, 1968.

Section 203. (c) [§*303(c) U.S.C.*] Certificate or permit.—[Unchanged. See vol. 18, p. 14274.]

Notes of Decisions

Volume 19—p. 15506.

2. Construction and interpretation.—[Vol. 19].—The statute explicitly authorizes the commission to eliminate transportation which, though carried on in the guise of private carriage, is in effect for-hire carriage which may lawfully be carried on only by an authorized common or contract carrier. The section merely codifies the "primary business" test developed by the commission, prior to enactment thereof, as a standard for determining whether a particular "buy-and-sell" arrangement was a device to evade regulation or was, in fact, private carriage conducted in connection with a bona fide nontransportation business. No outright prohibition of backhauling practices is embodied in §203(c); rather, the statutory scheme recognizes that mere availability and use of backhaul capacity may in certain cases by completely consistent with the bona fide conduct of a noncarrier business.—Red Ball Motor Freight v. Shannon, 377 U.S. 311 (313-4, 318)*.

Terms of the Interstate Commerce Act are sufficiently comprehensive to encompass all those who, no matter what form they use, are in substance engaged in the business of transportation of property on the public highways for hire; intent of the statute is highly remedial and it is to be liberally construed to effectuate its purpose in the public interest. United States v. Aides, Inc., 211 F. Supp. 122 (124); I.C.C. v. Teeter, 228 F. Supp. 479 (481).

Since §203(c), prohibiting for-hire carrier operations without first obtaining appropriate authority, condemns only the conduct of a carrier, and §222(c) prohibits conduct of related nature by a shipper only if he (a) receives some rebate or concession or (b) is guilty of some fraudulent conduct in an attempt to evade regulation, defendant shipper is not constituted an "aider or abbettor" merely because it employed defendant carrier to haul its goods. There is no evidence that shipper induced unlawful operations, or that it paid other than the normal tariff charges of authorized carriers for like transportation; no rebates, concessions, or "kick-backs" were involved. Where alleged violation of §203(c) necessarily contemplates joint action by shipper and carrier, a knowing participation by shipper (a member of the class protected from carrier abuse by regulation of motor carriers), without more, does not make such person an aider or abettor; it merely makes it possible for the carrier to violate the law.—United States v. Wiliamson, 235 F. Supp. 836 (837-9).

The primary business test, as codified in §203(c), clearly precludes all transportation conducted in connection with a commercial enterprise unless it is within the scope and in furtherance of a primary business other than transportation, without regard to identity of the actual shipper or shippers for whom the goods are being transported; accordingly, any contention that that test is in some way controlled by, or must yield to, a finding as to identity of the persons for whom the transportation is being rendered must be rejected.—Morgan Packing Co., Inc.—Investigation of Operation, 92 M.C.C. 48 (59-60).

In adopting the "primary business" test in the Transportation Act of 1958, Congress codified the test previously followed by the commission and approved by the courts; and

in referring to "a" primary business, rather than "the" primary business, the statute recognizes that a bona fide private carrier may be engaged in diversified lines of industrial or commercial activity, thus it is limited to a single "primary business." All that §203(c) requires is that the noncarrier enterprise or enterprises be primary to any related transportation activity, and that such related transportation be in furtherance of the primary activity or activities.—Smith Grain Co., Inc., Investigation of Operations, 86 M.C.C. 767 (769-771).

The Brooks case, 93 F. Supp. 517, held that existence of an identifiable transportation charge is not determinative of carrier status, and the congressional committees reporting on the present language of §203(c) disclaimed any intention to jeopardize or interfere with bona fide private carriage as recognized in that case, even if a charge is made.—Jackson and Plunkett—Investigation of Operations, 88 M.C.C. 671 (679).

The definitions of the three types of carriers, common, contract, and private, must not only be read and considered together, but must be considered in connection with §203(c) as amended; the committee reports on the 1958 amendment plainly indicate that one of the evils sought to be abolished was the backhauling by private carriers of merchandise for sale to others for the sole purpose of receiving compensation for the otherwise empty return of their trucks; that announced intention of Congress is not to be thwarted by mere fictions.—Cahaba Steel Co.—Investigation of Operations, 86 M.C.C. 759 (764)*.

On the evidence of record, there is no doubt as to illegality of applicant's activities in transporting exempt commodities southbound and then "leasing" its vehicles to shipper for northbound transportation of considered traffic (in "private carriage") with the same drivers used purportedly as shipper's employees for duration of the northbound movement. Under such "lease" arrangements, applicant is engaged, and abetted by shipper, in transportation of shipper's traffic, for compensation, without the interstate authority required therefor. Applicant and shipper are admonished to discontinue all operation under such arrangements unless and until appropriate authority is secured, and admonished further that continued operations of type described will subject both to criminal sanctions.—Interstate Distributing Co., 91 M.C.C. 36 (41-2)*.

3. For-hire transportation business.—[Vol. 19].—Record is not persuasive that backhaul movement of sugar by appellees, dealers in livestock and in various commodities (including sugar), was for-hire transportation. Their assets are not in large part composed of transportation facilities, nor is transportation a major item of expense of the sugar movement in question; also, while they warehouse only a small stock of sugar, that is a perishable commodity and their warehouse is not equipped for its preservation. Evidence does not sustain the commission's finding that considered transportation is a related or secondary enterprise conducted with the purpose of profiting from the transportation itself.—Red Ball Motor Freight v. Shannon, 377 U.S. 311 (319-21)*.

A transportation service is not immunized from prohibitions of §§203(c) and 206(a)(1) by the mere fact that the only thing transported is a motor vehicle which itself furnishes the motive power. Since 1200 vehicles a year move under auspices of defendant's business of providing drivers for transporting an owner's automobile to place where the driver wishes to go, and that activity is hardly eleemosynary, a "for-hire" transportation business is obviously being conducted by someone. While record shows that the dirvers are not engaged in transportation as a regular occupation or business, and therefore would be within the §203(b9) exemption, there is nothing "casual, occasional, or reciprocal" in defendant's operations. Neither the dictum in 64 MCC 475 (which was shortly thereafter corrected), nor other decisions cited by defendant, support the claim that it operates as an employment agency and that the for-hire transportation was conducted solely by drivers it provided for "drive-away" movement of owners' automobiles.—I.C.C. v. AAA Con Drivers Exchange, Inc., 340 F. 2d 820 (824-6)*.

Since defendant fixes the rate owner must pay the driver, and the higher that rate the more defendant can get from the driver, it has

as much interest in the transportation payments as it it collected from owners and paid the dirvers; its position differs from that of an employment agency which collects a fixed fee or a fixed percentage of salary set by the employer, or a combination thereof. Moreover, defendant sets all terms of the owner-driver relationship; owner and driver do not make their own arrangments as is normally done between employer and employee. One who holds himslef out and acts as defendant does cannot be said to have effectively placed himself beyond a rational construction of the prohibitory language of the statute, which Congress entrusted the commission to administer. Looking through form to substance, the commission rationally could (and its decisions show that it would) conclude that defendant led its customers to believe that it, not the drivers, was getting their cars from one place to another.—Id., pp. 824, 825-6.

Report and order in issue, finding that respondent (plaintiff) has ben engaged in for-hire transportation of sugar without requisite authority and requiring it to cease and desist therefrom, shows that the commission relied for both legal standards and factual comparability on its decision in 81 MCC 337; however, that decision was set aside in 219 F. Supp. 781 which was affirmed in 377 US 311 by a full opinion which declared a number of signigicant principles. Therefore, as the court must be certain that the commission has evaluated record in instant proceeding in light of the correct standards, the order is vacated and proceeding remanded for further hearing, consideration, and report. Other than statements that present record may be used and that the court's impression is that much more factual information will be helpful, if not required, proper proceedings on remand is left to the commission's discretion.—Shelby Biscuit Co. v. United States, 255 F. Supp. 475 (475-6)*.

Defendant by his advertisements holds out to the general public to transport automobiles by driveaway for individual owners, and by such holding out and his verbal representations to each owner establishes an expectation on the owner's part that he assumes to perform a transportation service. Although it is made to appear that the owner contracts with the driver for transportation and delivery of his car, drivers are not only selected by defendant, but are under his supervision and control as agents or employees during course of the transportation; and for each automobile transported he charges and receives from the owner a definite sum of money which constitutes compensation within meaning of Part II. Fact that the charge for the service is related to distance traveled discredits contention that such charge is for screening a driver; and the contracts or agreements used (apparently designed to avoid application of the act) are of no legal effect since their terms are contrary to the facts. Defendant's acts constitute unauthorized common carriage in violation of §206(a); permanent injunction issued.—I.C.C. v. Teeter, 228 F. Supp. 479 (482).

The Motor Carrier Act is comprehensive enough to bring within its purview all those who are in substance engaged in a business of for-hire transportation of property on the public highways. Operations of defendant nonprofit shippers association constituted an unauthorized for-hire transportation business, in violation of §§203(c), 206, and 209, when it transported goods of its shipper members in vehicles leased for the trip and, since those services were performed for compensation, it could not be classified as a private carrier acting in furtherance of a primary non-transportation business.—I.C.C. v. International Shipper Ass'n. of New Jersey, Inc., 249 F. Supp. 66 (69-70)*.

See also Federal Shippers Assn. case, §212(a), n. 35.

In determining the status of a lessor of motor equipment when vehicles are used by a shipper, the courts have disregarded form, and look only to the substance; the actual modus operandi of the parties must be examined to determine if for-hire transportation or private carriage is involved. In the dual test developed by the commission and prescribed by the Supreme Court's approval thereof in 368 US 370, the first test is one of control, direction, and domination of the transportation, and the second looks to the substance of the transportation. The purpose of these tests is to determine whether or not one who has hired the instrumentalities of transportation from another has assumed in signigicant

measure the characteristic burdens of the transportation business.—United States v. Wormsbacher, 240 F. Supp. 716 (718, 719).

Although lease arrangement between vehicle owner and shipper provided that shipper would have exclusive possession, control, and use of the tractors, and that drivers would be its employees and subject to its rules and direction, in actual practice drivers were hired and instructed by lessor, and latter, rather than shipper, assumed most of the burdens of the transportation business. Testimony of three drivers shows that shipper's control, direction, and domination of the transportation were slight compared to lessor's. Further, lessor retained substantial financial burdens in connection with the vehicles, as he was responsible for their maintenance and paid fuel and oil costs, had invested capital in them and suffered any loss from their nonuse, and absorbed cost of their empty return after making delivery for shipper. The arrangement under which defendants operated constituted for-hire transportation in interstate commerce without appropriate authority from the commission, in violation of §203(c).—Id., pp. 718-9.

While individual's purported lease of his tractors to meat company for transportation of its products in its trailers provides for lessee's exclusive direction and control of vehicles and that it will furnish its own drivers, in the actual operation he exercises substantial control through lessee's purported dispatcher who is actually his employee (he pays three-fourths of her salary), since she dispatches the vehicles, hires and discharges drivers, keeps their logs, arranges for northbound movement of agricultural commodities for lessee's account and for southbound transportation of its meats, instructs drivers concerning movements, and handles their accounts. Also, lessor assumes a substantial amount of the characteristic burdens of a transportation business such as maintenance and repair, operating supplies, insurance, etc. Defendant lessor thus acts as an unauthorized contract carrier within meaning of 368 US 370; he and his employees, etc., are therefore permanently enjoined from engaging in such operations unless and until appropriate authority is obtained from the commission.—I.C.C. v. Moore, 236 F. Supp. 168 (170-1, 173).

Defendants throughout their operation have retained the identifying characteristics of a for-hire motor carrier; by coordinating activities of drivers, shippers, and consignees they were the common denominator for each of the separate shipments, an issuance of checks to the drivers by shippers or consignees and "trip lease" or "spot lease" agreements executied were but a specious salutation to the regulations applicable to their interstate motor carrier business. Defendants have retained direction, control, and responsibility for the vehicles and drivers at all times, and have supplied incidental services normally attributed to for-hire transportation; their customers have been offered and delivered transportation at a fixed rate of compensation without assumption of financial risk or the characteristic burdens of a transportation business; defendants' business is thus unauthorized for-hire carriage in violation of§§206(a), 209(a), and 222(b).—I.C.C. v. Arpel, Inc., 211 F. Supp. 370 (373, 374).

See also I.C.C. v. All American Association; Northwest Agricultural Coop. Ass'n v. I.C.C.; and I.C.C. v. Nelson Cooperative Marketing Assn., cases, §222(b), n. 11.

Although plaintiff contends that shipper-lessees exercise direction and control over details of the transportation performed with vehicles leased from and drivers supplied by plaintiff, the Supreme Court in 368 US 370, in considering a substantially similar factual situation, expressly affirmed the commission's consistent position that such control is not incompatible with for-hire carriage by lessor; under that decision, in determining that considered operation was for-hire carriage by plaintiff, the commission quite properly did not rely entirely on the "control" test but looked at the totalities of the situation. Decision cited is controlling and the commission's action must be affirmed.—John J. Casale, Inc. v. United States, 208 F. Supp. 55 (56, 59-60)*.

See also I.C.C. v. Dudgeon, §202(a), n. 2.

By leasing fully-serviced vehicles to a corporation under a bona fide lease arrangement, which vehicles were used in lessee's private carrier operations, carrier of exempt agricultural commodities was not functioning as a

common or contract carrier of property for compensation. Carrier was engaged in, and intended to continue, transportation of exempt commodities; corporation's activities were not changed from those of a private carrier merely because the lease arrangement called for lessor to use the units in its exempt transportation when lessee did not need them or because drivers of the vehicles, who were lessee's employees, were obtained from among lessor's experienced drivers.—I.C.C. v. Schultz Transit, Inc., 207 F. Supp. 749 (751-2, 754).

See also I.C.C. v. Piedmont Sales Co., and Studna v. United States cases, §203(a)(17), n. 5.

Respondent manages, coordinates, and promotes a nationwide, one-way, rental system for utility trailers owned by its trailer-renting members; and, to further equitable distribution of available vehicles—so that each member has an adequate supply to rent and no one station accumulates trailers beyond its renting capacity—respondent redistributes trailers when and where required with its own equipment and drivers. Record does not show what revenues respondent derives solely from transporting utility trailers, but it does show that almost 50 percent of its annual income is spent on the redistribution transportation; nor does the record show what portion of such transportation has been, or is, in interstate commerce; in fact, respondent's redistribution operations only occasionally cross State lines. Therefore, since the basic issue of whether the redistribution transportation constitutes an unlawful for-hire transportation service cannot be resolved without such information, respondent's request for a declaratory order adjudging the operations involved to be private carriage is denied.—National Trailer Rental Assn.—Declaratory Order, 94 M.C.C. 526 (531).

Defendant shipper association has been engaged without authority in for-hire motor carriage subject to the act, in transporting nonexempt commodities of which it was neither owner, lessee, nor bailee in interstate commerce by motor vehicle for "charges" or "rates." Such "charges" or "rates" may, even if only reimbursement for operating costs rather than profitmaking constitute "compensation" (citing 308 F 2d 888). As defendant performed transportation service for some 65 to 100 member shippers, and solicited and moved loads for a shipper which did not become an association member, the service performed was common carriage; and though defendant's activities in nonprofit consolidation and distribution of freight for its members are excluded from regulation by §402(c), that exclusion does not authorize the performance of any motor carriage subject to the act. Cease-and-desist order entered.—Natl. Motor Frt. Traf. Assn., Inc., v. Internatl. Shippers, 94 M.C.C. 440 (446-7).

Though record does not permit detailed analysis of respondents' practices, it is apparent that corporate respondent, a purported shippers' association, is a business device whereby one individual respondent, who with a second acted as its agents, performed operations he could not lawfully perform in his own name, and those individuals received the profits from the operation in form of payments for procuring lease of equipment for each shipment transported. The corporation was treated as the carrier by its member shippers, was identified as such on most of the bills of lading, and bore risk of loss or damage in all instances; as lessee of the vehicles with direction and control over them, it cannot divest itself of a carrier's mantle; it has been performing an unauthorized contract-carrier service for its members, and individual respondents participated in the scheme by performing the indispensable function of locating and leasing the equipment used. Cease and desist order entered.—Western Shippers Assn., Inc.—Investigation, 88 M.C.C. 575 (577).

Such analysis of the facts should not be construed to preclude a finding on a more ample record that the owner-operators actually used are also partners in the joint enterprise and thus equally engaged in provision of unlawful contract carriage.—Id., p. 577-8.

Supporting conclusion that principal respondents' sugar operations are for-hire carriage are facts that in case of sales arranged through respondent brokerage company the latter assigns orders received from customers to either principal respondent according to availability of their equipment, and that many

customers to whom those respondents have delivered and biltdd shipments have no knowledge of their business and do not regard them as sugar dealers; if those respondents had no motor equipment, the broker would have no reason to make them parties to previously arranged sales.—Stewart—Investigation of Operations, 89 M.C.C. 281 (287); and respondent broker is interested in the principal respondents' unauthorized operations when it profits therefrom to extent that they enable it to broker more of the refinery's sugar, and it receives a commission from the refinery on all sugar purchased by them, whether deliveries are made to their own or to broker-arranged customers.—Id., p. 287.

Dairy company's transportation of sugar to consignees who, though nominally its customers, are actually customers of refineries from which it purchased the sugar and have been solicited by brokers for the latter, is unauthorized for-hire carriage performed for purpose of receiving compensation for the otherwise empty return of its vehicles.—Meinerz Creamery Co.—Investigation of Operations, 88 M.C.C. 77 (78, 84).

That title to the goods remains in the transporter until transportation is completed, that is assumes risk of damage or loss thereof while in transit, or that it maintains a place of storage where some of the goods are held to await future purchasers are not entirely controlling in determining status of steel company's buy-and-sell operation in transporting salt as return loads in trucks used for outbound transportation of its steel products. It is the effect of the plan, or what is actually being done, rather than the designation of it by person concerned, which must govern the determination. Evidence shows that, in transporting considered shipments of salt, respondent is engaging in for-hire transportation subject to certificate or permit requirements of the act; cease and desist order entered.—Cahaba Steel Co.—Investigation of Operations, 86 M.C.C. 759 (764-5)*.

Holding in 368 US 370 that shipper control over leased equipment is not alone determinative of whether the transportation performed is private carriage or for-hire operation by lessor and that the test is one of substance involving question of which bears the characteristic burdens of transportation, imposes a sharp limitation both on purported private carriers who seek to avoid those burdens and on lessors who assume them yet strive to remain outside the regulatory scheme. However, the Court recognized, at least implicitly, that there may be a genuine leasing and employment arrangement; and ordinarily, a lessee of vehicles does not bear the burden of capital investment and risk of premature depreciation or loss. Operations performed under respondent's present leasing arrangements with shippers, wherein he assumes costs of ownership, operation, and maintenance of the equipment, while shippers pay all other expenses, supervise and completely control the transportation service, and employ and control the drivers, are bona fide private carriage and not unlawful.—Lovell—Investigation of Operations, 92 M.C.C. 728 (733-6).

Though this conclusion is predicated on certain changes made in the leasing arrangements and methods of operations shortly before hearing, such changes were not made as mere paper compliance to avoid regulation; record is persuasive that respondent and his shipper-lessees have been fully cooperative with commission field em,loyees and have endeavored to bring their operations into full compliance with commission regulations. While any prior unlawfulness in operations as conducted prior to those changes is not condoned, in light of their continued evident willingness to comply with the commission's requirements and fact that they are now doing so, entry of a cease-and-desist order would be inappropriate.—Id., pp. 735, 736.

In applicant's claimed operations with leased vehicles as a private carrier of surgical supplies from Chicago to New Orleans and as a for-hire carrier of bananas northbound, it appears that arrangements between applicant and lessor are more flexible than terms of their written agreements, and, considering applicant's lack of control over the northbound transportation, it is possible that it is receiving an unauthorized service in the southbound movements; if arrangements on latter amount to a lease of equipment with drivers, such transportation if for-hire carriage subject to regulation. Though record

does not permit definition of exact legal effect of their agreement on southbound trips, applicant and lessor should examine their operations to determine whether their actual practices conform to the requirements of the act and the commission's regulations thereunder. —Kendall Co., 88 M.C.C. 364 (368).

Lease of equipment with drivers by a carrier to a shipper, in absence of showing to the contrary, raises a presumption that the transportation is for-hire carriage subject to regulation; however, record does not warrant finding that practices of carrier and equipment lessor respondents constituted unauthorized for-hire transportation. Respondent leasing company leased equipment to the shipper, but record does not indicate that either it or the carrier participated in furnishing the driver, although latter is regularly employed by the carrier; evidence is undisputed that carrier was unaware that its driver was also employed as an occasional driver by shipper; and record is far from conclusive that respondents engaged in deliberate and concerted efforts to evade regulation in that regard. Terms of the vehicle lease are not of record, and absence of other pertinent facts precludes a positive determination of for-hire carriage in accordance with principles of 27 MCC 191 and 368 US 370.—Silver Lines, Inc., Investigation and Revocation, 96 M.C.C. 173 (176-7).

Respondent trip-leasing equipment to shippers for return movements to Miami never relinquishes actual control of the vehicles. Argument that shipper must contact a driver's service overlooks availability at origin of such backhaul movement of a driver who has completed a northbound haul for another shipper-leasee at Miami. The equipment is dispatched to shipper's premises in response to a single request, over-the-road transportation is performed, and after unloading at destination the driver's employee status and the lease terminate. By respondent's instructions the equipment is then driven to its Miami facility or to an agent beyond for cursory reassignment as it directs. It is almost impossible to differentiate between such service and that of any for-hire carrier: any difference of form, such as calling the transportation contract a lease, separate employment of drivers by shipper, computing of charges on a somewhat different basis, and shifting of some of the burdens to shipper, do not suffice to divest control of the equipment from respondent and place it with shippers. The operations considered are unlawful for-hire carriage; cease-and-desist order entered.—American Equipment Rental, Inc.—Investigation, 96 M.C.C. 383 (385-6).

Review of all circumstances surrounding questioned transactions, including execution and implementation od documents involved, in convincing that respondents (a vehicle leasing company and one purporting to furnish drivers to shippers), in concert with one another and with vehicle owners or operators such as respondent meatpacker, offer shippers what is essentially a for-hire carrier service. While secondary respondents seemingly arrange for leasing equipment, employment of drivers, and cargo insurance, actually they are insulated from the transportation itself and exercise no more control over it than they would over operations of any for-hire carrier whose service they might use; thus, their employer relationship with the driver is illusory. Though primary respondents may be separate organizations, they jointly took part in plan for shippers' coordinated use of drivers and vehicles; fact that shipper may call both, rather than vehicle lessor, to obtain complete service, does not change ultimate effect thereof; performance of such conjunctive service constitutes unauthorized for-hire carriage on part of both.—Transport Rental Systems, Investigation, 94 M.C.C. 402 (408-12).

In determining the status of a motor carrier operation, the economic reality behind the arrangement, and not its form, is crucial. In instant proceeding the only duty falling upon secondary respondents was to forward checks to individual drivers and to lessor of equipment in amounts that were pre-determined by latter in accordance with an established one-way mileage scale; and record shows that payment of drivers' wages was merely a convenient financial adjustment under which shipper paid a part of the transportation expenses. Shipper's assumption, qua employer, of this responsibility did not transform the operation into private carriage when it was, in fact, a for-hire transportation. —Id., p. 410.

See also the Spencer case, §203 (a)(14), n. 1b.

After vendee holding one-way bulk-liquids authority leased tank trucks to vendor, a general-commodity carrier which had never transported bulk liquids, all such traffic was generated by and handled under control of vendee, which retained 85 percent of revenues therefrom; such service, being unrelated to vendor's normal operations but directly complementary to vendee's bulk operations, was clearly conducted as an adjunct of the latter for purpose of gaining additional traffic, particularly backhauls, with vendor serving principally as a conduit of revenues owing to vendee for its service. Such arrangement was an unauthorized lease of a portion of vendor's operating rights and, in absence of a lawfully effective lease thereof, vendee has been conducting unauthorized for-hire common carrier operations in violation of §206(a).—Tank Lines, Inc.—Purchase—S & N Freight Line, Inc., 90 M.C.C. 381 (384-5)*.

Although respondent entered into certain agreements whereby he is purportedly an agent or employee of shipper respondents, shippers exercise no effective control over transportation of their products. Respondent dispatches equipment, supervises and pays the drivers, pays the expenses of operation of his own and leased vehicles, carries insurance and assumes responsibility for loss or damage from theft or negligence. Shippers enjoy use of interstate motor service, are guaranteed a fixed cost for such transportaton, and are totally disassociated from risks and obligations normally incident to private carrier status (368 US 370). Thus, respondent has been providing motor carrier transportation for shipper respondents and others as a for-hire carrier without appropriate authority.—Kapke Investigation of Operations and Practices, 91 M.C.C. 377 (385, 386).

Under leasing arrangements between respondent shipper and owner-operators, which contemplate use of latter's vehicles from time to time for movements from California to Washington, shipper has no control over southbound movements of exempt commodities which vehicle owners undertake in their own behalf; "directing" the vehicle owner to appear at point A for a northbound haul of commodities to point B is extent of shipper's interest and responsibility until delivery of the cargo. Carrier assumes responsibility for maintenance of the vehicle, payment of the driver, protection of the public, and safe delivery of the goods; shipper assumes only liability for transportation charges under the contract; the leases are thus merely a guide for determining compensation due the owners when and as their vehicles are utilized. Under such arrangements respondent equipment owners act as independent contractors who from time to time perform a given service for a lump-sum compensation, thus are engaged in unauthorized for-hire operations subject to the act; and respondent shipper is aiding and abetting continuance of such unlawful operations; cease-and-desist order issued against all respondents.—United Retail Merchants' Stores, Inc.—Investigation, 89 M.C.C. 183 (187).

Respondent's occasional transportation of automobilies as "good will" to west coast dealers who have purchased them in Kansas City area, using drivers seeking low-cost transportation, is unauthorized for-hire carriage when he admittedly retains the $25 deposit he requires of each driver, as compensation. His contention that he is not a for-hire carrier because he does not hold out to serve the general public is without merit; investigation was begun to determine whether he was operating unlawfully either as a common or a contract carrier and it is immaterial whether he has been serving a single shipper or all shippers who desire his service. Cease-and-desist order entered.—Studna Investigation of Operations, 88 M.C.C. 52 (53,55)*.

In arranging for interstate transportation of automobiles from Detroit for dealers or private owners, using casual drivers, respondent holds out by personal solicitation and by newspaper advertisements and telephone listing to deliver automobiles anywhere; he retains as his fee all or part of the deposit required of each driver selected by him; and, while it is made to appear that the owner contracts with driver for transportation of his car, initial terms and conditions of each movement are prescribed by respondent, and representations made to owners establish expectation that transportation service is being performed

by respondent. Such operation is not within the exemption of §203(b9), but is unauthorized for-hire carriage in violation of §206(a) or §209(a).—Orleman Investigation of Operations, 91 M.C.C. 285 (288-9)*.

Furthermore, even assuming that respondent's long-standing arrangements with dealers throughout the country, under which the price paid drivers is standardized according to destination, establish an ostensible principal-agent relationship between the dealer and respondent, the underlying reason therefor is delivery of dealer's automobiles by the driveaway method, which cannot be considered private carriage. Cease-and-desist order entered, and respondent is referred to the decision in 89 MCC 33, and cases cited therein, for standards to govern his future conduct.—Id., pp. 87, 88, 89.

Respondent's transportation of automobiles belonging to military personnel between Wrightstown, N. J., and ports of entry at Philadelphia and in New York commercial zone is unauthorized for-hire carriage; he holds himself out to transport automobiles, advertises his service, has no title to property transported, and charges an amount readily identifiable as a transportation charge, with rates the same as those of a competing for-hire service. That respondent's for-hire transportation activities indirectly benefit his nontransportation business by giving him sales contracts with potential purchasers of automobiles does not bring his for-hire activities within scope of his automobile business. Cease-and-desist order entered.—Cherkos Investigation of Operations, 91 M.C.C. 535 (535, 541)*.

Although respondent has or assumes little actual control over or responsibility for over-the-road transportation of private automobiles for their owners, and physical movement is accomplished through use of drivers who apparently are bona fide travelers and as casual transporters would themselves be exempt under §203(b9) if not part of an overall patern indicating a for-hire carrier business, respondent's holding out of an automobile transporting and delivery service in newspaper and telephone-book advertisements, plus (1) its participation in arrangements vital to accomplishment of that which is held out, (2) realization of the transportation objective of owners approaching it within terms of the holding out, and (3) receipt of something of value by both the driver and respondent, is sufficient to compel conclusion that respondent is engaging in an unauthorized for-hire transportation business in violation of §§203(c) and 206(a).—Service Associates, Inc.—Investigation of Operations, 89 M.C.C. 33 (35, 36).

The substantial effect of respondent's holding out and participation is the service which those using it want and really pay for, namely, transportation of automobiles from one point to another. Because their compensation is their transportation, drivers may be considered, despite the wording of the various forms of agreement, as temporary employees or agents of respondent, or as partners with it in a joint venture in which the act or declaration of one is the act or declaration of all or any of them. And the complications of form of an arrangement do not change the overall substance or character of a for-hire operation; jointly, respondent and drivers accomplish the transporation which the public seeks, and exclusive direction and control thereof does not remain in the car owner. Respondent is in substance engaged in a common-carrier transportation business without the certificate required by the act; cease-and-desist order entered.—Id., pp. 36-7.

Furnishing of drivers alone may constitute a for-hire transportation service. Where there are continuing arrangements whereby drivers in employ of one person are furnished to a second and ostensibly used by latter to accomplish private transportation of its own traffic, a presumption arises that the transportation is performed by the person which under such arrangements provides the drivers and that, as a consequence thereof, that person is a carrier for compensation and the transportation is subject to the commission's regulation; however, that presumption will yield to a showing that the shipper has the exclusive right and privilege of directing and controlling the transportation service. [78 MCC 389.]—Schirmer Transp. Co., Inc.—Investigation, 91 M.C.C. 869 (875)*.

That presumption is not rebutted where, under agreement with respondent mining company, respondent MTS furnishes drivers

who operate the mining company's vehicles in transportation of its fuel oils from Superior, Wis., to its Minnesota plant and storage facilities, and record clearly establishes that the real responsibility for direction and control of the operation is vested in MTS and its affiliate and alter ego, respondent carrier, which was denied authority for the service involved. MTS recruits and trains the drivers, carries them on its payroll, instructs and directs them in their day-to-day operations, undertakes nearly all matters relating to compliance with safety regulations, maintains the vehicles used, and generally, except as to liability insurance protection, bears the risks of the operation.—Id., pp. 872, 876.

The mining company's reservation of authority over vehicles operating within its plant site cannot be deemed control over the entire operation, and its retention of certain personnel records, logs, and trip reports is not shown to aid in any way in supervision or control thereof. Its provision of liability insurance and occasional assertion of some degree of oversight are insufficient to offset the more persuasive indicia of control by MTS; nor would its placing of one of its own employees as dispatcher of the operation in itself warrant a different conclusion. And possibility of internal labor problems making it undesirable for the mining company to maintain the drivers on its own payroll must be regarded as one of the characteristic burdens a shipper must assume if it is to enter into bona fide private carriage. Involved operations constitute unauthorized for-hire carriage and, though there is no evidence of a willful attempt by respondents to evade regulation, issuance of a cease-and-desist order is appropriate.—Id., p. 876.

In "leasing" buses to groups for transportation to points outside California, with drivers regularly used in his intrastate charter operations, respondent is transporting passengers in interstate commerce, in charter service, without authority in violation of §206(a); and lease provisions designed to place ostensible control in the passenger group do not alter essential nature of the service thus provided. Even though the group pays the driver and cost of insurance, such practice is merely a financial adjustment under which the group pays part of transportation expenses which carrier respondent otherwise must pay. Consideration of the operation as a whole indicates that purpose of the leasing plan is to evade regulation under the act; cease-and-desist order entered.—Roesch Investigation of Operations, 91 M.C.C. 824 (826).

Individual respondent, wife of the president of carrier respondent, leases equipment owned by her to shipper, and also leases same equipment to the carrier; when it is to be used by shipper, it must first be released by the carrier, and on occasion latter's equipment has been used; other relations between those respondents transcend the lease of equipment between them, and the facts clearly indicate that they cooperate in an overall plan to provide their complementary services as one service for transportation of traffic beyond scope of the carrier's commodity authority.—Zirbel Transport, Inc., Investigation and Revocaton, 91 M.C.C. 705 (706-7, 709).

Moreover, though carrier's drivers purportedly become shipper's employees while transporting its traffic, and shipper pays them directly, they maintain a vital economic relation with carrier throughout the arrangements, and it cannot be found that they are in fact subject to shipper's exclusive direction and control. In substance, the service rendered does not differ from ordinary common carrier service; conclusion is inescapable that those respondents are in concert providing an unauthorized interstate for-hire service; cease-and-desist order entered.—Id., pp. 707, 708-9.

Although agreement between shipper and lessor purports to cover an equipment rental operation which does not supply drivers, vehicles involved were stationed at lessor's garage and were subject to use, often with drivers on that shipper's payroll, for movements on behalf of other shippers; conclusion is inescapable that, regardless of the lease terms, the vehicles were not assigned to shipper's exclusive use and possession, but reverted to lessor's control for use in other activities, and that in many instances the drivers maintained an economic relation with lessor in which they depended on it for employment. Even if shipper bore all the usual responsibilities of an employer with respect to drivers, the real service offered by lessor for that and

other shippers is in substance for-hire carriage subject to Part II; as shipper has benefited from its participation in the unauthorized operations, cease-and-desist order is directed to both respondents.—G & W Transfer Co., Inc.—Investigation of Operations, 89 M.C.C. 251 (253-4)*.

Transportation with vehicles leased to shipper is for-hire carriage by lessor when method of leasing and releasing provides no way of determining when and what vehicles are being used by lessor or lessee; shipper orders their use only when it has products to ship, and after they are unloaded does not know where the vehicle is or for what it is used; drivers selected by lessor are employed by shipper only when it needs transportation and then go off its payroll and revert to lessor; when shipper requires a one-way movement, though it pays on a basis of a round trip, one-half the expense is charged back to lessor, thus guaranteeing one-way transportation at a fixed cost per mile. Entire design and purpose is to evade regulation under the act; both lessors, and shipper cooperating with them, are in substance engaged in unlawful for-hire transportation; cease-and-desist order entered.—Schultz Transit, Inc., Investigation of Operations, 89 M.C.C. 305 (310-1)*.

Shipper's traffic manager, in leasing vehicles to his employer for purported private-carrier operation, exercises a substantial degree of control over the drivers; he not only employs them for shipper and chooses those to be assigned to each trip, but when the operation began drivers who formerly worked for him were merely switched to shipper's payroll, and there is reason to believe that they would cease working for shipper if the equipment lease were terminated. Those factors, coupled with the traffic manager's almost complete control over operation of the vehicles, and shipper's assertion that proposed contract-carrier operation by a corporation controlled solely by him would be similar to that presently conducted, compels conclusion that the present operation is illegal for-hire carriage, which should be discontinued.—Frost Motor Exp., Inc., 89 M.C.C. 155 (157-8).

Though, following finding in 82 MCC 820 that respondent's leasing of vehicles to building supply company (for use in distributing brick and cinder blocks) was unlawful for-hire carriage, he twice altered the arrangement by new lease agreements, such changes did not affect substance of the arrangement; recitations of the duties of each party, no matter how closely they conform to established requirements concerning purported private carriage, must yield to consideration of actual practices of the parties in conducting the transportation. Regardless of the lease terms, considered transportation is unlawful for-hire carriage by respondent when it is he who recommends drivers to be employed, determines which should be assigned to each trip, prepares the entire payroll, and acts as indispensable intermediary in distributing checks drawn by lessee; conclusion is inescapable that lessee lacks the exclusive right and privilege of directing and controlling the service performed. — Huffman — Investigation of Operations, 88 M.C.C. 437 (439, 440-1).

And the same conclusion is warranted as to transportation of paper products under similar lease arrangement with another shipper. Motor carrier operations must be conducted in good faith without shadow of subterfuge or attempted evasion of the letter or obligation of the law; no characteristic of present arrangement is shown which distinguishes it from service respondent formerly offered admittedly as a trucker; and its entire purpose is plainly to evade regulation under the act, which cannot be permitted to succeed. Mere shift of same drivers from respondent's to shipper's payroll, without some positive showing that shipper has assumed their sole direction and control, cannot strip respondent of the badge of an unauthorized for-hire carrier. Cease-and-desist order entered.—Id., pp. 441-2.

Respondent found to be unlawfully operating as a for-hire carrier in eastbound transportation of wine from California has also engaged in unauthorized for-hire carriage of lard from Omaha to California destinations by leasing vehicles with drivers to shipper under arrangement which does not give shipper exclusive control over operation of the equipment, and under which shipper does not bear the characteristic economic burdens of private carriage. However, whether the parties

have undertaken a joint enterprise unlawfully to effect reciprocal transportation of type condemned in 79 MCC 727 need not be considered, since, regardless of shipper's participation, the unlawful transportation in each instance is fully attributable to respondent. Cease-and-desist order entered.—Center America Corp.—Investigation of Operations, 88 M.C.C. 740 (743-4).

5. Primary business test.—[Vol. 19].—Record in commission investigation proceeding does not support the issuance of a cease and desist order against plaintiff corporation, based on the commission's conclusion that plaintiff's motor carrier operations constituted unlawful for-hire carriage rather than transportation incidental to its primary business of dealing in grain and feed and ingredients, when the evidence did not show any illegal activities by the corporation itself, but only illegal operations conducted by its major stockholder (and predecessor in interest) before the corporation was organized. Moreover, the commission's conclusion cannot be based on its finding that plaintiff was the alter ego of its predecessor stockholder when, there being no substantial evidence to show it to be a sham, or a mere shell, the record does not justify disregarding its corporate entity. Accordingly, order entering the cease and desist order against the corporation is reversed and set aside.—Farmers Feed & Supply Co. v. United States, 267 F. Supp. 72 (75-6)*.

The record clearly indicates that plaintiffs are in a general mercantile business buying and selling many items, including sugar; they purchase sugar in Louisiana in their own name, haul it to San Antonio in their own trucks, assume risks of damage or loss in value due to price fluctuations, and maintain a reasonable inventory of sugar at their place of business. There is no evidence in the record showing that plaintiffs make any identifiable transportation charge to buyers of the sugar, that they hold out to the general public to haul sugar for any compensation, or that it is their general practice to obtain orders for sugar from their customers before purchasing it in Louisiana. Thus there is no substantial evidence to support the commission's finding that plaintiffs have been and are engaging in unauthorized transportation of sugar in interstate commerce as a common or contract carrier in violation of §206 (a) or §209(a); the commission's cease-and-desist order permanently enjoined.—Shannon v. United States, 219 F. Supp. 781 (782)*.

In determining whether a particular transportation operation is private or for-hire carriage, the statements of the law must be considered in light of the pertinent facts. The criteria to be applied are (1) ownership of the property to be transported; (2) preexisting orders of respondent's customers' (3) extent of respondent's use of warehousing facilities, if any; (4) financial risks involved; (5) difference in price of the goods to respondent and its charge to the customer, and whether it appears that such charge consists mainly of something equivalent to a transportation charge; (6) extent of respondent's transportation for others; (7) nature of any advertising; (8) extent of respondent's investment in transportation and duties of its personnel; (9) performance of any real service other than transportation; (10) use of equipment on a backhaul basis; (11) respondent's use of for-hire carriers; (12) economic purpose of the operations. And there is nothing in decision in 377 US 311 limiting the commission's consideration of those criteria so long as they are weighed in balance.—Farmers Feed & Supply Co.—Investigation of Operations, 96 M.C.C. 409 (414-6, 417)*.

Under criteria developed in 82 MCC 65 and 94 MCC 458, defendant's activities in transportation of crude petroleum appear to be within scope and in furtherance of its business as a petroleum marketer. It holds title to the oil it transports, and though, in view of its contract with an oil company covering latter's purchase of an agreed amount per day at a fixed price, it must be deemed to have received a purchase order prior to acquiring the oil, thus minimizing its risk of ownership, nevertheless, if under its contract with the producer it were unable to obtain the quantity required it would still be obligated to satisfy its commitments to its purchaser, thus assuming an economic burden beyond scope of for-hire carriage. Defendant advertises as a marketer of crude oil, and neither transports nor holds out to transport for anyone but itself;

the $0.35 differential between cost of the oil to it and its selling price to the oil company cannot be strictly identified as a transportation charge; and while its transportation equipment is the largest part of its business investment, its business is newly organized and its services and facilities are geared to current needs thereof.—Northern Tank Line v. Petroleum Marketers, Inc., 96 M.C.C. 276 (279-80).

While movement of the oil from the producer's well site to a customer's refinery or drilling rig is an extremely important feature of defendant's service, it is also responsible for testing and gauging of the oil prior to shipment to ensure that the product delivered meets its customers' minimum standards of quality; and though the same type of testing and gauging service is obtainable from complainant at no extra charge to shipper, those services are nontransportation services not normally required or expected of a for-hire carrier. Moreover, defendant's transportation of crude oil is not coordinated with return movement of any commodity, and the financial success of its marketing business is neither concerned with nor dependent on any type of backhaul movement; additionally, it has used services of a for-hire carrier for interstate movements to drilling sites.—Id., 280, 281.

And though defendant only recently leased a storage tank and has used it for only a small portion of its business, its need for warehousing facilities only recently became manifest, since none were needed for its direct service from the well sites to its contracting purchaser, the oil company. That it obtained such a facility when feasibility of its use became apparent lends support to conclusion that defendant has not participated in any violation of the act; and as new developments occur and the services and facilities offered by it increase and expand, the true nature of its petroleum marketing activities should become more apparent. On the record, defendant is not shown to be engaging in a for-hire transportation service; complaint dismissed.—Id., pp. 279, 280-1.

Considered transportation of asphalt and oils from refineries direct to customers or customer-designated jobsites is within scope, and in furtherance, of applicant's primary noncarrier business of buying and selling road oils; applicant assumes entire risk of loss due to price fluctuations, risks loss in transit, performs additional services of providing storage tanks and reheating oil, and holds himself out as a supplier of oil rather than of transportation for compensation; also, he extends credit to his customers, and while distance of a movement is considered in quoting delivered price, it is not a controlling factor. Moreover, no exception was taken to the examiner's finding that transportation to applicant's storage depot is private carriage, and no substantial difference is discernible when applicant locates his storage facility adjacent to point of delivery. In neither case does title pass to the purchaser until oil is delivered to purchaser's facility.—Schnuerle, 91 M.CC. 231 (233, 234).

Respondent partnership's transportation of petroleum products owned by oil company from Port Wentworth, Ga., to Aiken, S. C., for which it receives a per-gallon hauling allowance, is private carriage within scope and in furtherance of its primary business of operating the oil company's bulk plant at Aiken and acting as its commission sales agent in that area. Although, in requesting informal ruling by Bureau of Motor Carriers as to propriety of such operation, the oil company stated that the hauling allowance would equal the published common-carrier rate, and that the partnership derives some profit from the transportation, such assumption requires no different conclusion in light of applicable precedents. See 17 MCC 658 and 82 MCC 417.—Jackson and Plunkett—Investigation of Operations, 88 M.C.C. 671 (676-8, 679).

Regardless of purpose of the hauling allowance, a finding of unlawfulness may not be predicated merely on its existence or size; substance of the arrangement must be considered rather than its contractual form; if the transportation were in fact the dominant element in the partnership's business, it would be unlawful; and even if not the dominant element, it must be so functionally related thereto that it cannot be separated without fragmenting an essentially unitary commercial enterprise. Should the allowance be eliminated, or even should it be doubled, economic

relationship of the parties would remain virtually unchanged; therefore, since the partnership would continue to transport and sell the oil company's gasoline, conclusion is warranted that the transportation activities are an integral part of its petroleum distributorship and were undertaken to better serve its customers and to promote sales.—Id., pp. 678, 679.

To be in furtherance of a primary nontransportation enterprise, transportation performed must not be too remote from that primary business; while efficiency of operation is important to many enterprises, unauthorized transportation subject to part II cannot be justified on the basis that it is simply an effort to achieve efficiency and substantial economies. Nor does mere duplication or close similarity between commodities dealt in as a primary business and those involved in the challenged operation dictate the result; all facts must be studies to determine whether particular operations are within scope and in furtherance of a primary noncarrier business, or whether their real purpose is to profit from the transportation as such.—Wallace—Investigation of Operations, 89 M.C.C. 593 (596-7)*.

Respondent's transportation of range and fuel oil from out-of-State origins directly to several small-volume consignees is more closely identified with his primary business as a petroleum dealer and distributor than with any transportation enterprise; although oil transported does not move through his storage facilities and itself involves no great financial investment, in some cases he may assume greater than normal risks by submitting competitive bids and, in one instance, he performs additional service (untypical of carrier operation) of checking storage level of consignee's oil tanks; such transportation is private carriage not conducted for purpose of profiting therefrom. And, though gross profit from direct service rendered a manufacturing concern is considerable, respondent's lack of storage facilities for the grade of fuel oil required, coupled with fact that he also serves that consignee from his local storage facilities and bids on part of its business, compels conclusion that that direct service is within scope and in furtherance of his primary business.—Id., pp. 597, 598.

But direct service rendered two other consignees is solely that of a transporter and not in furtherance of respondent's primary business when he performs no other services indicating that they rely on him in any noncarrier capacity; both are dealers operating businesses similar to his own and undertook their arrangements with him to replace common-carrier service; such operations are conducted for purpose of profiting from the substantial amount of transportation involved, in violation of §§203(c) and 206(a) or 209(a); cease-and-desist order entered.—Id., p. 598.

The problem of determining whether transportation performed ostensibly in furtherance of a primary noncarrier business is bona fide private carriage is one to be solved by practical common sense rather than by theoretical abstractions or by excursions into juristic semantics. When applicant whose primary business is predelivery processing of new automobiles delivers vehicles directly to dealers for whom predelivery services have been performed, the transportation is accomplished by applicant as bailee of the vehicles and as an incident to its primary business, whether or not the dealer's place of business is, like applicant's, within the New York commercial zone.—Car Services, Inc., 92 M.C.C. 595 (599-600).

But in seeking determination of status of proposed delivery service to dealers' customers outside New York commercial zone applicant has not indicated extent that its charges to dealers would be increased over its present flat rate to points in New York metropolitan area, or what effect denial of authority sought for backhaul transportation of used cars would have on its costs; applicant's charges—particularly relation to the total charge of that part attributable to transportation—are important in determining scope of its primary business; absent such essential facts for proper determination of the issue, motion to dismiss its §207 application must be denied. This does not preclude possibility of finding on a more adequate record that deliveries to points just outside New York commercial zone would be in furtherance of applicant's primary business, assuming no substantial change in its basic predelivery service charge due to transportation cost factors; but deliv-

ery to dealers' customers at such distant points as Harrisburg, Pa., and Albany or Utica, N. Y., would seem to result in transportation being the dominant part of its business.—Id., pp. 600-1.

Principal respondent is engaged primarily in packing, selling, and merchandising canned and related food products at both wholesale and retail, and its transportation of canned foods and related grocery products (other than sugar) from its principal location at Austin, Ind., and of factory and supermarket materials and supplies (including sugar) in reverse direction is clearly authentic private carriage. Also, its occasional transportation of canned goods and similar grocery items purchased for direct resale to its customers appears to be more closely identified with its status as a food packer and distributor than with any transportation activity beyond scope of its primary noncarrier commercial enterprise, and must therefore be likewise considered private carriage.—Morgan Packing Co., Inc.—Investigation of Operations, 92 M.C.C. 48 (56-7).

But respondent's transportation of sugar other than that used in its packing plant or retailed in its supermarket is unauthorized for-hire transportation not within scope of its primary business. It does not operate an independent bona fide sugar wholesaling business in pursuit of which it performs that transportation; it does not trade in sugar on its own account for purpose of obtaining profit from any differential or variation in the market price. Its mere taking of title to the sugar transported, assumption of certain negligible risks of ownership, and quotation of a single delivered price without itemizing a separate transportation charge do not alter the basic facts that in those sugar dealings it performs no service other than transportaion from which it can profit, that its markup to its customers is equivalent to transportation cost, and that it is therefore performing transportation for compensation.—Id., p. 57.

Nor is the considered sugar transportation within scope and in furtherance of respondent's food packing and distributing business. While undeniably related thereto in some respects, separation of its buy-and-sell sugar activities therefrom would not result in fragmentation of an essentially unitary business enterprise. Though wholesaling of sugar may supplement and indirectly benefit that business by helping to retain present customers and obtain new ones, its basic purpose is to provide an expense-defraying backhaul for outbound transportation of canned and related food products. Resulting transportation savings are the only important link between respondent's sugar hauling and its primary noncarrier business, and any compensation it receives from returning sugar to the Austin area or to points along its return routes, which reduces the cost of its outbound hauls, constitutes a profit from the transportation of sugar as such.—Id., p. 58.

While it is true that most of respondent's sugar customers are also purchasers of its canned goods and its sugar sales may function in part as a "loss leader" or advertising vehicle, and also that a bona fide private carrier may not be denied ipso facto to economic benefits or operational efficiencies of a backhaul operation, the unauthorized provision of transportation subject to regulation under Part II cannot be justified as a business effort necessary to achieve efficiency and economy. Benefits claimed to result from such transportation may not be too remote from, but must relate directly to, the transporter's primary business; establishment of an additional advertising or sales medium and generation of customer goodwill is not so directly related to respondent's food packing and distributing business as to unite that and its sugar operations into a single primary noncarrier enterprise in furtherance of which its unauthorized sugar transportation may lawfully be performed; any contrary conclusion would effectively nullify the primary business test.—Id., pp. 58-9.

Respondent's buy-and-sell sugar activities have benefited the sugar refiners, who might otherwise be required to absorb part of the freight cost on shipments moving in lawful for-hire carriage, and afford them a substitute method of marketing which enables them to compete in an area where they might otherwise be at a geographical competitive disadvantage; their agent brokers have benefited in receiving commissions on sugar which, absent respondent's operations, might not have

been sold in their marketing areas; and respondent's customers have benefited in receiving efficient and economical store-door delivery of l.c.l. quantities. Such transportation of sugar not actually consumed or retailed by respondent has been conducted, with respect to its primary business, as a secondary enterprise for purpose of profiting therefrom, and requires authority from the commission. Cease-and-desist order entered.—Id., pp. 60-1.

"Plan 1" operations of respondent, a licensed Missouri wholesale automobile dealer, in transporting automobiles he has purchased to west coast points for sale there to other dealers at regularly scheduled auctions, are an integral part of his wholesale business and therefore private carriage. [See 86 MCC 529.] But his transportation of automobiles under "plan 2" as "good will" to west coast dealers who have purchased them in Kansas City area is not private carriage, since it not only adds nothing to his primary business but in a competitive sense conflicts therewith; that his activities under plans 1 and 2 are similar does not make the latter in furtherance of the former; and whether one plan or the other involves the greater part of his total transportation is not controlling; they must be treated as distinct operations.—Studna Investigation of Operations, 88 M.C.C. 52 (54-5)*.

Although no one or combination of the criteria summarized in 82 MCC 651 for determining whether particular transportation meets the "primary business" test of §203(c) can be considered controlling, since each case is necessarily decided on its own facts, the criterion of whether the carrier performs any real service other than transportation from which it can profit is especially significant in determining character of the operation involved.—Stewart—Investigation of Operations, 89 M.C.C. 281 (285); in connection with their wholesaling and retailing enterprises, in which merchandise other than sugar is sold and distributed in area of their places of business, the principal respondents, in order to stock their warehouses with a minimum of inventory, operate line-haul equipment to pick up such commodities from their sources of supply as need arises; such transportation is in furtherance of their primary businesses and is lawful private carriage.—Id., p. 288.

But although respondents in their sugar operations contract with the refinery for purchases over periods of 1 to 3 months, mere taking of title to shipments does not establish private carriage; while they claim never to have preexisting orders prior to "purchase" under the contracts, it is not shown that the refinery allocates in its warehouse the kind and quantity of sugar contracted for. Respondents dispatch vehicles to pick up sugar only after receipt of orders, and dates of pickup at the refinery and ultimate delivery are relatively close; this phase of their operations emphasizes furnishing of transportation rather than speculation in price fluctuations. Moreover, though deliveries of sugar so purchased are routed by way of their warehouse locations, the sugar is not stored but is delivered in same vehicle by same driver that picked it up at the refinery; warehousing of a small percentage, apparently to supply needs of local customers, probably would not occur in absence of the other sugar operations. Contention of one respondent that the contracts vest ownership in him when made and consequently are equivalent to storage of the sugar in his own warehouse in untenable.—Id., pp. 285-6.

While respondents assume certain risks of ownership such as market price fluctuations and loss or damage in transit, latter are ordinarily assumed by any bailee for compensation, including for-hire carriers. Other assumed risks not ordinarily assumed by authorized carriers may be undertaken in furtherance of an unlawful transportation business as well as a noncarrier enterprise; further, neither respondent ordinarily extends credit to customers for longer periods than that given it by the refinery. Such risks are not controlling on whether a transporter is a private or a for-hire carrier.—Id., pp. 287.

That respondents ordinarily pick up sugar from a nearby refinery for movement to consignees in vicinity where they obtain other merchandise for their primary enterprises compels conclusion that the sugar operations are performed solely to achieve a profit-yielding two-way movement. Their delivered prices on sugar, though without an itemized transportation charge and unrelated to distances traveled, cannot be correlated with any

real noncarrier service from which they can profit; markup to customers is clearly equivalent to a transportation charge. In the circumstances, their advertising activities and recent efforts to increase customer solicitation, or occasional use of regulated carriers to transport sugar from refinery to warehouse, are entitled to little weight. Considered sugar operations constitute unlawful for-hire carriage; cease-and-desist order entered.—Id., pp. 288-9.

In applying the primary business test of §203(c), the first question to be determined is whether respondent's primary business is transportation or some noncarrier commercial enterprise; in view of efforts of buy-and-sell operators to camouflage unauthorized transportation with the forms of bona fide private carriage, each case is necessarily determined on its own particular facts; the problem is one to be solved, not by theoretical abstractions or excursions into semantics, but by practical common sense.—Smith Grain Co., Inc., Investigation of Operations, 86 M.C.C. 767 (769-70).

Applying the common-sense criteria of 82 MCC 651 to respondent's operations as detailed in appendix A, its primary business is clearly not transportation, and it is not important that expansion of the scope of its primary business in recent years was motivated to some extent by desire to operate its vehicles with maximum efficiency. Prudent and efficient operation is not determinative of carrier status; the question is not what respondent's primary business was some years ago, but what it is today.—Id., p. 770.

Viewing respondent's current business in its totality, its primary business (or businesses) must be defined as that of a dealer in feed and flour ingredients and in wholesale grocery items; its transportation of the challenged commodities, including sugar sold directly to its customers without the intervention of a broker, has been conducted within the scope and in furtherance of its primary business enterprise or enterprises. However, record clearly shows that respondent's primary economic function in sugar transactions, where sales are not made directly by it but are arranged by a broker who receives a commission from the refinery and asks respondent to handle the sale, is to provide transportation for the broker or his customer; this is unauthorized for-hire transportation; cease and desist order entered.—Id., pp. 771-2.

Although respondent is the owner of the transported commodity, the mere taking of title is not sufficient to establish private carriage, when the mutual understanding between respondent and its customers is tantamount to the receipt of orders, when respondent's articles of incorporation indicate that its intent is to profit from such transportation, when its only investment is in its transportation vehicles, and when two of its three employees are drivers almost exclusively engaged in a transportation service.—O'Fallon Gas Co. of St. Charles County-Investigation, 98 M.C.C. 634 (639).

In determining whether particular buy-and-sell operations are in furtherance of a legitimate nontransportation primary business enterprise, the commission must consider, in addition to criteria enumerated in 82 MCC 651, (1) whether the transportation is coordinated with opposite-direction movement of other products so that empty vehicles are not dispatched for one-way haul; (2) whether respondent ever engages for-hire carriers to effect delivery of the products; (3) whether the products are delivered directly from shippers to consignee; (4) whether such operations are undertaken in order to balance trucking operations with a profit-yielding backhaul; and (5) whether such operations cannot profitably undertaken but for availability of equipment which otherwise must be deadheaded incident to opposite-direction transportation.—Utley Lumber Co., Inc. Investigation of Operations, 94 M.C.C. 458 (462-3).

Considering instant factual situation in the light of all those criteria, respondent carrier's primary business with respect to considered buy-and-sell sugar transactions is transportation, and its transactions are motivated by the profit to be made from the transportation of sugar. Therefore, respondent's direct truckload transportation of sugar from refinery to customer-consignees constitutes unlawful for-hire carriage.—Id., pp. 463-5.

While respondent diary company's transportation of sugar from New Orleans to its warehouse at Clinton, Mo., for use in its

cheese-processing business is clearly bona fide private carriage, its transportation thereof directly to customers in southeastern Missouri within 125 miles of Clinton is unauthorized for-hire carriage conducted for purpose of profiting from the transportation performed. The dairy company is not engaged in the business of wholesaling sugar, does not actively solicit customers for or advertise sugar, and has transported only that purchased under preexisting orders arranged by respondent sugar broker; it has no investment in facilities other than vehicles and employs no salesmen or other personnel except drivers; the only identifiable service it performs in its sugar dealings from which it derives a profit is transportation, and if it had no vehicles the broker respondent would have had no reason to make it a party to previously arranged contracts of sale.—Clearfield Cheese Co., Inc.—Investigation, 92 M.C.C. 504 (508)*.

The only relation between such backhaul sugar movements and respondent's primary commercial enterprise is the reduction in cost of its legitimate transportation activities; however §203(c) makes clear that transportation may not be considered as furthering a noncarrier business merely because it yields revenues of ultimate benefit thereto or makes possible more profitable employment of transportation equipment used in the primary business. Even though respondent's sugar transportation is related to its primary business, it is merely a secondary enterprise conducted for purpose of profiting from the transportation as such. And though respondent contends that, had its modus operandi not been largely dictated by the sugar broker and refiners, it would have bought the sugar direct for resale under its own label, its operations must be assessed as they have been conducted, not as they might have been performed. Measured against the statutory standards, its sugar transportation activities fall within the prohibition of §203(c); cease-and-desist order entered.—Id., pp. 508-9.

But as question of lawfulness of respondent's transportation of salt and canned good has been subordinated to the larger and economically more important question of lawfulness of its sugar operations, the facts bearing on that issue are not sufficiently developed of record to permit effective analysis, and respondent's transportation of canned goods apparently ceased 2.5 to 3 years before the hearing, no findings concerning such transportation are made at this time.—Id., p. 509.

Respondent's transportation of sugar, whether to its warehouse or to customers solicited by it or by sugar brokers, is for-hire carriage not in furtherance of its primary business of buying and selling dairy products, and its taking of title to such shipments is not controlling; it transports sugar only as a backhaul,and would not be in the sugar business if it could not do so; its main purpose is to provide a backhaul for its outbound transportation of dairy products, and its backhaul operation is typical of that condemned by the congressional committees in reports relating to amendment of §203(c) to its present form.—Meinerz Creamery Co.—Investigation of Operations, 88 M.C.C. 77 (84, 85).

Sale of a product compatible with respondent's line of dairy products may indirectly further its dairy-products business, but its transportation of sugar more directly furthers that business by reducing cost of transportation performed as a part thereof, such reduction being the purpose of the backhaul operation; sugar transportation primarily furthers its transportation of dairy products by reducing cost thereof and thus falls within the prohibition of §203(c). Also, respondent's warehousing of sugar, as well as its purchase of small quantities thereof from local refineries to supply customers when its warehouse inventory is exhausted, must be considered incidental to and in furtherance of its sugar transportation business, rather than a primary business enterprise. Thus, with respect to its primary business, all of respondent's interstate transportation of sugar has been conducted as a secondary enterprise for the purpose of profiting from the transportation; constitutes for-hire carriage for which authority is required.—Id., pp. 84-5.

Although respondent originally transported repossessed automobiles as an incident to his repossession business, such transportation steadily increased as he undertook to perform it for numerous finance companies, until such activities were no longer in furtherance of a primary nontransportation business but for-

hire transportation constituting almost his entire business; for some years respondent has in essence held out to perform a for-hire carrier service, without authority, and has solicited automobile traffic. Cease-and-desist order entered.—Nash—Investigation of Operations, 89 M.C.C. 463 (468-9).

The principal business of respondent operating ostensibly as a broker or purchasing agent of California wines is transportation for compensation, and its eastbound transportation of wine is unauthorized for-hire carriage, when it normally has a specific order from a buyer before it makes a purchase at a California winery, its business investment appears to be entirely in instruments of transportation, and it maintains no storage or warehouse facilities.—Center America Corp.—Investigation of Operations, 88 M.C.C. 740 (741-2, 743).

Letter from respondent's secretary-treasurer summarizing its position respecting buy-and-sell operations in transporting return loads of salt in vehicles used for outbound movement of its steel products clearly shows that handling of salt is not a primary business of respondent and would not be continued if movement of steel to origin areas of the salt were to cease; while delay in bringing the case to hearing since initial investigation has afforded opportunity for changes in invoicing, evidence is convincing that no important change has been effected in respondent's manner of purchasing, transporting, and selling salt and that it is acting as a for-hire rather than a private carrier in such transportation; cease-and-desist order entered.—Cahaba Steel Co.—Investigation of Operations, 86 M.C.C. 759 (763, 764)*.

Section 204. (a)(1) [*§304 (a)(1) U. S. C.*] Powers and duties of commission—(a) Powers and duties generally.—[Unchanged. See vol. 9, p. 7905.]

Historical notes, see vol. 9, p. 7905; vol. 11, p. 9377; vol. 12, p. 10360; vol. 13, p. 11054; vol. 14, p. 11572; vol. 15, p. 12174; vol. 16, p. 12814; vol. 17, p. 13505; vol. 19, p. 15514.

Cross References

Section 103(g) of the National Traffic and Motor Vehicle Safety Act of 1966, Pub. Law 89-563, 80 Stat. 720, provides that the commission, in prescribing safety regulations covering motor vehicles subject to Part II, shall not adopt or continue in effect any safety regulation which differs from a motor vehicle safety standard issued by the Secretary of Commerce under Title I thereof, except that the commission is not prohibited from prescribing for such a vehicle a safety regulation which imposes a higher standard of performance subsequent to its manufacture than that required by the applicable Federal standard at the time of its manufacture.

Provisions of Public Law 88-201, Dec. 13, 1963, 77 Stat. 361, regarding minimum safety standards for seat belts used in motor vehicles, specifically do not apply to motor vehicles of carriers subject to safety regulations under part II of the Interstate Commerce Act.

Historical Notes

The commission recommends that part II be amended so as to authorize the commission to exempt from the requirements, or any provision, thereof, such service and transportation as may be determined in appropriate rulemaking proceedings to be of such nature, character, or quantity as not substantially to affect or impair uniform regulation of motor carriers engaged in interstate or foreign commerce in effectuating the national transportation policy.—Annual Report, 1963, p. 13, Annual Report, 1964, p. 68.

The commission recommends, in view of prohibitions in 18 USC §1001, that the IC Act and various related acts be amended to eliminate the mandatory requirement that certain reports, applications, and complaints be filed with the commission under oath, and that such oath provisions be made discretionary with the commission.—Annual Report, 1962, p. 209; renewed, Annual Report, 1963, p. 21.

Notes of Decisions

Volume 9—p. 7905; Volume 11—p. 9378; Volume 12—p. 10360; Volume 13—p. 11054; Volume 14—p. 11572; Volume 15—p. 12174; Volume 16—p. 12814; Volume 17—p. 13505; Volume 18—p. 14275; Volume 19—p. 15514.

1. Construction and interpretation.—[Vols. 9, 11-19].—The commission's duties to regulate exempt carriers relative to qualifications and maximum hours of service of employees and safety of operations or standards of equipment encompass the power to require the carriers to keep records, reports and logs. Carrier engaged solely in carrying agricultural commodities, and therefore partially exempt from regulation under §203(b6), was not exempt from keeping the records (driver's daily logs) in question; hence the trial court did not err in refusing the grant appellant's motion for acquittal.—United States v. Handfinger, 364 F. 2d 800 (802).

Section 204(a)(1) authorizes the commission to establish reasonable requirements for continuous and adequate service by motor common carriers, and it is a condition of each certificate that the holder render reasonably adequate and continuous service thereunder; but in determining what is "reasonably adequate and continuous" service, the overall economic situation, not only desires of the shipping public, must be considered. Though lack of more frequent service than defendant's 3-days-per-week schedules has caused concerns in Reno area to lose business to other points, defendant shows that, despite its effort to generate additional traffic, volume available between Reno and points involved is insufficient for operation of its vehicles at capacity even on thrice-weekly schedules; in the circumstances, defendant is complying with requirement of its certificate.—Reno C. of C. v. Consolidated Freightways Corp. of Del., 88 M.C.C. 796 (799-800).

2. In general; and definitions.—[Vols. 9, 12-14, 16, 19].—Order of November 25, 1936, requires every motor common carrier subject to the commission's jurisdiction to show on every bill of lading or receipt issued by it a description of the articles transported, and order of November 17, 1954, requires every for-hire carrier operating under authority granted pursuant to the act to display on each vehicle operated with own power the name of the carrier under whose authority it is being operated. Since respondent is a common carrier of passengers and of express in same vehicles, operating under authority from the commission, it is clearly subject to requirements of both orders; but the record is replete with evidence, including admissions of respondent's own witnesses, that prior to investigation of its operations in February 1961 it was neither furnishing a description of articles transported on face of its express receipts, nor identifying equipment trip-leased from other carriers in the prescribed manner. —Safeway Trails, Inc.—Investigation and Revocation, 91 M.C.C. 936 (942, 943-4)*.

Although the 1954 order does not apply to passenger carriers using vehicles of others in through service under a continuing interchange of equipment, provided the vehicle owner's name and certificate number is displayed on the leased or interchanged vehicle and the carriers file with the district director and post in each terminal or ticket agency on the route a schedule showing points between which each assumes and bears complete control and responsibility for operation of the vehicle, it is obviously impractical if not impossible for bus companies to post such information in their terminals and ticket agencies when trip-leased vehicles are used. Therefore it is imperative that trip-leased vehicles used in transportation of either passengers or property display prominently the name of the carrier under whose authority they are being operated, so as to advise the commission's field representatives, other carriers, and the public generally of the trip lessee's control over and responsibility for the operation.—Id., p. 944.

5. State regulation.—[Vols. 9, 11, 16, 18].—Argument that exercise of the commission's jurisdiction over vehicles and facilities used sometimes in interstate, and at other times in intrastate, commerce is in effect regulation of intrastate commerce has no validity. The commission has full power over regulation of both vehicles and facilities of carriers engaged in interstate commerce, and to extent that such regulation affects strictly intrastate matters, such effect is incidental.—United States v. Pioneer Motor Service, Inc., 204 F. Supp. 611 (613).

Since the commission's authority to promulgate and enforce safety regulations does not extend to motor vehicles operated solely in intrastate commerce, the important area of regulation, so far as rail-crossing accidents

are concerned, is left to the States. While §192.3 of the commission's safety regulations requires compliance with laws and regulations of the jurisdiction in which the vehicle is operated, so that, if a State law requires a particular vehicle to stop at a grade crossing and the vehicle is subject to the commission's jurisdiction, failure to stop violates §192.3, the commission lacks both personnel to enforce that regulation and the power to arrest, with result that there is no actual enforcement. But if, conversely, State laws were adopted prohibiting use of State highways except in compliance with commission regulations, so that a violation of latter would also violate State law, the resulting uniformity could be very helpful in enforcement and acceptance of the regulations and would be of material help to motor carriers operating in more than one State.—Prevention of Rail-Highway Grade-Crossing Accidents, 322 I.C.C. 1 (68, 73-4)*.

Although only a small proportion of grade-crossing accidents involve motor vehicles hauling flammable liquids or other dangerous commodities, because of serious consequences of such collisions State and local as well as federal authorities should make special efforts to strictly enforce all existing safety laws and regulations, and State legislatures should consider adoption of rigid driver licensing laws and regulations and should require that whenever possible such vehicles be rerouted over grade crossings outside of congested areas, where hazards are at a minimum.—Id., pp. 86, 89.

As schoolbuses normally do not operate across State lines, responsibility for safe transportation of schoolchildren rests with State and local authorities. Notwithstanding importance of entrusting safety of schoolchildren only to the most competent and responsible bus drivers, there is lack of adequate supervision and selection of such personnel. The commission recommends that State and local authorities responsible for operation of schoolbuses carefully investigate and screen all driver applicants respecting their character, competence, and responsibility. Program of State of New Mexico for selection, training, and supervision of drivers and regulation of schoolbus operations, which has resulted in an excellent safety record, discussed.—Id., pp. 43-5, 87, 89.

10. Safety of operation and equipment.—[Vols. 9, 11-19].—Definition of scope of the commission's regulatory field in §203(a)(19) as embracing all vehicles "used" in transportation in interstate commerce does not mean "only while being so used"; to construe "used" in such manner that fair standards of safe maintenance and operation normally applicable to a vehicle used in interstate commerce may or may not apply at particular times, depending on points of origin and destination of a single lading, would be a disservice to the need for public safety on the highways, would place a limitation on application of the safety regulations not imposed by the legislators, and would allow a particular shipment to characterize the entire use of the vehicle.—United States v. Pioneer Motor Service, Inc., 204 F. Supp. 611 (612).

It is therefore wholly immaterial whether a vehicle operated by a for-hire interstate carrier is empty at time of violation of particular safety regulation, or is being used to transport a commodity in intrastate commerce, or if its contents and origin and destination thereof are unknown; proof that the vehicle in question is one used, in ordinary meaning of the word, in transportation of property in interstate commerce is all that is required to bring it within the commission's jurisdiction.—Id., pp. 612, 613.

Defendant admitted that at time of accident his truck had no clearance lamps on its rear, and in absence of any evidence tending to show some impracticability in mounting the clearance lamps so as to indicate the extreme width and height of the truck, it is a necessary inference from his own description of his truck that he was in violation of §§193.12 and 193.20 of the commission's safety regulations; such violation constituted negligence. Jury's finding of no negligence on defendant's part was therefore contrary to the evidence; plaintiff's motion for new trial granted.—Natoli v. Deal, 210 F. Supp. 389 (390).

While the commission lacks authority to require or regulate protective devices for rail-highway grade crossings, it has authority under §204 to prescribe, and has prescribed, regulations for safe operation of motor vehicles under its jurisdiction; §192.10 of the regu-

lations requires stopping at grade crossings of vehicles transporting passengers or specified dangerous commodities, while §192.11 requires exercise of care at crossings in movement of other vehicles. However, though present regulations are not shown to be materially deficient and are reasonably adequate for promotion of safe operation at rail crossings if effectively enforced, inadequate enforcement has generated a tendency on part of drivers to ignore those requirements. Strict enforcement of safety laws and regulations is essential to reduction of grade crossing accidents; therefore, in cooperation with State and local authorities, the commission will make an intensified effort immediately to enforce all laws and regulations affecting grade crossings.—Prevention of Rail-Highway Grade Crossing Accidents, 322 I.C.C. 1 (48-9, 74, 87, 90)*.

While only a small portion of grade-crossing collisions between trains and motortrucks involves vehicles transporting flammable or explosive materials, severity of such accidents is increased by danger of fire; also, while present regulations require stopping at rail crossings of vehicles used to haul only those flammable commodities with a flashpoint of 80° Fahrenheit or below, a number of serious accidents have involved flammable liquids with considerably higher flashpoints. Therefore, the safety regulations, particularly §192.10, should be amended to require stopping at grade crossings also of vehicles, loaded or empty, that are used to transport commodities having a particular fire hazard but not described as flammable in present regulations, such as tank vehicles used to haul liquids having a flashpoint below 200°. Fahrenheit; such vehicles should also be required to display a sign indicating that they stop at all railroad crossings. A rulemaking proceeding to that end will be promptly instituted.—Id., pp. 66-7, 88, 90.

Purpose of relief granted by §192.10 from the stopping requirement at identified "exempt" crossings is to avert rear-end collisions on the highway when sudden, unexpected stops are made at little-used crossings by heavy commercial vehicles; also, because of their weight and slow acceleration, such vehicles may be unable to complete a crossing, after stopping, in time to avoid collision with an approaching train. The Government advisory group recommended to be established should adopt standards, such as those of California, for classification and indentification of "exempt" crossings, to be clearly marked, where motor vehicles would not be required to stop but rail traffic would be required to stop and proceed only when protected by a flagman; or in lieu of flagmen a three-light traffic-control system such as those used at highway intersections could be installed. Elimination of stops at such crossings would expedite vehicular traffic and lessen danger of train-truck collisions, and would not be a deterrent to enforcement of stopping at more hazardous crossings.—Id., pp. 84-5, 89.

Amendment of §192.10 of the Motor Carrier Safety Regulations to require motor tank vehicles, loaded or empty, used for transporting flammable liquids with flashpoints under 200° Fahrenheit to stop at railroad grade crossings would be in the public interest and would promote safety; while number of accidents covered by the amendment is small, serious nature and consequences thereof warrants its adoption. However, evidence of record as to the value of requiring such tank vehicles to also display a sign warning that they stop at all grade crossings is insufficient to justify adoption of such a requirement. Also, the record is not convincing that an amendment of §192.11, which would limit the speed of all regulated motor vehicles (except those required to stop) to 25-miles per hour when approaching railroad grade crossings, would add anything to requirements of the present regulations; accordingly, §192.11 is retained without such amendment.—Qualifications of Employees and Safety of Operation, 98 M.C.C. 741 (746-7)*.

Proposed rule 195.13 providing for declaring out of service of drivers who are in violation of the safety regulations is reasonable and necessary in the public interest; no reason appears why commission personnel charged with responsibility of supervising and inspecting operations of motor carriers for purpose of determining whether or not they are in compliance with the regulations should not be authorized to declare a noncomplying driver out of service in the same manner that they

now declare vehicles found to be in a dangerous state of noncompliance out of service; adopted. In addition, proposed new §195.1 designating responsibility for compliance, being found reasonable without discussion, is adopted.—Id., 89 M.C.C. 19 (21, 27-28).

A motor carrier employing trip-leased equipment with drivers is required to obtain medical certificates, logs, and vehicle condition reports from such drivers as well as its own, and to retain them in its files for stated periods. Respondent, which trip-leases equipment with drivers from other passenger carriers, admitted in a letter to a commission safety inspector that, since its trip lessors are willing to make all relevant vehicle condition reports and drivers' medical certificates and logs immediately available upon request, it has not deemed it necessary prior to his investigation to maintain those records in its own files; its past failures to observe those requirements were clear violations of §§191.10, 195.8, and 196.7 of the safety regulations, and though respondent has taken prompt action to correct those deficiencies, together with reasonable steps to prevent their recurrence, cease-and-desist order is entered.—Safeway Trails, Inc.—Investigation and Revocation, 91 M.C.C. 936 (941, 943, 950)*.

Although the record does not require any finding as to necessity for instituting a two-man operation in long-haul transportation of jet-thrust units of which explosives are a basic element, the regulations governing transportation of explosives are applicable, and applicants are reminded of their unvarying responsibility to observe all applicable rules and regulations in meeting shipper's requirements.—Baggett Transp. Co. Extension, 88 M.C.C. 3 (10)*.

15. Qualifications and hours of drivers, employees.—[Vols. 9, 11, 12, 15, 16, 18, 19].—See also Wirtz v. Tyler Pipe & Foundry Co., Fair L.S., 29 USC §§213, 215, n. 1.

In action to recover damages growing out of collision of two tractor-trailer combinations, plaintiff without objection introduced evidence showing that defendant's driver had violated the commission's hours-of-service regulations, but there was no contention that such violation was a causative factor in the accident; therefore, even though the judge did not mention the regulation in his charge to the jury, plaintiff suffered no substantial prejudice which would warrant a new trial.—Snyder v. Macaluso, 204 F. Supp. 370 (373-4).

See also United States v. Dixie Grain Co., §222(a), n. 15.

The overriding purpose of the hours-of-service regulations is to decrease the possibility of disastrous accidents arising from employment of tired or overworked drivers to operate extremely heavy and potentially dangerous vehicles on the public highways; and §195.2(a) thereof defines "on duty" as including time a driver is required to be in readiness to work. Although respondent's extra-board drivers are free to use sleeping accommodations available to them in rest facilities, they have no predetermined time in which to rest, but are at all times subject to call and required to be in readiness to work; thus the extra-board drivers are "on duty" within meaning of §195.2(a) while standing by in rest facilities awaiting assignment. Respondent's instruction to its drivers to log as "off duty" time spent by them at terminal facilities awaiting assignment violates that section, and its persistence in such violations after admonitions by commission representatives must be characterized as willful. Compliance order entered.—Safeway Trails, Inc.—Investigation and Revocation, 91 M.C.C. 936 (946-7, 950)*.

If respondent feels that the definition of "on duty" time in §195.2(a) of the safety regulations is too strict or imposes an undue hardship, it may seek relief by filing an appropriate pleading in Ex Parte No. MC-40 (Sub-No. 1). The fact that exception permitting certain drivers in the petroleum industry to accumulate off-duty time while resting in sleeping accommodations required entry of an amending order indicates necessity of similar action if a like exception is to be created for motor passenger carriers.—Id., p. 947.

Proposed rule 195.3(a) prohibiting driving for more than 10 hours following 8 consecutive hours off duty, or more than 2 hours after being on duty more than 13 hours following 8 consecutive off-duty hours, would not prohibit daily overall on-duty periods exceeding 15 hours, but merely further driving duties after the 15-hour maximum on-duty period, and would not prohibit further nondriving activi-

ties by a driver after a permissible 10 hours of driving in a period of 15 consecutive hours following 8 hours off duty. While compliance will necessitate changes in operations of some carriers, drivers should not be permitted to operate heavy vehicles on the highways after 15 consecutive hours on duty; fatigue factors are present in sufficient quantity after such a period, whether of driving or nondriving duties, to make performance of further driving operations undesirable from a safety standpoint. Such rule is reasonable and necessary in public interest; adopted.—Qualifications of Employees and Safety of Operation, 89 M.C.C. 19 (21,23).

Since new §195.3(a) represents a change from the "24-hour concept" to a concept based on observance of an 8-hour off-duty period prior to performance of driving duties, it is necessary to make the "exception" in §195.10 consistent with the new rule; §195.10 is revised accordingly.—Id., p. 23.

Proposed changes in maximum-hours regulations would be extremely difficult of application to drivers of companies providing various specialized services to the petroleum drilling and producing industry; due to peculiar needs of that industry, field operations of service companies are similar to those of oilfield haulers and are not susceptible of advance scheduling with any reasonable accuracy; considered driver-technicians of service companies are excepted from general provisions of new §195.3 However, no exemption from §195.3(a) is granted such drivers as to purely driving duties; exemption granted applies only to driver-technicians employed exclusively in the manner described; and drivers used in ordinary over-the-road operations are not eligible therefor.—Id., pp. 28-30.

But operation of carrier engaged in transportation of salt for ice control purposes are not in same category as those of oilfield and petroleum-servicing carriers, and record does not afford sufficient reason for extending to salt transporter's drivers the same exemption as granted to drivers of oilfield and petroleum-servicing carriers.—Id., p. 25.

Retention of present seasonal exemption from the maximum driving time and on-duty time provisions of drivers of vehicles engaged solely in making deliveries for retail stores during the period December 10 to 25, inclusive, of each year is unopposed and appears necessary in the public interest.—Id., p. 31.

Other proposed new or revised provisions of §§195.2, 195.3, and 195.7, being unchallenged or found reasonable without discussion, adopted.—Id., pp. 21, 25, 31.

In determining whether activities of refrigeration mechanics affect safety of operation and thereby subject them to the commission's jurisdiction, fact that an employee is a mechanic by trade is not decisive; true test is what the employees does, not what he is qualified to do. Trailers with modern mechanical refrigerating units presents obvious and serious safety hazards in operations on the highways; inspection, repair and maintenance of such units to ensure continued safe operation remedies defects which might have direct causal connection with safe operation of the equipment unit as a whole. Work of refrigeration mechanics in detecting and repairing defects which might result in an accident therefore has direct relation to safety; mechanics performing such work who are employed by common, contract, or private carriers, subject to Part II, are within classes of employees for whom the commission may prescribe qualifications and maximum hours of service. —Maximum Hours of Service of Motor Carrier Employees, 88 M.C.C. 710 (712-3)*.

18. Driver's log.—[Vols. 9, 11, 13, 14, 16-18].—Provision of recommended rule 195.8(j) that a carrier desiring its drivers, in preparation of daily drivers' logs, to use an alternative noon-to-noon basis in lieu of midnight-to-midnight basis specified, shall give written notification of its election to the district director of district in which its principal office is located is preferable, from an administrative standpoint, to giving of notice to district director of district in which the terminal electing to use the optional reporting method is located, and would appear to be more satisfactory to carriers since it would require but one notification, as might be necessary in the case of carriers maintaining terminals in a number of districts; proposal adopted as recommended.—Qualifications of Employees and Safety of Operation, 89 M.C.C. 19 (26).

The "forwarding" of daily logs required by §195.8(r) does not mean that logs must be

mailed to driver's home terminal each day; requirement is met if driver personally returns the log to his home terminal at approximately the same time it would have been received if mailed; if driver's tour of duty is of such duration that he cannot personally return his log in about the same time, then it should be forwarded by mail; adopted.—Id., p. 26.

Proposed new §195.8(t) exempts drivers whose duties do not take them beyond a 50-mile radius of their home terminal from the daily-log requirements; elimination of the 12-hour provision in present §195.8(b), so that drivers otherwise within that category need not keep daily logs, is a justifiable relaxation of present regulations; adopted. However, this class of drivers must still comply with the weekly on-duty provisions, and carriers must maintain required on-duty time records of such drivers.—Id., p. 27.

Other proposed new or revised provisions of §195.8, being found reasonable without discussion, adopted.—Id., p. 31.

See also Safeway Trails case, n. 10, above.

20. Accidents and accident reports.—[Vols. 9, 11, 16-19].—Although written reports of highway accident by driver of tractor-trailer to the owners of the equipment and to defendant-lessee thereof, the carrier, shortly after collision with plaintiff's automobile were made pursuant to the commission's motor carrier safety regulations, those reports were not privileged under the regulations pertaining to reports from carriers to the commission. Lower court's denial of plaintiff's motion for production of those reports was an abuse of discretion, good cause for their production having been shown.—Goosman v. A. Duie Pyle, Inc., 320 F. 2d 45 (50-3).

While carriers' delegation of responsibility for reporting accidents to agents located near scene thereof is unobjectionable insofar as it expedites filing of accident reports, in view of frequent failure of regional agents to forward copies to carriers' headquarters revision of pertinent safety regulations to redefine accidents, personal injury, and property damage and require carriers to maintain a central file or "accident register" of indexed copies of reports of all accidents for 3 years from date of each is desirable to promote increased accident consciousness among carriers and reduced delays in conduct of field investigations. While such registers need not be filed with commission, they must be available for inspection and are "reports" required by the commission; §220(f) provides ample protection against their use in civil suits arising out of motor carrier accidents.—Qualifications of Employees and Safety of Operation, 91 M.C.C. 141 (144-5, 146-7)*.

Requirement that carriers operating in interstate or foreign commerce report and record accidents occurring in course of their intrastate operations will not interfere with power of the States to regulate intrastate commerce and is desirable as a practical and efficient means of evaluating a carrier's entire accident record in judging overall safety standards and qualifications of individual carriers to perform interstate operations. However, carriers who do not at any time engage in interstate or foreign commerce, or whose operations therein are occasional or sporadic, need not report intrastate accidents.—Id., pp. 145-6.

The primary cause of grade-crossing accidents is failure of the motor-vehicle operator to stop or exercise due caution and to comply with existing laws and regulations and obey warning signs or signals; and truck drivers and carriers engaged in intrastate operations not subject to commission regulation are responsible for the major portion of such accidents involving commercial vehicles. While the heavy types of vehicle are involved in the more serious accidents, regulated carriers generally present no problem, the principal offender against safety being the exempt, unregulated, or irresponsible carrier; and though any type vehicle may be involved in a serious accident, the most severe are those involving vehicles hauling flammable, explosive, or other dangerous commodities. Intensified and coordinated enforcement of all existing safety laws and regulations by Federal, State, local, and other responsible bodies is essential to reduction of grade crossing accidents; other recommendations outline.—Prevention of Rail-Highway Grade-Crossing Accidents, 322 I.C.C. 1 (13-15, 63-8, 73-4, 86-9)*.

30. Carriers otherwise exempted under the act.—[Vols. 9, 19].—While 10 MCC 533 ex-

cepted vehicles and drivers used wholly within a commercial zone from safety regulations other than drivers' hours, to avoid conflict with municipal regulations, such conflict relates to technical rather than operational aspects of safety regulation; requirement that for-hire motor carriers record and report, and private carriers record, all accidents occurring in commercial zones is of latter type and will not impede enforcement of State or municipal regulations. Keeping of prescribed accident registers is necessary to aid the commission in evaluating carrier's entire accident experience and in assessing need for more active safety regulation in such areas, and in view of increased minimum property-damage requirement will not unduly burden carriers.—Qualifications of Employees and Safety of Operation, 91 M.C.C. 141 (148)*.

35. Highway transportation of motor vehicles.—[Vols. 9, 11, 13].—See Bell Transp. Co., Extension, case, §207(a), n. 25 *Truckaway*.

Regulations of the Commission

27 FR 6091, June 28, 1962, Part 193: Parts and Accessories Necessary for Safe Operation; §193.44 Front brake lines, protection, amended, effective on date of service of order.

27 FR 6716, July 14, 1962, Part 195: Hours of Service of Drivers, effective date of order of March 29, 1962 (27 FR 3553) postponed to Sept. 5, 1962, effective on date of order.

27 FR 7094, July 26, 1962, Part 195: Hours of Service of Drivers, Form BMC-59 Driver's Daily Log, required by §195.8, revised, effective Sept. 5, 1962.

27 FR 8119, Aug. 15, 1962, Part 195: Hours of Service of Drivers, §195.2(a) amended by adding thereto subparagraph (9) relating to specially trained drivers of specially constructed oil well servicing vehicles, effective on date of order.

27 FR 8550, Aug. 25, 1962, Parts 190, 194: Motor carrier safety regulations, §190.33 Applicability of regulations, amended, effective on date of order; also, title of Part 194 is amended and §§194.2 through 194.9 vacated and similarly numbered new regulations substituted in lieu thereof, effective Jan. 1, 1963.

27 FR 9103, Sept. 13, 1962, Part 193: Parts and Accessories Necessary for Safe Operation, §193.71 Coupling devices and towing methods, driveaway-towaway operations, paragraphs (a) and (c) amended, effective on date of service of order.

27 FR 3553, Apr. 13, 1962, Part 195: Hours of Service of Drivers, §§195.1, 195.2, 195.3, 195.4, 195.5, 195.7, 195.8, and 195.10 eliminated and new §§195.1, 195.2, 195.3, 195.7, 195.8, 195.10, and 195.13 substituted in lieu thereof, effective July 16, 1962.

27 FR 3813, Apr. 20, 1962, Part 193: Parts and Accessories Necessary for Safe Operation, §193.75(a) and (b) deleted and paragraph (c) redesignated (a), and §§193.50, 193.51, 193.65(e)(1), 193.66, 193.70(f), 193.76(a) and (h)(2), 193.77(c)(3), 193.78(a), 193.82, 193.90, and 193.96(c)(7), amended, effective Dec. 31, 1962.

27 FR 10585, Oct. 31, 1962, Part 195: Hours of Service of Drivers, paragraph (a) of §195.3 Maximum driving and on-duty time, revised, effective on date of order.

27 FR 12843, Dec. 28, 1962, Part 193: Parts and Accessories Necessary for Safe Operation, §§193.41(a), (b), and (c), 193.52, 193.71,(c), and 193.76(a) amended, effective Dec. 31, 1962.

28 FR 409, Jan. 16, 1963, Parts 7, 195: Hours of Service of Drivers, §§7.60 and 7.60A, Forms BMC-60 and BMC-60A, canceled, and §195.9(a),(b),(c), and (d) amended, effective July 1, 1963.

28 FR 1050, Feb. 2, 1963, Part 190: Motor Carrier Safety regulations, §190.40(b) amended to provide that carriers located in the Yukon Territory, Canada, shall file accident and hours of service reports at Anchorage, Alaska, effective Mar. 15, 1963.

28 FR 2236, March 7, 1963, Part 195: Hours of Service of Drivers, §§195.3(a) and 195.8(j) and (r) amended, effective March 30, 1963.

28 FR 4198, Apr. 27, 1963, Part 95: Hours of Service of Drivers, to permit operations of commercial vehicles, and provide service, under many adverse conditions in Alaska, §§195.3(a) and (b) and 195.10 amended, and new §195.3(e) added, effective on date of service of order.

28 FR 6509, June 25, 1963, Parts 7 List of Forms, and 196 Inspection and Maintenance: §7.63 Form BMC-63 Driver equipment compliance check, and §7.64 Form BMC-64 "Out-of-service" sticker, prescribed; and §196.5 Commission inspection of motor vehicles in operation, amended, effective on date of service of order.

28 FR 9208, Aug. 21, 1963, Part 195: Hours of Service of Drivers, §195.2(h) Driver-salesman, added, and §195.3(b) amended, effective Sept. 15, 1963. Corrected order published 28 FR 10263, Sept. 19, 1963.

29 FR 3088, Mar. 5, 1964: Retention periods, records, motor carriers exempt under §203(b) of IC Act, 49 CFR 191.10, 194.3, 194.6, 195.8, 195.9, 196.2, 196.7.

29 FR 8420 July 3, 1964, Parts 191, 193, 194, and 195: Qualifications and Maximum Hours of Service of Employees of Motor Carriers and Safety of Operation and Equipment, §194.6 is vacated, and §§191.2(b), 191.8, 191.10, 193.20, 193.95(f)(4), 195.2(b), and 195.8(r) are amended, effective 5 days after date of order.

29 FR 14495, Oct. 22, 1964, Part 191: Qualifications of Drivers, §191.2 Minimum requirements, introductory paragraph amended and a new paragraph (e) added, effective Dec. 31, 1964.

29 FR 15578, Nov. 20, 1964, Part 193: Parts and Accessories Necessary for Safe Operation, §193.70(f) Safety chains amended, and restated, effective on date of service of order.

29 FR 16256, Dec. 4, 1964, Part 192: Driving of Motor Vehicles, §§192.10 and 192.11 amended, effective Dec. 31, 1964.

30 FR 4481, Apr. 7, 1965, Part 193: Parts and Accessories Necessary for Safe Operation, §193.70(f) Requirements for safety chains or cables, revised, effective on date of service.

30 FR 7491, June 8, 1965, Part 192: Driving of Motor Vehicles, §§192.10 and 192.11 amended, effective July 9, 1965.

30 FR 7522, June 9, 1965, Part 193: Parts and Accessories Necessary for Safe Operation, §193.71(c) and §193.42(b) amended, effective June 7, 1965

30 FR 9206, July 23, 1965, Part 193: Parts and Accessaries Necessary for Safe Operation, §§193.43(a) and (b), 193.60(a), 193.61(a) and (c), 193.85, and 193.95(f) and (k) amended, effective on date of service.

30 FR 9881, Aug. 7, 1965, Part 193: Order previously published at 30 FR 9206 corrected.

30 FR 11103, Aug. 27, 1965, Parts 7 and 195: List of Forms and Hours of Service of Drivers, §7.60 Form BMC-60 cancelled and Form BOC-60 prescribed, and §195.9 amended insofar as it relates to revision of the form. Paragraph (b) of §195.9 revoked, and paragraphs (c) and (d) redesignated as (b) and (c), effective on date of service.

30 FR 14106, Nov. 9, 1965, Part 193: Parts and Accessories Necessary for Safe Operation, §193.50 and §193.77 revised, effective Dec. 31, 1965.

31 FR 6374, Apr. 27, 1966, Par 191: Qualification of Drivers, §191.2 Minimum requirements, §191.2(e) amended by adding (i), (ii), and (iii) to subparagraph (4), by adding new subparagraphs (8) and (9) thereto, and changing the language of subparagraphs (4) and (5), effective June 30 1966.

31 FR 8920, June 28, 1966, Part 193: Parts and Accessories Necessary for Safe Operation, Paragraph (i) of §193.95 Emergency equipment on all powr units, amended, effective June 30, 1966.

31 FR 10469, Aug. 4, 1966, Part 193: Parts and Accessories Necessary for Safe Operation, §193.12(a) and §193.13(a) amended to read as set forth, effective on date of order.

31 FR 12720, Sept. 29, 1966, Part 193: Parts and Accessories Necessary for Safe Operations, §193.26(e)(4) Requirements for Reflectors, amended, effective Nov. 1, 1966.

31 FR 16318, Dec. 21, 1966, Part 190: Motor carrier safety regulations, until further order of the Commission, provisions of §190.33 retain the currently effective provisions as to exemption from the requirements specified in Parts 191, 192, 193, and 196, and applicability provisions of §190.33 are amended to read as set forth in the table, effective Jan. 1, 1967. Ex Parte No. MC 40 reopened as set forth.

31 FR 16495, Dec. 24, 1966, Part 190: Effective date of order of Dec. 15, 1966 (31 FR 16318) postponed until March 1, 1967.

32 FR 719, Jan. 21, 1967, Part 191: Qualifications of Drivers, §§191.8 Original physical examinations of drivers, amended, 191.9 Periodic physical examination of drivers, amended, 191.10 Certificate of physical examination, amended, 191.11 Doctor's certificate, amended, effective March 1, 1967.

32 FR 3467, March 2, 1967, Part 190: General, effective date of order amending §190.33 Applicability of regulations (31 FR 16318) further postponed until June 1, 1967.

32 FR 3774, Mar. 7, 1967, Part 193: Parts and Accessories Necessary for Safe Operation, paragraphs (f), (g), (h), and (i) of §193.95 Emergency equipment on all power units, amended, effective April 1, 1967.

32 Fr 5424, Mch. 31, 1967, Part 193: Effective Date of order of March 7, 1967 (32 FR 3774) postponed pending determination of petitions for reconsideration.

NOTE: For recodification, see 49 CFR, Editorial Note, 32 FR 5606, April 5, 1967.

32 FR 5625, April 6, 1967, Part 293 [formerly Part 193]: Parts and Accessories necessary for Safe Operation; Driveaway-Towaway Operations, miscellaneous amendments, effective on date of service of order.

32 FR 7128, May 11, 1967, Parts 290 [formerly 190], 291 [formerly 191], 293 [formerly 193], 294 [formerly 194], 295 [formerly 195], and 296 [formerly 196]; Motor carrier Safety Regulations. Miscellaneous amendments, issued pursuant to §12(a) of Department of Transportation Act, P.L. 89-670 (80 Stat. 931), concerning only locations necessary for filing reports, directing communications, changes in designation of forms, and changes in organizational designation.

32 FR 7956, June 2, 1967, Part 293 [formerly 193]: Motor Carrier Safety Regulations, Driveaway-Towaway Operation, miscellaneous amendments, issued pursuant to §12(a) of Dept. of Transportation Act, to clarify status of the commission's order of March 22, 1967 which amended the regulations, effective June 2, 1967.

Section 204. (a)(2) [§*304 (a)(2) U.S.C.*] Contract carriers.—[Unchanged. See Vol. 9, p. 7919.]

Notes of Decisions

Volume 9—p. 7919; Volume 11—p. 9382; Volume 12—p. 10361; Volume 14—p. 11575; Volume 17—p. 13507; Volume 18—p. 14277; Volume 19—p. 15518.

10. Safety of operation and equipment.—[Vols. 9, 12, 14].—See Prevention of Rail-Highway Grade-Crossing Accidents, and Qualifications of Employees and Safety of Operation, cases, §204(a)(1), n. 10.

See also Qualifications case, 91 MCC 141, §204(a)(1), n. 20, 30.

15. Qualifications and hours of drivers, employees.—[Vols. 9, 12, 18].—When members of the commission's investigative staff requested respondent contract carrier's president to produce drivers' logs and medical certificates for the period prior to March 1962, he advised that such records were unavailable, and admitted that past compliance with those and other safety regulations had been a "hit and miss" affair; evidence of numerous such infractions of the regulations indicates willful and deliberate disregard of them. Respondents are therefore admonished that any future violations of the nature shown will weigh heavily in favor of imposition of drastic penalities.—C&R Trucking Co.—Investigation of Control, 93 M.C.C. 669 (680-1).

See also Qualifications of Employees and Safety of Operation, and Maximum Hours of Service, cases, §204(a)(1), n. 15.

20. Transporting United States mail under contract.—[Vols. 11, 17-19].—In absence of any clear holding that extensive interstate carriage of mail (concedely contract carriage subject to the commission's regualtion were the contracting authority other than the Post Office Department) is not contract carriage subject to such regulation solely because the Post Office Department is the contracting authority, the question of whether defendant's truck drivers are exempt from §7 of the Fair Labor Standards Act because its operations are subject to the commission's regulation has not been settled finally by the courts within meaning of §16(c) of that statute. Therefore, the court has no jurisdiction of action brought by the Secretary of Labor to recover, for benefit of those drivers, additional overtime compensation.—Wirtz v. Highway Transportation, Inc., 310 F. 2d 643 (644-6).

In deciding that the issue is one which has not been finally settled, the court does not consider administrative interpretation, or other material bearing upon proper construction, of the Motor Carrier Act or the Fair Labor Standards Act; and no opinion on merits of the claim is intimated.—Id., p. 647.

25. Safety; dangerous articles.—[Vols. 9, 11].—See Prevention of Rail-Highway Grade-Crossing Accidents, case, §204(a)(1), n. 10.

Regulations of the Commission

See Regulations following §204(a)(1).

Section 204. (a)(3) [*§204(a)(3) U.S.C.*] Private carriers.—[Unchanged. See vol. 11, p. 9382.]

Amendment, see footnote, vol. 11, p. 9383.

Historical Note

The commission recommends that §204(a)(3) be amended to make more definite the commission's authority to prescribe regulations governing the safety of operations and equipment of private carriers of property by motor vehicle.—Annual Report, 1962, p. 204; renewed, Annual Report, 1963, p. 20, Annual Report, 1964, p. 70-1.

Notes of Decisions

Volume 9—p. 7921; Volume 11—p. 9383; Volume 12—p. 10362; Volume 13—p. 11056; Volume 14—p. 11576; Volume 16—p. 12818; Volume 17—p. 13507' Volume 18—p. 14278; Volume 19—p. 15519.

1. Construction and interpretation.—[Vols. 9, 11-14, 16, 19].—Plaintiffs, during period covered by each of their claims for unpaid overtime compensation, were subject to the commission's regulatory power with respect to qualifications and maximum hours of service of employees, and safety of operation and equipment of private carriers, since they performed duties which substantially affected the safety of operation of defendant's trucks in interstate commerce. Defendant, a private carrier within meaning of pertinent statutes, employed plaintiffs to drive pump trucks used in its business of servicing oil and gas wells in

several States, to load and unload portable job equipment, operate the pumps, and to do routine maintenance work on the trucks and generally keep them in safe operating condition; thus, their duties directly affected safety of operation of the pump trucks. Such employees being expressly excluded from provisions of the Fair Labor Standards Act, neither of them has any claim for overtime compensation thereunder.—Harshman v. Well Service, Inc., 248 F. Supp. 953 (956-7, 958-60)*.

5. Qualifications and hours of drivers.—[Vols. 9, 11, 12, 16, 19].—In interest of protecting the public, activities of all driver-salesmen employed by private carriers should be made subject to weekly on-duty limitations of new §195.3 of the hours-of-service regulations, and all operations with vehicles having more than 2 axles and a gross weight exceeding 10,000 pounds subjected to driving-time limitations thereof; that will permit 10 hours of driving in a total on-duty period of 15 hours, following 8 consecutive hours off duty, and only nondriving work after the 15-hour period. Considering radical change in many driver-salesman operations, modern merchandising techniques, and development of vehicles able to carry heavy loads, existing exemption is no longer justified. And in view of trade practices and use of the same limitation in other provisions of present regulations, the selection of 10,000 pounds as limit beyond which a vehicle will be considered "heavy" is reasonable and not arbitrary.—Qualifications of Employees and Safety of Operation, 89 M.C.C. 19 (24).

See also Southland Corporation (Cabell's Dairy Division) v. Shew, Fair LS, 29 USC §§213, 215, n. 1 *Motor*.

In conducting transportation of automobiles with transient drivers, found to be private carriage, respondent has not attempted to comply with regulations concerning qualifications of employees or other safety requirements, and his failure to require his drivers to submit either doctor's certificates or daily logs is a clear violation thereof; respondent is admonished to comply with the safety regulations governing private carriers.—Studna Investigation of Operations, 88 M.C.C. 52 (53, 55)*.

See also Maximum Hours of Service case, 88 MCC 710, §204(a)(1), n. 15.

6. Driver's log.—[Vols. 11, 16, 19].—Provisions of new rule 195.8(s) for preservation of daily drivers' logs should cause meatpackers no concern; their method of operating fleets of equipment from various plant locations does not differ materially in physical aspects from that followed by for-hire carriers generally in operating fleets from strategically located terminals. Reason for desiring logs to be kept on file at a carrier's regional or terminal office for a specified time is to facilitate inspection by commission field personnel; forwarding and keeping of logs at the companies' chief executive offices, which might not be practicable, is not necessarily contemplated; if a company maintains plants in several supervisory districts, arrangement could be worked out with Director of Bureau of Motor Carriers for Preserving the logs at some chosen office in each district.—Qualification of Employees and Safety of Operation, 89 M.C.C. 19 (26-7).

Evidence concerning train-truck collisions at rail-highway grade crossings, especially those involving flammable or other dangerous commodities, conclusively shows that the principal offender against safety on the highway and at crossings is the exempt, unregulated, or irresponsible carrier, and such carriers, being independently operated, are difficult to identify because of lack of markings on their vehicles. For purpose of a realistic curbing of rail-crossing hazards, prescription of rules requiring such carriers to placard their vehicles so that they can be more readily identified, particularly when safety regulations are violated, would be of material aid. Accordingly, definite and conclusive action should be taken in pending rulemaking proceeding providing for placarding, reporting, and registration of motor vehicles operated by private carriers engaged in transportation of explosives and other dangerous articles in interstate or foreign commerce.—Prevention of Rail-Highway Grade-Crossing Accidents, 322 I.C.C. 1 (71-3, 90)*.

Under amended safety regulations, private carriers conducting operations in interstate commerce are required to maintain accident registers containing specified information on recordable accidents, as therein defined, in-

cluding those involving vehicles or drivers used wholly within commercial zones; required brief entries will not prove unduly burdensome and will enable commission's representatives to evaluate private-carrier accident-prevention programs. However, such carriers need not file accident reports with the commission; as the accident-recording requirements will affect a substantial segment of the motor-carrier industry for the first time, it is desirable that they be designed to remedy only immediate needs.—Qualifications of Employees and Safety of Operation, 91 M.C.C. 141 (149)*.

Regulations of the Commission

See Regulations following §204(a)(1).

Section 204. (a)(3a) [*§ 304(a)(3a) U.S.C.*] **Migrant farm workers.—**[Unchanged. See vol. 17, p. 13507.]

Notes of Decisions

Volume 18—p. 14278.

10. Safety of operation and equipment.—[Vol. 18].—See Qualifications of Employees and Safety of Operation cases, §204(a)(1), n. 10.

15. Qualifications and hours of drivers, employees.—[Vol. 18].—See Qualifications of Employees and Safety of Operation cases, §204(a)(1), n. 10.

Regulations of the Commission

See Regulations following §204(a)(1).

Section 204. (a)(4) [*§ 304(a)(4) U. S. C.*] **Regulation of brokers.—State; exemption.—**[Unchanged. See vol. 9, p. 7924.]

Notes of Decisions

Volume 9—p. 7924; Volume 11—p. 9384; Volume 12—p. 10363; Volume 13—p. 11056; Volume 15—p. 12176; Volume 16—p. 12819.

Section 204.(a)(4a) [*§ 304(a)(4a) U.S.C.*] **Operation within a single State; exemption.—**[Unchanged. See vol. 11, p. 9386.]

Historical Note

The commission recommends, in view of the prohibitions in 18 USC §1001, that §204(a)(4a) be amended so as to eliminate the mandatory oath provision therein, and that such requirement be made discretionary with the commission.—Annual Report, 1964, p. 72.

Notes of Decisions

Volume 11—p. 9388; Volume 12—p. 10363; Volume 13—p. 11056; Volume 14—p. 11576; Volume 15—p. 12178; Volume 17—p. 13507; Volume 19—p. 15520.

Section 204. (a)(5) [*§ 304(a)(5) U.S.C.*].—[Unchanged. See vol. 9, p. 7927, 7928; vol. 11, p. 9389.]

Section 204. (a)(6) [*§ 304(a)(6) U. S. C.*] **Administration.—**[Unchanged. See vol. 9, p. 7928.]

Notes of Decisions

Volume 15—p. 12178; Volume 16—p. 12819; Volume 19—p. 15521.

2. Construction and interpretation.—[Vols. 15, 16, 19].— The commission has the broad power under §204(a)(6) to administer, execute, and enforce all provisions of Part II, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedures for such administration. Determination of the area of a statutory exemption through case-by-case adjudication, or by general rule subject to case-by-case application, is within the commission's competence.—Wycoff Co., Inc. v. United States, 240 F. Supp. 304 (309)*.

While it is well settled that an administrative agency does not have carte blanche to adopt any rule it may fancy, and its regulations must be consistent with the purposes of the statute and reasonably adapted to carry them out, it is equally well settled that the commission has power to adopt regulations to carry out the policies of the laws it administers, if such regulations have a reasonable and rational basis, even though the statute contains no specific authority to promulgate regulations on the subject. Thus, even though §208(b) cannot be construed as authorizing a regulation governing designation of a regular alternate route which may become the carrier's principal route between the cities involved, such provisions in §211.1(c)(8) of the deviation rules are consistent with purposes of the Motor Carrier Act, reasonably adapted to carry out those purposes, and therefore within the commission's general rulemaking powers.—Greyhound Corp. v. United States, 221 F. Supp. 440 (444)*.

Whether an administrative tribunal may lighten or increase the burden of its administrative duties by a particular order, does not ordinarily present a justiciable question which one subject to regulation by that tribunal may put in issue.—Carolina Scenic Stages v. United States, 202 F. Supp. 919 (922)*.

The commission was empowered to issue considered order rejecting complainant's tariff, because it published rates on commodities for which carrier held no interstate operating authority, under its general powers to make all necessary orders to administer, execute, and enforce all provisions of the statute.—W. J. Dillner Transfer Co. v. United States, 214 F. Supp. 941 (946).

See also Studna v. United States, §12(1), n. 7.

Although the definition of interstate commerce as set out in §203(a)(10) does not specifically mention commerce moving partly by air, and there is no provision therein conferring specific authority to determine what motor operations come within the §203(b7a) partial exemption, the very extent of the commission's duty under §204(a)(6) "to administer, execute, and enforce" the act incontrovertably depends on, and is limited by, the scope of any exemption from regulation which the act provides. Clearly, there must of necessity be included in those duties the power to determine the scope of any partial exemption; moreover, there are abundant commission precedents dealing with highway movement of airfreight, and the commission's position finds impressive judicial support in the decision in 289 F. (2d) 770. Respondents' argument that the commission lacks jurisdiction in matter under investigation, rejected.—Film Transit, Inc., and Air Dispatch, Inc.,—Investigation, 98 M.C.C. 145 (149-50).

While no statutory provision confers "specific" authority on the commission to determine what motor operations come within the §203(7a) exemption, the commission's duty under §204(a)(6) "to administer, * * * regulate * * * make all necessary orders * * * and to prescribe rules and regulations" includes the power to define the terms used in the act in accordance with legislative intent. The very extent of that duty depends on and is limited by the scope of any exemption from regulation which the act provides; and clearly, the commission's power "to administer" the act and "to regulate" must include the power to determine scope of the partial exemption of motor transportation "when incidental to transportation by aircraft."—Motor Transp. of Property Incidental to Air, 95 M.C.C. 71 (80-1)*.

Although several of the parties assert that

the commission is attempting to regulate air transportation, a review of the sections of the Federal Aviation Act and the IC Act cited is convincing that the adoption of rules governing scope of the incidental-to-air exemption and, also, the use of regulated motor carriers by air freight forwarders, is in accordance with the national transportation policy and past decisions of the commission, and that such action does not conflict with provisions of the FAA, or with existing rules of the CAB. Furthermore, the interpretation of the §203(b7a) exemption conforms to the general practice of strictly construing any exemption; any broader construction would, without justification, serve only to divert traffic from regulated motor carriers and thereby defeat various sections of the act and the national policy stated therein.—Id. pp. 90-1.

See also Ayers v. Northern Tank Line, §204(c), n. 25.

Administrative rulings of the Bureau of Motor Carriers are made in response to questions propounded by the public, are tentative and provisional, and at time of issuance are made in absence of an authoritative decision. —National Auto Transporters Assn.—Declaratory Order, 91 M.C.C. 395 (396); such rulings are informal opinions intended to assist the commission's field staff and the public in interpreting the various provisions of the act and the rules and regulations promulgated thereunder, in absence of definitive decisions. They are not binding on either the commission or other persons.—Hughes, 89 M.C.C. 471 (485)*.

The power conferred by §204(a)(6) to enforce provisions of Part II by promulgation of general rules or regulations is coterminous with the scope of agency regulation and extends to the transportation of passengers and property by motor vehicle engaged in interstate or foreign commerce and to the procurement and provision of facilities for such transportation [344 US 298].—Discrimination—Interstate M. Carriers of Passengers, 86 M.C.C. 743 (745)*.

Regulations of the Commission

28 FR 9435, Aug. 28, 1963, Part 9a: Administrative Interpretations, §9a. 1 Authorization for adjustment of claims for damages resulting from misrouting. New part and section added, effective on date of order.

29 FR 4914, April 8, 1964, Part 500: New Subchapter E—Intermodal Transportation, Part 500 Practices of For-Hire Carriers of Property Participating in Trailer-on-Flatcar Service, §§500.1-500.8, added, effective July 6, 1964.

29 FR 6283, May 13, 1964, Part 210: Exemptions, §210.40 Motor transportation of property incidental to transportation by aircraft, added, effective June 24, 1964.

29 FR 8421, July 3, 1964, Part 500: Practices of For-Hire Carriers Participating in Trailer-on-Flatcar Service, effective date of order (29 FR 4914) postponed pending further order.

29 FR 11126, July 31, 1964, Part 51: New Part 51—General Requirements, added under the heading Parts 51-59, Consolidation, Finance, and Reorganization, effective Oct. 1, 1964.

29 FR 11273, Aug. 5, 1964, Part 500: Practices of For-Hire Carriers Participating in Trailer-on-Flatcar Service, effective date of order (29 FR 4914) fixed as Sept. 11, 1964.

29 FR 12508, Sept. 2, 1964, Part 500: Effective date of order (29 FR 4914) as amended (29 FR 11273) postponed until further order.

31 FR 8573, June 21, 1966, Part 6, Fees for Service Performed in Connection with Licensing and Related Activities, amended, effective July 22, 1966.

NOTE: For recodification, see 49 CFR, Editorial Note, 32 FR 5606, April 5, 1967.

32 FR 12689, Sept. 1, 1967, Part 600 [formerly Part 500]: Practices of For-Hire Carriers of Property Participating in Trailer-on-Flatcar Service, effective date, except as to §§600.7 and 600.8, is Aug. 18, 1967: §600.7 shall become effective Nov. 16, 1967, and §600.8 shall become effective Feb. 18, 1968.

32 FR 13414, Sept. 23, 1967, Part 106 [formerly Part 6]: Fees, §106.2 Filing fees, amended, effective Oct. 20. 1967.

Section 204. (a)(7) [*§304(a)(7) U.S.C.*] **Inquiry into management; recommendations.**—[Unchanged. See vol. 11, p. 9389.]

Amendments, see footnotes, vol. 11, p. 9389.

Section 204 (b) [§ *304(b) U.S.C.*] Classification of motor carriers.— [Unchanged. See vol. 11, p. 9390.]

Amendment, see footnote, p. 9390.

Notes of Decisions

Volume 9—p. 7929; Volume 11—p. 9390; Volume 12—p. 10365; Volume 13—p. 11057; Volume 14—p. 11577; Volume 15—p. 12178; Volume 16—p. 12820; Volume 17—p. 13508; Volume 18—p. 14280; Volume 19—p. 15522.

1. Construction and interpretation.—[Vols. 9, 11, 13-18].—Argument that the act does not recognize a distinction between regular- and irregular-route carriers was put to rest in the Brady case (47 MCC 23) and by the district court's holding in 80 F. Supp. 110 that the criteria established in that case constitute a reasonable classification. The act contemplates existence of the two types of common carriers and gives the commission broad discretion to establish the demarcation; thus the Brady criteria are not immutable, and if conditions in transportation should so change as to render all or some of them unrealistic or useless it is within the commission's authority to make whatever changes are necessary for fair and impartial regulation of the several carriers and to fulfill the other mandates of the national transportation policy.—Motor Common Carriers of Property—Routes and Service, 88 M.C.C. 415 (428-9).

5. Types of property carriers.—[Vols. 9, 15].—Historically, armored-car operators have engaged in guarding, protecting, and transporting monies, currency, and other valuables; their services are largely local, involving pickup and delivery at banks and business houses, with long-haul movements for Federal Reserve banks and United States Mint, using specially designed, bulletproof vehicles and trained and bonded drivers. Their principal service was in the protective custody given the items transported, rather than the transportation as such. Through the years they have been granted considerable leeway in performance of a complete service for banks in general, not being considered serious competitors of other carriers, and their operations have consistently been found to be contract carriage, even though the number of persons served might be considerable.—Armored Carrier Corp. Extension, 92 M.C.C. 336 (359-60).

However, armored-car operators' expansion of their services in recent years into such fields as transportation of business documents, film, and dental or optical supplies does not involve service of same nature as that offered to banks or financial institutions for transportation of their intrinsically valuable commodities. Business records and the like have no intrinsic value, and while their loss could be catastrophic, they do not require guards or special vehicles for transportation; and though they may be stored in safes or vaults pending pickup by the carrier, proposed transportation in panel trucks suggests that such measures are not essential for their protection. Other special services offered, such as pickup after normal working hours, are often provided by common carriers for their customers. Performance of such nonprotective services, in which prompt and dependable service is all that is required, should be classed as common carriage.—Id. pp. 360-1. [But see dissent.]

To extent that such finding is at variance with such past decisions as 77 MCC 433, 78 MCC 191, and 303 ICC 781, those decisions failed adequately to consider the difference between protective, armed-guard service and the variety of nonprotective services performed by so-called armored-car carriers. Review of history and development of armored-car service and expansion of such carriers into areas other than their traditional province is convincing that a distinction must now be clearly drawn between those two very

different types of service.—Id., pp. 357, 361.

Although Railway Exp. Agency has not shown to what extent it will perform intercity line-haul highway movements of loaded containers under proposed rates, its motor-carrier authority is sufficiently broad both territorially and commoditywise to be used for such movements unless prohibited by restriction of its general-commodity authority to shipments moving "in express service." That authority may be regarded for ratemaking purposes as coextensive with its authority as an express carrier under §1(3)(a), and, if considered transportation at nonpremium rates of traffic not shown to move more expeditiously than in ordinary l.t.l. freight service or to require any special handling or protection were held not to be "express service" within meaning of REA's certificates, it would seem to follow, in case of containers moved by rail, that an ordinary l.c.l. freight service is performed under Part I without commission approval of pooling arrangements between REA and the underlying rail carriers.—Freight, All Kinds, L.C.L. Container Charges—U.S.A., 323 I.C.C. 468 (477)*.

Conclusion that a highway express carrier of general commodities is not prohibited from handling any particular type of traffic nor required to publish any particular level of rates, but that an express carrier must move all the traffic it handles in express service, and may publish any level of rates for express service that is compensatory and otherwise lawful, is supported by commission precedent, by practical considerations of administration and enforcement of the act, and by the national transportation policy. A contrary conclusion would make it extremely difficult for REA to continue to provide a nationwide express service.—Id., pp. 477-8.

6. Types of property-carrier services.—[Vols. 9, 11-19].—Historically, common carriers of motor vehicles and heavy haulers have constituted two separate and distinct segments of the motor carrier industry; the distinction was recognized by the commission as early as 2 MCC 703, wherein it defined "carriers of motor vehicles" and "carriers of heavy machinery" (latter of which later became the heavy haulers), and again in 61 MCC 209, wherein the commission determined that, while authorities of carriers of motor vehicles may be described in terms of classes of vehicles, authorities of heavy haulers are most appropriately described in terms of service, including requirements of special equipment, without specification of commodities.—United Transports, Inc. v. United States, 214 F. Supp. 34 (40-2)*.

Distinction between regular and irregular route operations, made by the commission under its authority to classify carriers, was a necessary incident to the discharge of its duty under the "grandfather" clause to grant certificates authorizing operations which conform with those relied on as requiring the grant. A carrier granted only irregular-route authority to which its prior operations entitled it, may not operate a regular-route service without further authorization.—Railway Exp. Agency, Inc. v. United States, 205 F. Supp. 831 (837)*.

See also Winter Garden Co. v. United States, §203(b), n. 50 *Act of 1958*.

The five specific ultimate requirements of a bona fide express service, as set forth in 63 MCC 573, are practical and concrete criteria intended for guidance of highway express carriers and are controlling in defining express service. However, those criteria do not support the proposition that express service can be differentiated from ordinary freight service on basis of particular traffic, a particular weight of shipment, or particular rates. The generally higher level of express rates is not designed to protect general freight carriers from competition, but rather to compensate express carriers for providing additional or expedited service under less favorable conditions than those of ordinary freight service, and such attributes of express service as transportation of small shipments at premium rates are descriptive rather than limiting in nature, as most shipments attracted by the holding out of a true express service will weight less than 500 pounds, and cost of moving them expeditiously will be greater than if they were held for aggregation into truckloads.—Freight, All kinds, L.C.L. Container Charges—U.S.A., 323 I.C.C. 468 (479-80)*.

It is undisputed that Railway Exp. Agency's operations satisfy the criteria for express service, and it is clear that it moves the con-

tainer traffic in issue just as expeditiously as its other traffic, often in same cars or trucks. Historically, REA has handled shipments weighing over 500 pounds, including carloads; it had no reason to believe that it was required to justify proposed rates on containerized shipments in terms of some arbitrary weight limit, and to impose such an unexpected burden on it would be improper. Moreover, even assuming that it would be desirable to define "express service" in terms of a specific weight limit, the factual basis for such a limitation could be established only in a general investigation or ex parte proceedings.—Id., pp. 480, 481-2.

A definition of "express service" in terms of perishability, fragility, or value of commodities transported could not be articulated with the precision required for tariff publication; and to define it with reference to whether or not particular shipments require expedited handling would be wholly impracticable. Such a definition could not be enforced; no shipper would be likely to admit that a shipment he tendered to REA did not require expeditious handling, and, if REA were required to investigate and make such a determination as to each shipment, it would be required to substitute its judgment for that of its patrons, and many shipments requiring expedition would be delayed.—Id., p. 482.

"Express service" is a relative concept, rooted in shipping public's need for a special transportation service and common carriers' responsive duty to meet that need; it connotes certain distinct characteristics, particularly the expedited handling, in regular-route service, of comparatively small individual shipments, which common carriers or ordinary freight usually do not wish to, or cannot, provide; it contemplates a bona fide holding out and ability to transport any commodity that can safely be carried on ordinary van-type equipment, including those which require maximum degree of care or security, or both; and its superiority to ordinary motor freight service requires payment of premium charges. Express service therefore is not susceptible of precise definition, because its inherent attributes must be judged in comparison with services and rates of common carriers of ordinary freight.—Railway Exp. Agency, Inc., Extension, 91 M.C.C. 311 (322-3, 324)*.

While evidence indicating that average weight of shipments transported by Railway Exp. Agency throughout the nation is about 50 pounds, contrasted with average single-shipment weight of 200 pounds for one protestant, does not establish conclusively a firm division of small and large parcel traffic between REA and motor carriers of ordinary freight in all circumstances, those figures indicate strong probability that such historical cleavage still prevails, and, as the only such figures of record, fall far short of sustaining protestants' fears of encroachment by REA on their field through extensions of its authority to provide all-motor service in lieu of discontinued passenger-train service.—Id., pp. 323, 326-7.

Vendee's operations as an express carrier meet criteria of the Arrowhead case (61 MCC 131, 63 MCC 573), notwithstanding claim that it does not meet the criterion of transportation at premium rates; due to the 100 pounds' minimum charge maintained by general freight carriers to discourage light shipments, it is not unusual for an express carrier's rates on such shipments to be lower.—Mistletoe Exp. Service—Purchase—Central News Exp., Inc., 90 M.C.C. 797 (803).

Automobile haulers are a specialized group engaged in transportation of new and used motor vehicles including automobiles, trucks, trailers, chassis, bodies, and automotive display vehicles. Initial movement of new automobiles, trucks, and trailers is usually a radial irregular-route service, originating at a place of manufacture or assembly and ending with either final delivery to a consignee or interchange with another carrier. Transportation of used vehicles, display vehicles, and both new and used chassis, also new vehicles not moving from a point of manufacture or assembly, is generally nonradial, involving outbound, inbound, and crosshaul movements from to, and between unlimited origin or destination points within the carrier's authorized territory, and is regarded as a secondary movement.—National Auto. Transporters Assn.—Declaratory Order, 91 M.C.C. 395 (397-8, 409).

Grants of authority restricted to initial or

secondary movements, as defined in Administrative Ruling No. 75, were intended to keep those different spheres of activity separate and distinct. However, shifts in the method of distributing the traffic, following development of rail TOFC and multilevel-car service, have confronted both common and contract motor carriers (including holders of secondary as well as initial authority) with necessity of utilizing substituted rail service in order to retain traffic which they formerly handled in all-motor service; and under present interpretation of Ruling No. 75 as applied to such substituted service, the use thereof would in many cases require modification of carriers' outstanding certificates or permits; procedure for filing petitions for such modification, outlined,—Id., pp. 399-401, 415-6.

If proposed authority to transport small shipments of general commodities is granted, applicant must lose its present identity as a transporter of motion picture films and related commodities and eventually become a transporter of small shipments of general commodities.—Transway, Inc., Extension, 89 M.C.C. 513 (521).

None of the eight criteria set forth in the Brady case (47 MCC 23) as identifying regular-route operations is, standing alone, necessarily conclusive, except possibly the observance of definite, published schedules. Although defendants' operations under their irregular-route authorities undoubtedly have some elements indicative of regular-route service, when analyzed in light of the surrounding circumstances they are not of such character as would clearly justify conclusion that defendants have unlawfully converted them to regular-route operations. Their operations have not reached the stage of a predetermined plan, and there is no evidence that either observes fixed schedules of service or of departures or deliveries; while shippers can anticipate second-morning deliveries on shipments between Kansas City and Chicago, that is a reasonable service between such points and results from the practical aspects of motor carrier operation rather than from any apparent design of defendants; and though certain routes are predominantly used, there is no habitual use of fixed routes, and defendants do not instruct their drivers as to the routes to be taken.—Ship-By-Truck Co. v. Crouch Bros., Inc., 93 M.C.C. 89 (95-6).

However, in the area involved the difference between operations of an irregular-route carrier favored with a consistent and substantial volume of traffic and those of regular-route carriers is hardly discernible. In such border-line cases it is the obligation of the irregular-route carrier either to check the tendency of its operations to take on a regular-route character, and thus preserve its status, or to obtain appropriate regular-route authority. Defendants have chosen the latter course, and their applications have been favorably considered; complaint dismissed.—Id., p. 96.

Although a bona fide irregular-route carrier may conceivably do many things suggestive of regular-route service without unlawfully converting its operation into one over regular routes, when the number of such practices is substantial, and they are not explained or justified by special circumstances, they cumulate and compel the conclusion that such a conversion has been accomplished. However, no general rule can be laid down for determining the regular- or irregular-route character of all operations; each case must be judged by its own special circumstances.—United Parcel Service, Inc., Extension, 89 M.C.C. 709 (743-4)*.

The use of fixed routes is the outstanding characteristic of regular-route carriers, but this does not necessarily mean that rigid and inflexible use of a particular route or routes makes an irregular-route carrier into a regular-route one. On the other hand, fact that an irregular-route carrier habitually uses the only practical highways from one point to another does not mean that the test may not be applied; it is merely one of several circumstances to be weighed in determining the true nature of the operation. And the maintenance of a terminal at a point other than its base by an irregular-route carrier is another factor to be weighed in light of other surrounding circumstances; the maintenance of such a terminal, along with consistent movement of a substantial volume of l.t.l. shipments, strongly suggests an operation of fixed regularity and according to plan rather than call-on-demand.—Hart Motor Exp., Inc. v. Midwest Motor Exp., Inc., 88 M.C.C. 525 (530)*.

Also, while strict adherence to a fixed published arrival-and-departure schedule, regardless of available traffic, is a rare practice among regular-route carriers of property, there is an equivalent general regularity in arrivals and departures of equipment in their operations which is not characteristic of carriers operating only on call and over irregular routes. It is not required, however, that pinpoint accuracy be observed in providing a regular-route service; if a pattern of performance is established that results in an operation possessing a rhythm which may be predicted and relied on by shippers, the operation is essentially regular-route in character. Facts and circumstances surrounding the operations complained of, viewed in their entirety, establish conclusively that such operations are regular-route in nature.—Id., p. 531.

Proposal which would allow irregular-route carriers to conduct operations without regard to whether their service partakes of one or more of the 8 criteria established in the Brady case (47 MCC 23) as indicative of a regular-route type of service would effectually eliminate distinction between regular- and irregular-route services and permit irregular-route carriers to provide service of type hitherto considered the exclusive province of regular-route carriers. The Brady decision has been in effect for a number of years and carriers have come to rely on its terms and obey its mandate to seek conversion of their authority in appropriate circumstances; examination of cases involving conversion of irregular- to regular-route authority indicates that the Brady criteria have not been particularly troublesome to carriers to which they apply, and that fear of Irregular Route Conference that their continued observance would prevent logical development and improvement of irregular-route service is unfounded.—Motor Common Carriers of Property—Routes and Service, 88 M.C.C. 415 (427, 432, 433).

Though there can be no general rule for application of the Brady criteria to all operations, since to much depends on peculiar character of each operation and its surrounding circumstances, distinction made in that case was intended to apply to operations of irregular-route carriers authorized to transport general commodities or a large number of diverse commodities, rather than a limited range of special commodities; it was never intended to apply to operations involving special service or special commodities or both, such as those of carriers of packinghouse products or motion picture films, which have historically and consistenly been considered within the legitimate service area of the irregular-route, special-commodity carrier. Even if an operation involves handling of a large proportion of l.t.l. shipments for a number of shippers, entailing performance of some services noted as indicia of regular-route service, it may properly be considered an irregular-route service where shipper's particular needs require such a service.—Id., pp. 430-1.

Regardless of whether there has been a change in pattern of irregular-route carriers' operations since the Brady decision, criteria enumerated therein are not now obsolete. Position of such carriers remains completely different from a geographical standpoint from that of regular-route carriers; as their authority is normally described in terms of territories, they may serve a great number of cities of varying size and economic importance, over any highway they choose; if considered proposal were adopted, they could provide service or withhold it, depending on attractiveness of the available traffic, and thus compete for the most desirable of scheduled traffic without being required, like regular-route carriers, to handle less desirable traffic over designated service routes. Reasons summarized in the Brady report for maintaining the distinction between the two types of service thus remain the same.—Id., pp. 429, 432-3.

Though in regulation of a changing industry regulatory practice must keep pace with technological and economic development, and precedents must be reconsidered from time to time, fact that a principle has been followed for many years entitles it to a presumption of validity; principles of the Brady case have become accepted guideposts for the motor carrier industry, and to depart from them now would cause unwarranted blunting of distinctions between two types of motor carrier service which have been recognized since beginning of Federal regulation; abolition or modification of those principles is not justified

at this time.—Id., pp. 433-4.

7. Classification of carriers; commodity basis.—[Vols. 9. (par. (c) in v. 9), 11-19].—It is no longer open to question that the commission may employ an "intended use" test in construing a carrier's certificates; and its outline of circumstances under which plaintiff may accept a shipment as "building materials" or "construction materials" without investigation to ascertain the actual intended use of the articles shipped was a valid exercise of its discretion.—Mitchell Bros. Truck Lines v. United States, 225 F. Supp. 755 (760)*.

Principle that the commission's interpretation of words, terms, or phrases used in its own certificates should prevail unless arbitrary, capricious, a plain abuse of discretion, or violative of established law is especially applicable to meaning to be given terms denoting generic classifications of commercial products relating to industrial transportation under the regulatory purposes of the act.—McKenzie Tank Lines, Inc. v. United States, 211 F. Supp. 876 (877, 878)*.

Where the final issue was whether C & S containers are closer to packages or to tanks, the commission's holding that such containers are package-like when treated as packages, i.e., tendered to and received from the carrier when filled, is unexceptional. And since a conventional truck may be temporarily converted into a tank truck when a C & S container is premounted on it so that, without any packaging by shipper, a fungible, flowable commodity may be dumped, pumped, or poured into it, the commission's holding that the service provided to shipper becomes substantially different because of the new element of post-loading packaging of commodities traditionally carried by bulk carriers is convincing. There is little distinction, practically or transportationwise, between a tank truck and a flat-bed trailer on which is mounted a Sealdbin filled with liquid; latter becomes a medium of transportation of type specially adapted for service by tank-truck operators. As a judgment of legal significance, the package-tank differentiation as found by the commission is rational and its application to the facts as found is reasonable; sustained.—Railway Exp., Inc. v. United States, 213 F. Supp. 868 (874-6)*.

Although the commission has previously held that where similar functions were performed by two units of transportation one might be the "practical equivalent" of the other and thus require similar legal treatment, and other decisions have limited the "special equipment" category to situations where carrier provided something more than an ordinary vehicle and ordinary over-the-road transportation, the commission is firmly bound by neither line of decision; the court has no concern with the findings made in other proceedings before the commission.—Id., p. 875, Note 28.

Interpretation of commodity descriptions in a carrier's operating authority is not controlled by the commodity classification for rate purposes. In determining whether an article is embraced within a particular commodity description, great weight must be given to what the article is considered to be in the industry.—Plastics, Sirup & Washing Compounds, Del. to N.Y. & N.J., 315 I.C.C. 351 (353).

Record in proceeding granting respondent authority to transport heavy machinery, contractors' equipment, and parts and accessories, "in quantities of not less than 10,000 pounds" is convincing that "quantities" may properly be construed to mean "shipments," and that less than 10,000 pounds may be transported on a vehicle if it is part of a larger shipment tendered at one time and one place, but which respondent in prudent conduct of its operations determines should be handled in a separate vehicle. Thus, the minimum weight restriction does not prohibit transportation of combined loads of the authorized commodities, provided total weight of the shipment is not less than 10,000 pounds.—Ray Carter, Inc.—Investigation and Revocation, 91 M.C.C. 653 (655-6).

The commission in granting authority must attempt to describe the commodities to be transported so that the authority is sufficiently inclusive as to allow the carrier to meet present and foreseeable future transportation needs of the public; and, for purposes of transportation classification, it has long maintained a classification relative to prefabricated buildings and their component accessories

and parts which classification is clearly distinct from the generic description "building materials." Respondent's certificate primarily describes the transportation of prefabricated houses and buildings and certain related commodities and, when read in the light of commission usage of terminology therein, clearly shows intent to restrict the authority granted to the field of prefabricated to houses and buildings, while allowing the holder thereof to provide a complete service to shippers of prefabricated structures.—Whitehouse Trucking, Inc., Investigation and Revocation, 99 M.C.C. 621 (625, 627, 629)*.

See also Renner Motor Lines, Inc., case, §212(a), n. 1.

In interpreting operating authorities containing generic commodity descriptions such as "iron and steel articles," the lists formulated in the *Descriptions* case (61 MCC 209), although not controlling, should be considered even when no restrictive reference is made thereto and irrespective of whether the authority was granted before or after formulation of those lists. The lists should be considered because they include commodities which carriers, specializing in their transportation, have been hauling for many years.—Eagle Motor Lines, Inc., Investigation and Revocation, 94 M.C.C. 704 (707)*.

Movement of paint, packing, and insulating materials under "iron and steel articles" authority is unlawful unless they are an integral part of and shipped with such articles in quantity consistent with their being of an incidental nature; and, while record is not clear as to whether respondent's past transportation of those items so qualified, it is cautioned to observe those criteria in future movements. However, since the fifteen other commodities specified are not embraced by the iron-and-steel-articles classification, those items are not within the scope of such authority; therefore, respondent's past transportation of those commodities was unlawful.—Id., pp. 705, 706-7, 709.

Every carrier whose operations are subject to the act is charged with knowledge of the commission's decisions interpreting scope of a commodity description in its operating authority.—C & E Trucking Corp.—Modification of Permit, 88 M.C.C. 391 (394).

For purposes of transportation classification, the commission has formulated a general rule of interpretation that commodity descriptions in its operating authorities are to be construed on the basis of industry or trade usages and practices and common understanding in the transportation industry, rather than on the basis of academic or literal definitions to be found in dictionaries.—Mushroom Transp. Co., Inc. v. Midwest Emery Freight, 94 M.C.C. 51 (55); and in determining whether a particular commodity comes within a generic description, reference must be had in many cases to the understanding of the terms when the authorities were issued.—National Trailer Convoy, Inc., Extension, 91 M.C.C. 259 (262); also, the commission customarily considers whether the words used in a carrier's authority have acquired a meaning in the trade or industry which is different from their ordinary academic meaning and, in addition, often considers definitions in accepted dictionaries.—Melton Truck Lines, Inc., Extension, 88 M.C.C 723 (733).

Under the rule of reasonableness announced in 61 MCC 666 respecting carrier's duty to inquire as to intended use of a commodity, authority for transportation of which is governed by reference to its intended future use, the carrier may assume, unless it has knowledge to the contrary, that commodities used predominantly or almost exclusively in the particular activity referred to in its authority are actually to be used in that activity, and may transport all such commodities without making investigation as to their actual ultimate use. However, it is the prodominant use of the particular article or commodity that governs, not that of the generic class to which such article or commodity may belong; and if carrier has knowledge or notice of some other likely use for a particular shipment, it has the burden of acquiring knowledge of the actual intended user.—Mayfield Sons Trucking Co. —Interpretations, 92 M.C.C. 167 (169, 171)*.

No such assumption may be indulged in respecting commodities having general utility in many lines of work; such commodities may be transported only after they have in some way been earmarked for the use referred to in the carrier's authority (as by consignment to such a user),so that the carrier can be reason-

ably certain that, at time of transportation, such use is intended. A carrier may not close its eyes to facts within its possession that would raise reasonable doubt that a commodity is to be used in the activity specified in its authority, and investigation is required if it is apparent that a shipment is destined to a class or type of consignee not normally using or dealing in the commodity in question. Moreover, the commodities, whether of general utility or those predominantly used in an activity, must at time of transportation be in form or condition to be used, without further processing or manufacturing, in the particular activity specified.—Id., pp. 169-70.

Under strict application of the intended use test, only those commodities described in carrier's authority which, at time of movement, are intended for use in the type of activity, enterprise, or place specified in the description, and are in form and condition to be so used without further processing or manufacturing, may be transported. However, application of that test has presented many problems and, to ease carriers' burden of predetermining the use of commodities tendered for movement under such authority, it has been relaxed to permit transportation of those which (1) are known by the carrier to be, or are ascertained by it with reasonable certainty to be, intended for the particular use involved, or (2) are predominantly used in or have virtually no other use than in the particular activity, without specific inquiry as to their intended use, provided the carrier has no actual knowledge or notice of some other intended use of the shipment.—Great Western Motor Lines, Inc.—Investigation, 96 M.C.C. 522 (526); however, carrier may not ignore facts in its possession which would cause a reasonable man to doubt that the commodity is to be used in the specified activity.—Mitchell Bros. Truck Lines—Investigation, 91 M.C.C. 267 (269-70)*.

"Intended use" commodity descriptions have not been abandoned, and will continue to be used where appropriate; such descriptions afford flexibility to meet needs of consignees, which in certain instances offers more advantages from standpoint of public interest than broad generic descriptions or enumerations of a large number of individual items. Thus, if certain of applicant's "grandfather" authority in fact embodies an intended use test, it is not on that account bad and need not be rephrased to eliminate that test; the Classification case, 2 MCC 703, requires no different conclusion.—I. L. & C. Corp. Modification of "Grandfather" Authority, 89 M.C.C. 161 (164).

Acids: See also *chemicals*, below.

"Acids" has a generally accepted trade or industrial meaning which is substantially more limited in scope than its academic definition, and which clearly does not embrace vinegar or other liquid food products. Although all vinegars contain varying percentages of acetic acid, they are not generally considered acids in transportation parlance, any more than are fruit juices containing citric acid. It is also significant that vinegar is neither listed under acids in National Motor Freight Classification nor included in list of acids and chemicals in appendix XV to the Descriptions case, 61 MCC 209.Thus authority to transport acids does not embrace vinegar.—Erickson Transport Co. Extension, 92 M.C.C. 122 (123).

Classification of vinegar for transportation purposes is governed by decision in 88 MCC 635; discussion of "liquid chemicals" authority therein applies with equal force to transportation of vinegar under authority for bulk acids. Shipper concerned is a producer and processor of foodstuffs, not of acids and chemicals, and ships various types of vinegars as foodstuffs; while its vinegars undoubtedly contain acid, there can be no serious contention that they may be transported under bulk acids authority. And though its distilled white vinegar is shipped in concentrated form and contains a higher percentage of acid than the others, it is considered by shipper and its consignees to be, and is shipped as, vinegar, and no good reason is shown for treating it differently for transportation purposes than shipper's other vinegars; therefore it may not be transported under authority for acids.—Arisona Pacific Tank Lines Extension, 91 M.C.C. 906 (909).

Agricultural commodities; [Vols. 9, 14, 15, 17-19].—See also §203(b), n. 50.

The commission was correct in concluding that, under certificates issued before 1958

authorizing transportation of "agricultural commodities" and "farm produce," plaintiff could not continue transportation (in mixed loads) of frozen fruits, berries, and vegetables which, though previously held to be within the §203(b6) exemption, were specifically made subject to regulation by §7 of Transportation Act of 1958. Purpose of "agricultural commodities" certificates can only be to authorize transportation of items otherwise exempt under §203(b6) in mixed loads with non-exempt goods; and there is no indication that the 1958 act intended to deal with regulation of exempt and non-exempt commodities when transported in mixed loads.—Lester C. Newton Trucking Co. v. United States, 264 F. Supp. 869 (876-7)*.

Informal ruling of Bureau of Motor Carriers that, as used in grants of authority, "agricultural products" and "agricultural commodities" are synonymous was correct; any other conclusion would create a purely artificial distinction. Though in the past such authority was granted on a policy no longer followed by the commission, where those terms appear in outstanding certificates or permits they do not authorize transportation of any commodity not within the §203(b6) exemption. Applicant cannot lawfully transport butter and meat, fresh or frozen, under authority for "agricultural products."—Yeary Transfer Co., Inc., Extension, 88 MC.C.C 473 (478).

Canned water clearly does not come within the generally accepted meaning of "agricultural commodities" and may not be transported under authority therefor. "Agricultural commodities," as used in authorities issued by the commission, means those within exemption of §203(b6) and does not embrace canned goods in hermetically sealed containers. Neither canned fruits nor canned vegetables are considered agricultural commodities by Administrative Ruling 107 (incorporated by reference in that section), and no reason appears for any different treatment of canned water. —Lester C. Newton Trucking Co. Extension, 91 M.C.C. 919 (921-2).

Applicant may not transport frozen fruits and vegetables under authority for "fruits and vegetables"; that description is synonymous with "fresh fruits and vegetables" and has consistently been used in motor-carrier operating rights to describe fresh fruits and vegetables in their natural unfrozen state.—Home Transfer & Storage Co., 88 M.C.C. 223 (229)*.

Airplanes, parts, etc.: [Vols. 18, 19].—Following decision in 86 MCC 327, in which the entire commission determined not to extend the ordinary meaning of "airplane" or "aircraft" to include a missile, a unit designed as a component part for a missile cannot be found to be an aircraft part; moreover, considered jet thrust (JATO) units for pilotless interceptor missiles are not shown to be interchangeable with any similar component parts of aircraft; therefore, such units may not be transported under authority for aircraft parts. —Baggett Transp. Co. Extension, 88 M.C.C. 3 (8, 11)*.

Alcoholic and malt beverages: [Vols. 16-18]. —From the commodity description it would appear that vermouth may be transported as a "wine," and that conclusion is supported by the dictionary definition of vermouth as "an aromatized white wine in which herbs, roots, barks, bitters, and other flavorings have been steeped." Cases cited by applicant primarily deal with question of whether certain potable alcoholic beverages can be transported as liquid chemicals and, therefore, cannot reasonably be considered as controlling on the issue of whether vermouth, made from a wine base, comes within the generic commodity description "wine." On instant record, no reasons are advanced to show why vermouth should not be considered as being a wine; applicant may petition for further hearing to present evidence to establish the nature of vermouth for transportation purposes.—Southern Tank Lines, Inc., Extension, 92 M.C.C. 423 (424, 425).

Automobiles, etc.; parts, accessories: [Vols. 9, 11, 12, 14-19].—Certificate description "trailers designed to be drawn by passenger automobiles" describes a class of trailers; sectionalized homes, which are permanently located after delivery, do not qualify as trailers merely because the sections are placed by manufacturer on intergrated undercarriages equipped with hitch balls. While commission decisions show that that commodity description was intended to provide a field of service flexible enough to embrace developments in

the mobile home industry, they also show that newly developed commodities do not automatically come within it because of a superficial resemblance or common characteristic: the identity of each new commodity must be examined to determine its classification. The commission's decision that sectionalized homes, which are not built in single units and are not intended to retain any mobility, are not trailers is reasonable; a half-house in process of delivery, though moving, is not a trailer but rather is half of a house. Sustained. —National Trailer Convoy, Inc. v. United States, 240 F. Supp. 286 (288-9)*.

It is the commission's general practice in issuing certificates and permits to distinguish between vehicles and each type of vehicle, by naming each separately in a grant of authority; consequently, authority to transport a specific type of automotive vehicle should not be subjected to a strained interpretation for the purpose of including vehicles not intended to be included. Since "tractor" as used in certificates and permits means a vehicle for drawing or propelling others, authority to transport tractors does not embrace such functionally distinct single purpose self-propelled vehicles as the considered road rollers and streetsweepers, which are designed from the ground up for highly individual purposes only and not for pushing, hauling or propelling others.—Daily Exp., Inc.-Investigation of Operations, 98 M.C.C. 661 (670, 672).

Two generic commodity descriptions of trailers have evolved: (1) those designed to be drawn by passenger automobiles, which includes the various types of house trailers however equipped (including those equipped for commercial purposes) whether towed by passenger automobiles or other means such as light trucks; and (2) those not so designed, including not only commercial freight trailers used for transporting property from place to place, but also those adapted to other uses such as missile, shop, tank, and electronic trailers. However, not all traffic tendered, transported, and delivered on wheels automatically comes within description of either of the two categories of trailers.—National Trailer Convoy, Inc., Extension, 91 M.C.C. 301 (303)*.

Authority to transport trailers designed to be drawn by passenger automobiles embraces transportation of shrimp boat mobile kitchens, mobile egg factories, mobile motel units, and portable coin-operated laundries which are constructed in house-trailer shells and mounted on a house-trailer chassis or a wheeled undercarriage, since those structures are self-contained and enjoy the same substantial characteristics as house trailers even though, in some instances, the undercarriage is removed and returned to shipper upon delivery. But sectionalized manufactured homes constructed and shipped in two or more sections, which are designed to be joined together at destination to form a complete house, are not embraced within such authority; they are not single units nor are they sold to customers as mobile units, but as stationary, factory-built houses.—Id., p. 304.

Sections of "mobile homes" attached to undercarriages equipped with A-frames and fitted for towing by tractors are not within authority to transport house trailers designed to be drawn by passenger automobiles, or freight-type trailers which are not so designed; no basis is shown for finding that all traffic integrated with, tendered, transported, and delivered on wheels necessarily comes within either classification of trailers. Except for undercarriages, considered structures possess no characteristics of house-type trailers; they are not self-contained units suitable for immediate use on the highways, but are designed to be joined together at destination and become part of consignee's real estate. Moreover, their tender on wheels does not change identity of the structure from a house to a trailer; rather, the wheeled undercarriages and A-frames are the trailers used to transport the houses.—Id., 91 M.C.C. 259 (261-2).

"Commercial freight trailers" includes the several types of military and other governmental trailers applicant has been transporting for the military and postal services. History of that commodity description shows that "commercial" was not intended to be applied narrowly to trailers utilized only in a profit-making venture, but is much broader in scope; and more recent descriptions, in granting such authority, have been phrased "trailers other than those designed to be drawn by

passenger automobiles" in order to avoid confusion.—Dealers Transit, Inc., Extension —Clarification, Augusta Kans., 88 M.C.C. 369 (371-2).

Brick, clay, tile: [Vol. 18].—Authority to transport such commodities as "clay products," "brick," and "clay brick" does not authorize transportation of refractory products, or refractories, which are not composed principally of clay. Commodities must be formed of a particular material in order to be described as a "product" of that material; and, on the other hand, "products" in a certificate cannot be interpreted separately but must be considered together with other language therein, particularly its limiting adjective. Record shows that a number of refractories do not contain any clay and that the percentage of clay used in others has been substantially diminished; moreover, the numerous formulas used in refractory production are trade secrets not generally disclosed. Since substantial protion of refractories produced by supporting shippers are not composed principally of clay, authority to transport "clay products" is not generally sufficient for their transportation.—Pennsylvania-Ohio Exp., Inc., Extension, 96 M.C.C. 449 (451-3).

Building materials, roofing: [Vols. 9, 17-19]. —While any commodity listed as a building material in Appendix VI to the Descriptions case, 61 MCC 209, may be transported under authority for "building materials" if the carrier has no knowledge of an intended use other than as a building material, carrier may not close its eyes to facts giving rise to a reasonable doubt. Respondent should have known that it was highly unlikely that furniture manufacturers and electric power companies would use veneers and cables as building materials; at the very least, some notice (that listed commodities may not be intended to be used as building materials) exists if it is apparent that shipment is destined to a class or type of consignee who does not normally use or deal in building materials, and proper intended use must then be affirmatively established by the carrier.—Mitchell Bros. Truck Lines—Investigation, 91 M.C.C. 267 (269-70)*.

"Building materials" are those in a form and condition to be used in construction or repair of a building withoug further processing or manufacture; neither glue stock, which requires further processing nor furfural residue, a component of glue, qualifies as a building material. The same is true of glue and veneers used in making products used in building; commodities which may be used in manufacture of products ultimately used as building materials may not be transported under building materials authority.—Id., p. 271.

For the same reasons, veneers and glue cannot qualify as construction materials. However, "construction materials" includes building materials, and under authority thereof a carrier may transport any commodity which has virtually no other use than as a construction material, as well as any in the building materials list, provided it has no knowledge or notice of an intended use other than as a building or construction material. In addition, carrier may transport any other commodity if at time of transportation it is affirmatively established that it is intended for use as a building or construction material; thus, electric cables, transformers, and regulators may be transported to power and light companies if it is established that they are intended for use in construction of new power transmission lines and to be permanent parts thereof.—Id., p. 272.

But since cable, transformers, and regulators are listed as electric equipment and parts in Appendix VII to the Descriptions case they are not building materials and may not be transported under authority for building materials, including girders, boilers, "and other commodities of similar nature."—Id., p. 274.

Urethane forms which respondent would carry under its authority for building materials must be further processed by cutting to appropriate shapes and sizes before they can be used, and while they may ultimately be used in buildings, they may also be used as insulating material for a number of other objects such as refrigerated trucks or freezers. There is thus no "reasonable certainty" at time of transportation that they will be used as building material; therefore, under principles of 86 MCC 447 and 91 MCC 267, respondent may transport urethane forms only when they are used directly, in form tendered to

respondent for shipment, as building materials. Although shipments have moved solely to fabricators in the past, urethane is a new product for respondent's shipper and record indicates that it might be precut and shipped directly to jobsites for use as insulation in buildings; such transportation would be within scope of respondent's authority.—Building Materials, Middle Atlantic and New England, 322 I.C.C. 710 (711-13).

Controlling interpretations of commodity description "building materials" are well established, and high-pressure cement pipe may not be transported under that authority unless carrier, before accepting it for transportation, ascertains its intended use as building material; such authority does not embrace pipe used predominantly in construction of water or sewer systems.—Ace Lines, Inc., Extension, 91 M.C.C. 559 (565).

Authority to transport building materials utilized and for use only in logging, mining, and contracting operations embraces only building materials whose intended future use is in connection with one of those three types of commercial operation. Manufacture of wood products is not a logging or mining operation, nor is it a contracting operation as the term is used in commodity descriptions; thus glue may not be transported to such a shipper's plant under carrier's building materials authority.—Zirbel Transport, Inc., Investigation and Revocation, 91 M.C.C. 705 (707, 708).

Authority to transport "composition shingles" does not embrace rolls of composition roofing or roofing paper and articles used in installation thereof. Such rolls are not simply large shingles, as supporting shippers claim; shingles are cut comparatively small and customarily shipped flat, whereas prepared roofing and roofing paper are produced in long sheets and invariably shipped in rolls; also, since prepared roofing is the material from which shingles are cut, it would be illogical to hold that authority for shingles includes the right to transport rolls of uncut roofing. Roofing paper is not used as an outer covering, but as an underlayer, thus has an entirely different function than shingles; and while nails and roofing cement used in installation of shingles are customarily shipped at the same time, they are not parts of shingles and cannot be considered within authrity therefore.—Melton Truck Lines, Inc., Extension, 88 M.C.C. 723 (733-4).

Buildings: See *Prefabricated buildings*, below.

Bulk commodities;See also *In bulk*, below.

Authority for dump-truck transportation of "such bulk commodities" as can be unloaded by dumping does not embrace pig iron, which is of substantial size and weight and lacks the homogeneity and fungibility generally associated with bulk commodities; it can be and occasionally is unloaded piece by piece, and is not susceptible of handling by pouring, scooping, or shoveling in any practical sense; therefore it is not a bulk commodity.—McFeeley Extension, 92 M.C.C. 769 (771)*.

Canned goods: [Vols. 11, 14-19].—See also *Preserved foodstuffs*, below.

As used in motor carrier operating authority, "canned goods" has acquired a well established meaning; the commodity must be a sterile, bacteria-free food and its container must be hermetically sealed to maintain its first and intended state. Without these two indispensables of "canned goods" the commodity is not of that category. The commission's application of that definition to complainant's permit, to determine lawfulness of its questioned operations, was not in error; sustained.—Zuzich Truck Line, Inc. v. United States, 224 F. Supp. 457 (462, 463)*.

The commission's conclusions that, in light of "canned goods" definition in 61 MCC 311, plaintiff's authority to transport canned goods does not include transportation of peanut butter, that that commodity does not need to be enclosed in an air-impervious container for its preservation, and that inclusion of peanut butter in commodity lists in rate tariffs is not controlling on interpretation of operating authority, were not arbitrary, capricious, or unreasonable. Those determinations are firmly based; the first two lie in evidence, and the last in divergence in purpose between the tariffs and certificate specifications; sustained.—Archie's Motor Freight, Inc. v. I.C.C. 226 F. Supp. 487 (489-90)*.

The commission has long used "canned goods" in operating authorities to describe foods or potable liquids which have been

processed and enclosed in hermetically sealed containers for preservation; both the processing and use of hermetically sealed containers must be for purpose of preservation. Water is an inorganic potable substance used as nourishment for the body, and canned water (for use in civil defense programs or by campers or sportsmen) is embraced by "canned goods" authority, since both the elements of processing and placing in sealed containers for preservation are present. Moreover, it is a product of the canning industry and will move to many consignees of canned vegetables and be charged for at the canned-goods rates.—Lester C. Newton Trucking Co. Extension, 91 M.C.C. 919 (920-1).

However, canned water clearly does not come within accepted meaning of "canned vegetables" and may not be transported under authority therefor, since "vegetable" is defined as a plant of any kind, more specifically an herb used chiefly for culinary purposes.—Id., p. 921.

Cement, products: Since concrete is an aggregate of cement, sand, and water which, when allowed to harden into a finished form, may be considered a cement product, authority for "cement" does not include the right to transport ready-mix concrete.—New England Transp. Co. Extension, 88 M.C.C. 703 (708).

Chemicals: [Vols. 17-19].—See also *Liquid chemicals*, below.

Authority to transport chemicals as defined in the Maxwell case (63 MCC 677), in bulk in tank vehicles, does not include dry chemicals; that decision defines only liquid chemicals, and omission of the qualifying adjective "liquid" in applicant's certificate is of no consequence in absence of explicit language indicating that the authority granted is intended also to embrace dry commodities.—Bell Extension, 92 M.C.C. 276 (279).

But authority for "chemicals, liquid and dry," as defined in the Maxwell case, in bulk in tank or hopper-type vehciles, although it refers to the Maxwell definition, explicitly provides for transportation of dry commodities and therefore unquestionably authorizes transportation of both types. Also, authority for chemicals in bulk in tank and hopper-type vehicles (except finished or end products intended at time of transportation for packaging and sale to the general public without further processing), while not specifically referring to the Maxwell definition, incorporates its intended use test in apparent effort to make that definition applicable to both liquid and dry chemicals, and therefore provides for transportation of both types.—Id., pp. 279-80.

While the definition of liquid chemicals in the Southern Tank Lines case, 88 MCC 127, was held to apply also to dry commodities in 91 MCC 683, and there can be no doubt that considered slag and slag aggregates (formed as byproducts of smelting of ore) are produced by both physical and chemical processes employed in the chemical industry, the Southern Tank Lines case recognized that certain commodities, though chemically produced, are excluded from the liquid chemicals classification by common usage. Considered commodities are not listed as chemicals in the Motor Freight Classification, are not commonly considered chemicals for transportation purposes, and fall within that category of chemically produced commodities excluded from the chemical classification by common usage.—Dreyer Extension, 96 M.C.C. 343 (345-6).

Authority to transport "acids and chemicals," without further description, authorizes transportation of both liquid and dry chemicals. However, since authority to transport "chemicals as defined in the Maxwell case" was held to include only liquid chemicals in 92 MCC 276, the only dry chemicals that may be transported under opposing carrier's authority to transport "acids and chemicals as defined in the Maxwell case, 63 MCC 677" are dry acids.—Slay Transp. Co., Inc., Extension, 96 M.C.C. 47 (49).

Since salt has extensive utility without further processing and is a basic raw material in contradistinction to substances resulting from a chemical or physical change, it is not a chemical for transportation purposes, whether in dry or liquid form, and bulk salt can not be transported under chemicals or liquid chemicals authority. Although technically all materials might be classed as chemicals or combinations of them, the generic term is used generally to signify "products" of the chemical industry used in connection with other manufacturing "processes." Any impli-

cation in 83 MCC 773 that bulk salt is a "chemical" for transportation purposes is incorrect.—Chemical Leaman Tank Lines, Inc., Extension, 91 M.C.C. 683 (684, 685-6).

Construction materials: See *Building materials*, above.

Contractors' equipment, building materials, and supplies: [Vols. 14-19]. In interpreting plaintiff's authority to transport contractors' machinery and equipment as embracing transportation of all forms of machinery and equipment which are, at time of movement, intended to be used by a contractor, but as not authorizing such transportation when the machines and equipment, at time of movement, are intended for use by persons other than contractors, the commission did not properly apply the "intended-user" test. In view of conflicts in interpretations of record, plaintiff's authority is uncertain, indefinite, and vague as to what type of transportation service it may perform; case remanded for clarification, and establishment of definite guide lines that are not ambiguous, so that plaintiff may continue its operation without jeopardizing its certificate.—W.T. Mayfield Sons Trucking Co. v. United States, 211 F. Supp. 619 (624-6, 628)*.

Authority to transport "contractors' machinery, tools, and equipment" is broad enough to encompass hoist engines, piledrivers, stonecrushers, crane booms, dragline buckets, bulldozers, motor graders, concrete mixers, boilers and stacks, rollers, ditchers, back hoes, air compressors, and drill pipe.—Jetco, Inc., Extension, 91 M.C.C. 673 (677, 678).

Commodity description "contractors' equipment" is adequately explained in 62 MCC 586. While shipments of trucks, tractors, and other equipment to dealers are not automatically beyond "contractors' equipment" authority, respondent's movements of such commodities consigned to government agencies were not in any way connected with a contractor. Where the predominant use of articles is not necessarily by contractors, respondent was not justified in assuming without investigation that they were intended for use by contractors, but should have predetermined actual use to be made of them at time of shipment.—Ray Carter, Inc.—Investigation and Revocation, 91 M.C.C. 653 (656, 657).

Under authority for "contractors' machinery and equipment" a carrier may transport all forms of machinery and equipment predominantly used by contractors when consigned to contractors, or to distributors of or dealers in those commodities, without investigation as to ultimate use to be made of them, so long as it does not know or have some notice that the items transported are likely to be used by someone other than a contractor. In the absence of such knowldge or notice, carrier is justified in assuming that such commodities ultimately will be used by contractors. On the other hand, if it has such knowledge or notice, carrier would not be justified in assuming that shipment is intended for use by a contractor, and it could not transport such shipment unless it established that, at time of movement, shipment was actually intended for use by a contractor; and it is immaterial that consignee would use the machinery or equipment as a contractor would use it, since the use intended at time of movement must be by a contractor.—W. T. Mayfield Sons Trucking Co.—Interpretations, 92 M.C.C. 167 (170-1)*.

Dairy products: [Vols. 12, 14, 17-19].—Though the generic description "dairy products" includes poultry and eggs, it does not include baby foods, powdered mushrooms, and Metrecal produced by a creamery company.—Bilyeu Refrigerated Transport Corp. Extension, 92 M.C.C. 633 (640).

Dangerous articles: [Vols. 15, 18].—Nitro carbo nitrate is a blasting agent and, as such, may be transported under authority for "Classes A and B explosives and blasting supplies, materials, and agents"; however, amonium nitrate which is not intended to be mixed with a carbonaceous material to form NCN, nor to be mixed with other materials to form other explosives or blasting agents, cannot be considered a material or component of a blasting agent, nor is it a blasting agent or supply in itself. Therefore, amonium nitrate may not be transported under such authority unless at the time of shipment it is known that it will be used as a material or component of an explosive.—Monkem Co., Inc., Extension, 94 M.C.C. 749 (753, 755-6).

Furthermore, since definitions of amonium nitrate-carbonate mixtures and NCN disclose them to be entirely different commodities in chemical structure, and the regulations governing transportation of explosives permit bulk transportation of the former (subject to certain loading requirements) but not of the latter, motor carriers may not transport NCN in bulk under authority for that specific commodity; however, under authority embracing amonium nitrate without organic coating, carriers may transport bulk shipments of amonium nitrate in either closed vehicles with wooden floors and sides, or in all-metal open vehicles.—Id., pp. 756-8.

Although jet thrust unit for interceptor missiles is largely constituted of a solid propellant designated a class B explosive, purpose of the explosive is, not to dissipate energy in an explosion, but to furnish controlled propulsion, and purpose of the complete unit is to propel the missile from its launching site; therefore, even though commission's rules governing transportation of explosives must be observed, it is not within the "explosives" category; the explosives regulations relate to safety precautions necessary for movement of dangerous articles and do not control construction of commodity authority in certificates and permits; transportation of such units was not unauthorized transportation of explosives.—Baggett Transp. Co. Extension, 88 M.C.C. 3 (9, 11)*.

Irradiated fuel elements shipped in lead casks are properly classified as class D poisons within regulations governing transportation of dangerous articles (§73.391).—Dealers Transit, Inc., Extension, 88 M.C.C. 375 (379).

Dump-truck commodities: See also *Bulk commodities*, above.

Authority to transport such commodities as are ordinarily transported in dump trucks and can be unloaded by dumping does not authorize transportation of soda ash, since it is not the type of commodity ordinarily carried in dump vehicles.—Coastal Tank Lines, Inc., Extension, 94 M.C.C. 206 (210, 211-12); for the same reason, authority limited to commodities ordinarily transported in dump trucks does not include transportation of polypropylene polymer.—Chemical Leaman Tank Lines, Inc., Extension, 95 M.C.C. 394 (398).

Transportation of dry fluorspar, in bulk, is beyond scope of protestant's authority to transport "such commodities as are ordinarily transported in dump trucks and can be unloaded by dumping." That authority defines the commodities protestant may transport, but does not restrict it to the use of dump-type vehicles alone; and although fluorspar is a fungible, dry commodity that can be unloaded by dumping, it is not such a commodity as is ordinarily transported in dump trucks. Description of dump-truck operations in 2 MCC 703 clearly does not encompass transportation of dry fluorspar, bearing in mind its susceptibility to loss and damage and its relatively high value. While fluorspar is one of numerous commodities which can be, and occasionally are, transported in dump trucks, it is not "ordinarily" so carried. Any other interpretation of protestant's authority would embrace transportation of an infinite number and variety of materials, approaching "general commodities," which would go beyond the obvious intent of the grant thereof.—Coastal Tank Lines, Inc., Extension, 92 M.C.C. 149 (153-4).

Equipment: see *Fixtures and equipment, Special equipment*, below.

Express: [Vols. 16, 17, 19].—Definition of "general commodities moving in express service," in 61 MCC 737 and 63 MCC 573, as embracing any commodity which may be safely transported in ordinary van-type equipment, including those requiring a maximum degree of care or security or both, but excluding transportation of liquid commodities in tank vehicles, commodities requiring special equipment, or household goods as defined by the commission, is not inconsistent with an approach that recognizes inherent error in interpreting "express" authority strictly from a commodity viewpoint. The excluded commodities fundamentally require use of special equipment by specialized carriers, and their exclusion is based on consideration of the traditional movement of express in ordinary van-type equipment (albeit equipped with mechanical refrigeration for perishables or with safes for valuable items), and is designed to reflect the true nonspecialized nature of

express service, which limits the type of equipment that may properly be used under authority for commodities moving in express service.—Railway Exp. Agency, Inc., Extension, 91 M.C.C. 311 (322, 324-5)*.

That the nature of the cases cited required those interpretations to be finally directed to the particular certificates involved does not alter their general import; they are exemplary of conditions that have existed since inception of motor transportation of express and are illustrative of the meaning the commission has always intended in issuing certificates for express service. Fact that Railway Exp. Agency may have published tariffs purportedly reflecting broader operating authority is immaterial, and exception of bulk commodities or those requiring special equipment in certain of its certificates was mere inadvertent surplusage. Existing definitions of "general commodities moving in express service," or similar terms, which apply with full force to REA's certificates, are a realistic and practical reflection of the nature of express service as the commission has always conceived it, and are not shown to be in need of alteration or replacement at this time.—Id., pp. 326, 327.

Protestants' position that "express" in Railway Exp. Agency's certificates is intended to authorize only a service noncompetitive with ordinary freight service of general-commodity carriers, but competitive with express service latter are also authorized to (but seldom) perform, and that, should ordinary freight service improve to where it compares favorably with express service, competitive operations by REA would be unlawful, cannot be sustained as a matter of either certificate interpretation or compliance with the national transportation policy. Intercity hauls of REA and motor freight carriers are performed with same general type of equipment; both are governed by same speed limits; and, since freight carriers are authorized and able to provide service no less expeditious than REA's, latter's service would under protestants' theory would expand when that of its competitors deteriorated or their rates were increased, and would contract when their service improved or their rates were reduced. The commission never intended that, as a matter of managerial discretion, REA's competitors could determine scope of its operating authority or that it would be voidable at their option.—Freight, All Kinds, L.C.L. Container Charges—U.S.A., 323 I.C.C. 468 (482-3)*.

Changed transportation conditions over the years have permitted freight carriers so to improve their operations as to be substantially equivalent to express service, thus blurring the distinction between express and ordinary freight service; but that should not deprive REA of its preexisting rights to conduct express operations in a manner consistent with the criteria prescribed in 63 MCC 573; nor should it be prevented from applying new and advanced techniques and methods of handling its traffic or of pricing its service, which may directly or indirectly benefit the public.—Id., pp. 483-4.

However, while REA's authority for "general commodities moving in express service" permits it to publish nonpremium rates on containerized shipments not shown to move more expeditiously than in ordinary l.t.l. freight service or to require any special handling or protection, it may not publish rates for service which does not conform to the prescribed criteria of bona fide express service.—Id., p. 481.

Fertilizer, fertilizer materials: [Vols. 18, 19].—Though applicant's authority to transport "fertilizer, in bulk, in hopper-type vehicles" is unrestricted as to the form, whether liquid or dry, in which shipments may be hauled, traditionally, carriers of dry bulk commodities have used a variety of, including "hopper-type," vehicles and carriers of liquid products have used tank vehicle equipment for bulk shipments. However, new tank-type vehicles specially adapted to transport bulk commodities such as fertilizer, in either liquid or dry form, have been recently developed; and, while they differ from ordinary "tank vehicles" in their loading and unloading devices, the new vehicles appear to be sufficiently close in function, if not design, to "hopper-type" vehicles to be so classified whether the commodity hauled therein be in dry or liquid form. Therefore, to extent that it uses vehicles which are properly so classified, carrier's authority for "fertilizer, in bulk, in

hopper-type vehicles" allows it to transport bulk liquid fertilizer.—Truck Transport, Inc., Extension, 95 M.C.C. 597 (599-600).

Fixtures and equipment: [Vols. 16-18].—Authority to transport corsets, etc., "and equipment used in the manufacture thereof" does not allow transportation of sewing machines without any restriction that they be used in commercial manufacture or destined to a commercial manufacturer; commodity description "equipment" takes color from the substance and purpose of the main portion of the grant, i.e., authority to transport the specified foundation garments, and grant of additional authority to perform an auxiliary service transporting materials, supplies, and equipment used in their manufacture must be construed strictly. Plain meaning of such a description, as used by the commission and as recognized generally in the transportation industry, confines coverage of that portion of the description to equipment which reasonably is expected to be used in manufacture of the specified commodities, and not equipment which conceivably could be so used but which indifferently may be or not.—I. L. & C. Corp. Modification of "Grandfather" Authority, 89 I.C.C. 161 (164).

And authority for photographic equipment and parts thereof does not permit transportation of electronic equipment; the question is foreclosed, adversely to applicant, in 74 MCC 58 and 78 MCC 823.—Id., p. 165.

Foodstuffs: [Vols. 18, 19].—While "foodstuffs" has been found to connote only those things which are used for human consumption as foods, that definition includes not only any substance used as a food by human beings, but also those substances which are used in preparation of foods for human consumption. The commission has accepted the following definition of food: that which is eaten or drunk for nourishment; aliment (as distinguished from condiment), nutriment, in the scientific sense; any substance that, being taken into the body of animal or plant, serves through organic action to build up normal structure or supply the waste of tissue. Although flavored or phosphated beverages may have limited nutritional value, they are nevertheless potables for human consumption which serve the biological purpose of maintaining the fluid balance needed for sustenance of normal body functions; therefore, they are embraced in commodity description "foodstuffs, raw or manufactured." It follows that flavoring extracts and syrup used in preparation of such beverages are also embraced in that authority. Decisions in 64 MCC 689 and 74 MCC 129, distinguished.—Mushroom Transp. Co., Inc. v. Midwest Emery Freight, 94 M.C.C. 51 (56-7).

Authority to haul "food products" does not embrace fresh meats; while that description covers manufactured or processed commodities, it does not include the raw or basic commodity.—Bilyeu Refrigerated Transport Corp. Extension, 92 M.C.C. 633 (639).

Lecithin oil, used primarily as an additive in foods and not considered edible except when combined with other food ingredients, is not within authority for "foodstuffs and articles generally sold in grocery stores."—Southern Tank Lines, Inc., Extension, 88 M.C.C. 387 (388, 389).

Frozen foods, vegetables: [Vols. 16, 18, 19].—Under its authorities to transport frozen foods, issued by the commission before 1958, plaintiff may continue transportation of frozen fruits, berries, and vegetables in straight loads. The certificates authorized transportation of commodities in straight loads which, though formerly held to be exempt under §203(b6), was made subject to regulation by §7 of the Transportation Act of 1958; however, savings clause in §7(c) of the 1958 act was provided to give effect to such certificates issued prior to enactment thereof.—Lester C. Newton Trucking Co. v. United States, 264 F. Supp. 869 (876-7)*.

Since any vegetable which has been cooked to point of material change in texture of the raw articles or has undergone infusion of a foreign substance is no longer a vegetable, but a prepared food, "grandfather" authority granted for "frozen vegetables" will not permit the transportation of cooked vegetables; restriction to "frozen uncooked vegetables" is therefore unnecessary.—Home Transfer & Storage Co., 88 M.C.C. 223 (233)*.

Finding in 81 MCC 649 that commodities which have undergone such extensive physical change as frozen french fried potatoes cannot properly be described as frozen vege-

tables, and would not be embraced in "grandfather" or "interim" authority granted under §7 of Transportation Act of 1958, is equally applicable to authority granted under §207(a) to transport frozen and cold-packed vegetables; thus, such authorities do not embrace transportation of frozen, prepared potato products or frozen baby foods.—Midwest Coast Transport, Inc., Extension, 88 M.C.C. 587 (597)*. [But see dissent.]

Furniture: [Vols. 9, 14, 16-19].—Respondent's authority to transport "new furniture, uncrated" and "new furniture, new office and store fixtures, * * * " does not authorize transportation of supermarket service carts or shopping carts. Webster's dictionary defines a "cart" as a "small, open carriage," and a "carriage" as a "wheeled support carrying a burden"; and, while shopping carts involved are sometimes used for display purposes and with some modification they may be used as tables, the evidence shows that their primary use is as "carriages" for merchandise purchased by customers of stores or supermarkets. Therefore, since it is concluded that considered shopping carts are "carriages," it is evident that authority to transport "new furniture" does not include transportation of such carts.—North American Van Lines, Inc., Investigation, 94 M.C.C. 663 (666-7).

While authority to transport "new furniture" does not embrace transportation of pianos, a piano case or cabinet is not a piano, as protestants assert, but becomes part of one only after the instrumental mechanism is installed. The conclusion that generic commodity description "new furniture" includes new piano cabinets is clearly analogous to prior interpretations thereof as including cabinets for radio, television, talking machine without mechanisms, and other similar items; applicant's authority to transport new furniture embraces transportation of considered new piano cabinets.—Blodgett Uncrated Furniture Serv. Extension, 89 M.C.C. 503 (505-6).

Transportation of new pianos under authority to transport "new home furnishings" or "new household furnishings" is lawful. [66 MCC 519, 75 MCC 97.]—Trans-American Van Service, Inc., Extension, 89 M.C.C. 48 (50, 51).

Laboratory equipment and laboratory furniture generally would not be included within generic term "new furniture"; however, many items in the "laboratory furniture" catagory may be indistinguishable from those that can be hauled as "new furniture" and, under certain circumstances, commodities common to both catagories (counters, cabinets, tables, etc.) may be transported pursuant to either authority. Significantly, though, many laboratory items are not included in the "new furniture" list, and it was stated in the Descriptions case, 61 MCC 209, that the furniture list does not include articles which are to be permanently affixed to a building. Therefore, since a substantial portion of considered items (shipped as a complete laboratory installation) are custom built and are designed to be permanently affixed to buildings, they are not such items as would be included in the commodity description "new furniture" in operating authorities.—S & S Trucking Co. Extension, 91 M.C.C. 239 (242-4).

Authority to transport "office furnishings" does not embrace voting machines which are not a commodity used in furnishing homes or commercial establishments such as an office. A polling place is not an office, nor does temporary installation of voting machines in courthouses and commercial establishments warrant conclusion that such machines are furniture, office furnishings, or office equipment, and without clear evidence that voting machines are included in those generic terms, such interpretation would be a clear distortion of their ordinary meaning.—North American Van Lines, Inc., Extension, 91 M.C.C. 292 (293-4).

Gases, compressed, etc.: [Vol. 19].—Authority to transport compressed gases allows the transportation of liquid oxygen, liquid nitrogen, and liquid hydrogen; as held in 84 MCC 221, the adjective "compressed" refers to spatial compression achieved either by pressure or cooling or both and cryogenically liquefied gases are compressed gases.—Younger Bros., Inc., Extension, 95 M.C.C. 1 (16-7)*.

General commodities: [Vols. 9-16, 18, 19].—See also *Express*, above.

Under its authority to transport general commodities, issued by the commission before 1958, plaintiff may continue transportation of frozen fruits, berries, and vegetables in straight loads. The certificate authorized transportation of commodities in straight loads which, though formerly held to be exempt under §203(b6), was made subject to regulation by §7 of Transportation Act of 1958; however, savings clause in §7(c) of the 1958 act was provided to give effect to such certificates issued prior to enactment thereof. —Lester C. Newton Trucking Co. v. United States, 264 F. Supp. 869 (876-7)*.

The commission's finding that authority to transport general commodities "except liquid petroleum products, in bulk, in tank trucks" does not authorize transportation of petrochemicals, being supported by substantial evidence, is sustained.—Consolidated Freightways Corp. of Del. v. United States, 237 F. Supp. 391 (392)*.

Respondent's heavy-hauling authority may be joined at common points of service with her general-commodities authority even though latter is restricted against heavy hauling; however, the service common to both authorizations is extremely limited, and the "twilight zone" between general-commodities and heavy-hauling services is confined to situations where, owing to inherent nature of commodities transported, special equipment is required only for loading and is not provided by carrier.—Heavy Mach., Equip. & Supplies between Wis. and Ill. and Minn., 318 I.C.C. 545 (548).

In delimiting the fields of service relative to transportation of automobiles, a line of commission interpretations has developed the rule that while general-commodity carriers whose rights are modified by the usual "special equipment" exception may transport one or more automobiles in an ordinary trailer, such a carrier may not invade the automobile haulers' distinctive field of operations by using the carryall type of trailer to transport such traffic, since when it does so it is for all practical purposes providing a specialized service of type excluded by the usual exceptions to a general-commodity certificate. See discussion as to distinctions between general-commodity and specialized carriage in 84 MCC 585 and as to characteristics of automobile-hauling service in 91 MCC 395.—Motor Vehicles—Idaho, Nevada, and Utah Origins, 318 I.C.C. 859 (865).

Defendant's authority to transport general commodities (except household goods and articles of unusual value) within a described area, which restricts service to or from points on Federal or State highways to service requiring use of special equipment, does not limit latter service to "heavy hauling," and does not limit commodities which may be transported therein (other than those specifically excluded), so long as special vehicular equipment of any type is required and used.—Whitefield Tank Lines, Inc. v. Springer Transfer Co., 96 M.C.C. 285 (288-9).

The "special equipment" phrase, in its normal use as one of the "usual" exceptions to general-commodity authority, has reference to any commodity whose transportation or handling requires use of special equipment. This broad interpretation is equally applicable where that phrase is used inclusively in such a description; consequently, as used in defendant's certificate, it applies to all classes of commodities not expressly excluded, and merely prohibits transportation to or from points on Federal or State highways of those not requiring special equipment. Thus, under that authority, service involving use of special equipment, including transportation of bulk petroleum products in tank vehicles, is permissible at points both on and off the described highways. To extent that the decision in 83 MCC 319 is inconsistent with this conclusion, it is overruled.—Id., pp. 289-90, 291.

Electrical transformers and plate glass of large sizes may be transported under authority for general commodities, except those requiring special equipment, when ordinary over-the-road vehicles are used and loading and unloading is performed by consignor and consignee. Drop-frame trailers used for overheight shipments are used by general commodity carriers for a wide variety of articles, thus are not special equipment, and bracing and blocking in upright position is merely for protection of the commodities and for operational safety, and is common practice among such carriers. Moreover, carriers may use modern laborsaving devices in mechanically

handling shipments that can be carried in ordinary vehicles.—Schreiber Trucking Co., Inc. —Investigation, 91 M.C.C. 91 (99-102)*.

Exclusion of "commodities which because of size or weight require special equipment" from general-commodity authority is intended to preclude such carriers from performing heavy hauler type of service, and is not intended to bar transportation of items which might fit either type of service.—Id., p. 100.

Use of accessories such as rollers and pallets does not constitute a service by "special equipment" which cannot be performed by transporters of commodities generally.—Colonial Refrigerated Transp., Inc., Extension, 91 M.C.C. 369 (372).

A general-commodity carrier whose authority excepts commodities requiring special equipment may transport 40-foot lengths of reinforcing steel, provided it does not use special vehicular equipment.—Case Driveway, Inc., Extension, 89 M.C.C. 633 (635)*.

Palletized shipments of glass-lined or galvanized silo sections may be transported by general-commodity carriers when destined to industrial users who perform unloading with their own equipment; since, though loading and unloading of such shipments requires special equipment, the carrier does not perform that service, and only ordinary flat-bed equipment is required for over-the-road movement, such transportation falls within the "twilight zone" discussed in 64 MCC 229. —C & H Transp. Co., Inc., Extension, 88 M.C.C. 285 (292)*.

But movement of palletized silos to farm sites requires use of drop-nose trailers in connection with winch-equipped tractors for unloading, and it is not shown how general-commodity carriers could feasibly unload accompanying heavy silo unloaders without special equipment; it follows that they may not perform such service since it requires use of special unloading equipment which carrier must provide.—Id., p. 292.

Since shipments of irradiated fuel elements in lead casks weighing up to 20 tons can be loaded and unloaded by shipper- and consignee-operated cranes, and can be transported on reinforced flat-bed trailers not considered special equipment, they may be handled by general-commodity carriers as well as heavy haulers; under proposed loading conditions those commodities would not be injurious or contaminating to other lading.—Dealers Transit, Inc., Extension, 88 M.C.C. 375 (379).

That protestant's general-commodity authority is restricted against transportation of "commodities injurious or contaminating to other lading" does not necessarily prevent it from transporting shipper's empty oil drums, even if covered with oil or grease. Such restriction is primarily for carrier's protection, and the decision that a particular shipment will not be contaminating is one which can be left to carrier's reasonable managerial discretion. Furthermore, a literal interpretation of the language of the restriction might preclude a carrier from transporting such commodities at any time, but since it is intended to meet wishes of carriers desiring to refuse to handle such articles when they would be injurious to traffic being transported in the same vehicle at the same time, it does not apply to possibly contaminating commodities when transported in a separate vehicle.—Herr's Motor—Exp., Extension, 95 M.C.C. 696 (698).

As result of the commission's Order No. 61 reclassifying smokeless powder for small arms, in quantities not exceeding 100 pounds net weight in one motor vehicle, as a flammable solid for transportation purposes, that commodity in such quantities is no longer a class B explosive and may be transported by general commodity carriers whose authority is restricted to exclude such explosives, unless their authority is also restricted against transportation of flammable solids.—West Motor Freight, Inc., Extension, 94 M.C.C. 793 (797).

Since the commission, prior to decision in 114 F. Supp. 599, had always regarded "general commodities" as embracing frozen fruits and vegetables which it had theretofore considered beyond purview of the §203(b6) exemption of unmanufactured agricultural commodities, and Congress in enacting the 1958 amendment of that section recognized the effectiveness of authorities issued, prior to effective date thereof, for commodities thereby subjected to requirements of Part II, applicant may lawfully continue transporting frozen fruits and vegetables under its existing

authority for general commodities.—Home Transfer & Storage Co., 88 M.C.C. 223 (228-9)*.

Transportation of silver bullion is beyond the scope of the operating authorities of motor common carriers of general commodities when their authorities are restricted against the transportation of "articles of unusual value." As was held in 84 MCC 779, two factors must be considered in determining what constitutes articles of "unusual value" within that restriction, protective service required for the article and its actual value. Although the need for protective service is usually relative to the degree of value of the commodity, the asserted lack of need for protective service by a shipper cannot negate the fact that a commodity is one of unusual value. Conceding that "unusual value" is not a wholly definitive standard, nevertheless, there can be no doubt, that a truckload of silver bullion valued in excess of one-half million dollars is of unusual value.—Navajo Freight Lines, Inc., Extension, 95 M.C.C. 551 (557-8).

As cooked and smoked meats and bacon are groceries, they may not be transported under general commodity authority which specifically excludes groceries.—Nebraska Eastern Exp., Inc., Extension, 94 M.C.C. 799 (802).

General commodity authority restricted against transportation of commodities in bulk or those requiring special equipment does not authorize transportation of loose, flowable, and fungible commodities when tendered in a premounted collapsible container. Therefore, when evidence indicates that the collapsible containers to be used would be premounted on the vehicle and filled and emptied by a pump, applicant requires authority for proposed transportation of liquid and dry commodities, in collapsible tanks.—Los Angeles-Seattle Motor Exp., Inc., Extension, 89 M.C.C. 621 (624)*.

Groceries: [Vols. 11, 12, 14-19].—See also *Canned Goods, Foodstuffs*, above.

Bananas are clearly embraced within definition of "groceries" in 61 MCC 311 as articles for human consumption which are customarily served as food or used in preparation of food, except fresh meats.—Subler Transfer, Inc.—Purchase—Zanghi, 90 M.C.C. 911 (916).

Authority for "such general merchandise as is dealt in by wholesale and retain grocery and food business houses" does not embrace radio receiving sets, television sets, talking machines, proprietary deicing preparations, drugs or medicines, paints, varnishes, lacquers, solvents, and the like. Respondent's claim that it may transport any commodity whatever provided the shipper or consignee in the slightest degree buys or sells food or groceries is untenable. While it is common knowledge that grocery stores, especially chain stores, have expanded their operations to include such diverse lines as hardware, drugs, and items of furniture and clothing, those expanded lines are either in nature of sidelines not part of a normal grocery or food business, or may have become such an integral part of the business as to change its character to that of a department store or supermarket; the mere fact that a firm handles, sells, or processes articles normally dealt in by wholesale and retail grocery and food business houses does not thereby make it a grocery and food business house.—Various Commodities, Illinois to Denver, 322 I.C.C. 554 (555-6, 558).

Hardware: Authority to transport such commodities as are dealt in by wholesale or retail hardware stores does not limit the holder to goods intended for sale in hardware stores, but only to goods of kind generally sold in such stores as distinguished from those specializing in other types of merchandise. Thus there is sufficient doubt to preclude finding, on record in proceeding involving only substitution of TOFC service for part of applicant's authorized motor service, that its transportation of coal, glass bottles, lumber, sheet steel, clocks, books, transformers, and steel containers, all of which it claims are dealt in by hardware stores, is beyond scope of its hardware authority.—Houff Transfer, Inc., Extension, 92 M.C.C. 702 (704).

Sheet steel and steel bars and tubing are within authority to transport merchandise such as is dealt in by wholesale and retail hardware stores; number of hardware stores handling those commodities is substantial and widely spread, particularly those serving pre-

dominantly agricultural areas. That those items may not always move to or from a hardware store is immaterial; it is essential only that they be generally handled by such establishments. Nor is it controlling that such items may require some further processing; that hardware stores handle many articles not strictly "hardware" is not only common knowledge but is supported by affirmative evidence, and fact that considered commodities may also be termed plumbing materials is not important; further, it would be impractical to impose any gage or length limitations.—Momsen—Investigation and Revocation of Certificates, 88 M.C.C. 343 (345, 350).

But aluminum, zinc, zinc alloy and brass ingots, aluminum flux, magnesium sticks, and metallic sodium are rarely handled by wholesale hardware houses and even more seldom by retail stores; those commodities are customarily purchased by foundries and other metal processors from smelters, steel companies, or mill supply houses, and fact that finished products thereof may be items customarily dealt in by hardware business houses does not confer the right to transport the base materials, ingredients, or parts unless they themselves are dealt in by such establishments; to construe authority for such merchandise as is dealt in by hardware businesses as permitting transportation of every item so infrequently handled would approach "general commodities."—Id., p. 351.

Heavy haulers: [Vols. 9, 11, 15, 17-19].—See also *Special equipment*, below.

Past commission decisions show that the test of services authorized to be performed by a heavy hauler is whether or not special equipment is required for loading, unloading, or transporting the particular commodity, even in the "twilight zone" wherein the same commodity may properly be transported by a general-commodity carrier. Effect of the commission's application of the "15,000-pound rule" prescribed by it in 79 MCC 285, in finding that heavy hauler (under authority to transport contractors' equipment and commodities which because of size or weight require special equipment) was entitled to transport Army cargo trucks weighing over 15,000 pounds each, although no special equipment was required or used, was to establish a test different from that commonly applied in the past and to enlarge that carrier's operating authority in a manner not prescribed by law. The commission's finding is clearly erroneous and in excess of its statutory authority; the order set aside and declared a nullity.—United Transports, Inc. v. United States, 214 F. Supp. 34 (42-3, 44)*.

Heavy hauler authority to transport commodities requiring special equipment does not carry with it the incidental right generally to perform any specialized service outside the recognized heavy-hauler field of operations simply because specialized vehicular equipment of any type is used. Transportation of bulk commodities in tank vehicles is a specialized service that does not fall within the ambit of heavy-hauler service.—Road Paving Materials between Points in New England, 319 I.C.C. 95 (97).

Heavy-hauling authority does not include transportation of self-propelled road rollers and streetsweepers which can be loaded and unloaded under their own power and are transported on ordinary equipment. A heavy hauler cannot satisfy his special handling requirement by using a crane to load or unload commodities that can be loaded and unloaded by conventional means; and where a crane is used for commodities moved on conventional equipment, they lawfully may be transported only when the special handling implicit in crane loading or unloading is required by the inherent of the commodity transported, as distinguished from industry practice.—Daily Exp., Inc.—Investigation of Operations, 98 M.C.C. 661 (673-5).

Transportation of palletized bags of bonding mortar is beyond scope of heavy-hauling authority, since mortar clearly does not require palletization by reason of size or fragility. Also, transportation of ferro alloys in tilt-top pallet boxes is not shown to be "required" by inherent nature of the commodity; even assuming that tilt-top boxes could be considered special equipment, there is no indication that they are used other than as a convenient method of handling the material at shipper's plant.—W. J. Dillner Transfer Co. Extension, 91 M.C.C. 667 (670-1).

Specific authority to transport commodities reasonably related to those requiring special-

ized handling or equipment is not essential so long as movement thereof is incidental to the related heavy-haul movement. Therefore, since evidence of each supporting witness categorized and described the type of service sought by shippers in that manner, it must be concluded that applicant's present authority to transport commodities which require specialized handling or rigging because of size or weight also embraces related machinery and parts, or related contractors' materials and supplies, when their transportation is incidental to transportation of the specifically authorized commodities.—Leroy L. Wade & Son, Inc., Extension, 92 M.C.C. 451 (453-4).

Since early "grandfather" certificates bearing such commodity descriptions as "heavy machinery" were intended to authorize continued operations by carriers holding out to transport all heavy or bulky articles requiring special equipment (61 MCC 209), respondent's certificate for "heavy machinery, equipment, and supplies" authorizes a complete heavy-hauling service, including transportation of related equipment and supplies when incidental to movement of such heavy or bulky items. However, the terms "equipment and "supplies" cannot be taken out of context and construed as if they stood alone, and that authority does not allow separate transportation of many individual items in respondent's tariff which do not require special equipment.—Heavy Mach., Equip. & Supplies between Wis. and Ill. & Minn., 318 I.C.C. 545 (546-7).

While heavy-hauler authority includes authority to transport parts of the basic machinery which are moving in connection therewith and at the same time, it does not include authority to handle independent shipments of parts or of mixed shipments of parts and basic machinery to different consignees, unless such parts themselves are of such size or weight as to require the use of special equipment.—Home Transp. Co., Inc., Extension, 88 M.C.C. 265 (271)*.

It is well settled that silos may be transported under unrestricted heavy hauling authority; the silo itself is an edifice used as a large storage container, and as such has no mechanical function characteristic of machinery. Restriction of heavy-hauling authority to exclude farm machinery does not preclude handling of silos merely because shipments include silo unloading machines; the unloading machine is an accessorial device which, when installed, becomes a permanent part of the silo and its use does not change the nature of the silo or its function in farming operations. —International Transport, Inc., Extension, 91 M.C.C. 717 (719-20).

Heavy-hauler authority embraces transportation of palletized shipments of glass- or enamel-lined silo sections, and of galvanized silo sections; because of lined sections' fragility and galvanized sections' susceptibility to bending, palletization is a definite requirement for handling considered commodity, and the loaded pallets are of such weight as to require use of special equipment for their loading and unloading.—C & H Transp. Co., Inc., Extension, 88 M.C.C. 285 (291-2)*.

Though in determining whether a commodity requires special equipment and handling consideration normally is given only to weight of the individual article and not aggregated weight of the commodity and its container, considered spent fuel elements, because of their radioactive nature, inherently require protective lead casks (weighing up to 20 tons) for transportation and handling; combined weight of the irradiated fuel elements and casks brings such shipments within scope of authority of heavy and specialized carriers; recognition of aggregate weight of such shipments is consistent with principles of 78 MCC 319 and 81 MCC 515.—Dealers Transit, Inc., Extension, 88 M.C.C. 375 (379).

Transportation of 40-foot lengths of reinforcing steel is within a heavy hauler's authority, but it may not transport such steel in mixed shipments with shorter lengths.—Case Driveaway, Inc., Extension, 89 M.C.C. 633 (635)*.

Transportation of jet thrust units of which a basic element is a solid propellant designated a class B explosive, and which require special equipment and handling for loading and unloading, may be performed by a heavy hauler whose certificate is not restricted against transportation of dangerous explosives.—Baggett Transp. Co. Extension, 88 M.C.C. 3 (10)*.

Household goods: [Vols. 11-16, 18, 19].—Although "household goods" is not defined in motor carrier certificates authorizing such operations, meaning of that term is derived from rule 1 of the commission's regulations governing transportation of household goods (49 CFR §176.1); for more than 20 years that rule has delineated the scope of moving activities which holders of household goods certificates are allowed to engage in. Requirement in the redefinition of "household goods" in the rule, that change of householder's dwelling or relocation of business establishment must be involved, narrows that term by excluding certain types of services previously thought to be within the meaning of those words; order of the commission, insofar as it relates to rule 1(a)(1) or 1(a)(2), annulled and set aside and enforcement thereof enjoined.—Movers Conference of America v. United States, 205 F. Supp. 82 (84, 86)*.

The court's earlier order was not appealed from and no petition for modification thereof was filed. Instead, the commission, on further consideration and without receiving any additional evidence, promulgated an order almost identical to the one enjoined in the court's earlier opinion; only change was to add as exceptions certain examples of household goods movements cited in the earlier report. There is no room for error in interpreting the spirit and scope of the injunction; if the commission believed it was too broad, it should have applied to the court for modification rather than to proceed with a second redefinition of "household goods" in rule 1 of its regulations (49 CFR §176.1) which is clearly violative of the injunction. Challenged order of the commission redefining and clarifying meaning of "household goods" ordered vacated, insofar as it relates to rule 1(a)(1) or 1(a)(2).—Id., 251 F. Supp. 882 (884-5)*.

To fall within the purview of subsection (3) of the definition of household goods in §176.1(a) of commission's regulations, articles must be of such unusual nature, by reason of their fragility, delicateness, intrinsic value, or other characteristics, as to require the specialized handling and equipment usually employed in moving household goods. Interpretation of that definition in recently revised §176.1(b) makes no material changes in prior interpretations, except to stress that crating or noncrating is not important respecting articles actually embraced therein; and the interpretations in §176.1(b) of the definitions in §176.1(a)(1) and (2) are not intended to apply in any manner to articles embraced in subsection (3).—Neptune Storage, Inc., Extension, 88 M.C.C. 25 (31).

Supporting shippers' photographic and X-ray machines and equipment, like the microfilming equipment considered in 110 F. Supp. 273 and tabulating machines in 67 MCC 319 and 73 MCC 381, require the specialized handling and equipment usually employed in moving household goods for their transportation, thus come within authority for household goods as defined in rule 176.1(a)(3).—Id., p. 32. [But see dissent.]

In bulk: [Vols. 16, 19].—Transportation of any commodity, such as ferroalloys, in dismounted hopper-type containers, filled by shipper prior to placement on vehicles and unloaded by consignee subsequent to removal from the vehicles, cannot be termed bulk transportation. While the term "in bulk" is defined in 250 ICC 101 as a loose mass poured or thrown into a vessel or vehicle without regard to order and restrained during transportation only by bottoms and sides of the carrying vessel, it is clear that, taken in context, the term "vessel" therein refers to ships or barges operated by water carriers, not to wood hopper containers.—Ligon Specialized Hauler, Inc., Extension, 91 M.C.C. 254 (256).

Further, scrap iron and steel are not bulk commodities and may not be transported under "in bulk" authority. Metal waste or scrap metal materials vary in size, shape, and weight, and lack the homogeneity and fungible quality that is generally associated with bulk commodities; moreover, typical shipments of scrap involved are not to be poured, scooped, or shoveled in any practical sense but rather can be, and are, loaded and unloaded piece by piece. To the extent that decision in No. MC-119777 (Sub-No. 3), wherein the recommended report became effective without exceptions, differs from interpretation in instant proceeding, it is incorrect.—Id., pp. 256-7.

Iron and steel articles: [Vols. 12, 15, 17-19].—In the transportation industry, "iron and

steel articles'' means a list of rough or semi-finished articles made principally from iron or steel; however, not every item made of iron or steel is included in that classification. A legitimate iron and steel article, within operating authority containing such a generic commodity description, must be either a finished product uncomplicated in design or manufacture or in the rough or semifinished stage and requiring further processing, the amount of further processing required being relative to the complexity of the particular article in question; if very complex, a considerable amount of further processing is necessary, but if very simple, little, of any, further processing is necessary.—Eagle Motor Lines, Inc., Investigation and Revocation, 94 M.C.C. 704 (707)*.

Thus, lavatories, sinks, and bathtubs, which have been extensively finished by complicated nd specialized process not typical of the iron and steel industry may not be transported under authority for iron and steel articles. And though processes involved in manufacture of grease traps, fittings, plumbers goods, and freeze roll cylinders are not sufficiently disclosed for a determination as to them, obviously the first three could not be transported under such authority as items incidental to lavatories or bathtubs. Also, fire hydrants, iron body valves, cotton gin machinery consisting of complex and assembled parts, fully assembled band saws, and circular band saws, and circular band saw blades, because of the varied processes involved in their manufacture, are not the type of commodity produced by ordinary iron and steel producers and fabricators and are not within the iron and steel articles classification.—Id., p. 708.

But in view of finding in 43 MCC 585 that knocked-down steel houses are iron and steel articles, steel door frames may properly be so classified; and fact that such items may also be listed under building materials does not preclude their transportation as iron and steel articles. Likewise, manufacture of tractor-trailer couplers involves nothing which could not be provided by a typical iron and steel producer, and they are embraced in that authority.—Id., p. 709.

Under established trade and industrial usage, "structural steel" refers to a group of steels shaped by the rolling process and identified as "structural steel" regardless of intended use or application; steel beams, channels, tees, zees, and angles are rolled steels considered by the trade and industry to be structural steels and may properly be transported under authority for structural steel. But steel bolts and nuts, steel rings (rough), and steel wire, rivets, or screws are not rolled steel and therefore do not qualify as structural steel; sheet steel is an item not commonly understood to be structural steel, and therefore items produced therefrom, such as steel stampings, washers, tubing, forms, lathing, and grounds, do not fall within that category; nor are steel bars, round and flat, or steel welding rods included in the generic term "structural steel"; those items may not be transported under structural steel authority. —Simpson—Modification of Certificate, 94 M.C.C. 120 (127-8).

Protestant's presently held authority to transport "iron and steel products" does not embrace transportation of considered commodities, i.e., "lift trucks" and "cranes."—Home Transp. Co., Inc., Extension, 95 M.C.C. 128 (132).

Following decision in 86 MCC 440, respondent's authority to transport iron and steel products embraces the transportation of finished iron and steel rolling mill rolls; cease-and-desist order vacated as to that commodity.—Transportation Activities of McGaughey Bros., Inc., 89 M.C.C. 159 (160)*.

Liquid chemicals: [Vols. 18, 19].—Opposing carriers' authorities to transport "liquid chemicals," "acids and chemicals as defined in appendix IV of the *Descriptions* case, 61 MCC 209," and "acids and chemicals as defined in the *Maxwell* case, 63 MCC 677," respectively, all authorize the transportation of liquid chemicals only; holders of such authority may not transport dry chemicals thereunder.—Slay Transp. Co., Inc., Extension, 96 M.C.C. 47 (49).

Authority to transport "liquid chemicals," most recently defined in 88 MCC 127, authorizes transportation of liquid oxygen and liquid nitrogen which are substances resulting from a physical change induced by a process (distil-

lation) generally employed in the chemical industry. Liquid hydrogen may also be transported under such authority since, whether obtained by fractional distillation of petroleum, partial oxidation of natural gas, electrolysis of water, or by reacting oil, coal, or iron with steam, it is a chemically produced commodity. Moreover, all three commodities are well-known products of the chemical industry, and no basis is afforded in instant proceeding for excluding any of them from the "liquid chemicals" classification by common usage.—Younger Bros., Inc., Extension, 95 M.C.C. 1 (14-16, 17)*.

Report in the Maxwell case, 63 MCC 677, when read in entirety, supports construction of the language excluding from the definition of "liquid chemicals" such finished or end products as are intended, without further processing, "for packaging and sale to the general public" as requiring only that the excluded commodities be intended for some form of packaging and sale to the public in the retail trade. That report nowhere indicates an intention to exclude chemical substances shipped in bulk to industrial users; nor is there any requirement that substances be subjected to further processing by the user to qualify as a chemical.—Southern Tank Lines, Inc., Extension, 88 M.C.C. 127 (138)*.

Therefore, in order to be classified as a "liquid chemical" under the Maxwell case definition, a commodity must result from a chemical or physical change induced by processes employed in the chemical industry; it may be the product of analytical or synthetic chemistry, but not a substance in its raw or natural state; and the process need not be used in a chemical plant so long as it is a chemical process. In addition, the commodity must not be a finished or end product known to be moving to a distributor for packaging and retail sale to the public, and which as such has assumed a separate and distinct identity of its own.—Id., p. 139.

Under such interpretation of the Maxwell case definition, the liquid adhesive paste for which authority is sought is properly classified as a liquid chemical, since it is a substance resulting from processes employed in the chemical industry and, when tendered for shipment, it is not intended for packaging and retail sale, but for further plant use by consignee-manufacturer.—Id., pp. 133, 140.

There is a separate category of commodities, such as molasses and finished potables like vodka, which, although they might logically come within the Maxwell case definition because they are the product of processes similar to those used in the chemical industry, are by common usage not considered chemicals and therefore cannot with reason be classified as such. Since this category amounts to a deviation from the general rules of interpretation above set forth, its application should be limited to products not in fact produced by companies engaged primarily in the manufacture of chemicals or producing chemicals as a byproduct of a manufacturing process.—Id., p. 139-40.

Furthermore, it has become apparent during past several years that the commodity description in the Descriptions case, as supplemented by the Maxwell case, has not resolved the liquid chemical commodity description problem; it is likewise clear that a broader and more realistic description, which would permit motor carriers to provide a dull and complete service for the chemical industry, is desirable and should be adopted. Revised commodity description for motor carriers serving the chemical producers, "liquid chemicals, in bulk, in tank vehicles," and a revised definition or interpretation of commodities embraced therein which is the same as the Maxwell case definition, minus the so-called intended use test, found to be proper and reasonable.—Id., pp. 129-33, 141-4.

A mixture of liquid caustic soda and gluconic acid remains a "liquid chemical" as that term is used in operating authorities, whether or not the gluconic acid produces a chemical change in the liquid caustic and whether or not the mixture is to be used as a cleaning compound; no basis is adduced for concluding that the caustic soda, either before or after addition of the gluconic acid, is in category of commodities which by common usage are not considered liquid chemicals.—Stillpass Transit Co., Inc., Extension, 89 M.C.C. 38 (40).

Considering the definition of "liquid chemicals" set forth in 88 MCC 127 in light of the meager and vague testimony submitted by

applicant, evidence of record is insufficient for a determination as to whether or not liquid yeast is a liquid chemical within that definition. Applicant could have presented expert testimony as to the nature of liquid yeast without revealing any trade secrets connected with supporting shipper's production thereof; and, having failed to establish that liquid yeast is a liquid chemical, it has no basis to complain of the commission's resulting inability to make a finding thereon.—Slay Transp. Co., Inc., Extension, 95 M.C.C. 659 (661).

Authority to transport liquid chemicals as described in the Maxwell case, in tank trucks, authorizes transportation of all chemically produced substances except such finished or end products as are intended, at time of transportation and without further processing, for packaging and sale to the general public.—Los Angeles-Seattle Motor Exp., Inc., Extension, 89 M.C.C. 621 (624)*; and conclusion that the definition of "liquid chemicals" in the Maxwell case excludes paint only when intended, without further processing, for sale to the public in containers is buttressed by discussion in 88 MCC 127, which eliminated the intended-use test and laid down a "common usage" test for identification of excluded commodities. Paints, varnishes, and lacquers, all well-known products of the chemical industry, are not excluded by common usage when shipped in bulk to industrial users, and coating and molding resins are synthetic resins of type clasified as chemicals by the Maxwell case; thus, all those commodities are embraced in both the Maxwell and revised definitions of liquid chemicals.—Commercial Oil Transport Extension, 91 M.C.C. 129 (134-6).

Nitric acid not sold to the general public as such, but used in etching of metal plates by the printing and engraving industry, is within authority for liquid chemicals; its inclusion in list of acids and chemicals in appendix XV to the Descriptions case (61 MCC 209) cannot be ignored.—Walker Hauling Co., Inc., Extension, 88 M.C.C. 607 (609).

Description "liquid chemicals" is comprehensive in scope and intended to include all basic liquid chemicals and liquid chemical products produced by the chemical industry. However, as many chemical companies engage in other widely diversified manufacturing activities, the Maxwell case definition should not be applied so as to produce a result clearly at variance with common usage, and finding in 88 MCC 127 that such exceptions should be limited to commodities not in fact produced by the chemical industry was not intended to exempt all commodities transported for chemical companies from the "common usage" test, but only those shipped by such companies in their capacities as producers of chemicals and chemical products.—Southern Tank Lines, Inc., Extension, 88 M.C.C. 635 (640).

Thus, a particular commodity may be excluded from the liquid chemicals category by common usage even though producer technically qualifies as a member of the chemical industry, if the commodity is not directly connected with its activities in the chemical field; status of a commodity not generally recognized as a chemical is fixed, and should not vary according to the character of the company that produces it; to hold otherwise would render ambiguous the status of such clearly recognized nonchemicals as vodka and molasses, contrary to intentions and policy of the commission in reaffirming the "common usage" category in 88 MCC 127.—Id., p. 640.

Though whiskey contains ethyl alcohol, which is chemically produced and is listed as a chemical in the Descriptions case (61 MCC 209), it is a potable liquid which has a name, character, and use separate and distinct from the general category of "liquid chemicals" as understood in transportation parlance; therefore, whiskey may not be transported under authority for "chemicals" or "liquid chemicals"; and the same conclusion is warranted as to other popularly known beverages and liquid foodstuffs.—Id., p. 640.

Nothing in present record warrants disturbing conclusion in 82 MCC 432 that tall oil, a byproduct of coniferous wood, is a liquid chemical.—Hearin Tank Lines, Inc., Extension, 88 M.C.C. 189 (196)*.

Basic intent of the Maxwell decision (63 MCC 667) was to define all chemically produced substances as liquid chemicals except those finished or end products intended, without further processing, for packaging and sale

to the general public; there is no requirement therein that substances be subjected to further processing by industrial users to qualify as chemicals; a shipment of a liquid substance in bulk, in a tank vehicle, from the plant of a chemical manufacturer to another manufacturing plant may be presumed to be a liquid chemical in absence of actual knowledge to the contrary.—Refiners Trans. & Term. Corp. Extension, 88 M.C.C. 611 (613).

Protestant's authority for chemicals as defined in the Maxwell case cannot be considered insufficiently comprehensive to meet all of shipper's requirements (except for transportation of liquid chemicals derived from petroleum) when record does not disclose with certainty what specific commodities would be tendered as "finished or end products" within the Maxwell definition, what volume thereof would move in bulk, or what consignees would receive them for packaging and retail sale; however, that authority excludes "chemicals derived from petroleum," and protestant may not transport those known by it at time of tender to be in fact petroleum derivatives.—Id., pp. 613-4.

Authority to transport "liquid chemicals" embraces transportation of considered denatured rum; rum in question is a substance resulting from a process (distillation) generally employed in the chemical industry, and is to be used as an ingredient of flavoring sirup used in processing tobacco. Though potable rum, which is to be bottled and sold as a beverage, generally would not be considered a chemical, and only difference between drinkable rum and considered denatured rum is the denaturant added to exempt it from alcoholic beverage tax, it is important that considered rum is to be used in bulk by an industrial user in processing a product, rather than packaged and sold to the public in original form.—P. B. Mutrie Transp., Inc., Extension, 88 M.C.C. 597 (600-1); Southern Tank Lines, Inc., Extension, 88 M.C.C. 594 (595-6).

Since definition of liquid chemicals, as revised in 88 MCC 127, embraces all liquid chemicals in bulk without regard to intended-use test embodied in Maxwell case definition, 63 MCC 677, such authority, unqualified by reference to the Maxwell case, includes varnish produced by combining synthetic resin and various oils, gums, and solvents, even though usable as a decorative finish and protective coating in its present form; moreover, varnish shipped in bulk for plant use was held to be a liquid chemical in 91 MCC 129. However, considered varnish may not be transported under authority for styrene and synthetic resins, since though composed largely of styrene it is not a synthetic resin but a resin product; and authority for specific base or raw materials does not permit transportation of derivatives or products thereof.—Maxwell Co. Extension, 91 M.C.C. 392 (393-4)*.

Though nature of considered molding resins is not established with certainty, shipper is a manufacturer of chemicals, which produces the molding resins from synthetic resins and ships them in bulk in tank vehicles to manufacturing plants where they are baked, shaped, and formed into products for the retail trade. These facts raise a presumption under the Maxwell case, which is not rebutted by probative evidence, that the molding resins are chemicals; consequently, transporters of liquid chemicals are entitled to presume that the molding resins are within their authority. —Ruan Transport Corp. Extension, 88 M.C.C. 643 (646); the molding resins are not finished or end products which have los their identity as chemicals, and thus are not within exception to the Maxwell definition, since they are not sold to the public as such, but are used by other industries in manufacture of entirely different products.—Id., p. 646.

Protestant's authority for liquid chemicals as defined in the Maxwell case includes fertilizers and fertilizer solutions, having been granted specifically to meet a shipper need for transportation of fertilizing and ammoniating solutions to agrarian users; moreover, 88 MCC 127 specifically held that substances need not be subjected to further processing by users to qualify as liquid chemicals; protestant may handle shipments delivered directly to shipper's customers, as well as interplant shipments.—Petroleum Transit Co., Inc., Extension, 88 M.C.C. 399 (401-2).

Authority to transport liquid chemicals as defined in the Maxwell case does not include petrolatum and white oil. Such commodities are pure petroleum products and fact that they are so listed in Appendix XIII to the

Descriptions case, but are not included in list of acids and chemicals in Appendix XV thereto, indicates that they are not to be considered chemicals, in furtherance of the policy against encroachment by chemical transporters upon the rights of carriers of petroleum products.—Milk Transport, Inc., Extension, 91 M.C.C. 280 (281, 283). [But see dissent.]

Petroleum coke, though resulting from a physical change induced by a process employed in the chemical industry and intended for use as a carbon black ingredient, is one of those basic petroleum products which are not within authority for liquid hemicals.—York Interstate Trucking, Inc., Extension, 88 M.C.C. 680 (684).

Authority to transport liquid chemicals does not embrace lecithin oil. "Common usage" test of 73 MCC 404 applies; recovery of lecithin from soybean oil is accomplished by methods similar to recovery from cane juice of molasses therein considered; moreover, lecithin oil is produced, not by a company engaged primarily in manufacture of chemicals or chemical products, but by a cereal and animal food producer, which does not consider it a chemical.—Southern Tank Lines, Inc., Extension, 88 M.C.C. 387 (389).

Lumber: [Vols. 9, 15-19].—As wooden veneer is only a thin lumber which is, among other things, used in making plywood, authority to transport "lumber" includes wood veneers. But since "forest products" has been construed to include only raw products and not rough or finished lumber or processed products derived from raw forest products, veneer (a lumber) and furfural residue (a product of a chemical or industrial process) may not be transported under authority to transport "forest products."—Mitchell Bros. Truck Lines—Investigation, 91 M.C.C. 267 (272)*.

Machinery, machinery parts:[Vols. 11, 16-19].—Defendant's authority to transport "machinery" and "heavy machinery" (originally issued to its predecessor in 1939) is interpreted as including interstate transportation of fork-lift trucks, which the commission seeks to enjoin, when record in the original application proceeding clearly shows that fork-lifts, and other such vehicles designed for use in warehouses and storage yards, were considered as "machinery" or "heavy machinery" when the certificate was originally issued. Furthermore, the fact that the commission's current policy of distinguishing between fork-lifts and "machinery" or "heavy machinery" was first started about 16 years after considered certificate was issued, must not be overlooked.—I.C.C. v. Michell Bros. Truck Lines, 250 F. Supp. 636 (638-9).

The commission's interpretation of "machinery," as used in certificates issued by it, as embracing only mechanical devices which have not, through manufacturing or assembling process, been transformed into a new and different object which is itself considered to be a separate and distinct commodity, such as automobiles, airplanes, refrigerators, and farm tractors, received the approval of the courts as early as 1948, long before plaintiff commenced hauling cable, transformers, and regulators, and its decision that such articles do not fall within the description "machinery" was in line with the decisions cited.—Mitchell Bros. Truck Lines v. United States, 225 F. Supp. 755 (759)*.

Binder and baler twine may not be transported under authority to transport " farm machinery and parts thereo." while certain types of farm machinery use twine to tie bundles of various agricultural commodities such as hay, and the twine is thus used in connection with the machinery, it is not a part of the machine and does not become such when the machine is operated, but remains with the processed bundle.—Ace Lines, Inc., Investigation and revocation, 94 M.C.C. 96(98)*; and though rake teeth and harrow teeth are obviously farm machinery parts, separate shipments of those items alone may not be transported under authority to transport "farm machinery and parts thereof"; no other conclusion can properly flow from the commission's prior decisions cited.—Id., pp. 99-100.

Authority to transport road construction machinery and equipment as described in appendix VIII to report in the Descriptions case (61 MCC 209) embraces transportation of independent or mixed shipments of parts, accessories, and attachments to extent such articles are specifically described therein. Though description "road construction ma-

chinery and equipment" embodies an intended use test, manufacturers of type of machinery and equipment designed to be used in road construction need not inquire as to actual intended use unless the reasonable assumption of ordinary future use is negatived by known facts and circumstances to the contrary.—Home Transp. Co., Inc., Extension, 88 M.C.C. 265 (271).

Authority to transport "heavy machinery" does not permit performance of a complete heavy-hauling service. Although "heavy machinery" and "commodities which because of size or weight require use of special equipment" (heavy-hauler description) are analogous, they are not synonymous; any commodity transported under "heavy machinery" authority must be machinery. Cables, transformers, and regulators, which are listed under electrical equipment in appendix VII to the Descriptions case, cannot properly be considered machinery and may not be transported under such authority.—Mitchell Bros. Truck Lines, Investigation, 91 M.C.C. 267 (273-4)*; likewise, mine or pit cars may not be transported under "heavy machinery" authority.—Case Driveway, Inc., Extension, 89 M.C.C. 633 (634)*; and "machinery" as used is such operating authorities may not be construed as authorizing transportation of commodities (automobiles, airplane parts, automatic refrigerators, and farm tractors) which have lost their identity as machinery in the process of assembly into a new and different article.—C & H Transp. Co., Inc., Clarification of Authority, 88 M.C.C. 87 (94).

"Heavy machinery" has been given a more restricted interpretation than "commodities which because of size or weight require special equipment." The generic term "machinery" should be construed as meaning substantially less than its academic definition, and is limited to articles within a reasonable construction of the term. Commodities which have lost their identity as items of "machinery" and have been transformed into a new and different article may not be transported under such authority, nor may "parts and accessories" of such commodities.—Ray Carter, Inc. —Investigation and Revocation, 91 M.C.C. 653 (656).

Army tanks, army personnel carriers, cargo and GI trucks, tractors and truck tractors have clearly lost their identity as items of "machinery" and are not within purview of respondent's authority. And neither forklift trucks nor buildings used to house machinery may be moved under "heavy machinery" authority.—Id., pp. 656-658.

Meats, packinghouse products: [Vols. 11-13,15, 17-19].—It is well settled, by both court and commission decisions, that carriers possessing permits or certificates authorizing them to transport "packinghouse products" are limited to transportation of such commodities as come within meaning of that term (listed in 61 MCC 209) and, then, only when they are produced or distributed by, and transported for, or to, a meat packinghouse. Where not clearly erroneous, the commission's application of that definition to complainant's permit, to determine lawfulness of its questioned operations, did not deprive it of rights without due process of law; sustained.—Zuzich Truck Line, Inc. v. United States, 224 F. Supp. 457 (462, 463)*.

Certificates or permits of carriers serving meatpacking and dairy industries which authorize transportation of property by specific reference either to parts A or B of appendix to the Modification case, 46 MCC 23, or to parts A or B of appendix I to the Descriptions case, 61 MCC 209, shall be interpreted as authorizing transportation of commodities listed in such without regard to who manufactured or initially distributed such commodities. In contrast, authority framed by reference to part C of the Modification appendix, or to parts C or D of the Descriptions appendix I, shall be construed as authorizing transportation of such commodities subject to limitations inherent in the titles to those parts; that is, part C commodities may be transported only when they have been manufactured or initially distributed by meat packinghouses, while part D authorizes transportation of commodities used in the meat packing business when destined to or for use of meat packers. And the parts A and B interpretation extends to all such authority whether granted separately or in conjunction with specific authority to handle part C commodities.—Argo-Collier Truck

Lines Corp. Extension, 99 M.C.C. 591 (599-601)*.

However, the unconditional interpretations expressed do not apply to generic terms such as "packinghouse products" and, in accordance with principles established in 63 MCC 625 and 86 MCC 337, activities under authorities thus framed, regardless of whether reference is made to either of the appendixes, will remain limited to transportation of commodities produced or initially distributed by meat packinghouses.—Id., pp. 601-2.

Authority to transport meat products and byproducts as described in section A of appendix I to the Descriptions case (61 MCC 209) does not embrace vegetable oils and vegetable oil shortenings. Section A is headed by the generic description "Meats, Meat Products, and Meat Byproducts," and the list of items following that heading is clearly intended as a specification of those commodities deemed to be embraced by that description and must be interpreted in context thereof. Therefore the designation of "oils" without qualification in the section A list must be construed to embrace only those derived solely from animal matter. While "vegetable oils" and "vegetable-oil shortening" are included in the commodity list comprising section C of appendix I under the generic heading "Articles Distributed by Meat-Packing Houses," defendant's certificate does not authorize transporation of commodities listed in section C, and its transportation of vegetable oils and shortenings has therefore been unlawful.—Modern Truck Line, Inc. v. Colonial Refrigerated, 94 M.C.C. 149 (151).

And since a blend of vegetable and animal oil or fat is a hybrid product not derived solely from animal matter, authority to transport "oils" as described in section A of appendix I likewise does not authorize transportation of oils and shortenings produced by blending of vegetable oils and animal oils and fats. That some shippers classify the involved commodities as "meat and meat food products" is not controlling; otherwise the scope of commodity descriptions in the commission's certificates and permits would be subject to varying and inconsistent interpretations without regard to the systematic plan of regulation which has been established under the act.—Id., p. 152.

Metals: [Vols. 17-19].—Interpretation of authority for "metal pigs" as "all virgin or secondary metal which is to be melted for reuse" would amount to a partial revocation of petitioner's authority; while most pig metal is undoubtedly remelted, some industries work it directly, without remelting, by rolling, forging, or otherwise; further, "pig" implies a level of refinement attained by pouring metal directly from a smelting device into molds, creating a product in rough cast form; such authority embraces transportation of all metals in a rought cast form which are the direct product of a smelting process and are to be further worked into usable form.—Pittsburgh & New England Trucking Co. Modification, 88 M.C.C. 632 (633-4)*.

Missiles, parts, etc.: [Vol. 19].—Though a solid propellant designated a class B explosive constitutes a basic element of jet thrust (JATO) unit designed as a component for interceptor missile, purpose of the explosive is to furnish controlled propulsion, and purpose of the complete unit is to propel the missile from its launching site; it is an integral part of the missile and separated from it only when its propulsive capacity has been expended, and therefore falls more appropriately within the category "missile part" than that of "explosives."—Baggett Transp. Co. Extension, 88 M.C.C. 3 (9)*.

Oilfield commodities:[Vols. 15-19].—Authority to transport oilfield commodities as described in the Mercer case, 74 MCC 459, does not authorize transportation of pipe meant for use in water, sewerage, and irregation systems and as casing for cables. Part 2 of the Mercer description must be read with, and as subject to same intended-use limitation as, part 1; therefore, such authority authorizes transportation of pipe intended for use in the transmission of natural gas or petroleum or their products or byproducts.—C & H Transp. Co., Inc., Extension, 94 M.C.C. 711 (713, 718, 718, 720)*.

Pipe known to carrier at time of shipment to be intended for use in a pipeline right-of-way may not be transported under authority for (1) mine and oilfield machinery and supplies or

(2) machinery, materials, supplies, and equipment incidental to or used in construction, etc., of facilities for discovery, development, and production of natural gas and petroleum. And although pipestringing could be considered ancillary or incidental to transportation of the involved pipe, no ancillary transportation service may be performed unless the principal service to which it is incidental is authorized; moreover, pipestringing has long been considered a transportation service for which specific authority is required, and none is contained in the certificate in question. Since the fundamental transportation of the involved pipe was not authorized, the stringing thereof was likewise unlawful.—Great Western Motor Lines, Inc.—Investigation, 96 M.C.C. 522 (527).

Transportation of pipe and stringing, servicing, etc., of pipelines used for transmission of such byproducts of oil or gas as butane, butadene, ethylene, jet fuel, etc., is within the proper sphere of applicants' authorized operations under the second paragraph of the Mercer description (74 MCC 459).—J. O. (Red) Willett Pipeline Stringing Extension, 89 M.C.C. 427 (432, 435).

Failure to underline "and" in certificate authorizing transportation of "oilfield equipment, machinery, and materials" has no interpretative significance, and that description does not authorize transportation of materials other than those peculiar to or intended for use by the oilfield industry. Failure to repeat the limiting adjective before each noun in the series, where there is only one logical interpretation of the language used, does not manifest lack of intent to consider the words as a single group; even though respondent has found two learned professors of English who agree with its position, those witnesses, while experts in their field, were unfamiliar with regulated motor carriage and thus unaware of the absurdity, in transportation terms, of attempting to interpret respondent's certificate solely from an academic point of view.—J. B. Acton, Inc.—Investigation and Revocation of Cert., 89 M.C.C. 59 (62,63)*.

Oils: [Vols. 18, 19].—Authority to transport specific raw products,such as vegetable oils, does not permit the transportation of derivatives or products of such materials. Therefore, resin plasticizers may not be transported under authority to carry vegetable oils. —Ruan Transport Corp. Extension, 96, M.C.C. 719 (722); similarly, distillation fractions of crude tall oil having been classified as vegetable oil prducts in 84 MCC 506, tall oil rosin obtained from fractionation of crude tall oil is likewise a vegetable oil product and beyond scope of authority for vegetable oils. —McKenzie Tank Lines, Inc., Extension, 88 M.C.C. 554 (557); and since lecithin oil is not merely a grade of soybean oil, but a derivative thereof, it may not be transported under authority for only the base product, soybean oil. Southern Tank Lines, Inc., Extension, 88 M.C.C. 387 (389).

Authority to transport vegetable oils embraces transportation of tall oil and pulpmill liquid. All oils are broadly classified as animal, vegetable, or mineral according to their origin, and tall oil, being a byproduct of coniferous wood, is a vegetable oil [citing 81 MCC 101 and report cited therein]; pulpmill liquid is a volatile oil extracted from coniferous wood. Similar to findings with respect to definition of petroleum products in the Descriptions Case, 61 MCC 209, the advantages of consistency, simplicity, and utility in the transportation industry are persuasive that "vegetable oil" when used in certificates and permits should be construed to embrace tall oil and pulpmill liquid. Hearin Tank Lines, Inc., Extension, 88 M.C.C. 189 (195, 196)*. [But see dissent.]

See also the Modern Truck Line case under *Meats, packinghouse products*, above.

Naphtha, as well as all of the commodities specifically listed as "oils" in appendix XIII of the Descriptions Case, 61 MCC 209, may be transported under authority to transport refined and crude oils; however, there are not sufficient facts of record to determine whether any of the other petroleum products listed there, including toluene, toluol, and xylene, may be hauled under that authority.—Russell Transfer Co., Inc., 95 M.C.C. 412 (419).

Asphalt cutback may not be transported under authority for "oils compounded"; though it and its constituents are petroleum products, they do not possess the physical properties of an oil; and the blended substances may not be considered an oil compound, since a compound results from chemi-

cal action of two or more elements and has its own distinct chemical and physical properties, whereas, in the liquid state in which asphalt cutback is transported, the elements comprising it can be recovered or separated by evaporation; thus it is a mixture rather than a compound.—Asphalt Cutback, Louisville, Ky., to Indiana & Ohio, 315 I. C. C. 439 (440).

Paint: [Vols. 16, 18].—Bureau of Motor Carriers' informal interpretation of authority to transport "paint" as including varnish, shellac, and stain, approved as an appropriate and practical construction. Commerical Oil Transport Extension, 91 M.C.C. 129 (133).

Authority to transport paints, varnishes, lacquers, synthetic resins, oils compounded, thinning compounds, and lacquer and varnish solvents does not embrace asphalt cutback; even considering trade usages and common understanding, rather than scientific definitions, it would be unrealistic to include asphalt cutback, a road paving, among the array of paints and paint materials included in respondent's certificate.—Asphalt Cutback, Louisville, Ky., to Indiana & Ohio, 315 I.C.C. 439 (440).

Palletized shipments: [Vols. 17, 18].—See C & H Transp. Co. case, under *General commodities*, above, and *Special equipment*, below.

Paper, paper articles, products: [Vols. 11, 15, 17-19].—At time of grant of authority for "wrapping paper" commodity involved was so designated by all concerned; though used by consignee as a filler in laminated plastic board and manufactured by shipper solely for that consignee's use, it has all visible characteristics of wrapping paper, and, as it is shipped in rolls, all transportation characteristics thereof; moreover, it may well be that similar paper is used for wrapping. Original shipper's description of the commodity as wrapping paper was reasonable, and it would be a hypertechnical application of dictionary definitions, without regard to actualities, to hold that transportation of such paper was not within authority for "wrapping paper."—Herndon Extension, 89 M.C.C. 278 (279-80).

Parts: [Vols. 17-19].—Specific authority to transport a commodity embraces implied authority to transport parts and accessories used in its installation when transported in connection with, and intended for installation on, the specifically authorized item being transported at the same time.—Ace Lines, Inc., Extension, 91 M.C.C. 559 (565).

Authority for machinery or equipment "and parts thereof" or "parts and accessories therefor" authorizes transportation only of such parts as are necessary to complete the particular shipment of machinery which the carrier is then transporting and does not authorize transportation of separate shipments of such parts or accessories. Decisions cited from a continuity of precedent which should be followed in absence of showing that authority so granted was intended to supply an expressed shipper need for separate transportation of parts; and where the record is searched and the commodity description found to be incomplete, the remedy lies in modification of the certificate, not in arbitrary reversal of prior holdings as to meaning of operating authorities. Although in some recent certificates the restriction against transporting parts separately has been spelled out with more particularity to avoid future confusion, there is no doubt as to the meaning of respondent's older authority, under which parts may be transported only with the article with which they are to be utilized.—Ace Lines, Inc., Investigation and Revocation, 94 M.C.C. 96 (98, 99)*.

Authority to transport an article, with no mention of parts, includes authority to transport parts of that article which are moving in connection therewith and at same time, but does not allow transportation of independent shipments of parts; authority for heavy articles and "parts thereof" likewise does not embrace independent shipments of parts; and while general commodity carriers may handle independent shipments of parts, they may not transport those which require use of special equipment.—Gregory Heavy Haulers, Inc., Extension, 88 M.C.C. 45 (49).

See also Home Transp. Co., Inc., case under *Heavy haulers* and *Machinery*, above.

Petroleum, petroleum products: [Vols. 9, 14-19].—Defendant's authority to transport petroleum products authorizes transportation of helium gas produced from natural gas. In

determining whether helium is a petroleum product, it makes no difference whether the initial raw material is crude oil or natural gas because "petroleum" is inclusive of both sources for purposes of transportation classification.—Navajo Freight Lines, Inc. v. Steere Tank Lines, Inc., 98 M.C.C. 447 (450).

Authority to transport petroleum products embraces transportation of liquid hydrogen produced from petroleum or natural gas, since the hydrogen used for its synthesis is obtained either wholly or predominantly from petroleum sources. Liquified derivatives of natural gas are, for transportation purposes, classified as petroleum products. See 69 MCC 65. However, petroleum-based liquid hydrogen is not a liquefied petroleum gas; it is liquefied by cryogenic methods and, although a volatile commodity, does not have the same transportation characteristics and requirements as commodities generally considered to be liquefied petroleum gases by transportation industry and by established trade and industrial usage. The generally accepted trade or industrial meaning of "liquefied petroleum gas" is more limited than its literal or academic definition, and clearly does not embrace liquid hydrogen.—Younger Bros., Inc., Extension, 95 M.C.C. 1 (16, 17)*.

The authority to transport "petroleum products" authorizes the transportation of molten liquid sulphur which is derived from sour natural gas or crude petroleum; such authority is intended to authorize the transportation of all derivatives of crude petroleum, including liquid petroleum. However, this does not indicate that raw or natural sulphur, which is mined by the Frasch process and maintained in a molten or liquid form for transportation purposes is a petroleum product, or that authority to transport petroleum products includes the authority to transport liquid sulphur derived from sources other than natural gas or petroleum.—Pacific Intermountain Express Co., Extension, 94 M.C.C. 455 (457).

Authority to transport "petroleum products" includes petroleum treating compounds. While a majority of such compounds produced by supporting shippers are composed of at least a 50-percent petroleum base, some types may contain as little as 10 percent; however, the commission does not subscribe to any arbitrary percentage criteria in determining what may or may not be a petroleum product. Since one purpose in designating petroleum products as a commodity class was to simplify the burden on the petroleum industry in selecting motor carriers with proper commodity authority, as well as to allow the carriers to offer a comprehensive service to the industry, no realistic purpose would be served by a narrow construction of existing operating authorities. The involved commodities are closely related to products derived from processing of crude petroleum and resemble petroleum items which are customarily and ordinarily held to be within petroleum products haulers' authorities.—Hugh Breeding, Inc., Extension, 95 M.C.C. 720 (725).

While processes or materials used to produce anhydrous ammonia and nitrogen fertilizers are not disclosed, the former was found to be a petroleum product in another proceeding authorizing service on basis of same shipper's support, and there is no proof that its other products, all of which appear to be derived at least in part from petroleum sources, are not petroleum products. Therefore, all commodities produced at that shipper's plant may be considered "petroleum products" for determination of available service.—Dahlen Transport, Inc., Extension, 91 M.C.C. 609 (612-3, 614).

Crude oil and petroleum have become synonymous in the industry, the former being the residue remaining after removal of the basic sediment, gas, and water through a heating process; however, though "drip gas" or condensate which accumulates in a pipeline through which natural gas is pumped contains some of the elements of crude oil, it cannot properly be called petroleum since, to be commercially usable, it must be either weathered or fractionated at a refinery, thus is the result of a further extraction process from natural gas; may be transported under authority for "petroleum products."—Bridge Extension, 89 M.C.C. 494 (496, 497)*.

Although polypropylene polymer is manufactured from propylene, which is listed as a petroleum product in appendix XIII of the Descriptions Case, 61 MCC 209, it should not be classified as a petroleum product. The

manufacturing process is the reverse of that by which propylene and many other petroleum products are produced, and results in a nonvolatile substance that thas been converted to a solid rather than a gaseous or liquid form. The dry plastic pellets thus produced are not closely related to products formed from the processing of crude petroleum or natural gas and may not properly be classified as petroleum products for transportation purposes.—Chemical Leaman Tank Lines, Inc., Extension 95 M.C.C. 394 (396-8).

While some dry, solid commodities result from the progressive breakdown of crude petroleum or natural gas and have been classified as petroleum products, and 84 MCC 684 found that urea may be transported as a dry bulk commodity under authority for petroleum products urea is also transported in liquid form resembling anhydrous ammonia and nitrogen fertilizer solutions classed as petroleum products. That case should therefore not be construed to mean that any and all end products made from a petroleum product listed in the Descriptions case are classifiable as petroleum products; each commodity must be classified on an individual basis in accordance with the pertinent facts.—Id., p. 398.

Inasmuch as toluene di isocyanate is not listed in appendix XIII to the report in the Descriptions case, 61 MCC 209, and protestant's authority to transport petroleum products is restricted to commodities listed therein, it can not transport toluene di isocyanate under such authority; a grant of authority by reference to a list is specific and limited accordingly.—Chemical Leaman Tank Lines. Inc., Extension, 95 M.C.C. 349 (350-1).

Applicant's authority to transport refined petroleum products, except "residuary petroleum products," does not authorize transportation of asphalt produced from residual petroleum. It is obvious that "residuary" and "residual" are variant forms of the same etymological root and, in the petroleum industry, "residual petroleum" refers generally to the least volatile fraction of crude oil which occurs in the fractional distillation process; since supporting shipper refines residual petroleum to produce its various grades of asphalt, such asphalts are refined products of residual petroleum.—E.B. Law and Son, Inc., Extension, 94 M.C.C. 532 (538-9)*.

Prefabricated buildings: [Vols. 16, 18].—Respondent's authority to transport "prefabricated houses and buildings, prefabricated house and building sections, prefabricated house and building panels, with parts and accessories" authorizes transportation of (1) prefabricated houses and buildings, (2) prefabricated sections and panels which are intended for use in a prefabricated house or building, and (3) parts and accessories intended for use in prefabricated houses and buildings or in prefabricated house and building sections and panels; and its authority includes such items as are commonly identified as "building materials" only to the extent that they are parts and accessories intended for use in prefabricated houses and buildings or in prefabricated house and building sections or panels.—Whitehouse Trucking, Inc., Investigation and Revocation, 99 M.C.C. 621 (626-7, 629-30)*.

Since protestant's authority to transport "buildings, complete, knocked down, or in sections," and "component parts, materials, supplies, and fixtures" of such buildings is limited to transportation of "component parts, etc." of those types of buildings which are themselves capable of being transported at the same time as the buildings, it does not authorize the transportation of the building materials and supplies for which authority is sought.—Oyler Motor Transit Co., Inc., Extension, 94 M.C.C. 638 (640).

Authority to transport buildings and prefabricated buildings includes sectionalized manufactured homes designed to be permanently situated at points of destination; however, mobile kitchens, egg factories, coin-operated laundries, and motel units which acquired separate identities as trailers cannot be considered prefabricated buildings as that term is used in certificates.—National Trailer Convoy, Inc., Extension, 91 M.C.C. 301 (305)*.

Description "prefabricated buildings" is sufficiently broad to encompas silos, since a silo is an "edifice, framed or constructed, designed to stand more or less permanently, and covering a space of land, for use as a storehouse or some useful purpose" within the dictionary definition of "building." And silo unloading devices which become permanent

part of a silo when installed may also be transported by protestant prefabricated building haulers. Fact that freight classification lists do not include silos under the general heading "buildings" is not presuasive, since they omit other structures which would be considered buildings; moreover, such lists in themselves afford no cogent basis upon which to determine commodity interpretations.—C & H Transp. Co., Inc., Extension, 91 M.C.C. 1 (2-3)*.

Structures advertised as "pre-engineered" homes, shipped in two or more sections designed to be joined together at destination to become complete houses and part of consignee's real estate, and tendered for transportation on wheeled undercarriages equipped with A-frames and ball hitch connections for towing, may be transported under authority for prefabricated houses or buildings, which is not restricted against that method of transportation; no reason is shown why trailers drawn with a ball hitch cannot be used as freight-carrying trailers.—National Trailer Convoy, Inc., Extension, 91 M.C.C. 259 (261, 262).

See also Prefab Transit Co. v. United States, §217(a), n. 6.

Preserved foodstuffs: [Vols. 16, 18, 19].—See also *Canned goods*, above.

The authority to transport "canned and preserved foodstuffs" does not authorize the transportation of confectionery, cocoa, cocoa powder, chewing gum, candy and cake topping, and decorations.—Coldway Food Exp., Inc., Extension, 94 M.C.C. 479 (483)*.

Products: [Vol. 18].—The distinction between the terms "products" and "materials", when used in commodity descriptions is that "products" generally refers to that substance made of a specific material or commodity and is not generally used ambivalently to refer also to the type of manufacturer making the "product". The term "materials", on the other hand, generally relates to those terms which might be used or consumed in the course of construction or manufacture. Thus, a grant of authority to haul "refractory materials" would apparently authorize transportation of raw materials which are utilized by the refractory industry in producing its finished product.—Pennsylvania-Ohio Exp., Inc., Extension, 96 M.C.C. 449 (455).

Interpretation of authority to transport a commodity used in a manufacturing process requires consideration of intended use of the end products embraced in the carrier's commodity description. Since principal use of soaps and detergents, as a cleaning agent, is identical, authority for soap and commodities used in manufacture thereof includes crude sulphate of soda used in manufacture of detergents.—Langer Transport Corp. Extension, 91 M.C.C. 933 (934-5).

Rejected shipments: [Vol. 19].—No specific authority is required for return transportation of shipments rejected at time of delivery.—North American Van Lines, Inc., Extension, 91 M.C.C. 292 (294); Paul Markesano & Sons Co., Inc., Extension, 86 M.C.C. 727 (731).

Returned containers: [Vols. 18, 19].—In accordance with 82 MCC 677, no specific authority is required for return transportation of empty containers or other such facilities used in proposed transportation of bagged or packaged cement.—Daniel Hamm Drayage Co. Extension, 89 M.C.C. 563 (566)*; Paul Markesano & Sons, Inc., Extension, 86 M.C.C. 727 (731); Kroblin Refrigerated Xpress, Inc., Extension, 89 M.C.C. 657 (659)*; likewise, no specific authority is required for the return movement of an empty tank vehicle from an authorized outbound movement.—Younger Bros., Inc., Extension, 95 M.C.C. 1 (7)*.

Transportation of empty gas cylinders, restricted to return movement thereof following authorized outbound transportation of gas, requires no specific authority from the commission.—Eagle Motor Lines, Inc., Investigation and Revocation, 94 M.C.C. 704 (710)*.

Return transportation of shipper-owned undercarriages used to transport mobile kitchens, laundries, etc., under authority for trailers designed to be drawn by passenger automobiles can be performed without specific authority; their return is merely incidental to the outbound service, and while the undercarriage, outbound, constitutes an integral part of the trailer being transported, removing undercarriage or wheels from trailers when they have been towed to destination where they will remain for some time is common practice, and where return of the undercarriage is part of a preconceived plan of shipper, the authorized carrier performing the

outbound service should be allowed to return the undercarriage.—National Trailer Convoy, Inc., Extension, 91 M.C.C. 301 (305-6)*.

Silos: See C & H Transp. Co. case, under *Prefabricated buildings*, above.

Soap: *See Solvents*, below.

Solvents: [Vol. 16].—Although "detergent" is not synonymous with either "solvents," "soap" or "soap powder," soaps and detergents are closely related products with similar visible and transportation characteristics and identical principal use as cleaning agents. To hold that authority for "soap" does not embrace detergents would be a hypertechnical application of dictionary definitions without regard to actualities; no realistic purpose would be served by such a narrow construction of operating authority, when it would curtail services of existing carriers and impose on the shipping public a cumbersome duty to distinguish between products with a common identity. Crude sulphate of soda used in manufacture of detergents may therefore be transported under authority for solvents, soap, soap powder, and commodities used in manufacture thereof.—Langer Transport Corp. Extension, 91 M.C.C. 933 (934-5).

Special equipment: [Vols. 9, 11, 14, 16-19].—See also *Heavy haulers*, above.

If "special equipment" as used in carrier's certificate means anything, it is that as a "heavy hauler" it is authorized to transport only those commodities which require the use of special equipment for their loading, unloading, or transportation; as no special equipment was used or required to transport considered shipments of Army cargo trucks, carrier lacked the requisite operating authority and its transportation of such trucks was unlawful.—United Transports, Inc. v. United States, 214 F. Supp. 34 (43, 44)*.

While there is surface plausibility to argument that the "special equipment" exception in general-commodity authority relates only to commodities "requiring" special equipment and not to the type of equipment used, the principle is well established in motor carrier regulation that this phraseology in that context relates to the equipment as well as the commodity; e.g., heavy-hauler authority for commodities requiring special equipment does not confer the incidental right to perform any specialized service outside the recognized heavy-hauler field simply because specialized vehicular equipment of some kind is used. And to hold that the usual special-equipment exception to general-commodity authority does not preclude use of special trailer equipment to transport automobiles, because an automobile is not a commodity requiring special equipment within meaning of heavy-hauler authority, would be a sterile reading of the exception itself and of the regulatory precedent and policy on the point. [Citing 193 F. Supp. 645.]—Motor Vehicles—Idaho, Nevada, and Utah Origins, 318 I.C.C. 859 (866).

And that exception applies equally to convertible "Durabilt" trailers designed for alternative hauling of either multiple loads of automobiles or full payloads of dry freight, the superstructure being removable when not needed for transportation of vehicles. Mounting of the Durabilt superstructure on an ordinary flat-bed trailer converts it into a special-purpose vehicle which is not functionally different in any substantial respect from the standard carryall type trailer; the significant function of such a converted trailer is precisely that of the carryall type, namely, the efficient transportation of multiple loads of new automobiles, and use of such a trailer for that purpose does not differ from use of trailers with permanently affixed superstructures.—Id., p. 867.

Restriction of general-commodity authority to serve points on Federal or State highways in a described area to "instances where such service requires the use of special equipment" does not denote merely a heavy-hauler service, but authorizes transportation of any commodity not expressly excluded from the general-commodity description, so long as specialized vehicular equipment of any type is required and used. The "special equipment" phrase, either in its normal use as one of the exceptions to general-commodity authority or where it is used inclusively rather than as an exception in such a description, is not limited to any particular commodity or class of commodities whose transportation or handling requires use of special equipment. As tank vehicles were found in 84 MCC 585 to be "special equipment," transportation of bulk petroleum products in tank vehicles is within

the considered authority.—Whitefield Tank Lines, Inc. v. Springer Transfer Co., 96 M.C.C. 285 (288, 289-90).

Though variations of the "special equipment" phrase in some operating authorities may connote a type of heavy-hauling commodity description, heavy-hauling authority is not peculiarly designated as such solely by inclusion of such descriptive phrases; in accordance with commission regulatory precedent and policy, a phrase of that type must be examined in the entire context in which it is used in the particular authority. Thus, in the traditional heavy-hauling commodity description, "commodities the transportation of which because of size or weight requires the use of special equipment or handling," the "special equipment" phrase relates to the specific class of commodities enumerated therein, i.e., heavy or bulky commodities, and when employed in that context denotes the recognized heavy-hauler field of service; it does not authorize performance of any specialized service other than heavy-hauling operations merely because "special equipment" is directed to be used, but is construed narrowly in order not to include a dissimilar transportation activity.—Id., p. 289.

In considering restriction to transportation "in special equipment," record underlying grant of authority may be consulted to ascertain what was intended; such restriction of respondent's authority was clearly intended to restrict it to transportation of such heavy machinery and contractors' equipment as can be hauled only on special heavy-hauling equipment. All the commodities authorized by respondent's certificate must be transported in special vehicular equipment during the over-the-road movement.—Ray Carter, Inc. —Investigation and Revocation, 91 M.C.C. 653 (655).

Carriers holding authority for "commodities which, because of size or weight, require special equipment" may transport articles which require special equipment either for loading or unloading or for over-the-road movement; it makes no difference who supplies the special equipment for loading or unloading, so long as it is required; as to over-the-road equipment, vehicles of unusual design or vehicles equipped with additional mechanical devices are recognized as special equipment; in addition, such carriers may transport unitized commodities weighing 15,000 pounds or over, even though the over-the-road equipment used is of ordinary design.—C & H Transp. Co., Inc., Clarification of Authority, 88 M.C.C. 87 (94).

"Special equipment" refers to types not normally used in general-freight service, and includes vehicles of odd or unusual design and those with additional equipment such as winches. Drop-frame trailers with bilevel floors are fairly widely used by general-commodity carriers, are cheaper and less complex than some other types of ordinary equipment, and are readily distinguishable from lowboy vehicles, which are designed for much heavier loads and are "special equipment" by precedence. Moreover, the commission must recognize advances in design of conventional equipment to promote better handling methods and economy and safety of operations. Drop-frame trailers are not special equipment per se, and their occasional usefulness to heavy haulers does not make them such; decision in 79 MCC 572 distinguished.—Schreiber Trucking Co., Inc.—Investigation, 91 M.C.C. 91 (101-2)*.

A flat-bed trailer mounting a special steel cradle for transportation of liquids in 1-ton steel containers does not constitute specilized equipment.—Chem-Haulers, Inc., Extension, 88 M.C.C. 1 (2).

In bundling, aggregating, or palletizing, the commodity itself is the controlling consideration, and only under unusual circumstances may aggregation or bundling result in a situation where such commodities may thereby be recognized as requiring special equipment; involved commodities are not so easily damaged as to require bundling into units large and heavy enough to require special equipment and hence do not come within the exception to the general rule. Since record is convincing that the bundling is for reasons of economy and efficiency, considered shipments, as aggregated, are not within authority to transport commodities which require use of special equipment.—Case Driveaway, Inc., Extension, 89 M.C.C. 633 (634-5)*.

Palletization is a definite requirement in transportation of glass- or enamel-lined silo

sections because of their fragility, and of galvanized sections because of their susceptibility to bending, and the loaded pallets are of such weight as to require use of special equipment for loading or unloading; carriers holding authority to transport commodities requiring special equipment may therefore transport glass-lined or galvanized silos and related equipment.—C & H Transp. Co., Inc., Extension , 88 M.C.C. 285 (291-2)*.

Store; equipment, supplies: [Vols. 17, 18].—Synthetic plastic powder used by meat packer to make film for packaging products, moving to warehouse of wholesale food business, may be transported under authority for merchandise dealt in by wholesale, retail, and food business houses and equipment, materials and supplies, used in conduct of such business.—Plastics and Chemicals from Midland, Mich., to Chicago, 318 I.C.C. 105.

Under its authority to transport "new furniture, new office and store fixtures, new household fixtures and appliances, and new household and office furnishings," respondent may not transport considered shopping or supermarket carts. The carts are not of similar utility as a showcase, table, or wall case; they do not have a fixed position in a store but are removable and used primarily by supermarket customers for moving their merchandise; their limited use as bins or tables for display does not alter their classification; carts involved should be classified as "store equipment."—North American Van Lines, Inc., Investigation, 94 M.C.C. 663 (667-9).

Supplies: [Vols. 12, 14, 16, 18, 19].—"Supplies" are things consumed in or necessary to maintenance and operation of a plant, factory, or business, other than raw materials or ingredients which go into the finished product or structure; and "materials" are things used as ingredients or parts of a finished product. The intended use test definitely applies to commodity descriptions using those terms.—Mon Kem Co., Inc., Extension, 94 M.C.C. 749 (756).

Pipe known to carrier at time of shipment to be intended for use in a pipeline right-of-way may not be transported under authority for mine or oilfield "supplies."—Great Western Motor Lines, Inc.—Investigation, 96, M.C.C. 522 (527).

Trailers: See *Automobiles*, above.

8. Uniformity of commodity descriptions.—[Vols. 16-19].—General-commodity grants usually except four classes of commodities which involve services of a specialized nature: (1) dangerous explosives, because their transportation involves unusual hazards and requires special safety precautions; (2) household goods, because such carriers serve a particular class of shipper requiring expert skills and a knowledge of packing and stowing, and competition among those carriers differs from that among general-commodity carriers; (3) bulk commodities, consisting of liquids not in containers and fungibles such as sand, grain, coal, and cement, which are not adapted to carriage usually performed by general-commodity carriers; and (4) commodities requiring special equipment, which are excepted to prevent general-commodity carriers from invading the heavy-hauler field.—Gillette Motor Transport, Inc.—Control—Voss, 93 M.C.C. 265 (269)*.

Where generic commodity description, such as residuary petroleum products is used in certificates or permits, it must be deemed to embrace all commodities within the designated class and not be limited in each proceeding to certain representative commodities.—E. B. Law and Son, Inc., Extension, 94 M.C.C. 532 (537)*.

Underlying purpose of designating petroleum as a commodity class in motor carrier certificates was to simplify the burden upon the petroleum industry in its selection of motor carriers and to allow such carriers to offer comprehensive service to the industry. Therefore, since no realistic purpose is served by a narrow construction of existing authority to transport petroleum products where such interpretation would limit existing service, complaint, in effect seeking such interpretation, is dismissed.—Navajo Freight Lines, Inc. v. Steere Tank Lines, Inc., 98 M.C.C. 447 (451).

A description of a specific class of commodities is not meaningful unless it represents uniformly the same group of commodities in all operating authority issued, whether used to describe a grant or a limitation of operations; such a description cannot remain generic if through interpretation its meaning be-

comes unique in each proceeding, including only those specific commodities which provided the evidentiary basis for using general descriptive language. Moreover, a generic description is prospective in embracing commodities which fall within the class but were developed after the particular authority was issued; to isolate its meaning in point of time would destroy utility of that method of describing commodity rights. "Petroleum and petroleum products" is such a generic or class term, embracing generally those commodities derived from petroleum; see the Descriptions case, 61 MCC 209.—Consolidated Freightways Corp. of Del. Extension, 92 M.C.C. 443 (447-8)*.

The commodity descriptions in the Mercer case (74 MCC 459) were granted only to the applicants therein, and not to all motor carriers engaged in oilfield operations.—Great Western Motor Lines, Inc.—Investigation, 96 M.C.C. 522 (527).

Considering breadth of the dictionary definition thereof, "materials," when translated into trnasportation parlance, is roughly tantamount to "general commodities." However, a commodity description "materials," without limitation to a particular class of materials, would be unprecedented: when the commission authorizes transportation of general commodities, they are called by that name, and description "materials" is invariably used only in connection with a particular industry. Neither failure to underline "and" in certificate description "oilfield equipment, machinery, and materials," nor failure to repeat the adjective "oilfield" before each noun in the series, justifies respondent's interpretation of that description as permitting what approximates a general-commodity operation under its authority for "materials."—J. B. Acton, Inc.—Investigation and Revocation of Cert., 89 M.C.C. 59 (62, 63)*.

For consistency, authority granted applicant pipestringers for transportation services in connection with construction, etc., of pipelines, other than those used for transmission of natural gas, petroleum, their products and byproducts, water, or sewage, follows form used in paragraph (2) of the Mercer description (74 MCC 459) and will be complementary thereof.—J.O. (Red) Willett Pipeline Stringing Extension, 89 M.C.C. 427 (437).

Although the Southern Tank Lines case (88 MCC 127) treats only of liquid chemicals, it forms a suitable basis for reforming commodity authorities which provide for transportation of both dry and liquid chemicals; the same considerations of public interest which recommend removal of the intended use test for liquid chemicals authority are also pertinent where that test has been incorporated in authority to transport dry chemicals. Applicant's present authority for "chemicals" and for "chemicals, liquid and dry" should be revised to authorize transportation of "chemicals, in bulk, in tank or hopper-type vehicles."—Bell Extension, 92 M.C.C. 276 (280).

Commodity descriptions in operating rights should be intelligible to the average layman, to the shipper, and to the carrier and its employees, as well as of sufficient scope otherwise to enable a carrier to provide the service required; but the ideal commodity description, listing every article embraced therein, entails an almost impossible task; on the other hand, use of generic descriptions such as chemicals, building materials, etc., is productive of many interpretive difficulties and other complications. Revised definition of liquid chemicals, while not a panacea for all problems, should eliminate much controversy and will provide carriers with a commodity description flexible enough to meet changing conditions in the chemical industry.—Southern Tank Lines, Inc., Extension, 88 M.C.C. 127 (136, 142-3)*.

Although the commission has never favored grants of operating authority in terms of intended use of the commodity to be transported, since they present obvious problems of interpretation, that form of authority is often the only feasible means of authorizing a carrier to render a complete service for persons engaged in a particular business, without at same time putting it into position to invade the operational areas of existing carriers. Alternatives of using broad generic descriptions, or of naming all the commodities specifically, are often impracticable; the first would inevitably result in grant of more authority than that shown to be required, and the second, with the almost certain omission of some commodities of varied uses and with

no provision for newly developed commodities, would inevitably result in grant of authority too narrow to allow the carrier to perform the needed service.—Mayfield Sons Trucking Co.—Interpretations, 92 M.C.C. 167 (168)*.

Commodity descriptions embodying the intended use test have been employed to authorize the carrier to offer a consignee a complete service in transportation of all commodities required in furtherance of the consignee's business enterprise, resulting in an extremely broad description covering everything in the enterprise involved, subject only to the limitation that at time of shipment the commodities must be intended for such use; it is thus a consignee-oriented description. Although that test may at times be difficult of application, it is usually enough for the carrier and shipper to exercise a reasonable amount of care in ascertaining that the actual intended use of articles transported comports with that envisioned in the pertinent commodity description.—C & H Transp. Co., Inc., Clarification of Authority, 88 M.C.C. 87 (93).

The alternatives, where a consignee of a particular class or type shows need for a complete commodity service, would be (1) to attempt a broad generic description without an intended use test, which would inevitably result in grant of more authority than is shown to be needed, or (2) to list the specific commodities, with risk of omitting some items that should be authorized, thus preventing the carrier from meeting the consignee's reasonable need for a complete service.—Id., p. 93.

Description "road and bridge building machinery and equipment," which like "contractors' equipment and supplies" (explained in 62 MCC 586) embodies an intended use test, appears reasonably clear and definite in meaning; owing to the extremely specialized nature of much machinery and equipment of this type, it falls almost automatically within the commodity description under a reasonable interpretation of the intended use test, and inquiry as to actual intended use is superfluous unless the reasonable assumption of future use is negatived by known facts or circumstances to the contrary.—Id., p. 93.

Liquid chemicals: Continuing growth of the chemical industry and increasing use of tank-truck transportation call for a broader and more realistic and reliable commodity description of liquid chemicals; see discussion of historical development of descriptions in outstanding authorities, pp. 129-133. Definition in the Maxwell case, 63 MCC 677, does not permit complete service required by large shippers; promulgation of a revised description broadening that definition, with appropriate provision for modification of outstanding authorities of chemical carriers to conform therewith, will eliminate necessity for a rule-making proceeding, will be in public interest and consonant with the national transportation policy, and is long overdue.—Southern Tank Lines, Inc., Extension, 88 M.C.C. 127 (137, 141, 143)*.

Carriers attempting to afford a complete service under authority to transport chemicals and chemical products should hold such authority as will cover any such commodities irrespective of their intended use or other hairsplitting considerations. An appropriate revised commodity description for such carriers would be "liquid chemicals, in bulk, in tank vehicles," and a reasonable definition of commodities embraced will be "those substances or materials resulting from a chemical or physical change induced by processes employed in the chemical industry, including uniting, mixing, blending, and compounding." Although phrased in term of chemicals, the definition is intended to cover all acids which are, in fact, chemicals. While, realistically construed, the revised definition does not include petroleum items customarily falling within authorities of petroleum haulers, such as gasoline, kerosene, and fuel oil, it is not intended at the same time to exclude therefrom the basic petrochemicals produced in the petroleum industry.—Id., p. 142.

Regulations of the Commission

29 FR 6324, May 14, 1964, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, §§176.3(c) 176.7 and 176.8, amended, §§176.9 and 176.10, revised, and §176.14 Claims for loss or damage, added, effective July 10, 1964.

29 FR 7390, June 6, 1964, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, §176.1 Definitions, revised, effective July 20, 1964.

29 FR 8481, July 7, 1964, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, effective date of order (29 FR 6324) postponed to Nov. 10, 1964.

29 FR 9711, July 18, 1964, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, §176.1 Definitions, effective date of order (29 FR 7390) postponed from July 20, 1964 to Oct. 1, 1964.

29 FR 9835, July 22, 1964, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, corrections of order (29 FR 6324) in §176.8(c) and §176.12(a) and (b).

29 FR 14173, Oct. 15, 1964, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, effective date of order of May 6, 1964 (29 FR 7390) further postponed to Nov. 30, 1964.

29 FR 15289, Nov. 14, 1964, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, §176.3(c), 176.7, 176.8, 176.10, and 176.12 amended, and §176.14 Claims for loss or damage, added, effective Feb. 1, 1965.

29 FR 16125, Dec. 3, 1964, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, effective date of order of May 6, 1964 (29 FR 7390) postponed to Dec. 30, 1964.

29 FR 19107, Dec. 30, 1964, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, effective date of order of May 6, 1964 (29 FR 7390) further postponed to Feb. 1, 1965.

30 FR 3597, Mar. 18, 1965, Part 176: Effective date of order of May 6, 1964 (29 FR 7390) postponed to April 2, 1965.

30 FR 6117, Apr. 30, 1965, Part 176: Effective date of order of May 6, 1964 (29 FR 7390) postponed until further order, effective on date of order.

30 FR 16203, Dec. 29, 1965, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, effective date of regulations prescribed by order of May 6, 1965 (29 FR 7390) having been indefinetely postponed, currently effective regulations are published.

31 FR 8915, June 28, 1966, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, §176.1 Definitions, revised, effective August 1, 1966.

31 FR 8916, June 28, 1966, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, §§176.3(c), 176.7, 176.8 revised; §176.9 (b) and (c) revoked and §176.9 (d) renumbered as paragraph (b); §176.10 (a) and (c) revised, §176.10 (d) is renumbered as §176.10 (f) and new rules numbered §176.10(d), (e), and (g) are added; §176.12 is amended, and a new rule numbered §176.14 is added, effective Sept. 30, 1966, and will apply only on household goods removed from shipper's premises on and after effective date.

31 FR 10193, July 28, 1966, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, effective date of regulations prescribed by order of June 7, 1966 (31 FR 8916) postponed effective date to Jan. 1, 1967.

31 FR 13446, Oct. 18, 1966, Part 7: List of Forms, Part II, I C Act, Form BOC 101, prescribed as required by §176.10(e); §7.101 BOC 101, Form BOC 101 to report to the Commission all instances in which actual charges exceed written estimates by 10 percent or more, pursuant to §176.10(e), effective Jan. 1, 1967.

31 FR 14879, Nov. 24, 1966, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, §176.10(f), amended, Estimates of Charges, Reweighing, effective on date of order.

32 FR 16084, Nov. 22, 1967: Guide to Restrictions and Descriptions in Motor Carrier Operating Rights, Appended to report in 106 MCC 1 (Appendix II), published for information.

Section 204. (c) [§ 304 (c) *U.S.C.*] Investigation of complaints; orders.—[Unchanged. See vol. 11, p. 9391.]

Amendment, see footnote, p. 9392; historical notes, vol. 13, p. 11058, vol. 14, p. 11580.

Notes of Decisions

Volume 9—p. 7936; Volume 11—p. 9392; Volume 12—p. 10367; Volume 13—p. 11058; Volume 14—p. 11580; Volume 15—p. 12184; Volume 16—p. 12831; Volume 17—p. 13519; Volume 18—p. 14310; Volume 19—p. 15552.

25. Scope of issues.—[Vols. 9, 11, 12, 14, 17, 19].—Part I, §13(1), n. 46.

The mere fact that plaintiff's assertion in extension proceeding of right to operate over Garden State Parkway in East Orange and Bloomfield, N.J., under its "grandfather" authority to operate over city streets in those municipalities was accepted without question did not make that issue unassailable in subsequent complaint alleging unlawful operation by plaintiff or in court review of the commission's determination therein.—DeCamp Bus Lines v. United States, 224 F. Supp. 196 (205-6)*.

Although complaint alleging that carrier had engaged in an unreasonable practice in violation of §216(b) refers to past shipments and alleges damages, it clearly shows that complainant requests issuance of an order requiring defendant to cease and desist in the future from such unreasonable practice; thus, in fact, complainant seeks only future relief,

even though its evidence relates to past shipments and details rates charged and those it claims should have been charged, as if it were seeking reparation. And, while complaints concerning unreasonableness of motor carrier rates have been declined prior to institution of court action for damages in the matter, under §204(c) and §216(b), the commission has ample authority to require motor carriers to observe reasonable practices in connection with their rates and classifications and to consider complaints alleging unreasonable practices relating thereto.—Winthrop Laboratories Div., Sterling Drug v. Dorn's, 325 I.C.C. 654 (655).

While the rights of the parties at law must be left for determination in the proper tribunal, the commission has jurisdiction over considered written agreement between complainant's predecessor and defendant carrier, which is alleged to be an unlawful lease from its predecessor of authority now incorporated in complainant's certificate, and the determination of lawfulness of the agreement. Although complainant was not a party to the agreement, as successor to one party thereto, it has a legitimate interest in knowing conditions under which the authority involved may be operated. Furthermore, it is the commission's function to decide what agreements are required by the act to be submitted for approval, and failure to do so in proceeding challenging validity of considered agreement would be an abdication of that statutory function.—Ayres v. Northern Tank Line, Inc., 93 M.C.C. 468 (469, 470).

Contention that examiner's recommended finding, that transportation of binder and baler twine is not authorized by commodity description "farm machinery and parts thereof," goes beyond scope of investigation is invalid, because nothing in order of investigation implies a determination that baler and binder twine are farm machinery parts or that only the circumstances of the transportation were to be questioned.—Ace Lines, Inc., Investigation and Revocation, 94 M.C.C. 96 (99)*.

Although complainant, in connection with allegation of unlawful common control of two carriers, alleges that it had purchased acquired carrier's intrastate authority over a certain route on understanding that vendor would not be competitive between such points, and that, after it had instituted interstate proviso operations over that route, reactivation of vendor's interstate operations over that route under defendant's control had deprived complainant of traffic it had formerly enjoyed, the issue of competition does not in itself form legitimate basis for complaint, since vendor holds a certificate from the commission, and the holder of a dormant certificate may reactivate operations thereunder at any time, unless and until the certificate is revoked under §212(a).—Jimmy Stein Motor Frt. Lines, Inc. v. Mercury Frt., 93 M.C.C. 635 (640-1).

26.——Moot questions.—[Vols. 12, 14-19].——Reduced rate allowed to become effective without suspension having been replaced by an increased rate, investigation of lawfulness of the reduced rate is rendered moot.—Lumber from Cimarron, N. Mex., to Chicago, 315 I.C.C. 534.

28.——Broadening the issues—[Vols. 14-16, 18, 19].—Sufficient cause is shown for broadening of issues in investigation, after submission of examiner's report, to include activities of new truck-leasing company which is and has been leasing equipment to respondent shipper in the same manner, under identical agreements, and under same circumstances as respondent prior lessor, as well as shipper's relation to the transportation thus performed.—Schultz Transit, Inc., Investigation of Operations, 89 M.C.C. 305 (307-8)*.

Tariffs of certain respondents recently converted from contract to common carriers in some instances include cement rates to destinations not involved in contract carrier schedules initially subjected to investigation, and consideration of rates to such subsequently added destinations would broaden scope of the investigation; therefore, only rates in the present tariffs to the same destinations as shown in the prior contract carrier schedules are considered.—Cement and Mortar—Ill. & Mo. to Ill., Ind., Iowa, & Ky., 321 I.C.C. 166 (172).

29.——Related matters.—[Vol. 14].—Although, by complaint alleging that defendant has published rates for transportation of specified commodities not embraced within its

commodity authority, complainants imply that it may have transported such commodities, that is not the basis of their complaint; and in fact, there is no evidence that defendant has actually performed such transportation. However, since it is axiomatic that a motor carrier may perform only those operations for which it has appropriate authority, and since the commission in exercise of its regulatory function has power to interpret a carrier's authority to ascertain whether it is providing or offering to provide service beyond scope thereof, the issue of defendant's authority to transport the considered commodities is appropriately raised in the complaint.—Mushroom Transp. Co., Inc. v. Midwest Emery Freight, 94 M.C.C. 51 (54).

It is logical and appropriate to consider carrier's petition for clarification of its authority and reopening of "grandfather" proceeding before considering issues in investigation proceeding. Operating rights involved, held successively by several predecessors, are based on a "grandfather" grant in 1937, and petitioner seeks modification of its present certificate, wording of which differs somewhat from that of the original grant and of certificates held by its immediate and prior predecessors; purport of the petition and history of the authority indicate that the relief sought cannot fairly be considered without reference to the original grant and successive transfers, particularly in view of the commission's previous informal interpretation of the authority held by petitioner and its immediate predecessor, with which petitioner takes issue; moreover, the commission has held in 66 MCC 413 and 79 MCC 89 that a certificate issued in a "grandfather" proceeding may be challenged by a successor in interest.—Keystone Motor Exp., Inc.—Investigation of Operations, 89 M.C.C. 567 (569-70)*.

In view of the narrow issue raised by petition for declaratory order, which relates solely to legality of pallet-exchange agreement between a shipper and certain carriers, and exchange of pallets thereunder, it would be inappropriate to prescribe a tariff rule as requested by carrier proponents; however, this does not mean that the commission may not suggest lawful tariff provisions to cover the practice.—Legality of Pallet Exchange Agreement—Kraft, 322 I.C.C. 439 (444).

Though revenue-splitting arrangements with owner-operators may hinder efforts to maintain rate levels which are just and reasonable for motor carriers generally, prohibition thereof was not included in the vehicle-leasing regulations as finally promulgated in 68 MCC 553, and record in investigation of respondent's scrap-iron rates is inadequate for determining whether such revenue-splitting should be prohibited or discouraged. If such arrangements are inimical to general welfare of the motor carrier industry or appear inconsistent with basic objectives of the national policy, no appropriate remedy can be fashioned in isolated rate cases; such proceedings should not be made the vehicle for establishing a new, broad, and highly controversial policy concerning proper economic arrangements between hundreds of motor carriers and thousands of small entrepreneurs; the matter should be made the subject of a proceeding in which carriers, shippers, and all interested persons would have right to participate.—Iron or Steel Scrap from Conn., Mass., and R.I. to Pa., 318 I.C.C. 567 (576).

31.——Only matters in issue determined.—[Vols. 17-19].—Investigation instituted to determine whether respondent has been operating in violation of §206(a) is not an appropriate proceeding for requesting correction of its certificate. While respondent's claim that the certificate should be modified to include "store furnishings" authority inadvertently omitted by the commission from its consolidated certificate may have some merit, any modification of such certificate should be sought in the proceeding where issued; therefore, respondent's petition for correction of its certificate is dismissed without prejudice, so that it may pursue that course.—North American Van Lines, Inc.—Investigation, 94 M.C.C. 663 (669).

Since the only issue in investigation proceeding is the propriety of respondents' operation in transportation of fuel oils from Superior, Wis., to two Minnesota points, adequacy or inadequacy of existing service is not a matter for consideration.—Schirmer Transp. Co., Inc.—Investigation, 91 M.C.C. 869 (874)*.

Order instituting investigation to determine

whether respondent had been operating in violation of §206(a) raised no issues respecting respondent's fitness from a safety standpoint, and examiner exceeded scope of the investigation by considering evidence of safety violations and recommending an order in that proceeding directing respondent to cease and desist from practices in violation of the commission's safety regulations; therefore, his recommendations in related application proceedings, being based on compliance with an improper recommended order in the investigation, were also unwarranted. Issue of respondent's fitness to operate, and evidence of safety violations, are properly before the commission only in the application proceedings, which have been reopened to consider applicant's fitness.—T.I. McCormack Trucking Co., Inc.—Investigation, 89 M.C.C. 5 (7-8)*.

50. Evidence; admissibility, in general.—[Vols. 9, 11-19].—It is unnecessary to determine whether the parties' stipulation that twine, rake teeth, and harrow teeth are not farm machinery, but parts or items necessary to proper functioning of farm machinery, was one of fact or law or mixed fact and law, since the stipulation is not conclusive. Commission examiner was not clearly erroneous in determining that twine was not "parts" of farm machinery.—Ace Lines, Inc. v. United States, 239 F. Supp. 804 (806)*.

Although joint board refused, under the hearsay rule, to receive testimony of a State highway patrol officer concerning statements made to him by defendant's driver purportedly naming his employer, the testimony in question could properly have been received, not to establish the truth or falsity of the facts asserted, but merely to indicate that such statements were made. However, in light of submission of an offer of proof indicating that, had the officer been permitted to testify, the employer would have been identified as defendant's president, together with evidence subsequently developed, the board's ruling did not prejudice presentation of complainant's case.—Northern Tank Line v. Petroleum Marketers, Inc., 96 M.C.C. 276 (277).

Weight to be accorded certain exhibits of Bureau of Inquiry and Compliance pertaining to specific allegedly unlawful operations of respondent, in light of any deficiencies, was a matter addressed to the sound discretion of the examiner and the commission. Examiner clearly considered such evidence in light of other evidence of record, and the record as a whole adequately supports his findings of fact, which the commission adopts.—Farmers Feed & Supply Co.—Investigation of Operations, 96 M.C.C. 409 (411, 412-3)*.

The commission need not rule on admissibility of 27 challenged exhibits when its conclusions are based on the testimony of record, rather than the exhibits, and its decisions would not be altered if such exhibits were considered.—Natl. Motor Frt. Traf. Assn., Inc., v. Internatl. Shippers, 94 M.C.C. 440 (448).

Informal opinions expressed by any of the commission's bureaus within their sphere of competence and responsibility are admissible as evidence. Bureau of Motor Carriers' informal opinion, relied on by complainants in their quest for formal determination of scope of defendant's "foodstuffs' authority, is properly submitted as an element of their proof. However, as that opinion expresses only the Bureau's view of the matter, which has no binding effect on the commission or the examiner, it must be weighed, as an evidentiary element, with all other relevant matters and is not entitled to special weight because of its source.—Mushroom Transp. Co., Inc. v. Midwest Emery Freight, 94 M.C.C. 51 (54-5).

Statement in stipulation of respondent and Bureau of Inquiry and Compliance that binder twine, rake teeth, and harrow teeth are not farm machinery, but are "parts or items necessary to the proper functioning of farm machinery," obviously involves a conclusion of law. Since rule 1.69 of Rules of Practice permits stipulation of facts only, the commission is obliged to accept only the factual elements in the stipulation and will draw its independent conclusions therefrom. Respondent's request that portions of examiner's report dealing with the proper commodity classification of baler and binder twine be stricken as contrary to the stipulated facts is therefore rejected.—Ace Lines, Inc., Investigation and Revocation, 94 M.C.C. 96 (98, 99)*.

Statement of facts attached to petition, filed after submission of examiner's report and

joined in by all parties of record, for inclusion of new truck-leasing company as respondent in investigation proceeding, is received in evidence and made part of the record when it merely brings up to date the primary facts set out in the examiner's report.—Schultz Transit, Inc., Investigation of Operations, 89 M.C.C. 305 (308)*.

Interveners' motion to strike testimony of a representative of one of them, called by petitioner as a hostile witness, overruled; such evidence is in no way prejudicial to interveners and although of little weight is relevant to determination of the bona fides of petitioner's operation.—Service Trucking Co., Inc.—Declaratory Order, 94 M.C.C. 221 (224)*.

Traffic manager of complainant chamber of commerce was qualified to testify regarding market competition encountered by members of that association from shippers in other States when as a part of his official duties he is called on to ascertain whether prevailing level of rates from South Dakota origins would permit members to compete in common markets, and to negotiate with carriers for rates which would enable them to compete effectively; in discharging these duties he is necessarily aware of market competition encountered by members.—Traffic Bureau of Sioux Falls v. Barber Transp. Co., 316 I.C.C. 325 (329-30).

Oral testimony of a commision safety inspector that about 65 percent of 200 express receipts issued by respondent and inspected by him did not identify contents of shipments, as required by commission order, was properly received even though the underlying receipts were not available for inspection at the hearing. While the receipts themselves might be deemed the "best evidence" of the violations, the inspector's testimony related to matters within his personal knowledge; also, respondent was afforded opportunity to cross-examine the witness and to offer rebutting testimony, but submitted no evidence contravening his allegations—indeed, its own witness corroborated them. And since the inspector further testified that the express receipts were not readily obtainable from respondent, to compel their production in investigation would place an unnecessary and undesirable burden on the Bureau of Inquiry and Compliance in discharge of its enforcement functions.—Safeway Trails, Inc.—Investigation and Revocation, 91 M.C.C. 936 (942)*.

Exhibits submitted by the Bureau to show hours-of-service violations do not lack probative value because based on respondent's monthly reports rather than on specific drivers' logs. The safety regulations impose on all motor carriers responsibility for filing of truthful and accurate hours-of-service reports, and the filing carrier certifies the truth and accuracy of the information contained therein. Respondent has the burden of making such checks in advance of its reporting as may be necessary to ensure that data underlying its reports are accurate. Any instances of excessive hours of service shown in its monthly reports are clearly admissible to show extent of its compliance or noncompliance with hours-of-service regulations.—Id., p. 945.

Respondent's advertising brochure was properly admitted in investigation of lawfulness of his transportation services; and letters of inquiry which were routinely received either in response to the advertising folder or otherwise in the regular course of business should also have been admitted. However, other documents contained in advertising folder are not entitled to consideration when some appear to be copies and others to have been devised solely to support respondent's application.—Cherkos Investigation of Operations, 91 M.C.C. 535 (538)*.

Report of Texas Legislative Council dealing with problems of municipal annexation is relevant to consideration of the effect of an annexation of land by Orange, Tex., on commercial zones of that and nearby cities, and should be admitted to aid in understanding the overall situation; while the hearsay character of the report might be such as to preclude its consideration in a court of law, the commission as an administrative body may exercise considerable discretion in dealing with the admission of evidence.—Central Freight Lines, Inc. v. East Texas Motor Freight, 89 M.C.C. 637 (640).

And ordinance of nearby city of Port Neches, purporting to show annexation of a certain area, clearly is admissible as a public document; also, it is relevant for the limited pur-

pose of trying to show that Orange's claim to the annexed strip is not undisputed.—Id., p. 640.

While the commission has accepted Geological Survey maps as more authoritative than other types of maps in ascertaining distance between two points, because of errors inherent in making of maps and measurements thereon it has also considered other evidence which may be more reliable than use of maps alone. [See 63 MCC 528.] The parties' expert witnesses all made use of Survey maps in measuring dis;tance between northwest corner of Grant Park, Chicago, and shipping docks of plant at Woodstock, Ill.; however, measurement by aerial surveyor (who used surveyed coordinates of "bench marks" close to actual points involved to extrapolate coordinates of the critical points), which indicates that the distance exceeds defendant's authoized radial distance of 50 miles from Grant Park, is the more reliable because it involved corroborating results produced by independent processes based on accepted engineering techniques.—Peet Frate Lines, Inc. v. W.O.D., Inc., 89 M.C.C. 206 (207-8).

Report from Assistant Director of Coast & Geodetic Survey was admissible to show that Lincolnton, Ga., is beyond defendant's authorized radial-territory distance of 100 miles from corporate limits of Atlanta. While that report does not contain attestation by its author verifying the information therein, it was furnished by a Government agency upon request of one of complainant's employees, whose statement contains appropriate attestation, and the report adequately describes the maps used in arriving at the figure of 104.3 statute miles, thereby allowing all parties of record to verify that distance independently. Defendants' objection goes to weight to be accorded the report, not to its relevancy; therefore, their objections to its admissibility are without merit.—Hennis Freight Lines, Inc. v. Ohio Southern Exp., Inc., 88 M.C.C. 168 (170).

And there was no serious error in examiner's use of the latest edition of Rand McNally Road Atlas to determine the distance independently; that atlas is normally available to carriers and the general public and has been used by the commission in computing airline distances in granting radial authority; based on mileage scale shown on map of Georgia, distance between eastern extremity of Atlanta and western extremity of Lincolnton exceeds 103 miles. Distances computed by use of the map of Georgia in the 1959 Rand McNally Commercial Atlas and Market Guide, or the 1960-61 Georgia State Highway Department Map, and scales shown thereon, exceed 104 and 103 miles; both are available to the parties, and former is used by the commission to determine commercial zone boundaries.—Id., p. 171.

While it is not implied that in absence of the Coast & Geodetic Survey report the distances computed from any of the latter three maps would be controlling, they lend strong credence to the Geodetic Survey report, and in absence of any evidence to the contrary, conclusion is warranted that the distance between the eastern extremity of the corporate limits of Atlanta and the western extremity of Lincolnton exceeds 100 miles, and that transportation of shipments from Lincolnton is beyond defendant carrier's authority.—Id., p. 171.

Evidence consisting of the unsupported opinion of one of complainant's employees who was not shown to be qualified in interpretation of defendant's operating authority is insufficient to establish that defendant has transported certain commodities to points beyond scope of its authority, in violation of §203; moreover, complainant has not described the commodities in question in sufficient detail with regard to methods of production or manufacture or their transportation characteristics to permit determination of whether violations have occurred.—Middlewest Motor Freight Bureau v. Beaver Transport, 325 I.C.C. 175 (179).

Affiant was unavailable for cross-examination on matters stated in his verified statement; over defendant's objection, witness who adopted the statement, and who was acquainted with matters contained therein, was substituted as a witness for cross-examination in lieu of affiant.—Blue Line, Inc. v. Short Line of Connecticut, Inc., 88 M.C.C. 201 (206).

Statements in petitioner's exceptions that its terminal facility at Kearny, N.J., was con-

structed with private funds and is subject to heavy real estate taxes, in contrast with situation at Newark pier area, and that eastern railroads are in dire need of increased revenues, are beyond scope of proceeding on petition for restoration of commercial zone exemption as to traffic to and from the Kearny terminal, and are not considered.—New York, N.Y., Commercial Zone, 88 M.C.C. 336 (337)*.

Though examiner took official notice of fact that authorized carriers make one-way leases of equipment with drivers, testimony concerning amount of control exerted over drivers by regulated carriers was properly excluded as not material to determination of whether respondent shipper's utilization of leased equipment for one-way movements was private or unauthorized for-hire carriage.—Center America Corp.—Investigation of Operations, 88 M.C.C. 740 (744).

51. Application of principles of res judicata and stare decisis.—[Vols. 13-19].—The commission is not bound by stare decisis and inconsistency in itself is not necessarily unreasonable. Thus, in determining that certain commodities could not be transported under plaintiff's "prefabricated houses and buildings" authority, and ordering it to cease and desist from transporting those commodities, the commission was not bound by any prior administrative rulings; in the prior cases, plaintiff's certificate was not specifically in issue.—Whitehouse Trucking, Inc. v. United States, 261 F. Supp. 9 (11)*.

Interpretation and analysis of prior commission decisions are not determinative of whether parts may be shipped separately under authority to transport "farm machinery and parts thereof." The commission is not bound by a rule of stare decisis and inconsistency of its holding with prior holdings does not make its decision arbitrary.—Ace Lines, Inc. v. United States, 239 F. Supp. 804 (806)*.

Failure of the joint board and the commission, in determining plaintiff's application seeking extension authority over Garden State Parkway in Nutley and Clifton, N.J., to question its assertion of authority to operate over the Parkway in East Orange and Bloomfield under its "grandfather" certificate does not bind the commission. Neither that fact nor fact that the commission was made aware of plaintiff's intention to operate over the Parkway through those four points to Highway 3 justifies inference that the issue of its rights over the Parkway in East Orange and Bloomfield was determined on its merits. It would unduly burden the commission to require it to question every possible assertion of authority in connection with a certificate application so as to avoid application of the doctrines of res judicata, collateral estoppel, or direct estoppel. Moreover, those doctrines may not be raised against the United States or its alter ego the commission in review of decision that plaintiff's outstanding certificates did not authorize operation over the Parkway in performing service between Orange and New York City.—DeCamp Bus Lines v. United States, 224 F. Supp. 196 (206)*.

The court is not concerned with any inconsistency of the commission's findings in case under review with those in prior cases; each case must be decided in light of its own facts. The commission, created by Congress and appointed by law to interpret its own certificates, should be free to draw from its experience to accomplish this end with the minimum interference allowed by law. In the exercise of its expertise, it should not be bound by its prior findings in similar cases; its prior views are not stare decisis. See 41 F. Supp. 439 and 197 F. Supp. 591.—Id., pp. 206-7.

A subsequent modification of the significant facts, or a change or development in the controlling legal principles, may make a prior adjudication obsolete or erroneous, at least for the future; and a judicial declaration intervening between two proceedings involving the same parties and like issues may so change the legal atmosphere as to render the rule of collateral estoppel inapplicable. [333 US 591.]—Schultz Transit, Inc. v. United States, 208 F. Supp. 537 (540-1)*.

Although an earlier opinion of the district court (reported 207 F. Supp. 749) held that transportation of plaintiff shipper's merchandise in trucks leased by it from plaintiff Schultz was private carriage, not for-hire transportation by Schultz, and the present court may assume that subsequent expansion of plaintiffs' operations under their lease agreements did not so change the factual situation as to render that judgment inapplicable

as an estoppel, absent any change in the legal climate, there has since been a substantial change in the applicable law, due to decision in 368 US 370, which rejected the test of shipper control over a challenged operation as solely determinative of whether the transportation is private or for-hire, and approved the commission's consideration of substance of the arrangements. Thus, the rule of res judicata or collateral estoppel is inapplicable in suit to set aside the commission's cease-and-desist order entered upon further investigation of plaintiffs' operations.—Id., pp. 540, 541-2.

Petition for reconsideration of denial of complainant's request for oral argument, on ground that the issue of lawfulness of rate bureau's practice of protesting rates filed by nonmember carriers needs clarification and further evaluation, denied, as the issue has been decided by the judiciary.—Arbet Truck Lines, Inc. v. Central States Motor Freight, 321 I.C.C. 460 (461). [But see dissent.]

Complainants are not estopped by the doctrine of res judicata from challenging defendant's right to engage in charter operations under its regular-route authority for airport limousine service, since the commission, in the proceeding which led to issuance of defendant's certificate, did not specifically determine the extent to which it might engage in incidental charter operations. Moreover, not all parties to the complaint proceeding were parties in the application proceeding.—Arrow Lines, Inc. v. Connecticut Limousine Service, Inc., 96 M.C.C. 1 (4).

Though in 4 application proceedings in which applicant appeared as protestant its authority to serve points "in Connecticut, Pennsylvania, New Jersey, and New York within 100 miles of Columbus Circle" was construed as restricting its territory in all 4 States, no exhaustive study of scope of its authority was made in those proceedings because it was a collateral issue, and none of reports therein explained basis for that conclusion; such conclusionary findings do not control outcome of investigation to determine whether respondent has exceeded that authority in serving points beyond the 100-mile radius in the three States first named, but merely show that reasonable men can read its certificate in the way urged by Bureau of Inquiry and Compliance; in investigation proceeding the scope of that authority is squarely before the commisssion, and it is required by Administrative Procedure Act to explain its reasons for finding that respondent does or does not possess the authority claimed.—T. I. McCormack Trucking Co., Inc.—Investigation, 89 M.C.C. 5 (10-11)*.

52. Complaints.—[Vols. 17, 18].—Procedure followed by the Pennsylvania commission in bringing before the Interstate Commerce Commission situations involving carriers' alleged abuse of their interstate certificates, by operating over interstate routes tacked at New Jersey points in order to evade State regulation, is entirely proper; resolution of problems of that kind is for the ICC in the first instance, under §204(c). [See 359 US 171.]—Hudson Transp. Co. v. United States, 219 F. Supp. 43 (48)*.

Examiner properly sustained defendant rate bureau's objection, on grounds of surprise and broadening of the issues, to complainant's proposed amendment of complaint alleging violations of §5a and the national transportation policy, purportedly to clarify the issues by alleging violations of antitrust laws. It is elemental that in fairness to a defendant a complaint should state all relief sought and the basis therefor. While purpose of §5a is to give immunity from certain violations of antitrust laws, the general allegations of the complaint as filed cannot reasonably be interpreted as including antitrust violations; however, in view of that purpose, it is immaterial whether complainant actually alleged antitrust violations or only violations of §5a. —Arbet Truck Lines, Inc. v. Central States Motor Freight, 321 I.C.C. 460 (461).

Since defendants did not object to complainants' introduction of evidence concerning the preferential, prejudicial, and discriminatory nature of assailed rates as unduly broadening the issues, complaints will be considered as amended at hearing to include allegations that assailed rates and charges are and for the future will be unduly preferential and prejudicial and unjustly discriminatory.—Traffic Bureau of Sioux Falls v. Barber Transp. Co., 316 I.C.C. 325 (328).

If defendants' misuse of their interstate

certificates to transport essentially intrastate traffic over interstate routes did not violate the act, the commission would have no jurisdiction to entertain a complaint under §204(c). However, in considering similar subterfuge operations in 359 US 171, the Supreme Court interpreted §204(c) as empowering the commission to investigate whether any motor carrier has committed a subterfuge of any State's regulatory jurisdiction and, upon an affirmative finding, to issue a cease-and-desist order; and as pointed out in 348 US 61, if carriers persistently violate State laws the commission may protect the State's interest, either on complaint of the State or on its own initiative. Moreover, the requirement of Federal-State cooperation in motor carrier regulation, which is implicit in the Motor Carrier Act and expressly required by the national transportation policy, is sufficiently definite to support a complaint filed on behalf of a State under §204(c) and the issuance of an appropriate compliance order.—Pennsylvania Public Utility Comm. v. Hudson Transp. Co., 88 M.C.C. 745 (749-50)*.

Reference of complaints to joint board, see Brunswick Transp. Co. case, §205(a), n. 15.

53. Consolidation of proceedings.—[Vols. 15-19].—Appellee rate bureau's undertaking to be bound by the commission's conclusions in investigation into its proposed rate increases, which had not been concluded when another investigation into further rate increases in same territory was consolidated with the earlier proceeding, was nothing more than a consent to consolidation of two pending proceedings for hearing. Such so-called agreement to be bound by the decision in the consolidated case did not give rates published pursuant thereto a retrospective effect, as contended by appellant.—Lynchburg Traffic Bureau v. Smith's Transfer Corp. of Staunton, Va., 339 F. 2d 478 (480-1)*.

See also Railway Exp. Agency, Inc. v. United States, 205 F. Supp. 831, §206(b), n. 25.

As a matter of administrative discretion, the commission may consider an application separately or in combination with other applications; when applications before it conflict, however, the commission must base its decision upon the concept of fairness of opportunity to all parties involved, the effective procedures it has promulgated, and the public interest—the remedy does not have to be consolidation. In instant proceeding, granting of petitions seeking consolidation with other application cases would tend to encourage delaying tactics and the filing of dilatory petitions by unsuccessful applicants in related proceedings; moreover, petitioners will suffer no injustice and have not shown good cause to warrant disposition of matters in the separate applications on a comparative basis; petitions for consolidation, denied.—Alterman Transport Lines, Inc., Extension, 94 M.C.C. 421 (423-4).

The commission generally will endeavor to consolidate proceedings wherein protestant carriers do not hold permanent authority to provide the service sought by applicants but rely on pending application proceedings and recommended grants of authority therein; however, in instant proceedings the commodities, origin, and destination points sought in all three applications were so disparate as to make any consolidation difficult and confusing. The commission, however, is cognizant of the pending applications, and will not ignore developments therein.—Florida Refrigerated Service, Inc., Extension, 94 M.C.C. 364 (368).

When applicant's petition for consolidation of its application with another proceeding, assigned for hearing 7 days after its application was filed, was received too late even to be considered and was subsequently denied by order, any consolidated consideration of the two applications is not possible.—Railway Exp. Agency, Inc., Extension, 89 M.C.C. 537 (539).

55. Full hearing.—[Vols. 9, 11-14, 16-18].—Complainant carrier was entitled to a full, fair and open hearing in consolidated commission proceeding involving an investigation, a reopened "grandfather" and an extension application, and a conversion proceeding, as a prerequisite to validity of the commission's orders. But this does not mean that the commission was required to furnish internal reports or open its confidential files to the carrier when they were requested for use other than cross-examination of any witness.—Zuzich Truck Line, Inc. v. United States, 224 F.

Supp. 457 (461-2)*.

There is no merit to plaintiff's contention that it was denied fair hearing and due process in that it was not afforded opportunity to be heard on issues on which the examiner and the commission made their determinations that its challenged operations were unlawful. The issue of unlawfulness certainly encompassed the issues relating to derivation of authority for the questioned operations, such as tacking, segmentation, or interpretation of city street certificates; and the record discloses that plaintiff had ample opportunity to defend and substantiate its position on all such related issues.—DeCamp Bus Lines v. United States, 224 F. Supp. 196 (209)*.

See also Strickland Transp. Co. v. United States, §212(a), n. 30.

Although investigation proceeding was originally designated to be handled without oral hearing on facts stipulated by the parties, reopening thereof for oral hearing requested by certain parties, who were permitted to intervene, was not error; in the exercise of its administrative discretion, the commission may assign a proceeding for further hearing or rehearing at any time while it is pending. The commission's investigatory authority vests it with the power to hold hearings to gather the relevant facts, and the rule of administrative discretion is equally applicable to proceedings under modified procedure. Also, it is significant that intervener filed no reply to the requests for oral hearing, nor objected thereto at the time; further, it failed to show how it has been adversely affected by such hearing. —Schreiber Trucking Co., Inc.—Investigation. 91 M.C.C. 91 (92-3, 94-5)*.

Nor was it error to overrule intervener's request for a continued hearing to introduce rebuttal testimony when intervener was unable to identify witnesses or state why they were not available, what their testimony would be, and whether testimony would be repetitive.—Id., p. 95.

Though defendant requests that, if the commission adopts the joint board's findings concerning unlawfulness of certain of its charter operations conducted under claim of incidental §208(c) rights, the matter be referred to a hearing examiner for hearing de novo, it has presented no new fact or legal ground which could require different conclusions from those already made. Rehearing or hearing de novo is not warranted.—Brunswick Transp. Co., Inc.—Revocation of Certificate, 91 M.C.C. 899 (905).

Requests for reopening of proceedings involving propriety of use of plans I and III TOFC service by motor carriers of automobiles for further hearings to receive evidence of alleged changed economic conditions resulting from introduction of hybrid TOFC plans and widespread use of multilevel rail cars, denied when present records contain sufficient information and argument for determination of some of the major problems presented, and no useful purpose would be served by delaying decision thereon, especially in view of recent institution of a general investigation of TOFC service in which the whole picture of such substituted service will be examined.—National Auto. Transporters Assn.—Declaratory Order, 91 M.C.C. 395 (408).

There is no merit to contention of Contract Carriers Conference that it has not been afforded opportunity to be heard in opposition to proposed §195.3(a) of hours-of-service regulations, as amended; nothing of record indicates that its position regarding the 13-and 2-hour limitation adopted would have been any different from that it took respecting the originally proposed 12-hour limitation, since it opposed any change in the present regulation.—Qualifications of Employees and Safety of Operation, 89 M.C.C. 19 (22).

60. Parties and notice.—[Vols. 13-19].—While the Bureau of Inquiry and Compliance was directed to participate "for the purpose of presenting evidence and making representations on the issues involved" in complaint proceeding alleging that defendants, collectively, engaged in or aided and abetted the performance of unlawful motor carrier, freight forwarder, and broker operations, it is not a complainant, and the commission did not become a party complainant by directing such Bureau participation. Furthermore, the commission need not institute an action in court; it may order such participation and hold the proceeding under §§17(3), 204(a)(6) and (c), and 403(a) and (f).—Natl. Motor Frt. Traf. Assn., Inc. v. Internatl. Shippers, 94

M.C.C. 440 (441, 448).

Sugar broker of Peoria, Ill., is a proper party respondent in investigation proceeding involving transactions of carrier, refineries, and brokers in the purchase and resale of sugar; while record shows that respondent's place of business is at Springfield, Ill., evidence supports conclusion that it has offices both at Peoria and Springfield.—Utley Lumber Co., Inc., Investigation of Operations, 94 M.C.C. 458 (461).

Both carrier respondent and affiliated corporation are a single entity for purposes of investigation when both are completely controlled by the same brothers and, apart from functioning of the carrier's employees as a part of the affiliate's activities, latter's operation would be almost nonexistent. Although attempt has been made to keep separate the operations of the two companies, the distinction must be regarded as merely technical and formal in view of the total picture presented by the record.—Schirmer Transp. Co., Inc.—Investigation, 91 M.C.C. 869 (875)*.

Petition of all parties of record that new leasing company be made a respondent in investigation proceeding, granted when it is and has been leasing equipment to shipper in the same manner and under same conditions as prior lessor; sufficient cause is thus shown for subjecting it to any order entered.—Schultz Transit, Inc., Investigation of Operations, 89 M.C.C. 305 (307-8)*.

Order instituting investigation under §§ 204(c) and 212(a) of respondent's failure to comply with certain orders and regulations of the commission was supplemented by a letter from the Bureau of Inquiry and Compliance informing respondent of evidence it intended to present at hearing. Respondent was thus afforded adequate and timely notice of the legal authority under which the hearing was to be held and of the specific nature of the violations with which it would be charged.—Safeway Trails, Inc.—Investigation and Revocation, 91 M.C.C. 936 (949-50)*.

While statutory authority referred to in first notice of rulemaking proceeding might have included §204(a)(1), reference to §216(e), providing that in investigations on its own initiative the commission shall determine and prescribe the lawful charge or the lawful rule, regulation, or practice, is sufficiently precise to apprise interested persons of its legal authority to issue proposed rule.—Detention of Motor Vehicles—Middle Atl. & New England, 318 I.C.C. 593 (594)*.

62. Appearance and failure to appear.—[Vols. 18, 19].—Rule 1.7 of Rules of Practice does not preclude appearance in an investigation proceeding by a rate bureau in its own name through an authorized representative, since that rule does not relate to appearances, but merely provides that only persons, not corporations or firms, may be admitted and recognized as practitioners before the commission.—Arbet Truck Lines, Inc. v. Central States Motor Freight, 321 I.C.C. 460 (465).

65. Answer; sufficiency; effect.—[Vols. 17-19].—Although applicant failed to reply to protestants' exceptions within time specified in joint board's report and order, it petitioned for permission to file a late-filed reply; as error of its counsel in believing that he had 20 days in which to file such reply, instead of the 10 days allowed, is understandable, and since the reply was received within 5 days of the date due and caused no material delay in disposition of the proceeding, requirement in the commission's notice which accompanied the board's report is waived and the reply accepted for filing as part of the record.—Capitol Truck Lines, Inc., Extension, 88 M.C.C. 212 (213).

For the same reasons, and because the material contained in the reply is generally proper argument in light of the exceptions, protestants' motion to strike is overruled; since the commission's conclusions are based on the facts of record and the law applicable thereto, protestants' rights will not be prejudiced.—Id., p. 214.

75. Official notice.—[Vols. 9, 11-19].—A regulatory agency has the right to take official notice of reports filed with it by a regulated company.—P. Saldutti & Son, Inc. v. United States, 210 F. Supp. 307 (313)*.

The commission may take official notice of existence of statutes in many states expressly requiring segregation by race in facilities used in transportation of passengers in interstate commerce.—State of Georgia v. United States, 201 F. Supp. 813 (815)*.

The commission may consider post-hearing

changes in material facts; therefore, unopposed request is granted for taking of official notice of new tariff provisions, which establish that the practice of exchanging pallets cannot alter transportation charges which shipper would pay if its pallets were transported instead of being exchanged with carrier.—Legality of Pallet Exchange Agreement —Kraft, 322 I.C.C. 439 (442).

The commission takes official notice of short-highway miles listed in mileage guide of Household Goods Carriers Bureau.—Plastics and Chemicals from Midland, Mich., to Chicago, 318 I.C.C. 105 (106).

Under appropriate circumstances the commission may take official notice of prior reports in a proceeding, so that all pertinent facts can be collected upon which a decision should be based.—St. Louis, Mo-East St. Louis, Ill., Commercial Zone, 95 M.C.C. 519 (522)*.

120. Motions.—[Vols. 12, 16, 18, 19].—Though applicant's reply purports to contain a "motion to strike" matters in protestant's exceptions, it is not stated in detail or addressed to any particular portion of the exceptions, thus does not constitute a valid motion to strike.—Blythe Extension—Florida, 89 M.C.C. 195 (196).

See also Armored Carrier Corp. case, §205(a), n. 15.

126. Burden of proof.—[Vols. 15-19].—The burden of proving that carrier which holds no intrastate authority between considered Pennsylvania areas transports traffic between them over interstate routes through New Jersey as a subterfuge to evade State regulation was on complainant State commission, not on carrier, which admittedly is operating under validly combined interstate certificates. Apart from testimony offered to support its position that considered routes are circuitous and somewhat long, the State commission offered no direct evidence of bad faith on carrier's part, whereas carrier showed that it commingled the relatively few shipments concerned in the challenged transportation with interstate shipments for reasons of operating efficiency and economy. Since the commission bottomed its finding of bad faith solely on the circuity of such routing, this unwarranted conclusion must be rejected; cease-and-desist order reversed.—Jones Motor Co. v. United States, 218 F. Supp. 133 (137-8)*.

See also New York, N.Y., Commercial Zone, NTP, n. 5 *Commercial zones.*

Although respondents do not have the burden of proving lawfulness of rates in effect prior to institution of the investigation, motor carrier respondents have failed to overcome the prima facie showing by Bureau of Inquiry and Compliance that considered rates are unreasonably low because they fail to cover out-of-pocket costs; rates under investigation found to be unlawful.—Petroleum and Products from Oklahoma to Illinois, 318 I.C.C. 425 (428).

See also Terminal Charge on Order Bills of Lading Shipments, APA, 5 USC *Burden of Proof.*

Since considered rates were in effect when investigation was instituted, respondents do not have the burden of proof; however, although purpose of investigation was to afford interested parties opportunity to guard against possible adverse effects of rates of uncertain lawfulness, no evidence was submitted by any of the parties; thus the rates are not shown to be unlawful.—Meats and Packinghouse Products from Chicago to South, 315 I.C.C. 699 (700).

205. Proposed reports.—[Vols. 14, 15, 17, 19].—The commission is not required to accept examiners' recommendations nor the informal opinions expressed by one of its employees; therefore, it did not err in construing carrier's certificate contrary to examiners' recommendations and to an informal ruling.—U. S. A. C.. Transport, Inc. v. United States, 235 F. Supp. 689 (693)*.

See also Middlewest Motor Freight Bureau v. US, APA, 5 USC *Procedure.*

Incorporation of examiners' factual statements considered by the commission in arriving at its conclusions, by reference in its decisions to the examiners' reports, is proper.—Roadway Exp., Inc. v. United States, 213 F. Supp. 868 (871, Note 7)*.

The commission is not bound to accept the examiner's findings and may reject his recommendations; not only is it at liberty to do so, but it is required to reach its own conclusion on the evidence.—Robbins v. United States, 204 F. Supp. 78 (81, Note)*.

See also Somerset Bus Co. case, §205(a), n. 15.

Although examiner's recommended report does not contain the usual discussion and conclusions on which his ultimate findings are based, the record is relatively short, the facts are not in serious dispute, and the positions of the parties are complete and understandable despite such deficiency. While the commission could remand the matter to the examiner for preparation of a technically complete report, such action would only result in unduly delaying the ultimate decision; accordingly, the commission considers the evidence of record de novo.—Mitchell Transport, Inc., Extension, 94 M.C.C. 450 (451-2).

In view of indefinite postponement of effective date of cease-and-desist order issued in complaint proceeding pending final determination of Canadian carrier's application for authority between international boundary and Buffalo and Niagara Falls, N.Y., omission of hearing officer's report in latter proceeding was a sensible and reasonable application of administrative discretion and in no way prejudicial to protestants.—Fess Transport, 91 M.C.C. 924 (926)*.

See also North American Van Lines case, §17(5), n. 15.

206. Exceptions.—[Vols. 15-19].—Though division 1 did not separately discuss each of plaintiffs' exceptions to examiner's report which the division adopted as its own, it correctly found that the exceptions did not raise any new issues of fact or law not adequately considered by the examiner; therefore the commission was not required to discuss the issues further.—Deioma Trucking Co. v. United States, 233 F. Supp. 782 (783)*.

While exceptions filed by 3 respondents did not conform to rule 1.96(a) of Rules of Practice in that they did not refer to portions of the record relied upon for support, but merely stated ultimate conclusions contrary to those arrived at by the examiner, since substance of exceptants' contentions is clear, they will be considered; however, exceptions of one respondent, which clearly constituted new evidence contrary to rule 1.86, will not be considered.—Transport Rental Systems, Inc., Investigation, 94 M.C.C. 402 (405).

Though exceptions of two protestants are not specifically stated or numbered separately, contain no reference to the record, and include no corrected findings as required by rules 1.91(e) and 1.96 of the Rules of Practice, and such failure is not condoned, no purpose would be served by stricking them in view of the issues being reasonably clear. And statements sought to be stricken from joint replies to respondent's exceptions consist merely of conclusions and arguments of counsel drawn from facts of record, which may be presented as such. Respondent's motions to strike denied.—Dixie Ohio Exp., Inc., Investigation and Revocation, 94 M.C.C. 625 (629-30)*.

Requests for the Commission's official notice of matters of public record, and arguments in support thereof, may be presented on exceptions.—Colorado Arizona-California Exp., Inc., 92 M.C.C. 89 (91)*.

Under rule 96(b) of the Rules of Practice, any party may file exceptions to a proposed report even though no previous appearance has been entered. Therefore, protestants' petitions, which request that exceptions filed by the proponent who submitted no evidence in support of proposed reduced rates be returned because they contain new matter, are denied, except that the new matter therein will not be considered.—Machinery and Equipment, Central, South, Midwest, 316 I.C.C. 236 (237).

Although time for filing exceptions was extended at request of applicant's counsel and exceptions were filed on the extension date, counsel failed to notify other parties of the time extension allowed, as required by Rule 1.21(b) of Rules of Practice. While the exceptions have been considered, counsel is cautioned that failure to observe that requirement may result in rejection of future pleadings.—Dennis, 92 M.C.C. 135 (136).

Since assertions in applicant railroad's exceptions concerning its relations with motor carrier which formerly performed auxiliary service for it are not considered because not substantiated by the record, position of that carrier and protestants will not be prejudiced by their continued presence and no good purpose would be served by granting motion to strike.—Erie-Lackawanna R. Co. Extension, 91 M.C.C. 21 (26).

Applicants were advised that their "peti-

tion to set aside proposed report and order," submitted within the time allowed for filing exceptions, would be accepted as exceptions if the prescribed number of copies were furnished together with a certificate of service in accordance with the Rules of Practice; however, because of their failure to supply such certificate in time, the pleading was not perfected until after the recommended order denying the application became effective by operation of Law. Thereafter, it was accepted as a petition for reconsideration.—Sparacino, 91 M.C.C. 349 (349-50)*.

Although one protestant failed to reply to applicant's exceptions within time provided by Rule 1.23(a) of Rules of Practice, its late-filed reply does not present any new issues and consideration thereof should in no way prejudice applicant; therefore Rule 1.23(a) is waived and tendered reply accepted for filing as part of record for consideration.—Nationwide Carriers, Inc., Extension, 89 M.C.C. 663 (664)*.

Embraced proceeding handled under modified procedure, in which the parties waived issuance of a recommended report, was submitted subsequent to effective date of the recommended report; as a result, protestants' statements in exceptions relative to the embraced proceeding are not responsive to anything in the recommended report; motion to strike such statements, granted.—Cement and Mortar—Ill. & Mo. to Ill., Ind., Iowa, & Ky., 321 I.C.C. 166 (167).

Pursuant to Rule 1.86 of Rules of Practice, motion to strike certain statements in intervener's exceptions, on ground that matters referred to are not properly of record, is sustained when no special permission respecting such statements was granted.—Assembling Rates at Charlotte and Greensboro, N.C., 318 I.C.C. 429 (430).

Exceptions of one of two applicants for similar authority, which raise issues pertinent only to proceeding on the other application, to which it is not a party, may not be considered. —Dealers Transit, Inc., Extension, 88 M.C.C. 375 (376).

Applicant's failure to except to examiner's recommended denial of a portion of his claimed "grandfather" rights should not be considered a waiver of such rights, which are statutory.—Hollebrand, 88 M.C.C. 685 (687)*.

Since protestant's authority to transport acids does not embrace vinegar, it has no standing to object to examiner's recommended grant of authority to applicant to transport vinegar between points served by protestant. —Eirckson Transport Corp. Extension, 92 M.C.C. 122 (124).

215. Modified procedure.—[Vols. 17-19].—Pursuant to rule 1.50 of the Rules of Practice, facts asserted in any pleading filed under modified procedure must be sworn to by persons having knowledge thereof, which fact must affirmatively appear in the affidavit. Evidence pertaining to one motor carrier's claimed line-haul costs, which was presented through a copy of a telegram to traffic manager of principal proponent of considered rates, failed to meet that requirement of rule 1.50 when it was not sworn to by any officer or employee of the carrier.—Hides and Pelts from Texas to Ill., Mo., and Wis., 316 I.C.C. 243 (244).

See also Davis & Randall, Inc. v. United States, APA, 5 USC *Hearing*.

The rule of administrative discretion to hold a hearing to gather relevant facts in an investigation and, also, to assign a proceeding for further hearing or rehearing at any time while it is still pending, is equally applicable to a proceeding handled under modified procedure.—Schreiber Trucking Co., Inc.—Investigation, 91 M.C.C. 91 (94-5)*.

Examiner's acceptance of complainant's evidence consisting of a Coast and Geodetic Survey report as establishing, prima facie, that Lincolnton, Ga., is beyond defendant carrier's authorized radius of 100 miles from Atlanta did not violate any of defendants' legal rights or privileges; under Rules of Practice governing modified procedure, defendants could have requested oral hearing for cross-examination of persons submitting verified statements and exhibits, and they were given opportunity to submit verified statements and exhibits to refute complainant's evidence; argument that they could have exercised those legal rights but chose not to do so is entitled to no weight.—Hennis Freight Lines, Inc. v. Ohio Southern Exp., Inc., 88 M.C.C. 168 (170-1).

While defendants had no duty or legal obli-

gation to submit evidence in rebuttal to complainant's verified statements, in following that course of action they were aware that, should complainant establish a prima facie case, they would receive an unfavorable examiner's report and his recommended order could contain a provision ordering them to cease and desist from unauthorized operations.—Id., p. 171.

226. Prehearing conferences.—[Vol. 18].—Protestants' request that report of the commission's field staff (prepared from facts and opinions obtained at informal prehearing conference of interested parties) be incorporated in the record, denied. While notice of the prehearing conference stated that no oral hearing was contemplated, the matter was subsequently assigned for formal hearing; and when such procedure is followed, the issues are considered de novo at the hearing and no weight can be given to preliminary administrative handling. Therefore, it is clear that disclosure of the field report and its receipt as evidence would be a grossly improper use of administrative discretion; furthermore, since protestants do not allege that facts were presented at the prehearing conference which were not introduced in evidence at the formal hearing, it is clear that they will not be prejudiced by denial of their request.—Chicago, Ill., Commercial Zone, 88 M.C.C. 329 (331)*.

250. Investigations by commission.—[Vols. 14, 15, 17-19].—See also Burlington Truck Lines v. United States, §212(a), n. 10.

Disclosure of grand jury evidence for use in investigations by administrative agencies, see Grand Jury Proceedings, 309 F. 2d 440.

The commission's power to investigate whether respondent has failed to comply with any of its statutory obligations is expressly conferred by §204(c), and reference to §212(a) in order of investigation is to apprise respondent of the statutory basis for penalties or sanctions that may be invoked if there is found to be a willful violation of commission regulations or willful failure to comply with an order entered as result of such an investigation. Without §212(a), any order entered under §204(c) would be ineffectual to compel compliance; and order instituting instant investigation under a combination of §§204(c) and 212(a) does not provide for any action or penalties not expressly authorized by both.—Safeway Trails, Inc.—Investigation and Revocation, 91 M.C.C. 936 (948-9)*.

Also, contrary to respondent's contention that instant investigation should be dismissed because procedural requirements of §9(b) of Administrative Procedure Act were not followed, the right to notice and the opportunity to achieve compliance granted by §9(b) is expressly made inapplicable to cases of willfulness. And since order instituting the investigation specifies that respondent's certificates may be suspended or revoked only for willful violations, the necessity of a showing of "willfulness" as a prerequisite to suspension or revocation clearly exempts the investigation from those provisions of APA—Id., p. 949.

As purpose of investigation is to determine whether respondent is conducting operations for which authority is required, the commission's right of inquiry is not confined strictly to the geographical scope of order instituting the investigation. Use of "including" prior to naming of States in that order evinces intent to consider operations in other States besides those specified.—Kapke Investigation of Operations and Practices, 91 M.C.C. 377 (387).

See also Pennsylvania Public Utility Comm. case, n. 52, above.

Inasmuch as investigation to determine whether respondent is unlawfully transporting property not authorized by its certificate is authorized by §§204(c) and 212(a) and its legality is conceded by respondent, contention that the proceeding should be dismissed on ground that the commission, acting in dual capacity as prosecutor and judge, is likely to be biased and that a court action would afford a more impartial adjudication, is deemed to be without merit.—J. B. Acton, Inc. —Investigation and Revocation of Cert., 89 M.C.C. 59 (61)*.

There is no merit to protestant's argument on exceptions that the commission should initiate an investigation on its own motion into the question of removal of the §203(b8) exemption at New York and Philadelphia as a solution of the problems of local competition of regulated with exempt carriers. Protestant's petition in instant proceeding for re-

moval of the exemption at New York was rejected without prejudice to its filing of a petition for reopening of the New York commercial zone investigation, but it has filed no such petition.—Distribution Rates in Eastern Central Terr. Cities, 319 I.C.C. 410 (416-7).

The commission is empowered, upon an adequate record, to promulgate leasing regulations which may materially affect the financial arrangements between authorized carriers and lessors of equipment. If protestants believe that the use of leased equipment has a demoralizing effect on the transportation industry, and that use of owner-operators should be curbed or prohibited, they may petition the commission to institute an appropriate rulemaking proceeding.—Meats and PHP, Central & Western to Far Western States, 319 I.C.C. 667 (677).

Matters raised concerning spotting of trailers and requirement of observance of a detention rule by other than common carriers are beyond scope of proceeding on proposed rule for determining charges for detention of vehicles by consignors or consignees, as indicated by carrier conference's petition, the public notice, and the order of investigation.—Detention of Motor Vehicles—Middle Atl. & New England, 318 I.C.C. 593 (606)*.

Rail protestants' request for investigation of rates of two other motor carriers identical with that proposed, on ground that otherwise they would be compelled to reduce their potentially competitive rate, denied, since they have failed to show that they are unable to compete for involved traffic at reasonable rates or that complaint proceeding would not be more appropriate.—Sheet Steel, Galvanized—St. Louis to Marshalltown, Iowa, 318 I.C.C. 589 (590).

See also Pennsylvania Truck Lines case, §206(b), n. 25.

Following examiner's findings in report on prehearing conference that both shippers and eastern motor carriers are now opposed to prescription of minimum rates on iron and steel articles, that pendency of instant investigations has had a stabilizing effect on the motor rate structure and acted as a deterrent to rate cutting, that findings in prior reports have provided a standard of minimum rates with which to compare proposed reductions, and that the growth of rail "piggyback" service has substantially changed the competitive situation, investigations of iron-and-steel rates of motor and rail carriers in eastern territory are discontinued.—Iron and Steel Articles—Eastern Common Carriers, 314 I.C.C. 755 (757, 758)*.

See also Johnstown Motor Freight, Inc., case, §207(a), n. 10.

251.——Entry of order.—[Vol. 19].—Though findings and resulting orders in investigation by the commission to determine lawfulness of charges assessed on shipments of household goods during certain periods were declaratory in nature, they followed an adversary proceeding in which the critical question was sharply disputed. The commission sought by its investigation to remove any uncertainty as to applicability of the tariffs under consideration because of inadvertent omission of a footnote; it ruled against respondents in the administrative proceeding and found certain past charges made contrary to that ruling to be in violation of §217(b); it then ordered the proceeding discontinued, which, following denial of rehearing, constituted a final order. —National Van Lines, Inc. v. United States, 326 F. 2d 362 (367)*.

Such a determination, made under statutory safeguards and subject to judicial review generally, cannot be said to have no legal effect. By not making the refunds the commission found should be made, the carriers have already been found to be in continuing violation of §217(b), which could well jeopardize their certificates or permits to do business. Moreover, the commission ruling could serve as prima facie evidence against the carriers in actions by them for refund of payments deducted by the Government on basis thereof, and in suits by shippers for refunds the commission report (incorporated in the final order) would be available to the courts for their guidance. In its present posture the order has not removed any uncertainty, and until it is either changed by the commission or judicially reviewed by a court, the confusion will continue; order of the district court dismissing carriers' class action seeking review of the order, reversed and the cause remanded for a hearing on the merits.—Id., pp. 373-4.

Record of proceedings before the commission amply supports its findings in investigation proceeding that the policy of requiring racial segregation in facilities used for interstate commerce has been practiced on such a regular basis that case-by-case action initiated by individual complainants is not an adequate remedy; and the commission had power to implement §216(d) by issuance of a general order prescribing regulations to prevent race discrimination between passengers in vehicles or terminal facilities when used in interstate commerce.—State of Georgia v. United States, 201 F. Supp. 813 (815)*.

While certain of defendants' past practices violated the commission's regulations governing lease and interchange of vehicles, to extent that they amounted to an unlawful lease of one defendant's operating rights to the other, the record establishes that such improper activities were not performed with any willful intent to violate the regulations, and in any event have ceased. As defendants' subsequent and present arrangements appear to be in conformity with the regulations, no useful purpose would be served by entry of an order requiring them to cease that which has already been terminated.—Whitefield Tank Lines, Inc. v. Springer Transfer Co., 96 M.C.C. 285 (291-2).

Where the end result of investigation proceeding will be the entry of a cease-and-desist order requiring respondent to refrain from any violations of the act found to exist, such action is remedial in nature, since effect of the order is, not to punish or fasten liability on respondents for past conduct, but to ban specific practices for the future in accordance with the general mandate of Congress. A cease-and-desist order of that nature is not a penalty or forefeiture within provisions of 49 USC §47; motion to dismiss investigation, on ground that Bureau of Inquiry and Compliance's calling respondent as a witness and concurrently granting him immunity from any penalty or forfeiture vitiates the proceeding because it contemplates a punitive order, is therefore overruled.—Farmers Feed & Supply Co.—Investigation of Operations, 96 M.C.C. 409 (412, 413)*.

The commission is empowered by §204(c) and the requirement of Federal-State cooperation in the national transportation policy to require a motor carrier to cease and desist from subterfuge operations conducted under color of interstate authority to evade State regulation (citing 348 US 61 and 359 US 171). Defendants' conduct of essentially intrastate operations over physically interstate routes specified in their certificates is an attempt to defeat Pennsylvania laws and is not authorized by their certificates; cease-and-desist order entered enjoining defendants from using their interstate certificates to evade or subvert lawful regulation by the Commonwealth of Pennsylvania,—Pennsylvania Public Utility Comm. v. Hudson Transp. Co., 88 M.C.C. 745 (748-51)*.

The commission may order anyone to cease engaging in unauthorized operations, and may order participants who are, as stated in §2 of Elkins Act, "interested in or affected by" such unlawful operations to cease their participation therein. It is therefore unnecessary to decide which of three respondents controlled the instant operations found to be unlawful and thus was conducting rather than participating in them; all three should be ordered to cease and desist from conducting or participating in those operations. And though the involved operations are no longer being performed, since they are found to be unauthorized it is still deemed necessary to enter such an order.—Great Western Motor Lines, Inc. —Investigation, 96 M.C.C. 522 (525).

Although individual controlling corporate respondent found to be engaged in unlawful for-hire operations is not named a respondent, and no order may be entered against him, the principles set forth in report on investigation are applicable to any activities he may pursue in future, and entry of a cease-and-desist order against the corporation is appropriate. Moreover, as anyone directly connected with the unlawful operations must be considered a participant therein, the order should apply to all additional respondents, including a "drivers' service" said to have disbanded, but as to whose dissolution de jure there is no formal evidence.—American Equipment Rental, Inc.—Investigation, 96 M.C.C. 383 (387).

Since principal respondents' transportation of sugar is found to be unauthorized for-hire

carriage rather than incidental to a bona fide commercial noncarrier enterprise, cease-and-desist order is directed to all interstate sugar transportation performed by them, without regard to whether they transport shipments to their warehouses or to broker-arranged customers, but is not directed to their bona fide warehousing or local distribution of sugar. And since respondent brokerage company has profited in utilizing services of the principal respondents and has had full knowledge that their operations constitute for-hire transportation service, it must be deemed to be interested in such operations within meaning of §2 of Elkins Act; cease-and-desist order entered against it also.—Stewart—Investigation of Operations, 89 M.C.C. 281 (288-9).

Although respondent carrier's recent efforts in establishing and maintaining compliance with the statute and the commission's regulations are commendable, its admitted past violations with respect to rate concessions, improper description of commodities on freight bills, and extention of credit to shippers, require entry of cease and desist order to assure continued future compliance. —Silver Line, Inc., Investigation and Revocation, 96 M.C.C. 173 (176, 177).

In addition to defendant shipper association found to have engaged in unauthorized for-hire motor carrier operations, and equipment-leasing company found to have participated therein, cease-and-desist order should be issued only against those officers, employees, and board members not known, at time of the hearing, to have ended their connection in such capacities with defendant association. While most of the shipper defendants were identified as having been members of the association, the evidence fails to show specifically, or at all, in which of its functions (freight forwarding or motor carriage) they may have participated, and in most instances, whether they tendered any shipment to it.—Natl. Motor Frt. Traf. Assn., Inc. v. Internatl. Shippers, 94 M.C.C. 440 (447-8).

Termination of unlawful common control of two carriers in violaton of §5(4) was in response to a field investigation instituted by the commission under §§5(7), 204(c) and 212(a) rather than the voluntary act of the parties; therefore, in view of the long-continued nature of the violation, the close friendship of individuals controlling the two carriers, and the demonstrated disinterest of acquired carrier's president and owner in its operation, entry of a cease-and-desist order enjoining resumption of the control violation is deemed advisable. Issuance of such order cannot possibly injure any of respondents if in fact they do not continue or resume the unsanctioned control of one carrier in common interest with the other.—Jimmy Stein Motor Frt. Lines, Inc. v. Mecury Frt., 93 M.C.C. 635 (642).

As evidence respecting respondent dairy company's transportation of salt and canned goods is insufficient to permit any conclusion as to its lawfulness, cease-and-desist order is issued only against its sugar operations, which are found to constitute unlawful for-hire carriage; however, it is admonished to carefully examine its present and future operations in light of the commission's discussion, so as to avoid any unlawful transportation.—Clearfield Cheese Co., Inc. —Investigation, 92 M.C.C. 504 (510)*; and since the record was not earlier and more fully developed respecting the past pattern of respondent refiners' and broker's dealings with others engaged in unlawful for-hire carriage in guise of private carriage, order entered enjoins only their participation in the principal respondent's sugar operations; but they , too, are admonished to exercise care in their future dealings to avoid entering into similar transactions involving unlawful for-hire carriage.—Id., p. 510.

Respondent packing company ordered to cease and desist from all transportation of sugar under described buy-and-sell operations from east and south coast sugar refineries to points in destination States served in June 1960, without regard to whether such sugar is transported to a customer or to its Indiana warehouses. Such order is not directed to its transportation of sugar used in its factory or retailed in its supermarket, or to its warehousing of sugar, and should not affect its right to distribute sugar from a warehouse provided such operations are conducted as a primary business, or its right to perform transportation within scope and in furtherance of a valid nontransportation business.Morgan Packing Co., Inc.—Investigation of Operations, 92

M.C.C. 48 (61).

Respondent sugar refiners and their agent brokers have participated in and are interested in the principal respondent's unlawful sugar operations; their dealings with it have contributed to success of those operations and they themselves have benefited therefrom; in addition, they have full knowledge of every significant aspect of such activities and generally know the ultimate destination of every shipment of sugar picked up by that respondent in those operations. It is unnecessary to find that they knew or should have known that the principal respondent's sugar operations were unlawful before they may be ordered to cease and desist from participating with it in its buy-and-sell activities; however, because the record was not earlier and more fully developed respecting the past pattern of respondent refiners' dealings with others engaged in unlawful for-hire carriage in guise of private carriage, order entered conforms with that issued in 82 MCC 237.—Id., p. 61.

While entry of a cease-and-desist order against participating shipper is current practice in cases of unauthorized for-hire service under purported lease arrangements, recommendation to discontinue proceeding as to the shipper is consistent with commission's prior policy, and order against shipper-respondnt which has not filed any pleadings on exceptions would be inappropriate at this time. However, shipper is admonished that any willful evasion of regulation by any person, including a shipper, is a misdemeanor under §222(c).—Zirbel Transport, Inc., Investigation and Revocation, 91 M.C.C. 705 (710).

It is not important whether shipper respondent is using the title respondent's unlawful service westbound, or in engaging with latter in accomplishment of two unlawful for-hire operations, since regradless of shipper's participation the unauthorized transportation in both directions is fully attributable to the title respondent; order to cease and desist from the unlawful transportation westbound is entered against both. However, since order of investigation and prehearing notice indicated that the investigation would concern only the (westbound) transportation of lard, an order to cease and desist from the (eastbound) transportation of wine would be improper. Title respondent is admonished, however, that its continued for-hire transportation of wine will subject it to penalty provisions of the act.—Center America Corp.—Investigation of operations, 88 M.C.C. 740 (744).

Although respondent has taken prompt action to correct past failures to comply with orders and regulations respecting identification of trip-leased equipment, disclosure of shipments on express receipts, and obtaining and keeping on file medical certificates, logs, and vehicle condition reports from drivers of trip-leased equipment, and has taken reasonable steps to prevent their recurrence and avoid other violations, it is still far from being in satisfactroy compliance with hours-of-service requirements. Therefore, to avoid necessity of a new proceeding should any of such violations be continued or resumed, order is entered requiring respondent to cease and desist from all violations discussed, including those terminated prior to hearing, and commanding it to achieve and continue compliance with such orders and regulations, the order to remain in effect for 1 year, during which the proceeding will be held open for consideration of suspension or revocation of respondent's certificate if compliance is not reasonably forthcoming or is not sustained.—Safeway Trails, Inc.—Investigation and Revocation, 91 M.C.C. 936 (950)*.

And respondent's acceptance of certificate granted in extension proceeding will be deemed to constitute agreement by it that order entered in investigation proceeding shall apply to that certificate and shall subject it also to possible suspension or revocation or to any further order that the commission might subsequently enter in the investigation.—Id., p. 951.

While the for-hire transportation found to be unlawful has been discontinued, entry of a cease-and-desist order is necessary to insure that respondents will not resume such transportation in the future. It is also desirable that respondents and other carriers and shippers contemplating or participating in such operations be apprised of their unlawful character and of the fact that willful evasion of motor carrier regulation is a misdemeanor under §222(c).—Kapke Investigation of Operations and Practices, 91 M.C.C. 377 (380-1); similar-

ly, since unauthorized contract carrier operation could be resumed at any time, without a cease-and-desist order, order is entered against corporate respondent and one individual respondent. However, though the other individual was equally involved in the operations, no order may be entered against him as he was not served with notice of the investigation.—Western Shippers Assn., Inc.—Investigation, 88 M.C.C. 575 (577, 578).

Though the joint board found that respondent's unauthorized transportation of shingles and shakes was performed under an honest misapprehension that they were within exemption of §203(b6), and there is no evidence that he has continued such transportation since being advised of its probable illegality, cease-and-desist order is entered.—Everett—Investigation of Operation, 88 M.C.C. 784 (785, 788).

While mere fact of respondent's discontinuance, prior to hearing, of its unlawful for-hire transportation of certain commodities not within scope of its primary business as a dealer in feed and flour ingredients and wholesale grocery items does not warrant dismissal of investigation as to those operations, whether any purpose would be served by entry of a cease-and-desist order against their performance depends on such factors as respondent's voluntary discontinuance of the questionable operations, its good faith in performing them, its cooperation with Government officials, and sincerity of its professed intention not to engage in those practices in future. In determining that question conclusions of the trial examiner who heard the evidence are entitled to great weight.—Smith Grain Co., Inc., Investigation of Operations, 86 M.C.C. 767 (773).

Although the commission has broad discretion to determine whether or not a cease-and-desist order should be entered, that discretion is subject to a rule of reason which requires more than a mere suspicion, contrary to the evidence and the finding of the trial examiner, that a resumption of discontinued practices may reasonably be expected. No reason appears for disturbing examiner's conclusion that an order respecting those particular operations is unnecessary.—Id., p. 773.

However, although respondent is a private carrier in transporting sugar sold by it directly from its warehouses, where sales are arranged by a broker its primary economic function is to provide transportation of the sugar for the broker or latter's customer; such transportation is unauthorized for-hire carriage and respondent is ordered to cease and desist therefrom.—Id., p. 772, 773.

Respondent dairy company's backhauling of sugar being found to constitute unauthorized for-hire carriage not in furtherance of its primary business, cease-and-desist order is directed against all of its transportation of sugar in interstate commerce, whether to its warehouse or to customers, but not against its warehousing of sugar at Milwaukee or local distribuion therefrom.—Meinerz Creamery Co.—Investigation of Operations, 88 M.C.C. 77 (85).

Cease-and-desist order is also entered against respondent sugar refiners and brokers directing them to abstain from participating in any operation of the character found to be unlawful; their dealings with the dairy company have contributed to the success of its sugar transportation activities, and entry of order will do no more than require them to stop using the service found to be unauthorized; and its is unnecessary to find that they knew or should have known that the dairy company's activities were in violation of the act before they may be ordered to cease and desist from dealing with it, since their own dealings constitute participation in violation of the licensing requirements of the act.—Id., p. 85-6.

Respondent's furnishing of driveaway service for private automobiles from Cleveland to stated destinations, utilizing nonprofessional drivers, being found to constitute unauthorized common carriage for compensation in violation of §206(a)(1), cease-and-desist order entered.—Spencer—Investigation of Operations, 88 M.C.C. 243 (246)*.

Section 204. (d) [*§304(d) U.S.C.*] Application of sections 14 and 16(13) of this title.—[Unchanged. See Vol. 11, p. 9393,]

Amendment, see footnote, p. 9393.

Notes of Decisions

Volume 9-p. 7939; Volume 11—p. 9393; Volume 12—p. 10369; Volume 13—p. 11060; Volume 14—p. 11583; Volume 15—p. 12187; Volume 16—p. 12835; Volume 17—p. 13527; Volume 18—p. 14323; Volume 19—p. 15565.

1. Reports of the commission.—[Vols. 9, 12-15, 17-19].—Part I, §14(1), n. 1. See also APA, 5 USC, Reports, below.

Although the commission is required by statute to make a written report setting out its findings, conclusions and decision, together with its reasons therefor, it is not required to make detailed findings of fact; it is only necessary that the essential basis of its order appear in the report so that the court is satisfied that it has performed its function. Thus, the commission is not required to make specific subsidiary findings with respect to "willfulness" of intervenor-applicant's past unlawful operations when that issue was not of "manifest importance in determining applicant's fitness; record clearly shows that adequate consideration was given to the issue of willfulness; and specific subordinate findings in the report provide adequate and rational support for the commission's decision and order granting the authority sought; sustained.—Armored Carreir Corp. v. United States, 260 F. Supp. 612 (615-7)*.

The commission need not refer in its reports to all the evidence presented in the proceeding; and it is not required to discuss each item presented to it nor to evaluate separately the testimony of each witness.—E. B. Law and Son, Inc. v. United States, 247 F. Supp. 846 (849)*.

If the reviewing court is to rule, with any degree of certainty, that the commission did not act arbitrarily in denying plaintiff's application for authority to operate proposed limousine service, its opinion must be clarified. While neither a detailed anaylsis nor an opinion written with special proficiency is required, the commission must make sufficient explanation to enable the parties and the court to comprehend its action. The opinion under review is so drafted as to require speculation on the court's part to pin down the theory on which plaintiff's application was denied; reversed and remanded for further proceedings not inconsistent with the court's opinion.—Arrow Line, v. United States, 256 F. Supp. 608 (612)*.

See also Dixie Ohio Express, Inc. v. United States, §207(a), n. 24.

In denying part of the authority plaintiff sought, the commission may have been justified in concluding that existing carriers should be protected and that public convenience and necessity required that plaintiff not be authorized to serve points which two existing carriers had authority to serve; however, it made no specific findings directed to a choice between plaintiff and the existing carriers, other than its conclusion that proposed service would be competitive and that there was no clear showing of inadequacy of present service. This is not sufficient, particularly in view of its findings as to need for proposed service. In order to review the commission's action, the court must know the basis for it; portion of the commission order which partially denied plaintiff's application must be set aside and the cause remanded to the commission for action in accordance with the court's opinion.—Vincent Montone Transp., Inc. v. United States, 231 F. Supp. 484 (488-9)*.

10. Production of record by commission.—[Vol. 16).—The commission is not required to furnish internal reports or open up its confidential files to complainant carrier (respondent in consolidated commission proceeding involving an investigation, a reopened "grandfather," and other proceedings) to be used for the stated purposes of determining whether the investigation was undertaken as result of a field investigation or on complaint of another carrier and to ascertain the interpretation placed on carrier's permit by the commission's employees while in the process of handling the "gandfather" application. Decision in Jencks v. United States, 353 US 657, is wholly inapplicable in action to enjoin and set aside the commission's orders; and the Jencks Act, 16 USC §3500, is not helpful

to complainant as it applies only to discovery in a criminal prosecution.—Zuzich Truck Line, Inc. v. United States, 224 F. Supp. 457 (461-2)*.

Even assuming that it might have been proper procedure to have at least turned over the commission's files to the trier of facts for an *in camera* inspection of the documents so as to determine which ones were not confidential and clearly relevant to the issues before him, carrier made no request for such an inspection.—Id., p. 462.

Section 204. (e), (f). [§ *304 (e), (f) U.S.C.]* Use of motor vehicles not owned by motor carriers.—[Unchanged. See volume 17, p. 13527.]

Cross Reference

See §202(a), n., 10, vols. 15-17, established Note Numbers before §204 (e),(f) was enacted.

Notes of Decisions

Volume 18-p. 14324; Volume 19—p. 15566.

2. Construction and interpretation.—Long continued and unvarying practice of the commission and of Congress in treating "perishable property" and "livestock" as separate, distinct, and mutually exclusive terms has imparted to those terms, particularly when used in juxtaposition in same statutory setting, the character of terms of art; thus in the relation between §§204(f) and 203(b6), "perishable property" in former excludes "livestock" in latter and, conversely, "livestock" is not embraced in "perishable property." Context of the act does not call for any interpretation different from meaning imparted to the words in question by their long legislative and administrative construction; and this construction is entirely harmonious to the two sections.—Atchison, T. & S.F. Ry. Co. v. Unites States, 209 F. Supp. 35 (42)*.

In construing §204(f), the commission was bound as a matter of law to follow the meaning which "perishable property" has acquired as a term of art, particularly since its own 70 years of construction had contributed to that meaning; it was not free to depart from its long and unvarying construction. Moreover, the ambiguity which the commission professed to find was not a real ambiguity, since an entirely clear and nonambiguous construction was immediately at hand for precise application. As perishable property does not include livestock, and the commission was not faced with a problem of ambiguity, the commission erred in consulting the legislative history of §204(f); in such circumstances, legislative history may not be consulted to change the plain meaning of words thus established. —Id., pp. 42-3.

10. Leasing and interchange of vehicles.—[Vols. 18, 19].—Defendant motor carrier was not liable for negligence of owner-driver of tractor which carrier leased from him and which collided with an automobile, injuring plaintiffs, when, since owner-lessor was driving his tractor home after completing his work for carrier and while off duty, he was not engaged in his employer's business, nor was he doing anything for the employer's benefit. The commission's leasing regulations do not impose liability on a motor carrier using leased equipment for negligence of the owner-driver thereof greater than the liability imposed when the carrier's equipment is being operated by its employee-driver. Therefore, viewing the evidence in light most favorable to plaintiffs, lower court did not err in granting summary judgment in favor of defendant carrier.—Wilcox v. Transamerican Freight Lines, Inc., 371 F. 2d 403 (404-5)*.

Liability rested on both lessee interstate carrier and lessor intrastate carrier, for purposes of pending tort action arising from truck-automobile collision which occurred while driver of leased tractor and trailer (lessor's employee) was returning that equipment to lessor pursuant to lessee's instruction. At the time of the accident the driver had not abandoned the service of either lessee or his

employer, but was continuing to act for their mutual benefit and was subject to their joint control, even though lessee's decal had not been removed from the equipment, and it did not have a receipt for possession from the owner, as required by the commission's leasing regulations; and the mutually beneficial lease had no provisions respecting exclusive possession, control and use or the assumption of liability. However, failure to include such provisions in the lease would not excuse lessee from liability it might otherwise have; and lessee's liability would not release lessor if, at time of the accident, it held a joint right of control over the driver.—Vance Trucking Co. v. Canal Insurance Co., 249 F. Supp. 33 (35-8, 39).

While lessee had used considered equipment and driver to transport a shipment of tobacco, except for duration of lease of, or compensation for, a vehicle used in hauling "exempt commodities," all of the commission's leasing regulations are applicable without regard to the commodity hauled. Therefore, since obviously the statute and regulations issued thereunder are not designed to excuse a party from liability which he might otherwise have, a finding that lessee is responsible under the act and regulations does not preclude a finding that lessor was also responsible. Lessor and lessee, and their insurers, must defend the tort action which precipitated controversy as to agency of driver of the leased equipment at the time of the accident.—Id., p. 39.

Although a written form of trip lease was used for convenience to outwardly satisfy requirements of the commission, agreement between an intrastate and an interstate carrier under which they combined their resources, former's equipment and regular driver and latter's interstate authority, vehicle identification markers, and services on bill of lading, bookwork, etc., was not a lease in the true sense of the word. At most, there was only an arrangement between them whereby they could jointly deliver gasoline from North Carolina to Virginia for compensation; public liability provisions in the lease disregarded.—Carriers Insurance Exchange v. Truck Insurance Exchange, 203 F. Supp. 764 (765-6, 768)*.

It is immaterial whether the explosion which occurred during delivery of the gasoline was due to defect in portable pump used for unloading or to negligence of the driver; a question of public policy is involved. Lessor and lessee deliberately engaged in a dangerous enterprise in violation of the statute and the commission's leasing and safety regulations promulgated thereunder, and, consequently, neither should be relieved of complete liability for the results thereof when closeness of the wrongful conduct to the final unfortunate result is so manifest. The public policy inherent in the protection of the public is predominant. Affirmed.—Id., 310 F. 2d 653 (656-8)*.

Defendant is an "authorized carrier" as that term is used in the commission's leasing regulations, and as such is prohibited by §207.6(a) thereof from leasing equipment with drivers to private carriers or shippers. As that prohibition allows for exceptions only with respect to §203(b7) and (b8) of the act, no other exceptions apply, so that, even assuming exempt status under §203(b5) of cooperative to which defendant purportedly trip-leased vehicles with drivers, or assuming exempt status of the commodity transported (which defendant is not authorized to handle), the attempted leasing of equipment to the cooperative would continue to be legally prohibited by the leasing regulations. Moreover, the purported leases explicitly imposed all characteristic burdens of the transportation business on the purported lessor (defendant), and the operations were in fact conducted under its control (citing 368 US 370); such arrangements were therefore totally illegal by their very provisions and amounted to nothing more than specific contracts of transportation.—United States v. Lowther Trucking Co., 229 F. Supp. 812 (815-6).

The commission erred in holding that " perishable property" as used in §204(f) is ambiguous, erred in resorting to legislative history for construction of those words, and erred in holding that those words include in their meaning "ordinary livestock" in §203 (b6); therefore holding that private carrier's "trip-leasing" of equipment with drivers, after transportation of its own fresh meat and packinghouse products, to regulated carriers for

return hauls was within provisions of §204(f)(1), and the commission's leasing regulations issued pursuant thereto, must be set aside. Enforcement of the commission's order permanently enjoined, and the matter remanded to the commission.—Atchison, T. & S. F. Ry. Co. v. United States, 209 F. Supp. 35 (39, 42-3, 45)*.

Prior to amendment of September 15, 1961, exemption granted under certain conditions by §207.3 of the commission's leasing and interchange regulations from the requirements of those regulations, including §207.5 which expressly governs interchange of equipment by connecting carriers, was held valid by the Supreme Court (344 US 298); and that amendment did not change its validity. The "Red Book Plan," under which participating heavy haulers interchange loaded vehicles with drivers, is not shown to violate the act or the commission regulations, and plaintiff has not shown that members of that plan are unable or unwilling to meet the requirements of §207.3 of the regulations.—Robbins v. United States, 204 F. Supp. 78 (82, 83)*.

In order for equipment-leasing arrangements to be lawful, the carrier under whose rights the leased equipment is operated must assume full responsibility for the direction, conduct, and operation of such equipment while in its possession; unless that is done, the operation is that of the carrier owning the vehicle, and any movement over routes of the putative lessee would be unlawful. Although protestants question the validity of applicant's equipment-leasing arrangements, record does not provide sufficient facts for making such a determination; however, applicant is cautioned to ensure that its leasing arrangements are in compliance with those principles and with the commission's regulations.—Tompkins Motor Lines, Inc., Extension, 95 M.C.C. 472 (474-5, 479-80).

See also Barsh Truck Lines case, §207(a), n. 25 *Fitness*.

Under present equipment-lease contract, applicant-lessee has full direction and control of the vehicles, drivers, insurance, and the disbursement of operating expenses—albeit the latter will be reimbursed to it by the lessor. It is also noted that the lessor of equipment to applicant is 50 percent owned by applicant's two primary stockholders; thus, the favorable credit arrangement in the lease contract, including provisions (1) that lessor be obliged, at applicant's option, to provide an advancement sum for the reimbursement of operating expenses due applicant, and (2) the temporary withholding of payment of the rental fee by carrier in certain circumstances, seems nothing more than a liberal extension of credit by the leasing company to carrier. Applicant's operations under the lease conform to the requirements of the act and the commission's rules and regulations thereunder.—Florida Refrigerated Service, Inc., Extension, 94 M.C.C. 361 (362-3).

Vendor's transportation of bulk cement, performed in tank vehicles of an intrastate carrier under a lease of equipment with drivers, is not shown to have violated the commission's lease-and-interchange rules or to have constituted an unauthorized operation by lessor. Evidence is inadequate to establish that the intrastate lessor, rather than vendor, had actual dominion, control, and responsibility to the shipping public for the operations performed in its vehicles; on the contrary, vendor held out to the public to perform the service, and when a shipper had traffic to be moved it contacted vendor rather than the intrastate carrier.—Steel Transp. Co., Inc.—Purchase—Barry Transports, 93 M.C.C. 773 (776).

Vendee's lease of equipment to vendor under their joint-line operation appears to have been conducted in full compliance with the commission's lease-and-interchange regulations when protestants raised no objection to, and did not attempt to discredit, testimony of vendee's president that the equipment leased was completely under vendor's control and responsibility and that it complied with requirements as to drivers' logs and inspection of vehicles.—Cassens Transport Co.—Purchase—Speedway Transports, Inc., 90 M.C.C. 159 (165).

As stated in the prior report, the requirement of a written lease signed by the parties or their authorized agents or employees, a copy thereof to be carried in the leased equipment while it is in lessee's possession, is necessary to assure the objectives of §207.3(a) of the leasing regulations, including the fixing of

legal responsibility and control in the operation of vehicles leased by authorized carriers thereunder so as to assure effective implementation of the motor carrier safety regulations. Furthermore, there is no more easily ascertainable or appropriate time for the lessee's assumption of responsibility and control of the equipment than at the conclusion of the required inspection by lessee before its use.—Lease and Interchange of Vehicles by Motor Carriers, 89 M.C.C. 683 (684)*.

However, on reconsideration, it is not deemed necessary, or most reasonably calculated to further certainty, to designate the completion of a like inspection by lessor as the time when lessee's responsibility and control is terminated and lessor's reestablished. An inspection of leased equipment after use is not now required by the rules, and may not be immediately feasible or practicable in all circumstances. In any event, such an inspection requirement should more properly be the subject of a separate proceeding. Return of equipmnet to the owner or constructive owner should be made as easy as possibie consistent with the public's interest in certainty respecting control and responsibility; therefore, §207.4(a)(3) is modified so as to provide that lessee's responsibility shall terminate when lessor or its representative gives lessee or its representative a receipt specifically identifying the equipment and stating date and time of day possession thereof is retaken.—Id., pp. 684-5.

One contract carrier's trip-leasing of vehicles to another for delivery of shipments to points first carrier is not authorized to serve violates §207(a)(3) of the commission's leasing regulations, which provides that minimum duration of an equipment lease shall be 30 days. Nor does such operation involve an interchange of equipment permissible under §207.5 of the regulations, since that section does not apply to contract carriers.—Connell Transport Co., Inc., 95 M.C.C. 312 (314-5).

See also Kendall Co. case, §206(a)(1), n. 50.

Respondent's lease of all vehicles of another carrier for a 13-month period was obviously on an "as needed" basis when lessor continued to perform its own operations with the same equipment. Upon respondent's transmission of pickup orders to lessor, latter's vehicles and drivers were dispatched to pick up the loads from respondent's contracting shipper, and after delivery lessor forwarded the transportation papers to respondent. Lessor kept the drivers' logs and medical certificates in its files and did not transmit them to respondent; no receipts evidencing assumption and relinquishment of possession of the vehicles were issued by either party, and only occasionally were respondent's placards displayed thereon when used in its service. Clearly, respondent did not have exclusive possession, control, and use of the vehicles and did not assume complete responsibility for them, and they remained at all times under lessor's dominion. These practices violated §207.4(a), (b), and (c) of the leasing regulations.—C & R Trucking Co.—Investigation of Control, 93 M.C.C. 669 (679, 680).

The parties further failed to comply with requirements of §207.4(a) when respondent had no copies or records of the leasing agreement, and there is no showing that copies thereof were properly distributed to the parties involved, or that either a copy of the lease or the substitute certificate permitted by §207.4(d) was carried on the equipment used. Also, in leasing equipment to its contracting shipper, without first having obtained the commission's approval, respondent violated §207.6(b) of the regulations. Cease-and-desist order entered, and respondent admonished that future violations of the nature disclosed will invite drastic penalties.—Id., pp. 680, 681.

The regulations for lease and interchange of vehicles in no way affect the basic proposition that a motor carrier receiving traffic from another through interchange of vehicles with drivers must have and exercise control over operation of such equipment while in its possession. A mere paper agreement purporting to vest control in a connecting carrier is not enough; the carrier under whose rights the interchanged equipment is operated must in fact control the service to same extent as if it were the owner of the vehicle, and must control the vehicle to extent necessary to assume full responsibility to the shipper, the public, and the commission.—Dealers Transit, Inc.—Control and Merger, 93 M.C.C. 611 (619).

Under a separate agreement, survivor in

proposed merger leases its equipment with drivers to liquidating carrier from origin to destination, performing both pickup and delivery and billing and collecting of charges, paying liquidating carrier a percentage of revenues based on miles traveled under its rights. As the only witness presented to stand cross-examination on liquidating carrier's operations had little knowledge of its day-to-day operations and no knowledge of location of inspection station established at the carriers' common gateway or of identity of person relied on to inspect and placard the equipment, there is ample reason to doubt that liquidating carrier exercised any control over survivor's equipment and drivers while operating in former's territory; and cross-examination of applicants' witnesses was piercing enough to rebut any presumption that the purported interline operations were lawful.—Id., pp. 618-9, 620.

Purported interchange of vehicles between merger applicants violated the leasing rules, which require an independent inspection and transfer of control and responsibility to lessee, when the interchange movements were performed wholly with survivor's equipment and drivers, the same agent performed inspections for both carriers and signed the interchange agreement on behalf of both, or inspections for liquidating carrier were performed by employees of survivor; also, rental for former's use of latter's vehicles was not kept separate from revenue divisions between them, as required by the leasing rules. Such interchange was a mere fiction and the movements were controlled throughout by survivor, giving rise in effect to survivor's unlawful leasing of liquidating carrier's operating rights.—Kaplan Trucking Co.—Control—Thomas Boyd, Inc., 90 M.C.C. 419 (424-5)*.

Record also establishes that merger survivor and another carrier, of which it had unlawfully acquired control, similarly violated the leasing rules over a period of years; however, those violations have terminated and the related investigation proceeding is discontinued as to the second carrier. The two carriers are reminded, however, that, if joint operations are resumed, the investigation will be reinstituted should they fail to comply fully with the leasing rules and maintain operations separately and independently of each other.—Id., pp. 425-6.

When vendee made arrangements for interline of traffic with vendor, handled all paperwork concerning actual movements, and provided all equipment, with drivers paid by it, paying vendor $25 for each load moving under his rights, and there is no showing that vendor participated in arrangements for, or paid for, vehicle inspections, nor is it affirmatively shown that he even knew a vehicle was moving under his rights until the movement was completed, or performed any service in connection therewith, or treated drivers as his own employees, the evidence falls far short of showing compliance with the commission's lease and interchange rules, but shows instead that vendor's claimed bulk operations were commenced and continued under vendee's direction and control.—Liquid Transporters, Inc.—Purchase—Black, 93 M.C.C. 423 (427-8).

Following execution of purchase agreement, transferor's operations were almost entirely conducted by trip leases of transferee's equipment under arrangement whereby transferee retained 94 percent of revenues realized, paid all expenses of the physical operation, and employed and exercised sole control over the drivers. While the parties maintained paper compliance with the lease-and-interchange regulations, the vehicle arrangement was in fact used as a means of unlawfully leasing transferor's operating rights to transferee, and it would be improper in the circumstances to find a bona fide agency relation between transferor and transferee, who conducted the actual operations. Should the parties desire to continue such operations under a bona fide vehicle leasing arrangement, transferor must establish and maintain a degree of direction and control compatible with his status as a certificate holder, i.e., he must operate as a carrier.—Burns Motor Freight, Marlington, W. Va., Transferee, 93 M.C.C. 629 (633-4).

Even though a purported lease of equipment may comply in all respects with the commission's leasing regulations, it does not follow that activities carried on under such arrangements may not violate other provisions of the act, particularly §§5(4) and 206(a).

Arrangement whereby a bulk hauler leased tank trucks to a general-commodity carrier, not for purpose of augmenting latter's fleet to handle additional traffic generated by it, as contemplated by the leasing regulations, but primarily to enable the bulk hauler to solicit traffic for its vehicles which would otherwise move empty, is found to have resulted in an unlawful lease of a portion of the general-commodity rights and in unauthorized for-hire transportation by the bulk hauler, in violation of both those sections.—Tank Lines, Inc.—Purchase—S & N Freight Line, Inc., 90 M.C.C. 381 (384-5)*.

While under §207.3 of the leasing regulations an equipment lease need not be reduced to writing, the parties are still subject to §207.4(c) and (d) which require, in addition to an identifying placard, that unless a copy of the lease arrangement is carried on the vehicle a statement by the authorized carrier certifying that the equipment is being operated by it shall be carried thereon during the period of the lease. Administrative Ruling No. 104 interprets those provisions as allowing a carrier to choose whether it will make a written contract and carry it on the vehicle, or prepare and carry a certificate; it must do one or the other. Since it is not shown whether the certification requirement was met by parties to considered lease, they are admonished to give due consideration thereto in any lawful lease arrangement they may negotiate in future.—Id., pp. 385-6.

Under terms of leasing arrangement under which secondary movement of automobiles from St. Louis to Tulsa, Okla., under rights of respondent Haulers, is performed with equipment owned by respondent Speedway, which performs the initial movement to St. Louis, or with equipment previously leased to Speedway by Haulers, the vehicles leased from Haulers pass into Speedway's possession and under its full control and responsibility; such arrangement appears to be in no way illegal or contrary to the commission's leasing rules, and under rules 207.2 and 207.4(a)(4)(i) Speedway may be considered the owner of the equipment leased or subleased to Haulers.—Stewart—Investigation of Operations, 87 M.C.C. 681 (689).

However, technical compliance with the leasing and interchange regulations does not necessarily a lawful operation. A mere paper agreement that control is vested in the connecting carrier is not enough: a carrier under whose rights the interchanged equipment is operated must control the service to the same degree as if it were the owner of the vehicles, and must control the vehicles to the extent necessary to assume full responsibility to the shipper, the public, and the commission for transportation performed therewith. It is apparent that Haulers, which leases all its equipment from Speedway, does not exercise full and effective control over the transportation performed under color of its operating rights; moreover, it not only pays nothing for the privilege of trip-leasing equipment from Speedway, but receives a percentage of the revenue for permitting latter as ostensible trip-lessor to operate over its routes. Therefore, no lease of equipment exists, and the purported interchange arrangement is essentially an unlawful lease of Haulers operating rights.—Id., pp. 695-6.

Regulations of the Commission

27 FR 6546, July 11, 1962, Part 207: Lease and Interchange of Vehicles by Motor Carriers, §207.3 Exemptions—(a) Equipment used in the direction of a point which lessor is authorized to serve, modified, effective Aug. 13, 1962.

28 FR 264, Jan. 10, 1963, Part 207: Lease and Interchange of Vehicles, §207.4(a)(3) amended by addition thereto of subdivision (iii) Ice and snow control purposes, effective on date of service.

28 FR 827, Jan. 29, 1963, Part 207: Lease and Interchange of Vehicles, §207.10 revoked, effective March 5, 1963.

NOTE: For Republication and Redesignation of Regulations, see 32 FR 20003, Dec. 20, 1967.

33 FR 2847, Feb. 10, 1968, Part 1057 [former Part 307, formerly Part 207]: Lease and Interchange of Vehicles, §1057.4 (a)(3)(i) and (a)(3)(ii), §1057.4(c) and (d), and §1057.5(d) and (f) amended, effective Feb. 12, 1968.

Section 204a. *[§ 304a U.S.C.]* **Actions for recovery of charges; limitation of actions; definition; effective date.**—[Unchanged, except by the act of Sept. 6, 1965, Pub. L. 89-170, §6, 79 Stat. 648, which amended paragraph (2) to read as set forth below; and which renumbered paragraphs (5), (6), and (7) as par-

agraphs (6), (7), and (8), respectively, and added new paragraph (5), below. See vol. 18, p. 14372.]

(2) For recovery of reparations, action at law shall be begun against common carriers by motor vehicle subject to this part within two years from the time the cause of action accrues, and not after, and for recovery of overcharges, action at law shall be begun against common carriers by motor vehicle subject to this part within three years from the time the cause of action accrues, and not after, subject to paragraph (3) of this section, except that if claim for the overcharge has been presented in writing to the carrier within the three-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

* * * * *

(5) The term "reparations" as used in this section means damages resulting from charges for transportation services to the extent that the Commission, upon complaint made as provided in section 216(e) of this part, finds them to have been unjust and unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial.

* * * * *

Historical Notes

The commission recommends that §§204a and 406a be amended to make motor common carriers and freight forwarders, respectively, liable for payment of damages in reparation awards to persons injured by them through violations of the act.—Annual Report, 1962, p. 203; renewed, Annual Report, 1963, p. 19, Annual Report, 1964, p. 70.

30 FR 16050, Dec. 23, 1965: In view of enactment of Public Law 89-170, Sept. 6, 1965, the commission has approved a method by which motor carriers may be authorized informally to pay reparations to shippers in uncontested cases where the carrier is agreeable to making adjustments.

Historical Notes, see vol. 16, p. 12835; vol. 17, p. 13528; vol. 19, p. 15569.

Notes of Decisions

Volume 15—p. 12188; Volume 16—p. 12835; Volume 17—p. 13528; Volume 18—p. 14328; Volume 19—p. 15569.

10. Claims of and against Federal Government.—[Vol. 19].—Carrier's suit in Court of Claims for undercharges on that part of its transportation of Government shipments which occurred wholly within Germany is barred by statutory 3-year period of limitations when, by becoming a party to a §22 quotation containing rates on household goods between points in the United States and points in Germany, it had subjected itself to that time limitation provision. Shipments moved on Government bills of lading which referred to that §22 quotation and covered complete movement from origin to destination, plaintiff's bills were paid (pursuant to §66) on basis of the §22 rates for each of three legs of the trips, and its claims for undercharges on that part of services furnished abroad were submitted more than 3 years after payment. Adoption of plaintiff's view that, since transportation for which recovery is sought occurred in Germany, its suit is gov-

erned by 6-year limitation period in 28 USC §2501, would require splitting its single cause of action and the application of two statutes of limitation to a single contract of carriage. Plaintiff's petition dismissed.—Von Der Ahe Van Lines, Inc. v. United States, 358 F. 2d 999 (1000-2).

The 1958 amendment of §204a, limiting the Government's right of affirmative action to recover overcharges to 3 years, applies only to transportation performed and payments made after August 26, 1958, and does not affect claims for overcharges collected prior to that date.—Strickland Transp. Co. v. United States, 334 F. 2d 172 (179, Note 15)

Government's action for recovery of stipulated overcharges against ultimate distributees of assets of motor carrier which had transported the shipments (but subsequent thereto had ceased to do business) was not barred by two-year limitation of §204a because, as contended by the distributees, the bill of lading specifically subjected the Government to same rules and conditions as govern commercial shipments; those provisions clearly relate to actions to recover for damage to, or based on nondelivery of, shipments.—Stewart v. United States, 327 F. 2d 201 (205).

In action to recover amount claimed, on post audit, as overpayment on Government shipments, the Court of Claims has neither the authority to determine reasonableness of motor carrier's past charges, nor the authority to refer issue of reasonableness to the commission [citing 359 US 464]; thus, defendant is not entitled to deductions in issue on the ground that rates charged were unreasonable, or that, because the were unreasonable, they thereby became inapplicable.—Campbell "66" Express, Inc. v. United States, 302 F. 2d 270 (271-2).

20. Complaint seeking reparation.—[Vols. 15-19; was §204 (c), n. 20, vols. 11-14]. A justiciable question is presented by allegation that carrier violated its common-law duty in transporting an unrouted shipment over its interstate route at a higher rate than that applicable over its intrastate route between same points; since the issue is misrouting, not reasonableness of the rate as such, suit to recover damages in amount of difference between the two rates is not foreclosed by §216 (j), and principle of the T.I.M.E. case (359 US 464) is not controlling. Unlike ratemaking, there is no statutory procedure by which routing practices may be challenged in advance of shipment, nor is the shipper by truck given a statutory right to request a particular route of the carrier; in view of these weighty statutory differences, survival of a damage claim for misrouting is entirely consistent with the act. Absence of any judicial remedy would place shipper wholly at carrier's mercy, contrary to the overriding purpose of the act, whereas allowance of such actions gives neither an unfair advantage.—Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., 371 U.S. 84 (86-7, 88)*.

Although the commission has primary jurisdiction over routing practices, it does not follow that the courts are without power to award damages in every instance where the commission may not award reparation. Survival of a judicial remedy under the saving clause of §216(j) does not depend on whether the commission has primary jurisdiction to decide the basic question on which relief depends; survival depends on effect of exercise of the remedy upon the statutory scheme of regulation; according to §216(j), if the remedy is inconsistent with that scheme it does not survive.—Id., pp. 88-9.

Allowance of such a damage action, unlike one involving reasonableness of rates, nowise hampers efficient administration of the act; a misrouting claim does not jeopardize stability of tariffs or certificated routes, the sole issue being whether carrier routed the shipment over the cheapest available route, or made a showing of adequate justification for not doing so. Moreover, allowance of misrouting actions should have a healthy deterrent effect on utilization of misrouting practices by motor carriers,which in turn would minimize cease-and-desist proceedings before the commission.—Id., pp. 88.

Appellant's newly devised "contract" theory is merely a novel presentation of its claim for damages on past motor carrier shipments which is barred by decision in 359 US 464; and its alternative claim, that §216(j) grants it a common law remedy for appellees' "breach of contract," ignores the teachings

of the Supreme Court in that case.—Lynchburg Traffic Bureau v. Smith's Transfer Corp. of Staunton, Va., 339 F. 2d 478 (481)*.

See also McFaddin Express, Inc. v. Adley Corporation, 363 F. 2d 546, 28 USC §1331, n. 4.

Congress did not in express terms in 1965 amendment of §204a provide more than a judicial avenue to reparations; thus, the commission's decision to anticipate voluntary settlements before resort to the courts (by establishing informal procedure for settling uncontested reparations claims against carriers), and to make a rate determination for the convenience and protection of agreeing parties, was not a necessary consequence of the statutory change. Whether the commission should have so decided and, if so, what the precise form and scope of the procedure should be were questions for exploration in formal rulemaking. Accordingly, since the commission did not comply with rule-making requirements of §4 of the APA, orders under review are invalid.—National Motor Freight Traffic Ass'n v. United States, 268 F. Supp. 90 (93, 95-7)*.

Although question of reasonableness of motor carrier rates charged for transportation of government property during latter part of World War II was referred to the commission for determination prior to the decision in 359 US 464, under that decision neither the court nor the commission has authority to pass on allegations of unreasonableness of motor carrier charges for past shipments whether or not tariffs providing rates therefor are lawfully on file.—United States v. Garner, 236 F. Supp. 632 (635).

Although under Parts I and III the commission may determine the reasonable rate on a past shipment in absence of an applicable rate, under the Supreme Court's ruling in 359 US 464 it has no jurisdiction, even in such circumstances, to determine the justness and reasonableness of motor carrier rates charged on past shipments.—Newell v. Lux Art Vans Service, Inc., 318 I.C.C. 492 (494); however, the Supreme Court's decision has no application to overcharges and undercharges, and the commission has long held that it may make an administrative determination of rates applicable on past motor shipments even though it lacks authority to award reparation; therefore, where the only issue is applicability of the assailed rates, the commission has jurisdiction to determine that issue even though a suit for overcharges has been instituted in court and the court has not requested an advisory opinion.—Id., pp. 494, 495.

The commission has no authority under Part II to consider allegations of unreasonableness, unjust discrimination, or undue prejudice in motor-carrier rates on past shipments, or to award reparation.—Koss v. A.A. Lexington Moving & Storage Co., 315 I.C.C. 355.

The commision has no authority to pass on alleged unreasonableness of motor carrier charges on past shipments, whether or not tariffs providing rates therefor are lawfully on file. Decision in 359 US 464, that such an attack is foreclosed by §216(j) because inconsistent with the statutory scheme of regulation, emphasized the built-in protections against unreasonable rates that the act gives shippers prior to movement, and decision in 371 US 84 that there is no such protection against carriers' unreasonable routing practices does not apply to rates charged on shipments transported without proper authority. Section 206 prohibits carriers' engaging in unauthorized interstate transportation, and considered tariffs contained a restrictive provision concerning participating carriers' operating authority; requirements of §217 for publication and filling of tariffs, enforceable through provisions of §§204 (c), 212, and 222, amply protect shipper prior to movement under the circumstances. Complaint dismissed.—United States v. Garner, 319 I.C.C. 383 (388)*.

95. Limitation provisions, generally.—[Vols. 18, 19].— Two-year limitation of §204a on suits against motor carriers, at time stipulated overcharges were made on Government shipments, is not applicable in Government's action for recovery of those overcharges against ultimate distributees of assets of the motor carrier which, subsequent to period in which the claims arose, had ceased to do business. Statute of limitations does not apply to the United States in absence of a clear and manifest intent that it shall apply. Congress, in amending §204a and 49 USC §66 in 1958,

specifically made the limitation provision applicable to the United States under both sections; this indicates that Congress did not intend the United States to be bound by the two-year limitation of the statute prior to that amendment. [Citing 271 F. 2d 597 and 184 F. Supp. 42.]—Stewart v. United States, 327 F. 2d 201 (204).

While some shipments are barred as result of complainant's failure to file timely suit to recover claimed overcharges, others may not yet be barred by expiration of the 3-year limitation period, and the commission has discretion under §5(d) of Administrative Procedure Act to consider the issues presented as to such shipment.—Bemis Bro. Bag Co. v. Felten Truck Line, Inc., 316 I.C.C. 417 (418).

98. Complaints within 6 months after declination.—[Vol. 17].—Although §204a extends the statute of limitations to permit filing of an action at law to recover overcharges within 6 months after disallowance of the overcharge claim by carrier, since the 6-month extension period has expired and no suit for alleged overcharges has been commenced, the 3-year statute of limitations governs; pendency of a proceeding before the commission does not toll the statute for instituting actions at law. Furthermore, as to any shipments barred by statute, as a result of failure to file suit within the limitation period, the defense of the statute may not be waived; therefore, while defendant indicates willingness to refund any overcahrges found to be due, voluntary payment of any such claims would violate the prohibitions against unjust discrimination in the act.—Bemis Bros. Bag Co. v. Felten Truck Line, Inc., 316 I.C.C. 417 (418).

Section 205. [*§305 U.S.C.*] Administration. (a) Joint board; composition; references of matter to boards.—[Unchanged. See vol. 11, p. 9395.]

Amendments, see footnotes, vol. 9, p. 7941, 7942, vol. 11, p. 9395, Historical Note, vol. 17, p. 13530.

Notes of Decisions

Volume 9—p. 7942; Volume 11—p. 9396; Volume 12—p. 10371; Volume 13—p. 11062; Volume 16—p. 12836; Volume 17—p. 13530; Volume 18—p. 14332; Volume 19—p. 15571

2. Construction and interpretation.—[Vol. 19].—Application for authority to transport express in pup semitrailers in conjunction with passenger-carrying vehicles between Memphis and Jackson, Tenn., was properly assigned to joint board which includes a member from Arkansas, since West Memphis, Ark., is within the Memphis commercial zone. While applicant is limited in handling express as a passenger carrier to corporate limits of the communities served, and in proposed separate but related service might not intend to perform pickup and delivery outside the Memphis corporate limits, it has actually applied for authority to transport freight, which authority, if granted, would include the privilege of providing pickup and delivery services in the commercial zones of the municipalities involved.—Continental Southern Lines Extension, 88 M.C.C. 547 (549).

15. Jurisdiction of joint board.—[Vols. 11-13, 16-19; §205(b), v. 9].—When defendant's motion to dismiss complaint or strike certain portions thereof was overruled by the commission before the matter was assigned to a joint board for hearing, the board has no authority to reconsider that motion.—Armored Carrier Corp. v. B.D.C. Corp., 92 M.C.C. 665 (666).

The joint board to which broker application was referred exceeded its authority when it not only recommended that such application be denied, but went further and changed the nature of the entire proceeding in recommending that motor carrier authority be granted to a different applicant controlled by original applicant, inasmuch as no motor carrier application had been referred to it for hearing; latter recommendation must therefore be considered a nullity. Furthermore, though the broker application was correctly referred to a single-State joint board because the brokerage operation would have been conducted in a single State, the motor carrier operation recommended involves several States; and an

application for such motor operations must be referred to an examiner or, in the commission's discretion, to a joint board composed of members from the States in which the motor operations are to be conducted.—Anderson, 89 M.C.C. 786 (787-8).

Though applicant recommended by joint board to receive authority sought by three bus companies urges that the board's recommendation should be followed because it is intimately familiar with local conditions, and the commission gives careful consideration to conclusions and recommendations of joint boards in such local situations, it is clear beyond doubt that Congress, in providing for hearing by joint boards in matters involving three States or less, did not intend the commission to relinquish or subordinate its decision-making power and responsibility.—Somerset Bus Co., Inc., Extension, 89 M.C.C. 107 (115)*.

Joint board had jurisdiction to entertain complaint alleging unlawful charter operations although questioned operations involve more than 3 States; and defendant was not denied a valuable property right because the hearing did not have a duly appointed hearing officer. The commission has statutory discretion, when operations in issue involve more than 3 States, to refer proceedings involving suspension, change, or revocation of certificates, and also complaints of violations of requirements established under §204(a), to a joint board for appropriate action and hearing; however, such proceedings must be referred to a joint board when the operations involve no more than 3 States. Further in absence of direct evidence of fraud or deception, the commission is not obliged to go beyond the face of the complaint in determining whether reference to a joint board is mandatory, i.e., scope of the pleadings determines, even though evidence adduced after commencement of hearing reveals operations involving more than 3 States.—Brunswick Transp. Co., Inc.—Revocation of Certificate, 91 M.C.C. 899 (902-3).

Consideration of a practice of protestant which allegedly prevented some patrons from using existing common carrier service was relevant to determination of whether existing service is adequate and was not beyond scope of matters pertinent to issues before the joint board in application proceeding.—Kirk, 89 M.C.C. 587 (588).

30. Rules for conduct of hearings.—[Vols. 9, 11-13, 16, 18, 19].Joint board's ruling that shipper witnesses must corroborate their testimony as to adverse experience in use of existing carriers from shipping documents required a degree of specificity and corroboration not usually exacted from such witnesses by the commission, but that ruling promoted orderly development of an extremely lengthy record and, also, a more concise and useful record. Applicant had ample opportunity to advise its witnesses to bring such documents, and it presented witnesses who amply supported their testimony with shipping documents. Also, it is within proper discretion of the board to determine whether to receive witnesses' opinion as to "need" for proposed service; while it is common practice for witnesses to be asked, and to give, their opinion as to need for the service, such testimony adds little or nothing to the record, and in a strict sense such a question involves a matter of law. Nor was applicant prejudiced by the board's ruling curbing the time alloted it for completion of its case-in-chief; that board's action was within the mandate of rule 1.76 of the Rules of Practice.—Braswell Freight Lines, Inc., Extension, 95 M.C.C. 457 (459-60)*.

Section 205. (b) [*§ 305(b) U. S. C.*] Creation of joint board; rules and procedure; nominations for membership; procedure on failure of board to act.—[Unchanged. See vol. 11, p. 9397, vol. 15, p. 12188.]

Amendments, see footnotes, vol. 11, pp. 9397-9398.

Notes of Decisions

Volume 15—p. 12189; Volume 19—p. 15573.

Section 205. (c) [*§ 305 (c) U. S. C.*] Place of holding hearings.—[Unchanged. See vol. 11, p. 9398.]

Amendments, see footnote, vol. 11, p. 9398.

Notes of Decisions

Volume 12—p. 10372.

Section 205. (d) [*§ 305 (d) U. S. C.*] Oaths; attendance of witnesses and production of documents.—[Unchanged. See vol. 11, p. 9399.]

Amendments, see footnotes, vol. 11, p. 9399.

Notes of Decisions

Volume 9—p. 7946; Volume 12—p. 10372; Volume 17—p. 13530; Volume 18—p. 14335.

Section 205. (e) [*§ 305(e) U. S. C.*] Notice of proceedings and opportunity for hearing.—[Unchanged. See vol. 11, p. 9399.]

Amendments, see footnotes, vol. 9, p. 7947, vol. 11, p. 939.

Notes of Decisions

Volume 9—p. 7947; Volume 11—p. 9399; Volume 12—p. 10373; Volume 14—p. 11583; Volume 15—p. 12189; Volume 16—p. 12837; Volume 18—p. 14336; Volume 19—p. 15574.

Section 205. (f) [*§ 305 (f) U. S. C.*] Joint hearings with State authorities; offices for boards and State Commissions.—The commission is authorized to confer with or to hold joint hearings with any authorities of any State in connection with any matter arising in any proceedings under this part. The commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities as may be practicable, in the enforcement or administration of any provision of this part. [1]In addition, the commission is authorized to make cooperative agreements with the various States to enforce the economic and safety laws and regulations of the various States and the United States concerning highway transportation. From any space in the Interstate Commerce Commission Building not required by the commission, the Government authority controlling the allocation of space in public buildings shall assign for the use of the national organization of the State commissions and of their representatives suitable office space and facilities which shall be at all times available for the use of joint boards created under this part and for members and representatives of such boards cooperating with the commission or with any other Federal commission or department under this or any other act; and if there be no such suitable space in the Interstate Commerce Commission Building, the same shall be assigned in some other building in convenient proximity thereto. (Aug. 9,

[1]New sentence added at this point by act of Sept. 6, 1965.

1935, c. 498, 49 Stat. 548; Sept. 18, 1940, c. 722, §20, 54 Stat. 922; Sept. 6, 1965, Pub. L. 89-170, §1, 79 Stat. 648.)

Historical Note

The commission urges early enactment of legislation which could promote increased cooperation between State and Federal authorities in highway enforcement activities.—Annual Report, 1964, p. 74.

Regulations of the Commission

31 FR 16402, Dec. 23, 1966, Part 177a: New Part 177a Cooperative Agreements with States, §§177a.1 through 177a.7 added as set forth, effective upon publication in Federal Register.

32 FR 385, Jan. 13, 1967, Part 177a: Cooperative Agreements with States, to correct clerical errors in order published at 31 FR 16402, corrected Part 177a, §§177a.1 through 177a.8 is republished effective upon publication in Federal Register.

NOTE: For recodification, see 49 CFR, Editorial Note, 32 FR 5606, April 5, 1967.

32 FR 13282, Sept. 20, 1967, Part 277a [formerly Part 177a]: Cooperative Agreements with States, §§277a.1 through 277a.8 amended to delete reference to safety laws and regulations concerning highway transportation, those commission functions having been transferred to Department of Transportation.

32 FR 13512, Sept. 27, 1967, Part 277a: Cooperative Agreements with States, §277a.2 corrected.

Section 205. (g) [*§ 305 (g) U. S. C.*] Court review of commission's orders; compelling commission to take jurisdiction.—[Unchanged. See vol. 11, p. 9401, vol. 15, p. 12189.]

Amendments, see footnotes, vol. 11, p. 9401, vol. 15, p. 12190.

Notes of Decisions

Volume 9—p. 7950; Volume 11—p. 9402; Volume12—p. 10373; Volume 19—p. 15574.

5. Review of final orders.—[Vols. 9, 11, 12, 19].—See West Bros., Inc. v. United States, §5(2), n. 5.

Section 205. (h), (i), (j) [*§ 305 (h), (i), (j) U. S. C.*] Application of section 17; Pecuniary interest in carrier forbidden; Employees, examiners, attorneys, etc.—[Unchanged. See vol. 11, pp. 9403, 9404.]

Section 206. [*§ 306(a) U. S. C.*] Certificate of convenience and necessity.—(a)(1) Necessity for; carriers in bona fide operation on June 1, 1935; "grandfather" provisions.—[Unchanged, except that by act of Oct. 15, 1962, Pub. L. 87-805, §1, 76 Stat. 911, the semicolon in the next to last sentence was changed to a period, and the remainder of the paragraph (the second proviso) was deleted. See vol. 11, p. 9404, vol. 15, p. 12190.]

Amendments, see footnotes, vol. 10, p. 7953, vol. 11, p. 9404, vol. 15, p. 12190.

Notes of Decisions

Volume 10—p. 7954; Volume 11—p. 9405; Volume 12—p. 10374; Volume 13—p. 11063; Volume 14—p. 11584; Volume 15—p. 12191; Volume 16—p. 12838; Volume 17—p. 13531; Volume 18—p. 14337; Volume 19—p. 15575.

2. Construction and interpretation.—[Vols. 10-14, 17-19].—The commission's consistent position since enactment of the Motor Carrier Act that, to come within the exception contained in the second proviso of §206(a)(1), there must be a State board having power to grant or approve certificates authorizing intrastate operations, and that the carrier must have obtained an intrastate certificate from that board, was upheld in 35 F. Supp. 136. Congress also has recognized that interpretation in various reports on proposed amendments to this section, a Senate committee report in 1961 stating that under the existing proviso the right of an intrastate carrier to engage in interstate commerce is automatically obtained by filing its intrastate certificate with the commission, whereupon it is authorized to engage in interstate commerce to the same extent that it may operate in intrastate commerce under the certificate filed.—Daniels v. United States, 210 F. Supp. 942 (947-8, 949)*.

As a general rule legislative intent must be ascertained from text of the statute if the words are clear and unambiguous; but where the literal words bring about an absurb or futile result, or one plainly at variance with purpose of the legislation as a whole, legislative purpose is followed rather than the literal words. In construing a not unambiguous statute, all relevant light shed on the purpose of Congress may be used, including committee reports, statements of committee members in charge of the bill, and interpretation by the executive department or agency charged with its administration and enforcement. Intent of Congress cannot be ascertained from wording of the single-State proviso, and the court may properly consider its legislative history, the commission interpretation consistently followed for over 25 years, and subsequent congressional committee reports recognizing that interpretation. In light of those aids, the commission correctly rejected plaintiff's application for registration of his "interstate" permit issued by the State.—Id., pp. 949-50.

Nothing in the 1962 amendment which deleted the second proviso of §206(a)(1) and prescribed procedures whereby common carriers operating within a single State may engage in interstate operations within the State, or in legislative history thereof, supports plaintiff's position that prior thereto he was entitled to benefit of the proviso exemption; both before and after that amendment an intrastate certificate forms the basis for acquisition of interstate rights within the State, and no grant of interstate rights to a carrier who has no corresponding intrastate rights in contemplated.—Id., p. 951.

In providing for "grandfather" rights Congress intended substantial parity between future operations and prior bona fide operations. But "bona fide operation" is not completely convertible with "good faith" as used in other contexts, and the test thereof is neither wholly objective nor wholly subjective. One criterion is objective—the service must have been actual, physical, and substantial, not merely proposed or offered; another is subjective—the operation must not have been in defiance of law; and besides those two readily identifiable elements there is a large gray area wherein a certain factor or attitude may or may not vitiate bona fide operation. Mere infraction of law, without defiance, may be weighed as a factor relevant to determination of bona fide operation; this presents an issue of fact or a mixed question of law and fact for the commission to decide and does not automatically compel a finding one way or the other; and where a carrier seeks enlargement of its "grandfather" certificate precisely because it has exceeded that authority continuously since before date of issuance,the fact of such continuous violation is not enough alone to vitiate bona fide operation.—Nashua Motor Exp., Inc. v. United States, 230 F. Supp. 646 (650-1)*.

Since Congress's power over interstate commerce is plenary, it could in 1935 have recognized as valid certificates, such as respondent's Montana "interstate" certificate, which were of no force or effect when issued, and could have made State-issued interstate certificates eligible for filing under the second proviso. Neither the language of the statute nor its legislative history evinces any such intent; the contrary is indicated by definition of "State board" in §203 (a) (2) as a body having jurisdiction to grant certificates for transportation in intrastate commerce; and it is significant that in 1938 the proponents of an amendment to make no distinction between

intrastate and interstate operations conducted wholly within a single State were unsuccessful.—Daniels—Investigation of Second Proviso Eligibility, 88 M.C.C. 357 (361, 362)*.

And dictum of the Montana Supreme Court in its decision holding that State board's cancellation of respondent's certificate attempted without due process to deprive him of the right granted to operate in interstate commerce, that the Motor Carrier Act would not affect interstate certificates granted prior thereto, would apply only to whatever rights respondent might have under Montana law by virtue of his certificate. The Montana court has no jurisdiction to determine respondent's rights under the Interstate Commerce Act, as Congress has left such determinations to the commission and the Federal courts.—Id., pp. 358, 363.

25. Injunctions; operation without certificate.—[Vol. 10].—See I.C.C. v. AAA Con Drivers Exchange, Inc., case, §203(c), n. 3.

26. Intrastate certificate.—[Vols. 10-19].—Effect of repeal of single-State proviso, see §206(a)(6), (7), n. 2.

Amendments to §206(a), repealing the second proviso of paragraph (1) and enacting the registration provisions of paragraph (6) and "grandfather provisions of paragraphs (7)(A) and (7)(B), clearly indicate that they were to become effective on Oct. 15, 1962. Public Law 87-805 bears the notation "Approved October 15, 1962," and references in paragraphs (6) and (7) to the date of enactment thereof were codified as "on" or "on and after" Oct. 15, 1962. Statutes rarely show the hour of approval by the President, and the general rule appears to be that, absent a record of the exact time of enactment, a statute is regarded as in effect from the first moment of the day on which it was enacted. Plaintiff therefore could not have acquired any rights under the second proviso of §206(a)(1) when its State permits were issued and it began operations thereunder after the statute eliminating that proviso took effect, even though the permits were issued on October 15 and it began operations immediately.—Central Maryland Lines, Inc. v. United States, 240 F. Supp. 254 (257)*.

Moreover, while the second proviso excused a carrier operating in intrastate commerce under a State permit from obtaining a certificate from the commission to operate in interstate or foreign commerce, it provided that such transportation should otherwise be subject to the commission's jurisdiction under Part II; and there was nothing in the wording of that proviso to support a conclusion that it created any vested rights. Plaintiff's registration statement was filed on October 16, the day after all rights to engage in interstate or foreign commerce under the second proviso had terminated; its right to operate in interstate commerce therefore never vested under the second proviso, and it must now conform to the requirements of §206(a) as amended before it may engage in such operations. The commission's rejection of plaintiff's registration statement, sustained.—Id., pp. 257-8.

The [former] second proviso of §206(a)(1) must be construed in light of other pertinent provisions of the act which declare the national transportation policy, particularly §5(4); that proviso means only that, once a State has determined that a carrier's operations serve public convenience and necessity, it need not obtain a certificate from the commission for interstate transportation within the State. The commission's use of its BMC-75 statement to ascertain whether a carrier is entitled to second proviso authority is well within its power; there is nothing in wording of the proviso requiring conclusion that rights thereunder vest by statute; rather, it is the better construction to view a commission determination that the conditions have been met as a prerequisite to such authority. Illegal control by a multistate carrier means that the purported proviso carrier was not lawfully engaged in interstate commerce and thus was disqualified from carrier status.—Hart v. I.C.C., 226 F. Supp. 635 (639, 641)*.

The second proviso of §206(a)(1) was but one of three methods by which interstate operating rights could be acquired or confirmed, and plaintiff himself utilized the "grandfather" provisions of the first proviso and a §207 application for new authority. The only reasonable construction of the second proviso consistent with the policy of the act is that adopted by the commission, i.e., to authorize

common carriers holding intrastate certificates to obtain interstate authority over the same route without proof of public convenience and necessity under §207; and the 1962 amendment which deleted the second proviso and prescribed procedures whereby single-State carriers may engage in interstate operations within the State did not change the requirement of an underlying intrastate certificate as the basis for such rights. Plaintiff seeks registration of a State certificate which authorizes "interstate" operation only and does not cover any intrastate operations; nor does he hold any other intrastate authority for the same route; the commission properly rejected plaintiff's attempt to register his State certificate.—Daniels v. United States, 210 F. Supp. 942 (950, 951)*.

The former single-State exemption proviso of §206(a)(1) having been repealed by enactment of Public Law 87-805 on October 15, 1962, Form BMC-75 statement tendered on October 16 could not lawfully be accepted.—Central Maryland Lines, Inc.—Second Proviso Eligibility, 92 M.C.C. 737*.

Unlawful common control of a single-State and a multiple-State carrier having been terminated by voluntary acts of the parties, condition imposed on the carriers' pooling arrangement requiring the single-State carrier to discontinue all operations in interstate commerce under single-State exemption is eliminated and it is again entitled to operate under the proviso.—Freeport Fast Frt., Inc., and Liberty Trucking Co.—Pooling, 90 M.C.C. 510 (513-4)*.

See also Dodds Truck Line purchase case, §5(2), n. 48 *Conditions imposed.*

Two single-State carriers having been found in investigation under §5(7) to have been unlawfully controlled in common interest with a multiple-State carrier from inception of their interstate operations under color of single-State exemption, such operations were from their inception, and are continuing, in violation of §206. And in light of the surrounding circumstances, changes in their ownership, management, and operating practices which could make the three carriers independent of each other, so that single-State carriers' operations would be lawful under the proviso and without certificates from the commission, are of doubtful feasibility. Accordingly, as the commission's authority to require persons found to be violating §5(4) to take such action as it deems necessary to prevent continuance of such violation is clear, the two single-State are required by order in the investigation proceeding to discontinue all operations in interstate or foreign commerce.—Nigro Freight Lines, Inc.—Purchase—Coady Trucking Co., 90 M.C.C. 113 (120, 121).

Circumstances under which acquisition of intrastate carrier's capital stock by its present owner was negotiated and financed by individual controlling a multistate carrier, the role played by that individual in its operations and management, and the nature of its operations in close proximity with those of the multistate carrier, conclusively show that its operations were actually controlled by that individual before and after it filed its BMC-75 statement and were not those of a bona fide independent going concern. It was therefore not entitled to exemption under the single-State proviso and its interstate operations were unlawful from their inception; all its operations in interstate or foreign commerce must be discontinued immediately.—Hart Motor Exp., Inc.—Control and Merger, 90 M.C.C. 527 (533-4)*.

Respondent's filing of a Form BMC-75 statement of intent to conduct operations in interstate or foreign commerce in Illinois corresponding to those authorized in its Illinois intrastate certificate, under authority of the second proviso of §206(a)(1), is without force and effect because respondent is managed and controlled in a common interest with a multiple-State carrier and, therefore, is not entitled to operate under the second proviso. Although respondents consented at the hearing to cancellation of the second proviso filing, submitted over 4 years earlier, respondent's Form BMC-75 statement is rejected; both respondents ordered to cease and desist from the operations found to be unlawful.—State Transport Co.—Investigation of Practices, 91 M.C.C. 373 (375-6).

Although applicant is at present lawfully operating within Ohio under single-State exemption, as result of recent grant of authority between points beyond Ohio it will no longer be eligible to claim benefit of the provi-

so, and principle of the Day case (53 MCC 672) is therefore inapplicable to its application for certificate to continue the proviso operations.—Pedler—Control—All States Freight, Inc., 90 M.C.C. 491 (498).

Although language of phrase in the second proviso, "if there be a board in such State having authority to grant or approve such certificates," is ambiguous, "such" cannot refer to the immediate antecedent phrase" a certificate authorizing the transportation *** in interstate or foreign commerce," since latter may be issued only by the commission [citing 3 MCC 497]; the second proviso phrase "to grant or approve such certificates" should be read in pari materia with the phrase "to grant or approve certificates *** in intrastate commerce" in the definition of "State board" in §203(a)(2); thus read, the language of the proviso means "to grant or approve certificates of public convenience and necessity in intrastate commerce."—Daniels—Investigation of Second Proviso Eligibility, 88 M.C.C. 357 (359-60, 361)*.

Since the States may not regulate interstate or foreign commerce on economic grounds [267 US 307 and 2 F. Supp. 488], a State certificate was not a condition precedent to interstate operations before the Motor Carrier Act, and prior to that act respondent could have conducted interstate operations without the Montana "interstate" certificate in issue. However, a certificate of public convenience and necessity grants authority for operations which cannot lawfully be performed in its absence; respondent does not hold such a certificate; the document issued by the State prior to the Motor Carrier Act and purporting to authorize interstate operations is thus a nullity and may not be accepted as a basis for legitimate interstate operations under the second proviso.—Id., pp. 359, 361, 363.

50. "Grandfather" clause; bona fide operation.—[Vols. 10-15, 18, 19].—Whether plaintiff has engaged in bona fide operations continuously since the "grandfather" date, except for interruptions in service beyond his control, is a question of fact for the commission to determine; and, Congress having intrusted to the commission the power to determine those issues of fact, the scope of judicial review is limited to ascertaining whether there is warrant in the law and the facts for the commission's action.—Melman v. United States, 231 F. Supp. 503 (506)*.

Mere fact that plaintiff engaged in operations in interstate transportation prior to June 1, 1935, and after that date between certain points, or within certain areas, would not of itself entitle it to receive, as a matter of right, a "grandfather" certificate embracing all of the same points and areas; it was only entitled to have operating authority which assured a substantial parity between the future operations and prior "bona fide" operations. The commission had broad discretion to determine and delineate "grandfather" rights, and there is nothing of record indicating an abuse of that discretion whereby plaintiff was unlawfully deprived of rights which it should have had. Moreover, if public convenience and necessity can be shown for authority which plaintiff claims it is justly entitled to, it is not precluded from obtaining such authority pursuant to §207(a); if that cannot be shown, it would be contrary to sound public policy to allow it to obtain enlargement of its "grandfather" rights at this late date.—Cardinale Trucking Co. v. United States, 232 F. Supp. 339 (346, 348)*.

"Grandfather" rights determined many years ago should not be modified in absence of positive evidence of a miscarriage of justice. Abstract of eastbound shipments by plaintiff's predecessor, presented at hearing on plaintiff's petition for modification of its certificate to authorize eastbound transportation of general commodities from two intermediate points on its Cincinnati-Charleston, W. Va., route, shows only one shipment—a cargo of stoves—from one intermediate point prior to June 1, 1935, and 15 shipments of general commodities during the succeeding 18 months, 8 from Cincinnati and 3 and 4 each from the intermediate points. Though plaintiff has the burden under §206(a) of proving that the operations in question were actual and substantial, it declined to produce any additional evidence on that point. On the record before it, the commission's conclusion that such shipments were not substantial was reasonable; the commission's refusal to reopen the "grandfather" proceeding, sustained.—Keystone Motor Exp., Inc. v. United States,

228 F. Supp. 793 (796, 798-9)*.

See also United States v. W. J. Dillner Transfer Co., §222(b), n. 14.

In denying modification of plaintiff's "grandfather" certificate because it was unable to find that operations claimed to have been performed since prior to June 1, 1935 "have been bona fide since that time," the factor which the commission considered dispositive of bona fide operation was whether plaintiff did or did not read the certificate; this apparently insists on a one-to-one correlation between the concepts of "bona fide operation" and "good faith," and specifically rules that good-faith operations require that authority issued be read. Such an exclusive rule not only finds no support in the reported cases, but it goes beyond the elements of common sense and validity by arbitrarily excluding various unusual and marginal cases (and plaintiff's case may well be one) from the realm of bona fide operation. That ruling is found to be an erroneous statement of the law and an inadequate substitute for actual findings as to whether plaintiff failed to read the certificate and whether the circumstances precluded establishment of bona fide operations.—Nashua Motor Exp., Inc. v. United States, 230 F. Supp. 646 (650, 651)*.

The commission's alternate conclusion, that if the certificate was read the involved operations could only have been conducted in willful violation of the act, flies in the face of a specific finding by the joint board (whose findings of fact Division 1 found "correct in all material respects" and adopted as its own) that plaintiff's operations were apparently not willful and were openly conducted under a misapprehension as to scope of its certificate. Thus it is at best not clear what the commission has purported to find, or, at worst, the finding of willfully unlawful operaion is wholly arbitrary. For these reasons, the commission's order denying plaintiff's petition must be vacated and the cause remanded for further proceedings.—Id., pp. 651-2.

Principles enunciated in 315 US 15 and 475 for determining issues of past bona fide operations under the "grandfather" clause of the Motor Carrier Act of 1935 are equally controlling in cases under the similar clause of the Transportation Act of 1958, and the Supreme Court's concern with applicant's holding out is highly relevant. Though, strictly speaking, the test under the 1958 act is bona fide operation on and after May 1, 1958 (except for interruptions beyond the carrier's control), and instances of actual service between given points both before and after the critical date are strong evidence of bona fide operation, both courts and commission have long conceded that a holding out to provide service, accompanied by some representative service, may also be evidence of operation.—Jarman v. United States, 219 F. Supp. 108 (115-6)*.

In granting plaintiff only point-to-point authority the commission largely ignored both those factors. Plaintiff's small size and the fluctuating character of his frozen-foods traffic warrant reconsideration of his application under the area-of-service concept applied by the commission in other proceedings. Moreover, since the 1958 act sets no cut-off point for evidence of service rendered after the "grandfather" date, any evidence of service since the 1959 hearing which might tend to change the picture of plaintiff's operations should be considered. The commission's order set aside and the case remanded for rehearing and further consideration in accordance with the court's views.—Id., pp. 114, 116, 117, 118.

Purpose of the "grandfather" clause is to assure substantial parity between an applicant's future operations and prior bona fide operations, and the commission may not atomize its operations during the "grandfather" period, but must view them as a whole in arriving at the nature and extent of its bona fide operations. In that connection, an applicant's holding out and solicitation throughout the "grandfather" period are matters properly to be considered; the very definition of "common carrier by motor vehicle" in §203(a)(14) contemplates consideration of holding out as a standard. Refusal to consider proper holding out and solicitation in connection with actual service during the "grandfather" period would freeze carriers into the precise pattern of their prior activities and thereby materially alter the basic characteristics of their service; decisions in 315 US 15 and 475 and 211 F. Supp. 280 support the rule that proper holding out and solicitation are standards to

be considered in hearings on "grandfather" applications.—Frozen Food Exp. v. United States, 219 F. Supp. 131 (137, 139)*.

See also Denton Produce, Inc. v. United States, and Willis Shaw Frozen Exp., Inc. v. United States, cases, §203(b), n. 50 *Act of 1958*.

While issuance of a certificate under the "grandfather" clause is dependent upon bona fides of previous operations to be determined by the commission, and the Supreme Court has held that the commission is empowered to impose territorial limitations on a certificate issued thereunder to assure "substantial parity" between future and prior bona fide operations, the "grandfathe. ' provisions do not authorize imposition of similar restrictions on a certificate issued in conversion proceeding under §212(c).—J. B. Montgomery, Inc. v. United States, 206 F. Supp. 455 (460)*.

See also T. I. M. E. Freight, Inc.—Merger, case, §206(a)(6), (7), n. 50.

In order to obtain rights to perform claimed operations under the "grandfather" clause, applicant must establish that it and its predecessor have engaged, on and continuously since June 1, 1935, in bona fide operations for which authority is sought; moreover, "grandfather" rights which were determined many years ago should not be modified except where there is definite and positive evidence that a miscarriage of justice has occurred. Therefore, since no probative evidence was tendered which would justify a broader grant of authority than heretofore made, and there is no showing that authority granted in the "grandfather" proceeding was not fully responsive to the proof adduced therein, carrier's petition seeking reopening of its "grandfather" proceeding, for a three-fold modification of a portion of its certificate, must be denied.—Dixie Ohio Exp., Inc., Investigation and Revocation, 94 M.C.C. 625 (627, 632-5)*.

"Bona fide operation" means substantial, as distinguished from incidental, infrequent, or sporadic service, and a mere holding out to perform service, without actual operation commensurate therewith, does not constitute bona fide operation. Six eastbound shipments over involved route of commodities other than gas in cylinders, rubber tires, and stoves, all of which moved subsequent to the "grandfather" date and none prior thereto, do not meet the test of bona fide operation, and no shipments of stoves were transported during a 9-month period prior to filing of "grandfather"' application. Moreover, the "grandfather" applicants (petitioner's predecessors) expressly sought eastbound authority only for gas cylinders and tires, which was granted; no greater authority would be justified upon reconsideration; petition for reopening denied. —Keystone Motor Exp., Inc.—Investigation of Operations, 89 M.C.C. 567 (574)*.

Movements of petrochemicals after 1946 do not fulfill requirements of the "grandfather" provisions of the 1935 act, and afford no basis for modification of applicant's "grandfather" authority to transport general commodities, except liquid petroleum products, in bulk, in tank vehicles, so as to enable it to transport petrochemicals.—Consolidated Freightways Corp. of Del. Extension, 92 M.C.C. 443 (449-50)*.

A single shipment before, and a single shipment to the same point after, the "grandfather" date have been deemed sufficient to constitute bona fide operation as to that point; and actual, consistent, and frequent shipments to a number of points in an area or State satisfy the criteria for broad grants of authority; where substantiality of operations involved reflects a territorial operation, service from and to the same points both before and after the critical date is not necessarily prerequisite to territorial authority.—Hollebrand, 88 M.C.C. 685 (687)*.

Although applicant requests that the number of vehicles it was operating at time of hearing in September 1959 be considered in determining scope of its past operations, approximately 100 tractors and trailers were acquired and used in expanding its operation after filing of its "grandfather" application in December 1958; since the Transportation Act of 1958 confers no "grandfather" rights for operations commenced after May 1, 1958, the increased number of vehicles operated by applicant subsequent to that date will not be considered as probative evidence of extent of its past "grandfather" operations.—Home Transfer & Storage Co., 88 M.C.C. 223 (231)*.

Although the term "bona fide operation" in §7(c) of Transportation Act of 1958 is not susceptible of exact definition, it has consistently been construed to denote substantial as distinguished from incidental, sporadic, or infrequent service.—Denton Produce, Inc., 89 M.C.C. 301 (302)*; a "grandfather" applicant must establish that it or its predecessor has been engaged in bona fide operation in transportation of the commodities for which authority is sought, on and continuously since May 1, 1958. A mere holding out to serve or intent to conduct operations is not sufficient. —Northwest Fisheries Transp., Inc., 89 M.C.C. 324 (326)*.

An applicant for authority under the "grandfather" clause must establish by competent evidence a continuity of operations beginning at lease on the statutory date and continuing thereafter except for significant interruptions of service over which applicant had no control. Except for the implication in his filing of a "grandfather" application, one applicant does not allege that he was engaged in transportation of the involved commodities on and continuously since May 1, 1958; another applicant admittedly ceased operations in 1957, and his assertion that he was unable thereafter to obtain traffic for lack of authority has little significance since it was within his power to compete for traffic moving by other carriers who were in a similar position. Neither of the applicants adduced any evidence which would show operations on and subsequent to the critical date, and conclusion is inescapable that they were not in bona fide operation on that date.Denied.—Cox, 89 M.C.C. 545 (548)*.

Applicant has failed to establish that during the critical "grandfather" period it was a bona fide for-hire carrier of return loads of bananas in connection with southbound private carriage; though its apparent round-trip lease of vehicles and employment of drivers are strong formal indicia of its control over the northbound movement, whether in practice it exercised any real control as a common carrier for compensation is open to serious doubt; agreement with lessor limited northbound use of the behicles to empty moves or to transportation of property of which lessor was owner, lessee, or bailee, and did not govern day-to-day operations; prior to December, 1958, apparently only lessor kept records of banana shipments, which tend to show him as broker or seller thereof in his own right, and there is nothing to indicate that he was formally applicant's agent in such transactions.—Kendall Co., 88 M.C.C. 364 (367).

Nor do applicant's relations with drivers utilized strengthen its claim to have been a for-hire carrier; instead of a salary or wages, they were paid an unvarying sum of money for each trip, which seems to have been nothing more than a part of the financial accounting on the arrangements and understandings between applicant and lessor. There is no reliable evidence that applicant during or prior to 1958 held out as a for-hire carrier to the public generally, to lessor, or to any other individual; "grandfather" application denied.—Id., p. 367-8.

52.——Interruption of service.—[Vols. 10-15, 19].—The commission's finding that plaintiff's first interruption of service for a period of over 10 months, due to financial difficulties, was within plaintiff's control is not without precedent. Holding in 316 US 74 that the commission was warranted in holding as a matter of law that an interruption due to bankruptcy was not one over which the applicant had no control within meaning of Motor Carrier Act is determinative of similar issues arising under the Transportation Act of 1958, and the commission's action in denying plaintiff's "grandfather"application is supported by the record. Fact that the interruption in service commenced 8 1/2 months subsequent to the "grandfather" date does not alter the situation; under the statute the requisite absence of interruption of service continued to date of hearing, and there is no showing of arbitrary delay on the commission's part in passing on the application.The order sustained.—Melman v. United States, 231 F. Supp. 503 (506)*.

While the commission may justly question the relevance of shipments which follow a long interval without service, in its reconsideration of plaintiff's application under "grandfather" clause of the Transportation Act of 1958, following remand, it should consider whether peculiarities of the frozen food traffic may not justify some interruptions; al-

lowance in that statute for interruptions in service over which the applicant had no control may contemplate just such a situation. Moreover, the 1958 act sets no cut-off point for evidence of operations after the critical date; and, in view of indications that substantial service may have been rendered at certain points since the hearing on plaintiff's application, any evidence which might tend to change the picture of scant or nonexistent operations should also be taken into account. —Jarman v. United States, 219 F. Supp. 108 (118)*.

Admitted curtailment of "grandfather" operations by substituted applicants' predecessor, as result of decision in 84 MCC 393 that frozen potato products were not exempt commodities and could not lawfully be transported without appropriate authority, was not an interruption of service beyond its control. That decision only deprived it of certain traffic to which it was not entitled, and precluded it from continuing to haul mixed loads of nonexempt and previously exempt traffic, and its loss of that nonexempt traffic is attributable to its decision to handle such mixed loads in the first instance.—Refrigerated Service, Inc., 92 M.C.C. 311 (314)*.

Interruptions in service are not a bar to grant of "grandfather" authority where there is specific evidence to indicate that they were caused by factors over which applicant had no control; but interruptions of 2 or 3 years are not adequately explained by general assertions that origins of the subject commodities vary with changing weather conditions and crop rotation practices of growers in the area involved.—W. J. Digby, Inc., 89 M.C.C. 122 (123)*.

Although applicant was engaged in transportation of bananas from before May 1, 1958, until January 1959, he then lost possession of his vehicles owing to financial difficulties and ceased operation for a period of 10 1/2 months, until operations were resumed in his name under an agency arrangement with another carrier. That arrangement lapsed in February 1960 upon reorganization and temporary cessation of operations by that carrier, and applicant's operations were not again resumed until the following June, when he entered into a similar arrangement with an individual. While the commission has sometimes been liberal in attributing pertinent interruptions to causes beyond an applicant's control, and the second interruption might conceivably be so attributed, the first interruption, attributed by applicant solely to financial difficulties without further elucidation, impels finding, under a long line of precedents, that the cessation was within applicant's control. Applicant found not entitled to "grandfather" certificate under §7(c) of Transportation Act of 1958.—Melman, 94 M.C.C. 346 (347-8)*.

54.——Irregular routes.—[Vols. 10-14, 19]. —Characteristics of the transportation service involved, and the geographical area serviced, are relevant to territorial scope of operating authority that may be granted under the "grandfather" clause. While the test of bona fide operation within a specified "territory" includes actual rather than potential or simulated service, it does not necessarily restrict operations to the precise points or areas already served. Also, irregular or sporadic trips may be due to characteristics of the irregular-route service, which may have restricted the operation to a few points in a wide area which the carrier held out to serve.—Winter Garden Co. v. United States, 211 F. Supp. 280 (285)*.

See also Railway Exp. Agency, Inc. v. United States, 205 F. Supp. 831, §204(b), n. 6.

56.——Only established service covered by clause.—[Vols. 10-13, 15, 19].—When general commodities are involved in a "grandfather" proceeding, no specific finding is necessary for the transportation of household goods. Commodities transported by applicant for "grandfather" authority between numerous points in Alaska embrace the commodity description with noted exceptions; also, the record shows that, while applicant's transportation of household goods has not been extensive, he has transported several representative shipments in which he performed a packing and crating service. Accordingly, the board's findings and recommended grant of the general commodity authority, without a specific finding as to transportation of household goods, were not in error.—Knudsen, 94 M.C.C. 339 (341, 343).

See also Colonial Refrigerated Transp., Inc. v. United States, §203(b), n. 50 Act of 1958.

Section 206(a). (2), (3) Traffic moving to and from Territories and Possessions; "grandfather" provisions. [Unchanged. See vol. 15, pp. 12190-12191.]

Historical Note, see vol. 17, p. 13532.

Notes of Decisions

Volume 18—p. 14342.

Section 206 (a). (4), (5) Traffic moving from, to and within Alaska; "grandfather" provisions.—[Unchanged. See vol. 19, pp. 15580-15581.]

2. Construction and interpretation.—The language of §206(a)(5) providing that, where Alaska "grandfather" rights have been established, "a certificate shall be issued authorizing such operations without requiring further proof that public convenience and necessity will be served thereby, and without proceeding," is undeniably clear and means precisely what it says. The commission, having found that each of two affiliated applicants met the requirements of the act, and having found each of them to be entitled to a certificate authorizing such operations, was required by the mandatory wording of the statute to issue a certificate to each "without further proceeding."—Alaska Van & Storage Co. v. United States, 240 F. Supp. 501 (503)*.

History of the grandfather" provisions of §206(a)(4), coupled with omission therefrom of the words "bona fide operations," manifests intent of Congress that they be liberally construed, in accordance with what was deemed to be the economic interest of Alaska and in consideration of a presently sparse flow of traffic. However, it is equally clear that the liberal construction of the statute intended by Congress was aimed at substantiality of the operations and not the mode of transportation. It was not to be required that a large and steady flow of traffic be established before the "grandfather" clause would appiy, but this has no reference to whether or not a motor vehicle must be involved in the operation. The statute expressly and impliedly refers to motor vehicles, and any liberal construction is and must be applied only to motor vehicles, lest construction turn to destruction of the words themselves. The commission has no power under the "grandfather" provision to grant a certificate for continuance of operations other than that of motor vehicles.—Andrews Van Lines, Inc. v. United States, 240 F. Supp. 763 (766-7)*.

The same act which added the Alaska "grandfather" provisions, by adding §303(e)(3) to the Interstate Commerce Act, continued the jurisdiction of the Federal Maritime Board over the water portion of motor-water-motor operations of motor common carriers between Alaska and the 48 contiguous States; and plaintiffs' operations, involving water transportation from a Washington to an Alaska port, come within the Board's definition of a water common carrier in 6 FMB 245. In face of the express wording of the state, i.e., "motor vehicles," and the fact of the Maritime Board's jurisdiction over the intercoastal shipping, plaintiffs' contention that the mode of transportation outside U.S. territory should be reduced to a common denominator, so that the fact that shipments of some kind have been made would render plaintiffs eligible for benefits of the "grandfather" provisions, must be rejected; plaintiffs' use of water transportation is simply beyond the commission's jurisdiction and is not relevant to any proceeding for relief under the Alaska "grandfather" provisions.—Id., pp. 767-8.

Transportation by water, rail, or air is not transportation by motor vehicle and cannot form the basis for a grant of authority under "grandfather" provisions of the act, since the commission is without authority to grant certificates under §206(a) except in respect of operations by motor vehicle. In addition, applications for Alaska "grandfather" authority between Seattle, Wash., and points in the 48

contiguous States, or for authority to operate to and from Hawaii, are beyond the scope of the "grandfather" provisions of §206(a)(4) and (5).—Mollerup Van Lines, 95 M.C.C. 338 (340, 342)*.

Furthermore, certificates granted under §206(a)(4) must be limited to authorization of service to and from points within the 48 contiguous States which applicants were certificated to serve prior to the date Alaska was admitted to the Union, and then only to the extent that under such certificates they were authorized to perform "within the States" all transportation required for through motor vehicle transportation by the carriers to or from places in the territory of Alaska.—Id., p. 342.

The only operations contemplated by §206(a)(4) which would entitle a performing carrier to "grandfather" authority are those involving through movements to or from Alaskan points from or to points in the other States. While, on the date of enactment of the statute, applicant held a certificate authorizing operation between points in 16 of the 48 contiguous States under which service could have been rendered between those points, on one hand, and points in Alaska before it became a State, on the other, it was not engaged in providing such service on the critical date. Applicant's participation in through movements of Alaska-destined or Alaska-originated traffic was confined to transportation between points in the conterminous United States; its claimed holding out to directly serve Alaska points cannot, alone, justify grant of "grandfather" authority sought; applicant is entitled to no authority under §206(a)(4); denied.—U. S. A. C. Transport, Inc., 94 M.C.C. 399 (401).

The clear and unmistakable intent of §206(a)(4) is to enable a carrier qualifying thereunder to continue serving those points in Alaska which it served on and prior to the time Alaska became a State; and decision in 92 MCC 403 made it clear that a successful applicant for authority under §206(a)(4) must have been a holder of a certificate on July 12, 1960, authorizing operations between points in Alaska and points in the 48 contiguous States, and must have been engaged in providing such service on and continuously since the critical date.—Lynden Transfer, Inc., 94 M.C.C. 738 (743, 744)*.

In the Al Renk case, 89 MCC 91, involving a "grandfather" application under §206(a)(5), it was concluded that the intent of Congress was that Alaska "grandfather" applicants need not prove that their operations on and after the critical date were as substantial and frequent as those required in previous legislation to support a "grandfather" grant, and the commission announced a policy of using a liberal approach in assessing nature and scope of an applicant's operations in Alaska; on the other hand, it did not find tha authority would be granted where no evidence of operations during the critical period had been adduced. Subsequent commission decisions have held that carrier seeking wide territorial grant of "grandfather" authority in Alaska must show service to a sufficient number of points to be representative of the entire area sought. Scope of the "grandfather" authority to be granted the four applicants determined accordingly.—Id., pp. 743-4.

In assessing the nature and scope of an applicant's operations prior to, and since, the critical date, in order to determine whether it is entitled to Alaska "grandfather" authority, a liberal policy is followed. Considering applicant's holding out to render service between all points in the State, its overall operations in transportation of household goods, and representative shipments, the nature of its "grandfather" operations reflects a basis for grant of statewide authority, except in the Panhandle. —Sig Wold Storage and Transfer, Inc., 94 M.C.C. 471 (473); Denali Transportation Corp., 94 M.C.C. 521 (524).

The Alaska "grandfather" clauses [which became effective July 12, 1960] provide no "interim" rights for carriers which instituted operations after the critical date, August 26, 1958, since on January 3, 1959, when Alaska was formally admitted to statehood, for-hire motor carriers operating within, to, or from Alaska in interstate or foreign commerce became subject to Part II and could not lawfully so operate without temporary or permanent authority granted under then existing provisions of the act.—Alaska Truck Transport, Inc., 92 M.C.C. 787 (789, 790).

Section 206(a)(4) clearly requires that a

successful "grandfather" applicant must have been the "holder of a certificate" on the effective date thereof; the holder of temporary authority granted under §210a(a) does not meet that requirement, since such authority is not a "certificate" as defined in §203(a)(5), and §210a(a) specifically provides that a grant thereunder creates no presumption that corresponding permanent authoty will be granted. It is equally clear that, absent compelling equitable considerations, mere filing of application for a certificate cannot satisfy the statutory requirement that applicant be the "holder of a certificate" on the critical date.—Wright, 92 M.C.C. 403 (406).

The only interpretation that can be given §206(a)(5) is that it applies solely to operations wholly within Alaska, whereas §206(a)(4) deals with operations between Alaska and points in the 48 contiguous States making up the Union prior to Alaska's admission. There was therefore no error in the joint board's failure to consider applicant's claimed "grandfather" rights between Seattle and Alaska points in light of §206(a)(5).—Id., p. 404.

In enacting the "grandfather" provisions of §206(a)(5), Congress omitted the requirement for a showing of past "bona fide" operation contained in earlier "grandfather" provisions pertaining to motor and water carriers, and required only a showing of "operation" on and since the critical date, except that passenger carriers must also show compliance with applicable acts of the Territory and regulations of Alaska Bus Commission; and the Senate committee report enjoined the commission to allow "grandfather" rights that would foster economic motor operations that would in turn foster economic development of the new State.—Al Renk & Sons, Inc.—Alaska "Grandfather" Application, 89 M.C.C. 91 (100-2).

In light of the known conditions prevailing in Alaska and the legislative history of §206(a)(5), omission of the customary phrase "bona fide operation" must have been deliberate, and Congress must have intended that Alaska "grandfather" applicants need not prove that their operations on and after the critical date were as substantial and frequent as those required by previous legislation to support a grant of "grandfather" authority. Protestants' argument, that a showing of more than minimal activity is required as between points where a constant flow of traffic is available to the carrier, overlooks the volume of such "constant flow," ignores the conditions under which it moves, and confuses the statutory standard of the 1960 act with that of the 1935 act.—Id., p. 102.

While the commission is aware of dangers inherent in extreme liberality in grant of Alaska 'grandfather" applications, so long as there is no trafficking in certificates—and there should be none under the commission's administration of §§5 and 212(b)—the public interest will best be served by the policies followed in instant proceeding.—Id., pp. 98, 105.

50. "Grandfather" clause; past operations.—When record showed that plaintiff's overland motor carrier operations to and from Alaska in over 2 1/2 years (which included the "critical date" of §206(a)(4)) involved only six trips, and no specific dates of any trips were shown, those six trips cannot be found to constitute such a significant amount of continuous overland operations as would entitle the carrier to an Alaska "grandfather" certificate. The commission's order denying plaintiff's application for such certificate, being supported by the substantial evidence before it, is sustained.—United Van Lines, Inc. v. United States, 249 F. Supp. 984 (985)*.

One plaintiff admitted that it performed no overland motor vehicle transportation to Alaska until some months after the critical date, and while intervening plaintiff appears to have engaged to a very small extent in such operations at and/or prior to that date, there is sufficient evidence in the record to support the commission's finding that this was not enough, even under a liberal construction, to meet the requirements of the "grandfather" provision as to continuous operation. Therefore, the court has no choice but to confirm the commission's findings respecting actual overland shipments handled by plaintiffs.—Andrews Van Lines, Inc. v. United States, 240 F. Supp. 763 (768-9)*.

There is no adequate proof of plaintiffs' purported agency agreements with Alaska truckers. To have found the type of agency

relationship necessary to support "grandfather" rights between points in Alaska, the commission must have found that plaintiffs dominated, controlled, and directed the operations to such an extent that they became, equivalently, the principals' operations. Though shipment was done with one bill of lading on one of plaintiffs' mastheads and at through rates published by them, those factors standing essentially alone are insufficient to find the alleged agency and resultant control. Evidence is sufficient to find that the Alaska "agent" was independent to a great enough extent that plaintiffs should not be allowed relief on that score. The commission's denial of both applications, sustained.—Id., p. 769.

That two applicants, each of which is a separate legal entity, are commonly controlled does not prevent them from receiving "grandfather" certificates if they were in fact engaged in two separate transportation businesses during the "grandfather" period. The commission's conclusion that affiliated applicants' Alaska operations were conducted as one transportation business since early 1961 is not supported by substantial evidence on the record as a whole and is clearly erroneous; the record shows that each held itself out to the public and to its customers as a carrier, provided required insurance coverage, represented a different national van line which originated or terminated the traffic, and made separate tenders to the military, and the commission found that each met the requirements of the act and was entitled to a certificate. The mere fact that, for reasons of economy, the two companies operated for a time out of the same facilities, using the same equipment and personnel, does not support the conclusion that they were being conducted as one business. Commission orders set aside, with direction to issue a certificate to each applicant.—Alaska Van & Storage Co. v. United States, 240 F. Supp. 501 (503)*.

While evidence submitted in support of claimed highway operation to and from points in Alaska on and prior to the critical date is not impressive and leaves much to be desired, applicant maintains that described shipments are merely representative of the service actually provided during the period, that over-the-road operations were actually conducted and that weights mentioned in exhibits are not sifnigicant because only a small portion of the shipments handled were abstracted for the record; and the abstracts of shipments handled subsequent to the critical date are more impressive, particularly in respect of volume of traffic handled since 1959. Uncontroverted evidence submitted warrants conclusion that on and continuously since the "grandfather" date applicant operated as a motor carrier of general commodities, with certain exceptions, between Seattle, Wash., and points in Alaska except southeastern part thereof; granted.—Consolidated Freightways Corp. of Del., 95 M.C.C. 757 (760)*.

Also applicant handled considerable shipments prior to and since the critical date between points in Alaska in connection with water movements through the ports of Seward and Valdez, and is entitled to "grandfather" certificate. In view of congressional intent concerning administration of considered "grandfather" clauses, authority granted should extend to all points in the new State other than those in the southeastern portion, in spite of the fact that past operations only included principal points accessible by highway from the ports of Seward and Valdez and from the Alcan Highway.—Id., p. 760-1.

Of the several applicants for Alaska "grandfather" authority, only one has conducted substantial overland operations between points in Alaska and points in the 48 contiguous States continuously since prior to the statutory date and is entitled to a certificate authorizing continuance thereof; moreover, prior to admission of Alaska into the Union, the applicant was authorized to transport household goods between points in the United States and, thus, was authorized to perform "within the States" all transportation required for through motor vehicle movement to or from points within the territory of Alaska, a condition precedent to the granting of any authority under §206(a)(4). That applicant is entitled to a "grandfather" certificate authorizing continuance of its overland operations to and from points in Alaska.—Mollerup Van Lines Alaska Grandfather Application, 95 M.C.C. 338 (343)*.

However, regardless of other considera-

tions, two of the applications must be denied in their entireties because those applicants failed to establish that they conducted any motor-carrier operations, or that they participated in any movements of household goods, to or from Alaska on or prior to the statutory date. The proposed holding out of those carriers, without any actual operation commensurate therewith, cannot form a proper basis for a grant of "grandfather" authority.—Id., p. 343.

None of the applicants ever actually conducted any operations in Alaska. Their claims to "grandfather" rights between points in that State are based on operations of Alaska-based carriers—referred to as their "agents"—which actually conduct operations there, and most of which have filed "grandfather" applications in their own names and base their claim to rights on shipments they transported for the stateside applicants and upon which latter are dependant to establish their rights. Two carriers cannot be granted "grandfather" rights arising out of the same motor-carrier operation; and record clearly indicates that all vehicular equipment used in considered operations was owned by Alaska-based carriers and none was ever leased to stateside applicants, no applicant had any physical properties in Alaska, and that all matters in the motor operations were, on the statutory date, and still are, dominated, directed, and controlled by the Alaska-based carriers. Thus, although applicants issued their own bills of lading showing through movements to and from Alaska, on through rates published by them, none of them was ever engaged in motor-carrier operations between points in that State; all the "grandfather" applications for such authority must be denied.—Id., pp. 344-5.

Evidence of past operations by applicants on and continuously since the statutory date established "grandfather" rights for the transportation of household goods betwwen all points in Alaska except those in the Panhandle south of Yakutat Bay. Abstracts of shipments of household goods and supporting original shipping documents show a consistent and continuous movement of household goods between points in the Anchorage area and points in the continental United States south of the Canadian border, with applicants' participation limited to movements within Alaska.—Alaska Terminals, 96 M.C.C. 83 (86)*.

Evidence presented in "grandfather" proceeding adequately shows that applicant in its own right has conducted operations in Alaska on and prior to the critical date, as a connecting carrier of the Alaska R., in over-the-road motor transportation of household goods shipments moving to or from points in States south of the U. S.—Canadian boundary; therefore, it qualifies as a carrier within meaning of §206(a)(5). Although major portion of its operation was in the Anchorage area and on the Kenai Peninsula, limited operations were performed to and from other sections of Alaska and, at all times, it held itself out to transport all the traffic tendered. In addition, applicant maintained terminal facilities at Anchorage, owned or leased all the equipment used, and generally directed and controlled the motor carriage. Accordingly, applicant is entitled to a "grandfather" certificate for continuance of motor transportation of household goods between points in Alaska, except those in the area specified.—Alaska Van & Storage Co., Inc.—"Grandfather" Application, 94 M.C.C. 381 (384)*.

Applicants are entitled to "grandfather" certificate authorizing continuance of their transportation of household goods between all points in Alaska, except the panhandle, other than Juneau and Haines; they have operated in Alaska on and prior to critical date in transporting shipments received from, or delivered to, carriers certified to operate in conterminous United States; the shipments move by water between Seattle and Alaska ports, thence by Alaska Railroad to and from the railheads, principally Fairbanks and Anchorage, and then by applicants' motor carriers to destination. Fact that rail service is used, in part, to facilitate movement of the traffic does not alter the conclusion that operations performed were those of applicants; applicants hold out to provide pickup and delivery to and from all accessible ports in Alaska.—Hepp and Chapados, 94 M.C.C. 475 (476-7).

But insofar as general commodities are concerned, evidence warrants a grant of territorially limited authority under "grandfather"

provisions; there is no showing of any transportation of general commodities between Seward, Anchorage, and Fairbanks, as claimed; and, although applicants recently commenced operations in the Alaska Panhandle, admittedly, the only service maintained therein was to Haines and Juneau during the "grandfather" period. Applicants' contention that they have served the claimed points when the need arose, and that since the transportation picture in Alaska changes rapidly insofar as its geographic scope is concerned, the liberal policy enunciated in 89 MCC 91 should be applied herein, is unfounded in view of their past operations.—Id., p. 477.

While protestants challenge applicant's exhibit of shipments transported in Alaska on the theory that much of its evidence only shows billing of it as a water carrier (not subject to commission regulation) and that to some extent the shipments were also used to support "grandfather" applications of the "subcontractors" discussed in 89 MCC 91, the evidence shows that applicant's operations have been so extensive that it is clearly one of the principal motor carriers in the area. And there is no merit in protestants' contention that applicant has not provided continuous service when, though its operating authority was the subject of a "lease option to purchase" for a short time, there was no cessation of motor carrier operations either by it or the temporary lessee. The basic nature of applicant's "grandfather" operations (shown by the large number of interstate shipments, numerous points served, and the evident validity of proponderance of its shipments) indicates service to points in Alaska representative of the entire State, except the Panhandle. —Alaska Freight Lines, Inc., 94 M.C.C. 200 (202-3).

Applicant's motor carrier operations in Alaska have entailed point-to-point, irregular-route service, but the habitual use of the same highway has no significance where it is the only practical route available. Also, to limit its service to points on the main highways would result in a semi-regular route status inconsistent with the character of the transportation needs of a developing area. Therefore, since considered operations have included service to numerous points representative of the entire Alaskan area (except Panhandle) which are susceptible to motor carrier operation, territorial authority should be granted accordingly.—Id., p. 203.

And the board's recommended restriction of applicant's service to transportation of shipments having a prior or subsequent movement by it as a water carrier should not be imposed, since its operation as a water carrier between Alaska and the continental United States is subject to jurisdiction of the Federal Maritime Commission and bears only an indirect relationship to considered motor carrier operations. Furthermore, such a restriction would be consistent with applicant's status as a common carrier, with the development of an effective transportation in Alaska, and with the basic objectives of the Alaska "grandfather" act.—Id., p. 203.

Although evidence is clear that applicant operated between points in Alaska and points in the 48 contiguous States since 1953, its operations have been limited to transportation of traffic from, to, or between certain ports of entry on international boundary between United States and Canada and certain points in Alaska, and are not of sufficient breadth to justify a grant of statewide authority under §206(a) (4); grant in part.—Lynden Transfer, Inc., 94 M.C.C. 738 (744)*.

If carriers seeking authority under §206(a) (5) show that they have performed a representative service throughout Alaska, a grant of statewide authority is warranted; absent establishment of this fact, the commission can only grant authority commensurate with the evidence presented. Applying this criterion to "grandfather" claims of three applicants, one is entitled to authority for all of Alaska but the panhandle, another to like authority with addition of Haines, and the third to authority for only the points and routes specified.—Id., pp. 744-5*.

While "grandfather" authority sought is worded in terms of an irregular-route operation, the evidence shows that applicant either operated a regularly scheduled service of l.t.l. traffic between fixed termini, serving intermediate or off-route points, or held himself out to perform that type of services. The services of most motor carriers in Alaska have been of an irregular-route nature and,

consequently, those who have conducted representative territorial operations have been granted area-wide authority over irregular routes; however, in the final analysis, it is the commission's evaluation of the particular applicant's "grandfather" operations that determines the type and scope of the authority to be granted. A consideration of applicant's holding out, representative shipments, and overall operations shows a contrast to irregular-route operations of other "grandfather" applicants and demonstrates an identifiable pattern of regular-route service which warrants grant of regular-route authority.—Knudson, 94 M.C.C. 339 (342).

However, in order that applicant may have the benefit of reasonable flexibility in his overall operations, authority is granted to serve off-route points within 25 miles of the described routes and, also,the three specified more-distant off-route points. In addition, since applicant has served points on another highway as far as it was previously completed and participated in shipments to southern terminus thereof via local mail boat, and as that highway is, or will shortly be, completed over its length, grant of authority to serve the entire route is justified.—Id., pp. 342-3.

Applicant has engaged in continuous motor carrier operations in Alaska for over 20 years, maintaining a terminal at Fairbanks and operating several pieces of equipment; on and continuously since the critical date, using its own facilities, it has transported household goods in interstate commerce between numerous points,and has held itself out to render service between all points, in that State. While the evidence does not indicate service to all points within the State, the nature of applicant's "grandfather" operations as to household goods reflects a basis for grant of statewide authority, except for the Alaska Panhandle; further, such grant will be consistent with the developing transportation needs of the area.—Sig Wold Storage & Transfer, Inc., 94 M.C.C. 471 (472-3).

Although applicant's president is also an officer and stockholder of another Alaska "grandfather" authority applicant, common control of the two corporations is not in issue in applicant's "grandfather" proceeding so long as the corporations are separate and distinct and each conducts its own carrier operations; in this respect, there is no evidence of any common use of facilities or equipment and no indication of any pooling or division of traffic.—Id., p. 472.

Applicants, pioneers in transporting general property in Fairbanks, Alaska area, began the transportation of household goods prior to the "grandfather" date; those shipments move in interstate commerce under single carrier bills of lading, and are generally handled by water carrier between Seattle, Washington, and Alaskan ports, thence by Alaska Railroad to points of interchange with motor carriers, including applicants. While applicants operate principally to and from Fairbanks, they undertake to transport shipments to and from all points in Alaska upon delivery to them at points of interchange with the railroad or water carriers. In this manner, applicants have transported household goods shipments to and from points in Alaska, except the Alaska Panhandle, since, on, and prior to the critical date. However, their desire to serve points in the Panhandle over newly completed highway does not justify "grandfather" authority, in absence of operations to or from such points; granted accordingly.—Denali Transp. Corp., 94 M.C.C. 521 (523-4).

Although the vice-president and the secretary-treasurer (also stockholders) of one applicant are also officers and stockholders of the other,and its president is the president and principal stockholder of a third carrier which is an Alaska "grandfather" applicant in another proceeding, evidence indicates that operations of the three carriers have been conducted separately of the other and that each has operated its own equipment and maintained its own facilities and personnel; there is no duplication in supporting data of the respective carriers, and the affiliation existed prior to the critical date. Therefore, each carrier is entitled to "grandfather" authority to extent reflected by its supporting data.—Id., p. 524.

Although examiner recommended grant of authority to applicant under §206(a) (4) between specified interior Alaska points or areas and ports of entry, it held out to serve any point in Alaska in connection with its operations between Seattle and Tacoma, Wash.,

and ports of entry in Washington and Idaho, and handled some 20,000 shipments to or from numerous Alaska points over a period of 5 years, 9 months. As the commission is charged with viewing the Alaska "grandfather" provisions somewhat liberally, applicant is entitled to "grandfather" authority between all points in Alaska and the specified Washington and Idaho ports of entry.—Lynden Transfer, Inc., 92 M.C.C. 797 (801); and though question is raised whether temporary authority issued applicant for operation in Alaska after it became a State and pending enactment of "grandfather" legislation was broad enough to cover service between Alaska and authorized points in other States, it appears that such operations were contemplated, considering applicant's permanent authority and deletion of no-tacking restriction from the temporary authority.—Id., p. 800.

To be eligible for "grandfather" certificate under §206 (a) (4) an applicant must (1) have held on July 12, 1960, a certificate authorizing operation between points in the 48 contiguous States under which service could have been rendered to and from Alaska prior to its admission to the Union, and (2) have been engaged in such operations on and since August 26, 1958 (when Alaska electorate voted to accept statehood). Applicant meets neither of those tests when he never held permanent authority under which he could have provided service within the 48 States, whether on traffic to or from Alaska, or not,and does not claim to have conducted operations between Seattle and Alaska in his own right on August 26, 1958; that part of application is accordingly denied. However, applicant has established his "grandfather" right under §206 (a) (5) to perform secondary-movement truckaway and driveaway of motor vehicles in Alaska between Seward and points on described segments of Alaska Highways 1 and 9; certificate granted.—Wright, 92 M.C.C. 403 (405-7).

Although applicant did not object to examiner's recommended partial grant of "grandfather" application, which would permit service between points on all Alaska highways that appear suitable for truck operations at present time, no cogent reason appears for excluding portions of the State where improved roadways may be located at some future time, remote as such possibility may be in some areas, considering the terrain. Authority granted between points in Alaska, as sought.—Alaska Truck Transport, Inc., 92 M.C.C. 787 (791).

Applicants Tachick have operated in Alaska since 1953, serving mostly a limited area embracing the small communities of Kenai Peninsula, with principal interstate movement to and from Seward docks, and when occasion warranted have operated to, through, and from Anchorage; while latter operations have not matched the extremely regular and blanket coverage afforded Kenai points, they are an integral part of the rounded service provided applicants' Kenai customers; general-commodity "grandfather" rights granted for irregular routes between Anchorage and Kenai points, and for regular routes between other points named, including any future highways constructed on Kenai Peninsula.—Al Renk & Sons, Inc.—Alaska "Grandfather" Application, 89 M.C.C. 91 (94, 103-4).

Although applicant Renk, in his operations as a connection of water carrier subject to Federal Maritime Board, issued few if any shipping papers in his own name, he was not a mere subcontractor or owner-driver; overall record establishes within meaning of the statute a general operation sufficient to support grant of "grandfather" authority between points in Alaska except in Panhandle south of Haines; while fact that the great preponderance of Alaska's population is concentrated in the rail belt along Alaska R. makes the smaller irregular-route carriers such as applicant particularly vulnerable to through competition of the larger motor and water carriers and the railroad, applicant's operation was sufficiently flexible to remain viable after much of the inbound water traffic was diverted to different ports.—Id., pp. 94-5, 97, 99, 103.

Similar operations by applicants Unfer between Haines and Valdez on the south and Fairbanks on the north, while considerably less active, appear not unusual on the Alaska scene; there was a general holding out, with license as a carrier from the Territory or State, cargo and property damage, and liability insurance in force, bidding against others for available traffic not already committed to

through routing, and with problem of keeping vehicles and personnel busy at any task to be found; documentary evidencs supports grant of "grandfather" authority between Haines and Valdez, on one hand, and, on the other, points on or within 50 miles of described highways.—Id., pp. 94, 96.

Though most of the Unfers' Valdez operation appears to have been as connection of a water carrier, fact that delivery was made on latter's billing means little in view of manner in which most Alaska motor carriers disregarded paper; while their showing as to commodities transported is thus somewhat incomplete, they have established the fact of operation and holding out, and, considering the apparent intent of Congress in enacting the Alaska "grandfather" provisions, are entitled to a general commodity description.—Id., p. 104.

52. Interruption of service.—Nothing of record establishes any actual interruption in applicant's operations, except in the very early fifties; however, in a sense there has been a "continuing interruption" arising from the remoteness of Alaska from the rest of the country and the necessity (except for an extremely rugged overland operation) for Alaska traffic to come and go by air or sea, a circumstance giving decided advantage to those few motor carriers who could establish Stateside contacts and make advantageous arrangements for through movement with the principal water carriers and Alaska R., resulting in a virtual monopoly. Grant of "grandfather" authority is warranted.—Al Renk & Sons,Inc.—Alaska "Grandfather" Application. 89 M.C.C. 91 (103).

§206(a)(6)(7). INTRASTATE CERTIFICATE: REGISTRATION; "GRANDFATHER" PROVISIONS.—

(6) On and after the date of the enactment of this paragraph no certificate of public convenience and necessity under this part shall be required for operations in interstate or foreign commerce by a common carrier by motor vehicle operating solely within a single State and not controlled by, controlling, or under a common control with any carrier engaged in operations outside such State, if such carrier has obtained from the commission of such State authorized to issue such certificates, a certificate of public convenience and necessity authorizing motor vehicle common carrier operations in intrastate commerce and such certificate recites that it was issued after notice to interested persons through publication in the Federal Register of the filing of the application and of the desire of the applicant also to engage in transportation in interstate and foreign commerce within the limits of the intrastate authority granted granted, that reasonable opportunity was afforded interested persons to be heard, that the State commission has duly considered the question of the proposed interstate and foreign operations and has found that public convenience and necessity require that the carrier authorized to engage in intrastate operations also be authorized to engage in operations in interstate and foreign commerce within limits which do not exceed the scope of the intrastate operations authorized to be conducted. Such operations in interstate and foreign commerce shall, however, he subject to all other applicable requirements of this Act and the regulations prescribed hereunder. Such rights to engage in operations in interstate or foreign commerce shall be evidenced by appropriate certificates of registration issued by the Commission which shall be valid only so long as the holder is a

carrier engaged in operations solely within a single State, not controlled by, controlling, or under a common control with a carrier engaged in operation outside such State, and except as provided in section 5 and in the conditions and limitations stated herein, may be transferred pursuant to such rules and regulations as may be prescribed by the Commission, but may not be transferred apart from the transfer of the corresponding intrastate certificate, and the transfer of the intrastate certificate without the interstate or foreign rights shall terminate the right to engage in interstate or foreign commerce. The termination, restriction in scope, or suspension of the intrastate certificate shall on the 180th day thereafter terminate or similarly restrict the right to engage in interstate or foreign commerce unless the intrastate certificate shall have been renewed, reissued, or reinstated or the restrictions removed within said one hundred eighty-day period. Such rights shall be subject to suspension or termination by the Commission in accordance with the provisions of this Act governing the suspension and termination of certificates issued by the Commission. The Commission may impose reasonable requirements with respect to the filing with it of certified copies of such State certificates and other appropriate statements and data, and compliance with applicable requirements established by and under the authority of statutes applicable to interstate and foreign operations administered by the Commission, as conditions precedent to engaging in interstate and foreign operations under the authority of such State certificate. In accordance with such reasonable rules as may be prescribed by the Commission, any party in interest, who or which opposed in the State commission proceeding the authorization of operations in interstate or foreign commerce, may petition the Commission for reconsideration of the decision of the State commission authorizing operations in interstate or foreign commerce, and upon such reconsideration upon the record made before the State commission, the Commission may affirm, reverse, or modify the decision of the State commission, but only with respect to the authorization of operations in interstate and foreign commerce.

(7)(A) In the case of any person who or which on the date of the enactment of this paragraph was in operation solely within a single State as a common carrier by motor vehicle in intrastate commerce (excluding persons controlled by, controlling, or under a common control with, a carrier engaged in operations outside such State), and who or which was also lawfully engaged in such operations in interstate or foreign commerce under the certificate exemption provisions of the second proviso of paragraph (1) of this subsection, as in effect immediately before the date of enactment of this paragraph or who or which would have been so lawfully engaged in such operations but for the pendency of litigation to determine the validity of such person's intrastate operations to the extent such litigation is resolved in favor of such person, and has continued so to operate since that date (or if

engaged in furnishing seasonal service only, was lawfully engaged in such operations in the year 1961 during the season ordinarily covered by its operations, and such operations have not been discontinued), except in either instance as to interruptions of service over which such person had no control, the Commission shall issue to such person a certificate of registration authorizing the continuance of such transportation in interstate and foreign commerce if application and proof of operations are submitted as provided in this subsection. Such certificate of registration shall not exceed in scope the services authorized by the State certificate to be conducted in intrastate commerce, and shall be subject to the same terms, conditions, and limitations as are contained in or attached to the State certificate except to the extent that such terms, conditions, or limitations are inconsistent with the requirements established by or under this Act. If the effectiveness of the State certificate is limited to a specified period of time, the certificate of registration issued under this paragraph (7) shall be similarly limited. Operations in interstate and foreign commerce under such certificates of registration shall be subject to all other applicable requirements of this Act and the regulations prescribed hereunder. Certificates of registration shall be valid only so long as the holder is a carrier engaged in operation solely within a single State, not controlled by, controlling, or under a common control with a carrier engaged in operation outside such State, and except as provided in section 5 and in the conditions and limitations stated herein, may be transferred pursuant to such rules and regulations as may be prescribed by the Commission, but may not be transferred apart from the transfer of the corresponding intrastate certificate, and the transfer of the intrastate certificate without the interstate or foreign rights shall terminate the right to engage in interstate or foreign commerce. The termination, restriction in scope, or suspension of the intrastate certificate shall on the 180th day thereafter terminate or similarly restrict the right to engage in interstate or foreign commerce unless the intrastate certificate shall have been renewed, reissued, or reinstated or the restrictions removed within such one hundred and eighty-day period. Such certificates of registration shall be subject to suspension or termination by the Commission in accordance with the provisions of this Act governing the suspension and termination of certificates of public convenience and necessity issued by the Commission.

(B) All rights to engage in operations in interstate and foreign commerce under the provisions of the second proviso of paragraph (1) of this subsection, as in effect immediately before the date of the enactment of this paragraph, shall cease and terminate, but any carrier lawfully engaged in interstate and foreign operations on the date of the enactment of this paragraph or any carrier who would have been so lawfully engaged in such operations but for the pendency of litigation to determine the validity of such person's intrastate operations to the extent such litigation is resolved in favor of such

person, pursuant to such provisions, may continue such operations for 120 days after such date and, if an appropriate application for a certificate of registration is filed within such period, such operations may be continued pending the determination of such application. The Commission shall prescribe the form of such application, the information and documents to be furnished, the manner of filing, and the persons to whom or the manner of giving notice to interested persons of such filings. Issues arising in the determination of such applications shall be determined in the most expeditious manner and, so far as practicable and legally permissible, without formal hearings or other proceedings. A notice of intent to engage in interstate and foreign operations accompanied by certified copies of effective, lawfully issued or acquired State certificates filed with the Commission as evidence of authority to operate in interstate or foreign commerce under the provisions of the second proviso of paragraph (1) of this subsection, as in effect immediately before the date of the enactment of this paragraph, shall be conclusive proof that the applicant is lawfully engaged in interstate and foreign operations and the scope thereof. (Paragraphs (6) and (7) added by act of Oct. 15, 1962, Pub. Law 87-805, §2, 76 Stat. 911.) [See vol. 11, p. 9404; vol. 15, pp. 12190-12191; vol. 19, pp. 15580-15581.]

Historical Note

Only 50 applications under §206(a)(6) for new certificates of registration were filed during the year. There are indications that carriers prefer to obtain certificates, under §207, which can be transferred to multiple-State carriers.—Annual Report, 1965, p. 43.

2. Construction and interpretation.—Although prior to date of amendments to §206(a), which eliminated second proviso of paragraph (1) and added paragraphs (6) and (7), plaintiff might have been exempt from showing public convenience and necessity for interstate services it proposed to render in conjunction with additional authority contained in considered amendments to its intrastate certificate, it was not relieved from compliance with other regulations of the commission then in force. Thus, since at that time plaintiff had not filed a Form BMC 75 statement, as required by the commission's regulations dealing with interstate operations within a State under State authority, it could not have been "lawfully engaged in" operations under the second proviso; consequently, plaintiff was not entitled to a "grandfather" certificate of registration pursuant to §206(a)(7) covering such additional intrastate authority.—Valley Express, Inc. v. United States, 264 F. Supp. 1006 (1008-9)*.

Nor does plaintiff's lengthy struggle before the State commission to obtain the additional intrastate authority in issue constitute "litigation," within provisions of §206(a)(7)(A), which prevented it from operating in interstate commerce thereunder on the "grandfather" date. Record is not persuasive that Congress intended a figurative meaning of "litigation" as used in the statute; it intended the ordinary meaning of prosecuting or defending in court. And, while plaintiff contends that the State commission's determination was still subject to judicial review on the "grandfather" date, no judicial review had been invoked at that time; therefore, there was no litigation in the courts on that date. The commisssion's order denying plaintiff's request for "grandfather" certification of registration, sustained.—Id., pp. 1009-10.

The amendments to §206(a) which eliminated the second proviso of paragraph (1) and added paragraphs (6), (7)(A), and (7)(B) indicate clearly that they were to become effective on October 15, 1962: Public Law 87-805 bears the notation "Approved October 15,

1962," and the language "On and after the date of the enactment of this paragraph" in paragraph (6), and the reference in paragraphs (7)(A) and (7)(B) to persons engaged in certain operations "on the date of the enactment of this paragraph," have been codified respectively as "on and after October 15, 1962," and "on October 15, 1962." Moreover, it appears to be the general rule that, in absence of a record of the exact time of enactment of a statute, it is regarded as in effect from the first moment of the day on which it was enacted.—Central Maryland Lines, Inc. v. United States, 240 F. Supp. 254 (257)*.

Those amendments extended "grandfather" rights to certain carriers who on October 15, 1962, were (1) lawfully engaged in intrastate operations within a single State, and also (2) lawfully engaged in single-State operations in interstate commerce under the second proviso, or would have been so engaged but for "the pendency of litigation to determine the validity of such person's intrastate operations." Plaintiff admittedly was not engaged in any operation in interstate commerce on October 15, and there is no merit to its argument that its application for its intrastate authority, which was filed October 9, amounted to "pending litigation to determine the validity" of its intrastate operations which began on October 15. The "pendency of litigation" clause refers to litigation to determine the validity of the carrier's intrastate operations and does not include applications by the carrier to a State regulatory body for a certificate which will permit it to begin it to begin such operations.—Id., p. 258.

For purpose of the certificate exemption provisions of the former second proviso of §206(a)(1), and therefore for purposes of the "grandfather" registration provisions of §206(a)(7), as expressly indicated therein, a carrier cannot be said to have been and to be lawfully conducting interstate operations solely within a single State if it controls, is controlled by, or is under common control with a carrier authorized by the commission to engage in operations in interstate or foreign commerce outside that State, since its operations are not independent of those of the out-of-State or multiple-State carrier; and the fact that this power of control has not actually been exercised does not alter the situation.—Abramowitz—Investigation of Operations, 94 M.C.C. 213 (218-9).

As result of amendment of §206(a) by deletion of former single-State proviso of paragraph (1) and addition of paragraphs (6) and (7), principle of the Day case (53 MCC 672), which by its terms was limited to operations under the proviso, may no longer be applied as ground for denial of an intrastate carrier's application for corresponding interstate authority. However, the Day case principle was a reflection of the commission's long established policy of avoiding creation of duplicate operating rights by denying authority for operations which the carrier could perform under existing laws and regulations.—Sheridan-Indianapolis Bus Line, Inc., Extension, 92 M.C.C. 285 (286)*.

Since applicant did not use its intrastate authority to engage in interstate operations under the proviso prior to repeal thereof, it has no "grandfather" rights under §206(a)(7), and its existing intraste rights do not meet the procedural requirements of §206(a)(6) and therefore may not form the basis for issuance of a certificate of registration thereunder. And though it could possibly obtain an intrastate certificate under circumstances qualifying it for registration, neither the language of the statute nor its legislative history suggests that the §206(a)(6) procedures are intended to be the exclusive means by which motor common carriers may in future conduct interstate or foreign operations solely within a single State. Thus, since issuance of authority sought in application filed under §207(a) would not lead to creation of duplicate operating rights, there is no legal or policy bar against grant thereof.—Id., pp. 286-7.

While §§206(a)(6) and (7) specifically provide that certificates of registration shall be valid only so long as the holder is engaged in operations solely within a single State and is not controlled by, controlling, or under common control with a multi-State carrier, it is axiomatic that all provisions of the act must be read together in order to give effect to the intent thereof as a whole; it follows that the statutory mandate cannot be considered by itself but must be construed in the light of other pertinent provisions of the act. In addi-

tion, the provisions embodied in the amendments, to a substantial degree, effected a codification of established commission principles and precedents with respect to single-State interstate operations. Therefore, since both sections permit the transfer of certificates of registration, application of principle of the *Elliott* case , 38 MCC 547, to the purchase or acquisition of control by multi-State carriers of certificate-of-registration operations, and vice versa, in §5 proceedings, is not in contravention of legislative intent behind the amendments.—T. I. M. E. Freight, Inc.—Merger, 97 M.C.C. 310 (318, 322, 327)*.

Applicant single-State carrier was engaged in lawful operations under former §206 (a) (1) second proviso and, thereafter, such operations were continued under "grandfather" provisions of §206 (a) (7) until date multistate carrier took over operations under temporary authority. Such operations, both under former second proviso and the "grandfather" proviso, constituted the single-State operator a common carrier within meaning of §5(13) and it and the multistate carrier applicant have a statutory right to seek the commission's approval of proposed merger transaction; such proposed transaction must be approved if, on the merits, it is found to be consistent with the public interest. Also, under §210a, the commission may authorize continuance of "grandfather" proviso operations by multistate carriers, pending determination of proposed finance transaction under §5 or §212(b). Therefore, protestants' interpretation of §206 (a) (6), (7) as not permitting transfer of rights thereunder until certification of registration has been issued, has no support in the law.—Id., pp. 322, 327-8.

See also Sierra Distributing purchase case, §5(2), n. 110 *"Grandfather" applications.*

Interpretation in 44 MCC 325 of the former second proviso of §206(a) (1) as referring only to operations by motor vehicle, with result that it would not preclude a single-State operation by a motor carrier controlled by a railroad operating in several States, should apply equally to a carrier operating under §206(a) (7) which is affiliated with a multistate carrier of another mode. Nothing in history of the statute enacting paragraphs (6) and (7) warrants the view that Congress intended to overrule that case, and Senator in charge of the bill while under consideration stated that it would preserve all existing rights of intrastate motor carriers engaged in interstate operations under the proviso. Therefore, where §206 (a) (7) uses the word "carrier," it means a motor carrier subject to Part II. Upon consummation of approved purchase vendee, notwithstanding its affiliation with a coastwise water carrier subject to Part III, will be entitled to receive any certificate of registration issued as result of vendor's "grandfather" application.—Security Transp. Co.—Purchase—Security Truck Line, 93 M.C.C. 385 (390-1).

Although, upon consummation of purchase of vendor's State certificate, multiple-State vendee would be entitled to continue interstate operations formerly conducted by vendor under single-State proviso of §206(a) (1) and presently under "grandfather" clause of §206 (a) (7), pending issuance of certificate authorized under §207 (a), under §206 (a) (7) vendor's interstate rights would automatically expire on February 12, 1963, unless it previously applied for a certificate of registration, and vendee's right to continue the former proviso operations beyond that date is therefore contingent on vendor's filing of such application. Moreover, vendee's operation during the interim period is limited to extent of authority granted by the State certificate submitted with that application.—Mistletoe Exp. Service—Purchase—Central News Exp., Inc. , 90 M.C.C. 797 (804).

50. "Grandfather" clause. The commission erred as a matter of law in holding, contrary to pertinent Washington statutes, regulations, and Supreme Court decisions, that operating permits issued by Washington Public Service Commission from 1935, when state law abolished certificates of public convenience and necessity and authorized issuance of permits, to enactment of 1963 law re-establishing such certificates, were in substance and effect "certificates of public convenience and necessity" within the second proviso of §206 (a) (1) and Public Law 87-805 which repealed the proviso and added §206 (a) (6), (7) to the act. During period in question, governing State laws, regulations, and decisions did not mandatorily require the State commission to con-

sider all factors pertinent to "necessity" and certainly did not require it to deny a permit for lack of a showing and finding of necessity. The commission's order granting "grandfather" certificates of registration to 11 motor carriers previously operating under such intrastate permits, being based on its erroneous holding, is also erroneous as a matter of law; reversed and set aside.—Black Ball Freight Service v. United States, 266 F. Supp. 287 (288-90)*.

Respondent has shown that prior to October 15, 1962, he was engaged in operations solely within a single State and neither was nor is commonly controlled with a multiple-State carrier owned by his father. While there is evidence of earlier practices suggesting an overall family enterprise on part of respondent and his relatives who own and control the other companies involved, such practices occurred after filing of his BMC-75 statement and were terminated upon his discovery of their impropriety, substantially before the critical date. This cessation indicates good faith on respondent's part, and the close blood relationships between persons in the involved companies was made known to the commission at time respondent's registration was accepted. There is no common ownership or management of respondent's operations and those of the multiple-State carrier, and respondent's relatives have no material financial stake in his business, or vice versa; none of the parties has legal or actual power to control the business of the other. Respondent is entitled to issuance of "grandfather" registration certificate, but he is admonished that the tests of control discussed are applicable in maintaining the validity of that certificate.—Abramowitz—Investigation of Operations, 94 M.C.C. 213 (219-20).

Protestants' contention that "grandfather" rights under this section can be preserved by the person claiming them only if such person continues operations without interruption from October 15, 1962, until such time as the certificate of registration is finally issued and that such grandfather rights are personal to the party filing the application and may not be transferred, is without merit. Not only certificates of registration, but also "grandfather" rights to operate pending issuance of such a certificate may be transferred.—T.I.M.E. Freight, Inc.—Merger, 97 M.C.C. 310 (317-9)*.

Regulations of the Commission

28 FR 867, Jan. 30, 1963, Part 179: Transfers of Operating Rights, §179.1(b) amended, and §§179.10 through 179.14 added; rules added govern transfers of certificates of registration issued or to be issued pursuant to §206(a) (6) and (7) of the act, effective on date of publication.

28 FR 1255, Feb. 8, 1963, Part 7: List of Forms, Part II, IC Act, §7.201 BF 201, Form BF-201 prescribed and approved for applications for transfer or lease of certificates of registration provided for by §206 (a) (6) and (7), effective on date of publication.

Section 206. (b) [*§306 (b) U.S.C.*] Application for certificate; form and contents.—[Unchanged. See vol. 10, p. 7978]

Historical Note

The commission recommends, in view of the prohibitions in 28 USC §1001, that §206 (b) be amended so as to eliminate the mandatory oath provision therein, and that such requirement be made discretionary with the commission.—Annual Report, 1964, p. 72.

Notes of Decisions

Volume 10—p. 7978; Volume 11—p. 9425; Volume 12—p. 10386; Volume 13—p. 11067; Volume 14—p. 11586; Volume 15—p. 12192; Volume 16—p. 12839; Volume 17—p. 13532; Volume 18—p. 14343, Volume 19—p. 15582.

CONSULT THE TABLE OF CASES WHENEVER A CITATION IS FOLLOWED BY AN ASTERISK

15. Filing and verifying application; parties; notice.—[Vols. 10-19].—Although failure specifically to designate Robins Air Force Base as a service point in extension application was an inadvertent error, and evidence warrants grant of authority to serve the base as an off-route point, applicant Express Agency is admonished henceforth to designate specifically each point sought to be served in all applications for motor-carrier authority, in accordance with the defined limits of its motor-vehicle operations with respect to commercial zones and terminal areas, as set forth in 91 MCC 311.—Railway Exp. Agency, Inc., Extension, 91 M.C.C. 887 (890, 891)*.

While authority granted under §7(c) of Transportation Act of 1958 would possibly be more extensive if applicant were seeking certificate under §207(a), it elected to file an "interim" application and notice published in Federal Register so noted; consideration is therefore limited to actual operations commenced during the "interim" period.—Yeary Transfer Co., Inc., Extension, 88 M.C.C. 473 (479).

Application filed under §207, seeking modification of outstanding authority for road-building machinery to permit transportation of separate shipments of parts, was properly treated as an application rather than a modification proceeding. Applicant's prior petition for such modification was denied by order f the entire commission, and it was previously advised informally by Bureau of Motor Carriers that service for which authority is sought could not be performed under its existing certificates; moreover, as applicant's ourstanding authority is not patently indefinite or ambiguous, and it knew or should have known the extent thereof, determination of instant application does not require interpretation of carrier's existing authority.—Curtis Keal Transport Co., Inc., Extension, 89 M.C.C. 670 (672-3).

Failure to consolidate extension applications of Railway Exp. Agency and United Parcel Service did not preclude examiner's making a valid recommendation as to the latter. While territorial scope of both applications is the same, difference therein was apparent when REA's application was filed only 7 days before hearing on that of UPS; former contains none of commodity and service restrictions on UPS' proposal, but practically seeks authority for unrestricted general-commodity service, whereas UPS proposes only a specialized package delivery service; REA's application raises further question of whether unrestricted authority sought may properly be granted a railroad subsidiary. Moreover, the commission frequently grants authority to more than one carrier for overlapping services; thus, the two applications are not mutually exclusive within meaning of 326 US 327.—United Parcel Service, Inc., Extension, 89 M.C.C. 709 (736-7)*.

As certain highways over which authority is sought for operation between Washington, D. C., and Dulles Airport have not yet been completed, carrier selected to provide the scheduled regular-route service should file appropriate applications when those additional routes become more certain of completion.—A. B. & W. Transit Co. Extension, 88 M.C.C. 175 (183).

Notice: [Vol. 19].—The commission's power to grant certificates is not unlimited; one of the requirements for issuing a certificate is that notice of its proposed issuance be given to competitors, and another is that the commission first determine that there is a public need for issuing it. These two factors work hand in glove, one with the other; notice to competitors informs the commission as to existing authorized carriers in the requested area and the need for additional services proposed, and that information is sifted and weighed to determine wisdom of the grant.—Willey v. United States, 245 F. Supp. 669 (677)*.

Existing carriers must have proper notice of the true nature and purpose of a proposed service so that they may have an opportunity properly to prepare their case in opposition. And it is doubtful that sufficient notice of the transit feature of the proposal was given in the published notice of the application which merely set forth the commodities and points to be served when, in fact, applicant was seeking authority to perform the outbound leg of a storage-in-transit movement.—Willis Shaw Frozen Food Exp., Inc., Extension, 98 M.C.C. 466 (468)*; on reconsideration, however, since opposing carriers had a reasonable

opportunity to prepare their defense, conclusion is warranted that the statutory requirement of notice does not apply to the transit aspect of applicant's proposal.—Id., 100 M.C.C. 18 (20)*.

After notice of the application (designated for handling under modified procedure) had been published in the Federal Register, the proceeding was assigned for oral hearing without publication of notice to that effect; however, under rule 1.241(d) of the Rules of Practice, interested parties are entitled to notice when cases originally docketed for modified procedure are transferred to the hearing docket, and rule 1.241(c) requires persons desiring to protest an application so assigned for oral hearing to notify applicant and the commission thereof at least 10 days before the hearing. Opposing railroad filed notice of its intention to appear and protest the application, but its notice was not timely filed under rule 1.241(c); therefore, when it appeared at the hearing and sought leave to intervene, the examiner refused to let it appear in the proceeding. In light of the failure to publish a notice of assignment of the case for oral hearing, the examiner's ruling was incorrect, and rail protestant should be allowed to intervene.—Arrow Trailways, Inc., Extension, 94 M.C.C. 514 (515).

When "grandfather" application as published, although somewhat ambiguous because of partial "radial" wording therein, evidenced a desire to serve all points in Alaska, it can hardly be said that interested parties were not adequately informed that applicant intended to serve substantially all points in that State in the transportation of general commodities. Furthermore, the authority granted, being somewhat restrictive in nature, is not inconsistent with the description of authority published in the Federal Register, particularly in view of the fact that adequacy of existing service is not a relevant consideration in a "grandfather" type application.—Knudsen, 94 M.C.C. 339 (343).

Territorial authority granted for transportation of parts, etc., of road construction machinery does not constitute a broadening of applications as filed when it authorizes service only from origins specified in notice published in Federal Register; authority granted from specified Georgia points is restricted to traffic originating at points in origin States named in applications; and all authority granted is tied to a service to be performed in mixed shipments in same vehicle as part of applicant's presently authorized service, and is further restricted to service to and from points sought in the applications, albeit through a gateway.—Home Transp. Co. Extension, 92 M.C.C. 677 (686)*.

Rephrasing of grant to avoid duplication of applicant's present alternate route authority is not a substantial broadening of application and no additional publication of notice to the public is required.—West Bros., Inc., Extension, 91 M.C.C. 523 (532)*.

Assertedly defective notice in Federal Register as to elimination of gateway in no way prejudiced protestants; as competitors, they were on notice as a factual matter of applicants' gateway operations, and consideration of extension applications on that theory did not increase their burden of proof in opposition.—Mason & Dixon Tank Lines Extension, 91 M.C.C. 7 (10).

Application, as filed and published, for authority to transport "acids and chemicals" properly apprised any party who might have an interest in transportation of "grain fumigants and insecticides" of scope of the application; following 88 MCC 127, application as filed is sufficiently descriptive to include those commodities.—Cyrus Truck Line, Inc., Extension, 88 M.C.C. 447 (451).

Published notice of vendee's application for certificate covering operations conducted by vendor in Virginia under the "grandfather" clause of §206(a)(7)(B) indicated that it sought authority to operate between Lynchburg and Kenbridge, serving no intermediate points, whereas the application shows that authority for all intermediate points is desired; furthermore, underlying intrastate certificates authorize, and abstract shows an abundance of, service to and from such points. Since all the intermediate points are small towns on a rather short route, republication of the application does not appear necessary to consideration of requested intermediate-point authority; however, effective date of order granting certificate to vendee is deferred for 35 days to permit any interested

party to file a petition concerning the matter. —Overnite Transp. Co.—Purchase—Hill City Transfer, Inc., 90 M.C.C. 749 (753).

Although application for authority to transport aircraft parts not requiring special equipment or handling did not specify missile parts requiring special equipment, because applicant, the aircraft industry, and the Bureau of Motor Carriers then believed that its existing authority for transportation of airplane parts requiring use of special equipment embraced such movements, the public was given sufficient notice of the commodities for which authority was being sought. Interest of protestant general-commodity carriers would not have been more affected if notice to the public had included missiles; nor, since they could not transport commodities requiring special equipment or handling, would they have been affected by an unrestricted grant of missile parts authority.—Leonard Bros. Transfer, Inc., Petition for Clarification, 96 M.C.C. 246 (254, 255)*.

Nor may heavy haulers protesting petition for modification of the authority in question to specifically authorize unrestricted transportation of missile parts legitimately claim that they have been prejudiced by any discrepancy between the notice actually given and the authority for which need is found. They did not protest applicant-petitioner's earlier application for heavy-hauling authority for airplane parts, which were then mistakenly believed to include missile parts, and if applicant had been able in considered application to seek authority for missile parts as a separate commodity (which it could not do because of security restrictions), it would have shown that it was already providing a needed service thereon under color of right flowing from its existing certificate. In the circumstances, protesting heavy haulers would not now be prejudiced by a grant of authority they could not have successfully opposed at time of original hearing. However, to be abundantly fair to protesting carriers, the application, as reformed and amended in light of hearing on the petition, will be published in the Federal Register, and any interested person may file petition setting forth his cause within 30 days thereafter.—Id., pp. 255-6, 257.

Notice of application for irregular-route authority to transport magazines and periodicals did not reflect initial origin of part of the traffic involved, but rather the movement thereof from two intermediate points to the destination area. To insure that interested persons have not been misled and prejudiced by the omission of the information as to the original origins, statement of authority granted will be republished in the Federal Register and issuance of certificate withheld for 60 days from the date of such republication; during first 30 days after republication any proper party in interest may file appropriate pleading. —Kato Theatre Service, Inc., Extension, 94 M.C.C. 395 (396).

Since application as originally published sought authority for irregular-route transportation of food products from eastern origins only to Martinsville, Ind., for purpose of tacking to provide through transportation to Texas and Oklahoma, notice of authority granted from named origins to points in Oklahoma and Texas will be published in Federal Register, and 30 days from date thereof will be allowed for any interested party to file appropriate petition.—Trans-Cold Exp., Inc., Extension, 92 M.C.C. 739 (741).

Where need for service is established but published notice of authority sought was inadequate, due to an error by a member of the commission's staff in preparing the notice or to a minor or inadvertent error by applicant, the commission may provide for republication in the Federal Register of the authority to be granted commensurate with the demonstrated need, so that persons not alerted by the prior notice may have opportunity properly to protect their interests. Applicant's failure to specify Robins Air Force Base as a service point in extension application was an inadvertent error, and need for express service thereat is established; therefore, proper notice of complete scope of authority granted, including the base as an off-route point, will be published and certificate withheld for 30 days from republication date to allow any party affected by broadened scope thereof to file an appropriate pleading.—Railway Express Agency, Inc., Extension, 91 M.C.C. 887 (890-1)*.

While no useful purpose would be served

by requiring the filing of additional application for original authority sought, which was omitted from territorial description in notice of the application, as amended, which was republished in the Federal Register, grant of such authority is warranted by the evidence; therefore, since the change may prejudice parties not receiving notice thereof, a corrected notice will be published in the Federal Register and 30 days allowed for petitions by such persons prior to issuance of any operating authority.—Edwards Extension, 88 M.C.C. 566 (567)*.

Boundaries of nonradial territory authorized for transportation of additional commodities do not exactly coincide with those of radial territory described in applicant's present certificate and sought in extension application, and may in some places go beyond them. Although opposing carriers were present at the hearing and will not be prejudiced by the new boundaries, other members of the public who relied on notice of the application as published in the Federal Register may have an interest which is prejudiced by lack of proper notice; therefore, the new territorial and commodity description will be published therein and certificate withheld for 30 days from publication to allow any proper party in interest to file protest and petition for further hearing.—Melton Truck Lines, Inc., Extension, 88 M.C.C. 723 (736).

While unrestricted authority for transportation of experimental and display machinery and equipment is broader than authority sought to serve the single supporting shipper, grant of such unrestricted rights is justified; therefore, since members of the public who relied on the notice published in the Federal Register may have been prejudiced thereby, authority granted will be republished and certificate withheld for 30 days to allow any interested party to petition for further hearing.—Donaldson Transfer Co. Extension, 89 M.C.C. 651 (653)*; similarly, since authority granted to REA between Albany and Fonda, N. Y., goes beyond scope of the application as published, notice of authority granted will be published in Federal Register and certificate withheld for 30 days to allow any interested party to file appropriate pleading.—Railway Exp. Agency, Inc., Extension, 92 M.C.C. 227 (232).

Inasmuch as grant of authority for liquid chlorine without restrictions on type of container enlarges scope of the application beyond that published in Federal Register, members of the public who relied on the notice as published may have an interest which has been prejudiced by lack of proper notice. Therefore, the authority sought to transport liquid chlorine in containers will be republished, and any person believing himself prejudiced by grant thereof may file appropriate pleading within 30 days of such republication.—Chem-Haulers, Inc., Extension, 88 M.C.C. 1 (2).

Though primary purpose of application by irregular-route carrier is to obtain a regular route in order to interchange and participate in joint-line service, application as filed was not informative as to true nature of the destinations involved or of the total service that would be performed for supporting shipper. A simple note to effect that service at named destination was for purpose of interchange on shipments destined to certain eastern points would have been informative and more in keeping with Canon 29 of the Commission's Code of Ethics, which requires candor and fairness in presentation of causes before the commission.—Bonanza Trucking Co. Extension, 92 M.C.C. 220 (221-2)*.

On reconsideration, however, although territorial description of proposed service in the published notice was less complete than it should have been, outright denial of the application is not warranted on that basis. A number of motor and rail carriers operating in considered territory have actively opposed the application, and it appears unlikely that there are many if any other carriers whose interests are directly involved; therefore, authority may properly be granted, subject to republication in the Federal Register so that any interested person not heretofore apprised of the nature of proposed service will have an opportunity to be heard.—Id., 94 M.C.C. 620 (623-4)*.

Application as filed fails to give true notice to interested persons since it obscures the true purpose of the proceeding, which is to establish a new through operation between points in Alabama and Georgia not embraced

in carrier's regular-route authority, on the one hand, and, on the other, points it is authorized to serve in other States on its existing regular routes and off route points therefrom. Applicant and its counsel are admonished, therefore, that in the future, filed applications must be more informative and more in keeping with Canon 29 of the Code of Ethics. Application denied on other grounds.—Dixie Ohio Exp., Inc., Investigation and Revocation, 94 M.C.C. 625 (635-6)*.

When, although application purports to seek irregular-route authority from Kansas City, Kans., to points in States east thereof and the District of Columbia, applicant actually seeks to perform through single-line transportation from points west of Kansas City (by use of transit at that point) to requested destination territory, interested parties have not been afforded adequate notice by the application as filed and published of the scope of the proposed through service. Under recent criteria, applicants for irregular-route authority are required to set forth in the application, by notation or otherwise, the actual origins and destinations to be served. Absent appropriate notice and proof of need therefor, authority for such through single-line service is denied.—Willis Shaw Frozen Exp., Inc., Extension, 94 M.C.C. 495 (501, 503-5).

Application as filed and published in the Federal Register requesting irregular-route authority between Albuquerque, N. Mex., and points in Arizona could not have been reasonably interpreted as seeking authority to provide service between latter points and certain Colorado points, which applicant actually intended to provide by tacking that and its existing authorities, thus it did not constitute adequate notice to carriers who may be authorized to provide such service. Also, this is not the ordinary and accepted method of seeking an extention of irregular-route operations; and since published notice did not apprise possibly interested parties of actual nature of proposed service, application must be denied.—Denver-Albuquerque Motor Transport, Inc., Extension, 91 M.C.C. 582 (584); for similar reasons, application for authority from Wendover, Nev., to Midvale and Tooele, Utah, is denied when record shows that such authority is sought only for purposes of tacking. Application as filed could not have been interpreted as seeking operating authority from or to any points other than those actually named.—Oxborrow Extension, 95 M.C.C. 96 (97-8)*.

Following principle of 84 MCC 239 and 92 MCC 220, carriers who would perform an irregular route service involving tacking or interchange must, in filing application, inform the public as to the true nature of the proposed service.—Kreider Truck Service, Inc., Extension, 92 M.C.C. 662 (663).

Application as published in Federal Register, for authority to haul meats and packinghouse products, byproducts, and items distributed by packinghouses, did not embrace dairy products dealt in by creamery company which is not a packinghouse, and grant of authority sought for dairy products by amended commodity description submitted at hearing would exceed scope of the application as published. Republication in form now desired by applicant is not warranted when service now available to the creamery company does not appear inadequate for its limited transportation requirements as shown of record.—Bilyeu Refrigerated Transport Corp. Extension, 92 M.C.C. 633 (636, 640).

Where application as filed sought authority for "dry bulk commodities" but traffic of sole supporting shipper either cannot be termed bulk commodities or will not be handled in bulk, potentially interested parties were not afforded sufficient notice properly to protect their interests. Although, in certain situations, republication in Federal Register of authority to be granted has been ordered where prior notice was inadequate and need for proposed service is established, instant case does not present any such situation; moreover, the difference between the authority sought and that required is too great; application denied.—Ligon Specialized Hauler, Inc., Extension, 91 M.C.C. 254 (257-8).

Omissions: [Vol. 12].—Though applicant apparently made no effort to correct omission of extension authority originally sought from Union City to Jackson, Tenn., from territorial description in published notice of amended application, counsel's letter asserts that elimination of such authority was not intended; as evidence shows that one shipper requires

service on shipments from St. Louis to Jackson, and the sole motor protestant has made no serious effort to meet shipper's requirements, grant of authority originally sought is warranted.—Edwards Extension, 88 M.C.C. 566 (567)*.

Parties: [Vols. 11-13, 15, 18, 19].—It was not unreasonable for the commission to conclude that, because of low volume of traffic anticipated on recently constructed highway, only one of four applicants should be authorized to provide service over the new road; its report sets forth criteria it employed in concluding which of the four was the best-qualified applicant for the route, and evidence in regard to each of the criteria was reviewed in the report. The commission's determination in favor of one applicant, and against the others, was not without a rational basis; such exercise of its wide statutory discretion to determine extent of service to be rendered cannot be disturbed by the courts.—Great Northern Ry. Co. v. United States, 209 F. Supp. 238 (240-1)*.

Considering the nature of jet thrust units for interceptor missiles, stability among the competing classes of carriers can best be fostered by withholding preference of one over another; no such preference is necessary where need is shown for two carriers to ensure prompt delivery of items essential to the missile program; authority granted both applicant which is primarily a carrier of aircraft and heavy commodities and applicant which is largely a carrier of explosives.—Baggett Transp. Co. Extension, 88 M.C.C. 3 (6,9)*.

In determining which of two applicants is better entitled to authority sought, where service of only one is needed, among factors to be considered are (1) which produced evidence supporting the finding of public need, (2) existing authorities and operations of both, (3) location of their terminal facilities, and (4) equipment operated. While there is little difference between instant applicants in respect of terminal location or showing of public need, A's present operations embrace points in entire territory involved, and it can handle traffic in both directions except that originating in New England or middle Atlantic States, whereas B's authority is more limited territorially and is restricted almost entirely to one-way operations from Louisiana and Texas. A is thus in superior position to render efficient and economical service in connection with its existing operations, as well as having a much larger fleet of pneumatic trailers required for the traffic involved. Those factors and prior filing of its application outweigh B's limited experience in handling that traffic under temporary authority; A is therefore selected to perform proposed transporation of specified commodities from Ector County, Tex., to 25 States.—Younger Bros., Inc., Extension, 92 M.C.C. 624 (631).

In view of otherwise similar qualifications of all 21 applicants for authority to transport cryogenic liquids, fact that only 3 of the 21 operate equipment suitable for such traffic is controlling in selection of those three to perform needed services; record shows need for services of two carriers in the 30-State area applied for by most applicants and for service of a third carrier in western part of the United States. Two of carriers selected have authority for, and experience in, transportation of cryogenic liquids which entitles them to favorable consideration, and the third is the only one who actually owns cryogenic equipment. One applicant's argument that its prior application should take precedence over that of a selected carrier is without merit in instant circumstances. Carriers selected are the three best qualified applicants.—Younger Bros., Inc., Extension, 95 M.C.C. 1 (17-8)*.

Where service of only 3 of 5 applicants for authority to transport salt from Williston, N. Dak., area to points in specified States is shown to be required, the only overriding factor in selecting the successful applicants is which can afford the optimum in service. Insofar as ability to render service is concerned, all applicants stand on equal footing except as to availability of equipment. Those in position to furnish sufficient equipment at any given time are the three whose operations are centered in the area; each has terminals at Williston, conducts extensive operations in surrounding territory, and has demonstrated ability to furnish equipment as needed; evidence is not convincing that the other two could provide equipment for the traffic when tendered. Granted accordingly.—Maas Transport, Inc., Extension, 92 M.C.C. 534 (540-1)*.

While shipper-supported applicants do not automatically prevail over nonsupported applications, shipper support is one of several factors to be considered when choosing from a group of qualified motor carrier applicants. Recognition must also be given such factors as priority of filing, the existing authorities and operations of considered applicants, locations of terminal facilities, and the equipment operated before proper selection(s) can be made. Supporting shipper needs the service of two carriers; and on careful review of all the factors, authority is granted to the two applicants which have shipper's support and have been providing it with satisfactory service under their existing authorities.—Trans-Cold Exp., Inc., Extension, 95 M.C.C. 353 (356-7).

However, there is no reason to censure the third applicant for filing its application without the approval of supporting shipper. In light of a conversation between its representative and shipper, the carrier believed, in good faith, that shipper would support its application and, therefore, concluded it was making a legitimate request for authority at the time of originally filing its application, although subsequent events revealed that shipper support would not be forthcoming. That applicant should not have been castigated for insisting upon its right to be heard.—Id., pp. 355-6.

Where only one carrier service is shown to be needed, proper choice between several applicants cannot rest solely on basis of terminal location; other factors must be considered, such as amount and kind of equipment and facilities available, applicants' existing authorities and operations, and priority of filing. Of several applicants, the one whose application was filed first is best qualified in transporting similar commodities and in having available suitable equipment. Its nearest terminal is 14 miles away where are located facilities for cleaning tank trailers as required by shipper. Furthermore, its present operations extend throughout the destination area, and in 1962 it transported about 8,000 loads of dry bulk chemicals, including dry plastic materials whose handling characteristics are similar to that of supporting shipper's product. Considering on balance all of the factors involved, a grant to that applicant is justified.—Chemical Leaman Tank Lines, Inc., Extension, 95 M.C.C. 394 (400-1).

Record does not support authorization of six additional carriers to provide proposed service when, though the mint specifies that as many as three truckloads of silver bullion may move in a single week, projected tonnage for a year after the hearing indicated that an average of less than one truckload weekly was expected to move; also, it apparent that the service of one carrier will be adequate to meet the mint's needs. Each of the applicants is a substantial motor carrier with ample equipment and a nearby terminal, and the services they propose are substantially comparable. However, applicant Navajo handled substantial tonnage for the mint under its general-commodity authority prior to discontinuance of its service, filed its application prior to those of the other applicants, and is well qualified; considering all the circumstances of record, that applicant should receive the authority sought.—Navajo Freight Lines, Inc., Extension, 95 M.C.C. 551 (559-60).

Evidence shows need for some of the service proposed by two applicants, but potential eastbound traffic justifies certification of only one carrier. The applicant which has extensive terminal facilities in the two origin States and handles liquid chemicals from various points therein should be selected to provide additional service required, although its application was filed later than that of the other applicant. And for like reasons, the same carrier is designated to provide the westbound service shown to be needed, since it is in a superior position to render such service, notwithstanding fact that the other applicant is currently providing the service under temporary authority.—Pacific Truck Service, Inc., Extension, 94 M.C.C. 262 (266-7).

Four applications, requested by the same shipper, were all filed within 10 days of each other; such minimal variance in filing time should not be considered as controlling where volume of traffic involved does not warrant services of all applicants. Consideration of applicants' existing operations, their equipment, and terminal facilities, and the location of those States to which need for proposed service is shown provides a sufficient basis for

a fair and reasonable selection among them.—Wilson Bros. Truck Line, Inc., Extension, 94 M.C.C. 426 (431).

While evidence presented was too vague and indefinite to justify authorization of three duplicating operations, particularly where preponderance of the traffic does and will continue to move either by rail or in intrastate commerce, need exists for a single motor service for bulk shipments to certain of shipper's present and potential customers. Of three qualified applicants, the carrier selected to receive authority is presently authorized to perform some of considered transportation, maintains a complete terminal near shipper's plant, and was one of the two who first filed an application; that selection is as fair and appropriate as permitted by prevailing fact situation.—Coastal Tank Lines, Inc., Extension, 94 M.C.C. 206 (211-2).

Neither volume of supporting shipper's traffic nor its shipping problems require proposed service of both applicants in transportation of uncrated pianos from one origin to all States but Alaska and Hawaii. Authority granted applicant which already handles shipper's traffic directly to five States and by circuitous routing to the remainder; grant will merely eliminate existing circuity and will resolve its present difficulties in serving those States.—North American Van Lines, Inc., Extension, 91 M.C.C. 485 (488).

In choosing between two eligible carriers, where volume of traffic is not considerable and no need is shown for more than one, neither priority of filing nor fact that supporting evidence may have been presented on behalf of a particular applicant may be considered controlling unless other factors are equal. While first applicant has a terminal and considerable equipment stationed at considered origin, whereas second applicant customarily has only one or two trailers there, latter's equipment appears sufficient to handle the volume of traffic that will be moving; also, part of shipper's traffic is a dry bulk commodity which must move in hopper trailers and second applicant has several such trailers but first has none. Therefore, authority shown to be needed should be granted to second applicant.—Eldon Miller, Inc., Extension, 88 M.C.C. 309 (314)*.

Present need for through bus service between involved New Jersey areas and New York City does not warrant authorization of more than one carrier for either of proposed routes. Although proposals of three applicants are essentially identical respecting frequency of schedules, and all appear financially capable of providing the service, grant of extension authority to applicant recommended by joint board is not warranted when its existing routes do not serve territory along the proposed through routes, and route which it would coordinate with the primary routes is too circuitous to meet the need shown; neither priority of filing nor fact that it has temporary authority for the routes involved is controlling, and resolutions of civic and governmental organizations presented in its behalf are entitled to little weight when they were apparently formulated on understanding that it was the sole applicant, or because it was considered a taxpayer in the involved community.—Somerset Bus Co., Inc., Extension, 89 M.C.C. 107 (114-5)*.

Grant to one of the other applicants would enable it to accomplish by tacking a through service for which authority was denied it subsequent to consolidated hearing in instant proceeding; manifestly, it should not be granted authority now sought, without a restriction against such tacking, in absence of an overriding public interest, which is not shown. Public witnesses' expressed preference for that applicant or another were not based on comparison of their services; witnesses are primarily interested in reliable and adequate service, and their use thereof will not depend on which applicant receives the authority.—Id., pp. 111, 115.

Though the third applicant's anticipation of great reduction in transit time is not clearly substantiated, its proposal derives operational superiority from fact that it would serve two segments not included in the other proposals, where substantial public support for through service was demonstrated, and from its intention to operate the involved routes in connection with its present routes. Some improvement in transit time would result from greater use of express highways, and though prior report indicated that transit time over its present routes could be improved, there is no

showing that it is not rendering reasonably adequate service or that its operations could be better conducted in some different manner; such considerations should not vitiate weight to be given to probable improved transit time resulting from use of proposed routes; public interest will be best served by grant to that applicant.—Id., p. 116.

Prospective passenger traffic between Washington, D. C., and Dulles Airport near Chantilly, Va., is not shown to require scheduled regular-route service by more than one carrier, particularly in view of luxury-type, nonscheduled, door-to-door service concurrently authorized to be provided by a specialized carrier. Nor, while fact that one of two busline applicants already serves Washington National Airport is a factor to be considered in selecting the carrier to perform the scheduled service needed, is any need shown for the same regular-route carrier to serve both airports; decisive factor in selection of the other busline is that the Washington-Dulles routes are more within its operating area than that of the rival applicant, constitute a logical extension of its routes into Fairfax County, and would integrate better with its system.—A. B. & W. Transit Co. Extension, 88 M.C.C. 175 (182, 183).

Petition of contract-carrier applicant for leave to intervene in proceeding on common-carrier application for similar authority, for sole purpose of presenting a motion to strike portions of latter's exceptions which relate to matters in the contract-carrier proceeding, denied. Though both applicants had ample opportunity, neither opposed or became a party to the other's proceeding; joint consideration of both applications was not opposed by either and is in public interest; each proceeding is determined on its own merits, and the common carrier's exceptions, so far as they relate to the contract carrier's application, are not considered.—Dealer's Transit, Inc., Extension, 88 M.C.C. 375 (376, 377).

Order substituting as protestant a carrier which purchased original protestant's certificated rights at a tax sale and thereafter sought temporary authority to control the acquired operations pending final approval of the purchase, should be sustained. Such vendee has a vital and substantial interest in the application proceeding, since it is actively conducting the operations formerly conducted by the original protestant and has thus succeeded to its predecessor's interest.—Trans-Bridge Lines, Inc., Extension, 96 M.C.C. 506 (507-8)*.

The commission customarily allows carriers which do not yet hold authority but have applications pending to oppose the duplicating applications of others. Though one of two Canadian applicants for similar authority to conduct charter operations in United States holds no existing authority from the commission, it has an interest in the other's application and is a proper party protestant thereto, since if both applications are granted the resulting operations will be partly competitive.—Norton, 92 M.C.C. 82 (84).

In application proceedings under Part II the commission has consistently given consideration to the effect that grant of authority would have on existing carriers. Railway Exp. Agency's application for extension authority as a motor common carrier of express between specified points is in general similar to all certificate applications filed under Part II, and protestant short-line railroad has an interest therein to extent that it nows holds motor-carrier authority for part of the service REA seeks to perform. That interest on its face is entitled to protection, and fact that protestant is a party to a contract with REA concerning diversion of express traffic is immaterial.—Railway Exp. Agency, Inc., Extension, 92 M.C.C. 227 (230).

Though applicant objected to one protestant's participation at hearing on ground of noncompliance with Rule 1.241(c) of Rules of Practice requiring notice of intent to protest, and evidence adduced by a carrier on its own behalf will generally not be considered when it has not complied with that rule, protestant complied with the rule insofar as it filed timely copies of its notification with the commission, and asserts that such notification was in fact mailed to applicant's representative. Though applicant denies that it was received, the record does not warrant finding that the rule was in fact violated. Since that protestant has a real interest in the proceeding, and its authority coincides with that of other protestants, applicant was not prejudiced by its par-

ticipation; objection overruled.—Blythe Extension, 91 M.C.C. 827 (828-9).

The commission has always recognized interests of competing carriers in any proceeding which may result in grant of motor carrier authority and has permitted such carriers to become parties and actively participate. Although adequacy of existing service is not at issue in "grandfather" proceedings, opposing carriers aid commission to develop the record and to scrutinize evidence to insure that grant to "grandfather" applicant conforms to operations actually being conducted at time regulatory legislation became effective. In view of this long practice provided for by Rule 1.243(c) of Rules of Practice and sanctioned by the courts, rail protestants operating within territory claimed by applicant are proper parties to a "grandfather" proceeding.—M. D. Cressy Co., Inc., 91 M.C.C. 211 (212, 214).

Protestant brokers are proper parties of interest; even though authority for special operation may not be denied solely because of economic injury which brokers of round-trip tours may suffer, it is desirable that they be permitted to participate in application proceedings, since by reason of their familiarity with transportation conditions in the area and with the service offered they are able to assist the commission in developing an adequate record; they have sufficient interest to challenge an applicant's fitness and to ensure that any grant of authority conforms to the proof of public need for a new service.—Auch Inter-Borough Transit Co. Extension, 88 M.C.C. 455 (460).

Inasmuch as exceptant's notices of protest, having been dispatched 9 days prior to the date of hearing, on their face do not comply with requirement of rule 1.241(c) of the Rules of Practice that a notice of intent to protest be dispatched so as to reach applicant's representative at least 10 days prior to the hearing date, the examiner properly refused to permit exceptants to appear as protestants. Furthermore, fact that the carriers' representatives were attending a conference meeting, causing interruption in their office procedures, is not a good excuse for noncompliance with the rule as to notice; therefore, since it was within the examiner's discretion to deny their petition to intervene, filed at the hearing and alleging that fact, such action should not be interfered with under the circumstances presented.—Ringle Exp., Inc., Extension, 95 M.C.C. 602 (603,605).

Priority of filing: [Vols. 11-13, 15, 19].—Where two applicants seek same authority, but only one motor-carrier service is required, carrier selected is the one which first filed application and is qualified by its experience, availability of equipment, and general ability to perform the service.—Indiana Refrigerator Lines, Inc., Extension, 91 M.C.C. 71 (80).

Since volume of shipper's traffic does not require services of more than one carrier, authority is granted that applicant which first filed application, has shipper's unqualified support, has existing facilities at point of origin, and has rendered satisfactory service to that shipper within scope of its authority.—Trans-American Van Service, Inc., Extension, 89 M.C.C. 48 (50).

Since there is no substantial distinction in ability to provide service of the four applicants seeking to serve supporting shipper in transportation of silos to substantially the same destination territory, weight must be given to fact that initial application of one—though encompassing only glass- or enamel-lined silos—was filed approximately a year prior to those of the others; and since its later-filed application is broader in scope, the initial application is dismissed and authority granted, so far as need for the service is shown, pursuant to the later application.—C & H Transp. Co., Inc., Extension, 88 M.C.C. 285 (294-5)*.

And where 2 of the other applicants seek identical destination territory, authority is granted that one which filed its application nearly 2 1/2 months before the other's, except that grant of authority to both is justified to 2 States to which shipper's traffic volume is expected to be considerably heavier than to others.—Id., p. 295.

16. Amendment of application.—[Vols. 10-14, 17-19].—Although application seeking authority to operate over two routes between Philadelphia and New Jersey Turnpike, serving no intermediate points except on traffic to or from points beyond Philadelphia or New York City was not a masterpiece of draftsmanship, grant of authority to pick up and

discharge passengers and express along those routes, restricted against transportation of traffic originating at or destined to Philadelphia or New York, did not constitute an amendment after publication in Federal Register, contrary to rule 1.241(a) of the commission's Rules of Practice. Application's emphasis on Philadelphia and New York was to assure buslines serving Camden-New York and Camden-Philadelphia that authority requested did not cover that traffic, and there is no suggestion that plaintiff was misled or otherwise prejudiced by any difference between the application and the certificate as issued.—Safeway Trails, Inc. v. United States, 234 F. Supp. 362 (363, 364)*.

While applicant Greyhound's intention to pick up and discharge in the Camden area traffic moving to and from the South could have been more clearly stated, in view of its existing operation authority and routes Baltimore and Washington can reasonably be considered "beyond Philadelphia" in operating from Camden to the New Jersey Turnpike and then heading south; nothing in application indicates that service to those cities from Camden must be through Philadelphia. The commission's holding that there had been no amendment of the application was a reasonable interpretation of its own rule 1.241(a), and fact that there may be other reasonable interpretations does not authorize the court to reject the reasonable interpretation adopted by the commission; the commission's findings and order sustained.—Id., pp. 364-5.

Amendment of application for authority to transport agricultural implements to articles weighing not over 500 pounds is ambiguous and should not be accepted when applicant and shipper claim that certain units exceeding that weight can be transported in sections weighing less than 500 pounds. Notwithstanding rejection of the amendment, original application can be considered on its merits, even though the amendment prompted withdrawal of certain opponents; the commission is not bound by understandings or agreements of the parties which would be inconsistent with public interest and practical and effective regulation.—Kindsvater Extension, 92 M.C.C. 131 (133).

Section 7 of Transportation Act of 1958 does not preclude commission, as a matter of law, from accepting late tendered amendments to "grandfather" applications. [Herrett Trucking case, 14 Fed. Car. Cas. #81, 380.] It is within commission's discretion to allow such amendments, providing original application for authority was timely filed.—Produce Transport Dispatch, 88 M.C.C. 198 (199)*.

Although applicant, at request of a potential protestant, amended application to seek authority for transportation of liquid chlorine in 1-ton containers requiring specialized equipment, the commission is not bound by any restriction or amendment which achieves results inconsistent with public interest and practicable and effective regulation.—Chem-Haulers, Inc., Extension, 88 M.C.C. 1 (2).

Broadening scope of application: [Vols. 12, 18, 19].—The commission is not bound by any amendment permitted at hearing which enlarges the scope of an application.—Bilyeu Refrigerated Transport Corp. Extension, 92 M.C.C. 633 (636).

When original application as published in Federal Register clearly indicated applicant's intent to provide service at Hoosick Falls, N. Y., and amendment proposed at hearing to extend terminus of one route proposed therein from North Hoosick Falls to Hoosick Falls was not objected to by any protestant at that time, scope of application is not unduly broadened thereby.—Railway Exp. Agency, Inc., Extension, 91 M.C.C. 311 (314, Note 6)*.

In view of decision of district court, subsequent to the commission's rejection of amendment broadening scope of "grandfather" application, that it was error to refuse to accept a late-tendered amendment to an application timely filed under Transportation Act of 1958, the proceeding was reopened to permit applicant to re-offer the amendment and present additional evidence.—M. D. Cressy Co., Inc., 91 M.C.C. 211 (212, 213).

While the commission may grant authority in excess of that sought so that the certificate issued will conform to the need shown for service, such practice is not normal unless authority thus granted would be relatively minor in relation to that sought by application as filed. Although application sought authori-

ty for "dry commodities in bulk," traffic of sole supporting shipper either cannot be termed bulk commodities or would not be handled in bulk; difference between authority sought and that required to transport shipper's traffic is therefore too great for such correction of application by the commission.—Ligon Specialized Hauler, Inc., Extension, 91 M.C.C. 254 (257).

Although application for authority to transport jet thrust units for interceptor missiles did not seek authority for accessories used in their installation, authority limited to the thrust units themselves would not provide shipper with the complete service needed; broadening of the grant to include accessories is a minor change in the application and does not require republication thereof.—Baggett Transp. Co. Extension, 88 M.C.C. 3 (10)[W].

Commodities: [Vols. 10, 19].—Amendment of application filed under §7(c) of Transportation Act of 1958, seeking authority to transport exempt commodities in mixed shipments with those for which "grandfather" rights were claimed, should be accepted and considered on its merits. While applicants did not offer the amendment until date of the hearing, after statutory period for filing "grandfather" applications had expired, protestants were given sufficient advance notice of their intention to do so and there was thus no element of undue surprise; also, the amendment did not so materially broaden the issues as to cause any delay, administrative or otherwise.—Produce Transport Dispatch, 88 M.C.C. 198 (199)*.

Since public convenience and necessity cannot be found to require a service which applicant is already authorized to perform, applicants' amendment of their applications prior to further hearing does not deprive commission of right to interpret their present commodity authorities or eliminate necessity thereof.—C & H Transp. Co., Inc., Clarification of Authority, 88 M.C.C. 87 (92).

Narrowing scope of application: [Vol. 12].—Applicant's obvious intent for offering eight amendments to the applications, territorially restricting proposed operations, was founded on desire to eliminate all opposition thereto; however, as held in 83 MCC 113, such fragmenting of an application results in the public need for a particular service being subordinated to applicant's own interests, leaving an unclear picture of the authority sought and the support for the amended proposal. While considered restrictive amendments do not relate to any origin from which service is shown to be needed, and supporting shippers have not been confused by the amendments, applicants have used a proceeding before the commission to negotiate and secure their own interests without any apparent regard for public need for their services as originally proposed; the commission disapproves of such practices and strongly emphasizes that such tactics are not condoned.—Liquid Transporters, Inc., Extension, 94 M.C.C. 615 (616-7, 618).

While examiner's desire to protect interests of carriers who agreed to restrictive amendment of application is commendable, such agreements between the parties are not binding on the commission; protestants who withdraw their opposition because of examiner's acceptance of some restrictive amendment do so at their peril.—Fox-Smythe Transp. Co. Extension, 88 M.C.C. 57 (59).

Restrictive amendments offered at time of hearing are not binding on the commission; protestants who rely on such amendments do so at their own peril and cannot be heard to complain that they were denied opportunity to oppose the application actively.—Melton Truck Lines, Inc., Extension, 88 M.C.C. 723 (736).

Points, routes: [Vol. 10].—The commission adopts recommendation of joint board which substituted a geographical description, in defining applicants' area of service, for a mileage-radii one stipulated to by applicants in amending their applications. Applicants do not seriously object to the geographical description, or attempt to show that under such description they could not serve all points served before and since the critical date; moreover, the grants recommended by the board are supported by the record, and interpretations of the applicants' area of service would be greatly facilitated by an adoption of the board's findings.—Denali Transp. Corp., 94 M.C.C. 521 (522-3).

18. Burden of proof.—[Vols. 10-19].—Applicant for a motor carrier certificate has not only the duty to make an affirmative showing

that proposed operation will be of beneficial value to the community but also incurs the added burden of showing that such operation is a necessity; and the latter is generally ascribed to a lack of adequate existing facilities. —Watkins Motor Lines, Inc. v. United States, 243 F. Supp. 436 (439)*; and, therefore, there was no error in the commission's failure to require affirmative proof of protesting carriers' operating authorities and their interline connections. To require such proof would place on the commission a burden of needlessly sifting through certificates of authority and interline agreements which are not even in controversy.—Curtis, Inc. v. United States, 225 F. Supp. 894 (898, 899)*.

A showing of convenience alone is not enough to meet applicant's burden of establishing by the evidence that the proposed service is or will be required by present or future public convenience and necessity; adequacy of existing service is one of the basic ingredients in such a determination, and burden is on applicant to show lack of adequate service. Grant of temporary authority in no way eases applicant's burden of proving public need; the mere fact that it may have been operating successfully and in accordance with the commission's regulations does not prove that public convenience and necessity was served.—Colorado-Arizona-California Exp., Inc. v. United States, 224 F. Supp. 894 (896-7, 899-900, 902)*.

Applicant for a certificate has the burden of satisfying the statutory requirements; it must prove its fitness and must establish by a fair preponderance of the evidence that that present or future public convenience and necessity requires the proposed operations; the same rule is applicable with respect to an extension application.—Zuzich Truck Line, Inc. v. United States, 224 F. Supp. 457 (468)*; Eazor Exp., Inc. v. United States, 218 F. Supp. 393 (394)*.

Burden is on the applicant to prove that its proposed service is or will be required by present or future public convenience and necessity.—Vincent Montone Transp., Inc. v. United States, 231, F. Supp. 484 (487)*; but since evidence of adverse effect on protestants is generally within their control, protesting carriers should come forward with information of that nature to persuade the commission to deny the application for a certificate. —Robbins v. United States, 204 F. Supp. 78 (81)*.

The burden of proof is on applicant to establish public convenience and necessity; and the examiner's statement, in report which the commission adopted, that, all factors considered, the evidence submitted by protestant (plaintiff in instant case) did not warrant partial denial of the application, did not shift the burden of proof to plaintiff but, rather, merely concluded that plaintiff's evidence did not overcome applicant's showing of need for its service. Decision of the examiner and the commission was not induced by any erroneous view of the law relating to burden of proof.—Sloan's Moving & Storage Co. v. United States, 208 F. Supp. 567 (571)*.

In seeking removal of key-point, rail-haul, and other rail-auxiliary restrictions in its motor-carrier certificates, so as to compete with independent motor carriers in the area by rendering all-motor service on motortruck billing and rates, burden was on applicant railroad to show that such modification was required by present or future public convenience and necessity; there is substantial evidence of record to justify the commission's conclusion that plaintiff failed to sustain that burden; denial of plaintiff's application sustained.—Great Northern Ry. Co. v. United States, 209 F. Supp. 230 (231, 232, 234)*.

When plaintiff presented one of its officers as its single witness in its extension application proceeding, and sought to rely on shipper evidence in proceeding on another carrier's application for similar authority in the same territory without complying with rule 1.82 of the commission's Rules of Practice, clearly the commission's finding that plaintiff had failed to prove public convenience and necessity for its service by evidence at its own hearing was not without basis.—Railway Exp. Agency, Inc. v. United States, 205 F. Supp. 831 (834, 835)*.

A contract carrier that failed to seek timely conversion of its permit to a certificate under §212(c) bears a heavier burden of proof in an application for conversion under §207. Evidence of past operations alone normally will not be sufficient because those operations

necessarily will have been restricted to service for a limited number of persons; therefore, shipper testimony demonstrating a public need for applicant's service as a common carrier should be produced.—Connell Transport Co., Inc., Conversion Application, 95 M.C.C. 312 (317, 319).

Motor carrier which controls a forwarder and is apparently managed in common therewith, and which also conducts a storage and warehousing business, has affirmative burden to establish that proposed extension operations, in light of those circumstances, meet the standard required by the national policy and the public interest as expressed by Congress, which is to supply an adequate, economical, and efficient motor service to the public without undue preference, unjust discrimination, or destructive competitive practices.—M. G. M. Transport Corp. Extension, 89 M.C.C. 699 (701).

Applicant failed to prove that it is fit properly to perform proposed operations when, based on the facts of record, it cannot be said to be in a reasonably satisfactory degree of compliance with the commission's motor carrier safety regulations; fact that it currently has an intensive safety program in effect, in an effort to eliminate violations of the safety regulations, does not establish that applicant is now fit to receive authority sought. The record shows that applicant is continuing the same type of violations which were the subject of the report in its earlier application proceeding.—Service Transport Co. Extension, 94 M.C.C. 255 (257, 258-9).

As applicants seeking authority to transport petroleum treating compounds, a recently developed product, already hold extensive petroleum products authority, they have the burden of establishing that shippers' compounds do not fall within that description.—Hugh Breeding, Inc., Extension, 95 M.C.C. 720 (725).

It is not an applicant's burden to interpret a protestant's certificate; however, under criteria announced in 72 MCC 788 and 77 MCC 602, it is incumbent on applicant to establish the composition, manufacture, and in some instances the use, of the commodities it seeks to transport.—Commercial Oil Transport, Inc., Extension, 92 M.C.C. 186 (188); Southern Tank Lines, Inc., Extension, 88 M.C.C. 594 (595); nevertheless, since vinegar is clearly not an "acid" as that term is generally understood in transportation parlance, and therefore not within protestant's authority for acids, there is no burden on applicant to establish that fact. Decision in 67 MCC 502, distinguished.—Erickson Transport Corp. Extension, 92 M.C.C. 122 (123).

Inasmuch as application to transport vermouth was protested by a carrier authorized to transport "wine," applicant was placed on notice that commodity status of vermouth might be questioned, and should have been prepared to deal with that issue; in such circumstances applicant had the burden of establishing, through expert testimony, the status of vermouth for transportation purposes.—Southern Tank Lines, Inc., Extension, 92 M.C.C. 423 (425).

In view of applicant's assertion that "varnish" produced by supporting shipper is not within protestant's authority for acids and chemicals, it is an integral part of its burden to establish through expert testimony the status of the commodity sought to be transported; lacking this, it cannot be concluded that protestant may not handle the traffic or that shipper is without adequate transportation facilities.—Maxwell Co. Extension, 88 M.C.C. 648 (651).

To warrant a grant of authority, applicant must establish that a definite and substantial need exists for its proposed service, and that such service will be utilized if it is established. Such a showing is not made when the extent to which supporting shipper would use proposed service is highly indefinite and speculative. Denied.—Burton Trucking, Inc., Extension, 94 M.C.C. 790 (792); also, though the commission has generally been less exacting with respect to evidence deemed necessary to justify a grant of authority to transport house-

hold goods, there must be some evidence of need for the proposed service and proof that the authority would be exercised if granted.—Wheaton Van Lines, Inc., Extension, 94 M.C.C. 489 (492)*.

Applicant failed to show need for proposed transportation of household goods between Alaska and points in the 48 contiguous States when it relied solely on its alleged past operations in movement of household goods for military personnel, presenting no shipper support; evidence does not show how applicant participated in those shipments, how they were routed, or whether they moved overland or through a port; however, it is clear that many shipments were transported unlawfully if, in fact, transported by applicant. Applicant's claimed past operations are not entitled to any weight in determining need for proposed household goods transportation. —Trans-American Van Service, Inc., Extension, 94 M.C.C. 248 (250-2); and as to that part of the application seeking authority to transport certain other commodities, evidence presented as to public need is too vague and indefinite to support a grant. Denied.—Id., pp. 253-4.

Before common carrier authority may be granted, it is incumbent on applicant to establish by clear and convincing evidence that there is a real need for proposed operation which existing carriers are either unable or unwilling to fulfill.—B. & C. Transp., Inc., Extension, 94 M.C.C. 326 (329); applicants, for the most part, failed to sustain that burden of proof.—Wilson Bros. Truck Line, Inc., Extension, 94 M.C.C. 426 (430); since shipper's supporting testimony is without any specificity concerning any inadequacies in existing service, it fails to meet that burden. There being no definite showing of need, the application must be denied.—Dixie Ohio Exp., Inc., Investigation and Revocation, 94 M.C.C. 625 (636)*; similarly, applicant failed to sustain its burden of proof when motor transportation needs of supporting shippers can be met by existing common carrier services which are not shown to be wanting in any material respect. Denied.—Samack, Inc., 94 M.C.C. 161 (165)*.

Since Railway Express Agency is a shipper as well as a carrier of express, its opinion of existing facilities available to it as a shipper is entitled to consideration, and it may meet its burden of proof in extension proceeding by its own expression of need for service and its dissatisfaction with existing service.—Railway Exp. Agency, Inc., Extension, 91 M.C.C. 473 (479); however, REA should not be allowed to offer express service by motor vehicle in lieu of rail transportation without any consideration of the adequacy of other existing service. An unbroken line of cases establishes that an application by REA for motor authority to transport express is subject to the criteria which stem from Part II; and while it can meet the burden of proof under Part II by its testimony of need for service in its role as shipper, its evidentiary standards should be no less than the requirements which must be met by other shippers. —Id., 94 M.C.C. 102 (106, 107).

The commission has recognized that express service should not be tied to any particular mode of transportation; however, as held in 94 MCC 102, authorization of a proposed line-haul motor operation by REA must be justified on evidentary standards that are no less than those required of other carriers proposing a transportation service under certificated authority pursuant to Part II. That evidentiary burden is the same for any express carrier seeking such authority, whether its proposal is supported by representative user complaints regarding the underlying transportation made used to effect the express service, or by the carrier's own testimony—in its role as a user of carrier services complained of—as to need for the service for which authority is sought.—Id., 94 M.C.C. 677 (679).

Fact that record in "grandfather" proceeding under §7(c) of Transportation Act of 1958 was not completed until almost 4 years after the critical date of May 1, 1958, does not in

any way release substituted applicants (transferees of original applicant's "grandfather" claims) from necessity of showing continuous "grandfather" operations during the period since the critical date.—Refrigerated Service, Inc., 92 M.C.C. 311 (314)*.

One fundamental fact which must be established by an applicant for "grandfather" authority under Transportation Act of 1958 is that on and continuously since May 1, 1958, it has been engaged in bona fide operation as a for-hire carrier of the commodities specifically brought under regulation; in the usual case, any clear factual indication of the nature of applicant's operations should immediately satisfy its burden of proving this fact.—Kendall Co., 88 M.C.C. 364 (367).

In a "grandfather" proceeding, burden of proof in on applicant to establish the scope and character of his operations and the truth of every essential allegation in the application. Applicant admittedly transported bananas as both a private and a for-hire carrier and the presumption is strong, in absence of evidence to the contrary, that shipments on which there is no proof of payment of Federal transportation tax were transported in private carriage; and since that presumption was not overcome, applicant clearly failed to demonstrate that he transported those shipments as a for-hire carrier. Granted in part.—Lowrance "Grandfather" Application, 91 M.C.C. 440 (443)*.

Where "grandfather" authority to continue a territorial operation is claimed, an applicant must show that he has served a sufficient number of points throughout the territory which are representative of the entire area. Determination of "grandfather" rights involving household goods authority is attended with difficulties as the traffic is non-recurring and, while the evidence does not indicate service to all points within Alaska, it establishes service to numerous points representative of the entire Alaskan area, except the panhandle, susceptible to motor carrier operation.—Sig Wold Storage & Transfer, Inc., 94 M.C.C. 471 (473).

See also Al Renk & Sons, Inc.—Alaska "Grandfather" Application, §206(a)(4), (5), n. 2; and Consolidated Freightways Corp. of Del. "Grandfather" case, §206(a)(4),(5), n.50.

Existence of advantages of proposed coordinated rail-motor service is not per se a sufficient basis for granting authority sought for the motor portion thereof; applicants still have burden of proving significance of those advantages in a factual context, and a present or foreseeable future need for the service proposed.—Osborne Truck Line, Inc., Extension, 94 M.C.C. 414 (418).

Proof required of automobile haulers authorized to file petitions in lieu of applications for modification of their outstanding authorities to enable them to continue participating, by use of substituted rail service, in traffic formerly handled in all-motor movements, outlined.—National Auto. Transporters Assn.—Declaratory Order, 91 M.C.C. 395 (415).

Applicant's burden of proving need for proposed substituted motor-for-rail service, in highway transportation of TOFC trailers in connection with prior or subsequent rail movement, is not met if it appears that satisfactory motor carrier service is available and being used, and there is no apparent advantage in or need for additional service.—Copey Trailers, Inc., 91 M.C.C. 551 (553).

A higher standard of proof is required when an independent motor operation is proposed by a railroad or by a motor carrier subsidiary of a railroad; "special circumstances" must be shown to justify rail participation in a purely motor operation. Applicant railroad has met that burden when it shows that no other rail or motor service is now available to shippers located at points on abandoned branch line; where businesses have been established in reliance on transportation furnished by the railway, it should be permitted to continue supplying service.—Soo Line R. Co. Extension, 94 M.C.C. 19 (20, 21).

Inasmuch as service proposed by rail-subsidiary applicant is not a true substituted mo-

tor-for-rail service, since authority to serve off-rail points as well is sought, applicant must show not only that proposed service is required by public convenience and necessity but, also, that "special circumstances" exist which warrant favorable action on its application; evidence adduced falls far short of meeting that burden of proof.—Milwaukee Motor Transp. Co., Extension, 89 M.C.C. 41 (45).

The underlying policy of §5(2)(b) governs applications filed under §207 by railroad-controlled motor carriers; therefore, because it is a railroad subsidiary, applicant has a special burden to prove need for unrestricted extension authority sought, and fact that it now holds unrestricted "grandfather" authority does not render §5(2)(b) inapplicable; on the contrary, the policy of Congress reflected in latter section would seem to apply with greater force to railroad-controlled motor carriers holding unrestricted authority than to those with restricted certificates.—New England Transp. Co. Extension, 88 M.C.C. 703 (706).

Although public convenience and necessity for either elimination of a gateway or relocation of an interchange point may be found in operating economies and efficiency, an applicant seeking gateway elimination must show in addition that it is conducting a substantial competitive operation under all its pertinent authority through that gateway, and that elimination thereof will not enable it to institute a competitively different service to detriment of existing carriers, whereas one seeking relocation of an interchange need only establish additionally that the interline service through the new point will not be competitively different from that which can be performed through the present interchange point.—Blue Ridge Transfer Co., Inc., Extension, 92 M.C.C. 463 (465).

A carrier seeking relocation of an interchange point need only show, in addition to operating efficiency and economies, that interline or interchange service possible through the new point will not be competitively different from that of the present interchange point. Applicant's proposed interchange of traffic at Sacramento, instead of Oakland, would not be a new service, and would permit a more efficient and economic handling of its existing interline and interchange traffic.—Southern California Freight Lines Extension, 94 M.C.C. 467 (469).

Policy and rule of law laid down in 83 MCC 451, that an applicant seeking authority on the gateway-elimination principle, which lightens the normal burden of proof, must show that it is transporting substantially all authorized commodities from and to substantially all authorized service points, so as to be effectively and efficiently competing with existing carriers is sound and, thus, controls determination of the issues in instant proceeding. Therefore, since applicant failed to demonstrate that it is entitled to elimination of its existing gateway, it must meet the usual tests of public convenience and necessity.—Service Trucking Co., Inc., Extension, 88 M.C.C. 697 (700-1)*.

It would materially distort the concept of substituted motor-for-rail service to allow applicant railroad subsidiary, which seeks to transport traffic moving in Railway Exp. Agency's express service over a route shorter than its existing service route, to use the theory of gateway elimination, with its concomitant lesser burden of proof, to institute a motor service which would replace a less direct highway movement rather than an inefficient rail operation. Application must be considered as one involving an extension of operating rights, in which applicant must initially bear the burden of showing that the proposed service is required by public convenience and necessity. Applicant has failed to bear this burden, much less the greater one of showing special circumstances required of a railroad affiliate seeking motor carrier authority of the nature proposed; REA alone supports the application, and its evidence fails to show that existing service available to it in the area, which is partially utilized, is inadequate in any respect. Denied.—Central of Georgia Motor

Transport Co. Extension, 94 M.C.C. 6 (10-11).

Since the only permissible operations which applicant can now perform through its King City, Mo., gateway are between Kansas, Nebraska, or Iowa and the compartively limited number of authorized points on its regular routes extending generally circuitously from Kansas City to St. Joseph, Mo., thence northerly via the King City gateway area to Des Moines, it is apparent that the authority it seeks in order to provide through service between all points in its three-State radial territory, via St. Joseph, and between all points in two of those States, via Kansas City, far exceeds the scope of its existing authority and thus raises issues much broader than the mere question of operating economies. In the circumstances, it is incumbent on applicant to prove public convenience and necessity to same extent as would be required in any other application for new authority. Since it presented no public witnesses or other evidence that would meet that burden of proof, authorization of the described through service is not warranted.—Southwest Frt. Lines, Inc.—Control—Direct Transports, 93 M.C.C. 439 (451).

Where a carrier seeking irregular-route authority for purpose of tacking or interchange has failed to inform the public in its application of the true nature of the service proposed, it must be held to the burden of proving a need for service from and to the origin and destination points shown in the application.—Kreider Truck Service, Inc., Extension, 92 M.C.C. 662 (663).

The burden is on applicant to establish that present or future public convenience and necessity require a proposed service; and the burden rests on an applicant seeking modification of outstanding authority to establish by clear, concise, and unequivocal evidence that the relief sought is warranted.—C & H Transp. Co., Inc., Clarification of Authority, 88 M.C.C. 87 (95, 96).

An applicant proposing a new operation in a field already served by other motor carriers has the burden of proving that the existing carriers are not rendering the type or character of service which satisfies the public need, and that its proposed service would tend to correct or substantially improve that condition.—McKenzie Tank Lines, Inc., Extension, 88 M.C.C. 250 (252).

Although in appropriate circumstances the commission has authorized existing carriers to participate equally in traffic from a new plant, where plant sought to be served by 4 carriers operating over highways within approximately 2.5 miles thereof has been in operation for over 3 years, and services of other carriers are available, applicants must establish with certainty that the existing services are inadequate to meet that shipper's reasonable transportation needs, and that their proposed services would remedy such inadequacies.—Roadway Exp., Inc., Extension, 88 M.C.C. 533 (537).

Protestant claiming ability to provide service from shipper's plant at Knoxville, Tenn., under its authority to serve the nearby point of Warcer has burden of showing that Knoxville is within the commercial zone of Warcer. —Blue Ridge Transportation Co., Inc., 89 M.C.C. 616 (619).

Although protestant holding authority from considered origins to Omaha, Nebr., has interchange agreements with carriers serving North Dakota destinations, shippers allege that neither it nor its connecting carriers has shown any interest in interline shipments; in such a situation, protestant acquires the burden of establishing affirmatively that it can handle the traffic and, also, that the interlining carriers are willing and able to transport considered traffic to North Dakota.—Kroblin Refrigerated Xpress, Inc., Extension, 89 M.C.C. 657 (659)*.

Acceptance of protestant brokers' position that they are entitled, in arranging all-expense tours, to protection against direct competition of carriers holding special-operations authority would impose on carriers seeking such au-

thority a curious, and in some cases impossible, burden of proof, since in order to show that brokers' services are inadequate they would have to show that their own charter services are inadequate. Practical effect of such an anomalous requirement would be to reserve to brokers the right to satisfy future demands for new tour service—a result incompatible with requirements of the national transportation policy.—Auch Inter-Borough Transit Co. Extension, 88 M.C.C. 455 (460).

Though past operations conducted in good faith have consistently been considered some evidence of need for service, such proof, standing alone, is not enough to justify grant of authority; while the commission recognizes and appreciates the difficulties confronting passenger carriers in obtaining proof, since their customers do not have a regular and repeated need for service, some such proof is necessary to establish public convenience and necessity. Where a carrier seeks to establish the pattern of its past operations and its records are as informal as those of instant applicant, it is especially important that direct testimony, particularly of disinterested members of the traveling or shipping public, be presented so that a clear picture of the carrier's operations may be obtained.—Rose Extension, 86 M.C.C. 723 (724-5).

22. Evidence.—[Vols. 10-19].—Part I, §1(19), notes; see also §207(a), n. 25.

Probative value of evidence pertaining to a particular operation, in determining an issue of public convenience and necessity, is not affected by the fact that the operation may have been unlawful. If such operation shows a need for service, the need is nonetheless because of the fact, if it is a fact, that operating authority was lacking; thus, evidence pertaining to an unlawful operation should not be rejected because it is "insubstantial."—Best Way Motor Freight, Inc. v. United States, 253 F. Supp. 314 (319)*.

Although all possible connecting carriers did not appear as protesting witnesses, the commission's conclusion that adequate single-or joint-line service was available was not based solely on a presumption; 1958 edition of official directory, listing names of heavy and specialized haulers and containing advertisement describing Red Book Plan under which participating heavy haulers provide through service, was introduced in evidence at hearing; the commission is not unfamiliar with that plan and in absence of complaint may rely on members thereof to supply the services so offered.—Robbins v. United States, 204 F. Supp. 78 (82)*.

Since absence of an express finding of inadequacy of existing service does not invalidate an order of the commission, evidence to support such a finding is not a prerequisite to the commission's right to grant a certificate.—Sloan's Moving & Storage Co. v. United States, 208 F. Supp. 567 (570)*.

Though evidence is conflicting as to extent of likely diversion of plaintiff's small-parcel business by United Parcel Service, plaintiff's territory extends only some 75 miles out of St. Louis, while proposed service is to a much larger territory, and there is substantial evidence that much of UPS' business would be derived from shippers who have found parcel post unsatisfactory; any differences in the evidence as to value of UPS' service, availability of other service, and diversion, are not sufficient to take the case out of the area of the commission's judgment.—Id., p. 570.

When service carrier is lawfully providing to Air Force Base is regularly used by a substantial number of interstate passengers, it would be useless redundancy to require testimony that there was a substantial number of interstate passengers traveling through the Base who desire that service.—Carolina Scenic Stages v. United States, 202 F. Supp. 919 (923)*.

Although plaintiffs' application sought permit as a contract carrier and their evidence was designed to establish propriety of such a grant, the commission found the operation proposed to be common carriage and denied application on ground that plaintiffs had not

established a public need for the service that could not be adequately met by existing carriers. However, evidence relevant to contract carrier standards set forth in §209(b) often differs in type and degree from that relevant to common carrier standards of §207(a); plaintiffs could not reasonably be required to present evidence of public need for the proposed service, since such evidence was irrelevant to issues presented by their application. In treating the application as one for common carrier authority, the commission effectively denied plaintiffs opportunity to know by what standards they were to be judged; order set aside and case remanded.—Eddleman v. United States, 229 F. Supp. 231 (236-8)*.

Even though authority to operate over deviation route was disapproved, applicant for certificated authority over the same route was able to use the long-time operations over the deviation route which it had legally conducted in good faith under the Deviation Rules, before the commission ordered such operations stopped, as evidence of public need.—Strickland Motor Freight Lines Extension, 96 M.C.C. 732 (740, note).

Statements in applicant's reply not supported by record will not be considered; language objected to as scandalous and as prohibited by Rule 1.4(d) of Rules of Practice can reasonably be considered within purview of proper legal argument; motion to strike denied.—Erie-Lackawanna R. Co. Extension, 91 M.C.C. 21 (25-6).

Motion to strike certain matter in reply to exceptions overruled, since there is no indication applicant was aware that the conclusions complained of are contrary to law or any ruling or commission finding; moreover, applicant has right to reach and urge adoption of any conclusions it deems justified on basis of evidence submitted.—Alterman Transport Lines, Inc., Extension, 91 M.C.C. 43 (45).

Records of service performed by applicant, which were attached to his application, became part of the record as evidence under Rule 1.19 of Rules of Practice; thus, examiner erred in stating applicant had no documents substantiating his statement that he had performed proposed service from Charlotte to several of destination States.—Kiser, 89 M.C.C. 750 (755).

Letter from supporting shipper's administrative manager, confirming that its production of air cars at its South Bend plant has been discontinued and that it intends to dispose of its activities there, was made part of record by order of the commission; evidence of such changes in important facts, which have occurred since hearing and are made part of the official record, may properly be considered in determining whether authority sought should be granted.—George F. Burnett Co., Inc., Extension, 88 M.C.C. 452 (453)*.

Support of receivers is not required where shipper as a producer of cement has adequately demonstrated a need for motor service.—Orscheln Bros. Truck Lines, Inc., Extension, 88 M.C.C. 569 (573).

Since supporting shipper's witness is not attached to its division controlling transportation of petroleum products from Knoxville and Chattanooga to western North Carolina, and could not testify as to nature of shipping or transportation facilities at those points, there is no factual basis for determining whether or not any pipeline outlets that might be established in their vicinity would be within scope of applicant's present authority or the enlarged origin areas it now seeks; also, evidence of need for service from Chattanooga is completely speculative. All in all, the evidence adduced is far too vague and indefinite to justify grant of any part of application.—Petroleum Transp., Inc., Extension, 94 M.C.C. 777 (780, 781).

Although shipper witness testified concerning volume of steel traffic turned over to applicant in St. Louis area during a 10-month period, the claimed tonnage was not reflected in applicant's operating testimony for that period; applicant did not attempt to provide a basis of record for resolving those inconsisten-

cies at the hearing and must be considered to have waived its right to do so; and information contained in exceptions whereby it sought to cure the deficiency was not admitted into the record and may not be considered. Examiner's conclusion that the shipper witness was in error was logical; furthermore, volume of steel traffic transported over applicant's service routes would not provide adequate basis for a grant of the general-commodity alternate-route authority sought. —Transamerican Freight Lines, Inc., Extension, 91 M.C.C. 841 (845)*.

Protestants' tonnage figures for traffic moving not only between Chicago or St. Louis and the Dallas-Fort Worth area, but also through those points, are not properly comparable with applicant's tonnage figures for traffic originated and terminated at such points, and protestants' traffic data otherwise do not provide a proper basis for evaluating applicant's competitive effectiveness. However, it would be unrealistic to conclude that applicant, a substantial carrier, is not an effective competitor between St. Louis and Detroit (its headquarters and principal terminal) and other major markets served by it, particularly in view of confirmatory oral evidence of supporting shippers.—Id., p. 848.

Gasoline sales slips and weight station slips submitted by applicant do not show movement of commodities claimed to have been transported; though he claimed to have other documents to support his "grandfather" application, and was requested to locate them, have them abstracted, and bring such information to the continued hearing, he not only failed to do so, but, when afforded similar opportunity with specific instructions how to abstract, again failed to comply. Applicant has been given every opportunity to bring forth evidence to support his application, and his failure to do so suggests doubt that such evidence is available. Denied.—Cox, 89 M.C.C. 545 (548-9)*.

Although another applicant claimed that documents which would show operations after 1953 were found missing a week prior to hearing, it is significant that no evidence was adduced with filing of "grandfather" application of representative shipments handled from and to specific points, and no mention is made of origins or destinations served by him; it would be impossible to frame a grant of any authority in absence of such evidence; denied.—Id., p. 548.

Inasmuch as neither of air freight forwarders supporting application for authority to perform service (not within §203 (b7a) exemption) to and from certain airports holds a permit from the commission, and therefore may not utilize applicant's service, their evidence is not considered.—Nickerson, 88 M.C.C. 186 (187).

When supporting air forwarders hold no authority from commission and therefore may not lawfully tender traffic to applicant which it requires authority to handle, traffic handled for those forwarders in the past cannot be considered as traffic which would move under authority sought to serve points beyond terminal areas of the underlying air carriers.—Air Cargo Terminals, Inc., Extension, 88 M.C.C. 468 (470).

Admissibility:[Vols. 12, 19].—Exhibits supported by IBM cards, which cards were prepared in the regular course of business, were properly admissible without underlying documents. Objections to such documents, which merely are abstracts of more basic documents, must be directed to their probative value rather than to their admissibility.—Burnham Van Service, Inc., Household Goods—13 States, 98 M.C.C. 58 (61)*.

The sole qualified protestant in proceeding called, as witnesses, representatives of exceptants who were not permitted to intervene at the hearing, and offered such carriers' testimony as to their authority, willingness, and ability to perform proposed service. Such carriers were protestant's witnesses and testified in its behalf, although their testimony was also in their own interest. Since rule 1.241(c) of the Rules of Practice only applies to par-

ties, and does not limit the type of evidence which may be presented, the fact that witnesses consider themselves able to fulfill shipper's requirements is relevant to the issues involved on behalf of protestant, and may be submitted by it as rebuttal; failure of protestant's representative to testify has no bearing on admissibility of their evidence. But since protestant appeared in opposition to only part of application, evidence submitted through exceptants is relevant only to that extent. Examiner erred in not considering exceptant carriers' evidence as it pertained to authority to transport silos.—Ringle Exp., Inc., Extension, 95 M.C.C. 602 (605-6).

However, protestant, by not filing exceptions, waived any objection which it might have raised as to the examiner's failure to consider evidence offered by it through exceptants' testimony. Consequently, as no proper party complains of examiner's action, this issue is moot and will not be considered. Further, contrary to exceptants' contention, their witnesses were not entitled to have their testimony developed, or to be actively represented by their own counsel. The examiner's grant of authority adopted.—Id., p. 606.

Applicant's proposal, in response to a public need, to transport passengers directly from Camden, N. J., to Baltimore, Washington, and points south thereof without going through Philadelphia is transportation to "points beyond Philadelphia" and therefore within scope of application. As authority sought would be limited to traffic originating at or destined to points beyond Philadelphia or New York City, there is no requirement that such traffic move through either of those points, and, as Baltimore, Washington, and the other southern points are considerable distances south of and beyond Camden and Philadelphia, evidence applicable to proposed movement thereto was properly admitted.—Greyhound Corp. Extension, 95 M.C.C. 762 (769-70)*.

There is no merit to contention that applicant's evidence concerning proposed operations to Canadian points through ports of entry was improperly admitted because application did not specifically refer to such operations. Application seeks authority to operate in interstate and foreign commerce,and evidence concerning movement of either domestic or foreign traffic is clearly within its scope. Though the commission has no jurisdiction over applicant's operations within Canada or need for additional service between Canadian points, in deciding whether need is shown for authority sought to points on United States-Canadian boundary it is necessary to consider evidence submitted respecting service involving points in Canada.—Blythe Extension, 94 M.C.C. 23 (46).

And evidence relating to availability of commodity rates on considered traffic to the destination States was admissible as relevant to the question of whether or not available rates have not moved or will not move the traffic.—Id., p. 46.

Despite failure of protestant railroad's subsidiary to file notice of intent to protest application in accordance with Rule 1.241 of Rules of Practice, the fact that it is operating and considers itself able to fulfill part of supporting shipper's transportation requirements is relevant to the proceeding and may be put in evidence by a qualified protestant in rebuttal to evidence offered by applicant to prove that public convenience and necessity require the service proposed.—Younger Bros., Inc., Extension, 92 M.C.C. 624 (627).

Since Edgewater, N.J., is 4.2 miles from corporate limits of Jersey City, which has a population of over 100,000, it is within commercial zone thereof; thus, although only Jersey City was named in application, evidence of a consignee located at Edgewater was properly received.—Langer Transport Corp. Extension, 91 M.C.C. 933 (934).

Though protestant's regional manager stated on direct examination that he was familiar with availability of equipment at its Denver terminal, he stated on cross-examination that he receives no regular reports of such infor-

mation but learned the facts testified to from his subordinates—the terminal manager and dispatcher—who were not present at the hearing. Thus, his testimony was not admissible because it was based on information not within his personal knowledge, nor obtained by him in the normal course of business.—Curtis, Inc., Extension, 94 M.C.C. 728 (729).

Applicant failed at further hearing to produce evidence in support of the three grounds stated as basis therefor in its petition, but sought to introduce testimony of witnesses, some of whom testified in its behalf at prior hearing or who appeared on behalf of organizations which presented supporting witnesses at that hearing; the examiner excluded evidence sought to be introduced through those witnesses as cumulative, immaterial, or beyond scope of matters set forth in applicant's petition, or because adequate reasons for failure to present it at prior hearing were not submitted. Considering that prior hearing consumed 4 weeks and some 90 witnesses were presented, including 40 for applicant, examiner was justified in excluding testimony that was cumulative, immaterial, or irrelevant. See Rule 1.76 of Rules of Practices and §7(b) and (c) of Administrative Procedure Act.—Yellow Transit Freight Lines, Inc., Extension, 94 M.C.C. 153 (158-9)*.

Evidence presented by petitioner's witness concerning the number of rail merchandise cars operated between considered points, and the average load carried in each car, is hearsay evidence which is inadmissible because the underlying station agent reports were not prepared in the ordinary course of business. Petition denied on other grounds.—Missouri Pac. Truck Lines, Inc.—Removal of Key Points, 94 M.C.C. 146 (147-8).

Motion to strike traffic data concerning shipments handled subsequent to hearing, in applicant's reply to protestant's exceptions, granted when no provision for submission thereof was made pursuant to Rule 1.86 of Rules of Practices.—Transport Storage & Distributing Co. Extension, 92 M.C.C. 566 (568).

Testimony as to alleged competitive advantage of applicant partnership as result of one partner's being engaged in petroleum marketing business was properly stricken when it related to a statement by another shipper whom witness had solicited. Such testimony is irrelevant, especially as the partner referred to no longer has an interest in the noncarrier business.—Wooten and Parker Extension—Tamak Plant, 92 M.C.C. 530 (531-2)*.

Admission in evidence of a magazine article quoting an officer of petitioner's parent railroad on nature and scope of the railroad's Flexi-Van service was properly refused; statements thus sought to be introduced were plainly inadmissible under the hearsay rule.—New York Central Transport Co.—Modification, 89 M.C.C. 389 (391).

Testimony of protestant railroad's operating witness that on specified dates its agents at Wilmington and Baltimore reported that shipments of fluorspar were transported by applicant, which at the time lacked authority therefore, is clearly hearsay and is not considered in passing on applicant's fitness.—M. I. O'Boyle & Son, Inc., Extension, 88 M.C.C. 559 (561).

Conversion of authority:[Vols. 11-13, 15, 18, 19].—Where a carrier seeks conversion of irregular-route to regular-route authority, the usual showing of public convenience and necessity must be made; however, such is not the case where carrier seeks conversion of its regular-route to irregular-route authority because, in most instances, it is already authorized to operate over several routes between its authorized points, and grant of authority consonant with its normal method of nonscheduled operation adds nothing to the operation actually being performed.—Deaton Truck Line, Inc., Extension, 89 M.C.C. 231 (234-5).

Affidavits submitted by shippers in support of applicant's purchase of vendor's irregular-route "grandfather" rights under §206 (a) (7) are entitled to weight in determination of merits of related application for conversion thereof to regular-route.—Inland Exp., Inc.—Pur-

chase—Frontier Dispatch, Inc., 93 M.C.C. 50 (53).

Though the presence or absence of any single one of the 8 criteria of regular-route operation specified in the Brady case (47 MCC 23) is not conclusive, each of such practices is suggestive of a regular-route service; the whole spectrum of activities embraced in the operations must be considered in determining the character of service performed. That an operation under irregular-route authority has taken on such rigidity that its day-to-day or week-to-week pattern may be reliably forecast is evidence of a gravitation to regular routes which is properly to be considered in determining whether an unauthorized conversion has occurred.—Hart Motor Exp., Inc. v. Midwest Motor Exp., Inc., 88 M.C.C. 525 (529)*.

Though facts and circumstances of applicant's operation of daily through service between Twin Cities and Minot, N. Dak., a point in its radial area served from Bismarck, N. Dak., over its regular route from St. Paul to Bismarck and the only practicable route thence to Minot, will not support a finding that it has deliberately sought to destroy the irregular-route nature of its operations or that it could arrest the conversion process otherwise than by curtailing its legitimate business activities, its operations have taken on the characteristics of regular-route service. As it presently transports substantial amounts of general commodities between those termini and its service has become an integral part of the available transportation service, grant of regular-route authority from Bismarck to Minot is warranted.—Id., 92 M.C.C. 558 (563-4)*.

Cross-examination:[Vols. 11-13, 15, 19].—That the person who prepared exhibits purporting to establish applicant's financial status was not present at the hearing for puposes of cross-examination is not so material a defect in proof as to warrant a finding of financial unfitness when the exhibits were introduced through applicant's vice president, who, because of his position with applicant, was substantially familiar with financial data presented and was available for cross-examination thereon.—Schwerman Trucking Co. of N. Y. Inc., Extension, 94 M.C.C. 683 (685).

In order properly to develop a record in proceedings where applicant seeks authority for purpose of participating as initial carrier in a joint-line movement, potential interlining carriers are generally presented in support of the application. Existing carriers should have the right, by cross-examination, to establish the nature and reliabiity of the proposed joint-line service that would compete with their existing operations; but fair opportunity for such examination is not presented when the proposed delivering carriers are not participants at the hearing.—Bonanza Trucking Co. Extension, 92 M.C.C. 220 (223)*.

In determining whether documentary evidence should have been adduced to support oral testimony concerning inadequacies of existing service, the crux of the matter is whether the opposing party has had opportunity to cross-examine effectively; protestant had such opportunity when the documentary evidence could have been culled from its own business records.—T. M. Zimmerman Co., Extension, 89 M.C.C. 150 (153).

Joint board correctly denied protestant's motion to strike testimony of witnesses supporting application, on ground that it had not had opportunity to cross-examine them because, although they appeared for further hearing on date first set, protestant had not received notice thereof, and, as order rescheduling hearing did not direct applicant to have its witnesses present, they did not appear at that hearing. Right of cross-examination does not exist unless there is evidence presented, capable of being disputed, that is prejudicial to some right or interest which the asserting party has at stake; otherwise, cross-examination would serve no purpose. Supporting shippers testified to nothing from which an inference prejudicial to protestant could be drawn, and protestant does not claim

that their testimony was erroneous in any respect. Cross-examination on issue of need for proposed service would amount to no more than argument, since that issue is for the commission to decide. Further, the parties have been given opportunity to file pleadings wherein they might argue their viewpoints as to the interpretation to be given the facts.—Edwards Trucking, Inc., Extension, 92 M.C.C. 383 (384, 385)'*.

Under principles enunciated in 48 MCC 773, the examiner, at further hearing held for benefit of parties prejudiced by prior undue broadening of application, properly granted new protestants' motion to strike prior evidence of applicant and supporting shipppers because applicant did not make such witnesses available for cross-examination at the further hearing. As an alternative to issuing a decision limited by procedural considerations, however, application will be decided on its merit.—Leamington Transport, 91 M.C.C. 647 (648, 650)*.

Although applicant based its refusal to accept opportunity to cross-examine protestants' witnesses (who testified orally without prior submission of written statements) in part on overruling of its objections in a prior proceeding in which it had cross-examined a witness under similar circumstances, its inferences that had it not cross-examined that witness its objections would have been meritorious, or that it has waived any of its rights by cross-examining, are not justified by decision therein; such a holding would be contrary to intent of both Rule 1.87 of Rules of Practices (which requires only that objection be made at hearing and pressed in brief or other pleading to be preserved for consideration) and of Federal Rules of Civil Procedure, particularly Rule 46, with which the commission's rules are required by §17 (3) to conform.—Blythe Extension, 91 M.C.C. 827 (832).

Exhibits, abstracts:[Vols. 11-13, 19].—Rule that abstracts of original shipping documents, submitted to show shipments transported in the past, are inadmissible unless authenticated by underlying documents available at the hearing, has been consistently applied to abstracts prepared by computing machines for purpose of use at a hearing. An abstract, as such, inherently lacks authenticity, since its sole purpose is to set forth an abridgment of original records or douments; accordingly, to be admissible it must be supported by reliable documents or records which afford opposing parties a reasonable opportunity to test veracity of the abstracted information by cross-examination.—T.I.M.E. Freight, Inc., Extension, 89 M.C.C. 241 (242, 243).

But records or memoranda made in regular course of business are by their very nature vested with a quality of authenticity and are specifically made admissible by Rule 1.79 of Rules of Practice; opposing parties may by cross-examination of witness offering such an exhibit establish the nature, purpose, and reliability of the evidence so presented. However, intermediate business records consisting of IBM tabulating sheets, unsupported by more basic and informative documents, may be accorded little probative weight regardless of their admissibility. Rule 1.79 thus affords opposing parties adequate safeguards against consideration of unreliable evidence; business documents qualifying under that rule will be admitted, and objections thereto, where they appear to be abstracts of more basic documents, must be directed to their probative value rather than their admissibility; conclusions in the Transcon case, No. MC-110325 (Sub-No. 24), decided March 2, 1961, overruled.—Id., pp. 242, 243.

Exhibit submitted by applicant's director of freight operations, showing number of shipments and weight thereof transported between its termini during 1 month, is a monthly report compiled on IBM equipment in usual course of business and therefore admissible; other exhibits showing weight and number of shipments, as well as other information, for 5 specific days of that month, were supported by delivery receipts available at hearing; thus, as the exhibit is partially supported by under-

lying documents from which the tonnage figures shown were compiled, it may be accorded more than nominal weight.—Id., pp. 243-4.

There can be no question as to admissibility of exhibit consisting of a memorandum of savings realized in Railway Exp. Agency's motor operations between considered points under temporary authority, which was prepared under direction of its division superintendent who as result of his position was conversant with the information contained therein and was prepared to stand cross-examination thereon. The exhibit itemizes both REA's former operating expenses in handling involved traffic and those for the motor operations, lists line-haul savings from elimination of cost of rail car space, and deducts expenses incurred in separate movement of intrastate traffic. Although REA's underlying business data from which the exhibit was prepared might have assisted protestants in their cross-examination, they did not press for such data, but allowed the exhibit's admission without objection; in the circumstances, absence of the supporting data in no way diminishes the probative value of the exhibit.—Railway Exp. Agency, Inc., Extension, 94 M.C.C. 62 (69).

Abstracts of shipments transported by "grandfather" applicant were properly admitted although underlying shipping documents were not kept by him but by shipper in ordinary course of its business and turned over to applicant at hearing, where they were made available for examination by protestants. Each of the freight bills was signed on date of shipment either by applicant or by one of his drivers in shipper's office, and at hearing applicant was able to identify the freight bills and shipments they represented from the signatures thereon. Applicant had personal knowledge of his operations, including the shipments involved, and was subjected to extensive cross-examination; in view thereof, the underlying documents were sufficiently authenticated to support the abstracts.—Holomon, 92 M.C.C. 8 (12-13).

Exhibit representing shipper's file of instances in which protestant failed to place equipment as requested was compiled from typewritten reports prepared daily over a period of more than 10 years, analyzing service failures of carriers employed, which in turn was compiled from daily written reports, and was not inadmissible because of failure to produce such daily reports at hearing. There is a limit to the amount of underlying documentation required to support an exhibit; material contained in the challenged exhibit was accumulated by shipper in normal course of business and was properly admitted under the business records exception to the hearsay rule.—Blythe Extension, 92 M.C.C. 242 (243).

Exhibits showing cement traffic which would be diverted from applicant's parent railroad to independent motor carriers if application is denied were properly admitted when they were identified by the railroad's vice-president who, although he had been in its traffic department only a short time, had been employed by it for a considerable period. While exhibits were not compiled under his supervision, information was taken from records kept in his office in ordinary course of business, and he had checked records and could state that facts disclosed were correct within his knowledge.—Pennsylvania Truck Lines, Inc., Extension, 91 M.C.C. 167 (170)*.

Exhibits designed to show extent to which l.c.l traffic has declined were properly admitted in proceeding on removal of certain key-point restrictions; they were prepared from parent railroad's general statistical reports submitted monthly by agents of each station on the line, which show l.c.l. tonnage handled at the stations and number of cars required to move such traffic in and out. While a more complete breakdown of statistics might not square entirely with figures presented,the difference would probably not be great; decline in that segment of the railroad's business is consistent with experience of many railroads and is common knowledge in the transportation industry; exhibits substantially support purpose for which introduced.—Pennsylvania Truck Lines, Inc.—Key Points Re-

striction, 88 M.C.C. 505 (511).

While some shipments listed in applicant's abstract may in fact have been local or intrastate in character, they enhance his case by demonstrating the general nature of his transportation activities and his willingness to "haul anything anywhere"; also, some shipments listed were undoubtedly interstate although not so identified. While burden is ordinarily on applicant to establish the nature of shipments shown, there is no reasonable doubt that instant applicant transported general commodities in interstate commerce, and it is not reasonable to expect that in the frontier atmosphere prevailing in Alaska exact records were kept or technical niceties observed at all times; there is no need to examine each and every shipment for purpose of distinguishing between them, when the basic nature of applicant's operation is conclusively demonstrated.—Al Renk & Sons, Inc. Alaska "Grandfather" Application, 89 M.C.C. 91 (100).

In alternate-route application, where main disagreement between the parties was whether grant of the authority would allow applicant to institute a new service by avoiding terminal operations at Denver, Colo., applicant tried to explain that delays at Denver of up to 3 days, reflected in shipments extracted from its supporting exhibit, were caused by temporary personnel shortage and that the situation has been remedied. However, the exhibit covered shipments transported during a month which was 3 months before application was filed, and 6 months prior to the hearing. If applicant chose to support its application with evidence of operations it now claims were not representative, although it was free and had ample time to select a more representative period, it cannot be heard to complain should its own evidence be taken at face value.—Burlington Truck Lines, Inc., Extension, 96 M.C.C. 467 (470-1).

Examiner properly declined to consider abstract of some 2,500 shipments attached to "grandfather" application but not referred to at hearing by applicant or any other party, on ground that it did not constitute evidence. Several protests filed constituted reasonable compliance with requirement of Rule 1.19 of Rules of Practice that specific denial be made of matters contained in the application and attached exhibit, since at that time protestants had not had opportunity to inspect the underlying documents supporting the abstract. Thus, applicant had the burden of going forward with the evidence, and provisions of that rule respecting the abstract's status as evidence no longer applied; applicant was then under a duty to prove his case in the usual manner, qualifying any supporting exhibits, including that abstract, for admission in evidence.—Hughes, 89 M.C.C. 471 (477-8)*.

Furthermore, at hearing applicant introduced in evidence an exhibit listing some 8,000 shipments, for which underlying documents were available and on which he was extensively cross-examined; in view of the great number of shipments included therein and applicant's assertion that they were representative of his past operations, protestants' assumption that such abstract was duplicative and supplementary of that attached to the application is quite understandable, and it would be improper now to admit the latter in evidence.—Id., pp. 478-9.

Of thousands of shipments listed in 120 traffic exhibits submitted by protestants as subject to diversion as result of requested key-point elimination, a large number were beyond scope of the petition or would not be seriously affected by the proposals; therefore, at close of initial hearing the examiner specifically requested the parties to discuss on brief the weight to be accorded those exhibits. Only petitioner complied with that request, and as its analysis was not entirely satisfactory and time did not permit checking each shipment listed to ascertain which should be considered, the examiner properly concluded that those exhibits were not entitled to consideration.—New York Central Transport Co.—Modification, 89 M.C.C. 389 (395-6).

At further hearing for express purpose of clarifying the traffic exhibits submitted by protestants at initial hearing, late-filed exhibits listing shipments handled on a day of petitioner's selection by two protestants who had not submitted traffic studies at initial hearing were admitted over petitioner's objection. Though there is doubt whether those exhibits come within exact terms of the reopening

orders, to strike them on such technical grounds would be unduly harsh in view of their materiality to the main issue—effect of petitioner's proposal on operations of existing carriers; examiner did not exceed his discretion in admitting the late-filed exhibits, and data therein may be considered.—Id., p. 397.

Filing after hearing:[Vol. 19].—Rule 1.86 of the commission's Rules of Practice provides that, unless expressly so permitted or required, any documents or other writings submitted after close of a hearing will not be admitted in evidence or considered. As plaintiff's petition, filed some 9 months after hearing, for leave to file a late-filed exhibit was not based on either exception stated in the rule, it would seem that it was addressed to the sound discretion of the commission, exercise of which the court may not disturb unless it constitutes a clear abuse of authority. No such abuse appears; reasons assigned by the commission for denying the petition, that evidence sought to be introduced was cumulative of that already offered, also the long delay in making the application and an unexplained gap of some 8 months in the statistical record contained in the proposed exhibit, appear not unreasonable.—Great Northern Ry. Co. v. United States, 209 F. Supp. 230 (233-4)*.

Provision having been made in the examiner's recommended report for filing of applicant's current equipment-lease contract, as a later filed exhibit, whereby applicant could show that its present operations conform to the statute and the commission's regulations, that exhibit was received in evidence.—Florida Refrigerated Service, Inc., Extension, 94 M.C.C. 361 (362).

Motion to strike exceptions of one protestant and certain attachments to exceptions of another, on grounds that they constituted evidence adduced after hearing and that receipt thereof is proscribed by rule 1.86 of the Rules of Practice, granted as to the attachments; they should have been presented at the hearing and applicant afforded opportunity to cross-examine thereon. As to the challenged exceptions, that carrier is a proper party protestant and is entitled to submit exceptions irrespective of its participation in the hearing. See rule 1.96. However, certain references in those exceptions are in the nature of evidence, are akin to the stricken attachments, and therefore will also be stricken.—Sullivan Const. & Rigging Co. Extension, 94 M.C.C. 296 (298).

New and extension operation:[Vols. 12, 19].—Evidence showing that intervening defendant has been serving supporting shipper for almost 28 years, that under its existing authority it can transport pianos from shipper's Bluffton, Ind., plant directly to five States and circuitously via Chicago to the rest of United States, that it offered the only uncrated motor service available to shipper, and that grant of authority which would eliminate the circuitous routing via Chicago would reduce delays in service, together with other evidence of record, afforded sufficient justification for examiner's findings recommending grant of authority sought to intervening defendant and denial of plaintiff's application for similar authority, which the commission adopted; the commission's decision affirmed.—North American Van Lines, Inc. v. United States, 217 F. Supp. 837 (841)*.

Evidence relevant to shipper's marketing needs was unspecific in that its traffic manager, although generally well acquainted with transportation needs of the company, could not specifically testify as to projected sales to destination States. He could give, however, an approximation of shipper's tonnage and consequent motor carrier requirements; record contains a minimum of probative evidence showing that shipper has customers at destination points, whose needs will be supplied from its new distributing facilities, instead of the more distant manufacturing plants.—Mitchell Transport, Inc., Extension, 94 M.C.C. 450 (452-3).

Number of witnesses: [Vol. 11].—Although Railway Exp. Agency is an express company and therefore not a shipper in strict sense, it uses facilities of other carriers to transport the traffic which applicant railroad subsidiary seeks authority to handle over proposed extension route. Therefore, evidence of REA, which alone supports the application, concerning adequacy of transportation facilities available to it in involved area is considered; as that evidence, even in its most favorable posture, fails to show that existing service, which REA uses in part, is inadequate in any

respect, application is denied.—Central of Georgia Motor Transport Co. Extension, 94 M.C.C. 6 (11).

Since the only public witness supporting proposed pickup and delivery service within Atlanta for pool-car operators and unregulated forwarders was a representative of purported shipper association whose transportation needs were rendered moot by findings in 316 ICC 259, application must be considered devoid of public support. However, since applicant's failure of proof may be due to reliance on its claim of exemption and motion to dismiss, denial is without prejudice to refiling of application.—Atlanta Bonded Whse., Inc., 91 M.C.C. 104 (111).

While reroutings on prime machines are prepared initially by dealers, their selections are subject to supporting shipper's final approval and this, coupled with shipper's control of "parts" shipments, makes it the proper party to support application.—Ligon Specialized Hauler, Inc., Extension, 91 M.C.C. 356 (360).

Oral testimony:[Vols. 11, 12].—Although applicant's president testified that daily records of special and charter operations by it and its predecessor during the years 1926 through 1954 had been destroyed by a flood, testimony of two bus drivers employed by applicant and its predecessor continuously since 1927 and 1938, respectively, is probative evidence, was properly received, and should be considered, when their collective testimony shows that they were thoroughly familiar with the earlier operations performed by the predecessor and the later operations performed by applicant.—Trans-Bridge Lines, Inc., Extension, 96 M.C.C. 506 (510)*.

Joint board's admission of testimony of applicant's superintendent concerning number of express shipments handled by applicant in involved territory under temporary authority was not an abuse of its descretion and did not prejudice opposing carriers although it was based on a tally prepared especially for the hearing and underlying documents were not available for inspection. Witness had close personal knowledge of considered operation, and his testimony was subject of cross-examination and was substantiated to some extent by that of several public witnesses.—Railway Exp. Agency, Inc., Extension, 92 M.C.C. 487 (488, 489).

While presentation of documentary evidence might be deemed the "best evidence," the commission has always allowed testimony concerning transportation matters relating to supporting shipper's enterprise by those who have personal knowledge of the business and the transportation requirements of their companies; moreover, requirement of rule 1.83 of the Rules of Practice that underlying documents must accompany an abstract offered in evidence does not obtain when notes are used in giving oral testimony and the opposing party has means available to cross-examine effectively. Accordingly, testomony of shipper's general traffic manager concerning inadequacy of existing service, based on notes from company's records, was properly admitted.—T. M. Zimmerman Co., Extension, 89 M.C.C. 150 (153).

The examiner erred in not allowing applicant to use abstracts of his business records to refresh his memory; witness had some recollection of movements involved and the attempt to refresh his recollection was within bounds of permissive direct examination. The writing was not intended to be offered itself and the testimony would be what the witness said, not the writing, thus preserving all of the rights of cross-examination, while guaranteeing against the imposition of false evidence. Furthermore, use of an abstract for such purpose is allowable under rule 1.75 of the Rules of Practice and, also, 249 F. 2d 129 and 162 US 687.—Kiser, 89 M.C.C. 750 (753-5).

Testimony of protestants' witnesses regarding tonnages and transit times between points pertinent to application for gateway elimination was properly admitted, without underlying documents, when it was adduced through persons having close personal knowledge of operations of carriers they represented; witnesses were subjected to cross-examination, and joint board had opportunity to evaluate their testimony in light of their demeanor. Such evidence consisted largely of approximations and is weighed accordingly. —Centralia Cartage Co. Extension, 91 M.C.C. 749 (750).

There was not error in the examiner's allowing witnesses for protestants who were

not represented by practitioners to testify orally in narrative form. The Rules of Practice provide sufficient safeguards to protect interests of all parties, so that this method of testifying is not in itself detrimental to any. While use of written statements greatly facilitates the making of rulings as well as brevity and clarity and their use is preferable to unprepared oral narrative testimony, use of prepared statements is not required by Rules of Practice and, absent usual circumstances, a party is not prejudiced when witness presents testimony in extemporaneous and narrative form.—Blythe Extension, 91 M.C.C. 827 (831-2).

Record in other proceedings: [Vol. 19].—Whether or not the commision might have considered shipper evidence in another proceeding, wherein authority to provide similar services in the same territory was sought, in deciding plaintiff's application case, it was not required to do so; plaintiff made no attempt to comply with rule 1.82 of the commission's Rules of Practice, yet, in view of the many protestants in plaintiff's case and the large record in the other proceeding, compliance with that rule was in no sense a mere technicality.—Railway Exp. Agency, Inc. v. United States, 205 F. Supp. 831 (834, 835)*.

Exhibit consisting of certified transcript of testimony of supporting shipper's witness as given by same witness at hearing in a different proceeding is admissible, notwithstanding different destinations in same State were involved; although present applicant was not a party of record in that proceeding, he was called to testify in behalf of a protestant therein; exhibit is admissible, subject to objection, under Rules 1.78 and 1.82 of Rules of Practice, and objection to it as "irrelevant and immaterial" is not well taken.—Blythe Extension—Florida, 89 M.C.C. 195 (196).

Applicant presented only one witness, its representative, in support of application covering an extremely large area conaining 8,989 municipalities, intending to rely for public support entirely on evidence in another proceeding seeking similar authority in the same area. However, consolidated consideration of the two applications, as requested, is not possible; evidence adduced by applicant in its initial presentation would not warrant grant of any authority.—Railway Exp. Agency, Inc., Extension, 89 M.C.C. 537 (539-40).

In view of the fact that applicant filed no exceptions to report and recommended order on another application it filed subsequent to issuance to recommended report and order in instant proceeding, and the record in that proceeding showed that applicant had continued to provide the service found to be beyond the scope of its present certificate in the instant proceeding, it is evident that applicant has not ceased its unlawful operations even though it did not except to instant examiners' conclusion that it held no authority for such service. —Kennedy Motor Lines Inc., Extension, 95 M.C.C. 499 (502-3).

Joint board properly sustained objection to receipt in evidence of applicant's exhibit containing testimony of Department of Defense, as recorded in prior consolidated proceeding on two other applications, relating to need for additional motor service at military reservation. Nevertheless, the application should not be denied; need for additional service to all points in the reservation is plainly shown, and Department of Defense, being primarily interested in service, does not support any specific carrier.—Whitfield Transp., Inc., Extension, 95 M.C.C. 576 (582-3)*.

Though evidence of record in another proceeding is not admissible except in compliance with the Rules of Practice, there is no question but that the commission may refer to its conclusions and findings in prior reports; although the commission is not bound by factual determination of joint board in a prior proceeding that protestant's service in area now sought by applicant was adequate, it may be noted that that finding was based on evidence of one of applicant's principal supporting shippers.—Howard Sober, Inc., Extension, 88 M.C.C. 755 (758).

Rule 1.82 of Rules of Practice makes no provision for incorporation into the record of material extracted from protestant's applications seeking expansion of its authority; motion to strike that portion of applicant's reply to protestant's exceptions, granted.—Transport Storage & Distributing Co. Extension, 92 M.C.C. 566 (567-8); and reference by protestant in its reply to applicant's exceptions to evidence presented in an unrelated proceed-

ing by a non-protesting carrier is improper. Motion to strike such evidence is granted.—Canzano, 95 M.C.C. 568 (570)*.

Motion to strike from protestant's exceptions all reference to affidavits, testimony, or pleadings in another case, granted; applicant was not a party to that proceeding and had no opportunity to cross-examine witnesses or file pleadings; further, evidence referred to concerned matters outside scope of instant proceeding in that it involved service for a different manufacturing plant and it is not clear whether same commidities were involved.—S & S Trucking Co. Extension, 91 M.C.C. 239 (241).

Self-serving, indefinite, unsupported statements: [Vols. 11, 12, 19].—Applicant is not entitled to a territorial grant of "grandfather" authority on basis of its uncorroborated, self-serving declaration that the shipments shown in its abstract are merely "representative" of its overall operations, when nature of their representativeness is not shown; this is not to cast doubt on applicant's veracity, but only to make a clear that some confirmatory or explanatory evidence is required. In absence of such evidence, abstracts of "representative" shipments introduced in evidence do not warrant the broad grant of territorial authority sought.—Home Transfer & Storage Co., 88 M.C.C. 223 (230-1)*; similarly, grant of "grandfather" authority may not be based solely on applicant's uncorroborated testimony of vague and self-serving statements.—Cox, 89 M.C.C. 545 (548)*.

In absence of any shipper testimony as to public need for transportation of a given commodity, applicant's testimony of what a third party will need in way of transportation service is insufficient, without supporting evidence, to justify a grant of such authority.—Babcock & Lee Transp., Inc., Extension, 92 M.C.C. 521 (523).

Weight of evidence: [Vols. 12, 13, 19].—Question of financial connection between applicant and one of its supporting witnesses in the application proceeding was one of credibility and was for the commission; the commission could give as much or as little weight as it saw fit to the testimony of that witness.—Refrigerated Transport Co. v. United States, 214 F. Supp. 536 (539)*.

While the commission may not capriciously ignore evidence, it is not bound to accept the evidence of an applicant at its face value.—Robbins v. United States, 204 F. Supp. 78 (81)*.

Supporting shipper positively asserts that past service has not been satisfactory, and that it was prepared at hearing to detail evidence of many instances of past service failures on part of that carrier; latter, though a party of record, has put forward no evidence tending to contradict shipper's serious allegations, which are therefore entitled to full credence.—Souther Tank Lines, Inc., Extension, 88 M.C.C. 127 (140)*.

See also Bell Transp. Co., Extension, §207(a), n. 25 truckaway.

Testimony of shipper's witness regarding instances of protestants' failure to supply vehicles upon request is not persuasive that they failed to render reasonably prompt service when, on cross-examination, he conceded that two dates cited were Sundays when shipper's plant does not operate and that all dates referred to were scheduled delivery dates and not actual dates when requests were made. Witness had no recollection of actual dates on which equipment was requested; moreover, he could not recall ultimate disposition of the shipments in question, or the destinations for which equipment was needed, and he admitted that in some instances shipper cancelled requests for equipment or failed to use vehicles furnished.—Curtis, Inc., Extension, 94 M.C.C. 728 (730).

In computing the comparative monthly cost of operation, to show economies that could be effected by proposed motor express service, Railway Exp. Agency based the expense attributed to performing line-haul service in the area by motor vehicle on a 6-month average figure for a "similar motor operation" in another and undisclosed area. As no data concerning distance, number of stops, or other factors relevant to the latter operation were submitted, the figure used has no value for comparative purposes.—Railway Exp. Agency, Inc., Extension, 94 M.C.C. 102 (105).

See also the T.I.M.E. Freight case, under *Exhibits, abstracts*, above.

Exactness of applicant's memory as to operations conducted in the early fifties is of no

material importance where the critical date is August 26, 1958; but since record is clear that he did operate throughout the later fifties, his operations in the early part of that decade are of some interest as background and tend to show nature and continuity of his activities.—Al Renk & Sons, Inc.—Alaska "Grandfather" Application, 89 M.C.C. 91 (99).

Lists of shipments proffered to establish transportation between points in Alaska during the critical period had no evidentiary value to support claim of "grandfather" rights when they merely showed origin and destination of particular shipments and failed to indicate the portion of such movement which was actually handled by applicants or the points between which respective applicants actually moved shipments. Furthermore, in some instances, shipments were made through the port of Seattle which applicants were not authorized to serve; and, with a few exceptions, the lists fail to disclose the Alaskan points between which motor vehicle transportation was utilized as distinguished from rail service provided by the Alaska Railroad.—Mollerup Van Lines, 95 M.C.C. 338 (342)*.

Copies of tarriffs filed with the commission or the Federal Maritime Board, and military rate tenders filed with and approved by the Department of Defense have value to establish "grandfather" rights between Alaska and points in the South-48 States only to the extent of showing some sort of a holding out on applicant's part to perform the service (not necessarily motor service) at the time indicated. In many instances, moreover, the tariffs and tenders bear effective dates subsequent to the "grandfather" date and are of little probative value.—Id., p. 342.

Evidence of past transportation of mixed shipments of exempt and nonexempt commodities was properly rejected as support for claim of "grandfather" rights under Transportation Act of 1958, since the commission's consistent holding that such commingling of exempt and nonexempt traffic is unlawful without appropriate authority has been sustained by the courts.—Hughes, 89 M.C.C. 471 (477)*.

Shipments which moved between points in a single State have no weight in determining "grandfather" rights when it is not convincingly shown that they constituted a portion of any through movement in interstate or foreign commerce.—Home Transfer & Storage Co., 88 M.C.C. 223 (226)*.

No weight can be given shipper's oral statement that nonavailability of motor service resulted in an estimated loss of 10 percent of its business during past year, when it is not supported by any documentary evidence and such loss of business cannot otherwise be inferred from the record as a whole; nor may any weight be given examiner's conclusion that abandonment of a rail branch line caused shipper to look elsewhere for substitute transportation service, when such abandonment did not affect the movements involved.—Ruan Transport Corp. Extension, 88 M.C.C. 123 (125).

Verified statements, particularly when they deal in generalities and are phrased in more or less indentical conclusory words, are not as persuasive as testimony of individual public witnesses who testify extemporaneously and in some detail of their transportation requirements in the traditional manner. However, applicant which in reply urges that 51 verified statements submitted by another in support of proposed local interairport bus operation be not considered did not object thereto, its right to cross-examination was preserved, and those statements should be considered for whatever they are worth.—A. B. & W. Transit Co. Extension, 88 M.C.C. 175 (180).

See also Somerset Bus Co. case, n. 15 *Parties*, above.

Testimony of witnesses representing nonprofit organizations as to transportation needs of undesignated shippers and receivers at points on proposed extension route is too vague and general to be accorded substantial probative weight. Also, little weight can be accorded testimony of shippers not located within commercial zone of any of involved service points, since applicant would be unable to serve them directly.—Railway Exp. Agency, Inc., Extension, 92 M.C.C. 487 (489).

Crude oil is being transported in private carriage from two Colorado origins to plant of one supporting shipper under an expiring exchange agreement, and if successful in renewing that agreement or obtaining new

agreements for direct purchase of crude oil from Colorado producers, it would use proposed service only to supplement such private carriage; though same shipper also expressed general interest in possibility of obtaining condensate from Colorado origins, it failed to specify either location of such origins or volume that would move therefrom; such evidence is too vague and speculative to warrant grant of authority.—Bridge Extension, 88 M.C.C. 108 (112-3)*.

23. Official notice; res judicata; stare decisis.—[Vol. 19].—A regulatory agency has the right to take official notice of reports filed with it by a regulated company.—P. Saldutti & Son, Inc. v. United States, 209 F. Supp. 307 (313)*.

An administrative body, such as the commission, is not bound by the rule of stare decisis; and inconsistency of its holding with prior holdings in and of itself does not make the decision arbitrary.—Watkins Motor Lines, Inc. v. United States, 243 F. Supp. 436 (443, note)*; nor does inconsistency of the commission's decisions, in and of itself, render them unreasonable.—U.S.A.C. Transport, Inc. v. United States, 235 F. Supp. 689 (693)*.

Doctrine of stare decisis does not apply to decisions of administrative bodies, but consistency of administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily.—Dixie Highway Exp., Inc. v. United States, 242 F. Supp. 1016 (1021)*.

Although the commission cited 83 MCC 411 as its authority for holding that plaintiff's operations in 1955 and 1956 were too remote from the "grandfather" date (May 1, 1958) to have any probative value, to apply the result in that case to the case at bar, particularly where the commodity involved may have wholly dissimilar transportation and marketing characteristics, appears truly arbitrary. What is too remote to have probative value in one case may not be so in another; shipments in 1955 and 1956 may or may not be too remote from May 1, 1958, but such a determination is not to be treated as a question of law decided in prior cases, because it is a question of facts which must turn on the circumstances of the case at bar and not those of an unlike previous case.—Hale Distributing Co. v. United States, 221 F. Supp. 266 (270)*.

The courts are not concerned with alleged inconsistency with findings made in other proceedings before the commission.—Colorado-Arizona-California Exp., Inc. v. United States, 224 F. Supp. 894 (902)*; thus, fact that a new administrative decision departs from the rule of an earlier one does not require corrective action by a reviewing court. The court must decide whether the commission correctly applied the law, not whether it followed its own precedents.—Yale Transport Corp. v. United States, 210 F. Supp. 862 (864)*; therefore, there is no basis for reversal in the contention that the commission departed from its decisional precedents in granting irregular-route authority to plaintiff's competitor.—Sloan's Moving & Storage Co. v. United States, 208 F. Supp. 567 (571)*.

Plaintiff's apprehension that the commission's consideration of the scope of its authority, in passing on applications of another carrier, may be res judicata as to its pending commission proceeding seeking interpretation of its certificate is not warranted. In application proceedings the commission under the law acts on a finding of public convenience and necessity, and this necessarily implies that needs of the public may change from time to time; therefore, the commission is not ruled by res judicata as that term is used by courts as a rule of precedence. Power of an administrative agency to reconsider its own findings or orders has no relation to, and is not affected by, the doctrine of res judicata; agency is not bound by its own prior determinations, though the courts may take those determinations into consideration.—Worster Motor Lines, Inc. v. United States, 226 F. Supp. 603 (607-8)*.

The commission's rulings in prior proceeding in which same applicant sought similar authority are in no sense binding on it in instant proceeding; the doctrine of res judicata can have no application to a proceeding which involves a determination of present or future public convenience and necessity; courts and administrative agencies have, and must have, power to change their minds. Moreover, in the present case the commission was not holding a rehearing on the prior application,

but had before it an entirely new record based on additional facts and changed conditions.—Edwards Motor Transit Co. v. United States, 201 F. Supp. 918 (923, 925)*.

See also United Van Lines, Inc. v. United States, 28 USC §2325, n. 48.

Official notice is taken of definition of ammonium nitrate-carbonate mixtures in report of U.S. Interagency Committee on Hazards in Transportation of Ammonium Nitrate, in order to resolve discrepancy between quasi-expert testimony as to lawfulness of transportation of nitro carbo nitrate in bulk and the commission's regulations governing transportation of dangerous articles.—Monkem Co., Inc., Extension, 94 M.C.C. 749 (756-7).

Even though several carriers, recently authorized to provide a portion of proposed service, are not protestants in instant proceedings, the commission may take official notice of its outstanding grants of authority.—Florida Refrigerated Service, Inc., Extension, 94 M.C.C. 364 (371); New York Central Transport Co. Extension, 91 M.C.C. 161 (164)*; and official notice is taken of the authority of protestant's connecting carrier to transport household goods between points in 38 States and the District of Columbia.—Wheaton Van Lines, Inc., Extension, 94 M.C.C. 489 (492)*.

A certificate of authority is a public document of which the commission may take official notice whether offered in evidence or not; thus, inclusion of summary of protestant's operating authority in its properly filed exception is not objectionable.—Sullivan Const. & Rigging Co. Extension, 94 M.C.C. 296 (298).

Temporary authorities issued by the commission are matters of official record of which it may take official notice. And requests for the commission's official notice of matters of public record, and arguments in support thereof, may be presented on exceptions.—Colorado-Arizona-California Exp., Inc., 92 M.C.C. 89 (91)*.

The commission takes official notice of its records showing certificates, and restrictions therein, covering authority with which applicant proposes to tack certain authority sought in instant application.—Railway Exp. Agency, Inc., Extension, 91 M.C.C. 311 (316, Note 7)*.

Official notice is also taken of applicant's present operating agreement with owner and other railroads, approved in 308 ICC 545, as well as prior agreements approved in 275 ICC 739 and 291 ICC 11.—Id., p. 320, Note.

Official notice may properly be taken of commission documents, such as a motor-carrier accident report.—Blythe Extension, 92 M.C.C. 242 (243).

The commission takes official notice of certain intrastate authorities issued applicants subsequent to hearing, and petition of one applicant to introduce evidence thereof is denied pro forma.—A. B. & W. Transit Co. Extension, 88 M.C.C. 175 (175-6, footnote).

Inasmuch as described circumstances lend only a patina of truth, which is speedily dispelled on closer scrutiny of the facts and applicable law, the applicant's contention that contradiction and discrimination result from the grant of authority in another proceeding (decided 13 days earlier) and the denial of its application for similar authority, and since there is no evidence of "possible" improprieties, consideration is confined solely to the record at hand. Thus, the commission adheres to and affirms its longstanding rule that, when practicable, each case should be considered and determined on its own merits and its own record; that rule is particularly applicable where, as in instant circumstances, an unsuccessful applicant seeks to benefit from mere existence of surface similarities between applications heard on separate records.—Convoy Co. Extension, 91 M.C.C. 461 (460-1)*.

Although the matter might be viewed somewhat differently were it one of first impression, Division 1 feels constrained to accept conclusion reached by the entire commision in 86 MCC 447 that, regardless of form of authority applied for, only common-carrier authority should be granted applicants seeking to participate in cement traffic which has recently become available to the motor-carrier industry. While that decision was concerned only with needs of the cement industry in a number of eastern States, the same considerations apply to considered movement in the South.—Southern Bulk Haulers, Inc., 88 M.C.C. 299 (305-6).

See also Service Trucking Co. case, n. 18, above.

Denial of earlier petition to amend applicant's "grandfather" certificate to include additional commodities, as now sought by extension application, is not conclusive on interpretation of the commodity descriptions and should not govern disposition of the issue; such denial was based on carrier's failure to furnish proof of its operations, and that evidence is now before the commission.—Jetco, Inc., Extension, 91 M.C.C. 673 (676).

See also the Hughes case, §203(b), n. 50 *Act of 1958*.

25. Hearing, generally.—[Vols. 12-19].—See also §17(6), n. 10.

Plaintiff was accorded a full and fair hearing on the issue of interpretation of its certificate authorizing transportation of aircraft and aircraft parts when it filed an application for authority to transport missiles and missile parts and, coupled therewith, a motion to dismiss on the ground that its certificate authorized transportation for which authority was sought. Procedure used by plaintiff is a method of obtaining in a plenary proceeding interpretation of operating authority; and examiner's failure to render an express ruling on the motion has no legal significance, since a ruling was implicit in his finding for plaintiff on the interpretation issue.—U. S. A. C. Transport, Inc. v. United States, 235 F. Supp. 689 (691-2, 694)*.

While the commission, in accordance with procedure established in 91 MCC 395, denied hearing on question of convenience and necessity in connection with automobile carrier's petition for modification of its "initial-movement" certificate, so as to permit railroads to do part of its hauling in TOFC or MLRC service, need for carrier's service had already been established and it continued to supply that need just as before except for substitution of rail for motor carriage for part of the way. Record contains no statement as to nature of testimony protesting carriers would produce before the commission; nor does the court find any such statement in the briefs filed. However, in dismissing instant complaint, the court does not set a precedent for future application wherein it might clearly appear there is relevant testimony that the commission should consider.—Motor Convoy, Inc. v. United States, 235 F. Supp. 250 (251, 253)*.

That the commission, in denying plaintiff's application and granting authority sought to a different applicant, acted on evidence 2 1/2 years old, and that its decision was the third in a row of different decisions on same record, do not in themselves give rise to any right to reopening of the record for rehearing. It was clearly within the commission's competence to weigh plaintiff's allegations, in its petition for rehearing, as to changes in conditions and circumstances since close of hearing against matters alleged in answer filed by the successful applicant, and examination of the petition and answer discloses no reason for finding that the commission acted arbitrarily or capriciously in denying rehearing. Viewed individually or as a whole, the circumstances alleged by plaintiff are not of a level of importance that would deprive the commission of exercise of its discretion to deny the petition; the commission's orders sustained.—Suburban Transit Corp. v. United States, 215 F.Supp. 717 (725-6)*.

The court recognizes the general principle laid down in 326 US 327, that an administrative agency should not grant one application for a license without some appropriate consideration of another bona fide and timely filed application to render the same service, as a basic requirement for fair play; however, this does not mean that such agencies are placed in a procedural straitjacket. The requirement is that comparative consideration of such bona fide and timely filed applications be had, not that it should be had in some particular manner; whether this should be given through consolidation, by separate consideration of each application, or in still other ways, is normally for the agency to determine.—Railway Exp. Agency, Inc. v. United States, 205 F. Supp. 831 (834-5)*.

The commission was amply justified in considering plaintiff's extension application and that of United Parcel Service, covering similar service in the same territory, in sepatate hearings. In view of larger scope of plaintiff's application, as well as the issue of its railway affiliation, the commission's determination to proceed in that manner violated no legal right of plaintiff when UPS' application was not granted before plaintiff's application was be-

fore the commission for consideration. Plaintiff was not entitled to a consolidated hearing as a matter of law if some other suitable method of comparative consideration of both applications was afforded.—Id., p. 835.

The facts of plaintiff's operation as a small carrier of frozen foods justify grant of area-wide instead of point-to-point "grandfather" authority, but exact extent of origin and destination territories is for the commission to determine. Though rehearing might not be justified if the commission's decision appeared sound on basis of all information before it, the Transportation Act of 1958 sets no cut-off point for evidence of service rendered after the "grandfather" date, and the court is concerned that the remand should afford a true picture of plaintiff's traffic, including any shifts therein, since the 1959 hearing. Reopening is justified by need for thorough reconsideration, which would exist even if plaintiff were not allowed to present additional evidence. Remanded for rehearing and further consideration in accordance with the Court's views.—Jarman v. United States, 219 F. Supp. 108 (114, 117, 118)*.

Inasmuch as protestant was fully represented at both the initial and continued hearings, though its evidence was presented at former and other counsel covered its interests at latter, its "Preliminary Objection" (in its reply to applicant's exceptions) to receipt of applicant's further evidence at the continued hearing was proper; and its request in the reply that application be denied in all respects was also proper, since it appears to be a general statement of position based on protestant's appraisal of the record.—Canzano, 95 M.C.C. 568 (570-1)*.

Request for further hearing to clarify protestants' traffic studies in accordance with criteria applied in 89 MCC 389, denied. Such clarification in manner requested would not require any change in the examiner's recommended findings, in view of evidentiary defects in petitioner's presentation, and the evidence considered in the light of the exceptions and replies thereto does not warrant a result different from that reached by the examiner.—Missouri Pac. Truck Lines, Inc.—Removal of Key Points, 94 M.C.C. 146 (147).

The commission is not inclined to reopen proceedings for further hearing every time additional evidence is offered after a hearing has been closed. Litigation must end. Appli cant's petition for further hearing to present in evidence facts—relating to new demands for bulk delivery—which have occurred since the hearing is, therefore, denied. An applicant's remedy in such cases is to file a new application.—O'Boyle Tank Lines Extension, 89 M.C.C. 499 (501); applicant was afforded ample opportunity for submission of evidence at 3 days of hearings and, at that time, gave no indication of need for additional hearing. Testimony of seven more shippers it seeks to present is clearly cumulative; therefore, in absence of any showing of good cause, its petition for further hearing is denied.—Colorado-Arizona-California Exp., Inc., 92 M.C.C. 89 (91)*.

Request by one of five applicants seeking similar authority for further hearing to show that its operations and needs of supporting shipper are responsive to each other, denied; scope of applicant's operations is a matter peculiarly within its knowledge rather than that of shipper, and it produced very substantial evidence concerning its operations at two separate hearings; shipper's needs for service are completely described of record, and it expressed a strong desire for that applicant's service; further hearing would therefore serve no useful purpose.—Maas Transport, Inc., Extension, 92 M.C.C. 534 (541)*.

Further hearing to receive evidence of applicant's operations under temporary authority is not warranted when examiner's report, adopted by the commission, reveals that he accepted shipper's projected traffic volume (which far exceeds the volume sought to be shown on further hearing), yet concluded that applicant had failed to show a public need which could not be met by existing carriers; the proffered evidence therefore would not change or vitiate the essential validity of that conclusion.—Convoy Co. Extension, 91 M.C.C. 461 (464)*.

Further hearing for introduction of evidence concerning operations of opposing carrier whose witness was unable to attend hearing would serve no useful purpose nor add anything of sufficient probative value to justify additional delay in disposition of applica-

tion; authority of that carrier is a matter of record, and its operations within scope thereof are substantially the same as those of other opposing conference members.—Home Transp. Co., Inc., Extension, 88 M.C.C. 265 (268-9)*.

Protestant's request for further hearing or investigation (1) to determine amount of standby charge provided for, in addition to a mileage allowance, in applicant's agreement with its parent railroad, to compensate it for providing equipment at complete disposal of the railroad, and (2) to determine whether such charge is excessive and imposes an undue burden on the railroad's 1.c.1. service, denied. Though in certain circumstances amount of the standy charge and question of resulting double profits might be pertinent,issues in proceeding on elimination of certain key-point restrictions on applicant's authority turn on savings in operating costs and more efficient utilization of equipment, rather than on the railroad's 1.c.1. deficit.—Pennsylvania Truck Lines, Inc.—Key Points Restriction, 88 M.C.C. 505 (512-3).

36. Laches.—[Vols. 13, 17].—Contention that plaintiff's action is barred by the doctrine of laches is without merit. Laches is not merely a question of time; it is a question of diligence; and facts of record indicate no lack of diligence on the part of plaintiff. While it is true that plaintiff's effort to set aside the considered certificate came after a lapse of 15 years, it is also clear that he had no knowledge of its existence at the time of issuance due to failure of applicant therefor to notify plaintiff's predecessor, and that the authority was hidden for that entire time because of dormancy. As soon as plaintiff learned of existence of the certificate, he immediately sought to have the commission revoke the part thereof which is duplicative of his own certificate.—Willey v. United States, 245 F. Supp. 669 (676)*.

Regulations of the Commission

27 FR 12188, Dec. 8, 1962, Part 7: Form BOR 99 Application for Motor Carrier "Grandfather" Certificate of Registration by motor common carriers having, on Oct. 15, 1962, State certificates filed with and accepted by the commission under former second proviso of §206 (a) (1), required to be filed on or before Feb. 12, 1963.

28 FR 3534, Apr. 11, 1963, Part 7 List of Forms, Part II, and Part 210 Exemptions: §7.75 BMC 75, canceled, and §7.100 BOR 100, prescribing Form BOR 100, added: and §210.10 Interstate operations by motor common carriers within a single State, revised, effective on date of order.

29 FR 5801, May 1, 1964, Part 2a: Special Rules of Procedure Governing Conversion of Irregular-route to Regular-route Motor Carrier Operations, §§2a.1 through 2a.6 prescribed, effective on date of publication in the Federal Register.

31 FR 6058, April 20, 1966, Part 7 List of Forms, Part II, Form OP-OR-9 Application for Motor Carrier Certificate or Permit, prescribed and approved for use, Form BMC 78 Application for Motor Carrier Certificate or Permit, discontinued; §7.78 OP-OR-9 revised as set forth, effective May 20, 1966.

Section 207. [§*307 (a) U.S.C.*] Issuance of certificate.—(a) Issuance authorized to qualified applicants for regular routes and between fixed termini.—[Unchanged. See vol. 10, p. 7988.]

Historical Note, see vol. 16, p. 12842, vol. 18, p. 14365, vol. 19, p. 15609.

Historical Notes

In view of creation of the Department of Transportation by Public Law 89-670, effective April 1, 1967 (32 FR 5453), the Commission and the Department of Transportation entered into a Memorandum of Agreement on April 3, 1967 (32 FR 5744, Apr. 8, 1967) for the purpose of accomplishing continuity, laison, coordination, and support with respect to transferring from ICC to DOT personnel and functions concerned with (1) motor carrier safety matters; (2) certain pending ICC proceedings; (3) pending court cases transferred to DOT; (4) housekeeping operations for ICC personnel transferred; (5) access to, and provision of, reports and other documents, and (6) liaison and cooperation between ICC and DOT.

The commission recommends that part II be amended to authorize the commission, after opportunity for hearing, to deny certificates, permits, licenses, or other operating authority when, in application proceedings, perjury, or subornation of perjury, has been committed before the commission, and the commission finds that the director, officer, or person convicted of such crime has such an interest in the business that the conviction affects the fitness of the carrier or broker.—Annual Report, 1962, p. 207.

Notes of Decisions

Volume 10—p. 7988; Volume 11—p. 9432; Volume 12—p. 10390; Volume 13—p. 11071; Volume 14—p. 11589; Volume 15—p. 12195; Volume 16—p. 12842; Volume 17—p. 13537; Volume 18—p. 14365; Volume 19—p. 15609.

5. Construction and interpretation.—[Vols. 10-19].—Applicant's proposed limousine service between Hartford, Conn., and New York City which was to be a 7-passenger, non-stop, semi-scheduled service, over irregular routes, by reservation, door-to-door, year round, and from anywhere within Hartford County to anywhere within the five Boroughs of New York City, or the reverse, contemplated a "special operation" within meaning of §207(a), since that category is a catch-all of passenger service not ordinary or "charter," and since proposed service is neither over "a regular route or routes" nor "between fixed termini" (although lacking only one would do).—Arrow Line, Inc. v. United States, 256 F. Supp. 608 (609-11)*.

The commission has broad administrative discretion in certifying carriers. Its function is not only to appraise the facts and to draw inferences therefrom but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies. Therefore, a reviewing court has no authority to substitute its judgment for that of the commission.—Petroleum Carriers Corp. v. United States, 258 F. Supp. (615)*; on the other hand, judicial deference to expertise is not boundless, as expertise alone is not sufficient to sustain a decision. The commission's action must be supported by substantial evidence and must be within the statutory limits placed on its powers by Congress.—Campbell Sixty-Six Exp., Inc. v. United States, 258 F. Supp. 529 (532-3)*.

The congressional purpose in passing the Interstate Commerce Act was not to allow any carrier who could make a profit to enter into competition with other carriers, but rather to allow the commission to make a determination in the public interest.—Colorado-Arizona-California Exp., Inc. v. United States, 224 F. Supp. 894 (902)*; that statute has established the commission as the guardian of the public interest in determining whether certificates of convenience and necessity should be granted, and has entrusted it with a wide range of discretionary authority in performing its duty. And, in reviewing its action on an application, the function of the reviewing court is limited to ascertaining whether the commission's findings are supported by substantial evidence.—Eazor Exp., Inc. v. United States, 218 F. Supp. 393 (395)*.

While there is some authority for the commission's apparent view that a showing of inadequacy of the present service of protestants is indispensable to the ultimate finding of public convenience and necessity for proposed (or existing) service, the better rule is embodied in the more numerous cases to the contrary, which show that inadequacy of present service is not a term convertible with "public convenience and necessity," but is only one element to be considered in arriving at the broader determination of public convenience and necessity. Even apart from the cases cited, it appears to be the more reasonable view that the narrower conceptual element of inadequacy of present service was not intended to be imposed as a straitjacket on the process of determining the broader interests of public convenience and necessity in effectuation of the national transportation policy.—Nashua Motor Exp., Inc. v. United States, 230 F. Supp. 646 (652, 653)*.

The commission is not without power to grant requested authority "merely" upon a clear showing of future necessity without affording existing carriers opportunity to meet the increased demand; the law is clear that future, as well as present, public convenience and necessity suffice to warrant the commission's authorization of new motor carrier operations.—Campus Travel, Inc. v. United States, 224 F. Supp. 146 (148)*.

Congress has never attempted to define "public convenience and necessity," but has left interpretation thereof to the administrative and judicial bodies. The commission's assumption that it is its duty to make findings

of fact and apply thereto its expert judgment in determining public convenience and necessity within framework of the Interstate Commerce Act has long had the sanction and approval of the federal courts (citing 315 US 475); it not only has the duty and authority to establish standards and tests to facilitate its determination of the existence, or lack, of public convenience and necessity, but it is free to alter its policies and standards when the necessity, in its judgment, arises.—Youngblood Truck Lines, Inc. v. United States, 221 F. Supp. 809 (817, 818)*.

Congress has delegated exclusively to the commission a wide latitude of discretion in determining public convenience and necessity; public convenience and necessity is not defined by the statute, and the purpose of Congress was to leave it to the commission authoritatively to decide whether additional motor service would serve public convenience and necessity; this gives the commission administrative discretion to draw its conclusion from the infinite variety of circumstances which may occur in specific instances. [Citing 326 US 60.]—Edwards Motor Transit Co. v. United States, 201 F. Supp. 918 (921)*; however, a basic ingredient in determination of public convenience and necessity is, and has consistently been held to be, whether existing facilities are inadequate to meet present or future transportation requirements.—Curtis, Inc. v. United States, 225 F. Supp. 894 (898)*.

The issue of public convenience and necessity is a matter peculiarly requiring the exercise of the commission's judgment in the field of transportation. In the consideration of applications the commission is not restricted to an evaluation of the facts, but is exercising an expert judgment or discretion with respect to a transportation question, and it is its duty by so doing to determine on which side of the controversy the public interest lies. Public convenience and necessity is not an issue resolved with mathematical precision; it was the purpose of Congress to leave to the commission the questions of whether additional motor service would, under certain circumstances, serve public convenience and necessity, and the court cannot, except under certain limited conditions, usurp the administrative functions of the commission by setting aside its lawful orders upon the court's conception of whether the administrative power has been wisely exercised.—North American Van Lines, Inc. v. United States, 217 F. Supp. 837 (840)*.

That United Parcel Service's parent company and its carrier affiliates were not made parties to UPS' §207 application and that approval of the corporate control involved was not sought therein pursuant to §5(2) did not deprive the commission of jurisdiction to grant UPS a certificate; §207, which is in Part II of the Act, requires the applicant to "conform to the provisions of this part," and §5, which is in Part I, is not part of the division containing §207; thus, §207 does not specifically require an applicant to conform to §5, nor can such requirement be fairly implied.—Sloan's Moving & Storage Co. v. United States, 208 F. Supp. 567 (572)*.

See also Hart v. I.C.C., §5(2), n. 110 *Certificate under §207.*

Section 207 recognizes three distinct types of motor passenger service: (1) operations over a regular route or routes between fixed termini, (2) charter operations, and (3) special operations, and the latter has consistently been regarded a catchall classification which may include almost anything that is neither a charter service nor one of the "usual" operations of ordinary regular-route passenger carriers. Also, while the proviso to §207(a) authorizes the issuance of certificates for conducting special operations over irregular routes, it does not prohibit the granting of special-operations authority over regular routes. Thus, there are two types of regular-route authority to transport passengers: special-operations authority (which creates no incidental charter rights) and the "usual" or "ordinary" regular-route authority. Accordingly, when regular-route authority is granted, incidental charter rights are thereby created unless such authority is limited to "special operations" either expressly or by language of similar import.—Arrow Lines, Inc. v. Connecticut Limousine Service, Inc., 96 M.C.C. 1 (5-6).

Under provisions of §207(a), that an applicant for operating authority must establish that he is fit, willing, and able properly to perform proposed service and to conform to

provisions of the act and the commission's rules and regulations thereunder, a finding of fitness is a statutory prerequisite to a grant of authority. Primary purpose of the fitness provision is to protect the public from carriers whose conduct demonstrates an unwillingness to operate in accordance with the requirements of regulation. While applicant argues that his unlawful operations should not be a bar to a grant of authority because he has paid his debt to society in a criminal action, the record affords no basis for a finding that he is fit to receive the authority sought and, therefore, no authority may be granted.—Jones, 96 M.C.C. 100 (103).

6. Restriction of operations.—[Vols. 10-19].—It has long been the policy of the commission to impose a restriction upon a grant of motor carrier authority only upon a clear showing that such restriction would protect protestant carriers from unintended or unwarranted competition, or serve some other useful purpose. Therefore, since such a showing has not been made, authority granted will not be burdened by the restrictions proposed by protestants.—Ryder Truck Lines, Inc., Extension, 96 M.C.C. 771 (779-80); similarly, since protestant cannot provide the service, and it has made no showing of a material adverse effect upon existing carriers, no restrictions are imposed on authority granted.—Florida Refrigerated Service, Inc., Extension, 94 M.C.C. 364 (369).

Restriction of authority granted for irregular-route transportation of certain agricultural machinery to plant sites of supporting shippers, or alternatively imposition of an interchange restriction, are equally undesirable. There is no evidence indicating that protestants would be adversely affected in absence of either restriction, nor is there anything indicating that protestants are currently transporting similar traffic which would be subject to diversion.—International Transport, Inc., Extension, 95 M.C.C. 360 (364)*.

Restrictions suggested by protestant which would limit weight of shipments to 1,000 pounds and require that, in the service, vehicles no larger than 2-ton trucks be used, should not be imposed on authority granted. Evidence fails to show that a maximum-weight service would fully satisfy shipper's needs and thus, in some cases, such restriction might preclude an effective and needed service; likewise, the equipment restriction could, in certain circumstances, deter effective operation and deprive shipper of service. Moreover, both restrictions would be difficult to enforce and, from that standpoint, are administratively undesirable. In addition, record is not convincing that those restrictions are necessary to protect protestant's interests since the shipper is satisfied with, and will continue to use, its service.—Paschall Extension, 96 M.C.C. 652 (655-6).

In the absence of clear public need, the commission will not impose restrictions on grants of authority, especially where ambiguous grants and problems of enforcement would result. In instant proceeding, the amendments allowed by the examiner would restrict proposed service on traffic destined to points in certain States to the partial unloading of volume or truck-load shipment, the balance of which is to be delivered elsewhere. Since the commission is not bound by restrictions agreed to by parties where the result would be inconsistent with the public interest, the proposed restrictions which would be difficult to enforce and administratively undesirable will not be imposed.—Alterman Transport Lines, Inc., Extension, 94 M.C.C. 421 (424).

Restrictions on operating rights create undesirable operating complications, and ordinarily should not be imposed except where the record shows that they are necessary and essential to the well-being of competitors.—Tallant Transfer, Inc.—Purchase—Guest Trucking Co., 93 M.C.C. 712 (716); suggested restriction of authority for transportation of liquid fertilizer, including placing of storage tanks at farms lacking suitable tanks for delivery of that commodity, to a combination of line-haul and accessorial service is rejected as contrary to well-established precedent.—Delaware Exp. Co. Extension, 92 M.C.C. 718 (721).

The commission is not bound by any restriction in an application, or by a restrictive amendment agreed to by the parties, which achieves results inconsistent with the public interest and effective regulation.—Chem-Haulers, Inc., Extension, 88 M.C.C. 1 (2);

Fox-Smythe Transp. Co. Extension, 88 M.C.C. 57 (59).

Examiner's interpretation of "peddle service" restriction in applicant's present authority to transport meats and packinghouse products as precluding it from transporting more than half a truckload consigned to any one person and, also, from making fewer than 15 delivery stops to as many consignees on one run, is not supported by any commission precedent. No precise definition as to number of delivery stops, maximum weight shipment allowed to be delivered to one consignee, or other aspects of such service has been formulated. In view of imprecise meaning of "peddle service," and the resultant difficulty of enforcing such a restriction, its imposition is not favored.-Id., p. 61; on the other hand, while such a restriction is imprecise and is not imposed in extension authority granted, applicant is required to attempt to comply with the restriction in its outstanding certificate until it is eliminated. Even though a policy of not including a particular restriction in operating authorities has been adopted, such a restriction in outstanding certificates or permits cannot be flouted with impunity.—Id., p.61.

Restriction of authority granted for transportation of experimental and display machinery and equipment to "sites of plants, sales branches, warehouses, experimental stations and/or farms, shows, exhibits, and field demonstrations owned, operated, or used" by single supporting shipper, as originally proposed by applicant, is sufficiently clear in meaning to justify its use in the circumstances; sites which may be served are locations that may be known with reasonable certainty at any given time. In view of highly specialized nature of the service authorized, imposition of the restriction is warranted.— Donaldson Transfer Co. Extension, 91 M.C.C. 896 (897)*.

See also Refrigerated Transport Co. v United States, n. 24, below.

While the commission is reluctant to impose on Railway Express Agency or any other certificated carrier restrictions which are administratively undesirable or difficult to enforce, interpretation of "general commodities moving in express service" as permitting REA to publish nonpremium container rates on traffic not shown to move more expeditiously than in ordinary l.t.l. freight service, or to require special handling or protection, does not mean that all certificates hereafter issued to it must confer authority for an unrestricted express type service. In considering extension applications by REA, the commission must tailor its grant to the need shown, even though need demonstrated is for less than a complete "express service." However, exclusion from express authority of liquid commodities in tank vehicles, commodities requiring special equipment, and household goods is designed to reflect the nonspecialized nature of express service, resulting in limitation on the equipment that may properly be used in operations under authority for general commodities moving in express service.—Freight, All Kinds, L.C.L. Container Charges—U.S.A., 323 I.C.C. 468(481)*.

Automobiles, trucks:[Vols. 18,19].—Restriction in protestant's operating authority limiting its right to transport motor vehicle "bodies" only to subsequent or secondary movements, in truckaway service, should be disregarded because, unlike automobiles or trucks, bodies are not vehicles but merely constitute a part of the vehicle to which they will be attached. Consequently, disregarding the "secondary movement" restriction, protestant has authority to transport newly manufactured vehicle "bodies" in the same manner as any other commodity.— Matson, Inc., Extension, 96 M.C.C. 648(649-50)*.

Commodities [Vols. 18,19].—In proceedings on application seeking authority to transport acids and chemicals, in bulk, the commission was not compelled to restrict the certificates granted to the nine chemical commodities specified by supporting shipper as currently being manufactured and shipped. On the contrary, both in the evidence concerning the shipper's research and development program and in the expertise for divination of future needs committed exclusively to it by Congress, the commission had more than enough basis for the general grant. Complaint dismissed.— Younger Bros., Inc. V. United States, 238 F. Supp. 859 (860-1)*.

See also Refrigerated Transport Co. v. United States, 227 F. Supp. 1021, §212(a), n. 1.

That plaintiff is not limited as to the shippers he may serve does not mean that limitations inherent in his commodity authorization can be ignored or that the commodity description "packinghouse products" in his certificate authorizes any different transportation, commoditywise, than the same authority in a permit.— Morehouse v. United States, 194 F. Supp. 940 (945)*.

See also Winter Garden Co. v. United States, §203(b), n.50 *Act of 1958.*

In amending petitioner's commodity authority for aircraft parts to specifically author-

ize transportation of missile parts (not mentioned at hearing on its application because of security restrictions), no restriction against transportation of parts containing explosives should be imposed. Although little evidence of specific need for movement of missile parts containing explosives, including "jet thrust units," was adduced at that hearing, petitioner proposed to provide the aircraft and missile industry with a complete service, embracing all commodities then produced by supporting shippers, including missile parts without restriction. Now to impose the requested restriction would be tantamount to finding that petitioner did not propose to transport missile parts without exception, or that in granting a complete service for supporting shippers the commission intended to exclude a minor part of the transportation service shown to be needed.—Leonard Bros. Transfer, Inc., Petition for Clarification, 96 M.C.C. 246 (256)*.

The commodity restriction "not including chemicals" sought by applicant for authority to transport slag and slag aggregates, and imposed by the joint board in its recommended grant of authority, implies that some slag and aggregates would be "chemicals" as defined by the commission, and some would not; however, since considered commodities fall within that category of chemically produced commodities excluded from the chemical classification by common usage, imposition of such restriction would not limit proposed operations; recommended exclusionary exeption eliminated from authority granted.—Dreyer Extension, 96 M.C.C. 343 (344-6).

Protestant's requested restriction of authority granted applicant for transportation of financial and business papers to preclude transportation of bills, notes, and checks for shippers other than banks would be impractical and would not meet the fluctuating needs of the involved shippers; not imposed.—Woody, 94 M.C.C. 759 (764).

In compliance with mandate of the court to restrict authority granted for frozen fruit juices and concentrates in mixed shipments with canned citrus products so as to limit applicant's operations to a bona fide mixed service and preclude it from competing directly with existing carriers in hauling truckloads of frozen items, restriction to "mixed loads" of frozen and unfrozen commodities is imposed. That restriction will authorize transportation of frozen commodities only at same time and in same vehicle as unfrozen commodities, and will not allow applicant to handle t.l. amounts of frozen fruit juices or concentrates, or of canned citrus products, in direct competition with presently authorized haulers thereof; nor may it transport l.t.l. quantities of frozen or unfrozen items unless there is also present in the same vehicle at same time a reasonable volume of contrasting freight.—Barsh Truck Lines, Inc., Extension, 92 M.C.C. 254 (255)*.

But it is unnecessary and administratively impracticable to impose a percentage or quantity limitation on amount of frozen commodities that may be loaded in each vehicle. The basic purpose of mixed-lading restrictions generally is protection of existing authorized carriers from unwarranted competition; but the boundary between existing adequate services which must be protected and needed additional services which should be authorized cannot be delineated with mathematical precision; therefore, any mathematical mixing rule would not only be arbitrary in formulation and theoretical in application, but would tend to focus excessive controversy on observance of the artificial demarcation line. However, this does not mean that a restriction to mixed loads or shipments may be defeated by consolidation of a token quantity of one type of commodity with a truckload of another; such a device would be mere subterfuge, for which adequate remedies are available under the act.—Id., p. 256.

Following 92 MCC 254, authority granted for transportation of mixed shipments of frozen and unfrozen citrus products is restricted to "mixed loads."—Wilson Bros. Truck Line Extension, 92 M.C.C. 497 (501-2).

No useful purpose would be served in restricting authority granted for certain frozen cooked vegetables to movement in mixed shipments with frozen fruits and vegetables merely because applicant has been transporting them in that manner.—Colonial Refrigerated Transp., Inc., Extension, 91 M.C.C. 187 (191).

Suggested restiction of authority for foods, etc., to mixed shipments of specified non-refrigerated commodities when moving with

commodities requiring refrigeration, under refrigeration, in mechanically refrigerated equipment, is involved and indefinite; to attempt to enforce a restriction to such mixtures would place an intolerable enforcement burden on the commission; "commodities requiring refrigeration" is ambiguous and difficult to apply; any requirement that commodities transported be "refrigerated" is meaningless, as temperature required to place a commodity "under refrigeration" depends on commodity to be cooled, requirements of specific shippers, seasonal temperature changes, and other vague and variable considerations; protestants' interests are sufficiently protected by restriction to transportation in vehicles equipped with mechanical refrigeration.—Refrigerated Transport Co., Inc., Extension, 88 M.C.C. 71 (73-4).

Inasmuch as supporting shipper has received "grandfather" authority to transport frozen fruits, berries, and vegetables from involved origins to many of destinations sought by applicant, and has offered no assurance that it would surrender such authority if corresponding portion of application were granted, no need appears for transportation by applicant of frozen food items made nonexempt by Transportation Act of 1958, and authority granted is therefore restricted to exclude frozen fruits, berries, and vegetables within meaning of §7(c) thereof.—Colonial Refrigerated Transp., Inc., Extension, 86 M.C.C. 796 (798, 799).

See also Home Transfer & Storage Co., §204(b), n. 7 *Frozen foods, juices.*

Applicant is presently transporting for supporting shippers numerous items of farm and construction machinery which have widespread and varied uses, and as there are many occasions when it is impossible to foresee ultimate use, any grant of authority dependent on the intended use test would be impractical and unrealistic; elimination of the intended use test will simplify and clarify applicant's existing authority and permit it to furnish those shippers the complete service to which they are entitled; similarly, the very nature of shippers' products compels a similar conclusion as to restrictions which require use of special equipment.—Gregory Heavy Haulers, Inc., Extension, 88 M.C.C. 45 (48).

Since supporting shipper requires complete coverage for its extensive line of machinery and power equipment, restriction of authority granted against handling of "Mercer" type commodities would generate the same problems now created by an intended use description and will not be imposed.—Ligon Specialized Hauler, Inc., Extension, 91 M.C.C. 356 (359).

Restriction against transportation of commodities which because of size, weight, or inherent nature require use of special equipment is properly imposed ony where valid reason is shown. As refractory products are not shown to be of character requiring special equipment, no reason appears for imposing such restriction on authority therefor.—Freeport Transport, Inc., Extension, 89 M.C.C. 168 (172).

Modification of railroad subsidiary's certificate by authorization of substituted highway service in zones defined around 12 key points should not be restricted against transportation of classes of commodities usually excepted from general-commodity authority, including bulk commodities, since it would diminish petitioner's existing authority without showing of necessity therefor; however, exceptions in its present certificate relating to commodities moving in express or railway baggage service should be retained.—New York Central Transport Co.—Modification, 89 M.C.C. 389 (402, 410-1, 412).

See also Pennsylvania Truck Lines case, n. 35 *Substituted freight service*, below.

Equipment: [Vols. 18, 19].—There is force to applicant's reasoning that, owing to length of haul between Washington, D.C., and Dulles Airport, use of buses as well as limousines may be necessary to make possible an economical service; accordingly, authority granted will not be restricted to prohibit use of bus-type equipment. Limitation of the grant to nonscheduled door-to-door service will ensure a bona fide livery service; and restriction of service authorized between Dulles and National Airports to transportation of a maximum of 14 persons in one vehicle, exclusive of the driver, will be an appropriate limitation.—A.B. & W. Transit Co., Extension, 88 M.C.C. 175 (183).

Although applicant seeks authority to trans-

port sand, in bulk, in hopper-type trailers or mechanical discharge trailers, the equipment restriction requested is undesirable and is not imposed.—J-E-M Transp. Co., Inc., Extension, 94 M.C.C. 573 (577)*.

To serve a shipper who mined and evaporated salt, applicant sought authority to transport "salt, in bags and in blocks, on flat-bed trailers with protective tarpaulins", but in the authority granted the restrictive phrase "on flat-bed trailers with protective tarpaulins" was removed and the words "in cartons" added to the commodity description.—Argo Trucking Co., Inc., Extension, 96 M.C.C. 434 (435).

Distinction has often been drawn between trucks and trailers; recommended restriction of authority for bulk salt against use of dump or hopper type "vehicles" would prevent applicant's use of such trailers as well as trucks, thus precluding it from transporting dry salt in bulk; restriction imposed against transporting dry salt in bulk; restriction imposed against transportation in dump or hopper-type trucks.—Chemical Leaman Tank Lines, Inc., Extension, 91 M.C.C. 683 (686).

Although an equipment limitation is sometimes utilized to resolve ambiguities in commodity descriptions, and applicant applied for authority to transport frozen foods in vehicles equipped with mechanical refrigeration, such limitation is unnecessary: commodity description "frozen foods" itself dictates the type of equipment required. Moreover, should it become feasible to transport frozen foods in vehicles not equipped with mechanical refrigeration applicant would not be required to return to the commission for additonal authority.—Colonial Refrigerated Transp., Inc., Extension, 86 M.C.C. 796 (799).

Removal of restriction "in vehicles equipped with mechanical refrigeration" from citrus-products authority previously granted six applicants is warranted when many of those commodities can be satisfactorily transported in insulated vans or by use of nonmechanical refrigerants, especially during colder months; present restriction has handicapped applicants and the Florida citrus industry by denying use of available saitisfactory equipment that is cheaper to operate, without any corresponding benefit to general-commodity carriers. Applicants require unrestricted authority for citrus juices in bulk, as there is need for additional tank service; supporting shippers also require transportation of other citrus products in insulated vans as well as in mechanically refrigerated vehicles; removal of restriction will promote efficiency and economy in applicants' operations and be responsive to shippers' changing needs, without serious diversion of traffic from protestants.—Clay Hyder Trucking Extension, 89 M.C.C. 757 (761-2).

Protestant dry-freight carriers' interests will be sufficiently protected by restriction of authority for foods, etc., to transportation in vehicles equipped with mechanical refrigeration; such equipment is more expensive to purchase and operate than conventional van equipment and its use to transport general commodities not requiring it would be uneconomical.—Refrigerated Transport Co., Inc., Extension, 88 M.C.C. 71 (74).

Though application seeks authority for transportation of liquid chlorine in 1-ton containers requiring special equipment (a flat-bed trailer mounting a special steel cradle), the commission does not favor imposition of restrictions as to kind of container and mounting or to flat-bed trailers; moreover such a modified vehicle does not consititute specialized equipment; restriction not imposed.—Chem-Haulers, Inc., Extension, 88 M.C.C. 1 (2).

Restriction of authority granted to transport licithin oil, in bulk, to transportation in stainless steel vehicles is not necessary.—Southern Tank Lines, Inc., Extension, 88 M.C.C. 387 (390).

See also Truck Transport, Inc., Extension case, §204(b), n. 7 *Fertilizer, fertilizer materials.*

No need appears for restriction of authority granted for transportation of composition roofing to exclude commodities in bulk, in tank vehicles; applicant does not operate tank equipment and it is not shown that there is a type of composition roofing that can be so transported.—Melton Truck Lines, Inc., Extension, 88 M.C.C. 723 (735).

Restriction of authority granted for agricultural limestone to transportation in dump spreader equipment would be an unwarranted

imposition, since it would place on applicant the duty of performing a separate and distinct service from that of transportation.—Star Carriers, Inc., Extension, 88 M.C.C. 282 (283).

Explosives, 5 year limitation: [Vols. 18, 19].—As no 5-year limitation on transportation of explosives was imposed on authority granted petitioners in another proceeding to transport specified missile parts (as distinguished from jet thrust units), none is imposed on modification of its existing aircraft-parts authority to specifically authorize transportation of missile parts, including those containing explosives or jet thrust units.—Leonard Bros. Transfer, Inc., Petition for Clarification, 96 M.C.C. 246 (256-7)*.

Applicant's general commodity authority in its southwestern area (between Birmingham and Houston) is restricted against carriage of class A and B explosives so that, while it moves considerable amounts of general commodities, it cannot transport explosives in that area; on the other hand, its southeastern authority is not so restricted and it transports explosives in its southeastern area. On showing of a need for a carrier of expolsives in the southwestern area, which existing carriers were not meeting, applicant is granted authority for proposed tranportation of explosives which, in effect, amount to removal of the restriction against explosives from its general commodity authority. However, explosives authority granted is limited to expire 5 years from date of issuance of certificate.—Ryder Truck Lines, Inc., Extension, 96 M.C.C. 771 (774, 778, 780).

Extension authority granted Railway Exp. Agency, insofar as it authorizes transportation of dangerous explosives, is limited to the usual 5-year term.—Railway Exp. Agency, Inc., Extension, 94 M.C.C. 102 (109); Id., 91 M.C.C. 836 (839); similarly, to extent that general commodity authority granted authorizes the transportation of explosives, it is limited to a period of 5 years from date of certificate.—Whitfield Transp., Inc., Extension, 95 M.C.C. 576 (583-4)*.

Since liquid hydrogen, liquid nitrogen, and liquid oxygen are all classified as dangerous commodities in the commission's dangerous explosives regulations, a 5-year term limitation is imposed in the certificates granted each of three applicants.—Younger Bros., Inc., Extension, 95 M.C.C. 1 (19)*.

Less-than-truckload: [Vols. 18, 19].—Requested l.c.l. and l.t.l. restrictions on railroad subsidiary's modified authority are ambiguous, would impose no really definite or effective limitation on its operations, and are administratively undesirable; not imposed.—New York Central Transport Co.—Modification, 89 M.C.C.389 (410).

Limited-term operating authorities: [Vols. 18, 19].—See also *Explosives*, above.

Authority granted is limited to a period of 5 years when the only need for service is to supply a roadbuilding contractor with necessary petroleum products during construction of an interstate highway; applicant may file petition for extension of the authority if further need for service develops.—Blue Ridge Transportation Co., Inc., Extension, 89 M.C.C. 616 (619-20).

Oilfield, oilwell, pipeline stringing: [Vol. 18].—Since scope of authority for pipestringing services, originally restricted to the oil and gas industries, has been expanded as actual and potential use of pipelines has been extended to other commodities, no reason appears for imposition of that outmoded restriction on carriers authorized to serve Alaska.—J.O. (Red) Willett Pipe Line Stringing Corp. Extension, 92 M.C.C. 41 (44)*; and limitation of authority granted to service in connection with main or trunk pipelines is likewise not warranted, since it would inconvenience both applicants and industries they serve; although lateral and gathering lines are normally of smaller diameter than trunklines and employ pipe that is easier to handle, gathering lines often extend from producing fields as well as within refinery areas, and lateral lines usually connect an oil-field to a trunkline system; thus both fall reasonably within scope of applicants' specialized service. However, following 89 MCC 427, service in connection with water and sewer lines is specifically excluded.—Id., pp. 44-5.

Nor should applicants' services be restricted to movements to and from pipeline rights-of-way; such restriction might impose a heavy burden on applicants and their patrons, since it would preclude transportation of pipe in-

tended for use in pipeline construction but placed in storage temporarily until needed, unless the storage site was actually at the pipeline. Such restriction is unnecessary in view of fact that an "intended use" test is inherent in authority for transportation of commodities in connection with the construction, operation, repair, servicing, maintenance, and dismantling of pipelines.—Id., p. 45.

Authority for transportation in connection with stringing and servicing of pipelines for other than oil and gas industries should be limited to avoid duplication of existing services, yet provide for expansion of specialized operations where needs of the shipping public require it; limitation of service to pipelines as defined by examiner would afford no protection to protestants' transportation of pipe for water or sewer systems, which is not shown to require a different or more specialized service; grant to applicant pipestringers should therefore be limited in terms of commodities for which a pipeline is used or proposed to be used. Granted for service in connection with pipelines other than those used for transmission of natural gas, petroleum, their products and byproducts, water, or sewage, restricted also to shipments moving to or from pipeline rights-of-way.—J. O. (Red) Willett Pipeline Stringing Extension, 89 M.C.C. 427 (436-7).

Passenger operations: [Vols. 18, 19].—Authority to engage in special operations (providing of chauffeur service) in transportation of privately owned passenger automobiles, in secondary movements, in driveaway service, is restricted to movements in which the automobile is accompanied by the owner thereof, employees, dependents, or relatives of the owner, or other persons designated by and traveling with the owner, and the baggage of such passengers.—Adams, 94 M.C.C. 290 (295).

Authority granted two applicants to provide limousine service between Connecticut points and La Guardia and Idlewild airports is restricted to transportation of not more than 8 persons, in case of one applicant, and 11 in case of the other, in same vehicle, exclusive of the driver.—Hatom Corp., 91 M.C.C. 725 (734-5)*.

Authority granted Greyhound Corp. To serve Dulles International Airport near Chantilly, Va., is restricted to traffic moving between the airport and points west of Chantilly.—A.B. & W. Transit Co. Extension, 88 M.C.C. 175 (185).

Since proposed transportation of stockmen between Ames, Iowa, and stockyards at Chicago is a special service analogous to assembly and distribution of mill workers or plant employees, authority therefor is restricted to passengers picked up or discharged at the stockyards.—Myers, 89 M.C.C. 125 (129)*.

Plant site: [Vols. 18, 19].—Claim of plaintiff (protestant in commission proceeding) that the commission should have restricted authority granted to two applicants to the plant site of supporting shipper, instead of permitting service from named city and points within 5 miles thereof, rejected. There was ample proof of substantial present and future need and of inadequacy of existing service; and that the evidence was related solely to the one shipper did not compel a plant site restriction. Both for conceptual and practical reasons, the commission imposes such restrictions in carrier certificates only in cases where clear and convincing evidence shows that such a limitation is required in the public interest. Since nothing in the record suggests that existing carriers would be adversely affected as to traffic from other plants in the area, the commission is entitled to the view that the mere fear that traffic might be diverted is not a sufficient basis for a plant site restriction. Complaint dismissed.—Younger Bros., Inc. v. United States, 238 F. Supp. 859 (860, 861)*.

Plant-site restrictions, for the most part, are included in a grant of authority where the exact location of a particular plant is not known or in order to protect the interests of existing carriers against unwarranted competition; however, neither of those conditions is present.—Slay Transp. Co., Inc., Extension, 96 M.C.C. 47 (50); similarly, no good reason appears for restricting the authority granted to plant sites of supporting shipper.—Argo Trucking Co., Inc., Extension, 96 M.C.C. 434 (437).

In petition for reconsideration, applicant urges that his contract-carrier application be considered as one for common carrier authority, and suggests that any authority granted

should be restricted to supporting shipper's plant site; however that limitation was not requested in the application and, generally, common carriers should not be granted authority confined to plants of particular shippers, except where it is the only manner in which a needed common carrier service may be provided, or where interests of existing authorized carriers must be protected. Accordingly, authority granted will not contain any plant site restrictions.—Major Extension, 94 M.C.C. 652 (653, 656)*.

Except in rare instances, common carrier authority should not be confined to a plant site of a particular shipper, since a common carrier's duty to serve the general public without discrimination obligates it to serve, to the extent of its ability, all shippers who request its services.—Chemical Express Extension, 89 M.C.C. 452 (455).

Normally common-carrier authority is not restricted to service from plant-site locations unless competitive conditions are such as clearly to warrant that action to protect operations of carriers with whom an applicant would compete; evidence does not warrant such restriction on applicant's service.—Blue Ridge Transp. Co., Inc. Extension, 89 M.C.C. 616 (619); imposition of destination plant-site restriction is not warranted where rail protestant failed to show that it will be harmed in any manner by grant of authority to applicant to serve all of Baltimore, Md., as a destination point.—Shipley Transfer, Inc., Extension, 89 M.C.C. 524 (526).

As the probative evidence is limited to the need for service of one supporting shipper only, grant of authority to transport candy and confectionery, etc., is limited to movements from that shipper's plant site.—Alterman Transport Lines, Inc., Extension, 96 M.C.C. 478 (481)*; similarly, authority to transport meats, etc., is limited to traffic moving from supporting shipper's plant site.—Fox-Smythe Transp. Co. Extension, 88 M.C.C. 57 (64); however, since authority granted is restricted, as sought, to transportation of meats and dairy products from plant site of supporting packing house, there is no need for further restriction against transportation of bulk liquids in tank vehicles.—Nebraska Eastern Exp., Inc., Extension, 94 M.C.C. 799 (804).

As a general proposition, the commission does not favor restricting common carrier authority to a plant site; but in instant case such limitation provides the only suitable means of identifying the location where service is needed, without granting countywide authority.—Dahlen Transport, Inc., Extension, 91 M.C.C. 609 (615); Steel Transp. Co., Inc., Extension, 92 M.C.C. 387 (398); in addition, and more important, restriction of authority granted to traffic originating at site of plants whose traffic is controlled by supporting shipper would preclude applicants from tacking it with their present authority from other nearby steel-producing points. No need is shown for such service and it would adversely affect protestants and other carriers operating in that highly industrialized area.—Id., p. 398.

Though applicant seeks authority from Sheffield, Ala., and points within a radius of 15 miles thereof, supporting shipper's plant is at Muscle Shoals, about 2 miles from Sheffield. As there are several other chemical shippers in the Sheffield area, and the commission disfavors territorial descriptions framed in terms of mileage radii, origin authority is limited to plant site of the sole supporting shipper.—Redwing Carriers, Inc., Extension, 92 M.C.C. 379 (382).

Since 27 independent motor carriers have been granted authority to serve the site of supporting shipper's new plant at Oakbrook, Ill., and the evidence shows need for service at that point only, authority granted rail-subsidiary applicant should be similarly restricted.—New York Central Transport Co. Extension, 92 M.C.C. 173 (178)*.

While the commission generally does not favor restricting a grant of common-carrier authority to a plant site, authority granted is restricted to supporting shipper's plant site at Niagara Falls, as requested, since such limitation is the only suitable method of protecting other carriers in a large commercial area, where service is needed only at a particular production point.—Southern Tank Lines, Inc., Extension, 88 M.C.C. 127 (141)*.

Although plant-site limitations are not normally imposed in grants of authority to common carriers, public interest requires such

restriction where applications are supported by only one shipper (receiver) who would use proposed services for approximately one truckload weekly of flourspar and two of feldspar; without such restriction resulting authority would afford applicant opportunity to serve a public far exceeding the limited proof of need for service shown by the single supporting shipper. Destination authority restricted to site of shipper's plant at Baltimore. —M. I. O'Boyle & Sons, Inc., Extension, 88 M.C.C. 559 (561). [But see dissent.]

Points, origin, intermediate, off-route, destination.—[Vols. 18, 19].—Reviewing court, in settting aside, in part, and remanding application proceeding for further proceedings consistent with its finding that record did not support grant of authority for a new service between Beaumont-Orange and Houston, Tex., and intermediate points, specifically indicated what part of the service should be authorized in the further proceedings; since the commission is bound by the court's opinion, a broader grant of authority contrary thereto, though unintended, would not meet either the court mandate or statutory requirements. Restriction in amended certificate issued after the remand is not framed to preclude a "through" service by tacking at Houston, which grant the court found to be erroneous; thus, the commission has no alternative but to issue a second amended certificate correctly reflecting the court mandate. Therefore, certificate is further amended so as to restrict service at points in Orange, Beaumont, and Houston commercial zones to traffic moving to or from points on specifically described route in Louisiana.—Central Freight Lines, Inc. v. Strickland Transp., Inc. 102 M.C.C. 291 (294-8)*.

See also Transamerican Freight Lines, Inc. —Interpretation, case, §208(a), n. 31.

Since the commission can authorize operations only in interstate or foreign commerce, the examiner's recommended restriction of passenger authority "to traffic destined to, or originating at, points outside of or beyond New York" is redundant and will be omitted. —Arrow Trailways, Inc., Extension, 94 M.C.C. 514 (519).

Although busline's application seeks authority to operate over two routes between Philadelphia and New Jersey Turnpike, serving Camden, N. J., and other intermediate points only on traffic to or from points beyond Philadelphia or New York City, to avoid ambiguity and future questions of interpretation that restriction is changed to prohibit transportation of traffic originating at or destined to Philadelphia or New York City.—Greyhound Corp. Extension, 95 M.C.C. 762 (764, 770)*.

While restrictions against a busline's serving intermediate points should not be imposed without strong reasons, the almost complete lack of passenger support for service between Rahway, N. J., and New York City in addition to existing service of protestant railroad and a rival busline, together with probable adverse effect on the railroad's service, warrant a closed-door restriction on authority granted applicant for routes from other New Jersey points against service at Rahway as an intermediate point.—Somerset Bus Co., Inc., Extension, 89 M.C.C. 107 (111-2)*.

In order to achieve applicants' intended limitation of proposed transportation of liquid oxygen, liquid hydrogen, and liquid nitrogen to military and Government traffic, authority granted is restricted against transportation of shipments moving to destinations which are not missile storage or missile launching sites, missile test facilities, or manufacturing plants producing those commodities.—Younger Bros., Inc., Extension, 95 M.C.C. 1 (19)*.

While record indicates that there are shippers of chemicals, other than supporting shipper, at or in Lake Charles, La., area, and that protestants serve at least some of them, there is no evidence of their need for applicants' proposed service; therefore, to afford some protection to protestants and confine the grants more to conformance with proof submitted, authority granted to each applicant, as to origin, is limited to Lake Charles and points within 5 miles thereof.—Robertson Tank Lines, Inc., Extension, 95 M.C.C. 234 (245, 250-1)*.

As the preponderance of new-automobile traffic transported by applicant in secondary movements from Spokane to Washington and Idaho destinations will continue to originate in California and will be merely supplemented by the limited volume moving from other origins, requested elimination of present restric-

tion to shipments originating in California depends on whether public convenience and necessity require its removal to permit applicant to provide a complete service for General Motors Corp., which controls the routing. Although GMC did not appear in support of proposed operations, and protestant is authorized and willing to serve supporting dealers in the movements involved, there is no evidence that it, a substantial carrier, needs protection of that restriction. Effective and efficient operation requires that applicant be able to provide a complete service on considered traffic; and that removal of the restriction is supported only by dealers in its authorized area does not warrant a different conclusion. —Transport Storage & Distributing Co. Extension, 92 M.C.C. 566 (569, 571).

Authority to serve Harrisburg, Pa., in connection with applicant's regular-route operations between Lewistown and Philadelphia is limited to interchange of shipments, since no need is shown for additional service at Harrisburg for any other purpose.—Noerr Motor Freight, Inc., Extension, 89 M.C.C. 589 (592).

Authority for transportation of meats to certain points and territory in northeastern New York is restricted against service at Syracuse or points within 10 miles thereof, at points in Albany commercial zone, or at points within 10 miles of New York Highway 5 between Albany and Utica.—Refrigerated Food Exp., Extension, 89 M.C.C. 795 (800)*.

Although applicant's primary aim in seeking proposed route in Mississippi appears to be its desire to handle traffic between Memphis and proposed off-route point of Helena, Ark., and a restriction precluding such transportation should not be imposed without strong reasons, since it is in some sense contrary to accepted concept of common-carrier service, imposition is warranted when protestant's service between those points appears reasonably satisfactory and would be adversely affected by a new competitive operation.—F. & W. Exp., Inc., Extension, 88 M.C.C. 262 (263)*.

See also Schroder's Exp. case, and Al Renk & Sons, Inc.—Alaska "Grandfather" Application case, §208 (a), n. 30.

As it does not appear that applicant has ever provided or participated in providing service to or from points in West Virginia portions of commercial zones of Ohio points it is authorized to serve under single-State proviso, or that any need exists therefor, certificate granted for continuance of its Ohio operations is restricted against service at such points.—Pedler—Control—All States Freight, Inc., 90 M.C.C. 491 (498).

At opening of hearing on purchase application vendee's counsel made clear that in seeking certificate covering its operations under former single-State exemption proviso it sought only authority corresponding to its present intrastate authority, in which its regular-route rights are divided into three contiguous territorial groups, with restriction against tacking for purpose of performing service between a point in one group and a point in another, and which also contains restrictions against service between specified points; similar restrictions are therefore imposed on authority granted under §207.—Dodds Truck Line, Inc.—Purchase—Strain, 93 M.C.C. 229 (230-1, 237).

Authority granted for alternate operating-convenience routes over US Highway 36 between St. Joseph, Mo., and Pittsfield, Ill., and between Decatur, Ill., and Indianapolis is restricted to movement of traffic between St. Joseph and Indianapolis; otherwise, applicant could operate directly between St. Joseph and points on its service route between Pittsfield and Decatur to perform a service different from that presently conducted and beyond that contemplated.—Transamerican Freight Lines, Inc., St. Joseph Alt. Routes, 92 M.C.C. 747 (752)*.

Policing of applicant's proposed restriction of alternate-route authority between Birmingham, Ala., and Meridian, Miss., to traffic moving from or to Birmingham and to or from New Orleans and Gulfport does not present any administrative difficulty.—West Bros., Inc., Extension, 91 M.C.C. 523 (532, 533)*.

Authority granted to railroad subsidiary for service between supporting shipper's plant at Oakbrook, Ill, and Chicago is restricted against handling of traffic originating at or destined to points in Lake and Porter Counties, Ind., and points in Illinois other than in St. Clair and Madison Counties.—New York

Central Transport Co. Extension, 92 M.C.C. 173 (178-9)*.

Restriction in railroad subsidiary's certificate prohibiting service "at any point not a point on the rail lines of the railroad" allows it to serve all terminal, intermediate, and off-route points described in its certificate which are stations on its parent's rail lines; "points" refers to all communities, incorporated or unincorporated, or unincorporated areas in which such stations are located.—New York Central Transport Co.—Modifications, 89 M.C.C. 389 (397-8).

A key-point named in connection with one route, but which acutally lies on a connecting route, does not limit operations over the latter route; naming of Erie, Pa., as an off-route key point in connection with certain routes granted in petitioner's extension proceeding does not limit service over routes acquired in earlier purchase proceeding between Erie and either Buffalo, N. Y., or Cleveland or Sandusky, Ohio.—Id., pp. 393-4.

Petitioner's modified authority for substituted highway service over authorized routes in 12 defined key-point zones should not be restricted to movements through the zone hub; the railroad's management should have option of either utilizing petitioner's service in that manner or operating directly between way stations, whichever provides the more efficient and economical service at the time; management should enjoy the same freedom of action in that respect as it now does under the key-point principle.—Id., p. 411; similarly, restriction of petitioner's service at break points common to two or more zones to points within only one zone would require either circuitous back hauls or continuance of uneconomical merchandise car service to and from break points; service should not be confined to one side of a break point so as to preclude handling of traffic flowing in a different direction in the other zone.—Id., p. 411.

Prior or subsequent movement by air: [Vols. 18, 19].—Although applications for authority to transport passengers between Connecticut points and La Guardia and Idlewild Airports limit authority sought to passengers having an immediate prior or subsequent movement by air, it is common practice for persons other than airline passengers to utilize airport limousine service. Also, since applicants will be authorized to transport passengers only when traveling to or from an airport, such restriction is neither necessary nor in the public interest.—Hatom Corp., 91 M.C.C. 725 (734)*.

Authority granted REA for motor carrier operations between Mobile, Ala., and Pensacola, Fla., should not be restricted against transportation of express shipments having a prior or subsequent movement by air. While not extensive, some service of that nature has been performed by REA in the past, and it does not appear that protestant would be seriously injured by failure to impose such a restriction.—Railway Exp. Agency, Inc., Extension, 94 M.C.C. 180 (184-5).

Grant of authority for transportation of general commodities, including those of unusual value, between Somerset and Middlesex Counties, N. J., and Newark, Idlewild, and La Guardia Airports, is restricted to traffic having an immediately prior or subsequent movement by air.—Con-Ov-Air Air Freight Service, Inc., 92 M.C.C. 526 (529).

Prior or subsequent movement by rail: [Vols. 18, 19].—See also NTP, n. 10 *Restrictions, auxiliary, supplemental service.*

Although the commission's interpretation of §5(2)(b) as applicable to certificate applications under §207 by rail-affiliated carriers, and its implementation thereof by imposition of a rail-haul restriction on authority granted such carriers, was expressly approved by the Supreme Court in 340 US 419, there was no error in its grant of extension authority to Railway Exp. Agency without including a rail-haul restriction. In approving the commission's use of the policy of §5(2)(b) as a guide rather than a rigid limitation in interpreting §207, the Court in 355 US 141 held that the commission has discretion to grant totally unrestricted authority to rail-affiliated companies where special circumstances prevail and unrestricted operation by the rail-owned carrier is found on specific facts and circumstances to be in public interest.—Auclair Transp., Inc. v. United States, 221 F. Supp. 328 (334-5)*.

In instant case the commission has in fact found the special circumstances justifying non-imposition of the rail-haul restriction; its report finds specifically, on substantial evid-

ence, that existing motor carriers are unable or unwilling to perform the type of service rendered by REA. Such a restriction would have resulted in denial of express service to shippers in the involved localities, since the very reason for the applications was the discontinuance of passenger trains carrying express freight to those communities. The commission acted well within its statutory authority; sustained.—Id., p. 335.

Authority granted for secondary truckaway movement of new automobiles from Spokane, Wash., to additional destinations in Washington and Idaho is restricted to traffic having prior rail movement from plant sites of General Motors Corp.—Transport Storage & Distributing Co. Extension, 92 M.C.C. 566 (572).

Imposition of a prior or subsequent rail-haul condition on a systemwide basis on petitioner's modified authority for substituted service in 12 defined key-point zones would deprive the zone plan of much of its flexibility by compelling use of rail service when all highway operation would be more logical and practical. However, to protect certain independent motor carriers whose traffic would be subject to diversion, rail-haul restrictions are imposed as to traffic between specified points in designated zones; such restrictions will permit operation through the restricted points to and from other origins and destinations, and with one exception will apply to the named points only and not to points in their commercial zones.—New York Central Transport Co.—Modification, 89 M.C.C. 389 (409-10, 411).

Although application seeks authority for transportation of contractors' equipment from North Dakota railheads to missile launching sites, restricted to service supplemental of that of Soo Line, such movement is on applicant's billing, and restriction to service for one railroad is unnecessary. Instead, restriction to traffic having prior rail movement is imposed.—Maas Transport, Inc., Extension, 92 M.C.C. 581 (583, 585)*; on reconsideration, however, authority restricted only to traffic having a prior rail movement represents a broadening of scope of the application as filed, and authorizes service at points on lines of the opposing railroad without it having an opportunity to show the adequacy of existing service at those points. Accordingly, authority granted is limited to traffic originating at stations on the Soo Line. —Id., 95 M.C.C. 375 (377)*.

Restriction requiring a "prior" movement by rail precludes transportation of shipments which would be proscribed by an "immediately prior" restriction; both terms have been used interchangeably by the commission and appear to have been understood by the regulated transportation industry as identical in meaning; in either form, such a rail-haul restriction refers to uninterrupted movements from origin to destination and does not permit performance of a distribution service on cement which after an initial rail movement has come to rest in silo storage at a rail point.—New England Transp. Co. Extension, 88 M.C.C. 703 (706-7).

Since all interstate express traffic originated or terminated at Great Falls, S. C., under authority granted Railway Exp. Agency to enable it to continue serving that point, will have a prior or subsequent rail movement through either Charlotte, N. C., or Greenwood, S. C., or will move by motor vehicle over a connecting route of REA which is subject to a rail-haul restriction, a like restriction is imposed on the extension route granted.—Railway Exp. Agency, Inc., Extension, 94 M.C.C. 102 (109); likewise, authority granted REA over a route between Clinton, Iowa, and Crystal Lake, Ill., is limited to express shipments having an immediately prior or subsequent movement by rail or air, except that purely local service may be rendered on express traffic moving solely between points authorized on that route.—Id., 92 M.C.C. 487 (490).

In view of imposition of a key-point restriction on extension authority granted Railway Exp. Agency, a rail-haul condition would not be appropriate. Key-point and rail-haul restrictions are not intended to be applied concurrently, but are imposed as alternatives, depending on which one would most suitably accomplish the basic objectives.—Railway Exp. Agency, Inc., Extension, 91 M.C.C. 473 (481); removal of rail-haul restriction on REA's present authority between Elgin Air Force Base and Pensacola, Fla., to permit tacking with motor-carrier authority granted

between Pensacola and Mobile, Ala., is not warranted when no need is shown for the proposed all-motor service. Authority granted is therefore restricted to observance of Pensacola and Mobile as key points.—Id., 94 M.C.C. 180 (182, 183-4).

As there is no other express at points along proposed route between Sioux City, Iowa, and Mitchell, S. Dak., a rail-haul restriction on authority granted Railway Exp. Agency would preclude it from rendering service required on traffic not having a prior or subsequent rail haul which moves over its existing Sioux City-Omaha motor route. Even in absence of rail service, REA's Sioux City-Omaha operations cannot be considered substituted motor-for-rail movements, but are motor express movements; rail-haul restriction should therefore not be imposed, and it follows that a restriction against handling of traffic moving in TOFC service as part of a rail-haul restriction would likewise be inappropriate.—Railway Exp. Agency, Inc., Extension, 91 M.C.C. 836 (839).

Authority granted railroad subsidiary to transport ore and ore concentrates is limited to shipments moving under a through bill of lading and having an immediately subsequent movement by rail.—Rio Grande Motor Way, Inc., Extension, 89 M.C.C. 199 (202-3).

Since proposed transportation of building materials from Jersey City, N. J., and Queens, N. Y., to three New York counties is exactly the same type of service as that now provided by applicant on ex-rail shipments from its Brooklyn terminal, authority granted is restricted to shipments having a prior movement by rail.—Paul Marckesano & Sons Co., Inc. Extension, 86 M.C.C. 727 (729, 733).

Prior or subsequent movement by water: [Vol. 18].—Respondent's permit to transport general commodities "received from, or delivered to, port facilities, or places of storage before or after a movement by water" does not authorize it to transport traffic to or from a port area regardless of whether it has had a prior or subsequent water movement; restriction "before or after a movement by water" is clear and unambiguous and obviously requires that shipments transported have, at some time, a water movement. Restriction of authority granted in conversion proceeding to "general commodities having a prior or subsequent movement by water" ensures substantial parity between past and future operation.—P. Saldutti & Son, Inc., Conversion, 89 M.C.C. 338 (341-2)*.

Authority granted to transport chemicals between named Texas points and water terminals in Texas is restricted to shipments having a prior or subsequent movement by water through a Texas port.—Ryder Tank Line, Inc., Extension, 91 M.C.C. 497 (500, 501); and authority for distribution of salt from border port stockpiles on the Great Lakes and other designated waterways is restricted to shipments having prior water movement from Detroit or Cleveland.—Paul W. Wills, Inc., Extension, 88 M.C.C. 692 (696).

Private and for-hire transportation: [Vols. 18, 19].—See also Winter Garden Co. v. United States, §203(b), n. 50 *Act of 1958.*

"Grandfather" authority granted is subject to conditions that such operations be conducted separately from applicant's other business activities, that separate accounts and records therefor be maintained, and that applicant not transport property both as a for-hire and a private carrier at the same time in the same vehicle.—Lowrance, 91 M.C.C. 440 (443-4)*.

Although applicant's proposed operation as a common carrier of toilet preparations while continuing private carriage of contractors' supplies is found unobjectionable, departure from the commission's long-established policy against commingling of private and for-hire traffic in same vehicle is not warranted; to hold otherwise would place applicant in a particularly advantageous competitive position because of assurance of regular traffic as a private carrier, and would enable it to compete on more than even terms with other common carriers. Usual requirements that applicant conduct its private and for-hire carrier operations separately and not transport traffic of both types in same vehicle at same time, imposed.—Wycoff Co. Inc. Extension, 92 M.C.C. 549 (551-2).

Tacking: [Vols. 18, 19].—Imposition of tacking restriction in conversion proceedings, see Tar Asphalt Trucking Co. v. United States, §212(c), n. 2.

While complainant alleged that the imposi-

tion of restriction against tacking on authority granted it in §5 and related §207 proceedings was unlawful because the commission's conclusion was conjectural and speculative and not based on concrete evidence, and record lacked evidence of adverse effect of its unrestricted operations under temporary authority on other carriers, there had not been prior to the commission hearing any adverse effect on other carriers from such competition, simply because complainant had been competing only on a negligible scale. Evidence supports inferences that protesting carriers were operating equipment at less than capacity and were operating at a very narrow margin of profit; and that complainant's area of operation would duplicate theirs, and he would divert traffic from all of them, if allowed to tack; that protestants had not already been adversely affected was not controlling, since complainant was in complete control of the evidence in that respect; sustained.—Cope v. United States, 222 F. Supp. 596 (602-4)*.

See also Tallant Transfer case, §5(2), n. 110 *Restrictions on operating rights*.

It is not the commission's policy to impose no-tacking restrictions on grants of common-carrier authority in absence of compelling reasons.—Colonial Refrigerated Transp., Inc., Extension, 91 M.C.C. 187 (191); Bridge Extension, 88 M.C.C. 108 (113)*; imposition of a restriction against tacking is not warranted when there is no showing that protestant is hauling any traffic which would be subject to diversion as result of such tacking.—Refiners Trans. & Term. Corp. Extension, 88 M.C.C. 611 (614); likewise, as it does not appear that nonimposition of tacking restriction requested by protestants will have any material effect on existing carriers, it is not imposed.—Colonial Refrigerated Transp., Inc., Extension, 86 M.C.C. 796 (799).

There is no justifiable basis for imposing a tacking restriction on extension authority granted from Florida to the Carolinas; it would not be practical or feasible to tack that authority with applicant's Texas authority in a manner which would be competitive with protestant's service, since routes involved would be too circuitous; nor would applicant gain competitive advantage by tacking that authority with its authority from High Point, N. C., since it may already render direct service from Florida to points in substantially the same territory it is authorized to serve from High Point.—Alterman Transport Lines, Inc., Extension, 91 M.C.C. 43 (50).

In absence of any showing that tacking of applicant's existing authority for dry bulk chemicals with authority granted for transportation of three specified synthetic resins from Ector County, Tex., to points in 25 States is necessary to prevent injury to existing carriers, recommended tacking restriction is not imposed.—Younger Bros., Inc., Extension, 92 M.C.C. 624 (631); also, restriction against tacking is unnecessary to protect competing carriers when authority granted is restricted to three types of liquid or dry-bulk chemicals. —Eldon Miller, Inc., Extension, 88 M.C.C. 309 (314)*.

It is the commission's well established policy not to encumber grants of authority with restrictions against tacking unless protestants show that they would be materially adversely affected by the failure to do so; and even more compelling reasons exist for that policy with respect to restrictions against interchange. In order that common carriers may fulfill their public obligation to provide adequate service and facilities for interstate transportation of property, the act itself encourages interchange by providing, in §216 (c), a correlative privilege of establishing through routes with other common carriers; therefore, restrictions against that privilege are not readily imposed.—Tompkins Motor Lines, Inc., Extension, 95 M.C.C. 472 (481).

Accordingly, since evidence is convincing that protestants would be materially and adversely affected by grant of the authority denied, and that failure to impose a restriction to prevent tacking authority granted with other authority presently held by applicant would have exactly the same effect, restriction against tacking is imposed on grant of authority for which a need is shown. However, applicant's privilege of interchange will not be limited although, without that restriction, it would be able to make a direct connection which would reduce present three-line haul from midwestern to southeastern points to a two-line haul. Such considerations, involving merely the risk of somewhat less indirect

competition from applicant and other unnamed carriers, provide a woefully weak argument for a restriction against interchange, while the policy against imposing such restrictions is very strong.—Id., pp. 481-2.

Evidence does not indicate that protestants will be adversely affected by failure to impose a restriction against interlining (requested as an alternative to a plant-site restriction) on grant of irregular-route authority to transport certain farm machinery from Ogden, Utah, and from Boise, Burley and Parma, Idaho, to points in several States. Authority granted is subject to a restriction against tacking or combining, directly or indirectly, with any other authority held by applicant for the purpose of providing through service.—International Transport, Inc., Extension, 95 M.C.C. 360 (364)*.

Inasmuch as the broader commodity description in authority granted, if unrestricted, would enable applicant—through tacking—to serve the same origins and destinations as protestants serve, grant of irregular-route authority to transport prepared foods, and poultry when moving in mixed loads with prepared foods, is restricted against joinder with other authorities held by applicant for performance of through transportation.—Blythe Extension, 96 M.C.C. 546 (549).

Authority granted to each of two applicants to transport acids and chemicals is restricted against tacking or joinder by applicant with any other of its authority for purpose of performing a through service other than that authorized.—Robertson Tank Lines, Inc., Extension, 95 M.C.C. 234 (236, 251)*.

Grant of extension authority for a route between Nashville and Lancaster, Tenn., is restricted against tacking with applicant's existing authority to provide through service between Nashville and Lebanon, Tenn., which would place applicant's operations in direct competition with those of protestant without a showing of public need therefor. As applicant does not seek to serve Lebanon or points between Lebanon and Nashville, protestant need not submit specific evidence of adverse effects it would experience in absence of a no-tacking restriction.—White Motor Exp., Inc., Extension, 94 M.C.C. 12 (13-14).

It is the commission's policy not to encumber grants of authority with restrictions against tacking unless protestants show that they would be materially and adversely affected by failure to do so; and there are even more compelling reasons for adhering to that general policy with respect to restrictions against interchange. No justification appears for imposing a restriction against tacking or interchange on authority granted applicant between Williamson, W. Va., and one western Virginia and six eastern Kentucky counties; the region is in need of regular and dependable common carrier service for shipments originating beyond Williamson as well as for those moving from or to Williamson itself; and for competitive reasons several line-haul carriers do not desire to interchange with protestant, but seek to interline with applicant whom they do not consider a competitor. Restriction to traffic originating at or destined to Williamson, not imposed.—Hogan Storage & Transfer Co. Extension, 92 M.C.C. 63 (66-7).

No compelling reason therefor being shown, recommended restriction against tacking of extension authority granted for hydrolized vegetable protein or interlining of shipments thereof is not imposed. However, grant of unrestricted rights to transport liquid sugar would give applicant substantial additional authority through incidental tacking rights; as only limited need for proposed transportation of liquid sugar and blends thereof is shown, and applicant agreed to, and protestants withdrew their opposition in reliance on, proposed tacking restriction on such authority, it is imposed accordingly.—Robert H. Carr & Sons, Inc., Extension, 92 M.C.C. 262 (264, 265).

While restrictions generally are undesirable and tend to present problems of enforcement, evidence of opposing carriers establishes that unrestricted competition by vendee at points east and south of Asheville, N. C., would have materially adverse effect on their operations, and the commission would be derelict in its duty if it approved purchase without restriction of authority granted vendee in related §207 proceeding for two routes between Knoxville, Tenn., and southwestern North Carolina area against tacking with its irregu-

lar-route authority between a 50-mile radial area based on Asheville and a large North Carolina territory outside thereof. Such restriction will afford some protection to protestant operating in area directly south of Asheville, which vendee will be limited to serving only on an interline basis to and from Knoxville.—Cope—Purchase—Hill and Burdick, 90 M.C.C. 71 (78)*.

Regular route granted vendee in lieu of vendor's irregular routes between Salt Lake City, Utah, and Page, Ariz., is restricted against tacking with vendee's existing routes between California and Texas for performance of single-line service between California points and Salt Lake City when such service would be a new competitive operation for which no need is shown. Such restriction would be in consonance with the commission's view that existing carriers are entitled to reasonable opportunity to provide the service before a new competing service is authorized.—Colsolidated Copperstate Lines—Purchase—Nielsen, 90 M.C.C. 483 (489, 490).

Applicant is essentially authorized to transport automobiles in eastern half of United States, and in absence of a tacking restriction extension authority granted from Springfield, Mass., to Maine would enable it to provide service to Maine from points where no need for such service has been shown; supporting shipper's interest is in movement from Springfield of ex-rail shipments from Buffalo and Michigan; authority granted from Springfield is therefore restricted against tacking with applicant's other authority, to protect carriers now serving Maine from other points. —Howard Sober, Inc., Extension, 88 M.C.C. 755 (760).

Truckloads: [Vols. 18, 19].—See Bowman Transp., Inc., case, §212(a), n. 1.

Weight: [Vols. 18, 19].—The commission has consistently held that, so far as practicable, a common carrier should be expected to offer a complete service and that operating authorities should not, without special justification, be so framed as to permit a carrier to do less. Suggested 2,000-pound maximum weight limitation on shipments handled by railroad subsidiary under approved key-point zone plan would imply approval of a holding out of less than a complete service, and is objectionable because it would detract from flexibility of petitioner's service; not imposed.—New York Central Transport Co.—Modification, 89 M.C.C. 389 (410).

Elimination, in certificate granted vendee for continuance of vendor's operations under "grandfather" clause of §206(a)(7), of size and weight limitations on vendor's underlying State authority is supported by the evidence and is desirable in public interest so that vendee may provide a complete service within Kansas to conform with satisfactory service it is providing express shippers and receivers in Oklahoma and Texas.—Mistletoe Exp. Service—Purchase—Central News Exp., Inc., 90 M.C.C. 797 (804).

7. Competition.—[Vols. 10-19].—Protestant has been transporting supporting shipper's traffic from St. Louis, Mo., to points in North and South Carolina by combining its own authority between Cincinnati, Ohio, and the Carolinas with temporary authority to operate between St. Louis and Cincinnati under another carrier's certificates pending final determination of its application to purchase that carrier's operating rights. Therefore, since protestant is providing service between St. Louis and the Carolinas even though its continuation is contingent upon approval of the proposed purchase, and that service would be seriously and adversely affected should the application be granted, considered application will be denied without prejudice to applicant's filing a petition for reconsideration should protestant's purchase application, or any part thereof, be denied.—Parkhill Truck Co. Extension, 96 M.C.C. 541 (543-4).

Though grant of extension authority sought will divert some traffic from other carriers and would not be justified if applicant were seeking to institute a new service, denial is not warranted where it is already serving supporting shippers and is merely seeking to broaden its commodity authority to afford them the complete service they require.—Home Transp. Co., Inc., Extension, 88 M.C.C. 265 (271)*.

Public convenience and necessity cannot be established for either a new service route or an alternate route merely upon an applicant's assertion of fear that a grant of authority to

another carrier over the same route or a portion thereof would impair its competitive position by diverting traffic other than that between the involved termini.—Greyhound Corp. Extension, 88 M.C.C. 20 (23).

Grant to Greyhound of a segment giving it a more direct passenger route between Raleigh and Charlotte, N. C., does not warrant granting a corresponding more-direct route, even on a "closed door" basis, to Carolina, a Trailways member; that Greyhound may not now be competing effectively with Carolina for local Charlotte-Raleigh traffic is no reason why it should not be permitted to do so. The main traffic subject to diversion is overhead traffic from and to points beyond those termini, and there is no evidence as to effect, if any, of such diversion on Carolina; in the circumstances, an arbitrary balancing of applicants' competitive positions is not a sound basis for a grant of authority.—Id., p. 23.

Also, fact that applicants in connection with their respective system members are in active competition, especially on long-haul traffic, and that the Raleigh-Charlotte operations are an important link in both systems' north-south trunklines, does not mean that both applications should be granted. It is not necessary, or desirable, that each system serve all points in common, or that each should have the most direct route between two points. Carolina's application therefore should be denied.—Id., pp. 23-4.

The fundamental purpose underlying economic regulation of motor carriers was to protect the public from the damaging effects of ruinous competition among carriers; this regulatory concept derives its validity from the public utility characteristics of the transportation industry, and particularly the fact that common carriers of passengers must make a heavy investment in equipment, terminals, and other transportation facilities in order to provide safe, economical, and reliable service.—Auch Inter-Borough Transit Co. Extension, 88 M.C.C. 455 (459).

Ordinarily, certification of motorbus operations and licensing of brokers produces no conflict between them; however, practical and inevitable effect of finding in 54 MCC 291 that a broker of all-expense tours may use services of carriers holding charter authority, in addition to regular-route passenger carriers and those with special-operations authority, was to make tour services rendered jointly by brokers and authorized charter carriers directly competitive with those offered by carriers under special-operations authority. On the other hand, while such brokers perform a beneficial economic function the transportation field, and it is important that services of legitimate brokers be maintained, the act was not intended to protect brokers who might be adversely affected by such direct competition. Record does not support protesting brokers' fears that applicants will use their best equipment in their own tour operations and, by restricting availability of equipment for broker-assembled groups, will drive brokers in the area out of business. Section 216 provides a remedy for such discriminatory practices.—Id., pp. 458-9.

But where a broker is joined by a carrier protestant engaged in charter operations, their combined economic interest is entitled to full consideration; however, if special operations authority were denied because of adequacy of existing service provided by a broker and an authorized charter carrier, the protection against unwarranted competition would not be extended to the broker as such, but to the charter bus operator who in cooperation with the broker is willing and able to satisfy the alleged need for service.—Id., p. 460-1.

Existing motor carriers: [Vols. 12, 19].—See also n. 25 *Existing carriers*, below.

Fact that granting the considered certificate to intervenor would not only divert traffic from plaintiffs (protestants in commission proceeding) but would also increase their preexisting unbalanced traffic flow, is a factor to be considered and the commission did consider it; however, it is not the only factor to be weighed when the public benefit is to be determined. The commission held that need for proposed service outweighed the effect of the loss of traffic and revenues to plaintiffs and other carriers; and its conclusion that the certificate should issue, being adequately supported by the evidence and within its statutory functions, the court cannot say it was wrong; sustained.—Mercury Motor Express, Inc. v. United States, 261 F. Supp. 621 (622)*.

Even assuming *arguendo* that plaintiffs are presently able to provide the unique express service required by shippers, this factor alone would not bar the commission from certifying additional service by Railway Exp. Agency. Plaintiffs have no vested right to be immunized against competition.—Auclair Transp., Inc. v. United States, 221 F. Supp. 328 (333)*.

While issuance of a certificate requires determination by the commission of any prejudice that will result to existing properly authorized carriers, proceedings before the commission are not contests between competing motor carriers; and since evidence of adverse effect on them is generally within control of protesting carriers, they should present information of that nature to persuade the commission to deny the certificate.—Robbins v. United States, 204 F. Supp. 78 (81, 82)*.

Though protestants contend that grant of interstate authority to applicant busline for its existing intrastate route, with incidental charter rights appurtenant thereto, would adversely affect their charter operations, adequacy of existing interstate charter service is not in issue, and the matter of incidental charter rights, which are automatically bestowed on a successful applicant, is immaterial to the issue of public convenience and necessity for the requested regular-route authority.—Sheridan-Indianapolis Bus Line, Inc., Extension, 92 M.C.C. 285 (287)*.

None of three applicants for extension authority which would permit through bus service between certain New Jersey areas and New York City has established that grant to a competitor would cause substantial diversion from existing routes; no traffic studies were made to show extent of possible diversion, or even that available combination service is being used. Selected applicant's operation tion, it is only reasonable that the criterion on of tremely limited, and any passengers it draws therefrom are probably residents of the northwest portion only; opposing applicant's claim of diversion is premised on alleged affiliation of the selected applicant with another busline which is not shown to be in fact an affiliate, or to be the primary local carrier in that area; thus, competitive considerations are not a determining factor.—Somerset Bus Co., Inc., Extension, 89 M.C.C. 107 (114)*.

One of criteria that a railroad subsidiary must satisfy before substitution of its motor service for that of its parent railroad may be approved is that the proposed service will not seriously endanger operations of existing independent motor carriers. And though systemwide operations of a large independent motor carrier might not be threatened by a competitive setback in one geographical location, it is only reasonable that the criterion on of serious impairment be interpreted to apply to a limited area of service.—Pacific Motor Trucking Co. Extension, 92 M.C.C. 573 (578, 579); authority for substituted motor service between El Paso, Tex., and Tucumcari, N. Mex., is denied when ability of existing carriers to continue effectively serving the small towns along that route depends on retention of their present tonnage, and applicant's proposed daily service to all points in lieu of parent railroad's sporadic and noncompetitive service would probably seriously impair their operations.—Id., p. 579.

Analysis of traffic exhibits of 44 protestants shows that all but 10 would be virtually unaffected by modification of railroad subsidiary's certificate to authorize substituted freight service in 12 defined key-point zones, and that only 714 of 104,992 shipments listed could be handled by petitioner in all-highway service from origin to destination; fact that petitioner's routes in each zone are mainly between intrastate points, and such operations must be preceded or followed by a rail movement beyond the State, militates against appreciable alteration of the competitive situation. However, as a rather high percentage of shipments hauled by certain protestants to and from some individual points would be subject to diversion, to protect those carriers from unwarranted and excessive competition railhaul conditions are imposed as to traffic between specified points in designated zones.—New York Central Transport Co.—Modification, 89 M.C.C. 389 (401, 409).

As to protestants' fear that the railroad might enhance its competitive position by concentrating its Flexi-Van operations at break points between adjacent zones instead

of at the key-point hubs, the 12 zone hubs are the more advantageously located to achieve maximum operating economies, and petitioner and the railroad have committed themselves to removal of all LCL-freight handling facilities at the 33 eliminated key points, many of which are break points, also to use of the zone hubs as the principal collection, delivery, and transfer points. If the more flexible zone operations authorized are misused or otherwise serve to restrain competition, the commission will reopen to proceeding for imposition of such further restrictions or conditions as may be necessary.—Id., p. 412.

Existing carriers are entitled to have their services tested before the commission authorizes institution of any additional competitive service.—B & C. Transp., Inc., Extension, 94 M.C.C. 326 (329); and existing tank-truck carriers should be given an opportunity to engage in transportation in premounted collapsible containers before a competitive carrier is permitted to enter the field. Thus, protestants should be afforded an opportunity to expand their facilities to include collapsible containers for handling commodities they are now authorized to transport; to the extent, the application is denied.—Los Angeles-Seattle Motor Exp., Inc., Extension, 89 M.C.C. 621 (624-5)*.

Although carriers initially in the field are not immune to addition of competitive carriers where evidence warrants such additional service, existing carrier is entitled to at least a fair opportunity to demonstrate suitability of its service before another carrier is permitted to enter the field in competition with it.—McKenzie Tank Lines, Inc., Extension, 88 M.C.C. 250 (252).

Grant of authority to transport meats and packinghouse products from Louisville, Ky., to points in three of the destination States sought is not warranted when no traffic is shown to be moving to one of them and no inadequacy is shown in facilities available to points in the others. Fact that supporting shipper may occassionally require multiple-delivery service to destinations both within and beyond the scope of protestants' operating rights does not constitute a basis for placing applicant in a position to compete for traffic now being transported by protestants for other shippers from Louisville to points in the States denied.—Tompkins Motor Lines, Inc., Extension, 95 M.C.C. 472 (480-1).

Though grant of common-carrier authority to applicant armored-car operators for transportation of commercial papers, film, and related articles may cause some diversion from protesting bus companies, considering amount of such traffic generally handled by the buslines relative to their total operations, and the need shown by supporting shippers, such undetermined diversion cannot be considered a substantial deterrent to grant of authority sought.—Armored Carrier Corp. Extension, 92 M.C.C. 336 (363).

Only a very small portion of overall traffic of protestant which operates a parcel delivery service in addition to household goods moving and general hauling is exposed to diversion by applicant, and such exposure involves a type of traffic on which protestant has demonstrated ability to withstand applicant's competition; traffic of other independent motor carriers which would be exposed to diversion is likewise an insignificant portion of their overall operations; each of those carriers serves only a limited number of points which would be served by applicant, and their opposition does not warrant denial of any portion of application.—United Parcel Service, Inc., Extension, 89 M.C.C. 709 (741)*.

Though protestant general-freight carriers' concern regarding increased competition by Railway Exp. Agency through extensions of its authority to provide all-motor express service in lieu of discontinued passenger-train service is not wholly unfounded, and a finding in instant proceeding that grant of authority to REA for all-motor service is justified where existing carriers are not regularly rendering an express service could greatly facilitate expansion of REA's motor operations, it would not be to detriment of common carriers of general freight. Though such carriers have always been authorized to transport express traffic, absence of any real showing thay they do so more than occasionally indicates that, by and large, they have never effectively exercised their ability to compete with REA, no matter what mode of underlying transportation it utilized.—Railway Exp. Agency, Inc., Extension, 91 M.C.C. 311 (323, 340)*.

Notwithstanding recent grant of authority to one protestant for substantially the same commodities, including separate loads of parts, from supporting shippers' plants in Illinois to North Carolina, grant of like authority to applicant will not adversely affect that protestant in any material degree when applicant is now providing service to that State through interline and is handling substantial tonnage for those shippers in such service.—Gregory Heavy Haulers, Inc., Extension, 88 M.C.C. 45 (49).

Express: [Vols. 11-13, 19].—See also Freight, All Kinds, L.C.L. Container Charges, §204(b), n. 7 *Express*.

Railway Exp. Agency's proposed motor operation between Charlottesville and Newport News, Va., does not amount to a completely new service but merely substitution of a different mode for one part of its underlying line-haul transportation. Competitive effect of its existing express service has long been felt by other motor carriers and it is not shown to have been providing general freight service between those points under temporary authority or to be contemplating a change in character of express service it now renders; grant of application, restricted to transportation auxiliary to its express service and on through express billing, should not alter REA's existing competitive relations with protestants. Moreover, the commission will continue to scrutinize REA's operations with a view to forestalling any developments which threaten to change the character of its service to serious detriment of other motor carriers; and if its operations under the authority granted should serve to restrain competition the proceeding can be reopened for imposition of any necessary corrective restrictions or conditions.—Railway Exp. Agecy, Inc., Extension, 94 M.C.C. 62 (74, 77, 78).

Railway Express Agency's estimates of diversion to applicant's proposed parcel delivery service are not sustained by evidence; about 40 percent of supporting shippers seldom use REA's service, and others use it for shipments applicant would not handle; much of traffic of shippers supporting REA's opposition moves beyond proposed territory, and others consider its service more suitable to their needs. Applicant's sacrifice of some features attractive to REA's customers, in order to provide a fast, low-cost service, precludes diversion of any appreciable volume within overlapping size and weight brackets. Moreover, division of traffic between a low-cost service and REA's more varied service has already been effected by parcel post, and it is significant that all 193 supporting shippers are parcel post users who desire applicant's service in lieu thereof; advantages of proposed service outweigh any adverse effects of a limited diversion from REA.—United Parcel Service, Inc., Extension, 89 M.C.C. 709 (737, 740-1)*.

Railroads: [Vols. 11, 12, 19].—Although authority granted applicant for transportation of cement will divert some traffic from rail protestants, motor service will provide transportation benefits and will not be unduly prejudicial to existing railroads; on balance, public interest will best be served by an additional competitive service of the type proposed.—Best Transport, Inc., 91 M.C.C. 82 (84-5)*.

Passenger traffic between the heavily populated area around Rahway, N.J., and New York City is an important source of revenue to protestant railroad, and additional bus service would be likely to result in substantial diversion from it; no question of allowing passengers their choice between rail and bus service is involved, since one applicant already operates routes extending through Rahway; in view of almost complete lack of passenger support for additional service to or from Rahway, authority granted a different applicant from other New Jersey points is restricted against serving Rahway as intermediate point.—Somerset Bus Co., Inc., Extension, 89 M.C.C. 107 (111)*.

9. Jurisdiction of the commission.—[Vols. 10-12, 14, 15, 17-19].—District Court erred in concluding that it is the commission's "unvariable rule" to give existing carriers in an area an opportunity to remedy deficiencies in their service, and in holding that carriers have a property right to such opportunity before a new certificate may be issued upon a finding of public convenience and necessity pursuant to the statute. The commission's power is not so circumscribed; and no such limitation has been established by commission decisions or by judicial determinations. While the public

interest in maintaining the health and stability of existing carriers should be considered, the commission may, upon appropriate findings, authorize the certificate sought even though existing carriers might arrange to furnish successfully the proposed service. Lower court's decision vacating the commission's action, and permanently enjoining it from issuing the certificate until after appellees are afforded such opportunity, reversed and remanded for further proceedings consistent with the court's opinion.—United States v. Dixie Highway Exp., Inc., 389 U.S. 409 (411-12)*.

The commission must exercise its discretion under §207(a) within the bounds expressed by the standard of "public convenience and necessity"; and for the courts to determine whether the agency has done so, it must disclose the basis of its order and give clear indication that it has exercised the discretion with which Congress has empowered it; it must make findings that support its decision and are in turn supported by substantial evidence. While expert discretion is the lifeblood of the administrative process, Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body; unless the requirements for administrative action are made strict and demanding, expertise can become a monster which rules with no practical limits on its discretion. —Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (167-8)*.

Though common factors may emerge in adjudication by the commission of questions arising under Interstate Commerce Act and by National Labor Relations Board of matters under Labor Management Relations Act, independent consideration and resolution are possible, with the Labor Board confining itself to consideration of whether employees have violated their duties under LMRA and the commission to whether the carrier may have failed in its obligations under ICA (357 US 93). But if either agency is not careful, it may trench on the other's jurisdiction and because of expert competence contravene the national policy as to transportation or labor relations; fact that §8(e) of LMRA now exposes the employer as well as the union to Labor Board injunctive processes underlines necessity for careful analysis by the commission in fashioning a remedy to terminate unlawful action by delinquent carriers; the policies of ICA and LMRA must be accommodated, one to the other.—Id., pp. 172, 173-4.

An order ofthe commission is not to be disturbed by the court if such order is within scope of the statute which the commission is authorized to administer and enforce and is based on adequate findings which are supported by substantial evidence, even though the court might disagree with the commission's conclusions. The duty of the court is to determine whether order being considered comes within prescribed legal limits, and to ascertain whether there is warrant in the law and the facts for the commission's action.—Willey v. United States, 245 F. Supp. 669 (674)*.

However, the commission's power to grant certificates is not unlimited; one of the requirements is that notice of proposed issuance of a certificate be given to competitors, and another is that the commission first determine that there is a public need for issuance thereof. Therefore, since record of proceedings which resulted in grant of contested authority to transport dump-truck commodities does not show that notice was given to plaintiff's predecessor, or to any competitor other than those listed, and only evidence presented regarding such movements concerned limited northern Illinois-Indiana area, it is not reasonable to assume that the commission intended to grant such authority for entire areas between those States; in the circumstances, the contested unrestricted certificate was issued as a result of inadvertance or mistake. The commission has power to revoke or modify a certificate issued as result of inadvertance or mistake; but whether certificate in issue should be revoked or modified is for the commission to decide.——Id., p. 677.

Careful review of the record shows (1) that commission findings and conclusions in application proceeding are supported by substantial evidence, (2) that the commission followed prescribed statutory standards, and (3) that it did not act arbitrarily and capriciously in making its findings and reaching its conclusions. Therefore, the decision and order granting considered operating authority is

sustained.—Mason & Dixon Lines, Inc., v. United States, 271 F. Supp. 54 (55)*.

The commission did not commit any error of law by supposing that it was without statutory power to sanction any part of the operations covered by plaintiff's substitution-of-gateways application (as recommended by the examiner) unless it concluded that the whole thereof should be authorized. On the contrary, its specific findings that plaintiff failed to show that it was an effective and efficient competitor, while operating through its gateways, of existing carriers and that proposed operations would not materially improve its competitive position to the detriment of existing carriers, provide a rational basis for the order under review. The commission's conclusions resulting in denial of plaintiff's application in its entirety are based on adequate findings supported by substantial evidence; complaint dismissed.—Bowman Transp., Inc. v. United States, 267 F. Supp. 57 (60-1)*.

The provisions of §5(2) do not limit the commission's jurisdiction to grant a certificate under §207; see 355 US 141.—Sloan's Moving & Storage Co. v. United States, 208 F. Supp. 567 (573)*.

As the Supreme Court pointed out in 355 US 141, §207 (the commission's statutory authority to issue certificates of public convenience and necessity) does not contain the restrictive language of §5(2)(b), concerning limitation of authority granted motor carriers controlled by or affiliated with a railroad to rail-auxiliary service, nor is there anything in §207(a) "even suggesting a mandatory limitation to service which is auxiliary or supplementary." Thus, regardless of §5(2)(b), the commission could grant rail-subsidiary applicant unrestricted authority to serve shipper's new Oakbrook, Ill. plant as an off-route point in connection with its regular-route operations to and from Chicago, already authorized, when it correctly found that "special circumstances," negating any possible disadvantage to the public from the grant to railroad-owned motor carrier, existed which justified granting the application; sustained.—American Trucking Associations v. United States, 260 F. Supp. 386 (389-90)*.

The commission not only has the duty and authority to establish standards and tests to facilitate its determination of the existence, or lack, of public convenience and necessity, but it is free to alter its policies and standards when the necessity, in its judgment, arises.—Youngblood Truck Lines, Inc. v. United States, 221 F. Supp. 809 (818)*.

Since the commission's finding of public need is adequately supported by the record in application proceeding, its grant of certificate authorizing extension of passenger service to Air Force Base was a proper exercise of the discretion given it by statute.—Carolina Scenic Stages v. United States. 202 F. Supp. 919 (924)*.

Congress delegated to the commission broad and exclusive discretion in determining public convenience and necessity in application proceedings. In enacting the Motor Carrier Act, Congress chose the same words to state the condition for authorization of new motor lines which had been employed for similar purposes for railroads; and "public convenience and necessity" is not defined by the statute. Thus Congress, in leaving to the commission authoritatively to decide whether additional motor service would serve public convenience and necessity, gave it administrative discretion to draw its conclusion from infinite variety of circumstances which may occur in specific instances. The commission acted within bounds of such discretion in denying plaintiff's application.—W. T. Mayfield Sons Trucking Co. v. United States, 211 F. Supp. 619 (626-7)*.

Inasmuch as the commission did not exceed its authority in construing tall oil as a "vegetable oil" within meaning of protestant's certificated authority therefor, it follows that its order in that regard (denying plaintiff extension authority sought for tall oil) did not violate §207.—McKenzie Tank Lines, Inc. v. United States, 211 F. Supp. 876 (877)*.

It is within the commission's statutory authority to grant only a part of the operating authority sought; and it is well established that the commission has a wide latitude in determining extent of service to be rendered. Grant of authority for only part of the operations covered by the application, and denial of the rest, was a proper exercise of the commission's discretion. The commission reached a permissible conclusion based on substantial

evidence; its action was not arbitrary or capricious; sustained.—Great Northern Ry. Co. v. United States, 209 F. Supp. 238 (240, 242)*.

The commission is the guardian of public interest in determining whether certificates of convenience and necessity should be granted, and for performance of that function it has been entrusted with a wide range of statutory authority; forecasts as to the future are necessary to determination of whether a proposed service is or will be required by present or future public convenience and necessity.—Aero-Mayflower Transit Co. v. United States, 208 F. Supp. 303 (305)*.

Although complaint seeking to set aside commission's denial of extension authority sought under §207 (a) requests grant of application, the court has not power to grant plaintiff's application or to order the commission to award him a certificate.—Robbins v. United States, 204 F. Supp. 78 (83)*.

Although statutes cited by examiner, in support of his conclusion that transportation of shipments by Canadian carriers from customs stations at Buffalo and Niagara Falls, N. Y., to customs plazas for interchange with United States carriers requires no authority from the commission, were not discussed in 83 MCC 673, the issue of jurisdiction of the international bridge authorities was briefed in that proceeding and the commission considered the question. The acts of Congress cited were not intended to deprive the commission of any jurisdiction it would otherwise have over the transportation involved: whenever Congress has intended to divest the commission of jurisdiction, it has specifically amended the Interstate Commerce Act; there is no language in the acts cited which either expressly exempts such transportation from economic regulation or confers any corresponding powers on the bridge authorities. Modification of finding in case cited that such transportation, though for extremely short distances, requires authority from the commission is not warranted.—Overland Exp. Extension, 92 M.C.C. 757 (763-5).

See also Central Freight Lines, Inc. v. Strickland Transp., Inc., n. 6 *Points*.

It is within the commission's power to grant authority broader than that requested. [322 US 1.].—Donaldson Transfer Co. Extension, 89 M.C.C. 651 (653)*; broadening of grant of authority sought for transportation of jet thrust units for missiles to include accessories used in installation thereof, and thus enable applicant to provide the complete service needed, is clearly within the commission's power.—Baggett Transp. Co. Extension, 88 M.C.C. 3(10)*.

10. Violation of act.—[Vols. 10-16, 18, 19].—See also n. 25 *Fitness, Past operations*,below.

If carrier operations in question, which the commission found "were inadvertently begun," continued to be inadvertent and performed in good faith, such operations, albeit unauthorized, would be no bar to a grant of authority; and even considering the operations to be inadvertently begun but knowingly continued, no decision is cited which declares that willful performance of unauthrized operations is, as a matter of law, a bar to such grant. Absent pertinent authority, and since the commission is the expert in the transportation field, its view—that past knowing willful conduct in violation of the act and rules and regulations, is an item to be considered in determining present and future fitness—is entitled to special consideration. Accordingly, the court finds that past willful misconduct is not, as a matter of law, sufficient to bar a grant of authority; rather, the commission is to consider such willful misconduct as an element in assessing applicant's present and prospective "fitness" within the act.—Armored Carrier Corp. v. United States, 260 F. Supp. 612 (614-5)*.

Although there is substantial, even compelling evidence that plaintiff's transferor purchased considered rights with understanding that they restricted shipments of general commodities to truckloads only, the record is equally clear that, as early as 1950 when his authority to transport less than truckloads was questioned, he consulted an experienced attorney who advised him that the certificate on its face did not limit general-commodity shipments to truckload lots. The commission's first interpretation of that certificate in its 1957 report should not be retrospectively applied to condemn as "obviously illegal" the l.t.l. shipments transported by plaintiff and its predecessor in the years preceding that

report; such conclusion is at war with the construction of the certificate by its own able and experienced examiner.—Bowman Transp., Inc. v. United States, 211 F. Supp. 354 (358)*.

The restriction "in truckload lots" is vague and indefinite, and the record does not show that plaintiff's past operations, though in excess of actual authority, were willfully and knowingly unlawful. There is pointed disagreement among carrier witnesses as to the understanding within the industry of the "in truckload lots" restriction, and though the commission has the right to crystallize that phrase in process of interpretation, there is no substantial evidence to support its subsidiary conclusion that plaintiff's transportation of l.t.l. shipments was not performed in good faith; that plaintiff, in defining the limits of its authority, has previously relied on factors that the commission now finds impermissible is not evidence of bad faith.—Id., pp. 358-9.

That the findings of obvious illegality and bad faith respecting past operations were gravely prejudicial to plaintiff's application for removal of the restriction is underlined by the commission's conclusion that that type of transportation may not be relied on to establish public need for service or to show an established and continuing operation justifying modification of the certificate. Remanded for further hearing on the issue of public convenience and necessity, unprejudiced by findings of illegality or bad faith in plaintiff's past operations.—Id., p. 359.

Although in investigation proceeding, which embraced applicant's conversion proceeding as well as a "grandfather" proceeding and an extension proceeding involving the identical operations under investigation, applicant was found to be unlawfully transporting certain commodities and serving certain points not authorized by its permits, such violation of terms of its outstanding authorities should not be carried over for consideration in instant proceeding involving altogether different operations; as no finding of applicant's unfitness was made in the embraced extension proceeding, and its fitness is otherwise unquestioned, a finding of unfitness on present record is not warranted.—Zuzich Truck Line, Inc., Extension, 89 M.C.C. 69 (73-4).

Conduct of operations of commonly controlled contract carriers's operations by applicant's president has not changed since decision about 2 years earlier wherein it was found that such common control existed, and wherein the contract carrier was specifically admonished to bring its operations into compliance with the statute and the commission's regulations; applicant's vehicles and drivers perform all transportation conducted under the permit, they have the same business address, and permit holder takes no interest in and exercises no control over the operations. Moreover, permit holder is willing to surrender his permit if common carrier authority sought is granted. Described conduct of the contract carrier operations presents a continuing picture of violations of the act and the commission's regulations by applicant's president and his personal friend, the holder of the permit. Application denied, and full investigation into operations of both carriers directed. —Johnstown Motor Freight, Inc., Extension, 94 M.C.C. 167 (169, 170-1).

That a multiple-State carrier must hold a certificate before it may transport interstate traffic over a route within a State is basic to motor carrier regulation; though applicant claims that its unlawful transportation to and from Michigan points on unauthorized routes was undertaken inadvertently, in erroneous belief that it possessed the necessary authority, and without any intention of deliberate wrongdoing, it is an experienced carrier of many years standing, yet failed to discontinue such operations after being advised of their unlawfulness and after being twice advised to obtain authority before continuing them. Moreover, applicant has performed other unlawful operations and has violated the commission's safety regulations; while it claims that such violations were either insignificant or due to omissions of employees, its conduct has not been such as to absolve it from blame. An applicant's promiscuous disregard for requirements of regulation should not be allowed to redound to its substantial benefit; authority to continue considered operations denied.—Consolidated Freight Co. Extension, 89 M.C.C. 457 (460, 461-2).

Applicant, as set forth in Appendix B, has purposefully flouted the certificate provisions

of the act despite repeated unambiguous admonitions, and certain of its violations are so flagrant that no admonition would appear necessary. Applicant's past conviction of unlawful transportation, and reports in two subsequent proceedings dealing with scope of its commodity authority, made findings of unlawfulness of the transportation for which authority is now sought and put it on notice thereof; nevertheless, it has since made no apparent effort to confine its operations within limits of its authority, and in view of its long-continued contumacy there is no alternative but to deny its application on ground of unfitness.—I. L. & C. Corp. Modification of "Grandfather" Authority, 89 M.C.C. 161 (165).

Applicant's conduct conclusively establishes his unfitness for proposed operation; previous determination that device employed to evade regulation of service performed for one shipper and admonition to discontinue the unlawful carriage resulted only in his adoption of another device by which he hoped the same operation would be sanctioned; furthermore, in face of that determination, he instituted a bald unauthorized service for another shipper; much later, another slightly more sophisticated device was adopted to conceal the illegality, but evidenced instead an unmistakable intent to evade regulation. Such conduct cannot be countenanced if regulation of motor carriage and issuance of operating authorities is not to produce unfair results detrimental to public interest. Denied.—Huffman—Investigation of Operations, 88 M.C.C. 437 (442).

11. Status of applicant.—[Vols. 10-13, 15, 16, 18, 19].—Although applicant is under joint control with a corporation which leases equipment to a shipper that applicant serves as a for-hire carrier, such arrangement is not per se unlawful in absence of some specific abuse or concession.—Monkem Co., Inc., Extension, 94 M.C.C. 749 (755).

That applicant may have disassociated itself from Trailways system since the hearing is of little significance. As a Trailways member, it competed with another Trailways carrier offering express bus service between New York City and Hartford, Conn., and fact that it offered connecting service with that carrier could have little significance for persons traveling between New York City and points beyond Hartford because of latter's faster, more direct service. Apparently no Trailways affiliate is serving the smaller communities along applicant's present or proposed routes, and passengers at such points are compelled to use applicant's service to Hartford and some other carrier's beyond; applicant's affiliation or nonaffiliation with Trailways is therefore irrelevant to need for proposed service.—Arrow Trailways, Inc., Extension, 94 M.C.C. 514 (517).

Despite fact that applicant is a separately incorporated entity its sole supporting shipper is also its president and sole stockholder and would therefore be in position to demand preferential treatment over other shippers in involved territory. An intimate relationship between a carrier and a shipper creates an opportunity for favoritism, discrimination, and unfair competitive practices, which is incompatible with status of a common carrier, which owes a duty of indiscriminate service to all shippers. In the circumstances, applicant has failed to establish that it is qualified to conduct proposed operations. Denied.—Burton Trucking, Inc., Extension, 94 M.C.C. 790 (791-2).

Applicant, in addition to its motor carrier operations, conducts a storage and warehousing business and controls and apparently is managed in common interest with a forwarder which routes a substantial volume of traffic to its terminal and warehouse; by reason of the dual capacities and identity of controlling interests involved, it appears that proposed extension operations would be conducted to advantage of applicant's storage business and its control of certain shippers' routing to advantage of its carrier operations, to probable detriment of competing motor carriers and the shipping public dependent on them; resulting situation offers opportunities for unjust discrimination and unfair competitive practices; denied.—M.G.M. Transport Corp. Extension, 89 M.C.C. 699 (701); and in view of fact that similar operations are being conducted by several corporations controlled by same interests, Bureau of Inquiry and Compliance is directed to investigate and determine whether such operations are in public interest and in

accord with the act and commission's regulations.—Id., p. 702.

Although applicant's status was found in conversion proceeding to be that of a common carrier, it has not yet been issued certificate in lieu of its permits; as it would be inappropriate to issue certificate granted in instant proceeding while its permits are still outstanding, issuance will be withheld until certificate authorized in the conversion proceeding is issued.—Zuzich Truck Line, Extension, 89 M.C.C. 69(73).

Since in another proceeding applicant has been granted certificate in lieu of its outstanding permit to transport cement between other points, to be issued upon its compliance with certain conditions, grant of additional common carrier authority is conditioned on prior or concurrent issuance of that certificate, to eliminate possibility of unlawful dual operation.—Best Transport, Inc., 91 M.C.C. 82 (86)*.

Provisions of §5(2) are quite specific as to how a person or carrier may obtain control of two or more carriers, and such acquisition of control is made unlawful by §5(4) unless approved and authorized by the commission. Record amply demonstrates that corporate applicant is controlled by persons also controlling two other carriers and that the commission's prior approval of such common control was not obtained. Issuance of certificate is therefore withheld pending filing of appropriate §5 application and approval thereof by the commission.—Babcock & Lee Transp., Inc., Extension, 92 M.C.C. 521 (523, 524); similarly, in view of applicant's control of another common carrier, grant of authority is conditioned on commission approval of such control under §5(2).—Reaveley, 91 M.C.C. 604 (607-8).

See also Sloan's Moving & Storage Co. case, n. 5 above.

Record in consolidated application proceedings does not permit determination of whether any unlawful common-control relationships exist as between two Canadian applicants and carriers subject to the act; however, upon grant of authority to one, it would be commonly controlled with a certificated United States carrier within meaning of §5. Issuance of certificates to both is therefore conditioned on prior approval under §5(2) of any common control of the respective applicants and the specified carriers or entities, or other affiliated carriers, where such approval is in fact necessary.—Overland Exp. Extension, 92 M.C.C. 757 (766-7).

24. Proceedings remanded.—[Vols. 11, 13-19].—Subsequent to the commission's decision granting certificate to appellee to remedy deficiencies in service due to trunkline motor carriers' refusal under union pressure to interchange traffic with appellee's carrier stockholders, and over a year before the district court sustained the commission, Labor Management Relations Act was amended by §8(e), which raised serious doubts as to legality of "hot cargo" clauses in union-employer agreements. The delinquent interlining carriers, as well as the union, would be subject to injunctive and other processes of National Labor Relations Board if their conduct violated §8(e), and pressures which generated the refusals to serve might be effectively removed. These intervening facts so changed complexion of the case that the reviewing court should have vacated the order and remanded it to the commission for further consideration in light of the changed conditions.—Burlington Truck Lines, Inc. v. United States, 371 U. S. 156 (171-2)*.

Moreover, at time the case was before the commission there was every indication that a cease-and-desist order would have been effective; there was no reason to have assumed that ordinary processes of law were incapable of remedying the situation. The commission made no findings specifically directed to its choice between two vastly different remedies with vastly different consequences; nor did it express any rational connection between the facts found and choice made; in the circumstances, its choice of the sweeping relief of certification rather than the more precise and narrow cease-and-desist remedy was improvident, absent compelling justification. Judgment of the district court reversed, and case remanded with instructions to remand to the commission for further proceedings consistent with opinion.—Id., pp. 168-70, 173-4.

The reviewing court is not concerned with the propriety of a commission determination but only with the questions of whether such

determination is based on adequate findings and is arrived at by proper application of legal standards. The court is unable to ascertain, on careful review of the record in "grandfather" application proceeding under §7(c) of Transportation Act of 1958, whether the commission applied the proper standards in its assessment of applicant's (plaintiff's) holding out and solicitation in determining the scope of its bona fide operations; and the commission report reflects, to the court's satisfaction, that the only standard applied was that of actual point-to-point service. The commission's order is set aside and the case is remanded for further proceedings—Frozen Food Express v. United States, 280 F. Supp. 661 (663)*.

See also Willis Shaw Frozen Exp., Inc. v. United States, case, §203(b), n. 50 *Act of 1958*.

In summarily denying plaintiff's application for authority for service now conducted under claim of "grandfather" rights, because "no inadequacy was shown in protestants' services," the commission apparently announced an erroneous standard of law to effect that a showing of present inadequacy of protestants' services is indispensable to issuance of a certificate. Moreover, existing service includes plaintiff's disputed service, and the commission does not show how protestants' services would be adequate in absence of that service, or reconcile its finding with the joint board's characterization of plaintiff's service for several shippers as "advantageous," "satisfactory," "very satisfactory," "needed," and "superior to that of other carriers." Remanded for further proceedings in conformity with the court's opinion.—Nashua Motor Exp., Inc. v. United States, 230 F. Supp. 646 (652, 653)*.

The commission's report in consolidated proceedings does not provide the reviewing court with sufficient findings and reasonings for determination of whether its conclusions are based on a fair and reasonable analysis of pertinent facts and circumstances. Thus, its conclusions in the investigation, that "regular and irregular route" portion of plaintiff's "grandfather" certificate did not permit service from a point in the irregular-route area to an intermiediate point on its regular route and that, therefore, plaintiff willfully violated terms of its certificate by transporting considered shipments, are not supported by the record. "Regular and irregular route" portion of the certificate is clearly ambiguous; the "grandfather" decision does not clearly show that plaintiff may not serve all intermediate points on its regular routes; and the finding of willfulness, predicated only on a reading of the certificate and the decision, is clearly erroneous. Matter remanded for further consideration and findings.—Dixie Ohio Express, Inc. v. United States, 263 F. Supp. 993 (999-1002)*.

There is also a lack of sufficient findings or reasoning for the commission's findings with regard to the modification and application proceedings. While three separate and distinct grants were applied for, the commission's findings and conclusions are drafted in such a manner that it is difficult in many respects, and impossible in others to determine the particular aspect to which they are directed; aside from failure to distinguish those three aspects, applicant's claims were disposed of with general statements and inadequate findings as to subsidiary facts. Moreover, after a most careful reading of the report, it is impossible to determine which of the commission's conclusions apply to the commodity description problem rather than to the route description problem; also, there were no findings relative to the application for removal of "in truckloads" restriction in the certificate. Therefore, issues in the application proceedings must be remanded for further consideration and findings.—Id., pp. 995, 1002-1005.

Order granting interstate authority to intervening defendant for transportation of passengers between Northhampton and Williamsburg, Mass., is vacated and the case is remanded to the commission for further action, when the only substantial evidence of need for proposed service concerned convenience of passengers traveling between Veterans Administration Hospital in one section of Northhampton and bus terminals of interstate carriers in other sections of that city. While it may not be feasible to require testimony from prospective passengers, the other evidence of record, which pertains to requests for information about interstate bus service beyond

Northhampton, is totally lacking in specificity as to number tf requests, how recently or how frequently they were made, or to what extent they reflected a desire to purchase through interstate tickets.—Interstate Buses Corp. v. United States, 259 F. Supp. 577 (578-80)*.

Furthermore, while plaintiff's agrument that transportation of passengers within corporate limits of Northhampton is a service for which a certificate is neither necessary nor proper because it is exempt by §202(c) has plausibility, it was not presented to nor considered by the commission. In action to set aside the commission's order, the court ought not to make a decision as to whether a certificate is permissible when all proposed interstate transportation as to which there is supporting evidence will be within terminal area of certified carriers and under arrangements with them, even if it be a question of law, until that point is raised before and considered by the commission.—Id., pp. 580-1.

While the commission's expert judgment, especially as to public convenience and necessity, is entitled to a wide range of discretion and, in application cases, it must of necessity balance desirability of new and different types of service with the competitive effect thereof on existing services, it is not sufficient for it to cloak its decision in "administrative discretion"; it has a continuing obligation to avoid arbitrary exercise of its powers and the duty to stay within confines of the statutory scheme. If the reviewing court is to rule, with any certainty, that the commission compiled with those minimal requirements and did not act arbitrarily in denying plaintiff's limousine-service application, its opinion must be clear and it must make sufficient explanation to enable the parties and the court to comprehend its actions. Opinion under review is so drafted as to require speculation on the court's part to pin down the theory on which plaintiff's application was denied; reversed and remanded for further proceedings not inconsistent with the court's opinion. —Arrow Line, Inc. v. United States, 256 F. Supp. 608 (611-12)*.

Although evidence presented in application proceeding related solely to need for service at White Sands Missile Range, and the commission found that no need was shown for service to other points and that authority granted should be so limited, the ultimate findings granted one applicant authority to serve points on the highways involved other than White Sands. Therefore, insofar as the orders in question allow or support allowance of service by that carrier at any point other than White Sands, they exceed scope of the application, are not supported by the evidence, and are unsupported by and contrary to the commission's evidentiary findings. Orders set aside, in part, and the cause is remanded to the commission for such action as it deems appropriate, but in accord and consistent with the court's findings and conclusions.—Whitfield Transp., Inc. v. United States, 254 F. Supp. 852 (854, 855)*.

The commission was in error when it denied plaintiff's application as to points in two States merely because two opposing motor carriers had authority to serve those points and there was no clear showing of inadequacy of their services; mere absence of a clear showing of inadequacy of existing services does not justify such limitation. The conclusion to be drawn from the commission's report, i.e., that in no case will an application be granted if it will result in competition with existing carriers, is not the law. Introduction of a competing service may be in the public interest. That portion of the commission's order which denied plaintiff authority to serve points in the two States is set aside; cause remanded to the commission for action in accordance with the court's opinion.—Vincent Montone Transp., Inc. v. United States, 231 F. Supp. 484 (487-9)*.

Although entire application was premised on need for transportation of mixed truckloads of frozen and nonfrozen commodities, authority to transport "mixed shipments" thereof was granted; in view of the commission's definition of "shipment," authority granted could be construed to allow much more than mixed-truckload service. There being no rational basis of record for grant of authority beyond that sought, the commission erred in not restricting authority granted to mixed truckloads; case remanded for imposition of a proper restriction, formulation of which is left to the commission's expertise. Order appealed from suspended pending im-

position of such restriction; otherwise, set aside.—Refrigerated Transport Co. v. United States, 214 F. Supp. 536 (539-40)*.

Since record of commission proceedings which resulted in grant of contested authority to transport dump-truck commodities does not show any notice to plaintiff's predecessor, or to any competitor other than those listed, and the only evidence presented regarding dump truck movements concerned a very limited northern Illinois-Indiana area, it is not reasonable to assume that the commission intended to grant dump-truck authority for entire areas between those States; however, the contested authority issued was not restricted to the area defined and discussed at the hearings. Case remanded to the commission for further consideration in light of the court's determination that, since the unrestricted certificate was issued as result of inadvertance or mistake, the commission has the power to revoke or modify it on the facts of the case.—Willey v. United States, 245 F. Supp. 669 (676-7)*.

The commission's summary rejection, without a hearing, of plaintiff's application for waiver of rule 101(e) and its denial of the petition for reopening did violence to an established principle of law. As plaintiff, at the instance of the court, produced witnesses to demonstrate that it was in position to prove the allegations of its petition concerning the circumstances giving rise to the mistake which it claims occurred, the commission's order denying the petition is set aside and the cause remanded with directions to the commission to grant the hearing and make a factual determination on the matters alleged in the petition.—Id., p. 539.

The district court's power to order a remand to an administrative body to enable that body to take into consideration oversights which may have crept into its decision by reason of mistake or inadvertence stems from the equitable principles governing judicial action, as reflected in rule 60(b) of Federal Rules of Civil Procedure, which provides for relief from a final judgment or order on ground of "mistake, inadvertence, surprise, or excusable neglect." Plaintiff (protestant in application proceeding), in its application for waiver of rule 101(e) of the commission's Rules of Practice and its petition for reopening of the proceeding to change a portion of the certificate alleged to have been granted as result of misrepresentation or by mistake, set forth facts which, if found to be true, would render its withdrawal of protest and failure to appear at the hearing a matter of excusable neglect and inadvertence, and would require the commission to reopen the proceeding to allow plaintiff to adduce evidence in support of its position and be heard in opposition to the challenged grant of authority.—James J. Williams, Inc. v. United States, 241 F. Supp. 535 (537-9)*.

Plaintiffs' late-filed petition for (1) leave to intervene, (2) waiver of rule 101(e) of the Rules of Practice, and (3) reopening and reconsideration in application proceeding (in which none of them participated) showed good cause and was based on averments reasonably pertinent to issues therein and did not broaden them; plaintiffs were diligent in acting after they acquired knowledge of order in that proceeding. The commission abused its discretion in denying the petition to intervene; directed to vacate its order in the application proceeding, and further to permit plaintiffs' intervention, to waive rule 101(e) of the Rules of Practice, and to reopen and reconsider report and order in that proceeding.—National Bus Traffic Ass'n v. United States, 212 F. Supp. 659 (661-2)*.

Although the court sustains the commission's interpretation of plaintiff's certificate as restricting its authority to transport general commodities to truckloads only, it does not follow that such interpretation may be retrospectively applied to condemn plaintiff's past transportation of l.t.l. shipments as "obviously illegal"; and there is no evidence to support its subsidiary conclusion that such transportation was not performed in good faith. Those findings were gravely prejudicial to plaintiff's application for removal of the truckload-lots restriction from its present authority; application proceeding remanded for further hearing to determine, on present record or in such other proceedings as the commission in its discretion may elect, whether plaintiff has established that public convenience and necessity require the operation proposed, unprejudiced by findings that

its past operations were illegal and not performed in good faith.—Bowman Transp., Inc. v. United States, 211 F. Supp. 354 (358,359)*.

Operation; Extension

25. Necessity, demand, for service, in general.—[Vols. 10-19].—In action to set aside the commission's orders granting authority to transport household goods in several western states to intervening defendants, the court may not criticize the criteria by which the commission chose to determine public convenience and necessity, unless they are found to be capricious or irrational; scope given the commission is broad, and within that scope it may choose criteria and weigh evidence of public need as it sees fit. Thus, there is no need for the commission to specifically find inadequacy of existing or decreased service before granting additional operating authority in a given area, and absence of such a finding is not a basis on which the court may invalidate its order. Findings and conclusions in each of considered cases adequately support the grant of authority therein; those findings and conclusions are not arbitrary, but are adequate, supported by substantial evidence of record, and in accordance with the law; the commission's orders sustained.—United Van Lines, Inc. v. United States, 266 F. Supp. 586 (589-90)*.

Congress intended to leave to the commission discretion to decide whether additional motor service would serve public convenience and necessity and, on the record as made, its denial of plaintiff's application for additional authority (because it failed to show that existing carriers could not provide services required) was a sound exercise of its administrative discretion.—Lester C. Newton Trucking Co. v. United States, 264 F. Supp. 869 (886)*.

The commission's denial of a certificate to plaintiff for transportation of airfreight between Salt Lake City Airport and points beyond the airlines' terminal areas at that point, despite the examiner's recommendation of a grant, was pursuant to statutory authority, and its decision is supported by adequate findings based on substantial evidence. The commission, not the examiner, exercises the determinative judgment and discretion, and its conclusions are not vulnerable merely because they overruled those of the examiner. The rational basis of the order is sufficient to require its approval; sustained.—Wycoff Co., Inc. v. United States, 240 F. Supp. 304 (312)*.

It has been held repeatedly that in issuing a certificate of public convenience and necessity the commission need not specifically find existing service to be inadequate; conversely, mere absence of a finding of inadequacy is not enough to bar issuance of a certificate if other factors justify a finding of public convenience and necessity. Other important elements appear to be desirability of competition, desirability of different kinds of service, and desirability of improved service. The element of inadequacy is thus not controlling, but is to be considered along with those other factors. In denying plaintiff's application solely because no inadequacy was shown in protestants' services, the commission apparently applied an erroneous standard of law; order vacated and the cause remanded.—Nashua Motor Exp., Inc. v. United States, 230 F. Supp. 646 (652-3)*.

While the commission has wide discretion in deciding whether additional motor service would serve the public convenience and necessity, its discretion is not boundless; that discretion must be exercised within the bounds expressed by the standard of "public convenience and necessity." [Citing 371 US 156.] Mere absence of a clear showing of inadequacy of existing services does not justify denial of an application; the holder of a certificate is not entitled to immunity from competition under any and all circumstances; and the introduction of a competitive service may be in the public interest where it will secure benefits of an improved service without undue prejudice to existing service.—Vincent Montone Transp., Inc. v. United States, 231 F. Supp. 484 (487-8)*.

In concluding that plaintiff (applicant) had failed to show need for its proposed passenger service, the commission was not bound by the Joint Board's recommended grant of the application when, though it adopted the Board's statement of facts, it disagreed as to conclusions to be drawn from those facts and the commission's contrary conclusions had

substantial evidentiary support in the record. The commission is the body charged with the responsibility of decision and it is not only at liberty, but is required, to reach its own conclusions on the evidence. Conclusions of the commission find support in the record as a whole; there is nothing to suggest that it abused its discretion or that it did not weigh amply the claims supporting the application; complaint dismissed.—Continental Southern Lines, Inc. v. United States, 265 F. Supp. 218 (220-2)*.

Contrary to claim of plaintiff (protestant before the commission), record is clear that the commission considered plaintiff's intrastate bus operations and evidence of its pending application for intrastate authority generally paralleling interstate passenger authority sought by applicant, in determining that public convenience and necessity required applicant's proposed service; examination of the record shows that plaintiff's activities were carefully considered at every stage of the commission proceeding. On reconsideration, the appellate division considered the possibility that plaintiff's pending intrastate application might be granted; nevertheless, it concluded that, even if it was, public convenience and necessity required grant of the authority sought by applicant. There is substantial evidence of record to support that conclusion; suit to set aside the commission's orders is, therefore, dismissed.—Resort Bus Lines, Inc. v. I.C.C., 264 F. Supp. 742 (746-7)*.

Determination of the need for a proposed service is for the commission rather than for the courts. Since the commission found a need for the unique door-to-door passenger service which the applicant proposed to offer, the court cannot say that the public interest is accommodated by existing bus service of protestants which, though reasonably adequate for those who may use it, is of an entirely different type. The commission's judgment that need has been shown for proposed service is entitled to the same respect it commands for other matters within its purview, and the court finds no basis for disturbing it; sustained.—Trailways of New England, Inc. v. United States, 235 F. Supp. 509 (514)*.

Since fact that passenger carrier's service had been, and was being, used proves demand for the service to extent of such utilization, general testimony by witnesses to prove what the traffic figures as to number of passengers established definitively could add but little; was unessential to sufficiency of foundation of the commission's finding of public need therefor.—Carolina Scenic Stages v. United States, 202 F. Supp. 919 (923, 924)*.

The standard "public convenience and necessity" is not defined in the statute, but was left by Congress to the commission to be determined, in exercise of sound discretion, upon consideration of infinite variety of circumstances which may occur in specific instances; and the lodestar for the commission's guidance in the exercise of its discretionary power is the national transportation policy. On reconsideration, following remand by a three-judge court, the commission properly gave due weight to intervening defendant's past operations; and its ultimate conclusion that public convenience and necessity required continuation of those operations without an "in truckload lots" restriction is rational, based on adequate findings, supported by substantial evidence, and in harmony with the national transportation policy; sustained.—R-C Motor Lines, Inc. v. United States, 241 F. Supp. 124 (126, 127)*.

The commission is the final arbiter of the "public convenience and necessity." Absence of any finding as to inadequacy of existing service does not invalidate the commission's order granting extension of operating authority. While the commission does not enjoy unbounded discretion in the exercise of its regulatory powers, it nevertheless is the expert in the field of transportation, its judgment is entitled to great deference because of its familiarity with conditions in the industry which it regulates. Complaint dismissed.—Clay Hyder Trucking Lines, Inc. v. United States, 234 F. Supp. 673 (675-6)*; each case entails not only a weighing of evidence by the commission but also the exercise by it of an expert judgment on the intricacies of the transportation problem involved.—Auclair Transp., Inc. v. United States, 221 F. Supp. 328 (332)*.

Congress has delegated to the commission broad discretion to determine whether a public convenience and necessity exists, and it is

not the court's function to determine factual issues which have been entrusted to the commission; if there is support for the commission's findings in law and fact, the reviewing court cannot substitute its own views. The record supports the commission's denial of plaintiff's application; sustained.—Keystone Motor Exp., Inc. v. United States, 228 F. Supp. 793 (799)*.

The Interstate Commerce Act in general, and §207 in particular, gives the commission broad authority to pass on present and future public convenience and necessity; orders of the commission based on adequate findings and supported by substantial evidence cannot be upset; and a court on review is not concerned with the consistency or inconsistency of the commission's decisions.—Sloan's Moving & Storage Co. v. United States, 208 F. Supp. 567 (569, 571)*; the commission's finding that plaintiff failed to show need for its proposed service is rational, based upon proper standards, and supported by the record. Sustained.—W. T. Mayfield Sons Trucking Co. v. United States, 211 F. Supp. 619 (626-7)*.

The statute gives the commission wide discretionary authority to determine whether present and future public convenience and necessity require grant of motor carrier operating authority in issue. Testimony of some 15 witnesses in support of the application, along with other evidence of record, sufficiently supports the commission's finding as to need for proposed service; sustained.—Great Northern Ry. Co. v. United States, 209 F. Supp. 238 (240-1)*.

Though plaintiff railroad, in its proceeding before the commission, presented 37 shipper witnesses in support of application for modification of its motor-carrier certificates to permit unrestricted service in Montana-North Dakota area, most of them are located at smaller Montana communities and are not large or frequent users of freight transportation services; protestant motor carriers, on the other hand, showed that at least three of them serve every principal point in Montana and that each, except one, of the smaller points is served by at least one protestant. The commission's conclusion that there had been no showi g of material defects in existing service, expected increase in available freight, or other substantial grounds for introduction of another carrier into the existing competitive situation, is warranted by the evidence; order denying plaintiff's application sustained.—Id., 209 F. Supp. 230 (233, 234)*.

The standard "public convenience and necessity" is not defined in the act, and the commission is given a broad discretionary authority to determine, under that standard, whether the showing of a particular applicant is adequate. But a showing of convenience alone is not enough.—Colorado-Arizona-California Exp., Inc. v. United States, 224 F. Supp. 894 (900)*.

The commission may base a finding of need for proposed service on future public convenience and necessity, but the finding for the future must have some evidentiary basis of the anticipated need. Although the commission's grant of statewide authority to transport cement from shipper's plant at St. Louis to Missouri points did not in whole depend on questionable interstate character of the major method of stocking the St. Louis facility by barge from Hannbal, Mo., the only evidence of need for that statewide authority was the possibility of certain emergency situations. Since the emergencies would have to coincide with continuation of a predestined interstate movement, and there is no showing that this is more than a remote possibility, it is only remotely possible that such an emergency would create interstate traffic in Missouri. Portion of the commission's order granting statewide authority in Missouri, set aside.—L. A. Tucker Truck Lines, Inc. v. United States, 215 F. Supp. 261 (264-6)*.

Producer of fresh, cooked, and canned meats and meat products shows need for proposed single-line, irregular-route service, with multiple dropoffs en route, from its three plants at Louisville, Ky., to points in 6 of the 9 destination States sought; applicant holds packinghouse products authority from Nashville, Tenn., to five States and has participated in considered traffic through equipment-leasing and interchange arrangements with other motor carriers, acting as delivering carrier on shipments to its authorized points and as intermediate carrier on shipments to points beyond its lines. Moreover, shipper expects

need for multiple-delivery service to increase because it is servicing smaller accounts, and because recent government ruling requires that less-truckload shipments of perishable canned meat be moved in mechanically refrigerated equipment. Respondents operate the required equipment but, except as to States where no need for proposed service is shown, their authorities are not sufficiently comprehensive, commoditywise or territorially, for performance of required service. Granted in part.—Tompkins Motor Lines, Inc., Extension, 95 M.C.C. 472 (474-6, 480).

Recommendations for grants of authority in protestants' pending application proceedings do not form a sufficient basis in themselves for denying in whole or in part, considered applications. While the commission is cognizant of those proceedings, and will not ignore developments therein, finality of such recommended grants of authority cannot be sufficient to preclude grants of authority sought if the evidence so warrants. Record justifies grants of additional authority, but not to the extent sought by both applicants; granted in part.—Florida Refrigerated Service, Inc., Extension, 94 M.C.C. 364 (368, 369-73).

Although a tremendous volume of Air Force and Defense Department shipments of cryogenic liquids is involved, record shows that a large percentage will move intrastate and another large percentage will continue to move by rail or in shipper-owned equipment. Considering, also, that bulk of the traffic moves to, from, or between points west of the Mississippi River, that up to time of initial hearing motor transportation requirements were being satisfactorily met by two applicant-carriers operating under temporary authority, as well as the estimated future volume available for for-hire truck movement, there is need for services of two carriers in considered 30-State area and for service of a third carrier between points in 11 of those States west of the Mississippi. Authority granted to the three applicants shown to be best qualified to provide needed service.—Younger Bros., Inc., Extension, 95 M.C.C. 1 (17-8)*.

The Bureau of the Mint requires silver bullion to be shipped to it in quantities that can be accommodated by its limited storage capacity, but sufficient to maintain production schedules necessary to meet the supply and demand of silver coins in the various Federal Reserve districts. Service must be available on 24-hour notice, Monday through Friday, for as many as three truckloads weekly; and, equipment must be clean, fully enclosed, and secured van trailers are necessary, although armed guards are not required. Protestants have not handled the traffic, and equipment allegedly purchased to handle the mint's transportation needs has been used for other purposes; also, there is some question as to whether they are able to provide equipment of adequate capacity and on short notice. In any event, if proposed service is denied, the mint will not utilize protestants' services, but will continue to use REA Express; granted.—Navajo Freight Lines, Inc., Extension, 95 M.C.C. 551 (558).

Part of applicant's proposed service is aimed at effecting expeditious clearance of checks and other financial papers for banking and financial establishments whose essential need is for maximum speed in forwarding such papers. Existing carriers are primarily passenger carriers, which requires shippers to coordinate their operations with existing bus schedules; moreover, protestants stop only at designated places and shipper would be compelled to pick up or deliver packages at such points. Clearly, proposed operation will be superior to existing services. However, nonradial operation between all points in four-State area is not shown to be needed or economically feasible; thus, authority granted is limited to points and areas where need for the service is shown.—Woody, 94 M.C.C. 759 (763-4).

But shipper supporting that part of the application seeking authority to transport film, etc., anticipates using applicant's service only in lieu of air transportation between certain points in event of airline strikes or adverse weather; thus, the need for all motor movements between those points would be sporadic and of an emergency nature, and is insufficient to warrant a grant of authority. Moreover, the shipper has not investigated existing services in the area; denied as to such service.—Id., pp. 764-5.

Complete parcel delivery service proposed

for manufacturers, wholesalers, and distributors between all points in considered territory, with daily pickup service, is definitely superior to existing service of Railway Exp. Agency; a large number of small cities and communities and a significant percentage of the total population in that territory do not have REA service available, and at many of REA's local offices no pickup or delivery is provided. Moreover, all 193 supporting shippers are parcel post users who desire applicant's service in lieu thereof because of its superior features (discussed at pp. 718-9, 720-1); REA, because of its minimum charges and high rate level, is unlikely to obtain much of traffic now handled by parcel post; applicant proposes a territorially more complete, expeditious, and lower cost service on such traffic than REA, and public need for such improved service is apparent; granted.—United Parcel Service, Inc., Extension, 89 M.C.C. 709 (738-9).

In addition to those operations found exempt from economic regulation under §203(b10), one supporting shipper needs a nontowing wrecker service for wrecked or disabled passenger automobiles within considered territory; such service, for which authority is required, is necessary to complement applicant's wrecker operations and to provide that shipper with a complete wrecker service; therefore, to that extent, proposed service will be authorized. On the other hand, since record is devoid of any shipper support for proposed transportation by towing of stolen or repossessed vehicles, that portion of the application is denied.—Flora Service, Inc., 95 M.C.C. 673 (675).

Need is shown for proposed transportation of wrecked, disabled, and repossessed motor vehicles; applicant provides wrecker service between points in West Virginia under intrastate authority, operates a repair garage, and owns two wrecker vehicles suitable for proposed interstate operation; and supporting shipper is engaged in buying and selling used motor vehicles and frequently has need for wrecker service. Insofar as proposed service relates to shipper's transportation needs, it is not the type of emergency transportation contemplated by §203(b10); thus, to that extent, a grant of authority is required.—Reilley's, Inc., 95 M.C.C. 608 (610); and proposed wrecker service is needed by automobile salvage broker who arranges for movement of wrecked, repossessed, or burned automobiles from points in five States to West Memphis, Ark., for sale at that central point rather than arranging such sales over widely dispersed territory. Since the shipments do not originate at scenes of accidents or breakdowns and do not require emergency movement, transportation thereof is subject to economic regulation. Granted to extent of need shown.—Heckinger, 95 M.C.C. 668 (670-1).

Evidence of record shows need for busline's proposed service between Scottsville and Leitchfield, Ky.; several passenger witnesses testified as to the inconvenience of present bus service and the need for an improved service in the area; some witnesses also receive emergency express shipments, and need a local express service. Record is convincing that there is a need for bus service at the points involved; persons residing in the area suffer material inconvenience due to inadequacy of protestant Greyhound's available service; granted.—Continental Tennessee Lines, Inc., Extension, 95 M.C.C. 728 (730)*.

Record established that proposed passenger service between Armonk, N. Y., and Sandy Hook, Conn., is required by public convenience and necessity. A number of public witnesses testified as to their need for bus service between the relatively small communities in Westchester County, N. Y., and points on applicant's present route in Connecticut and, also, between the small communities and points beyond New York City; existing motor and rail service is not adequate to meet needs of those traveling to or from Connecticut points; and proposed service, originating and terminating at New York City Port Authority Bus Terminal, would be more attractive than that of protestants. Applicant is successfully providing similar service at small communities on its present route, and that proposed will be in the public interest. Granted.—Arrow Trailways, Inc., Extension, 94 M.C.C. 514 (519).

Public need for proposed passenger service between Boston and Berlin, N.H., is clearly demonstrated and should be authorized to extent it cannot be provided under rights ac-

quired in recently approved purchase or by compliance with commission's deviation rules.—Trailways of New England, Inc., Extension, 92 M.C.C. 434 (437).

Grant to Greyhound of proposed route between Asheboro and Charlotte, N. C., which will give it a more direct route between Charlotte and Raleigh, is warranted when a substantial number of public witnesses expressed need for the service and dissatisfaction with protestant's service requiring layover time for connecting service; but grant of a more direct Raleigh-Charlotte route to Carolina, a member of competing Trailways system, is not justified merely to enable it to provide faster service when no public need therefor is shown.—Greyhound Corp. Extension, 88 M.C.C. 20 (23).

Need for two essentially different and noncompetitive types of for-hire passenger service between Washington, D. C., and Dulles International Airport near Chantilly, Va., one a scheduled, high-density, regular-route bus service and the other a nonscheduled, door-to-door specialized service of "air-limousine" type, is uncontroverted. However, no need is shown for an express scheduled service by a second busline, or for service to Dulles by same bus carrier now serving Washington National Airport; a single carrier should provide the scheduled service, whether local or express; carrier whose existing operations are in same area as proposed Dulles Airport-Washington routes is the logical selection.—A. B. & W. Transit Co. Extension, 88 M.C.C. 175 (181-2, 183).

And no need is shown for scheduled interstate regular-route bus service between National and Dulles Airports; as one applicant already holds Virginia intrastate authority between those airports, authorization of limousine-type service between them by applicant now providing such service between Washington and National Airport and concurrently granted similar authority between Washington and Dulles Airport should satisfy all reasonable needs.—Id., p. 182.

No effective service is shown to exist on dairy products from Missouri to destinations in Colorado, and grant of authority to serve Colorado will increase the dropoff service which applicant is authorized to provide by enabling it to serve destinations in eight States including the entire Pacific Northwest, thus giving it ample opportunity to offer combinations of points for a highly flexible dropoff service. However, no need is shown for the broad midwestern origin territory sought; granted from Springfield, Clinton, and Carthage, Mo.—Raye & Co. Transports, Inc., Extension, 94 M.C.C. 554 (561)*.

Upon consideration of entire record in light of general principles and policies relating to transportation needs of the Florida citrus industry, as discussed in instant and prior decisions, grant of authority sought for transportation of canned citrus products from Florida to 12 eastern States is warranted to make available to that industry and particularly the 9 supporting shippers a complete service not now available, including service to Canadian points through ports of entry on international boundary.—Blythe Extension, 94 M.C.C. 23 (46-7, 49-50).

Need is shown for proposed transportation by three applicants of frozen fruit juices and concentrates in mixed loads with canned citrus fruits and juices from Florida to five midwestern States, which cannot be met by existing services. Though supporting shippers have adequate service available for straight t.l shipments of either frozen or unfrozen commodities, they lack flexible service for combined shipments of those products, and their customers require prompt service on small shipments because they maintain limited inventories and experience fast turnovers of stock. As shippers will continue to use protestants' services for straight shipments, authority granted applicants for mixed loads will not materially affect them adversely.—Wilson Bros. Truck Line Extension, 92 M.C.C. 497 (501).

Although nationwide authority to transport fruit and citrus juices and concentrates from Florida is not warranted as backhaul for applicant's southbound movement of other products, considering applicant's present pattern of operations and need of sufficient carriers to meet the citrus industry's heavy demand for service, authority is granted from specified origins to Lyons, Ill., and points in Minnesota and Wisconsin.—Clay Hyder Trucking Extension, 89 M.C.C. 757 (762).

Authority granted to transport frozen foods, except frozen citrus products, from Fort Lauderdale and Orlando, Fla., and same commodities, except frozen meats, from Miami, to points in the Carolinas; statewide orgin authority not granted, since supporting shippers at Orlando and Miami do not have need for service from other Florida points and any such future need for Fort Lauderdale shipper is too indefinite. Further, applicant already holds authority to transport frozen meats from a number of Florida points, so it can substantially meet future needs of Fort Lauderdale shipper.—Alterman Transport Lines, Inc., Extension, 91 M.C.C. 43 (49).

Proposed transportation of mixed shipments of frozen and unfrozen commodities from Florida to 6 States will provide additional flexibility in meeting shippers' requirements which existing carriers cannot offer because they lack authority for both types of commodities, as well as equipment suitable for such mixtures; in permitting more rapid consolidation of truckloads, proposed service would make possible more timely deliveries to customers who need particular products immediately, and to smaller receivers who are some distance from a distribution point; while amount to be carried by applicant will be small compared with that now moving in separate shipments, the service should be made available. Granted for frozen fruit juices and concentrates in mixed shipments with canned citrus products.—Barsh Truck Lines, Inc., Extension, 88 M.C.C. 579 (584, 585)*.

Collectively, supporting shippers are presently shipping frozen foods from Philadelphia or nearby secondary plants and warehouses to points in 22 States and District of Columbia; number of points at which they do business in those States is increasing, and indications are that their businesses will continue to develop and expand; though only one or two points have been served in some of States named, weighing the evidence as a whole, including rate of growth of some shippers during period between initial and further hearings, grant of authority for that entire radial territory is warranted.—Hughes, 89 M.C.C. 471 (481)*.

But evidence of need for transportation of frozen foods in mixed shipments with exempt commodities is confined to shipments of fruits and vegetables in fresh, partially frozen, and frozen conditions; authority based on that shipper's needs is therefore limited accordingly.—Id., p. 483.

Since applicant is already serving supporting shipper in transportation of meats from Denver to Boston, New York, and Washington, it should be authorized to serve shipper to those points from Greeley, Colo., also; none of protestants can serve those cities directly from Denver, thus could not provide a two-line service with carriers operating between Denver and Greeley. And since shipper has sought vainly to obtain satisfactory motor carrier service to New Haven, Conn., Savannah, Ga., Lexington, Ky., and Knoxville, Tenn., applicant should be authorized to serve it from Greeley to those points also. Granted in part.—Curtis, Inc., Extension, 92 M.C.C. 25 (31)*.

Movement of whiskey in tank vehicles by virtue of new Federal tax regulations is in effect new traffic; evidence warrants grants of statewide authority to 7 States not served by protestants under their alcoholic beverages authority, but shows only one point in Tennessee from and to which traffic will move; no specific need is shown for service to or from New York points; volume of available traffic appears sufficient to support operations of two carriers; both applications granted in part.—Southern Tank Lines. Inc., Extension, 88 M.C.C. 635 (641).

Overall evidence establishes need for proposed tank-truck transportation of prune juice concentrate from San Jose, Calif., to eastern points; supporting shippers ship some 10,000 tons annually and require direct, multiple-delivery service on relatively small shipments to consignees with limited storage facilities and located at off-rail points; applicant, with its compartmented, stainless-steel equipment, can supply the needed service, resulting in considerable savings in transportation costs to shippers; granted.—Ringsby Truck Lines, Inc., Extension, 92 M.C.C. 225 (226)*.

Although applicant may transport canned water under its authority for canned goods, it may not do so to points where its authority is limited to canned vegetables, and latter authority must be supplemented to meet sup-

porting shipper's transportation requirements, as no service is presently available on canned water and there is a reasonably certain future need for such service. Stockpiling and use of canned water in State, local, and private civil defense programs requires that it be distributed widely and in relatively small quantities, and it will normally move in mixed loads with canned vegetables. Granted.—Lester C. Newton Trucking Co. Extension, 91 M.C.C. 919 (922).

Authority granted for transportation of meats and packinghouse products from Waterloo, Iowa, to 11 States and District of Columbia when rail service is inadequate for supporting shipper's needs, the only motor protestant does not serve Waterloo, and an increasing number of large-volume buyers demand delivery on a given day; present interline service is unsatisfactory because of delays in Chicago and insufficient amount of, or refusal of carriers to interchange, refrigerated equipment. Although shipper has only recently begun to use motor service extensively, it has sales offices throughout the destination territory, and aggressive solicitation of new business is impossible without the type of service proposed.—Kroblin Refrigerated Xpress, Inc., Extension, 89 M.C.C. 255 (263-4)*.

Another shipper desires transportation of mixed loads of frozen and canned goods in refrigerated equipment, the better to serve customers desiring to purchase small quantities of its products, and the only opposing carrier lacks authority to provide the complete service required; applicant already transports canned goods for same shipper to other destinations; granted, restricted to mixed truckloads.—Id., p. 264.

In view of lack of interest of other motor carriers in proposed transportation of bananas from gulf ports to the Northwest, and bearing in mind that certain of supporting shippers are presently using the respective applicants, both have demonstrated a need for service that cannot be met adequately by existing carriers; both applications granted.—Lowrance Extension, 86 M.C.C. 787 (793).

When all supporting shipper's traffic moves from three origins, authority granted is limited accordingly. Though it is considering moving one plant to a new location, it has not entered into a contract for construction of a new plant at that point; such evidence is too conjectural to support grant of additional authority.—Huston, 92 M.C.C. 374 (375, 377).

Grants of authority may be made on basis of foreseeable future need which in normal course of events is reasonably certain to arise. Such reasonable certainty of need for future transportation of liquid sugar is shown only from Cleveland to Pittsburgh, and while sole supporting shipper's desire that applicant obtain authority to transport such traffic to all points in three large and populous States is understandable, such desires do not constitute a real public need. Authority granted from Cleveland to Pittsburgh only, subject to tacking restrictions.—Robert H. Carr & Sons, Inc., Extension, 92 M.C.C. 262 (264-5); although supporting shipper's need for tank-truck transportation of orange juice from Fort Pierce, Fla., to High Point, N. C., is for the future, it is reasonable to anticipate bulk shipments thereto when its customer thereat is presently installing bulk equipment under shipper's guidance.—Kramer Extension, 91 M.C.C. 16 (19).

Authority to transport bulk commodities may be granted on basis of foreseeable future necessity where evidence indicates a prospective need that in the normal course of events is reasonably certain to materialize.—Maxwell Co. Extension, 91 M.C.C. 736 (737); Commericial Oil Transport, Inc., Extension, 91 M.C.C. 961 (963).

No present or reasonably certain potential need is established for bulk transportation of lacquers, paints, etc., from Cincinnati to five New England States when, except for five shipments of varnish to Waldoboro, Maine, prior to hearing, both supporting shippers deliver their products exclusively in drums and could not forecast when, if ever, any of their consignees would convert to bulk facilities. However, the Waldoboro receiver is ready and willing to accept bulk delivery of varnish and no existing carriers are authorized to provide that service; grant limited accordingly.—Maxwell Co. case, p. 737.

Although applicant seeks authority for transportation of numerous bulk liquids from California points to various destinations, with

exception of esters of coconut oil moving from Hawthorne to Kansas City supporting shipper does not deliver any of its products in bulk to customers in the destination area; in fact, it has not established sales offices in that area, and at best could only speculate as to its future needs for bulk transport. Shipper's expectations and hope, as opposed to reasonable definiteness concerning amount of traffic moving to specific destinations, cannot support a grant of authority; granted only for described movement of coconut esters.—Commercial Oil Transport case, p. 963.

Though supporting shippers have a potential need for proposed tank-truck transportation of bulk flour from Pittsburgh area, such need is contingent on applicant's proposed establishment of a bulk storage facility at Pittsburgh; furnishing of storage or similar facilities, however, is not a part of the actual transportation but accessorial or ancillary thereto, and such type of service is not pertinent to the issue of public convenience and necessity; applicant has therefore failed to establish that present or future public convenience and necessity require the proposed service, and that part of application is denied. —E. Brooke Matlack, Inc., Extension, 89 M.C.C. 76 (79).

But since a bulk storage facility already exists at Norristown, Pa., applicant is providing similar service under its existing authority, and no other bulk motor service is shown to be available to the destination territory sought, authorization of proposed service from Norristown is warranted. The milling industry is experiencing increasing customer demand for delivery of flour in bulk, and shippers have salesmen actively soliciting bulk accounts in territory involved; though evidence concerning particular destinations or volumes that would move to specific points is necessarily general, as proposed service is designed to meet a potential rather than a present need, flour can be transported more economically in bulk than in bags, and shippers have reasonable expectation that a substantial volume will move in the near future. —Id., p. 79.

Supporting shippers have demonstrated a valid potential need for motor tank service on petroleum shipments from Harris County, Tex., refineries to California; no authorized motor service is shown to be available and rail transportation lacks flexibility required for off-rail or small-volume shipments. Shippers' traffic in reverse direction has consisted or will consist of petroleum coke and dry and liquid bulk chemicals; however, one protestant holds requisite authority for liquid chemicals and its service should be protected. Granted in part.—York Interstate Trucking, Inc., Extension, 88 M.C.C. 680 (683).

Additional motor service is needed for transportation of lumber from Telfair County, Ga., to points throughout 11-State destination territory; lumber producers are shipping a substantial volume to that territory, and their requirement of expedited transportation on very short notice cannot be met by the limited rail service available. Although protestant motor carrier professes willingness to spot equipment for supporting shipper when needed, its ability to do so is questionable; on the other hand, applicant has rendered eminently satisfactory service of exact nature required. Authority granted from Telfair County.—Dennis, 92 M.C.C. 135 (139).

However, no need is shown for applicant's transportation of lumber from La Grange, Ga., area when its headquarters are almost 150 miles from that area, and supporting shipper has regularly used protestant's services and found them generally satisfactory. Fact that a substantial volume of that shipper's traffic moves in private carriage does not indicate a need for additional certificated service, especially in view of shipper's failure to tender such shipments to existing carriers; nor does shipper's mere desire for an additional service support a finding of convenience and necessity. Authority denied from LaGrange area.—Id., p. 139.

Need is also shown for transportation of wooden pallets from Leesburg, Fla., to points in Georgia and South Carolina, when lack of adequate transportation has discouraged development of additional business in those States; but there is no evidence of need for such service to other States, and grant of authority is limited accordingly.—Id., p. 140.

Need is shown for transportation of lumber from Flathead and Ravalli Counties, Mont., to four midwestern States. Because the lum-

ber business is highly competitive, supporting shippers require dependable, economical, and rapid delivery service; use of rail service entails extra shipping costs, and authorized motor carrier service is inadequate due to inability to furnish suitable equipment; while one shipper has made substantial use of unauthorized truckers, their service has been unreliable. However, record does not support finding that transportation requirements of those shippers are typical of Montana shippers generally; other producers are not shown to have tried and failed to obtain satisfactory service from authorized carriers, and movement of some traffic in unauthorized operations does not justify grant of statewide origin authority; there is no evidence of identities of such producers, their precise locations, volume of their traffic, or reasons for use of such service. Granted in part. Babcock & Lee Transp., Inc., Extension, 92 M.C.C. 408 (410, 411).

Authorization of service between Williamson, W. Va., and Wise County, Va., and six eastern Kentucky counties is justified when the destination area is part of a mountainous coal mining region dependent on highway transportation for general freight movement, supporting receivers are union hospitals scattered throughout those counties, and available for-hire motor service is slow, unreliable, and often involves participation of several carriers.—Hogan Storage & Transfer Co. Extension, 92 M.C.C. 63 (64-5).

Quantum of available service is inadequate for transportation of present and prospective volume of iron-and-steel traffic from two new plants in Kankakee County, Ill., to 12 States. Several regular-route protestants serve only portions of those States and various interchanges would be required, thus making service difficult to off-route jobsites or other points therein; many irregular-route protestants must use circuitous routes, making service to some areas impracticable, or their authority is further limited commoditywise or territorially. Therefore, even assuming extensive interline arrangements with other carriers, protestants could provide, with some circuity, only a portion of the service needed, and clearly could not offer the flexible statewide service shown to be required. And since applicants holding some authority from origin involved are confronted with like problems, they and protestants collectively cannot now meet shipper's demonstrated needs.—Steel Transp. Co., Inc., Extension, 92 M.C.C. 387 (397).

Furthermore, supporting shipper must frequently make firm commitments as to time of arrival of shipments at consignees' jobsites, often requiring overnight service, so that shipments can be coordinated with consignees' construction schedule and skilled labor requirements. Service of all 17 applicants is shown to be needed, but record does not justify grant to each of all destination areas each seeks; authority granted each applicant is therefore fashioned according to applicants' and protestants' existing pattern of operations, their terminal locations, quantity and type of their equipment, shipper's present and prospective production schedules, respective tonnage to be shipped to the various destination States, nature of expeditious service required, and requisite coordination at consignees' jobsites.—Id., pp. 397-8.

Shipper needs applicant's service for movement of its agricultural implements to warehouses and distributors throughout destination territory sought, and knows of no available motor service which can meet its requirements. Protestants obviously agree with shipper as to articles weighing less than 500 pounds, since they do not object to a grant subject to that weight limitation, and their anxiety to settle for a favorable restriction weighs strongly against any willingness on their part to meet shipper's needs. Granted without restriction.—Kindsvater Extension, 92 M.C.C. 131 (133-4).

Although shipper of salt from Williston, N. Dak., area supports applications of five carriers, its support of some is predicated less on need for services of those carriers than on its desire to provide them with backhaul traffic. Need is shown only for services of three carriers, and those which could provide the optimum in service are the three whose operations are centered in the Williston area. While the other two would benefit from return loads not otherwise available to them, authorization of more service than is actually required would so dilute the traffic as to make such re-

turn loads of doubtful value; applications of those carriers denied.—Maas Transport, Inc., Extension, 92 M.C.C. 534 (540)*.

Supporting shipper requires transportation of bulk salt from border ports of entry on Great Lakes and other designated waterways to 12 States and District of Columbia, in connection with prior water movement from Detroit or Cleveland; in the past it has distributed large volumes of salt from latter points to those States, which comprise its normal marketing area, using services of applicant and protestant, but use of numerous stockpiles throughout the origin area, with combined water-motor service, is becoming a vital part of its basic distribution program; shipper's salt is used largely for ice control on highways, and peculiar transportation requirements imposed by adverse weather demand an exceptionally flexible motor service. granted.—Paul W. Wills, Inc., Extension, 88 M.C.C. 692 (694, 695).

For a number of years applicant, under color of right, has been providing a highly satisfactory service on l.t.l. as well as t.l. shipments between 5 Georgia points and a 6-State destination territory, which has attracted a substantial volume of traffic from a significant number of shippers who have come to rely on the felt superiority of its service. Existing regular-route carriers cannot offer the complete service required by several supporting shippers, and their joint-line operations would not afford an adequate substitute for applicant's direct service. As applicant's l.t.l. service has existed, albeit unlawfully, for a considerable time, its continuance would not create a new or aggravated competitive situation; authority granted without restriction to truckload lots.—Bowman Transp., Extension, 92 M.C.C. 651 (655)*.

Supporting shippers desire services of a carrier which can handle mixed shipments of their basic machinery and equipment in same vehicle with parts, attachments, and accessories destined to different consignees in same general area; heavy haulers cannot handle shipments of most parts independently or to other than consignees of basic machinery when transported therewith; general freight carriers now handle independent shipments of such articles but have been unable to provide requisitie flat-bed equipment, and their services have proved less reliable than applicant's; moreover, some shipments must be delivered direct to jobsites. Grant of authority is warranted.—Home Transp., Co., Inc., Extension, 88 M.C.C. 265 (270-1)*.

However, the only real evidence of shipper need is for movement of parts and attachments independently of the primary commodities applicant is now authorized to transport, and amount of that traffic is small compared to the volume of prime commodity traffic. Shippers require expeditious carriage of their parts shipments, and applicant's service, which is essentially truckload, is superior to l.t.l. service now available to them to points in considered destination States; they would benefit by its faster service and by savings incidental to more efficient loading of vehicles. General commodity carriers should be able to retain a good portion of such parts traffic as they can lawfully and expeditiously handle. Authority granted for transportation of parts, accessories, and attachments of road construction machinery and equipment in same vehicle with presently authorized commodities, from and to points and areas specified in appendix.—Id., 92 M.C.C. 677 (684-5)*.

Grant of authority for transportation of mine or pit cars from Huntington, W. Va., to three States is warranted when it is not embraced in protestants' heavy-hauling authority, and one protestant's authority for such cars is too limited to provide shipper with complete service required; but while need is shown for transportation of other iron and steel articles to Kentucky, reinforcing steel is excluded from authority granted therefor, since it may be handled by protestants, who can meet shipper's reasonable requirements. —Case Driveaway. Inc., Extension, 89 M.C.C. 633 (634, 635)*.

Need for proposed irregular-route transportation of roofing and siding from Little Rock, Ark., to specified eastern Oklahoma area is established when regular-route carriers either do not serve points therein or can do so only in circuitous manner; some customers cannot handle van-type trailers because of peculiarities of their unloading and warehousing facilities, and Little Rock Shipper has had difficul-

ty in obtaining flat-bed equipment. However, although other supporting shippers desire to curtail their private-carrier operations provided they have available an irregular-route carrier with sufficient flat-bed equipment, in view of lack of specificity of evidence as to volume of potential shipments or location of their customers, grant of broader authority sought is not warranted.—Boswell Extension, 88 M.C.C. 219 (220, 221)*.

Authority granted for transportation of dry cement and motor from supporting shipper's plant at Ravena, N. Y., to 8 States and from its plant and storage site at Boston to 7 of those States. Shipper has shown need for services of a motor carrier that can handle its shipments throughout that area and deliver those reconsigned en route; its Boston plant lacks facilities for loading rail cars, and motor carrier holding authority from Boston cannot serve all points in marketing area of shipper's plant. Moreover, shipper is naturally unwilling to depend exclusively on latter carrier in view of its close business relationship with one of shipper's major competitors.—Bonded Freightways, Inc., Extension, 92 M.C.C. 68 (71).

Although Salt Lake City shipper is not marketing its cement outside of Utah and its future needs are too speculative to justify a grant of authority, shipper at Devils Slide, Utah, has a large productive capacity and its sales volume requires service to named destination territory, which is its normal interstate marketing area. Protestants hold "building materials" authority to a substantial portion of the destination territory, but cement may be transported thereunder only if it is to be used in construction of a building; thus, since a high proportion of highway construction is involved, protestants' authorities are too limited to ensure the complete service required. Granted in part.—Reaveley, 91 M.C.C. 604 (607).

Even though shipper's cement has moved from Douro, Tex., only to points in southeastern New Mexico, applicant should be authorized to provide service in remainder of that State in view of the substantial volume of production at shipper's Douro plant, the projected expansion of its sales activities, and the fact that its potential customers are located throughout that State; furthermore, it appears that existing carriers cannot provide the service required by the shipper to compete adequately in the New Mexico cement market. Need is shown for service to all points in New Mexico.—Chemical Exp. Extension, 89 M.C.C. 452 (454).

Due to competitive and other factors, each of supporting shippers requires services of a motor carrier authorized to transport cement throughout its marketing area; although rail service—the only transportation service now available—has been generally satisfactory in the past, shippers require motor service additionally to enable them to comply with customer requests for direct delivery to plant and job sites not located near rail sidings and to remain competitive with other cement producers who already have available motor service in involved destination areas. Authority granted substitute applicant (parent company of original applicants) as specified in appendix.—Ruan Tansport Corp. of Kansas, 88 M.C.C. 65 (66)*; Ruan Transport Corp. Extension, 88 M.C.C. 123 (124-5).

Evidence indicates that rail and general-commodity carriers have been unable satisfactorily to meet supporting shippers' needs for transportation of small boats from Dickson, Tenn., to Minnesota, Louisiana, and points in States east of Mississippi River, and that one shipper's unsuccessful attempts to obtain protestant's service caused it to resort to private carriage; it is doubtful if protestant can provide the quantity or quality of service Dickson shipper needs and which can reasonably be expected from applicant with headquarters onl a few miles from its plant; granted in part.—Rolling Boats, Inc., 89 M.C.C. 789 (793)*.

While motor carrier protestants each have certain authority in considered area, as pertinent, each is confined to petroleum products and/or liquefied petroleum gases; supporting shipper does not produce, or ship from its chemical plant, liquefied petroleum gases, and it asserts that all commodities moving to or from the plant are chemicals and that they are, and will be, shipped outbound as such mostly under their chemical names. In any event, protestants' possible service would be limited geographically since one has authority

to serve only 1 of the 8 destination States sought, and service of the other to points in 2 of its 4 authorized States would involve substantial circuity of operations. Rail service is also inadequate to meet shipper's transportation needs. Also, record indicates that failure by protestants to obtain any of shipper's new traffic, as result of authority granted, would be only to extent that proposed service is more responsive to the need shown.—Robertson Tank Lines, Inc., Extension, 95 M.C.C. 234 (244-7, 249)*.

Need is shown for transportation of chemicals between specified Texas points and Texas water terminals, since no other motor or rail carrier is in a position to provide the service required, but supporting shipper's needs are otherwise too speculative to justify grant of authority on a countywide basis. There is also need for transportation of certain chemicals from Fort Worth and Houston, following rail movement from out-of-State orgins, to consignees at Texas points. Granted in part. —Ryder Tank Line, Inc., Extension, 91 M.C.C. 497 (500, 501); needed transportation of petrolatum and white oil from Karns City, Pa., to points in Illinois and Wisconsin cannot be provided by existing carriers. Since considered commodities may not properly be classified as chemicals, protestant does hold requisite authority for their transportation; granted.—Milk Transport, Inc., Extension, 91 M.C.C. 280 (283).

Supporting shippers demonstrate need for proposed new and flexible service afforded by the use of collapsible containers. Protestant tank-truck carriers are not authorized to transport considered dry commodities, or those liquid commodities involved which are end products intended for packaging and sale to the general public; need exists for the proposed transportation service that cannot be provided by existing carriers. Granted in part. —Los Angeles-Seattle Motor Exp., Inc., Extension, 89 M.C.C. 621 (624-5)*.

The primary questions in determining public convenience and necessity are whether the proposed operation will serve a public demand, and whether such demand cannot be as well met by existing carriers. Issuance of a certificate must be predicated on a showing of material defects in existing service, expected increases in available freight, or some other substantial grounds for introduction of another carrier into the existing competitive situation.—East-West Transport, 88 M.C.C. 352 (355); although at time of hearing supporting shipper had not completed construction of adequate storage facilities at its plant for bulk shipments of lecithin oil, a real need is shown for transportation thereof, which none of protestants has authority to supply. Granted. —Southern Tank Lines, Inc., Extension, 88 M.C.C. 387 (390).

Unrefuted evidence that shipper's pertinent traffic moves in substantial volume to the destination points and areas sought, together with convincing evidence that protestant has been unable to meet shipper's reasonable transportation requirements, warrants grant of authority sought; fact that 80 percent of the total volume is destined to points in Colorado and Wyoming indicates need for statewide authority to those states.—Consolidated Freightways of Del. Extension, 88 M.C.C. 603 (605).

Supporting shipper has established need for a complete motor service in transportation of cement from its Hannibal, Mo., plant to points in Illinois, Iowa, and Missouri; though volume of interstate shipments to Missouri points is apparently small, such traffic is important to shipper and authority for its movement should be granted.—Orscheln Bros. Truck Lines, Inc., Extension, 88 M.C.C. 569 (573).

Grant of authority for described fungicides from Memphis to Missouri, Iowa, and Kansas is warranted when no motor service is currently available and supporting shipper is at disadvantage in competing for business in that area; however, though that shipper expects to use service to those States about once a week, it is less specific as to prospective volume which might move to other States, and testimony of other shippers is too vague and general to support a grant, since they have not shown that sufficient volume would be available to support proposed operations or that they have sales programs which might develop more traffic; granted in part to one applicant and denied as to rival applicant.—Eldon Miller, Inc., Extension, 88 M.C.C. 309 (313)*.

Although shipper support of application is

not substantial, evidence demonstrates some need for service at points on proposed route between Clarksdale and Dundee, Miss., including off-route points within 5 miles thereof; however, only one shipper supported proposed service between Memphis and the off-route point of Helena, Ark., and only advantage the shipping public would gain therefrom would be availability of another motor service not shown to be required; granted, with restriction against transportation of traffic between Memphis and Helena.—F. & W. Exp., Inc., Extension, 88 M.C.C. 262 (263)*.

Neither applicant nor protestants are now authorized, territorially or commoditywise, to provide the complete service required by supporting shippers and their dealers on tractors, engines, and other heavy articles, including independent shipments of parts; while general-commodity carriers are satisfactorily transporting separate loads of small parts, they may not handle those requiring special equipment. Since applicant already holds broad authority and is now serving shippers from and to the involved points, grant of authority sought, including separate authority for parts, attachments, and accessories, and without restrictions as to intended use of the commodity or need for special equipment, will enable it to meet shippers' reasonable transportation needs without material adverse effect on opposing carriers.—Gregory Heavy Haulers, Inc., Extension, 88 M.C.C. 45 (48-9).

Inasmuch as protestant's authority for aircraft parts is now held not to embrace transportation of jet thrust units for interceptor missiles, the producer, and the Government as consignee, require additional service to move such units and accessories from Redstone Arsenal in Alabama to specified destinations in Utah and Washington, and services of both applicants are needed to ensure prompt delivery of items essential to the missile program; granted accordingly.—Baggett Transp. Co. Extension, 88 M.C.C. 3 (9)*.

In absence of unusual circumstances, territorial grants should not be atomized by excepting therefrom points within the territory. Protestant does not dispute need for an overall motor service between Willow Run and Detroit Metropolitan airports and between those airports and adjacent Michigan area and Toledo, Ohio, but seeks to have excepted therefrom authority to serve Toledo and three Michigan points; however, preponderance of evidence establishes need for applicant's service at those four points.—Nickerson, 88 M.C.C. 186 (187).

Evidence amply supports grant of extension authority to transport new furniture from Hazelwood, N. C., to Illinois and lower peninsula of Michigan; authority is also warranted for transportation of new furniture and pianos to 5 southwestern States and California, where supporting shippers have customers; those shippers are entitled to inherent advantages of motor service enabling them to ship furniture uncrated, more readily serve customers at off-rail points, and make faster deliveries. However, grant of 11-county origin territory sought would enable applicant to serve certain highly populated and industrialized counties where no shipper support is presented; authority granted from 7 North Carolina counties and 2 specific points which contain all plants of shippers who appeared in support of application.—B & P Motor Lines, Inc., Extension, 86 M.C.C. 719 (720-1)*.

Bi-State agency authorized to purchase operating rights of 14 inter-and intrastate buslines serving St. Louis area seeks authority to serve certain additional points and to continue all the acquired operations, with elimination of certain restrictions on the interstate routes as to intermediate-point service and pickup of passengers. Rights sought are essentially the same as vendors' present operations, revised or rearranged slightly for more effective service, and may properly be granted.—Bi-State Development Agency—Purchase—Vandalia Bus Line, 93 M.C.C. 579 (593-4); and denial under §5 of authority for purchase of one vendor's rights between St. Louis and Collinsville, Ill., because of objectionable route split resulting from vendor's proposal to continue operating between Vandalia, Ill., and St. Louis via Collinsville, reflects different considerations than question of convenience and necessity under §207 for the agency to operate partly over same highways between St. Louis and Edwardsville, Ill., via Collinsville, its access to Collinsville being only one aspect of a mass transportation plan of merit where present and future public convenience and

necessity amply justify the service; granted. —Id., pp. 595-6.

See also Best Way Motor Freight, Inc. v. United States, §5(2), n. 115.

That numerous shippers of diversified commodities from 13 points in Kansas and 4 in Colorado offered evidence as to need for continuance of unified service vendee is providing under temporary authority adequately meets the test as to whether public convenience and necessity require such operations in future; certificate granted for continuance of operations formerly conducted by vendor under "grandfather" clause of §206(a)(7).—Denver-Limon-Burlington Transfer—Purchase—Kansas Interm., 93 M.C.C. 210 (214)*.

Such shipper need as was claimed, but not proved, for continuance by vendee of service under vendor's §206 (a)(7) "grandfather" rights between Louisville and Brandenburg, Ky., area related to traffic originating at Louisville and destined to points in other States; no shipper evidence was offered to show need for service between Louisville and the Brandenburg area. Vendee's proposed operation between whose termini would present many tacking possibilities for which no public need has been shown, and protestants would be adversely affected thereby. At most, record shows only a possible need for service in connection with overhead traffic moving from one shipper's Louisville plant to Oklahoma and Texas; and since evidence is inconclusive as to whether existing service is able to meet that shipper's needs, and vendee has the burden of proof, it must be concluded that no public convenience and necessity has been shown for a grant of authority. Denied. —Liquid Transporters, Inc.—Purchase—Black, 93 M.C.C. 423 (429-30).

Storage-in-transit is a recognized and long established commercial practice that has been adapted to motor transportation of various types of commodities; and storage-in-transit privileges are currently used to a considerable extent in the frozen food industry, where shippers find it necessary to maintain storage facilities at centralized locations for effective distribution of their products. As a commercial practice, storage-in-transit is a feature that may be considered in determining reasonable transportation requirements of the shipping public; however, storage itself is not regarded as a transportation service, and offers to provide transit arrangement are not viewed as controlling but merely as an element to consider in concluding whether there is a need for a proposed new service. Accordingly, even considering desire of two shippers for transiting (and such desire of shippers has been considered in a number of cases), applicant failed to show need for proposed service; denied.—Willis Shaw Frozen Food Exp., Inc., Extension, 100 M.C.C. 18 (20-21)*.

Though shipper is satisfied with applicant's past service from its other plants and prefers such service from its new plant, shipper preference alone is not proof of convenience and necessity. Also, while it is generally difficult to define a future need with precision and exactness, shipper's evidence concerning future need for service from an unopened plant is too general and indefinite to establish future need for applicant's supplemental service. Moreover, record does not show that protestant's untried service from considered origin will be inadequate to meet shipper's requirements for supplemental common carrier service; denied.—Dealers Transit, Inc., Extension, 98 M.C.C. 297 (302-3).

A finding of public convenience and necessity cannot be based on a shipper's mere desire for an additional or "standby" carrier.—Letarte, 91 M.C.C. 158 (160); especially in absence of any evidence demonstrating a genuine need for more than one service.—C & H Transp. Co., Inc., Extension, 88 M.C.C. 285 (296)*; similarly, though there is need for motor transportation of calcium carbide where supporting consignee lacks facilities for handling rail shipments, authority is granted for only one of three origins when consignee's mere desire to have the other sources of supply available for possible future use must be considered too speculative.—Shipley Transfer, Inc., Extension, 89 M.C.C. 524 (525); likewise, authority for towage of replacements for wrecked or disabled motor-carrier vehicles is denied when need for such service appears to be largely speculative.—Young, 91 M.C.C. 445 (453).

Extension authority sought for northbound transportation of ex-air freight from Florida

denied when, in view of abundance of authorized motor-carrier service available to perform the single-line operation proposed, supporting evidence at best establishes a mere preference for applicant's service; applicant's desire to obtain a profitable backhaul and thus round out its operations affords no basis for a grant.—Armellini Exp. Lines Extension, 88 M.C.C. 539 (541); similarly, no present or foreseeable future need is shown for proposed transportation of airfreight between Salt Lake City Airport and points on applicant's authorized routes beyond supporting air carriers' terminal areas. Although increase in airfreight is anticipated, evidence is not convincing that it will occur outside the terminal area from and to which the bulk of such traffic moves; nor is there any evidence that abundant existing service is inadequate to meet supporting witnesses' needs; denied.—Wycoff Co., Inc., Extension, 89 M.C.C. 369 (374)*.

Applicant seeking to serve only southern half of New Jersey from cement plants in five Pennsylvania counties would be unable to provide complete service needed. Carriers serving each plant should be limited to a reasonable number in order to promote efficient and economical shipper operations, and applicant concedes that the evidence will not support grant of duplicating authority to each of numerous applicants seeking to provide a new service not previously available. Conclusion in 86 MCC 447 that, generally, only two motor carriers should be authorized to serve each cement mill is sound. Prior denial affirmed.—Pennsylvania Truck Lines, Inc., Extension, 91 M.C.C. 167 (174-5)*.

No public need is shown which warrants a grant of authority that would permit continuation of applicant's past unlawful for-hire transportation of automobiles of miliary personnel between Wrightstown, N. J., adjacent to McGuire Air Force Base, and ports of entry at Philadelphia and New York City. Protestant is authorized to provide a similar service between McGuire and the ports, and appears to be fully
capable of meeting any reasonable requirements for such transportation; also, even considering the diffuculty of obtaining witnesses to demonstrate public support for the application, applicant has failed to show that existing authorized service is materially deficient. Moreover, applicant desires to use the proposed service as a means of obtaining prospective customers for his automobile sales business, but that would be inconsistent with the duties owed the public by common carrier. Application denied.—Cherkos Investigation of Operations. 91 M.C.C. 535 (541)*.

The commission may take into account changes in important facts, which have occurred since hearing and are made part of official record, in determining whether authority sought may properly be granted; authority to transport air cars from South Bend, Ind., would not be responsive to any actual need when, since prior report, supporting shipper has discontinued their manufacture at its South Bend plant and is disposing of its activities there; denied.—George F. Burnett Co., Inc., Extension, 88 M.C.C. 452 (453)*.

No need has been shown for proposed transportation of sections of prefabricated houses from Wellsville, N. Y., to all points in United States, and while a present need has been established for service to Pennsylvania points and there is a possible future need for service in northeastern States and Virginia, applicants have not shown any inability on part of protestants to perform needed service; denied.—National Trailer Convoy, Inc., Extension, 91 M.C.C. 259 (263).

Supporting shipper has failed to establish need for proposed transportation of dry bulk fertilizer compounds since it is not yet in production and its future needs are vague and indefinite; its indication in broad terms of desire for service to all destinations in 5 States is not sufficient. Moreover, in most instances its cooperative owners designate the mode of transportation and the carrier.—Dahlen Transport, Inc., Extension, 91 M.C.C. 609 (612, 615).

Although supporting shipper desires to supply vinegar to Utah points from its Oakland, Calif., plant, production facilities thereat have concededly reached their peak, and future movements to Utah would be largely dependent on completion of proposed enlargement of production facilities at that plant at an unspecified future date. Shipper has failed to establish a need for applicant's pro-

posed service with sufficient specificity to warrant grant of authority sought; denied.—Arizona Pacific Tank Lines Extension, 91 M.C.C. 906 (910).

Inquiries regarding bulk truck service will not alone support a finding of public convenience and necessity; before an inquiry may be translated into need, it must be coupled with reasonable assurance both that the service will be utilized and the volume of traffic will be substantial enough to require the service. Applicant's evidence is too speculative to warrant a grant of authority.—O'Boyle Tank Lines Extension, 89 M.C.C. 499 (501); similarly, supporting shippers' evidence is not convincing of any need for proposed bulk truck service. Neither shipper mentioned a specific point in destination State to which any of involved commodities move or could be expected to move; and while both expressed need for prompt and expedited service, such need is not shown to apply to the only two commodities shipped by them in bulk to that State. Denied.—Maxwell Co. Extension, 88 M.C.C. 648 (651).

Support of one shipper is apparently directed toward transportation of emulsifiying compounds used in manufacture of cheese and cheese products, which are not shown to be within scope of application for authority for commodities dealt in by grocery stores; petitioner's past transportation of soap and related articles for another supporting shipper was performed under an unwarranted misinterpretation of its authority for "groceries"; as a plethora of untried motor service is available which appears completely capable of meeting that shipper's needs, no additional service should be authorized. Denied.—C & E Trucking Corp.—Modification of Permit, 88 M.C.C. 391 (395-6).

Alaska: [Vols. 18, 19].—See J. O. (Red) Willett Pipe Line Stringing Corp. case, under *Petroleum*,below.

Commercial competition: [Vol. 18].—Supporting shipper's present and future need for tank truck service, to enable it to compete effectively with other shippers of plastic materials and to meet the changing requirements in its industry, justifies a grant of authority. All of shipper's traffic now moves in bags and containers and amounted to about 5 million pounds in 1962; approximately double that amount is expected in 1964, and that will require 300 truckloads or a maximum of five tank trailers in any one day. Shipper's need cannot be met by protestants which do not hold appropriate commodity authority; rail service is not adequate because of lack of rail bulk loading facilities at shipper's plant and absence of rail sidings at some customers' plants. Granted as to one applicant.—Chemical Leaman Tank Lines, Inc., Extension, 95 M.C.C. 394 (400).

Since Coralville, Iowa, and La Grange, Mo., are competing distribution points for petroleum and petroleum products, availability of at least four competing carrier services at the former point places the latter point, with only one carrier service, at a competitive disadvantage. Also, the availability of proposed service from La Grange in addition to that of protestant would instill an element of flexibility in supporting shipper's distribution pattern at potentially reduced costs; thus the existence of two carrier services from La Grange would be in the public interest. Granted.—Ruan Transport Corp. Extension, 95 M.C.C. 134 (136)*.

As supporting lumber shippers serve consignees throughout a State who cannot accommodate truckload shipments, a carrier with broad territorial authority is required. Protestant, authorized to serve only part of one destination State, cannot provide split load deliveries shippers require; granted as to that State.—Hicklin Extension, 94 M.C.C. 434 (438).

On further hearing, and considering the application in light of the critieria established in 355 US 83, a valid need has been shown for proposed transportation of sand, in bulk, from Newport, N. J., to Orangeburg, N. Y.; to that extent, the application is granted. Consignee, a manufacturer of glass containers, must have a constant supply of sand at its plant to maintain operations; expeditious truck deliveries from Newport are needed to supplement rail shipments from a major source in Virginia; furthermore, supporting shipper's sales of sand to consignee began only after applicant was granted temporary authority, and it appears probable that the shipper will lose a valuable customer if instant

application is denied. Protestant, on the other hand, having never handled the subject traffic, will not be adversely affected by a grant of authority to extent of the need shown.—J-E-M Transp. Co., Inc., Extension, 94 M.C.C. 573 (576-7)*.

Commodity description: [Vols. 17-19].—Term "general commodities" as used in describing authority granted is generic and, unless limited or restricted in some manner, it includes and encompasses explosives; therefore, it is unnecessary to authorize transportation of explosives in more specific terms.—Whitfield Transp., Inc., Extension, 95 M.C.C. 576 (583)*; the commodity description "general commodities moving in express service" is sufficient to limit applicant's operation to its normal range without the imposition of weight limitations in the grant of authority.—Railway Exp. Agency, Inc., Extension, 98 M.C.C. 92 (99).

Vendor's intrastate regular-route certificate authorizes transportation of "property," which appears to correspond to the commission's general-commodity authority. But since certificates for transportation of general commodities usually exclude certain classes of commodities requiring special equipment or rendition of special services, and abstract of interstate shipments transported by vendor under former single-State proviso or "grandfather" provisions of §206(a)(7) does not indicate that it handled any shipments within those classes, certificate issued multi-State vendee for continuance of the regular-route service will contain the usual exceptions.—Ohio Southern Exp., Inc.—Purchase—Vermilion Truck Line, 97 M.C.C. 93 (102-3)*.

While witnesses who appeared in behalf of the Air Force and certain shippers supporting petitioner's application for authority to transport aircraft parts, etc., misdescribed the missile parts they were shipping as airplane or aircraft parts, they did so in compliance with strict security regulations and under the impression, based on an informal opinion of the Bureau of Motor Carriers, that the commission sanctioned describing missiles as aircraft for transportation purposes. That the public may have known that guided missiles were being developed has no bearing on the security regulations in effect at time of the hearing on that application. Those witnesses were under specific instructions that missiles were not to be mentioned, and that reference to airplane or aircraft parts was adequate to support a grant of authority for missile parts; they deliberately used what they thought were proper terms to describe the commodities involved, and their reasons for doing so are beyond reproach.—Leonard Bros. Transfer, Inc., Petition for Clarification, 96 M.C.C. 246 (252)*.

And although the Air Force's exceptions, filed some 6 months after close of hearing in which those witnesses testified, stated that it could now be generally admitted that the program was concerned with development of long-range guided missiles, it is clear that before those exceptions were filed no mention could have been made of the fact that guided missiles were involved. The Bureau's informal opinion that airplane parts included missile parts, together with reference in the commission's report in that proceeding to the fact that guided missiles were involved, were sufficient to lead petitioner to believe that the authority granted authorized it to transport missile parts.—Id., pp. 252-3.

And while there was no intent, in granting that authority, to use "airplane parts" or "aircraft parts" as generic terms to embrace missile parts, this does not mean that there was no intent at that time to authorize applicant to provide a complete service for both its airplane parts and missile parts shippers. The situation is unique, and there is no question that, had requirements of the national security allowed the shipper witnesses to be more specific when they described the commodities they were shipping, applicant would have received authority for both airplane parts and missile parts as a result of that hearing. Petitioner should be authorized to continue to transport missile parts and related commodities used in the supply, service, repair, operation, or maintenance thereof, without restriction.—Id., pp. 253, 254.

Though jet thrust (JATO) unit for interceptor missiles consists largely of a solid propellant designated a class B explosive, grant of explosives authority would be inappropriate when purpose of the explosive is, not to dissipate energy in an explosion, but to furnish

controlled propulsion, and purpose of the complete unit is to propel the missile from its launching site; as it is an integral part of the missile, it falls more appropriately within category "missile parts"; but since evidence relates solely to transportation of jet thrust units and accessories used in their installation, rather than missile parts as a class, authority granted is limited accordingly.—Baggett Transp. Co. Extension, 88 M.C.C. 3 (9-10)*.

Commodity description of authority recommended is rephrased to eliminate internal duplication, the description "acids and chemicals" being sufficiently broad in scope to embrace paints, varnishes, and laquers. However, since it is possible that certain types of resins may be excluded from that description (although the majority of resins are chemicals), authority is granted to transport acids, chemicals, and resins, in bulk, in tank vehicles.—Slay Transp. Co., Inc., Extension, 96 M.C.C. 47 (50-1).

Shipper of soybean oil and resin plasticizers requires motor carrier service from two plant sites in Illinois to points in some 20 States throughout which it is soliciting or plans to solicit business in those commodities; and while protestant has authority to transport vegetable oils (which would include soybean oil, but not the resin plasticizers) from both plant sites to all the destination States, it can transport the resin plastercizers from only on plant site to a limited number of States under its liquid chemicals authority. Consequently, as protestant cannot provide multiple pickups of both commodities required, and cannot haul them in mixed loads to all of the territory sought, the application is granted but restricted against transportation from one plant site to the few destinations that protestant is authorized to serve.—Ruan Transport Corp. Extension, 96 M.C.C. 719 (722).

Both applicants seek authority to transport liquid chemicals, in bulk; however, in view of shipper evidence concerning particular chemical they produce and ship, specified, rather than generic, commodity descriptions should be used, except insofar as operations being authorized embrace traffic originating at named points where chemical producers have or will soon have a variety of commodities for shipment to the various proposed destination States.—Pacific Truck Service, Inc., Extension, 94 M.C.C. 262 (265, 266).

Since no present or foreseeable future need is shown for transportation from Ector County, Tex., of dry bulk chemicals other than polyethylene, polypropylene, and polystyrene, authority granted is limited accordingly. —Younger Bros., Inc., Extension, 92 M.C.C. 624 (631); likewise, though authority is sought to transport dry plastic materials, authority granted is limited to transportation of polypropylene polymer since that is the only product manufactured by supporting shipper, and shipper does not indicate that any other type of dry plastic will be produced at its plant.—Chemical Leaman Tank Lines, Inc., Extension, 95 M.C.C. 394 (401).

While shipper is presently producing only one prepared food product, turkey rolls, it has definite plans to expand its facilities and is experimenting with other products involving different types of meats as well as certain additives, such as cranberries and dressing. Based on the rationale of the Alterman case, 84 MCC 416, applicant was granted authority to transport "prepared foods", which is a broad grant of commodity authority that will allow applicant to ship its full line of products that it develops without the necessity of supporting future applications for authority as its transportation needs change.—Blythe Extension, 96 M.C.C. 546 (548).

Since authority sought for "food products" would convey the right to transport only those fit for human consumption, and supporting shippers also need transportation of canned pet foods, separate authority is granted for canned animal foods.—Trans.-Cold Exp., Inc., Extension, 92 M.C.C. 739 (741).

In view of shippers' demonstrated need for a transportation service which can handle numerous commodities which fall only within the broadest generic terms of food and foodstuffs, authority is granted for food, food preparations, and foodstuffs, to enable applicant to transport all the freight for which need is shown.—Refrigerated Transport Co., Inc., Extension, 88 M.C.C. 71 (74,75).

Mere assertion that supporting shipper may have future need to ship frozen fruits along with its present products, or that at some fu-

ture date it might develop new products requiring transportation, is insufficient basis for grant of broad authority for "frozen foods." As need is shown only for transportation of frozen waffles, pancakes, muffins, and onions from and to specific points, authority granted is limited accordingly.—Watkins Motor Lines, Inc., Extension, 92 M.C.C. 259 (261).

Though need is shown for proposed transportation of mixed shipments of frozen and unfrozen commodities, supporting shippers are primarily interested in transportation of frozen fruit juices and concentrates in mixed loads with canned citrus products; evidence as to need for transportation of other commodities is too vague and speculative to support a broader grant.—Barsh Truck Lines, Inc., Extension, 88 M.C.C. 579 (585).

Recommended description "frozen cooked, or partially cooked (except blanched) foods" is ambiguous; all supporting shipper's frozen food products are cooked or partially cooked, and probably all are "blanched." As shipper has a program of processing new food products, commodity description should be broad enough to provide for its future as well as present needs; the clearest language that will exclude commodities within shipper's recently granted "grandfather" authority is "frozen foods (except frozen fruits, frozen berries, and frozen vegetables within meaning of §7(c) of the Transportation Act of 1958)." —Colonial Refrigerated Transp., Inc., Extension, 86 M.C.C. 796 (798-9).

Since proposed commodity description "chilled citrus juices" is ambiguous, "not canned and not frozen" is substituted for "chilled."—Kramer Extension, 94 M.C.C. 690 (694)*.

Proposed service is clearly required. However, authority to transport "other dairy products as described in subdivision B, appendix I" of the Descriptions case would not suffice, since applicant proposed to transport various products not embraced therein; moreover, use of "other" in that all-inclusive phrase implies that the additional commodities are also wihin the term "dairy products." Authority granted for transportation of dairy products as described in sectin B of appendix I, with specific exceptions and additions.—McGiffen, 91 M.C.C. 555 (557).

While authority to transport lumber includes transportation of veneer, since no evidence was adduced concerning need for transportation of veneer to the destination territory, it is excluded from authority granted.—Hicklin Extension, 94 M.C.C. 434 (438).

The few commodities produced by the sole shipper supporting application for authority to transport agricultural machinery, etc., as listed in section 1(B) and 1(C) of appendix XII to the Descriptions case, do not warrant so broad a grant, and there is no evidence that it is continually developing new products. Moreover, certain items produced by that shipper are not included in those lists, and authority drawn in terms of the Descriptions Case would not permit their transportation. Commodity description in authority granted is therefore limited to shipper's actual transportation requirements as established of record. —International Transport, Inc., Extension, 95 M.C.C. 360 (363)*.

Although two new plants whose traffic is controlled by supporting shipper are presently producing only steel reinforcing rods and dowel assemblies, it has definite plans to manufacture numerous other items; authority is therefore granted for transportation of iron and steel articles listed in appendix V of the Descriptions case (61 MCC 209), as requested.—Steel Transp. Co., Inc., Extension, 92 M.C.C. 387 (394, 398).

Grant of authority to transport self-propelled road rollers and streetsweepers is warranted when neither applicant's authority to transport tractors nor its heavy hauling authority enable it to meet shippers' needs. Supporting shippers require service of an authorized carrier for transportation of considered commodities which are specifically identifiable self-propelled single purpose vehicles distinct from tractors, a workhorse type of vehicle used for pulling or propelling others, and distinct from heavy-hauler commodities which, by their inherent nature, require the special handling implicit in crane loading or unloading.—Daily Exp., Inc.-Investigation of Operations, 98 M.C.C. 661(672,674).

Because recent technological advances in the refractory industry have resulted in new products and basic changes in the physiochemical properties of other items, thus rais-

ing some doubt as to whether such commodities are encompassed within authority to transport "clay products," applicants seek to broaden their commodity authorities in order to transport refractory materials and products to the same extent territorially as their present "clay products" authority. Bulk of the new products still possess same physical characteristics as refractories made primarily of clay; the change in their composition was and continues to be evolutional, and unknown to the carriers, so that applicants have unwittingly transported substantial quantities thereof under their "clay products" authorities for a considerable time; and under the circumstances, failure to grant the broader authority can only result in withholding needed service from supporting shippers. Therefore, applicants' present authorities should be appropriately broadened; authority to transport "refractories" granted.—Pennsylvania-Ohio Exp., Inc., Extension, 96 M.C.C. 449 (453-6).

Petitioner's authority for "wrapping paper" was granted on specific showing of need for transportation of a commodity then called "wrapping paper" by all concerned; subsequently, the same commodity (used by consignee as a filler in laminated plastic board) was reclassified by supporting shipper's successor as "wood pulpboard" and marketed as "Kraft saturating." Original shipper's use of description "wrapping paper" was reasonable, since the commodity has all visible as well as transportation characteristics thereof, and it is not apparent that anyone could have been deceived or prejudiced thereby. However, such a broad description authorized a greater service than need was shown for; manufacturer's arbitrary classification of the commodity as "pulpboard" is a misnomer for transportation purposes; the most apt description is "Kraft paper, saturating"; certificate modified accordingly.—Herndon Extension, 89 M.C.C. 278 (279-80).

Furniture shipped in cartons is considered "crated", as the term is used in the commission's commodity descriptions.—Johnson Bros. Truckers, Inc., Extension, 96 M.C.C. 500 (502, note)*.

The term "new furniture", alone, without modification embraces both crated and uncrated furniture.—Id., p. 505.

Traditionally, carriers of liquid products have used tank vehicles to serve liquid bulk shippers, while those handling dry bulk commodities have used a variety of vehicles, including the closed "hopper-type"; thus, under its authority to transport "fertilizer, in bulk, in hopper-type vehicles," applicant has carried only dry fertilizer shipments. However, its certificate is unrestricted as to the form, whether liquid or dry, in which shipments may be transported; and in light of recent development of new tank-like vehicles specially adapted to hauling bulk commodities in either liquid or dry form, and that are so functionally similar to "hopper-type" vehicles that they could be so classified, applicant's authority allows it to transport bulk liquid fertilizer, provided such new vehicles are utilized. But since need is shown only for proposed transportation of dry fertilizer, removal of the equipment in applicant's certificate is not justified. Extension authority to transport dry bulk fertilizer, unrestricted as to type of vehicles, granted.—Truck Transport, Inc., Extension, 95 M.C.C. 597 (599-600).

There is no reason to describe authority granted for transportation of ammonium nitrate fertilizer in terms of shipment "in bulk, in bags, and in packages," since the commission's explosives regulations prescribe the containers and loadings permitted, and new containers of other types may be developed and used in future.—Monkem Co., Inc., Extension, 94 M.C.C. 749 (758).

Though application seeks authority for liquid chemicals as defined in the Maxwell case, shipper fears that such a grant might preclude transportation of chemicals intended for use as end products; since commodities involved embrace a wide range of liquid chemicals, authority is granted for "liquid chemicals, in bulk, in tank vehicles," in accordance with revised definition promulgated in 88 MCC 127, which eliminated the intended use test.—Consolidated Freightways Corp. of Del. Extension, 88 M.C.C. 603 (605).

Determination of whether or not liquid yeast is a liquid chemical within applicant's existing authority is not necessary when it has been established that supporting shipper has a definite need for transportation of liquid yeast from St. Louis to Galesburg, Ill., and there is

no evidence on record of the ability or willingness of any protestant to render such service. Shipper should not be denied availability of a carrier with unquestionable authority to provide the service merely because an unresolved issue is raised as to scope of applicant's present commodity authority; and no burden of proof as to nature of liquid yeast has been imposed on protestants. Therefore, a finding that the public convenience and necessity require the proposed operation to Galesburg, without further consideration of protestants' operating authority can be made. Granted accordingly.—Slay Transp. Co., Inc., Extension, 95 M.C.C. 659 (661).

Proposed description "mineral mixtures" is ambiguous and does not accurately describe supporting shipper's products, which are mixtures of minerals generally known in the feed industry as "mineral feeds" and used as feeds for livestock and poultry. As applicant is already authorized to transport manufactured animal and poultry feeds, authority for animal and poultry mineral feed mixtures would permit it to carry all of shipper's products involved. However, issuance of certificate is conditioned on favorable resolution of issue of applicant's fitness in another proceeding.—Monkem Co., Inc., Extension, 92 M.C.C. 235 (236).

Grant of authority for the broad commodity description recommended, i.e., fish meal and ingredients used in manufacture of animal and poultry feeds, is not warranted when it would permit transportation of commodities (such as chemicals) for which no need is shown; definite need is shown only for movement of fish, peanut, cottonseed, and hydrolyzed feather meals, meat and bone scraps, tankage, and dried blood. Since all supporting shippers ship fish meal, authority granted therefor is based on their collective needs; more limited territorial authority granted for the other commodities is restricted against tank transportation in liquid form; and cottonseed cake is excepted from authority to transport cottonseed meals as a precautionary measure in case, on a more comprehensive record, the latter should be held to include the former. Issuance of certificate withheld pending determination of applicant's fitness in another proceeding.—Monkem Co., Inc., Extension, 92 M.C.C. 160 (165).

Although supporting shipper desires complete service for its extensive line of machinery and power equipment, as the record contains no specific mention of road rollers and compactors authority for those articles is denied. However, while generators are not separately referred to, they frequently move in combination with engines with which they are used to produce electricity, and their separate inclusion in authority granted will ensure shipper adequate coverage where these components are to be assembled at point of delivery.—Ligon Specialized Hauler, Inc., Extension, 91 M.C.C. 356 (360).

"Intended use" commodity descriptions have not been abandoned, and will continue to be used where appropriate; despite difficulties posed by such descriptions, they provide flexibility to meet the needs of the consignee, and are in fact consignee-oriented, which in certain instances offers more advantages from point of view of public interest than attempted broad generic descriptions or enumerations of a large number of individual items.—I. L. & C. Corp. Modification of "Grandfather" Authority, 89 M.C.C. 161 (164).

While under some circumstances an application under §207 may be a proper vehicle for seeking modification of a carrier's operating authority, applicants seek in effect to change their commodity descriptions from intended-use and generic descriptions to descriptions which are in part mere naming of specific commodities, on basis of past operations claimed to have been conducted under color of right; however, abstracts of some 17,000 shipments showing merely the name of the commodity, the consignor and consignee, and the date of shipment do not meet their burden of establishing by clear, concise, and unequivocal evidence that the relief sought is warranted.—C & H Transp. Co., Inc., Clarification of Authority, 88 M.C.C. 87 (95).

Moreover, applicants seek not only to have their commodity descriptions reworded to embrace additional commodities not now authorized, but ask that this be done without reference to territorial scope of each specific commodity authority sought to be so modified; in absence of substantial evidence that existing authorized services are in any wise

inadequate, applicants' past participation in the available traffic affords no basis for continuance of any presently unauthorized service. Denied.—Id., p. 96.

Conversion to common-carrier operation: [Vols. 17-19].—Application under §207 for conversion of a carrier's contract-carrier permit to common-carrier authority may be approved only upon a showing that public convenience and necessity require proposed operations. However, applicant cannot rely solely on past operations as proof of convenience and neccessity, as would be the case had it filed a timely application under §212(c), but must also present shipper testimony showing need for proposed common-carrier operations. In support of the application, applicant should submit a statement of its past lawful operations so its claim of use of the authority to be converted can be verified, and it should offer to surrender for cancellation authority on which past operations are not based; but evidence of past operations alone normally will not be sufficient because, since the 1957 amendment to the act, such past operations necessarily will have been restricted to service for a limited number of persons.—Connell Transport Co., Inc., 95 M.C.C. 312 (317, 319).

To convert contract carrier authority obtained for service to a few shippers without a clear showing of public need for applicant's service as a common carrier would grant applicant an undeserved benefit, to the detriment of existing carriers. It also would mean that a carrier which had obtained shipper support for its permit application by promises of specialized services, or assignment of vehicles to shipper's exclusive use, would be rewarded for having abandoned the elements of specialization that orginally made its service attractive and probably contributed significantly to authorization thereof. Accordingly, shipper testimony which demonstrates a need for applicant's services as a common carrier rather than a contract carrier should be produced; and since applicant has failed to present such evidence, relying solely on past operations (much of which were unauthorized), its conversion application must be denied.—Id., p. 319.

Although applicant seeks common-carrier authority only slightly broader territorially than its existing contract-carrier authority, it is already meeting transportation needs of supporting shipper as a contract carrier, except for an infrequent shipment from its shook mill or red cedar plants, and reasonably adequate common carrier service is available from numerous protestants; applicant's two remaining contract shippers also have ample service available; denied.—Goodman Motor Transport Co., Extension, 91 M.C.C. 206 (210).

Applicants have made the requisite showing of convenience and necessity to justify issuance of certificates for operations identical in scope with those now performed under their permits as contract carriers of cement or cement and mortar; each has performed considerable service for its supporting shippers, each is willing to provide common-carrier service, and shippers are willing to use it; there is no showing of any other service able to meet those shippers' needs. However, issuance of certificates is withheld pending (1) receipt of written requests for cancellation of certain duplicative authority in applicants' permits, and (2) issuance of certificates in conversion proceedings of two affiliates who serve certain of same shippers as applicants. —Schwerman Trucking Co. of N.Y., Inc., Extension, 88 M.C.C. 661 (664, 665).

In deciding conversion applications, the criteria that must be considered include the nature and extent of past operations, whether the proposed operations would be those of a common carrier, and whether the public support is sufficient to sustain applicant's burden of proof; however, where the proposed conversion is directly related to a §5 transaction, the commission favors a more liberal approach, and conversion has been permitted without the full measure of proof ordinarily required. Although vendee seeking to purchase common-carrier rights has served three shippers as a contract carrier, only one voiced vague support of its conversion application, and in describing its service needs stated that its operations are highly seasonal and that it requires timed deliveries and short-notice pickups; thus its requirements related more to service characteristic of contract carriers. Moreover, the need expressed does not relate to traffic which vendee has handled under its

contract-carrier rights. Evidence adduced falls far short of justifying proposed conversion even under a relaxed measure of proof; denied.—Bowser and Campbell—Purchase—Motorway Corp., 97 M.C.C. 192 (202).

Issuance of certificate to vendee for dormant contract carrier rights it seeks to purchase is not warranted when no inadequacy of existing services is shown and the only supporting shipper, which vendor formerly served as contract carrier, has transacted its business satisfactorily without once using vendor's service during the 13 months preceding hearing. Denied.—H. C. Gabler, Inc.—Purchase—Logan, 90 M.C.C. 436 (440).

Criteria to be considered in deciding conversion application, which is directly related to proposed §5 transaction, are the nature and extent of past operations to be converted, whether proposed operations would be common carriage, and whether the public support is sufficient to sustain applicant's burden of proof. Since vendee's proposed transportation of petroleum products from shipper's terminal under the contract-carrier rights it seeks to purchase is not unique, and it has been providing a similar service as a common carrier in the same area, proposed operations would be common carriage. Therefore, as vendor's operations under the permit have been continuous, and evidence of public support is sufficient to sustain applicant's burden of proof, conversion of the acquired rights from contract- to common-carrier, upon consummation of the purchase, is approved.—Ruan Transport Corp.—Purchase—Hillside Transit Co., Inc., 90 M.C.C. 523 (525, 526).

Delay: [Vols. 11, 17-19].—In determining whether existing joint-line interchange services are inadequate, delays caused by originating carrier and those concomitant with interchange must be considered. Protestants' joint-line service has frequently resulted in undue delays causing consignees to lose sales or to borrow or purchase supplies and appliances elsewhere; authority granted, except as to one intermediate point.—Brown Transport Corp. Extension, 89 M.C.C. 354 (356).

Denied: [Vols. 11, 18].—Although in seeking a new route between Broken Bow, Okla., and Little Rock, Ark., applicant proposes to improve its present service between those points and Dallas, Tex., on one hand, and southeastern Oklahoma, including Eagletown, on the other, an inextricable part of its plan is institution of a new overnight service between Hot Springs, Ark., and Dallas. But though Hot Springs shippers profess desire for it, they have demonstrated no need for consistent overnight service when their rush shipments are infrequent and most do not have daily traffic movements; it appears unlikely that applicant could generate sufficient traffic at Hot Springs to justify an overnight service, and any it obtained would be at expense of carriers now attempting to serve that point; those carriers depend in part on Texas traffic to support their entire operations at Hot Springs, and loss of any of it would jeopardize continuance of their service, particularly on traffic that applicant does not seek to handle. As no material inadequacy of existing service is shown, no new competitive operation should be authorized.—Gordons Transports, Inc., Extension, 92 M.C.C. 426 (431-2).

A grant permitting intermediate-point service only at Eagletown, or limiting applicant to movement of traffic between southeastern Oklahoma, including Eagletown, and Dallas, Little Rock, and Memphis, restricted against transportation of through traffic between Little Rock or points beyond and Dallas or points beyond, would not enable applicant to improve its present operations or to provide superior service at the southeastern Oklahoma points; such operation would be economically unsound. Therefore, as the evidence does not otherwise justify a grant permitting through operations between Little Rock and Dallas, application must be denied in entirety.—Id., p. 432.

In view of absence of evidence that public convenience and necessity require proposed transportation of express shipments, since applicant sought consolidation with, and intended to rely for public support entirely on evidence in, another proceeding in which similar authority in the same large area is sought, application is denied.—Railway Exp. Agency, Inc., Extension, 89 M.C.C. 537 (539-40).

Since the only part of proposed service which requires authority from commission is supported only by air freight forwarders who may not use it because they lack permits as

surface forwarders under Part IV, application is denied.Special Delivery, Inc., Extension, 88 M.C.C. 275 (277).

Desire for connecting link: [Vols. 12, 19].—The close-the-gap principle recognized by the commission in granting authority to applicant which would supply a missing link in Trailways System's service between western New York and Baltimore-Washington was given approval of the Supreme Court in 327 US 515 (p. 532, Footnote 20), and the commission was not estopped, in the present proceeding on an entirely new record based on additional facts and changed conditions, by its refusal to invoke that principal in an earlier proceeding wherein the same applicant sought similar authority.—Edwards Motor Transit Co. v. United States, 201 F. Supp. 918 (923, 925)*.

Desire for particular carrier: [Vols. 11, 12, 16-19].—That some shippers supporting plaintiff's application might be more conveniently served by having a locally based carrier, and that they have a degree of confidence in plaintiff's operator, does not overcome the substantial evidence that existing service is adequate. A showing of convenience alone is not enough.—Colorado-Arizona-California Exp., Inc. v. United States, 224 F. Supp. 894 (900)*.

That a particular shipper desires applicant's proposed service is not as weighty a factor in a §207(a) proceeding as it would be in a §209(b) proceeding for a contract-carrier permit.—Robbins v. United States, 204 F. Supp. 78 (82)*.

Supporting shippers, some of whom applicant has been serving satisfactorily for years, consider single-line service essential because of perishable nature of their products, and have had difficulty in obtaining service from authorized carriers owing to low-volume character of the traffic; one shipper was unable to continue doing business beyond immediate vicinity of Philadelphia after applicant discontinued service on advice of counsel. Shippers unanimously agree that applicant manifests intention to provide the type of service required, regardless of volume or length of haul; their confidence in his service is demonstrated by their assertions that its continuance is vital to successful distribution of their products; considering protestants' general lack of interest in the traffic, grant of authority to extent indicated is justified.—Hughes, 89 M.C.C. 471 (480-4)*.

While supporting shipper asks that applicant be granted broad territorial authority for a variety of commodities, to provide it with flexible service it desires for distribution of its products and cannot obtain from existing carriers, and desires of supporting shippers are an important consideration in application proceedings, determination of whether public convenience and necessity require an additional service cannot be dictated solely by one shipper's desire to follow a particular plan of product distribution; such determination requires consideration of whether shipper's distribution plan is a reasonable or necessary one, which in turn must be determined, at least in part, in light of existing transportation services.—Kroblin Refrigerated Xpress, Inc., Extension, 89 M.C.C. 255 (262-3)*; similarly, shipper preference for service of applicant because of a natural desire to expand its markets is not sufficient to show a need for entire proposed service, particularly since some protestants hold pertinent authority never tried by the shipper.—Dahlen Transport, Inc., Extension, 89 M.C.C. 131 (136).

See also Salem Nav. Co. case, under *Following the traffic*, below.

Shipper supports the application primarily because of a preference for applicant's service, rather than because of real need for additional motor carrier service. While shipper desires to use its own trailers for considered traffic, adequate carrier service is available, serving entire area involved; and protestants authorized to handle the traffic indicate a willingness to use shipper owned trailers; denied.—B. & C. Transp., Inc., Extension, 94 M.C.C. 326 (327-9).

Although 5 shippers selectively support different ones of 3 applicants seeking substantially the same authority, in judging the separate proposals against the standard of public convenience and necessity the commission is not limited to consideration of such preferences by shippers.—Colorado-Arizona-California Exp., Inc., 92 M.C.C. 89 (97)*.

While shipper emphasizes element of service, evidence indicates that it is primarily interested in applicant's lower rates; shipper's preference for applicant's service in this regard cannot form basis for grant of authority, especially since it has not been shown that

protestants' rates are so high as to constitute an embargo. Adequate service is available from existing carriers; denied.—Webb's Transfer, Inc., Extension, 91 M.C.C. 297 (300).

Mere desire to have service of a particular carrier available, without a showing that it would meet a need for service not presently available from existing carriers, is insufficient to support the statutory finding that public convenience and necessity require the proposed operation.—H. C. Gabler, Inc.—Purchase—Logan, 90 M.C.C. 436 (440).

Shipper's desire for applicant's proposed service in order to have available a motor carrier which operates directly from all Louisiana origin points to its plant at Springdale, Ark., is insufficient basis for a grant, particularly where available rail and motor service has not been shown to be inadequate.—Colonial Refrigerated Transp., Inc., 91 M.C.C. 369 (371); nor does shipper's preference for applicant, to which it already tenders intrastate or exempt traffic, justify a grant of operating authority in absence of a showing that the services of existing carriers somehow are inadequate to meet shipper's transportation requirements.—W. J. Dillner Transfer Co. Extension, 91 M.C.C. 667 (669).

Desire of a supporting shipper to engage services of a particular operator, or of an applicant to engage in a particular transportation service, is insufficient, alone, to warrant granting the authority sought.—McKenzie Tank Lines, Inc., Extension, 88 M.C.C. 250 (252); and shippers' desire for services of locally domiciled carriers does not warrant grant of authority sought when they have not used service of existing carriers and therefore cannot determine that it is inadequate for their transportation needs.—Hearin Tank Lines, Inc., Extension, 88 M.C.C. 189 (197)*.

Distance to available carriers: [Vols. 16, 18, 19].—Until protestants' services have been utilized, they cannot be found inadequate simply because carriers' terminals are too remote from shippers' location; while protestants' ability to perform satisfactorily might be questioned because of location, that uncertainty should not be translated into a current need for additional service. The record is not convincing that protestants' facilities are inordinately distant, or that shippers necessarily require a locally-domiciled carrier. While applicant's proposed service might be more prompt than that of protestants, one protestant can place equipment at considered origin within 2 hours after notice; and others, while less proximate, have equipment daily in that area. Denied.—Sullivan Const. & Riggin Co. Extension, 94 M.C.C. 296 (298-9).

Protestants cannot provide the locally domiciled charter service needed by supporting travel groups; their closest equipment availability points are 45 miles or more from the economically depressed mining area involved, and more than nominal deadhead mileage charges discourage charter travel by its inhabitants. Moreover, one protestant has had little success with its charter service from that area, and the other is not at present engaged in operations, whereas applicants are experienced intrastate charter operators and maintain adequate equipment and facilities within a few miles of involved origins. Granted in part.—Lanich Bus Lines—Charter Service, 92 M.C.C. 156 (158).

Although protestant motor carrier indicates willingness to spot equipment for supporting lumber shippers located in Telfair County, Ga., its ability to do so is questionable; its terminal is 300 miles from considered origin points and, in view of its extensive operations, there is no assurance it will have equipment in the area when needed. Applicant, on the other hand, has a terminal in the immediate vicinity and has rendered eminently satisfactory service of exact nature required; granted from Telfair County.—Dennis, 92 M.C.C. 135 (139); but no need is shown for transportation of lumber by applicant from La Grange, Ga., area when its headquarters (though 150 miles closer than protestant's) are almost 150 miles from the base area, thereby reducing materially the significance of the comparative proximity factor, and supporting shipper has regularly used protestant's service and found them generally satisfactory. Authority denied from La Grange area.—Id., p. 139.

Economy and efficiency: [Vols. 12, 18, 19]. —Applicant having failed to establish public need for proposed operation over two shorter

alternate routes, applications must be denied unless it can show a shipper need for the improved service. Applicant has been providing direct, expeditious service by use of a deviation route substantially the same as one route sought, but the deviation route has been disapproved; thus denial of the applications would force carrier to use other routes to serve its shippers which are slower, more costly to operate, and less efficient generally; and inevitably the price of such inefficiency will be paid by the shippers in poorer service. Consideration of competing carriers does not justify decline in the transportation which probably would result from denying the applications; rather, shipper benefits from continuance of applicant's past service clearly outweigh competitive disadvantages to existing carriers. However, to accomplish the desired result, a grant of only one of the routes sought is shown to be needed.—Strickland Motor Freight Lines Extension, 96 M.C.C. 732 (739-41).

Although public convenience and necessity may be found in operating economies or efficiency both in a proceeding involving elimination of a gateway and in one involving relocation of an interchange point, the two types of proceeding are not the same: the former arises out of an applicant's desire to do directly what it may presently do only indirectly by tacking separate grants of authority, while the latter involves serving one point in lieu of one or more others, not in collection or delivery of traffic at the relocated point, but only as a point where traffic that will be handled anyway may be interlined more conveniently and expeditiously. Consequently, the proof required in addition to a showing of economy and efficiency is less in the latter case than in the former.—Blue Ridge Transfer Co., Inc., Extension, 92 M.C.C. 463 (465).

Primary purpose of Railway Exp. Agency's extension application is to make substantial operating economies, especially in service to intermediate points, while continuing the distinguishing characteristics of express service. Maintenance of express expedition in considered area has become increasingly expensive under current methods of operation, and institution of proposed motor service can reduce those costs by over a quarter of a million dollars annually, without significant change in character or quality of express service now rendered; any change resulting from proposed operation can only be in direction of increased efficiency. Granted, subject to key-point and express-auxiliary restrictions.—Railway Exp. Agency, Inc., Extension, 91 M.C.C. 473 (479-80).

Existing carriers: [Vols. 12, 18, 19].—In its consideration of an application for a certificate, the commission should consider the public interest in maintaining the health and stability of existing carriers; however, upon the basis of appropriate findings of public convenience and necessity, it may authorize issuance of the authority sought even though existing carriers might arrange to furnish successfully the proposed service. See 368 U.S. 370, 326, U.S. 60, and 355 U.S. 83. Accordingly, lower court's decision which vacated the commission's action in application proceeding and which permanently enjoined it from issuing a certificate to applicant, unless and until appellees (protestants in commission proceeding) are first afforded reasonable opportunity to furnish the considered service, is reversed and remanded for further proceedings consistent with the court's opinion.—United States v. Dixie Highway Exp., Inc., 389 U.S. 409 (411-12)*.

Where deviations from an otherwise completely adequate service (which has economic need for the traffic) consist solely of illegal and discriminatory refusal to accept or deliver traffic from or to particular carriers or shippers, the powers of the commission under §§204(c), 212(a), and 222 bear heavily on the propriety of §207 relief. In such cases choice of the certification remedy may not be automatic: it must be rational and based upon conscious choice that in the circumstances the public interest in "adequate, economical, and efficient service" outbalances whatever public interest there is in protecting existing carriers' revenues in order to "foster sound economic conditions in transportation and among the several carriers."—Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (166-7)*.

It is by no means firmly established that the commission must make positive findings that service provided by existing carriers is inade-

quate before new authority may be granted. [See 75 F. Supp. 915 and 209 F. Supp. 10.] Though 204 F. Supp. 78 appears to hold that inadequacy is a prerequisite to a finding of public convenience and necessity, such a requirement does not mean that the holder of a certificate is entitled to immunity from competition in any and all circumstances; introduction of a competitive service may be in public interest where it will secure benefits of an improved service without being unduly prejudicial to the existing service. In the case under review, the commission's findings were more than sufficient to support its conclusions that the requested authorizations would greatly improve service without undue harm to plaintiffs; coupled with findings that plaintiffs were inadequately equipped to meet the public need, this would preclude the relief sought; the commission's orders sustained.—Campus Travel, Inc. v. United States, 224 F. Supp. 146 (149)*.

In challenging the commission's finding that plaintiffs' service fails to meet the need shown for express service, plaintiffs concede that their certificates do not permit them to transport commodities of unusual value, and do not challenge the finding that they have to date shown no willingness to perform express service of any kind. Their argument that they should be given reasonable opportunity to meet the existing need is answered by statement in 326 US 236 that the commission's doubt that the public need will be adequately served by existing carriers is entitled to the same respect as its expert judgment on other complicated transportation problems. The commission's order granting authority sought by Railway Exp. Agency, sustained.—Auclair Transp., Inc. v. United States, 221 F. Supp. 328 (333)*.

Service offered the public by a protesting motor carrier should be considered as that service is provided at time of filing of the new application; not having moved for years, protestant Greyhound should not be permitted to wait until filing of an application by a competing carrier to increase or improve its service. Testimony of public witnesses indicated need for a through, daylight, and round-trip bus operation between involved termini, but Greyhound made no effort to provide that type of scheduled service until after applicant had completed its case in chief; commission's order granting extension authority sought, sustained.—Edwards Motor Transit Co. v. United States, 201 F. Supp. 918 (922)*.

In application proceedings the commission must determine whether public convenience and necessity require the proposed service; and an important factor for consideration is whether the authority sought is already covered by certificates of protesting carriers. The commission's position, that existing carriers should be afforded opportunity to serve a shipper before a new carrier is authorized to enter the territory, of necessity requires it to review scope of authority of each carrier who protests the application. Thus, necessarily the scope of a protestant's authority is subject to interpretation in such circumstances.—Worster Motor Lines, Inc. v. United States, 226 F. Supp. 603 (607-8)*.

The commission's finding of prospective need on part of the shipping public for utilization of C & S containers for transportation of bulk commodities is not inconsistent with its finding that tank truck carriers do not presently utilize equipment required for transportation of such containers—if tank truck carriers can and will meet that prospective need. On the record available, it cannot be found that existing tank carriers are either unwilling or unable to meet that need; the commission's statement that those carriers have expressed a readiness, and have the right, to do so is sufficient. The commission's denial of plaintiffs' extension applications, sustained.—Roadway Exp., Inc. v. United States, 213 F. Supp. 868 (876-7)*.

Adequacy of services and abilities of existing carriers is only one phase of the commission's problem in determining a §207 application; subject to restrictions of §210 as to dual operation, §207 declares that a certificate shall be issued to any qualified applicant if it is found that the proposed service "is or will be required by the present or future public convenience and necessity"; such a finding entails a prophecy so far as future requirements are concerned, and to require the commission to deny an application unless it found actual inability on part of existing carriers to acquire facilities necessary for future transportation

needs would impose a limitation on its power which is not found in the act.—Aero-Mayflower Transit Co. v. United States, 208 F. Supp. 303 (304-5)*.

The commission's findings that supporting shippers' needs can all be met by protesting carriers and that they have not adequately utilized such existing services are borne out by substantial evidence; and there is nothing in the record to cast doubt on its finding that all protestants are willing and able to provide service for those shippers. Failure of some protestants to file replies to plaintiff's exceptions to examiner's report or to plaintiff's petitions for rehearing did not indicate lack of interest in serving supporting shippers; burden is on plaintiff to show lack of adequate service, and just as that burden cannot be overcome simply by showing that all possible carriers have not testified, it cannot be overcome by inferences drawn from a fact susceptible of other inferences.—Colorado-Arizona-California Exp., Inc. v. United States, 224 F. Supp. 894 (897, 899)*.

The commission's policy that existing carriers should be afforded opportunity to transport all traffic they can handle adequately, efficiently, and economically is consistent with the national transportation policy. The record amply demonstrates that protestants collctively serving most of the destinations specified by supporting shipper are able to obtain any additional equipment necessary to supplement the large fleets they have on hand, and each expressed willingness and desire to participate in the contemplated traffic. Both intrastate protestants which would haul the traffic from Greeley, Colo., to Denver and their interstate connections believe they could perform satisfactorily, and since that service has not been tried there is no substantial basis for finding it inadequate or unsatisfactory. Interline service by two or even three carriers cannot be deemed inadequate per se, particularly where transportation is sought to very distant points.—Curtis, Inc. v. United States, 225 F. Supp. 894 (899, 900, 901)*.

And failure on part of one protestant to except to the examiner's report and recommended order cannot be taken to indicate a change of heart or lack of interest inproviding service to the supporting shipper. This cannot be a standard of judgment, for it would not only be an inference drawn from a fact susceptible of other inferences, but would place a burden of practically interminable litigation on every existing carrier which decided to protest an application.—Id., p. 899.

When numerous protestants have the requisite authority and equipment to provide a reasonably adequate transportation service for supporting shippers, they are entitled to transport the traffic involved without the added competition of applicant's proposed service. Denied.—Samack, Inc., 94 M.C.C. 161 (165); since protestant recently obtained authority to transport petroleum products from Knoxville, Tenn., to western North Carolina, at request of shipper supporting instant application for similar authority, authorization of another service from that point is unwarranted in absence of a showing of inadequacy of existing facilities.—Petroleum Transp., Inc., Extension, 94 M.C.C. 777 (780-1).

Supporting shipper although aware of the protestants' services has used interline service of applicant and another carrier with satisfaction and apparently felt no need to try other available services; its primary interest is applicant's lower rates, but it has made no attempt to negotiate a lower rate nor has it sought relief by complaint to the commission. Protestants are moving substantial quantities of similar commodities for other shippers. Under such circumstances a shipper cannot successfully base its support of an additional carrier on the proposition that the existing rates are too high to move the traffic. Absent a showing that the existing rates constitute an embargo, failure to establish new rates does not reflect adversely against existing carriers, Denied.—Trans-Cold Exp., Inc., Extension, 98 M.C.C. 10 (12-13).

Supporting shipper has never tendered protestants any shipments of meats or dairy products which involved direct deliveries from its Lincoln, Nebraska plants to its retail outlets, or apprised any carrier other than applicant of its desire for such service; and, though shipper describes an anticipated need for transportation of a large volume of traffic involving multiple deliveries on single loads in order to put its new distribution system into effect, there is no showing that available serv-

ices have been tested; three protestants hold authority to originate traffic at Lincoln and, collectively or individually, can participate with fourth protestant in joint-line service to substantially all points, and these services have not been shown to be inadequate. Denied, except to two States.—Nebraska Eastern Exp., Inc., Extension, 94 M.C.C. 799 (801,803).

Applicant failed to show that protestants' services have been found unsatisfactory by supporting shippers. Record is vague as to points and areas of service required by shippers; each shipper, moreover, utilizes existing services. Protestants, on the other hand, clearly offer a broad range of services, both for truckload and less-than truckload traffic, and could satisfy shippers' needs for consolidating less-than-truckload shipments into truckloads by providing multiple pickups and deliveries. Denied.—Fogleman Extension, 94 M.C.C. 671 (675).

Supporting shippers and receivers have not demonstrated any interest in obtaining proposed coordinated rail-motor service in conjunction with existing motor carriers, and supporting railroads have no objection to participating in coordinated service with such carriers. Inability of each protestant to handle every conceivable item within the generic commodity description applied for, or to serve every point in territory sought, is offset by total absence of evidence of any difficulty of supporting witnesses in obtaining service within scope of the applications. Denied.—Osborne Truck Line, Inc., Extension, 94 M.C.C. 414 (419-20).

There is no adequate showing that existing carrier service could not satisfactorily handle considered traffic. Protestants' can provide direct service to the six-State destination area and, although shipper requires multiple deliveries, two of protestants serve broad areas which will enable them to provide this service with substantial facility. Further, shipper's complaints with respect to protestants' services are general and vague, falling short of showing any substantial deficiencies therein. Abrupt decline in shipper's business in the destination area cannot, on this record, be held attributable to any demonstrated material inadequacies in available for-hire motor service; applicants have failed to establish need for proposed operations.—Alterman Transport Lines, In., Extension, 94 M.C.C. 187 (193-4).

There is a potential flow of traffic to each destination State sought, and furtherance of supporting shipper's business greatly depends on availability of a flexible carrier service; however, while services available at time of hearing may not have been responsive to shipper's reasonable transportation requirements, protestant (by tacking authority granted since that time with that previously held) currently holds requisite authority to transport considered traffic to points throughout each destination State. In view thereof, and since such service has not been tested, the few complaints against protestant at the hearing are not serious enough to warrant grant of authority sought; there is no allegation of injury to shipper, and its interest apparently stems from a desire to have single-line service available.—Watkins Motor Lines, Inc., Extension, 94 M.C.C. 232 (233, 236).

The commission has a continuing duty to protect the public against institution of a new service which will operate to detriment of the public in general and authorized carriers in particular. Protestant short-line railroad, under its motor-carrier authority, has been providing adequate express service for Railway Exp. Agency between Fonda and Gloversville, N.Y., and revenues therefrom have been a substantial percentage of its net income and are important and vital to its ability to continue serving communities which have no other rail service. Grant of authority to REA to serve Gloversville as a motor carrier of express would jeopardize protestant's existence in an area largely dependent on its service and would not be in public interest; denied as to Gloversville.—Railway Exp. Agency, Inc., Extension, 92 M.C.C. 227 (231).

Protestant heavy hauler operates a wide array of equipment suitable for movement of considered silos and can serve all destinations involved except Canadian border ports of entry in Minnesota, as to which it is not shown that any service will actually be required. While protestant may also be unable to handle certain hypothetical movements involving

delivery in two or more States, there is no showing of specific need for such movements. No need appears for proposed service in absence of more specific showing respecting volume and particular points to or from which service is required, or why present carriers cannot provide such service; denied.—International Transport, Inc., Extension, 91 M.C.C. 717 (719, 720).

Although two protestants of instant application did not oppose application of another carrier, granted only 13 days before denial of instant application, there is no indication that they abstained from that proceeding for improper motives; instant record is persuasive that these and other opposing carriers can adequately meet supporting shippers' requirements; denial affirmed.—Convoy Co. Extension, 91 M.C.C. 461 (465)*.

Authority denied applicant for towage of wrecked or disabled motor-carrier vehicles when protestants authorized to serve the territory are well able to supply the services proposed, need more business to keep their wrecker fleets busy, and can obtain additional equipment if needed. As no deficiencies in their services are alleged, protestants should be given ooportunity to serve supporting shippers or carriers.—Young, 91 M.C.C. 445 (453).

Although need is shown for transportation of repossessed automobiles, particularly to western States, existing carriers' services are not shown to be inadequate; at least two conduct extensive operations in movement of type of vehicles involved, and many are conducted in States where the bulk of applicant's unauthorized operations has centered; applicant's favorable rates and assumption of responsibility for delivery before "conversion" dates have enabled him to obtain traffic from a substantial number of shippers, preventing some of them from testing existing services and probably impeding development of as highly specialized a service by opposing carriers. Protestants have adequate equipment and facilities, and with benefit of the traffic involved, which all desire and of which they have been deprived by applicant's unlawful competition, should be able to furnish the type of service shown to be needed; existing carriers, particularly those already engaged in similar operations, are entitled to opportunity to transport the traffic without applicant's competition. Denied.—Nash—Investigation of Operations, 89 M.C.C. 493 (469-70).

Authority sought for transportation of repossessed automobiles between points in Florida and some 28 States, denied when protestant holding authority for secondary-movement driveaway service between all points involved has 150 drivers stationed at various terminals around the country, which in turn are linked by a teletype network; with such wide dispersion of facilities and personnel, it is not unlikely that protestant could better serve shipper's need for fast delivery than applicant who must normally start from Jacksonville; protestant should be afforded reasonable opportunity to meet shipper's requirements before a new competing service is authorized.—Morris, 89 M.C.C. 386 (388).

Where opposing motor carriers are authorized, and have amply demonstrated their willingness, to handle the involved traffic, they should be afforded opportunity to satisfy shipper's reasonable transportation needs before a new competitive service is authorized.—Hagen Extension, 92 M.C.C. 479 (486); evidence fails to establish that protestant's service is inadequate. Denied.—Blythe Extension, 89 M.C.C. 195 (198); supporting shippers have only a small volume of traffic moving between a limited number of points involved, and protestant should be afforded opportunity to demonstrate the quality and adequacy of its service. Denied.—Air Cargo Terminals, Inc., Extension, 88 M.C.C. 468 (470); record is not only devoid of shipper support for proposed service, but shows that protestants operate suitable equipment in the territory and have provided service without complaint from shipping public. Denied.—Curtis Keal Transport Co., Inc., Extension, 89 M.C.C. 670 (672).

Existing carriers are able to meet reasonable needs of the public transportation of small shipments, and would be harmed by loss of traffic if the broad territorial authority sought by applicant were granted. Proposed guaranteed overnight delivery service is not so different from existing services as to justify grant of authority; such new service should not be authorized in absence of a very definite

and convincing showing that protestants' services are inadequate, which applicant has failed to make; denied.—Transway, Inc., Extension, 89 M.C.C. 513 (522).

No need is shown for proposed transportation of liquified petroleum gas from southwestern origins to Nebraska when protestant is authorized to provide service thereon from and to all points involved, and no serious deficiencies in its service are shown; moreover, a substantial volume of the traffic is moving in private carriage or by rail, and it is not shown that that situation would be changed if authority sought were granted.—Bridge Extension, 88 M.C.C. 108 (114)*.

Since there is no expert testimony or other evidence of value to show whether cleaning compounds manufactured to military specifications are within protestant's authority for "liquid chemicals," it cannot be found that protestant is not authorized to transport them, as many liquid cleaning compounds are properly so classified. In view of protestant's ability to provide reasonably direct service from shipper's plant to all points in proposed destination territory, it must be concluded that applicant has failed to show that protestant's service is inadequate to meet shipper's reasonable transportation requirements. Denied. —Commercial Oil Transport, Inc., Extension, 92 M.C.C. 186 (187-8).

Since applicant has failed to advance any reasons why vermouth should not be considered as embraced in protestant's authority to transport "wine," and it therefore appears that supporting shipper has available motor carrier service capable of meeting its needs, which has not been used, application is denied, without prejudice to applicant's filing of petition for further hearing to introduce evidence tending to establish nature of vermouth for transportation purposes.—Southern Tank Lines, Inc., Extension, 92 M.C.C. 423 (425).

Movement of whiskey in tank vehicles by virtue of new Federal tax regulations is in effect new traffic, and as neither of two protestants holding alcoholic beverages authority between points in portions of considered area has yet been tendered any of such traffic, their services cannot be considered inadequate, and to that extent applications must be denied.—Southern Tank Lines, Inc., Extension, 88 M.C.C. 635 (641).

No need is shown for applicant's proposed transportation of frozen foods when supporting shipper has used protestant's service satisfactorily and service of another recently authorized carrier is available, both of which can meet all of shipper's indicated needs; denied.—Nationwide Carriers, Inc., Extension, 89 M.C.C. 675 (680); nor is need shown when shipper's present transportation needs are well satisfied by an existing common carrier, and whether or not that carrier is a protestant is irrelevant in view of shipper's testimony that its service is adequate. Shipper's fears that it might be deprived of that carrier's service through possible purchase by another company is sheer speculation; even assuming occurence of such acquisition, any effect on shipper cannot be forecast.—LeTarte, 91 M.C.C. 158 (160).

Authority sought by three applicants is denied when protestants are authorized to transport considered commodities within the territory, are willing to provide service for supporting shippers to and from points sought, have sufficient and suitable equipment and are willing to station vehicles in origin areas to meet shippers' requirements; shippers have not used their services and therefore cannot determine that they are inadequate; and small volume of traffic involved does not require service of more than one carrier from each origin.—Hearin Tank Lines, Inc., Extension, 88 M.C.C. 189 (197)*.

Volume of involved traffic expected to move between considered points is not large and one carrier should suffice for all transportation shown to be required; protestants offer joint-line service, and mere possibility of interruption therein is insufficient basis for placing an additional carrier in the field; in event of emergency which may disrupt their service, temporary authority may be issued to some other carrier to meet any transportation needs of supporting shipper. Denied.—P. B. Mutrie Motor Transp., Inc., Extension, 88 M.C.C. 597 (601).

Although shipper complains of delays in transit in rail piggy-back service, it has not tried service of existing motor carriers nor advanced evidence that joint-line service is unsatisfactory. Further, while protestants

lack authority to serve all Louisiana points, shipper has shown definite transportation requirements only from one point; denied.—Colonial Refrigerated Transp., Inc., Extension, 91 M.C.C. 369 (371-2).

See also Pennsylvania Truck Lines case, n. 35 *Substituted freight service*, below.

No need is shown for applicant's proposed service when existing joint-line services are not shown to be inadequate to meet all of supporting shipper's reasonable requirements, protestants' routes are not unduly circuitous, and shipper has not yet tried their service on movements to considered destination territory; in absence of proof that a test of protestants' services would be useless, applicant has established only a strong shipper preference for the proposed service; denied.—T. I. McCormack Trucking Co., Inc. —Investigation, 89 M.C.C. 5 (17)*.

Upon consideration of authorities, facilities, and large fleets of equipment operated by existing tank truckers in considered territory, authority sought by two applicants is denied. Three protestants collectively can transport supporting shippers' traffic to 15 of 19 destination States sought, and while no direct service appears to be available to Georgia, one tankload a month does not support authorization. Though one protestant has been unable to furnish clean equipment in some instances, it is establishing cleaning facilities and like the others should be afforded opportunity to meet shipper's requirements before competing service is authorized.—Commericial Oil Transport Extension, 91 M.C.C. 129 (136).

Protestant's authority for "vegetable oil" includes proposed transportation of tall oils (88 MCC 189); it is an experienced operator, with terminals not inordinately far from origins of supporting shipper's traffic, has empty vehicles in the origin territory daily, and is willing if enough traffic is tendered to establish a new terminal for shipper's greater convenience; until its service has been tried and found inadequate in some substantial respect, there is no basis for finding that it will not meet shipper's disclosed needs; denied.—McKenzie Tank Lines, Inc., Extension, 88 M.C.C. 250 (252).

Though supporting shipper proposes to use applicant's service only for transportation of t.l. shipments of meats which it is now transporting in private carriage, it has never given protestant opportunity to provide the service desired, and there is no reason to believe that protestant's t.l. service would not be satisfactory. Denied.—Shaw Extension, 92 M.C.C. 118 (120-1).

Only two of supporting shippers have tried protestant's service on fresh meats, and one of them is now using it even though applicant's service is available between same points; although the other shipper alleges that protestant's service to a different destination was unsatisfactory on one occasion, it did not so notify protestant or file damage claim; conclusion is not warranted that protestant could not provide reasonably satisfactory service to destinations it is authorized to serve; denied in part.—Refrigerated Food Exp., Inc., Extension, 89 M.C.C. 795 (799)*.

Where majority of supporting shippers have made no attempt to avail themselves of protestant's services in transportation of small boats, and others have complaints relating only to isolated instances several years ago, it does not appear that applicant will be in better position than protestant to provide satisfactory service throughout broad territory sought. Moreover, even protestant has been unable to obtain much northbound traffic from Florida in spite of its extensive nationwide operations and widespread terminals, including one in Florida; granted in part.—Rolling Boats, Inc., 89 M.C.C. 789 (793)*.

Supporting shipper's examples of protestant's alleged failure to furnish adequate service for movement of small foreign cars and transporters from Boston to Maine are not so serious as to justify grant of authority to applicant; while protestant operates only one trailer capable of carrying 3 cars and 3 transporters from Boston, applicant also operates only one such trailer from its Boston terminal; it is not established how many movements require distribution of 3 cars and 3 transporters on same trailer, and protestant operates numerous other trailers which can handle other 6-unit combinations; in addition, a second protestant can handle foreign cars from Boston to Maine; thus no need is shown for applicant's service on that traffic.—Howard Sober, Inc., Extension, 88 M.C.C. 755 (759-

60).

At least two protestants have authority to perform proposed service and are ready, willing, and able to do so; evidence as to shipper dissatisfaction with service of carriers other than applicant is general and vague and no specific instances of inadequacy are cited; applicant's unauthorized operations have for several years deprived authorized carriers of traffic they are qualified to handle, and they should be given reasonable opportunity to demonstrate that they can render the service adequately, efficiently, and economically before a new service is authorized. Denied.—Keystone Motor Exp., Inc.—Investigation of Operations, 89 M.C.C. 567 (585-6)*.

Although protestants collectively hold authority to serve all points involved, provide daily service at many of them, and are willing to meet supporting shippers' reasonable transportation requirements, applicant, by combining its unauthorized operations to and from the Michigan points involved with its lawful intrastate operations, has obtained the dominant position in the traffic, and thus for many years has deprived existing authorized carriers of traffic to which they were entitled. Its unauthorized operations have prevented a fair test of existing authorized services and can be accorded no weight in determining whether need exists for the service proposed; denied.—Consolidated Freight Co. Extension, 89 M.C.C. 457 (460, 462).

Existing carriers are entitled not only to continue to transport traffic which they handle satisfactorily, but also, when their services have not been used, to opportunity to show that they can render adequate service. All but 2 of 40 supporting shippers are receiving satisfactory service from existing carriers, and those 2 have not recently tried available through-trailer services; evidence as a whole fails to show public need for applicant's proposed more direct service; denied.—Eazor Exp., Inc., Extension, 89 M.C.C. 345 (350)*.

Both protestants have stainless steel, compartmented tank trailers suitable for transportation of liquid caustic, and their equipment is not being used to full capacity; though shipper requires empty vehicles in absolutely clean condition, and desires that inspection thereof be made by its employee at Sidney, Ohio, before loading at Wyandotte, Mich., for movement to Ohio, it is not shown that protestants would have refused so to accommodate shipper, had it requested their service; both have transported liquid caustic in the past without complaint, and one is in better position than applicant to serve shipper, including inspection at Sidney; thus no need for new service appears; denied.—Stillpass Transit Co., Inc., Extension, 89 M.C.C. 38 (39, 40).

Since transportation of liquid adhesive paste, in bulk, in tank vehicles, is now found to be within protestant's authority for liquid chemicals, and no inadequacy of protestant's service is shown, application is denied.—Southern Tank Lines, Inc., Extension, 88 M.C.C. 127 (140)*.

In embraced case, however, there is need for that applicant's proposed transportation of liquid chemicals in tank vehicles from supporting shipper's Niagara Falls plant to a 9-State area when shipper's assertion that service of one opposing carrier has been unsatisfactory is not rebutted; the other protestant's authority is too limited in scope to meet shipper's distribution requirements, and its only existing terminal is over 350 miles from Niagara Falls. Shipper is entitled to proposed service even though authority granted will be duplicative, in whole or in part, of protestant's authority.—Id., p. 140.

Authority denied to three of destination States sought, which can be served by protestant, when one supporting shipper has used its service and found it satisfactory, and the other expressed willingness to use it, conditioned on protestant's conversion from contract to common carier, which has now been effected.—Service Trucking Co., Inc., Extension, 88 M.C.C. 697 (701)*.

Since three protestants hold authority for liquid chemicals, in bulk, between the points involved, and applicant has not shown that their services would be inadequate to meet supporting shipper's requirements for transportation of considered molding resins, no need for additional authorization can justifiably be found until their services have been tested. Denied.—Ruan Transport Corp. Extension, 88 M.C.C. 643 (646).

Extension application must be denied when there is an abundance of existing motor service offering direct, overnight delivery in transportation of considered commodities, and, to the relatively scant extent utilized, no specific complaints of deficiencies therein were cited by any supporting consignor or consignee.—Momsen—Investigation and Revocation of Certificates, 88 M.C.C. 343 (346).

Abnormal demands for service which cannot be met by existing carriers are not a proper basis for a grant of operating authority. It is not shown that supporting shipper's request for transportation of styrene 3 weeks after protestant filed its notice of protest of application is representative of shipper's requirements for bulk transportation to the destination State, or that protestant's performance on that occasion was so inadequate as to indicate unwillingness or inability to meet shipper's reasonable demands. Denied.—Maxwell Co. Extension, 88 M.C.C. 648 (650, 652).

While the commission has often held that protestants generally are entitled to opportunity to transport all the traffic they can adequately handle before a new competitive service may be authorized, a finding of inadequacy of existing services is not indispensable to issuance of a certificate. Supporting shippers have used applicant's services, including its unauthorized regular-route service between considered points, in transportation of a variety of commodities between Boston and New Hampshire and, while they do not contend that protestants' services are inadequate, they characterize applicant's service as excellent, very satisfactory, or the best afforded them, and strongly express their need for its continuance. Protestants do not rely on that traffic, and should not be seriously injured by grant of authority sought. On balance, shippers' demonstrated need for applicant's superior service outweighs any adverse effect on protestants; granted.—Nashua Motor Exp., Inc.—Petition for Modification, 96 M.C.C. 583 (585, 586)*.

While existing carriers should normally be accorded opportunity to transport all available traffic that they can handle adequately, efficiently, and economically in territory they serve before a new competitive service is authorized, it is ordinarily incumbent on such carriers to show, not only applicable authority, but also their willingness and ability to provide the service in question; where they fail to do so, their existence is insufficient basis for denying an application when applicant has established a prima facie case.—Blythe Extension, 94 M.C.C. 23 (45); application granted where existing carrier cannot render service required by shipper.—Commerical Oil Transport, Inc., 94 M.C.C. 244 (246); where rail and motor carrier protestants cannot render the highly coordinated service for which need is shown.—Daniel Hamm Drayage Co. Extension, 89 M.C.C. 563 (566)*; and where protestants are not shown to be able to provide all the service shown to be required by supporting shippers.—Baggett Bulk Transport, Inc., 88 M.C.C. 403 (410); Kroblin Refrigerated Xpress, Inc., Extension, 89 M.C.C. 657 (659)*; Babcock & Lee Petroleum Transporters Extension, 91 M.C.C. 517 (522).

No need is shown for additional transportation service with respect to fertilizer from Houston since one of several protestants was shown capable of providing a complete service including farm site delivery needed in the transportation of this commodity. Until this protestant's service is tried and found wanting, authorizing a competing operation is not justified.—Shaw, 95 M.C.C. 663 (666); however, there appears need for service for transportation of fertilizer in bags and wire from and to other points, since the service of the only protestant objecting to this portion of the application is confined to regular routes, and therefore unsuitable since farm site deliveries cannot be made. Granted in part.—Id., p. 666.

Grant of motor carrier authority to Railway Exp. Agency to enable it to continue providing expeditious express service to Great Falls, S. C., after discontinuance of substituted motor-for-rail service of railroad subsidiary which it is now using, is warranted when protestants cannot provide a complete express service. Opposing general-commodity carriers do not handle the full range of commodities involved, especially those of unusual value; other protestants render essentially a passenger-carrier service which under their certificates cannot be changed into a pure express service, and in many instances shippers using their service would have to coordinate

their operations with existing inflexible bus schedules.—Railway Exp. Agency, Inc., Extension, 94 M.C.C. 102 (107-8).

Despite the fact that the Bureau of the Mint supported contract-carrier protestants for the authority they now hold, it has been unable to negotiate contracts with those carriers; further, it is the commission's long established principle that a shipper is entitled to motor carrier service which is not dependent on negotiating a contract with carrier or the burden of assuming obligations of such a relationship. In light of the doubt as to whether protestants are actually capable of meeting the mint's reasonable transportation requirements, shipper is entitled to common carrier service; also since protestants have not rendered service for shipper, they do not stand to lose presently handled traffic.—Navajo Freight Lines, Inc., Extension, 95 M.C.C. 551 (559).

Availability of contract carrier service will not defeat an application for common carrier authority, since the commission is indisposed to force such an arrangement.—Pacific Motor Trucking Co. Extension, 89 M.C.C. 645 (649); that protestant was recently granted substantially coextensive contract-carrier authority to serve same shipper in transportation of bulk salt does not militate against a grant to applicant, but rather tends to confirm shipper's peculiar need for complete service over a wide distribution area. Moreover, applicant is almost totally dependent on shipper's salt business for its economic livelihood; shipper's widespread salt operations warrant service of two motor carriers. Granted.—Paul W. Wills, Inc., Extension, 88 M.C.C. 692 (695).

While grant of authority to transport commercial papers, sales audit media, and exposed or processed film and prints between certain points in Texas and Oklahoma may result in some diversion of traffic from protestant motor carriers, such diversion should not be substantial when measured by the amount of that traffic handled by protestants relative to their total operations and the need shown by supporting shippers. All protestants but one—a regular-route express carrier—render essentially a passenger carrier service which under their certificates cannot be changed to the type of service shown to be required, and applicant's proposed operation will be superior to existing services in speed of delivery and efficiency of handling. Granted between points specified.—Southern Couriers, Inc., Extension, 94 M.C.C. 111 (116).

The only protestant of record indicating any willingness to provide desired service had leased applicant's equipment, drivers, and managerial talent and utilized them in performing much of the service involved; however, protestant's sale of its pertinent authority to another carrier has recently been approved. Although other carriers might possibly provide proposed service, they have shown no interest in the proceeding and are not parties of record. Authority to provide service shown to be needed by supporting shippers, granted.—Storm, 96 M.C.C. 761 (762-3)*.

Although there were several carriers specializing in banana transportation already authorized to serve Galveston, it is significant that such carriers failed to protest the application which indicates their lack of interest in the prospect of an additional carrier to move considered banana traffic. As to the protestants, the grant of authority sought would have no material adverse affect on their operations because shippers do not use their services and they are, for the most part, unable to provide the type of transportation required. Moreover, on cross-examination, protestants' witness admitted they do not oppose the application insofar as authority is sought to serve Galveston. Granted.—Hirschbach Extension, 96 M.C.C. 339 (341)*.

Grant of authority sought to originate banana traffic at Gulfport, Miss., is not warranted when supporting shipper has been satisfied with transportation provided by protestant serving Gulfport, which is able and willing to furnish the additional service desired and is dependent on that shipper as its principal source of such traffic. However, grant of authority from Mobile and New Orleans to Tulsa, Okla., is warranted when protestant authorized to perform the service is also a distributor of bananas at Tulsa; shipper should not have to rely on a competitor for needed transportation service.—A and A Produce Co., Inc., Extension, 92 M.C.C. 77 (80).

Supporting shippers' future needs of transporting chilled citrus juices from Florida, in bulk, cannot be met adequately by protestant, although he is authorized to perform proposed operations. Bulk shipment of citrus juices is a relatively new but rapidly increasing development in the the industry, while shipments in packages are correspondingly decreasing. Shippers' estimate of maximum needs amounts to approximately 46 loads weekly to destinations involved. Record indicates that protestant, who already serves satisfactorily some of the supporting shippers, does not have enough equipment to meet all of shippers' demands, particularly during normal crop seasons, and would have to buy or lease additional equipment to fulfill their requirements. Although existing carriers are entitled to transport all the traffic they can adequately handle without added competition, shippers should not be compelled to rely solely on one protestant whose equipment is already committed to the juice industry. Granted.—Kramer Extension, 94 M.C.C. 690 (692-3)*.

As supporting shipper has recently been granted "grandfather" authority under Transportation Act of 1958 to transport frozen fruits, berries, and vegetables from involved origin territory to many of destinations sought, no need appears for such transportation by applicant. However, protestants' authority for frozen cooked vegetables other than those made nonexempt by that act, and for other frozen prepared foods, is too limited commoditywise and territorially to meet shipper's reasonable transportation requirements. Granted for frozen foods other than those within supporting shipper's carrier authority. —Colonial Refrigerated Transp., Inc., Extension, 86 M.C.C. 796 (798, 799).

In addition to lacking authority, both as to commodities and territory, protestants cannot provide the flexible and expeditious service required by shippers of dry and liquid chemicals and resins. Existing service in considered origin area is uncertain and inadequate, being dependent on protestants" having equipment in the area at a given time or the deadheading of equipment from a terminal many miles away. At times, shippers must "ship within the hour" after a sale is made and this, coupled with rigid requirements for clean equipment, makes it mandatory that adequate terminal and cleaning facilities be maintained in the area. Furthermore, protestants' interest in considered traffic is based primarily on their need for backhaul traffic; and it would generate uncertainty among shippers to require them to depend on carriers whose equipment much of the time would be available only when their primary purpose had been fulfilled. Granted.—Slay Transp. Co., Inc., Extension, 96 M.C.C. 47 (49-51).

Shipper of salt requires irregular-route motor service in order to better compete with producers with motor service available, and to recapture former business; while it knows of two carriers with appropriate authority, only one has suitable equipment and, as they do not oppose the applications, patently they are not interested in the traffic. Railroad protestant now serves shipper from one of considered origins by interlining with other rail carriers, and shipper will continue use thereof, but that mode is inadequate for all of its demonstrated transportation needs. Authority granted to one applicant.—Argo Trucking Co., Inc., Extension, 96 M.C.C. 434 (436-7).

One protestant carrier of explosives appears primarily interested in truckload movements and has imposed a 10,000-pound minimum charge on l.t.l. shipments; and its rate structure is such that shippers are discouraged from using its services for expedited movement of small, l.t.l. shipments; another motor protestant has limited frequency of its service to the extent of being unresponsive to shippers' demands upon it; and rail protestants are primarily interested in moving traffic to and from government installations and cannot adequately handle considered traffic. While some traffic may be diverted from protesting carriers, such diversion is not enough to deprive the public of improved service. Applicant, an experienced explosives carrier, is already operating in the area as a carrier of general commodities, except explosives; granted.—Ryder Truck Lines, Inc., Extension, 96 M.C.C. 771 (778-9).

Supporting shippers concede that regular-route common carriers have provided reasonably adequate service on petroleum treating compounds in containers from named Okla-

homa origins to destination territory sought, and that their services will continue to be used, especially for l.t.l. shipments. "Mercer description" carriers collectively serve all destination States and at least three serve each (except one) of States not now served by applicants under their petroleum products authority, which is held to include involved compounds. However, as the Mercer-type carriers generally do not operate appropriate tank vehicles in or near Oklahoma to provide the needed bulk service, their bulk operations should not be protected. Authority granted all three applicants for bulk transportation of compounds to 7 States.—Hugh Breeding, Inc. Extension, 95 M.C.C. 720 (726).

Supporting shipper is not shown to require services of more than one carrier for proposed transportation of liquid chemicals; under authority for chemicals as defined in the Maxwell case, protestant may transport all shipper's products except liquid chemicals derived from petroleum; authority granted only for transportation of liquid petrochemicals between points sought.—Refiners Trans. & Term. Corp. Extension, 88 M.C.C. 611 (613).

Need is shown for applicant's proposed service when record, as a whole, establishes that existing services are unable to meet supporting shippers' transportation requirements. Rail service is clearly not adequate because many of shippers' customers are not served by railroads; and none of the motor carrier protestants is authorized to provide the needed service. However, since record discloses a need for transportation only of shortening and vegetable oils, authority granted is limited accordingly.—Colonial Refrigerated Transp., Inc., Extension, 95 M.C.C. 379 (380-1); broadening of applicant's "grandfather" authority for transportation of frozen vegetables to include three additional commodities produced by supporting shipper will not adversely affect protestants, since they are not authorized to provide the service required. Moreover, shipper requires additional carriers' services and does not intend to divert any traffic from those it now uses; granted.—Id., 91 M.C.C. 187 (190-1).

Shipper needs the comprehensive service of a motor carrier which can transport its shipments from points throughout the origin territory to its new plant at Paulsboro, N. J.; protestant would be able apparently to transport drums only in quantities, and would have to rely on interline connections with carriers to handle shipments originating at points it is not authorized to serve. Furthermore, it is problematical whether connecting carriers would be willing to handle the involved commodities. Applicant, on the other hand, has demonstrated its ability and willingness to perform required service, and handled traffic previously for the shipper at another plant; granted.—Herr's Motor Exp., Extension, 95 M.C.C. 696 (698-9).

The joint-line service offered by two protestants is not sufficiently comprehensive as to enable them to respond to shipper's transportation needs to points in Georgia and Tennessee when, though one of them holds authority to transport traffic that does not require special equipment from considered origins, the other's presently held authority to transport "iron and steel products" does not embrace transportation of the commodities involved, i.e., "lift trucks" and "cranes." Thus, there being no service shown able to provide the shipper with the complete service required to points in Georgia, a need exists for proposed operation thereto.—Home Transp. Co., Inc., Extension, 95 M.C.C. 128 (131-2).

Third protestant's existing territorial authority is too limited to provide the flexible coverage required, and although it desires to handle combined loads destined to points in Tennessee in conjunction with another carrier, not a party to this proceeding, the latter has not adduced evidence of its pertinent authority and operations or quality of the service which would be offered. Proposed service is particularly suitable for shipper's needs and the latter's desire to have available a complete and flexible motor carrier service to move the involved traffic and further its business is justified. A need exists, therefore, for proposed operation to points in Tennessee.—Id., p. 132.

Since protestant's service between Memphis and Helena, Ark., an off-route point appurtenant to proposed route in Mississippi, has been at least reasonably satisfactory, and

authorization of an additional motor service would have substantial adverse effect on its operation, authority granted applicant is restricted to exclude traffic moving between Memphis and Helena.—F. & W. Exp., Inc., Extension, 88 M.C.C. 262 (263)*.

Interchange service offered by protestants to shipper of frozen foods has not provided the greatest protection which could reasonably be expected in the handling of perishable commodities; and fact that shipper discussed the possibility of obtaining through trailer service with one protestant, but did not object formally to their policy of physically interchanging its frozen lading, is not of major significance. In view of the highly perishable nature of considered commodities, carriers should make every conceivable effort to avoid physical transfer of the lading during interchange; and protestants' failure to do so constitutes a clear reflection on quality of the service they have rendered to shipper. Authority granted for proposed single-line service.—Trans-Cold Exp., Inc., Extension, 95 M.C.C. 300 (303-4)*.

On reconsideration, grant of authority limited to "heavy hauling" commodities is not fully responsive to supporting shippers' needs; a complete motor service is required to accommodate mixed loads of commodities which require special equipment and those which do not. Opposing motor carrier cannot meet shippers' full requirements, since it is not authorized to provide service as to commodities requiring heavy-hauling service. Aplicant is presently providing proposed service under temporary authority; and protestant will not be adversely affected to a significant degree by grant of the application, particularly since bulk of the traffic movement will be of limited duration. Prior findings modified accordingly.—Maas Transport, Inc., Extension, 95 M.C.C. 375 (377)*.

Supporting cement shipper's transportation needs cannot be met adequately by either existing motor carrier or rail service. It has constructed four distribution plants at considered origins for the express purpose of convenient, short-haul motor distribution of bulk cement to its customers' locations, but existing motor service, therefrom, is not adequate. Further, shipper's new plants will not have facilities for bulk loading of rail cars, and many of its customers have off-rail locations; and, any diversion of traffic from rail protestant will be compensated by shipper's use of rail on inbound shipments from its manufacturing facilities. Granted.—Mitchell Transport, Inc., Extension, 94 M.C.C. 450 (452-3).

Although protestants are collectively authorized to transport shipper's products from Jersey City to destination points, at the time of the hearing they had no equipment suitable for movement of bulk cement; and, while they were in the process of obtaining such equipment, it was committed to the use of another shipper, and there is no real assurance that it will be readily available to shipper for its bulk shipments. However, they operate equipment suitable for transporting packaged cement, and should be afforded opportunity to demonstrate caliber of their service before a competing operation is authorized. Granted in part.—Schwerman Trucking Co. of N.Y., Inc., Extension, 94 M.C.C. 683 (688).

Shipper's needs for transportation of clay and refractory products cannot be met adequately by either existing motor carriers or rail service; location of its customers and nature of the commodities sold prompt the use of single-line carriers that can serve a large area with flat-bed equipment. About 15 of the 25 destination States sought are not served by any protestant; and scope of operations of the general-commodity carriers is limited but, while their service is not satisfactory for volume shipments because they do not have enough flat-bed equipment available, they will continue to be used for small shipments. However, one protestant can meet the shipper's needs to the extent utilized, and there is no indication that it could not do so in the future, at least as to points in three destination States. Granted in part.—Grant Trucking, Inc., Extension, 96 M.C.C. 145 (147, 148-9)*.

Supporting shippers are turning increasingly to use of flat-bed trailers for transportation of composition roofing, due to advantages of fork-lift loading and preference of many consignees; protestants have few or no flat-beds and are mostly limited territorially to service at points on or adjacent to their regular routes, so that routings by those carriers are sometimes circuitous, resulting in delays, and

present difficulty in effecting split deliveries; moreover, as roofing is a low-rated commodity, protestants have not sought enthusiastically to provide service adequate to meet shippers' requirements for their very substantial volumes of traffic; applicant would render a comprehensive service, providing an ample number of flat-bed trailers, with split deliveries at points throughout considered territories; granted.—Melton Truck Lines, Inc., Extension, 88 M.C.C. 723 (735).

While many of the 21 applicant-protestants hold competitive authority to transport cryogenic liquids involved, under various commodity descriptions, authority or authorities held by each are too territorially fragmented to permit complete and flexible service required by the Air Force and Defense Department. Shippers' probable future need for bulk motor transportation requires services of three carriers; granted accordingly.—Younger Bros., Inc., Extension, 95 M.C.C. 1 (17-18)*.

Although a Trailways member operates frequent schedules between New York City and Philadelphia, serving Camden, N.J., and passengers and shippers of express using that service between the Camden area and New York City consider it satisfactory and will continue to use it, many others, particularly those requiring service between the Camden area and points beyond Philadelphia and New York, consider it necessary to continue using Greyhound's service because latter provides through bus service to their desired destinations, with frequent and convenient departures, whereas Trailways' service involves frequent changes from one bus to another, longer transit time, and more inconvenient departures, and Trailways does not serve all destinations in which supporting parties are interested. In view of the need shown by the supporting parties, Trailways' inability fully to meet that need, and fact that it would lose little if any traffic by grant of authority to Greyhound to serve the Camden area from and to points beyond New York City and Philadelphia, application should be granted.—Greyhound Corp. Extension, 95 M.C.C. 762 (768-9)*.

Although need for tank transportation of orange juice is shown only to two points which cannot be served by one protestant, and another protestant is authorized to serve one of them, latter has in the past been unable to provide equipment when called on, and as its assertion that it can lease all necessary equipment is not based on experience, its success in doing so is problematical. Authority granted for both these destinations.—Kramer Extension, 91 M.C.C. 16 (19).

Though two opposing motor carriers have been granted authority (against which petitions have been filed) to transport bulk cement from considered plant to 2 of 3 States sought by applicant, even if such grants are ultimately affirmed protestants could not provide service shown to be needed for shipments in packages and to destinations in Iowa; moreover, protestants hold out to serve other cement plants and shippers, and, even if supporting shipper's volume estimate is high, and assuming one truck could make 2 or 3 trips a day to nearby points, it is evident that shipper's need for motor equipment could well tax capacity of applicant and both protestants. Granted.—Orscheln Bros. Truck Lines, Inc., Extension, 88 M.C.C. 569 (573).

Although protestants under new furniture authority can transport some types of laboratory furniture, they are without authority to transport all or any significant portion of commodities for which shipper requires proposed service and would be unable to render complete service; need shown for applicant's proposed flexible interstate operation from Statesville, N.C., to points in the United States except Alaska, Hawaii, and North Carolina.—S & S Trucking Co. Extension, 91 M.C.C. 239 (243-4).

Although general-commodity carriers may transport supporting shipper's silo sections to industrial users who unload them with their own equipment, they may not transport such traffic to farm sites where carrier must supply special unloading equipment required; therefore, as some movements include both types of shipment and there is often uncertainty as to ultimate destination of a movement at its inception, existing general-commodity service would meet shipper's needs only when it could be definitely ascertained in advance that shipment would move to an industrial plant.—C & H Transp. Co., Inc., Extension, 88

M.C.C. 285 (292)*.

While the record is abundantly clear that supporting shipper needs single-line transportation of silos, silo unloading devices, parts, and materials and equipment for erection and completion of silos, from Kankakee, Ill., to the numerous destination States collectively sought by four heavy-hauler applicants, much of the territory is already adequately served by other applicants or by protestants; grants of authority are therefore limited to States where no adequate direct-line service is now available, except that, since carriers collectively authorized to serve Minnesota, Iowa, and the Dakotas cannot provide the complete service required, authority for galvanized silos is granted applicant already serving that territory in transportation of glass- or enamel-lined silos. Each application granted in part. —Id., pp. 294-5.

On reconsideration, though three protestants may transport silos under their "prefabricated buildings" authorities, supporting shipper has found the service of one inadequate, and the other two do not have available the drop-nose trailers and winch-equipped tractors required for careful handling of fragile silo sections; also, neither of the protestants' drivers are experienced in the specialized type of delivery. Thus, service offered by the prefabricated buildings carriers is not of a type suitable for shipper's reasonable transportation requirements. Findings in prior report, granting each application in part, affirmed.—Id., 91 M.C.C. 1 (2-4)*.

In determining whether need exists for a proposed service, the whole picture must be considered. It is not enough that motor-carrier protestants, singly to some extent, and to a greater extent collectively, hold authority to provide all or the great majority of the services required; the real question is whether they will provide service when called on to do so, and there must be something more than an expression of willingness and ability to handle the traffic. Whenever services of authorized carriers fail to meet shippers' needs substantially, the commission will not hesitate to grant new authority.—Hughes, 89 M.C.C. 471 (484)*.

Authorized carriers have not demonstrated willingness to handle supporting shippers' food products, which move predominantly in modest lots and must be accorded expeditious service because of their perishable nature and consignees' limited storage facilities; generally, existing carriers have either shown lack of interest in l.t.l. volumes or have been unable to provide the single-line service considered essential. Significantly, several carriers which appeared as protestants at prior hearing some years earlier have not solicited supporting shippers in the interim; applicant, on the contrary, has rendered satisfactory service regardless of size of shipments; grants of authority to extent indicated is justified.—Id., pp. 480-3.

Although applicant's prior application for like authority was denied largely because of protestant's professed willingness to meet supporting shipper's needs, during ensuing 5 years protestant has made no effort to solicit or transport considered traffic or to discuss rates with shippers, who consider its existing rates prohibitive; if it were actually willing to serve the shippers, it would have negotiated with them long before filing of instant application, and its failure to do so indicates lack of interest in the traffic at rates on which it can move. Protestant has been afforded more than a reasonable time to demonstrate its willingness and ability to handle the traffic and has failed to do so. Granted.—Edwards Extension, 88 M.C.C. 318 (320-1)*; Id., 88 M.C.C. 566 (567)*.

See also Fleet Transport Co. of Ky. case, under *Rates*, below.

Protestant's deficiencies in service are serious enough to warrant conclusion that it is unable to meet shipper's reasonable transportation requirements; shipper has afforded it ample opportunity to improve its service, but without success, and protestant gave no satisfactory explanation for its failure to remedy the various deficiencies complained of. Application granted.—Consolidated Freightways of Del. Extension, 88 M.C.C. 603 (605).

Though ordinarily authority for a new operation will not be granted unless it is shown that existing carriers are unable or unwilling to handle the available traffic, applicant is not a new entrant in the field, having conducted proposed operations under color of right for many years; its operations are substantially

the same as those of existing authorized carriers, and it is clear that service offered by each developed in response to a specific and continuing public need; under the circumstances it would not be in public interest to force applicant to discontinue those operations; granted.—Border Exp., Inc., Extension, 88 M.C.C. 491 (494).

Since protestant can transport nitro carbo nitrate to all States sought except Kansas (which apparently involves intrastate movement), has proper equipment, and solicitated supporting shipper upon learning oc completion of its new plant, there is no basis for a grant of competitive authority for that commodity in absence of experience by shipper disclosing material inadequacy in protestant's service. However, protestant is only authorized to transport ammonium nitrate when intended for use as a constituent of a blasting agent or explosive; therefore, since shipper's principal reason for storing that commodity at considered origin is to meet peak demands for it as a fertilizer, and no other authorized service meeting that projected need is shown, applicant is granted authority to transport dry ammonium nitrate.—Monkem Co., Inc., Extension, 94 M.C.C. 749 (751, 758)*.

Aside from movement of caustic soda to Georgia points, protestants are authorized to provide any service from Muscle Shoals, Ala., shown to be needed by supporting shipper. Though one protestant's terminals are some distance from shipper's plant, it is willing to station equipment there regularly if given opportunity to provide service; and though shipper complains generally of service of the other protestant, its complaints are trivial and do not justify a finding of inadequacy. However, as shipper needs service to all Georgia points, but one protestants lacks authority for that State and the other can serve only three points therein, applicant is granted authority to transport liquid caustic soda to all Georgia but those three points.—Redwing Carriers, Inc., Extension, 92 M.C.C. 379 (381-2).

Protestant or its predecessor has transported frozen potato products for supporting shipper from Caribou, Maine, to described New York Area continuously since 1949 under color of right, and in iew of concurrent modification of its frozen vegetables authority to include potato products its single-line service is sufficiently comprehensive to satisfy that shipper's requirements; although shipper intends to add other products to its line, its plans are still in the formative stage and it is not established with reasonable certainty that there is a potential flow of traffic which cannot materialize unless the proposed service becomes available. However, authority should be granted applicant to transport frozen potatoes and products from Greencastle, Pa., to Wauseca, Minn., in view of extreme circuity of protestant's route; also to transport frozen prepared foods from Milton, Pa., to New England when protestants have not shown that they can provide the service needed by shipper.—Midwest Coast Transport, Inc., Extension, 91 M.C.C. 812 (816-7)*.

One protestant clearly may transport refined tall oil from Nitro, Va., to Missouri, as its authority for acids and chemicals is not limited to those listed in Appendix XV of the Descriptions case (61 MCC 209); in view of prior finding that application must be denied to extent it seeks authority coextensive with that of protestants, authority to serve Missouri is denied.—Stillpass Transit Co., Inc., Extension, 89 M.C.C. 692 (693-4)*; but another protestant's authority for acids and chemicals as listed in that case (which does not include tall oil) does not permit it to transport that commodity to Wisconsin, notwithstanding the broadened definition of "liquid chemicals" in 88 MCC 127; the commission is concerned with availability of existing motor service, and latter case merely outlined procedures whereby existing certificates might be revised. Grant of authority to applicant for Wisconsin, affirmed.—Id., pp. 693, 694.

As applicant and two protestants are authorized to provide a substantial service for supporting shipper from Erie County, Pa., to North Carolina, and shipper failed to indicate specifically what volume of considered food products would move from that county, it cannot be found that existing services of the three available carriers are inadequate to meet shipper's reasonable transportation requirements therefrom. While shipper professes dissatisfaction with protestants' services, that of one is not shown to fall so far below reasonable performance standards as to warrant

authorization of an additional competitive service; shipper's damage claims against the other are mostly for less than $10 each, and amounts involved cannot be considered exorbitant or indicative of careless or irresponsible service, considering fragile nature of some of the commodities and the substantial volume of shipper's traffic handled by the protestant. Grant of additional authority to applicant from Erie County is not justified.—Blythe Extension, 92 M.C.C. 242 (245, 246).

While applicant has served supporting shipper from only one origin in Chautauqua County, N.Y., to North Carolina, it appears reasonably certain that in the near future shipper will originate traffic for North Carolina at other points in that county. Although applicant and one protestant are now authorized to provide substantial service from Chautauqua County origins, neither's authority is sufficiently broad to provide the service required by shipper from its numerous facilities in that county. Authority granted for transportation from Chautauqua County to North Carolina of specified fruit products, except canned goods, which protestant is authorized to transport from virtually all origins in that county to the destination area.—Id., pp. 245-6.

Although opposing household-goods carriers may, individually or collectively, transport uncrated photographic and X-ray machines and equipment to all points sought beyond territorial scope of applicant's household-goods authority, it does not follow that there is no need for applicant's proposed service; consideration should be given to fact that applicant pioneered and gained considerable experience in transporting those and similar complicated machines and pioneered in refining its equipment and methods of handling uncrated shipments to meet its shippers' needs; as protestants have provided such service only to a limited extent, they would not be materially injured by grant of specific authority for the articles involved.—Neptune Storage, Inc., Extension, 88 M.C.C. 25 (32-3).

Existing service adequate: [Vols. 11, 18, 19]. —It is unmistakably clear from the record that trunkline motor carriers' refusals to handle interchange traffic and to accept freight from certain shippers, which caused substantial disruption in motor service and serious inadequacies in available service, arose from union pressure applied to obtain union objectives and that in normal circumstances existing carrier facilities and services were adequate. In such circumstances certification of an additional carrier is not an automatic remedy in view of others available under the act; choice thereof must be rational and based on conclusion that public interest in adequate service outbalances that in protecting existing carriers. There are no findings or analyses to justify the commission's choice of granting appellee a certificate; the commission's order set aside, a proceeding remanded.—Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (165-7)*.

A basic ingredient in the determination of public convenience and necessity is whether existing facilities are adequate to meet present or future transportation requirements. Denial of plaintiff's extension application because it failed to show inadequacy of existing services was sound exercise of the commission's discretion, when record amply supported its finding that direct service and interline arrangements existed throughout areas involved; and evidence before the commission fully justified its conclusion that existing service was adequate and satisfactory.—Lester C. Newton Trucking Co. v. United States, 264 F. Supp. 869 (885)*.

The commission's finding that services offered by plaintiff (applicant in commission proceeding) were offered and available from other existing carriers (through either single-line service or interline arrangements), although supporting shippers had not taken advantage of such existing services, is supported by the evidence; there is also substantial evidence in support of commission finding that plaintiff's proposed service was not so special or that demands of supporting carriers were not so unusual as to justify granting the authority sought. Since that is a matter which calls for commission expertise, the reviewing court would not be justified in conducting a pinpoint, faultfinding analysis thereof; moreover, it is not for the court to say that the commission was wrong in concluding that plaintiff's proposed services would duplicate

W.J. Digby, Inc. v. United States, 254 F. Supp. 515(517)*.

Adequacy of existing transportation service is one of the basic ingredients in determination of public convenience and necessity. The commission's findings that all destinations in question had single-line service of one or more protestants with exception of one point which had two-line service, and that shippers were not using authorized motor carriers willing to meet their transportation needs, are amply supported by the evidence. There is no merit to plaintiff's argument that, in finding existing service adequate and satisfactory, the commission erred in considering joint line service and in considering interline arrangements with carriers who did not appear at the hearing to show they were willing and able to interline with existing carriers. The dispute was not directed at interline arrangements particularly, rather testimony was offered to show no available service at needed points or that existing carriers could not take shipments at time requested. Moreover, the commission simply found that supporting shippers were not using available facilities, in some instances because they were not aware of carrier's availability. Sustained.—Watkins Motor Lines, Inc. v. United States, 243F. Supp. 436 (439, 441-2,443)*.

The record supports the commission's findings and conclusions that plaintiff failed to establish a present or foreseeable future need for its performance of nonexempt transportation of airfreight between Salt Lake City Airport and points outside the air carriers' terminal areas on presently authorized routes. One of the basic ingredients in determination of public convenience and necessity, is the adequacy of existing service; the applicant has the burden of producing evidence to show that the proposed service is or will be required by present or future public convenience and necessity, and adequacy of existing services is a proper subject of consideration in this field. The commission's denial of the authority sought, sustained.—Wycoff Co., Inc. v. United States, 240 F. Supp. 4(312)*.

It is not fatal that the commission's finding that supporting shipper had adequate motor service available to all but a few of the 151 destination it desires to serve from its new plant at Greeley, Colo., entails a prophecy as to future requirements; the court cannot require the commission to find actual present ability of existing carriers to render the service that may be needed in the future. The commission's prediction of adequacy of existing service to the points in controversy could rationally be made on the evidence before it; thus its finding is supported by substantial evidence. Order denying plaintiff's application as to those destinations, sustained.—Curtis, Inc. v. United States, 225 F. Supp. 894 (900-1)*.

One of the basic ingredients in the determination of public convenience and necessity is the adequacy of existing service; and protesting carriers should come forward with information concerning adverse effect on them, which is generally within their control, to persuade the commission to deny the authority sought.—Worster Motor Lines, Inc. v. United States, 226 F. Supp. 603 (607)*; since the commission's finding that public convenience and necessity does not require complainant carrier's proposed operations is supported by substantial evidence, and that evidence clearly establishes adequacy of existing service, the court must sustain the commission's decision.—Zuzich Truck Line, Inc. v. United States, 224 F. Supp. 457 (468)*.

The commission's finding that plaintiff failed to establish need for motor service in addition to that available at time of the order because existing service, consisting in part of two-carrier interline arrangements, was adequate, is borne out by substantial evidence. Contention that the commission should not be allowed to consider interline arrangements, in considering adequacy of existing service, is untenable: that would mean that any carrier able to show lack of direct single-line service to any given point in United States could apply for and would necessarily be granted a certificate without further showing of inadequacy of the inter-

line service available. Congress intended that decision to be one for administrative determination, not to be over-turned by the courts except in absence of substantial evidence supporting the commission's findings. And the commission may similarly consider adequacy of existing rail service.— Colorado-Arizona-California Exp., Inc. v. United States, 224 F. Supp. 894 (896-7, 898-9)*.

And contention that the commission erred in giving controlling weight to adequacy of the existing service must be rejected, since it is based on a Supreme Court decision under the contract carrier provisions of the act, as amended in 1957, involving considerations not present in the case at bar. Since the commission may and does consider adequacy of existing service in testing merits of an application, and since the evidence is ample to show that all destination points of supporting shippers are served with adequate speed and volume by existing carriers, either directly or by interline, it follows that plaintiff has not sustained its burden. That some shippers might be more conveniently served by having a locally based carrier, and that they have a degree of confidence in plaintiff's operator, do not detract from the substantial evidence that the existing service is adequate. Order denying plaintiff's application sustained.—Id., p.900

In order to establish that public convenience and necessity require its proposed service, plaintiff (applicant) was required to show that existing facilities are inadequate in that authorized carriers are not ready, willing, and able to perform the service. Record supports the commission's finding, after giving due consideration to supporting shippers, that there is an ample supply of authorized carriers in the area who are ready, willing, and able to provide the type of transportation service proposed; sustained.—W.T. Mayfield Sons Trucking Co. v. United States, 211 F. Supp. 619 (627)*.

One of the basic ingredients in determination of public convenience and necessity is adequacy of existing service; though not all possible existing carriers appeared as protestants to heavy hauler's extension application, the commission's conclusion that adequate single-line service is available to several of involved destination States, and joint-line service to the balance, was not based solely on a presumption; evidence concerning the Red Book Plan under which participating heavy haulers provide through service was introduced at hearing; the commission is not unfamiliar with that plan and members there-of, and, in absence of complaints to the contrary, may rely on that organization to supply the services it offers to shippers.— Robbins v. United States, 204 F. Supp. 78 (81,82)*.

In action to set aside grant of authority to intervenor for transportation of aluminum products from one Florida county to certain eastern States, the commission's findings that, based on the facts of record, existing service was inadequate and public need had been shown for the type of service proposed by applicant, are adequately supported by the evidence and justify the conclusion that the certificate should issue. The commission acted within the scope of the functions commited to it by Congress; the record discloses no departure by the commission from requirements of the law nor any abuse of the discretion which is vested in it; order of the commission sustained.— Mercury Motor Express,Inc. v. United States, 261 F. Supp. 621 (622)*.

A showing of need for more than one carrier can satisfy the legal standards of public convenience and necessity even though no specific inadequacy of existing service is found. Furthermore, grant of authority to one applicant merely increased scope of its authority from a point it was already serving; and it is clear that, in granting certificates to three applicants, the commission gave consideration to the effect of increased competition on existing carriers.— Petroleum Carriers Corp. v. United States, 258 F. present services substantially; sustained.—

Supp. 611 (615-17)*; while inadequacy of present service is certainly an element to be considered in determining public convenience and necessity, a specific finding of inadequate service is not necessary. Contention of plaintiff (protestant in commission proceedings) that the commission's failure to make an affirmative finding that its service is inadequate precluded its grant of authority in question, is not in accord with the law. Complaints dismissed.— Id., 258 F. Supp. 617 (620)*.

Though adequacy of existing service is a factor which the commission should consider in determining whether any authority should be granted, §207 expressly provides that issuance of a certificate confers no proprietary interest in use of the highways on the certificate holder, and plaintiff concedes that absence of an express finding of inadequacy of existing service does not invalidate an order of the commission. The record indicates that the examiner, and the commission in adopting his recommendation, gave full consideration to the available existing service; the commission's order granting certificate for service competitive with that of plaintiff, sustained.— Sloan's Moving & Storage Co. v. United States, 208 F. Supp. 567 (570)*.

Evidence shows that at least two motor carriers are willing and able to provide the service required by supporting shippers of frozen foods, that complaints of service inadequacy are not substantial, and that an abundance of suitable equipment and facilities is available. Moreover, there has been no reasonable effort to work out transiting arrangements with protesting carriers, who show willingness to institute storage-in-transit arrangements with respect to traffic moving to all points involved. Denied.—Willis Shaw Frozen Exp., Inc., Extension, 100 M.C.C. 18 (21).

Untried single-line and, in some cases, joint-line services available cannot be found inadequate on the record; protestant's through-trailer service cannot be presumed to be inadequate merely because a joint line service would be provided on perishable products.—Wilson Bros. Truck Line, Inc., Extension, 94 M.C.C. 426 (430); collectively protestants can provide service to a vast territory, affording shippers of dairy products ample opportunity to obtain a variety of combinations for stops in transit for partial unloading. Shippers are not entitled as a matter of right to service to every point or combination of points to which they might conceivably make a shipment when reasonably adequate existing services are available which they have failed to try. Granted in part.— Raye & Co. Transports, Inc., Extension, 94 M.C.C. 554 (561)*.

Record does not show that protestants or other existing carriers are unable or unwilling or are not, in fact, presently providing the public with adequate service in the handling of considered traffic. On the contrary, it was shown on cross-examination that supporting shippers are reasonably satisfied with present services of existing carriers and, in some instances, with that being rendered by applicant on an interline basis; extension application denied.—Dixie Ohio Exp., Inc., Investigation and Revocation, 94 M.C.C. 625 (636)*; similarly, supporting shipper describes service of one protestant as adequate and reliable, has no complaint about service rendered by the other, but is interested in having the service of at least two carriers to each of two destination States involved. Applicant has failed to show that existing service is inadequate; denied.—E.B. Law & Son, Inc., Extension, 94 M.C.C. 532 (534-5, 539-40)*.

Supporting shipper's only complaint regarding existing carriers' service is that they could not transport small quantities of smokeless powder in mixed shipments with their other products, but this deficiency has been remedied by the Commission's reclassification of smokeless powder in quantities not exceeding 100 pounds as a flammable solid for transportation purposes, thus bringing it within authority of general commodity carriers unless restricted against transportation of flammable solids. Existing carriers are willing and able to render service reasonably adequate to meet shipper needs; denied.—West Motor Freight, Inc., Extension, 94 M.C.C. 793 (797).

Supporting shipper's described loss of sales in destination States sought is not shown to be due to any particular factor whatever, much less inadequate transportation; in fact, a portion of the loss of sales which shipper claims at one New England city occurred subsequent to grant of temporary authority to applicant to serve that point; it seems clear, therefore, that the asserted loss of business cannot properly be attributed to lack of motor carrier service, and evidence is not persuasive that protestants failed to render reasonably prompt service in furnishing vehicles upon request.—Curtis, Inc., Extension, 94 M.C.C. 728 (730).

Though applicants seek authority between Alabama railheads and other Alabama points for purpose of establishing coordinated rail-motor service on traffic assertedly not susceptible of all-motor or all-rail movement, claimed advantages of such service cannot be related to any demonstrated need when no complaints about, or material deficiencies in, the abundance of existing and available motor services are shown. No present or potential shipments are shown to be beyond protestants' authority or ability to handle, and failure of supporting shippers and receivers to investigate services of existing motor carriers, or to request them to reach workable through-route and joint-rate agreements with supporting rail carriers, is of controlling significance. Applications denied.—Osborne Truck Line, Inc., Extension, 94 M.C.C. 414 (418-9).

Though 3 applicants seek statewide destination authority for transportation of meats, packinghouse products, and frozen foods from Denver, the 5 supporting shippers presently sell their products at only one or a few points in each State sought, and their evidence is not shown to be representative of a more extensive distribution pattern. All those destinations are served single-line by one or more protestants, and the record demonstrates that supporting shippers have not adequately utilized existing services of carriers authorized and willing to meet their requirements. All three applications denied.—Colorado-Arizona-California Exp., Ind., 92 M.C.C. 89 (97-8)*.

Supporting shipper has been able to move its products satisfactorily from Denver to 147 of 151 points to which it now ships or has sought to ship from Denver; on the whole, existing motor carrier service from that point is not shown to be inadequate, and protestants now serving shipper from Denver are willing to interchange with carriers operating between Denver and Greeley. Since latter service has not been tried and there is no substantial basis for finding such interline service inadequate or unsatisfactory, it is necessarily concluded that shipper has adequate service available from Greeley to all points, with certain exceptions, to which it now ships from Denver; application denied as to such points.—Curtis, Inc., Extension, 92 M.C.C. 25 (31)*.

Need for proposed transportation of chemicals by 2 applicants from 2 West Virginia points to 10 States and District of Columbia is not shown; protestants' services when used have concededly been entirely adequate, and 23 instances in which they did not furnish equipment on request are insignificant compared to overall volume which they have transported without complaint, and do not justify duplication of their authority and dilution of their present traffic. Applicants' transportation of certain traffic, which is some cases protestants apparently could not handle on short notice, does not establish a presumption of public need; denied.—Mason & Dixon Tank Lines Extension, 91 M.C.C. 7 (12-13).

Application denied as to points protestant may serve when its service for supporting shipper has been at very least reasonably adequate; protestant has made every effort to insure its continued participation in involved traffic even when afforded very short notice of need for equipment. Although protestant must lease some equipment to fulfill shipper's peak needs, it has done so in the past, and there is no reason to believe it will be unable to do so in the future, even with increased production anticipated by shipper.—Kramer Extension, 91 M.C.C. 16 (19).

Protestants operate over feasible, though slightly more circuitous, routes than applicants, and have suitable equipment which they are willing to make available to satisfy shippers' needs. Shipper's only real interest is proposed lower rate; however, protestants have not sought to embargo the traffic, but

rather have done all they could to obtain it. Before additional authority is granted, existing authorized service should be tried; denied. —Hulme Extension, 91 M.C.C. 575 (581).

From Sioux City-Omaha area three carriers provide single-line service to a considerable portion of 13-State destination area sought, and numerous others perform joint-line service, so that entire destination area generally is served; criticism of their service lacks specificity and is not convincing that present service is inadequate; denied as to those origins.—Indiana Refrigerator Lines, Inc., Extension, 91 M.C.C. 71 (80).

Evidence of supporting shippers is vague and generally fails to show any need for service to specific destination points; plethora of motor and rail service is available and shippers have not shown any substantial inadequacy which would warrant new competitive service. An existing carrier should be given reasonable opportunity to transport all the traffic it can satisfactorily transport before new competitive service is authorized. Although applicant is providing supporting shippers with service to points in the Lower Peninsula, he should not be permitted to extend his operations to the rest of Michigan where no inadequacy in existing service is shown.—Davis Extension, 91 M.C.C. 623 (631, 632).

Supporting shipper makes no claim of material deficiencies in available transportation facilities at Vancouver where its new terminal will be located; four opposing carriers are authorized and equipped to transport petroleum products from Vancouver to all or substantial portion of Oregon; one is eminently qualified to meet all shipper's requirements and its ability to do so is unchallenged. Loss of traffic applicants have handled for shipper at Portland is unlikely to impair their ability to provide adequate service. Denied.—Salem Nav. Co. Extension, 91 M.C.C. 699 (701, 704).

Evidence at further hearing vitiates prior conclusions as to need for through service on meats by Canadian applicant to points in eastern States; protestant has amply demonstrated that it handles the traffic in a satisfactory manner; no load has been rejected because of spoilage and no claims for spoilage have been made, While existing service involves a physical transfer of lading, protestant is willing to participate in through trailer arrangements with applicant. Denied as to such service.—Leamington Transport, 91 M.C.C. 647 (650, 651)*.

Collectively protestants are authorized to serve the entire destination area sought and in most cases a minimum of two of them can provide service to any point. They are all serving supporting shipper satisfactorily or are willing to do so; they operate considerable amount of refrigerated equipment and offer 1.t.l. as well as t.l. service. Supporting shipper's transportation needs are apparently being met by existing carriers who are capable of assimilating more traffic, and the ample service available has not been shown to be wanting in any respect; denied.—Blythe Extension, 91 M.C.C. 827 (834-5).

Where opposing carriers provide service similar to that sought to be established, applicant must show inadequacy of the existing service; a finding of inadequacy of such service is subsidiary, thus relevant and necessary, to an ultimate need for the new service; and evidence concerning certain activities of protestant which allegedly prevented use of existing common carrier facilities was relevant to a determination of whether existing service is adequate. Need for proposed transportation of passengers, in special and charter operations, not shown.—Kirk, 89 M.C.C. 587 (588-9).

One or more of protesting carriers is authorized, with few exceptions, to provide all service proposed by railroad subsidiary; they operate suitable equipment, have served supporting shippers in both intra- and interstate movements in the past, are willing to enter into joint rail-motor arrangements with applicant's parent railroad, and also, if requested, to provide shippers with all-motor service. Shipper testimony as to present or future need is vague and speculative; much of expressed future need is contingent on shippers' successful bidding on construction contracts; no situation is foreseeable whereby existing facilities would be inadequate to handle the traffic; denied.—Milwaukee Motor Transp. Co., Extension, 89 M.C.C. 41 (44-5).

Although supporting shipper represents that existing motor carriers, most of which

operate over regular routes or serve only limited destination territories, cannot provide the flexible service it desires for distribution of its products, a finding of necessity for an additional transportation service cannot be predicated solely on one shipper's desire to follow a particular distribution plan. Considering number and extent of available motor and rail services, it is not shown that existing carriers cannot meet that shipper's reasonable transportation requirements; denied.—Kroblin Refrigerated Xpress, Inc., Extension, 89 M.C.C. 255 (262-3)*.

No real need is shown for transportation by applicant of frozen fruits, berries, and vegetables in relatively broad territory additional to that for which "grandfather" rights were confirmed; general statements by supporting shippers that they ship traffic between storage facilities or from copackers' plants to storage facilities and to their customers, and that they need flexible single-line service between such points, do not demonstrate need for more service than is now available; existing regular-route general-commodity carriers and irregular-route carriers of frozen foods serve practically all points in considered Middle Atlantic States, and with their connections provide interline service to southern and New England States; not only is there no specific showing of inadequacy of such services, but shippers are admittedly satisfied users of several protestants' services; denied.—Lester C. Newton Trucking Co. Extension, 89 M.C.C. 269 (274)*.

Two protestants which can serve supporting shipper's plant operate over substantial systems of routes, and though services provided by each are to a certain extent performed over routes of subsidiary or affiliated companies, both offer the through-trailer type of service shown to be required, not only over their own systems, but through interchange with connecting carriers as well. There is no showing of inadequacy of those services; shipper's only specific complaint concerns a shipment handled by another carrier which could have been handled by one of those protestants; no good reason appears why shipper cannot use their services; application denied.—Roadway Exp., Inc., Extension, 88 M.C.C. 533 (537-8).

Except for transportation of grain fumigants and insecticides from Kansas City area to Illinois points, existing motor carrier service is not shown to be inadequate to meet supporting shippers' reasonable transportation requirements. One shipper has available to points in the destination territory protestants' untried services, which are not shown to be inadequate in any material respect, and but for that shipper's unsupported expectations there is no evidence to indicate the volume of anticipated inbound traffic or points from which it would move; another shipper's isolated examples of delays or dirty equipment are not a proper basis for a grant of authority. Granted in part.—Cyrus Truck Line, Inc., Extension, 88 M.C.C. 447 (451).

While adequacy or inadequacy of existing service is a factor to be accorded weight, a finding of inadequacy is not indispensable to issuance of a certificate; and though, once a need for a proposed service has been established, adequacy of existing service is an important factor in determining whether public convenience and necessity require certification of a new carrier, it is only one of the many factors which must be considered in arriving at the broader determination of public convenience and necessity.—Nashua Motor Exp., Inc.—Petition for Modification, 96 M.C.C. 583 (585)*.

See also Railway Exp. Agency, Inc., Extension, n. 7 *Express*, above.

Shipper of candy (which requires refrigeration) from Texas to retail drugstores at some 105 points throughout Florida is presently using a three-line service provided by regular-route carriers; but that service is unsatisfactory because of transit time, which limits it to once-a-week service to some points, and because it prefers single-line service to avoid exposing its candy to unfavorable temperatures. Transportation of the many small shipments to a large number of points requires an irregular-route carrier that can provide extremely flexible single-line service and that can either make the necessary dropoffs or has a peddle service from terminal refrigerated storage facilities which cover the State. Existing services are inadequate to meet shipper's transportation needs; granted.—Alterman Transport Lines, Inc., Extension, 96 M.C.C.

478 (480-1)*.

Supporting children's camps require a fast, efficient, and reliable service in the transportation of campers' baggage, since failure of a carrier to make prompt pickup and delivery can cause great inconvenience to the child, create ill will between the camp and the child's parents, and result in loss of attendance the next season. Seven camps have used services of protestants but have found them unsatisfactory, and cite numerous examples of delayed and lost shipments and rude and incompetent service. Considered camps desire applicant's proposed interstate service and would utilize if the application is granted; they have used applicant's intrastate service and found it to be very satisfactory. Evidence is convincing that the existing service is inadequate to meet shippers' reasonable transportation needs; granted.—Gibney Distributors, Inc., 95 M.C.C. 733 (735-6).

Motor protestants have never carried fertilizer from and to involved points, have made no serious solicitation of shipper, and their rates are too high to move its traffic; to this extent available service is inadequate; authority granted.—Porter Transp. Co. Extension, 91 M.C.C. 178 (181).

The examiner's finding that existing service for transportation of fresh meats between considered points is inadequate was justifiable solely on the basis of the quality of service protestant has rendered in the past; any consideration of intrastate service by the examiner was merely gratuitous; and an allusion to the "complete service" concept was subsidiary to a finding of inadequate interstate service. Applicant's proposed service is shown to be needed by supporting shipper.—T.M. Zimmerman Co., Extension, 89 M.C.C. 150 (153).

Express: [Vol. 19].—Since applicant is affiliated with rail carriers within meaning of §5(2)(b), special circumstances must be shown to exist in order for it to obtain authority to conduct motor operations wholly disassociated from rail operations. Operation of rail passenger and merchandise trains in considered area has been discontinued, and evidence shows that existing motor carriers do not regularly render express motor service therein; such "special circumstances" justify a finding of public need for proposed motor carrier service, limited to that auxiliary to or supplemental of REA's express service. But issuance of certificate is withheld pending republication of the application, as amended, to give any interested party notice of complete scope of the authority granted.—Railway Express Agency, Inc., Extension, 98 M.C.C. 75 (78-9, 80); similarly, "special circumstances" justify grant of express-auxiliary authority between Chicago and Cincinnati, serving named intermediate points.—Id., 98 M.C.C. 92 (98-9); and over Macon-Atlanta, Ga., route, serving Robins Air Force Base as an off-route point.—Id., 91 M.C.C. 887 (890, 891)*.

When Railway Exp. Agency seeks to institute motor vehicle operations which are not auxiliary or supplemental to those of the express company, such as irregular-route service which is not considered to be in nature of an express service, it must show that special circumstances exist; and since it is affiliated with railroads within meaning of §5(2)(b), it must show special circumstances to justify authority for motor operations wholly disassociated from rail operations. Such special circumstances are in fact present where existing motor carriers are not regularly rendering an express service.—Railway Exp. Agency, Inc., Extension, 91 M.C.C. 311 (339-40)*.

And although use of existing transportation modes and carriers is intrinsic to operations of an express company, where existing services are not compatible with transportation of the wide range of commodities that move in express service, or with the expedition and special care provided thereby, there is ample cause for REA to institute motor operations in its own behalf. Argument that such an application should turn on a showing that REA will transport over the route involved a significant number of commodities which by nature require special handling ignores the fundamental function of an express service, which is a premium service utilized by shippers whenever speed or special handling, rather than rates, is important the choice is shipper's, and it is clearly in public interest that if possible that choice be not precluded.—Id., p. 340.

Need is established for REA's transportation of express between Boston and certain

points in New Hampshire, and between Hoosick Falls, N.Y., and Middlebury, Vt., latter restricted to traffic having prior or subsequent movement in REA's express service, when passenger-train service formerly utilized has been discontinued and existing motor carriers are unable to provide the complete service required because their authority excludes commodities of unusual value. More important, absence of proof that protestants have at any time effectively competed for express traffic warrants conclusion that none of them regularly renders an express service such as applicant has been providing. Extension authority granted for service auxiliary and supplemental to REA's express service. —Id., pp. 315-9, 341-2.

When existing modes of transportation are inadequate for many commodities that move in express service, or for expedition or special care provided in express movement, Railway Express Agency has ample cause to seek authority for motor vehicle operation in its own behalf. Dimunition of passenger-train service and of expedited rail operations in which express has historically moved should not be permitted to threaten continued existence of express service in the affected area. Protestants cannot, either singly or collectively, provide the complete express service required in considered area; therefore, extension authority is granted, subject to key-point and express-auxiliary restrictions.—Railway Exp. Agency, Inc., Extension, 91 M.C.C. 473 (479, 480); similarly, public need is clearly established for REA's motor express service to points along proposed route between Sioux City, Iowa, and Mitchell, S. Dak., and, since no other express service is available at those points, authority granted is restricted only to express-auxiliary service.—Id., 91 M.C.C. 836 (839).

Railway Exp. Agency's contention that as long as its express service, as distinguished from the operational means whereby the service is rendered, remains essentially unchanged the existing competitive situation will not be affected by a grant of motor-carrier operating authority to it, and that consequently it should be allowed to continue to offer express service regardless of the underlying transportation mode and without consideration of adequacy of other existing services, rejected. While the commission recognizes the distinct character of express service and that it should not be tied inflexibly to any particular underlying transportation mode, an unbroken line of cases establishes that an application by REA for motor authority to transport express is subject to the criteria which stem from Part II, and in such proceedings the commission has consistently considered the adequacy of existing service by all modes in determining the propriety of a grant. —Railway Exp. Agency, Inc., Extension, 94 M.C.C. 102 (106, 107).

But when for a convincing reason the underlying mode in the area is shown to be inadequate for movement of express, as where train discontinuances leave an area without express service or with service available only at inconvenient times, or where use of existing modes results in substantial in-transit delays, a grant of motor operating authority to REA is warranted. Such authority has also been granted where, in addition to inadequacy of existing service, there was a convincing showing that substantial interior operating economies would result. However, applicant's argument that present proposal should be treated like a railroad proposal to substitute motor for rail service and, thus, should be authorized on the sole showing that use of the new motor route would generate operating economies, was rejected in 91 MCC 311; and its contention that the criteria applicable to alternate-route applications should apply is untenable, since its proposal contemplates a service route.—Id., pp. 106, 107.

There is no justification for allowing REA to institute line-haul motor operations between Charlotte, N.C., and Chester, S.C., when as a shipper it has shown no material deficiencies in present underlying rail service; and while specific support from individual users of its service at intermediate points is not prerequisite to establishing public need for that proposed service, there is no convincing evidence that existing rail service materially handicaps them or fails to meet REA's requirements as a shipper. Contemplated earlier deliveries at such intermediate points are not demonstrated to be responsive to any definite need therefor, and claim that they

would increase efficiency of scheduling express traffic through the Charlotte gateway does not rebut the prima facie showing that present rail service is compatible with the expedition required in that area. Additionally, there is no convincing showing that proposed service would result in such substantial operating economies as to justify grant of all authority sought, without any apparent accompanying benefit to the public.—Id., p. 108.

But public need is established for continuance of REA's expeditious express service at Great Falls, S.C., which otherwise would be rendered impossible in view of impending discontinuance of railroad's substituted motor service to that point, which REA is now using, when buslines and motor general-commodity carriers cannot provide a complete or convenient express service of type required. Therefore, authority is granted, subject to rail-haul and through-billing restrictions, between Chester and Lancaster, S.C., serving Great Falls as an intermediate point. —Id., pp. 104, 107-8; for similar reasons, regular-route authority is granted between Hartford and Evergreen, Ala., serving specified intermediate points, and over two alternate operating-convenience routes, subject to certain restrictions.—Id., 94 M.C.C. 731 (735-6) and public need is established for REA's proposed service between Roanoke, Va., and Walnut Cove, N.C., serving named intermediate and off-route points, in lieu of service formerly provided in passenger trains which have been discontinued.—Id., 91 M.C.C. 711 (715).

See also Pennsylvania Truck Lines case, n. 35 *Substituted freight service*, below.

While the peculiar attributes of express service, viz., expediency and special handling of freight at premium rates, have always provided a natural line of demarcation between such service and that rendered by common carriers of ordinary freight, and those distinctions have often been persuasive that a proposed line-haul motor movement of express by REA will not present any substantial threat of undue competition with operations of independent common carriers conducted generally at lower rates, in instant proceeding there is no evidence to indicate that shipper of fresh meats would use REA's proposed service because of any expeditious or special handling or other attributes of express service that might be provided; thus, applicant failed to rebut protestant motor carrier's prima facie case that it can provide that shipper with the complete motor service required.—Railway Express Agency, Inc., Extension, 94 M.C.C. 677 (681-2).

Applicant is now providing express service in considered area with rail transportation and there have been no complaints of material deficiencies therein, by users of applicant's service or by applicant itself. Neither contemplated earlier deliveries to some points on inbound shipments, nor elimination of transfers of express between rail terminals and applicant's recently installed off-rail pickup and delivery facilities at certain points, are shown to be responsive to any definite need and, thus, do not rebut the prima facie showing that existing rail service is entirely compatible with transportation presently required for express traffic in the area.—Id., pp. 680-1; the proposed substantial line-haul motor operations should not be authorized on a sole showing that applicant's use of new motor route would generate some interior operating economies, without a concomitant showing of some appreciable and direct benefit to the public. Any other conclusion would accord REA a privileged status and treatment, in determining its requests for motor authority, that Part II of the act does not contemplate. Denied.—Id., p. 682.

Because of limited space available on underlying railroad's trains operating between Charlottesville, Richmond, and Newport News, Va., discontinuance of stops at some intermediate points, and inadequate time for transfer of express to Richmond train at Charlottesville, Railway Exp. Agency has had to hold eastbound express shipments overnight at Charlottesville or route them circuitously via Washington, and institution of motor service under temporary authority has resulted in earlier deliveries at Richmond and Newport News. Moreover, in view of rapid diminution of passenger train service in recent years, REA cannot be expected to continue in reliance on existing rail service.—Railway Exp. Agency, Inc., Extension, 94 M.C.C. 62 (66-7, 72).

More importantly, economies possible without significant change in character or quality of express service previously rendered, as demonstrated by REA's experience under temporary authority, warrant grant of permanent authority for routes sought. REA has maintained the separate character of express service in those operations, and existing motor carriers do not or cannot provide express service of like comprehensive scope. General-commodity carriers do not regularly furnish express service on poultry or live animals at points involved, and protestant buslines do not handle explosives, articles of high value, or certain perishable commodities; moreover, size of shipments handled by buslines is limited to carrying capacity of their passenger vehicles, and their ability to render pickup and delivery service is circumscribed by their more restricted terminal areas. Granted for service auxiliary to REA's express service.—Id., pp. 69, 73, 76.

Evidence presented by REA, which alone supports application of railroad subsidiary for authority to handle REA's traffic over proposed shorter route between Atlanta and Cedartown, Ga., fails to show that existing service available to it in that area is in any way inadequate. Protestant motor carrier's service has not been tried, and that of applicant and another railroad, which it now uses, is not shown to be deficient except in allegedly inconvenient late arrival time of shipments moving to Atlanta—which could easily be remedied by a change in applicant's scheduling of vehicles or by REA's use of protestant's more direct service; thus, grant would merely allow applicant to enhance its competitive position and that of REA at expense of an authorized independent motor carrier which has already suffered diversion of part of its general freight traffic and whose service is not shown to be anywise inadequate. Moreover, REA's expressed preference for rail carriers or their affiliates because of their familiarity with type of billing used has little significance when shipments originating at Cedartown are rehandled at REA's Atlanta facility before reshipment to destinations. Denied.—Central of Georgia Motor Transport Co. Extension, 94 M.C.C. 6 (11).

Evidence establishes a need for applicant's proposed motor express service at Loxley, Robertsdale, and Foley, Ala., which will be superior to that presently provided by freight train express service; receivers of express at those points will be able to handle additional commodities, in some instances, and to improve their customer relationship through use of the more expeditious service to be provided. However, grant of unrestricted motor carrier authority between Mobile, Ala., and Pensacola, Fla., is not warranted; present service between those points is not shown to be inadequate and, so far as time is concerned, there is virtually no difference between present train and proposed truck service. Authority granted, therefore, is subject to express-auxiliary and key-point restrictions.—Railway Exp. Agency, Inc., Extension, 94 M.C.C. 180 (183-4).

Record as a whole demonstrates need for continuance of applicant's express service between Clinton, Iowa, and Crystal Lake, Ill., serving designated off-route and intermediate points including Chicago, also for local express service solely between authorized points on described route, but otherwise restricted to reflect accurately the contemplated traffic movements shown of record.—Railway Exp. Agency, Inc., Extension, 92 M.C.C. 487 (489-90).

Use of the various existing transportation modes and carriers is inherent in operations of Railway Exp. Agency, and where existing modes are not adequate for express service REA may seek to institute motor operations in its own behalf. Evidence adduced demonstrates public need for continuance of expeditious express service between Albany and Gloversville, N.Y., serving Amsterdam as intermediate point. Though applicant has been using New York Central's service between Albany and Fonda and that of protestant short-line railroad between Fonda and Gloversville, Central's service has not been entirely satisfactory, and its failure to protest REA's application indicates lack of interest in continued participation in express traffic between the involved points. In such circumstances, and in view of protestant's inability to serve Albany or Amsterdam, applicant should be granted authority between Albany and Fonda, serving Amsterdam as intermediate point.— Railway Exp. Agency, Inc., Extension, 92 M.C.C.227(230-1).

However, REA, should not be authorized to serve Gloversville when protestant is ready, willing, and able to provide adequate motor service between Fonda and Gloversville, as it has done in the past, and its service on express is not shown to be in any way inadequate. Moreover, express revenues derived from its motor operations are important and vital to continuance of protestant's service as the only rail carrier serving communities in the Gloversville area. Authority granted REA between Albany and Fonda will allow it to institute an expeditious and dependable express service, using its own vehicles between those points and those of protestant between Fonda and Gloversville, thus permitting protestant to continue participating in the express traffic which yields a substantial percentage of its new income—Id., pp. 231-2.

Considering that purchase applicants' services involve solely express operations, any adverse effects on protestant general freight carriers of issuance of certificate to vende for continuance of vendor's single-State proviso operations would be inconsequential in view of fundamental differences in, and limited competition between, those types of service; moreover, neither of those protestants is authorized to provide the complete service needed in involved rural area. While protestant busline is authorized and capable of providing the needed service to some extent, it could not provide the flexible service needed, due to weight and size limitations inherent in its transportation of express in some vehicles with passengers, lack of pickup and delivery arrangements, and need to subordinate transportation of express to interest of passengers. Certificate granted.—Mistletoe Exp. Service—Purchase—Central News Exp., Inc., 90 M.C.C. 797(803-4).

No need is shown for proposed operation, in distribution service for an air freight forwarder, between Cleveland airport and that portion of adjacent 5-county area not within terminal areas of airlines serving that airport; supporting forwarder has available, and utilizes, various motor carrier services and has expressed no dissatisfaction with existing service except in very general terms; protestant is authorized and willing to transport freight in that area, but supporting forwarder has never used it, and in absence of proof of any material deficiency in service of protestant and other carriers its desire to use applicant's service does not warrant grant of authority.—Panther Cartage Co. Extension, 88 M.C.C.37(42).

Proposed transportation of express in pup semitrailers, to be towed by applicant's buses, would be merely a new method of performing service it already renders, and is not shown to serve any bona fide public purpose. While the commission subscribes to encourangement of progressive measures which will benefit the general public, it cannot do so in face of appreciable adverse effects on other segments of the transportation industry. Benefits from proposed service, which would accrue primarily to applicant, lose significance when considered within the context of desirability of requiring passenger carriers to remain primarily in the passenger business, and of considerations of safety and feasibility of operation. Furthermore, supporting shippers express complete satisfaction with existing services, and applicant admittedly has no overflow of express traffic which it cannot handle on the next scheduled trip after tender. Denied.—Continental Southern Lines Extension, 88 M.C.C.547(552).

Fitness, in general:[Vols. 10-12, 14-19].—See also n. 10, above.

As management changes and improvements in corporation form of business enterprise may result in radical change in corporate applicant's capability to perform its carrier operations, it would be unrealistic to hold that the commission lacks authority to decide whether a corporation is presently "fit" to perform proposed operations. Past willful misconduct should be considered as an element in assessing applicant's present and prospective fitness; and such assessment is one peculiarly within the commission's expertise and should not be interferred with unless found to be arbitrary or capricious. While the commission made no specific subsidiary findings on the issue of willfulness of corporate applicant's past unlawful operations, record shows that it gave adequate consideration to that issue; other subsidiary findings of record adequately support its conclusion that evidence of past unlawful operations did not require finding applicant unfit to receive grant of authority; sustained.—Armored Carrier Corp. v. United States, 260 F. Supp. 612 (615-7)*.

Despite previous unlawful operations applicant is found fit to provide the proposed service. Although informed by report in an earlier extension proceeding that its authority to transport tractors did not authorize the transportation of commodities similar to considered self-propelled road rollers and street-sweepers, it was not given an adequate guideline as to the full scope of that authority. Its continued unlawful transportation of such commodities appears to have been based on an honest difference of opinion; moreover, no other unauthorized operations on its part are shown.—Daily Exp., Inc.-Investigation of Operations, 98 M.C.C. 661 (676).

Applicant cannot be found unfit to provide proposed service when record does not show that its leasing arrangements may result in owner-operators being inadequately compensated and in improper expense-cutting practices in contravention of the national transportation policy. The record does not provide sufficient facts to make a determination whether as petitioners contend, applicant is merely renting out its authority to owner-operators and that its operations, therefore, do not constitute for-hire carriage as contemplated by the act. Should petitioner desire to further pursue their contentions in this regard, other appropriate proceedings before the commission are available.—International Transport, Inc., Extension, 95 M.C.C. 360 (362-3)*.

The examiners' conclusions as to applicant's fitness are twofold: (1) that it has not shown exclusive possession, control, and use of the equipment it leases and (2) that its financial balance sheets show current liabilities grossly in excess of assets. The leasing arrangements are discussed and approved in concurrrent decision (94 MCC 361) on another extension application by same carrier; balance sheet for a recent 8 month period shows that applicant's current assets substantially exceed its current liabilities; it is found fit to conduct proposed operations.—Florida Refrigerated Service, Inc., Extension, 94 M.C.C. 364 (366, 373-4).

Applicant may properly be found fit to perform proposed service when protestant's allegations concerning past unauthorized transportation of the commodity involved are not supported by any convincing evidence.—M. I. O'Boyle & Son, Inc., Extension, 88 M.C.C. 559 (561); facts bearing protestant's claim that applicant has made stops in transit for partial unloading without appropriate tariff provisions are not set forth sufficiently to permit determination of that issue. However, applicant has satisfactorily established its fitness to perform the proposed operations.—Raye & Co. Transports, Inc., Extension, 94 M.C.C. 554 (559)*.

Specific evidence of an understanding or arrangement between carriers and/or shippers, whereby carriers agreed not to protest a particular application, would raise a question of the present and future fitness of such participating carriers to conduct operations subject to the commission's regulation.—Convoy Co. Extension, 91 M.C.C. 461 (465, Note)*.

Although fitness issue is not foreclosed, further hearing was authorized to permit certain carriers to contest issue of need for proposed service and, in absence of anything to the contrary, prior evidence establishes applicant's fitness.—Leamington Transport, 91 M.C.C. 647 (649)*.

Even though carriers have transported silver bullion in the past under authority to transport general commodities, except commodities or articles "of unusual value," the record does not necessarily justify a finding of unfitness. The issue of the status of silver bullion has not been entirely clear cut, and applicant has been diligent in testing its restricted general-commodity authority since it was first challenged. Therefore, applicant is found fit to conduct proposed operation.—Navajo Freight Lines, Inc., Extension, 95 M.C.C. 551 (554, 560).

While the violations complained of cannot be condoned, they stem from misunderstanding, and misconstruction of the court's action in refusing judicial review of the commission's opinion that transportation of certain commodities was not authorized by applicant's authority to transport "canned and preserved foodstuffs" because of its advisory character, rather than from a willful disregard of the act and the commission's rules; in the circumstances, therefore, a finding that applicant has not shown itself to be fit to receive authority requested is harsh and not warrant-

ed. Other alleged unlawful safety, operational, leasing, and the interchange activities on the part of applicant consisted primarily of rather infrequent minor infractions of the commission's rules; and those infractions especially appear rather inconsequential when considered in light of applicant's extensive operations, the absence of evidence indicating willfulness, and the inconclusiveness of other evidence. Applicant found fit to perform needed service.—Coldway Food Exp., Inc., Extension, 95 M.C.C. 780 (784-6)*.

Although applicant's past unlawful operations cannot be condoned, a finding of unfitness is not warranted since the transportation was performed under some color of right. Applicant is authorized to transport meats and meat products, but has transported vegetable oils and vegetable oil shortenings on the ground that these commodities were classified as "oils" and included in the list of "meats, meat products, and meat byproducts" contained in section A of appendix I to the report in the Descriptions Case, 61 MCC 209. After the commission found that such operations were not permitted by applicant's outstanding certificate, applicant filed instant application to obtain necessary authority.Therefore, a finding of fitness may properly be made.—Colonial Refrigerated Transp., Inc., Extension, 95 M.C.C. 379 (380, 382).

While applicant's past operations disclose various violations of the commission's safety regulations, and it has also violated the explosives regulations in certain respects and performed unlawful tacking operations, applicant appears to have taken measures which, if diligently pursued, will eliminate the failings it has been guilty of in the past; therefore, in view of apparent absence of willfulness in those violations, a finding of unfitness is not warranted. However, applicant does not have a full-time safety director, and services of its part-time ssfety consultant are more advisory than supervisory; it should employ a full-time safety director if that appears desirable to prevent violations of type considered, since any recurrence thereof could have serious consequences.—Monkem Co., Inc., Extension, 94 M.C.C. 749 (755).

Although applicant has transported considered traffic without appropriate authority, and such unlawful operations are not condoned, a finding of unfitness is not warranted when applicant has demonstrated that it will comply with the commission's rules and that it is fit to perform proposed service.—Gibney Distributors, Inc., 95 M.C.C. 733 (737); when record shows no improper operations of a material nature, and applicant conscientiously ceased unauthorized service when admonished to do so and filed for both temporary and permanent authority covering those operations.—S & S Trucking Co. Extension, 91 M.C.C. 239 (241); when past unlawful transportation was performed in mistaken belief that it was permissible under a combination of applicant's existing authorities.—Edwards Extension, 88 M.C.C. 318 (321, 322)*; when there is nothing to indicate that applicant's past unlawful operations were conducted in willful disregard of requirements of the act.—Kiser, 89 M.C.C. 750 (753).

Unlawfulness of past transportation of shipments by applicant Canadian carriers from customs station at Buffalo and Niagara Falls, N. Y., a few hundred feet to customs plazas for interchange with United States carriers does not preclude a finding of fitness. One applicant instituted such operation only after being advised by the commission's district supervisor, some years before similar operations of another carrier were held unlawful, that no authority was required; and legality of the other's operations, conducted since about 9 years prior to enactment of the Motor Carrier Act, was never questioned by commission personnel. A stronger color of right than that under which applicants have operated in the past would be difficult to imagine.—Overland Exp. Extension, 92 M.C.C. 757 (760, 761, 765).

Question of fitness arising from Canadian applicant's past unauthorized movements across international boundary must be resolved in its favor, considering that the commission's Bureau of Motor Carriers had rendered informal opinion that no authority was required for the operation involved. Similarly, in light of surrounding circumstances, past existence of an improper common-control relationship with a United States carrier did not render it unfit, since it provided service between the United States and Canada under

erroneous assumption that its operations were not subject to the commission's jurisdiction and thus would not be subject to its regulation regarding common control; applicant did not engage in unlawful operations willfully and should not be considered unfit because of its participation therein.—Fess Transport, 91 M.C.C. 924 (927)*.

And though issues pertaining to rate matters are not normally pertinent to application proceedings, applicant's failure to abide by terms of tariff published by tariff bureau while a member thereof was a violation of the act, since a foreign operator, by participation in a joint rate with a United States carrier, becomes subject to terms of the act to extent of the joint rate. However, since that violation was likewise due to applicant's mistaken belief that its activities were not subject to the commission's jurisdiction, a finding of unfitness on that ground is not warranted.—Id., p. 927-8.

Since applicant's past transportation of stockmen between Chicago stockyards and Ames, Iowa, was conducted under color of right and without any attempt at subterfuge, application should not be denied for unfitness, especially as denial would leave the Iowa stockmen without adequate transportation service to and from the stockyards.—Myers, 89 M.C.C. 125 (129)*.

Although applicant's drivers were delinquent in accepting a shipment from a retail store and in accepting 5 shipments exceeding 50 pounds, in violation of restrictions in its certificate, and such violations are not condoned, they fall short of establishing that those restrictions cannot be satisfactorily administered or that applicant is unfit to conduct proposed extension operation.—United Parcel Service, Inc., Extension, 89 M.C.C. 709 (742-3)*.

Though applicant has disagreed with the commission's interpretations of various sections of the act, has actively taken issue with its holdings as to exempt or nonexempt status of certain commodities, and continued to perform certain transportation after revocation of his certificate therefore, his theory that all commodities he transported were exempt received encouragement from certain court decisions, and he has operated under a bona fide belief that his theory was correct. He has always accepted responsibility for his actions, has cooperated with commission personnel during surveys of his operations, and his conduct has never approached a willful and flagrant disregard of the law; he may therefore be found fit to conduct the operations authorized.—Hughes, 89 M.C.C. 471 (476, 484)*.

While applicant continued transporting frozen potato products after denial of its "interim" application filed under §7(c) of Transportation Act of 1958, it did so on advice from Bureau of Motor Carriers that such transportation would be considered lawful pending final determination of proceeding on exempt status of frozen cooked vegetables; therefore, although decision therein (81 MCC 649) held commodities such as frozen french fried potatoes to be nonexempt, applicant's transportation thereof does not reflect upon its fitness.—Midwest Coast Transport, Inc., Extension, 88 M.C.C. 587 (588, 591)*.

Although applicant has engaged in some questionable leasing practices and transported some shipments after his temporary authority therefore was revoked, he is found fit to perform proposed service when there is no indication that legality of his leasing operations was questioned prior to hearing on instant application or that he is now engaged in any unauthorized transportation activities, and he ceased the unauthorized operations upon learning that he lacked appropriate authority. Considerable weight is accorded applicant's status as a new operator whose oversights apparently resulted from ignorance of regulatory requirements; fact that he has never been cited for violation of safety regulations, and his highly satisfactory performance for supporting shippers, are also taken into account.—Dennis, 92 M.C.C. 135 (140).

However, grant of authority should not be construed as condoning applicant's past unlawful activities. He is admonished that he has an affirmative duty to conform to requirements of the act and the commission's regulations thereunder, and that mere compliance after notification of a deficiency is not enough; that duty requires his constant and continuing interest to ensure that his operations are in total conformity with the commission's rules, and he is reminded that upon is-

suance of certificate he becomes an authorized carrier subject to regulation and should be governed accordingly.—Id., p. 140.

In determining a carrier's fitness, consideration must be given the nature and extent of its violations, any mitigating circumstances shown to exist or to have existed, whether its conduct represents a flagrant and persistent disregard of provisions of the act, and whether it has made sincere efforts to correct past mistakes.—Melton Truck Lines, Inc., Extension, 88 M.C.C. 723 (734).

Applicant has made substantial progress in bringing its operations into line with requirements of regulation. It has ceased its gateway violations and, although there is room for additional improvement, has inaugurated a safety compliance program which has had a high degree of success; its unauthorized transportation of certain commodities was at least undertaken under some color of right, and extension application was filed as soon as its authority was questioned by a commission representative; in the circumstances a finding of unfitness is not warranted.—Id., p. 734.

Applicant's continued transportation of repossessed automobiles after two investigations does not reflect adversely on his fitness when the first resulted in a letter allowing it as private carriage, and in the second, after his transportation activities had presumably increased, no action was taken. And while his continuance of unauthorized transportation after institution of a third investigation and before he received temporary authority is not condoned, no official action was taken in that proceeding for some months; considering former character of his operations and aura of uncertainty that surrounded them, together with his assertion that he considered the investigation proceeding as appropriate a vehicle for determiing character of his operations as alternative of filing a motion to dismiss his application, there is no fitness bar to his obtaining such authority as may be needed.—Nash—Investigation of Operations, 89 M.C.C. 463 (469).

While certain of applicant's operations from Kentucky origins to Memphis are not authorized under its "grandfather" certificate, applicant had reasonable basis for concluding otherwise, especially since the commission now finds it necessary to clarify that ambiguously drafted certificate; applicant's prior operations, conducted in good faith under a color of right, do not impugn its fitness for proposed operation for which need has been demonstrated.—Southern Forwarding Co. Extension, 91 M.C.C. 221 (227).

While not condoning unauthorized operations, the commission has long recognized that it may not be in public interest, where convenience and necessity are clearly established, to deprive a shipper of a needed service where extenuating circumstances, such as misadvice, attend past unauthorized operations. Applicant has conducted operations for which authority is now sought for over 5 years under color of right and upon advice of cousel, and considering the original wording of its "grandfather" authority and changes therein in course of successive transfers (applicant being the fifth transferee), it cannot be concluded that its unauthorized operations were conducted willfully. Applicant is experienced in the type of transportation involved, has been rendering service satisfactory to supporting shippers, and is financially fit; in the circumstances, concurrent finding that its past performance of such service was unlawful does not require a finding of unfitness. Denied on other grounds.—Keystone Motor Exp., Inc.—Investigation of Operations, 89 M.C.C. 567 (580, 585)*.

That one of applicant partners, who was formerly a distributor of liquefied petroleum gas, sold his interest in the distributorship to a brother does not warrant finding that applicants' relation to supporting shipper, a producer of LPG, would be inconsistent with public interest. There is no contention that the partner's sale to his brother was not bona fide; he testified that his brother paid cash for his interest, and there is no evidence that he or any of his brothers ever had any financial interest in supporting shipper; therefore there is no secondary business or personal relation between applicants and the shipper. Substitution of a corporate applicant for the partnership does not affect this conclusion, since it is a change only in form rather than in actual management or control of the carrier. Applicant is fit to perform proposed service; however, should conditions change and any un-

lawful relationship or practice arise, any injured party may file appropriate complaint.—Wooten and Parker Extension, 92 M.C.C. 530 (532)*.

Applicant's refusal to accept collateral determination in four earlier proceedings in which appeared as a protestant, that territorial description in its authority to serve points "in Connecticut, Pennsylvania, New Jersey, and New York within 100 miles of Columbus Circle" restricted its territory in all four States, and its failure to initiate a proceeding for clarification of its certificate, did not amount to defiance of the commission or demonstrate any unfitness. If the prior collateral determinations are correct, applicant might be unable to claim good faith operations as justification for additional authority; however, it is not attempting to do so, but claims to hold unrestricted authority for the three States first named, and it should not be characterized as perfidious for refusing to accept what amounts to a "Humpty Dumpty" interpretation of its certificate. Thus, in view of the novelty of the interpretative problem presented, no finding of unfitness can be predicated on unlawfulness of applicant's operations beyond scope of that authority.—T. I. McCormack Trucking Co., Inc.—Investigation, 89 M.C.C. 5 (10-12, 16)*.

In addition, after being convicted and fined for hours-of-service violations, applicant appears to have discontinued the offending practices, and it would be improper to increase the court-imposed penalty when that action has apparently been effective in securing applicant's compliance; and its violations of the safety regulations consisting of a number of minor infractions over a long period, when balanced against applicant's extensive operations and satisfactory accident record, do not even suggest a finding of unfitness. Therefore, all things considered, an affirmative finding as to applicant's fitness is warranted.—Id., pp. 16-17.

While issue of applicant's fitness is questioned in another proceeding, inasmuch as that proceeding does not involve unsafe operations or safety violations by applicant, applicant can properly found to be fit to perform the proposed interchange service; proposed operation would improve applicant's safety of operations and afford greater safety to the general public. This finding, however, is specifically limited to instant proceeding, and shall not be construed to foreclose a contrary finding in any other pending proceeding.—Daily Exp., Inc., Extension, 95 M.C.C. 106 (108-9).

That legality of applicant's present operations under its modified heavy-hauling authority is under consideration in several other proceedings does not reflect on its fitness to perform proposed transportation of steel reinforcing rods.—Steel Transp. Co., Inc., Extension, 92 M.C.C. 387 (392).

Since certain of applicant's operating practices are questioned in pending purchase proceeding, it would be inappropriate in extension proceeding to make any finding respecting its overall fitness. However, as only alternate routes are sought in connection with presently authorized operations and applicant does not propose a new service, it can properly be found fit to receive such authority. But that conclusion is specifically limited to instant proceeding and does not foreclose any possible contrary finding in any other proceeding involving applicant.—Illinois-California Exp., Inc., Extension, 92 M.C.C. 125; Ringsby Truck Lines, Inc., Extension, 88 M.C.C. 544 (545).

While fitness need not be considered in view of lack of need for proposed service, applicants' unlawful leasing arrangement, their unauthorized leasing of vehicles to shipper as a contract carrier, and their repeated unlawful transportation of mixed loads of regulated and unregulated commodities has placed their fitness in very real question. Applicants are admonished that continued violations may subject them to fines and/or proceedings looking toward revocation of their present authority.—Hulme Extension, 91 M.C.C. 575 (581).

Delay in final determination of extension applications, due to further hearings respecting applicant's fitness, has had a salutary effect in that applicant has shown commendable improvement in its attitude toward commission's regulations, terms of its certificates, and safety of the general public, and its drivers have achieve a satisfactory degree of compliance with hours-of-service regulations.

Though the placing out of service of 13.8 percent of its units of equipment road-tested during a 6-months period is unfavorable, and it is admonished to bring all its operations into full compliance, applicant's fitness must not be judged in a vacuum; that percentage compares substantially with the national average; all things considered, applicant has improved its operations to the point that it can be found fit to receive additional authority.—Kroblin Refrigerated Xpress, Inc., Extension, 89 M.C.C. 255 (259)*.

Applicant has now demonstrated that it is fit and able to perform proposed transportation of roadmaking machinery, etc., from South Bend, Ind., for which need has been found; after operating under present ownership for about 5 years, it is thoroughly experienced in such transportation, has a completely equipped terminal at South Bend, and maintains adequate equipment; it enjoyed a modest profit in the 2 months following filing of application, and anticipates profitable operations; proposed extension should afford it opportunity to improve its financial position; authority granted to 36 States.—Taylor Heavy Hauling, Inc., Extension, 88 M.C.C. 208 (210)*.

Examiner's observation that applicant has not proved its fitness, based apparently on his belief that it is not observing the peddle service restrictions in its outstanding certificate, is not supported by the record. That applicant's president was unable to explain clearly the precise effect of that limitation was due primarily to its inherently vague contours; reasons making compliance difficult for applicant are essentially the same as those causing the commission to look with disfavor on peddle service limitations.—Fox-Smythe Transp. Co. Extension, 88 M.C.C. 57 (61).

Applicant's experience in operating profitably in transportation of new furniture from Hazelwood, N. C., to Oklahoma and Texas indicates it will probably be able to continue operating profitably over greater distances under extension authority granted from other North Carolina origins to those and three other southwestern States and California.—B & P Motor Lines, Inc., Extension, 86 M.C.C. 719 (721)*.

Applicant's past transportation of butter and fresh or frozen meat under "agricultural products" authority does not warrant finding it unfit; that authority and "agricultural commodities" authority involve a complex and somewhat confused area; however, in view of finding that such authority does not embrace those commodities, applicant is admonished to discontinue such unlawful practices.—Yeary Transfer Co., Inc., Extension, 88 M.C.C. 473 (477-8).

While applicant's leasing arrangements with a shipper appear to be unauthorized and in violation of §207.6 of the leasing regulations, and its records do not comply with condition in its Sub-No. 1 certificate requiring it to maintain separate records and accounts for its private and for-hire operations, hearing on present application followed so closely the grant of that certificate and applicant's incorporation that such violations warrant only an admonition at this time. However, applicant is directed to take appropriate measures to ensure compliance with all applicable regulations and with restrictions in its certificates; fact that it is being the benefit of the doubt and granted a certificate does not license it to conduct any illegal activities in the future; and such admonitions should be followed strictly and with celerity.—Barsh Truck Lines, Inc., Extension, 88 M.C.C. 579 (585-6)*.

Though neither applicant's failure to provide in its tariffs for unloading of shipments from rail cars, furnishing of special pallets, and provision of storage prior to delivery, all of which it does without charge in addition to the line-haul rate, nor its operation beyond scope of its authority in transporting shipments from its warehouse at an unauthorized origin, appears to have been in intentional disregard of its obligations as a regulated carrier or to require finding it unfit to receive extension authority sought, such violations are not condoned and it is admonished immediately to take steps to comply fully with the provisions of the act and regulations thereunder.—Paul Marckesano & Sons, Inc., Extension, 86 M.C.C. 727 (731-2).

Although, in prior report, applicant was properly granted authority to perform service shown to be needed, since that decision an investigation was instituted to determine whether it has been transporting commodities

not authorized by its certificate and whether it has been unlawfully extending credit; until that decision, a statutory finding of fitness would not be warranted; therefore, issuance of certificate is withheld pending outcome of the investigation proceeding.—C & H Transp. Co., Inc., Extension, 94 M.C.C. 711 (720)*; likewise, inasmuch as applicant's operations are the subject of a pending investigation, a finding that it is fit to provide the needed service cannot be made at this time. Proceeding held open for further consideration of applicant's fitness after final disposition of the investigation proceeding.—Home Transp. Co., Inc., Extension, 95 M.C.C. 128 (132).

Since applicant's fitness has been placed in issue in a new pending application proceeding, a finding of fitness in instant case would be premature and inappropriate. Therefore, while need is found for proposed service, proceeding is held open for further consideration of applicant's fitness after determination of the pending proceeding.—Ace Lines, Inc., Extension, 91 M.C.C. 559 (568); the question of applicant's fitness being involved in other application proceedings, grant of authority is conditioned upon a favorable finding of fitness in those proceedings.—Clay Hyder Trucking Extension, 89 M.C.C. 757 (762); similarly, as questions concerning common control and applicant's past operations have been raised in other proceedings, finding of applicant's fitness and issuance of certificate are conditioned upon favorable determination in those proceedings.—Milk Transport, Inc., Extension, 91 M.C.C. 280 (283).

Violations of a State's maximum weight laws may be considered in determining a motor carrier's fitness.—Alcoholic Liquors, Detroit, Mich., to Long Island City, 319 I.C.C. 404 (408).

Inasmuch as demand for proposed special or charter-party service, especially at the commencement of operation, will not be so great as to require applicant to augment his equipment to any substantial degree, the fact that he only has two vehicles presently does not necessarily mean that he cannot meet the future increased demands for service; moreover, he is financially able to add more limousines to his fleet either by purchase or through legitimate leasing if necessary. Also, while applicant may have conducted numerous interstate trips unlawfully, he ceased all such trips when informed of impropriety thereof, and he is desirous of conforming with all commission regulations. Applicant found fit, financially and otherwise, to conduct proposed operation.—Canzano, 95 M.C.C. 568 (574)*.

Although special and charter operations conducted by applicant for many years were in numerous instances unauthorized, evidence indicates that similar operations were conducted by its predecessor since before 1935 without question, and there is no record support for conclusion that applicant acted other than in bona fide belief that it was operating under color of right. Moreover, it has filed application for appropriate authority and has made full disclosure of its operations. In the circumstances, a finding of unfitness is not warranted.—Trans-Bridge Lines, Inc., Extension, 96 M.C.C. 506 (512-3)*.

Though applicant, an intrastate carrier, engaged in unauthorized interstate charter operations for a number of years and also for a time participated in such operations under an unlawful leasing arrangement with another carrier, his meager educational background and unfamiliarity with commission regulations are an extenuating factor, and it is significant that on each occasion when he was informed by a commission representative of unlawfulness of a particular operation he discontinued the service; moreover, his refusal on a number of occasions since then to handle interestate charter movements indicates sincerity of his expressed intention to conform to regulation by the commission. In the circumstances his part violations, while not condoned, do not bar grant of authority sought.—Blunt, 92 M.C.C. 306 (307, 309)*.

Since applicant is already operating over other authorized routes between the New York City and Newark, it may properly be found fit to operate over the shorter and safer route granted via George Washington Bridge, notwithstanding findings in investigation proceeding of numerous violations of the commission's orders and regulations. However, such finding of fitness shall not operate to exempt operations conducted over the new route from compliance with safety and other

regulations in the manner and to the extent required generally by order entered in the investigation.—Safeway Trails, Inc.—Investigation and Revocation, 91 M.C.C. 936 (951)*.

The primary purpose of the statutory requirement that an applicant be found fit before a certificate may be issued is not to punish the applicant for past offenses, but to protect the public from carriers unwilling to operate in accordance with the requirements of regulation. In determining fitness, the nature and extent of applicant's violations must be considered, as well as any mitigating circumstances, also whether its conduct represents a flagrant and persistent disregard of provisions of the act and whether it has made sincere efforts to correct past mistakes; thus it is entirely proper to consider an applicant's past convictions and improper conduct where they reflect on its present fitness. It is incumbent on a carrier to comply with regulations whether or not violations are specifically called to its attention: a fit carrier endeavors to be continually in compliance through its own efforts and not because of direct, coercive supervision.—Interstate Dress Carriers, Inc., Extension, 92 M.C.C. 142 (146, 147).

Applicant was guilty of a number of serious violations during the 1950's, and at or shortly before the hearing it was shown to be committing further serious violations by failing to completely identify shipments on its bills of lading for rate purposes, by failing to collect transportation chages within the allowed time limitation, and by failing to assess minimum charges on certain shipments. It is significant and indicative of the aggravated character of those violations that they place applicant in a position to make concessions to favored shippers, although it is not shown to have actually performed discriminatory acts in committing them.—Id., pp. 146-7.

Moreover, applicant has made no positive effort to ensure that its activities are in full compliance with the requirements of regulation; its compliance efforts are entirely recent and result from investigation of its operations shortly before the hearing and from its desire to avoid a finding of unfitness in instant proceeding. In view of its past violations, and in absence of a demonstrated sincere desire to correct its past mistakes, applicant cannot be found fit to conduct proposed operations; consequently, the commission need not consider whether public convenience and necessity require those operations. Applicant is admonished to take immediate and comprehensive steps to bring its operations into full compliance and to ensure that no additional improper practices arise in the future. Where its violations result from competitive pressures among carriers serving a difficult and demanding industry, applicant should invoke assistance of the commission's field staff or other appropriate agencies in order to avoid violations. Denied.—Id., p. 147.

The record establishes that applicant has engaged in numerous unlawful operations; in fact, applicant was still serving one shipper unlawfully even after his court conviction, and was serving other shippers immediately prior to this conviction. In spite of numerous warnings, and with full knowledge of the requirements of the act, applicant has demonstrated a flagrant disregard for the law, and has not offered any explanation for his contumacious conduct. Any individual who willfully ignores the primary requirement that he obtain operating authority can hardly be trusted to comply with the obligations a regulated carrier is expected to observe in his relations with shippers and the general public. Nor can evidence based on willful unlawful transportation be used as grounds for establishing public convenience and necessity. Denied.—Jones, 96 M.C.C. 100 (103).

Applicant filed no exceptions to examiners' conclusions that words "Merrick, Long Island, Nassau County, N.Y." in its present certificate refer to a single origin point, Merrick N.Y., that it holds no authority to originate considered traffic from any other point and, hence, should cease and desist from serving points, other than Merrick, under such authority; giving applicant the benefit of any doubt, however, examiners also found that its past operations did not render it unfit to conduct proposed operation. Had applicant ceased its unauthorized operations, it might have been found fit to receive extension authority sought; but it failed to do so and its open and flagrant continued unauthorized service from considered origin, as shown by record in a subsequent application proceeding

involving substantially similar authority, leaves the commission no alternative but to find that its actions constitute a willful refusal to abide by the act and the commission's rules and regulations thereunder. Applicant found not shown to be fit properly to perform proposed service; denied.—Kennedy Motor Lines, Inc., Extension, 95 M.C.C. 499 (501-3).

Though all of applicant's interstate towage of wrecked or disabled motor-carrier vehicles was unlawful prior to grant of temporary authority, such activities might be understandable, in view of his reliance on a proposed amendment of the act to exempt wreckers, if he had ceased illegal operations at or shortly before the time he first applied for temporary authority. On the contrary, although he was advised on several occasions that his operations were illegal, he continued openly to flout the provisions of the act; such actions cannot be condoned nor applicant found fit; application denied.—Young, 91 M.C.C. 445 (447, 453).

Applicant's transportation of a number of commodities under its heavy-hauling authority has resulted in continuous disagreement with, and substantial litigation before, the commission. Principles of interpretation established in prior proceedings involving applicant are completely unsusceptible of strained construction which applicant advances as an excuse to transport considered commodities. A condition precedent to operation under commission authority is compliance with the act and the commission's rules and regulations, but applicant has made no attempt to follow guidelines laid down in earlier cases involving its authority; a carrier which takes regulation so lightly should not be granted additional authority. Finding of fitness is not justified; authority sought for additional commodities, denied.—W. J. Dillner Transfer Co. Extension, 91 M.C.C. 667 (669, 672).

Before granting motor-carrier authority, the commission must find, among other things, that applicant is fit and able, financially and otherwise, to conduct such operations. Statements in last recommended report relative to applicant's current accident record and improved safety program, and the letter from its counsel stating matter of its fitness had been disposed of, do not show that applicant is now fit; record shows that applicant's violations of the act and the commission's safety regulations are continuing; denied.—Service Transport Co. Extension, 94 M.C.C. 255 (257-9).

Applicant has failed to establish his fitness to provide proposed service; evidence shows numerous violations of commission's leasing regulations and persistent violations of safety regulations despite numerous warnings. Necessity of observing minimal safety standards may not be minimized because of applicant's zeal to expand. Applicant has instituted a new safety program but its effectiveness is not indicated in sufficient detail, and his history of continued violations in face of repeated warnings and the gravity of certain offenses must be considered in determining whether improved conduct in the future will materialize. Before additional authority is granted, applicant should be required to show his experience during the past 2 years under the new safety program.—Davis Extension, 91 M.C.C. 623 (632-3).

Applicant has failed to show that it is entitled to a certificate where the record shows a continuing picture of violations of the act by its president, who, rather than seek commission approval of contemplated dual operations, transferred his individual permit to a personal friend and then became manager of those operations, assuming complete control over his own former contract carrier operation. Even though the common control did not require commission's approval, the resulting dual operations did. Parties were repeatedly informed that they were in violation of the act, but nothing was done to rectify the situation.—Johnstown Motor Freight, Inc., Extension, 94 M.C.C. 167 (170-1).

Past conduct of applicant's president and sole stockholder renders him personally unfit to receive operating authority, and since applicant is merely his alter ego, his actions preclude finding that applicant has shown itself fit. While his conviction for performing unauthorized transportation was based on violations committed 3 or more years ago, and his recent conviction by State court of receiving stolen property has been appealed, applicant has the burden of proving its fitness as a

basic element of its case; the record falls far short of showing that its management is willing to comply with requirements of the act and the commission's regulations. Application denied.—Gouverneur Trucking, Inc., Extension, 92 M.C.C. 621 (623).

Applicant's past record of continued and apparently willful non-compliance with commission's regulations concerning hours of service, drivers' logs, accident reports, and other safety requirements renders it unfit for grant of requested extension, particularly as its president, while an individual operator, was fined for such serious violations as operation of equipment with defective brakes and other dangerous defects; its very recent corrective efforts and safety program are not persuasive of its fitness when all of the reform procedures had not actually been instituted at time of hearing. Denied.—McCue Transfer, Inc., Extension, 89 M.C.C. 296 (297-8).

Extension authority to serve an additional intermediate point for purpose of interchange is denied when applicant's acquiescence in continuing unlawful control by a connecting carrier over transportation ostensibly performed under applicant's regular-route rights, together with accompanying dormancy of its own operations, precludes finding it fit to conduct the operations proposed.—Stewart—Investigation of Control, 87 M.C.C. 681 (698).

Financial fitness: [Vols. 16, 18, 19].—Inasmuch as applicant's current assets and capital accounts indicate an ability to meet its obligations as they come due, it already owns equipment suitable for considered commodities, and is otherwise fit, the application should not be denied because (1) applicant's practice of not including equipment obligations due within 1 year in its "current liabilities" accounts is contrary to the Uniform System of Accounts regulations, and (2) its balance sheet reflects an operating loss in 1962 and that its current liabilities and equipment obligations due within 1 year exceed its current assets.—Schwerman Trucking Co. of N.Y., Inc., Extension. 94 M.C.C. 683 (684-5, 686).

Applicant who operated at a profit in 1961 and already owns sufficient equipment suitable for proposed operation found financially fit in view of limited grant of authority and fact that his ability to meet current financial obligations is uncontradicted.—Kramer Extension, 91 M.C.C. 16 (19).

Applicant which has operated profitably in each of 10 preceding years and has assets in excess of $11,000,000 is fit financially to perform proposed service.—Schwerman Trucking Co. of Ala., Inc., 89 M.C.C. 628 (629)*.

The record does not warrant conclusion that applicant is not financially fit to conduct proposed operations because it had operated at a loss in recent years and owes its parent company approximately $516,000. Aside from that debt, applicant is in fairly strong financial position; its balance sheet shows current assets of $839,504, and current liabilities, excluding debt owed the parent company, of $503,311. Applicant is fit and able, financially and otherwise, to conduct proposed operations.—Braswell Freight Lines, Inc., Extension, 95 M.C.C. 457 (460-1)*.

Applicant may be found financially fit to conduct proposed operation from Greeley, Colo., to seven eastern cities when it has been conducting similar operations at a profit from Denver. While it relies largely on transportation of exempt commodities or leasing of its equipment to other authorized carriers for returns trips, there is nothing unlawful in such activities, and it has demonstrated that the proposed operation is economically feasible. —Curtis, Inc., Extension, 92 M.C.C. 25 (31)*.

Though applicant's current liabilities greatly exceed its current assets, proposed service will not require any financial outlay for terminals or equipment, will permit it to make more efficient use of equipment it now operates, and should enable it to improve its financial position. Applicant is currently operating at a profit and may be found financially fit.—Freeport Transport, Inc., Extension, 89 M.C.C. 168 (169).

Although applicant sustained a considerable net operating loss in 1960, its net worth is substantial and its financial condition has improved during first quarter of 1961; further, such loss is partly attributable to large expenditures on its safety program which has resulted in steadily declining accident ratio; applicant found fit and able to perform proposed service.—Kroblin Refrigerated Xpress, Inc., Extension, 89 M.C.C. 657 (658)*.

Since financial condition of one applicant, as shown on its yearend balance sheet, raises serious doubt of its ability to continue to provide service, its application is reopened for further hearing on that issue.—Hatom Corp., 91 M.C.C. 725 (734)*.

Financial exhibits of corporate applicant currently engaged in equipment leasing, as modified by testimony of individual who organized it, show current assets considerably less than equipment obligations due within a year. At time of hearing it had issued no stock, and its balance sheet did not reflect as a stock subscription $26,000 advanced by its organizer for stock to be issued later, which he explains was used for payments on equipment. The inconsistent evidence relating to applicant's financial position fails to show ability to undertake the new responsibility of a motor common carrier; and financial fitness of its potential stockholders is not only not a satisfactory substitute for that of a corporate applicant, but those involved do not appear able financially to support the corporate obligations even if willing.—Colorado-Arizona-California Exp., Inc., 92 M.C.C. 89 (98)*.

Following the traffic: [Vols. 11, 12, 14, 16-19].—The commission's holding in 61 MCC 748, sustained 120 F. Supp. 277, that grant of authority cannot be justified solely on the "follow the traffic" theory, does not entirely reject any consideration to a "follow the traffic" basis for authority but teaches that such theory cannot alone be the ground for such grant. If there are, or may be, other factors justifying a grant based on public convenience and necessity, a carrier might be allowed to follow its traffic through grant of new authority. There was sufficient evidence in application proceedings for the commission's findings that (1) there would be substantial increase in petroleum products traffic from considered pipeline-terminal origins to destinations involved because of shippers' changes in distribution and marketing patterns; (2) multiple carrier service was needed; and (3) competitive sharing of the rerouted traffic would be in accord with objectives of the national transportation policy. Those findings being supported by substantial evidence, the court cannot set them aside.—Petroleum Carrier Corp. v. United States, 258 F. Supp. 611 (613-15, 617)*; Id., 258 F. Supp. 617 (618-19)*.

Desire of two railroad subsidiaries to serve supporting shipper from its new distribution facility at Oakbrook, Ill., to Chicago involves aspects of the "follow the traffic" theory, and carriers have been allowed to follow the traffic where existing carriers will not be harmed or where there is need for service of a particular carrier. Shipper anticipates need for expanded service at Oakbrook due to increased production, and dearth of motor carrier opposition to instant applications indicates that any harmful effect of approval on existing carriers (27 of whom have been authorized to serve the new plant) would be minimal. Granted, subject to plant-site restrictions.—New York Central Transport Co. Extension, 92 M.C.C. 173 (177-8)*.

Applicant has been transporting glass products from various plants of supporting shipper for some 40 years and, after shipper transferred its assembly and distribution warehouse to Greencastle, Pa., continued to provide service from latter point but, owing to circuity involved, obtained temporary authority from the Greenville plant to the destination territory embraced in present application for permanent authority. Shipper, because its customers generally maintain small inventories and order its products only as needed, requires stopoffs and multiple delivery within definite time limits and has been using over 100 different stopoff combinations throughout its marketing area. It has generally found interline service unsatisfactory for such movements, and protestants' authorities are not sufficiently comprehensive to provide the complete and direct service needed, whereas applicant under temporary authority has demonstrated ability to provide a reliable service of type desired. Outbound authority granted to all destinations sought except those in Connecticut, but no need is shown for backhauls of commodities used in manufacture and distribution of glassware except from New York-New Jersey area authorized.—H. W. Taynton Co., Inc., Extension, 94 M.C.C. 1 (3-4)*.

Follow-the-traffic theory has little application to question of whether restriction to traffic originating in California on applicant's

secondary authority for transportation of new automobiles from Spokane to Washington and Idaho points should be removed. Most of the traffic will continue to originate in California, and there is no reliable evidence that manufacturer which controls the routing contemplates any substantial change in its method of distribution.—Transport Storage & Distributing Co. Extension, 92 M.C.C. 566 (570).

Under the "follow the traffic" principle as generally applied since 61 MCC 748, grant of authority to continue serving same shipper from a new location is not warranted on a mere showing of loss of traffic, without proof that existing service in the new location is inadequate. The same principle applies where closing of a warehouse requires a change in distribution and shipper wants applicant to serve several destinations in dropoff service rather than the one destination formerly served. Adequate service is available from existing carriers whose services shipper has found satisfactory in transportation of its products in other destination areas; denied.—Webb's Transfer, Inc., Extension, 91 M.C.C. 297 (299, 300).

Applicants presently serving supporting shipper from its Portland, Oreg., petroleum distribution terminal seek authority to continue serving it from its new terminal at Vancouver, Wash., 8 miles distant; however, shipper's support is based wholly on its and its customers' preference for applicants' services, not on any inadequacy of existing service at Vancouver. While each case of "following the traffic" must stand on its own merit, principle of 61 MCC 748 that a grant of authority on a mere showing of loss of traffic without proof of lack of adequate existing service in the new location would be contrary to law and to sound reasoning is clearly applicable. Denied.—Salem Nav. Co. Extension, 91 M.C.C. 699 (701, 703).

Foreign commerce: [Vols. 10, 11, 14, 16, 18, 19].—Review of the record fairly establishes that no material inadequacy exists in services of existing carriers presently handling international traffic between the United States and Mexico. Applicant failed to demonstrate how or in what manner its proposed service via Laredo, Texas, would be any more satisfactory than that offered by such existing carriers, or how it would expedite the movement of traffic across the international boundary. Furthermore, even if it could be instituted, proposed through-trailer service would be of little benefit to supporting shippers. Proposed operations would provide only an additional competitive and unneeded service; denied.—Yellow Transit Freight Lines, Inc., Extension, 94 M.C.C. 153 (159-60)*.

Where applicants seeking operating authority between international boundary points and points in United States hold authority from Canadian origins to appropriate border points, the commission need not consider the need for service at points in Canada or effect of a grant on Canadian carriers, since those issues have already been resolved to satisfaction of the Canadian authorities. What is pertinent is the extent to which each applicant has established a need for service to particular destinations in United States, and its fitness and ability to operate in this country in a manner consistent with the commission's regulations.—Norton, 92 M.C.C. 82(87).

Evidence supports grants of authority enabling two Canadian applicants to conduct charter passenger operations, in foreign commerce only, between described ports of entry and points in the 48 contiguous States; in view of the broad area sought and the numerous specific points to which public witnesses indicated need for service, authority granted should not be atomized by limiting extent of its application; and no reason appears for restricting origin points to specific points within territorial limits of applicants' Canadian rights. However, authority sought by one applicant for operation to Alaska is denied since that State cannot be reached via the ports of entry specified in its application.—Id., p. 87.

Authority granted will allow applicant to move considered traffic, in foreign commerce only, over Canadian highways to port of entry at Noyes, Minn., thence over U.S. highways to port of entry at Detroit, thence over Canadian highways to Buffalo-Niagara Falls ports of entry for interchange; however, issuance of certificate is conditioned on applicant's submission of a sworn statement that it has obtained appropriate authority from the Canadian authorities. Also, applicant is admonished that authority from the commission is necessary to move traffic within U.S. boundaries at Niagara Falls or Buffalo ports of entry for interchange or otherwise.—Leamington

Transport, 91 M.C.C. 647 (651)*.

See also Overland Exp. Extension under *Interchange*, below.

Authority granted to transport refractory products from Pennsylvania and New Jersey points to Canadian ports of entry in New York and Michigan, restricted to shipments moving to Ontario destinations, and conditioned on issuance of appropriate authority from the border points by Canadian regulatory authorities. Supporting shippers producing a large quantity of such products require single-line motor service because the traffic is susceptible to damage by excessive handling, direct service is more expeditious, and rail service involves excessive transit time.—Freeport Transport, Inc., Extension, 89 M.C.C. 168 (171).

Household goods: [Vols. 12, 16, 18, 19].—Both applicants, "independent" household goods carriers, have been meeting a public need in transportation of household goods between sought territories and their authorized points through interline service performed prior to and subsequent to "grandfather" days; however, protesting nationwide van lines do not interline with them. Record clearly shows that applicants' present interline arrangements are unsatisfactory and threatened with termination, whereby the public will be deprived of a needed service; that no adverse effect has resulted from their past interline service; and that termination of such interline service would constitute an interference with the public interest. Such evidence demonstrates a public need for proposed service; both applications granted.—Burnham Van Service, Inc., Household Goods—13 States, 98 M.C.C. 58 (62-5)*.

Present and future public convenience and necessity, require proposed transportation over irregular routes, of household goods as defined in 17 MCC 467, between points in Colorado, Kansas, Oklahoma, and Texas, on one hand, and, on the other, points in Arizona, California, and New Mexico. Evidence establishes the tremendous growth in population and the accompaning economic growth of latter 3 States sought to be served, and survey of existing service to California is persuasive that protestants are unable or unwilling to provide the service required to meet the needs of shippers of household goods. Granted.—King Van Lines, Inc. Extension, 98 M.C.C. 19 (23-4)*.

Although there is merit to applicant's contention that its participation in transportation of household goods to and from points in the Dakotas under interline arrangement has for reasons apparently beyond its control resulted in unsatisfactory service to the shipping public, and service of one protestant has not been altogether adequate on shipments under 5,000 pounds, another protestant can serve directly or through its connecting carrier Greyhound all points in the broad territory sought, including the sparsely populated Dakotas, and no material inadequacy in that service is shown. In the circumstances, applicant's dissatisfaction with its existing interline arrangement and desirability of authority sought from an operating standpoint do not justify establishment of a competing service.—Wheaton Van Lines, Extension, 94 M.C.C. 489 (492)*.

Interchange: [Vols. 17-19].—A carrier seeking relocation of an interchange point need only show, in addition to operating efficiency and economies, that interline service possible through the new point will not be competitively different from that through the present interchange point. Applicant's proposed interchange of traffic at its new terminal at Roanoke, instead of at Rocky Mount or Martinsville, Va., would not be a new service, and grant of authority for interchange of trailers at Roanoke would merely permit more efficient handling of its existing interline traffic. Protestants' fears that applicant's competitive position would be strengthened because of the greater number of connecting carriers available at Roanoke are not justified, since its trailer equipment primarily is especially designed for furniture. Applicant has shown that its proposal will result in economies and efficiency, and even if its competitive position were improved no new or competitively different service would result. Granted.—Blue Ridge Transfer Co., Inc., Extension, 92 M.C.C. 463 (465-6).

Application involves only the transfer of applicant's existing point of interchange with connecting carriers from Lewistown to Carlisle, Pa; routes sought will enable applicant to

operate principally over safer Pennsylvania Turnpike instead of transporting considered heavy commodities over narrow mountainous highways presently used; moreover, no new or different service will result from relocation of the interchange point. In view of the benefit to the public from applicant's safer operations, authority sought is granted.—Daily Exp., Inc., Extension, 95 M.C.C. 106 (108-9).

Purpose of application is to permit applicant to interchange freight and trailers with connecting carriers (primarily its commonly controlled affiliate) at Sacramento in lieu of Oakland, California; Oakland terminal has become congested and its use requires applicant to traverse heavily congested areas. Routes sought will enable applicant to avoid heavily congested San Francisco Bay area and to effect operating economy and efficiency, and relocation of interchange point will not result in any new or different service. In view of the benefit to the public from applicant's safer operation, and the annual savings that will accrue to applicant, authority sought is granted.—Southern California Freight Lines Extension, 94 M.C.C. 467 (468-9).

Though applicant may serve points within corporate limits of Harrisburg, Pa., as a point within commercial zone of an authorized point on its Lewiston-Philadelphia route, it may not interchange shipments at terminals within the Harrisburg commercial zone beyond the corporate limits; as applicant's interchange service at Harrisburg clearly developed in response to public need, and public interest will be served by allowing it to continue to meet that need, authority is granted to serve Harrisburg for interchange of traffic, only, in connection with its regular-route operations.—Noerr Motor Freight, Inc., Extension 89 M.C.C. 589 (590-1).

See also the Hogan Storage & Transfer Co. case, n. 6 *Tacking*, above.

Applicant Canadian carriers have established public need for interchange of freight with United States carriers at points in Buffalo and Niagara Falls, N.Y., other than plazas adjoining customs stations. Congestion at the customs plazas preventing transfer of shipments there has occurred in the past and will doubtless do so on future occasions. To prevent situations where a carrier must choose between interchanging at an unauthorized point or turning back a loaded trailer, applicants should be authorized to serve the two cities adjacent to the international bridges solely for purpose of interchange with connecting carriers; within those limits, the precise location of interchange cannot affect competing carriers. More economical, safer, and more efficient interchange can be performed at motor carrier terminals in those cities than in the customs areas; moreover, the commission is reluctant to hamper the bridge authorities in controlling traffic in vicinity of the bridges by requiring interchange within the limited space of the customs plazas. Both applications granted accordingly, restricted to traffic moving to or from Canada.—Overland Exp. Extension, 92 M.C.C. 757 (765-6, 767).

Based on satisfactory past performance under color of right, together with expressed desire of numerous shippers for continuance of its service, Canadian applicant is granted authority to serve Buffalo and Niagara Falls, N.Y., solely for purpose of interchanging traffic with connecting carriers.—Fess Transport, 91 M.C.C. 924 (927, 928).*

No need is shown for proposed transportation by Canadian applicant of traffic originating in United States and received by it from connecting lines at its Canadian terminals for movement to Canadian destinations over routes partly through United States; supporting motor carriers have not shown with clarity the volume of traffic which can be expected to move to Canadian destinations, proportion thereof which might be tendered applicant for movement over United States highways, or assurance that they will continue to interline with applicant; and applicant's evidence is devoid of any figures as to amount of traffic which its proposed service might or could generate. Denied.—East—West Motor Transport, 88 M.C.C. 352 (355-6).

Intrastate certificate: [Vols. 16-19].—Since, as result of recent grant of authority between points beyond Ohio, applicant will no longer be eligible to claim benefits of the single-State proviso, principle of the Day case (53 MCC 672) is inapplicable to its application for certificate to continue its Ohio proviso operations.—Pedler—Control—All States Freight, Inc., 90 M.C.C. 491 (498).

It is well established that past lawful performance of transportation in interstate or foreign commerce under exemption of former single-State proviso is in and of itself evidence of public need for continuance thereof, and the same principle applies to amended §206. Vendor's past operations under the proviso and under the "grandfather" clause of §206(a)(7)(B), as continued by multiple-State vendee under temporary authority, support issuance of certificate to latter covering former's irregular-route rights as authorized in its State certificate.—Inland Exp., Inc.—Purchase—Frontier Dispatch, Inc., 93 M.C.C. 50 (53).

Evidence of past operations and public testimony demonstrate that vendor, prior to vendee's exercise of temporary authority, and vendee since, have provided substantial service to the shipping public in interstate commerce with respect to number of points served and volume of shipments, under vendor's §206(a)(7)(B) "grandfather" rights within a 50-mile radius of Springfield, Ill., and between that area and other Illinois points, that such service is responsive to supporting shippers' needs and cannot be provided by protestants alone, and that grant of authority therefor to multiple-State vendee is warranted. However, no need is shown for institution by vendee of new unrestricted service between all points in Illinois.—Chicago Kansas City Freight Line, Inc.—Purchase—Capitol, 97 M.C.C. 68 (73, 76).

Labor difficulties: [Vol. 19].—Grant of certificate to appellee on basis of inadequacies of service due to trunkline motor carriers' refusal under union pressure to interchange traffic with carrier stockholders was an improvident exercise of the commission's discretion; argument that attempted compliance with a cease-and-desist order by the unionized carriers might have so aggravated their labor difficulties as to cause a complete cessation of operations ignores the commission's conclusion that carrier aprehensions of teamster reprisals were exaggerated and unwarranted, and further ignores the fact that (as the commission was aware) the National Labor Relations Board had ordered the union to cease boycotting any of the stockholder carriers by appeal to employees of any other carrier. Moreover, 357 US 93 recognized the commission's power to enter cease-and-desist orders against carriers' violating the transportation law and their tariffs; thus there was no reason to assume that the ordinary processes of law were incapable of remedying the situation.—Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (169-70)*.

This is not to imply that service deficiencies of the sort considered could never justify issuance of permanent operating authority; a totally different case might be presented if other remedial action by the commission or the Board proved fruitless, hopelessly time-consuming, or otherwise inadequate to terminate the interruptions in service. Nor does the Court pass on the commission's discretion to provide temporary authority under §210a pending determination of a §207 application or one for a cease-and-desist order, or as an alternative to permanent authority to remedy service inadequacies of that type.—Id., p. 171, Note.

The Court does not wish to fetter the commission's expert, discretionary powers by specifically prescribing in the instant case that cease-and-desist order relief (if relief is still needed) be granted rather than additional certification; nevertheless the commission should be particularly careful in its choice of remedy because of the possible effects of its decision on functioning of the national labor relations policy. Whatever it does affirmatively may have important consequences upon the collective bargaining processes between the union and the employer, and it must act with a discriminating awareness of the consequences of its action; the policies of the Interstate Commerce Act and the Labor Management Relations Act must necessarily be accommodated, one to the other.—Id., pp. 172, 174.

Lease arrangement: [Vols. 12, 16, 18, 19].—Shipper-owned terminal facilities, see Southern Bulk Haulers case under *Public interest*, below.

Applicant's operations under its new equipment-lease contract, which specifically provides that lessee-carrier shall have full direction and control of the vehicles, drivers, insurance, and disbursement of operating expenses—though the costs will be reimbursed

to applicant by lessor—conform to the statute and the commission's regulations. Very favorable credit arrangements in the new lease seem to be no more than a liberal extension by the equipment leasing company, which is 50 percent owned by applicant's two major stockholders, to the carrier-lessee. Unquestionably there is need for a portion of proposed service; granted in part.—Florida Refrigerated Service, Inc., Extension, 94 M.C.C. 361 (362-3).

While protestants question the validity of equipment-leasing arrangements between applicant and other carriers under which supporting shipper is afforded through service from considered origin to destination, the record does not provide sufficient facts for the commission to make such a determination. Should protestants desire to pursue that contention further, appropriate commission proceedings are availalbe.—Tompkins Motor Lines, Inc., Extension, 95 M.C.C. 472 (479).

Noncompliance by carrier: [Vol. 16].—See *Fitness*, above.

One-way service: [Vols. 17-19].—Although evidence in support of proposed service from Minot, N. Dak., to Twin Cities is less persuasive than that supporting applicant's operation in reverse direction, restriction of regular-route authority granted in lieu of irregular-route to a one-direction movement is not desirable, since applicant would be unable to provide the shipping public with the additional services required of a regular-route carrier, and such a limitation on authority granted would be unduly burdensome.—Hart Motor Exp., Inc. v. Midwest Motor Exp., Inc., 92 M.C.C. 558 (564)*.

While applications for irregular-route authority between points in seven States are supported by three producers of granular and pulverized limestone and by five contractors who use limestone, only the producers showed definite need for service from points in 4 of the 7 States sought where their plants are located; however, no need is shown for interstate service from either plant to points in the State where it is located. One-way authority to serve location of shippers' production facilities, to extent that need for interstate service is shown, granted.—Liquid Transporters, Inc., Extension, 94 M.C.C. 615 (617, 618).

One-way authority granted for transportation of jet thrust units for interceptor missiles from Redstone Arsenal in Alabama to one destination in Utah and one in Washington; though return shipments of salvaged units may be made to point of manufacture, such shipments are sporadic and of uncertain origin; authority for return movement is therefore not warranted.—Baggett Transp. Co. Extension, 88 M.C.C.3 (8, 10)*.

Operation in connection with other business: [Vols. 10-15, 18, 19].—See also Ralph A. Veon, Inc., case, §209(a)(1), n. 29.

Under principle of 7 MCC 369 condemning authorization of for-hire carriage in connection with private carriage in reverse direction, reaffirmed in 92 MCC 248 which emphasized the deleterious long-term effects of exceptions to that policy, application for authority to transport fertilizers and feeds is denied when applicants' principal interest is livestock farming and proposed for-hire operation is admittedly designed to provide backhauls in connection with their private carriage of livestock to Chicago and Madison, Wis., markets.—Taylor and Lambert Extension, 92 M.C.C. 783 (785-6).

Principle of 7 MCC 369 against grant of for-hire authority to applicants also operating as private carriers in connection with a primary noncarrier business, which was reaffirmed in 92 MCC 248, is not applicable to proposed transportation of toilet preparations by applicant also engaged in sale and distribution of contractors' supplies a private carrier, since applicant's primary business is that of a motor common carrier, and it has been engaged for many years in for-hire transportation of various commodities pursuant to authority granted by the commission. Grant to such an applicant of authority sought will not have effect of fostering the growth of private carriage to detriment of carriers subject to regulation.—Wycoff Co. Inc. Extension, 92 M.C.C. 549 (550-1).

See also Derrico Co. case, §209(a)(1), n. 12.

Past operations:[Vols. 10-19].—See also n. 10, above.

Inasmuch as the route description in "regular and irregular route" portion of plaintiff's

"grandfather" certificate is clearly ambiguous, and the commission's finding of willfulness finds no support in the record, plaintiff's past operations from an origin in its irregular-route territory to an intermediate point on its regular route did not constitute a willful violation of the terms of its certificate; on the contrary, such service was clearly rendered under claim of right. Therefore, the commission erred in failing to consider and weigh such past service in determining whether public convenience and necessity required grant of authority sought.—Dixie Ohio Express, Inc. v. United States, 263 F. Supp. 993(999, 1001, 1003)*.

See also Armored Carrier Corp. v. United States under *Fitness, in general,* above.

In order for evidence of past operations to be entitled to consideration in determining whether there is need for such operations, they must have been lawful or, at least, conducted under some color or right; but prior unauthorized operations should be considered where they were undertaken under color of right or in the good faith belief that they were authorized. Plaintiff had been put on notice, by the commission's prior determination of the services a carrier of "packinghouse products" and "canned goods" could lawfully perform, that the past operations it relied on were unauthorized; the commission therefore properly refused to give any weight to evidence of those operations and properly denied plaintiff's extension application.—Zuzich Truck Line, Inc. v. United States, 224 F. Supp. 457 (468-9)*.

The commission has consistently held that public need may be shown by prior service, lawfully conducted, without additional testimonial evidence. That rule is a reasonable one; the reviewing court cannot conclude that the commission could not treat the fact, nature, and use of prior service of motor carrier of passengers as sufficient proof of public need for its continuance; grant of authority sustained.—Carolina Scenic Stages v. United States, 202 F. Supp. 919 (923, 925)*.

Plaintiff's contention that the commission is required to consider its past unauthorized operations as evidence of public convenience and necessity is without merit; unauthorized operations are not sufficient to establish public need for a service in absence of compelling reasons to the contrary.—W.T. Mayfield Sons Trucking Co. v. United States, 211 F. Supp. 619 (627)*.

Applicant seeking interstate authority to transport cement and fly ash from plant sites at Chicago, Ill., to points in described portion of Indiana, has transported those commodities for supporting shippers from and to points embraced in its Illinois and Indiana intrastate authorities and, also, has performed some interstate transportation within the Chicago commercial zone. In addition, applicant's equipment, drivers, and managerial talent have been leased by protestant and used by that carrier to perform much of the service involved; however, protestant's sale of its pertinent authority to another carrier has recently been approved. On reconsideration, therefore, since applicant has shown need for its proposed service which cannot be met by protestant, and denial of the application would deprive shippers of a needed service, authority sought is granted.—Storm, 96 M.C.C. 761 (762-3)*.

Although past operations are not alone conclusive proof of public need for their continuance, they are, where not conducted in willful disregard of the law, entitled to consideration in determining whether, on balance, public convenience and necessity require their authorization. Petitioner's unauthorized operations since 1935 over three regular routes between Manchester and Laconia, N.H., have been conducted, not in willful defiance of the law, but under a misapprehension of the true scope of its "grandfather" certificate. In those operations, conducted openly and without any element of pretense, disguise, or concealment, petitioner has proyided a highly satisfactory service which has attracted a substantial volume of traffic from a number of shippers. Those supporting extension application have come to rely on the superiority of petitioner's service and strongly express their need for its continuance, and that expressed need cannot be disregarded when it does not appear that protestants will be seriously injured. Granted.—Nashua Motor Exp., Inc.—Petition for Modification, 96 M.C.C. 583 (584, 586)*.

Applicant has transported supporting shipper's spreaders used for spreading aggregate on roadbeds and for agricultural and other purposes for almost 4 years under mistaken impression that it was authorized to do so under its authority to haul roadbuilding and construction machinery; however, upon being informed that such authority does not embrace transportation of spreaders used for agricultural purposes, it filed instant application for authority to transport a new spreader for such use. A substantial portion of shipper's traffic is presently handled by applicant; grant of authority sought would enable it to provide shipper with a needed complete and direct service, especially on mixed shipments of both agricultural and roadbuilding spreaders. On the other hand, protestant has not handled any of considered traffic, although authorized to do so, and may provide the service only over circuitous routes. Granted. —Matson, Inc., Extension, 96 M.C.C. 648 (650)*.

Applicant is authorized to transport canned and preserved foodstuffs from origin points to destination States and has sufficient equipment with which to conduct the proposed operation. Since 1956, it has provided an expeditious, multiple pickup and delivery service on both t.l. and l.t.l. shipments under mistaken belief that its existing certificate authorized such service; supporting shippers have come to depend upon applicant's service, and consider it to be highly satisfactory. Furthermore, although protestant has handled some of the traffic involved, it cannot perform the complete service required by supporting shippers; and, inasmuch as proposed service has been conducted for a number of years, it is unlikely that its continuance would have a materially adverse effect upon existing carriers; granted.—Coldway Food Exp., Inc., Extension, 95 M.C.C. 780 (786-7)*.

For over 3 years, shippers had come to rely on the service performed by applicant who efficiently transported their traffic from points in the Southwest to the East Coast using, for the segment between Cleveland and Newark, a 500-mile deviation route along turnpikes instead of over applicant's 647-mile service route between these cities. This use of the deviation route was protested and the commission finally ordered the carrier to cease from using it, resulting in the present application being made for certificated authority to use the deviation route as a service route, serving no intermediate points. Along with showing how the use of such route would provide faster, safer and more economical service, shipper evidence of the applicant's satisfactory service provided through use of the deviation route, in good faith and under color of right, although subsequently disapproved by the commission, was accepted as evidence and relied on as establishing public need.—Strickland Motor Freight Lines Extension, 96 M.C.C. 732 (739).

As applicants' past operations in transportation of certain new refractories (not composed principally of clay) under their certificates which generally authorize transportation of "clay products", were not conducted in intentional derogation of the commission's rules and regulations, such past operations do not make them unfit to receive additional authority to perform services required by supporting shippers. Nor, in the circumstances, should those past operations be overlooked in considering evidence adduced of the needs of supporting shippers. Authority to transport "refractories" granted to all applicants.—Pennsylvania—Ohio Exp., Inc., Extension, 96 M.C.C. 449 (453-4, 456).

Applicant has fairly demonstrated a continuing need for charter and special operations from named New Jersey and Pennsylvania counties to 30 States and District of Columbia; evidence adequately shows that existing carriers are lacking in authority and ability to provide service comparable to that offered by applicant in territory involved. Applicant has been providing a very satisfactory service under color of right for many years, and its patrons have relied on that service. While past performance of unauthorized operations, or their use as a means of establishing public convenience and necessity, is not condoned, the violations were not deliberately committed, and denial of application would deprive the traveling public of an established service on which it has long relied, whereas grant should have no materially adverse effect on protestants whose operations and revenues have flourished despite appli-

cant's competition.—Trans-Bridge Lines, Inc., Extension, 96 M.C.C. 506 (514-5)*.

For over 20 years prior to 1959 applicants conducted charter operations from Long Island in belief that they were within their incidental rights under their regular-route authority between New York City and New Jersey. Though those operations were found to be unauthorized, they were performed in good faith and under substantial color of right and, in absence of any showing that they were knowingly and willfully performed unlawfully, may be considered in determining whether their resumption is required by the public.—Hudson Transit Lines, Inc., Extension, 92 M.C.C. 586 (589-90)*.

Although applicant's past transportation of l.t.l. shipments between 5 Georgia points and 6 southern States under "grandfather" rights restricted to "truckload lots" was unlawful, the court, in remanding extension proceeding seeking like authority without a quantity restriction (211 F. Supp. 354), made clear that the commission may not question applicant's good faith in conducting those operations under color of right. While past conduct of operations is not in itself proof of public need therefor, and the court did not direct a finding that public convenience and necessity require the proposed operation, no other conclusion is possible when due weight is accorded applicant's past service. Authorization will sustain a needed service which should not now be impaired by enforcement of the "truckload lots" restriction; granted, conditioned on surrender of the corresponding "grandfather" authority for cancellation.—Bowman Transp., Extension, 92 M.C.C. 651 (655)*.

Because applicant's past service for supporting shippers, though unauthorized, was performed under some color of right, and issue of fitness has been resolved in its favor, evidence of its past operations is entitled to consideration in determining public need for their continuance.—Melton Truck Lines, Inc., Extension, 88 M.C.C. 723 (735).

That applicant has been serving supporting shipper under color of right for some 20 years clearly establishes need for continuance of its service.—Border Exp., Inc., Extension, 88 M.C.C. 491 (494).

Where a multi-State carrier seeks a certificate for acquired single-State operations already lawfully in existence under §206(a) exemption provisions, the problems presented are not identical with those where entirely new operations are proposed. Past continued performance of operations lawfully conducted in interstate commerce by single-State vendor is itself substantial evidence of public need for their continuance by multi-State vendee, and effect on competing carriers is not substantially different from that in the ordinary §5 acquisition case. But where the only "past continued performance" established by vendor was under its regular-route authority, argument that the chaotic state of its records was responsible for lack of freight bills covering service over its irregular routes is not convincing, especially in view of abundant evidence of service under its regular-route rights. As vendor's irregular-route State authority is found to be dormant, and involved Ohio area is abundantly served by other motor carriers, vendee is granted certificate only for the regular-route operations.—Ohio Southern Exp., Inc.—Purchase—Vermilion Truck Line, 97 M.C.C. 93 (100-1)*.

On reconsideration, however, in view of vendee's extensive operations under temporary authority and the expressed need of supporting shippers for continuance of its improved service under the unified operations, conclusion is warranted that substantial compensatory benefits have resulted to the shipping public, without adverse effect on protestants' operations and services. Grant to vendee of authority to transport general commodities, with exceptions, over regular and irregular routes between specified points in Ohio will enable it to provide a more adequate and essential service to consignors and consignees which it presently serves without any apparent serious impact on the service of other carriers; accordingly, prior findings are modified in part.—Id., 101 M.C.C. 444 (449-52)*.

Though applicant's single-State proviso operations in Ohio are at present confined to transportation of residual fuel oil between only a few points for a single shipper, and it is not shown whether there are other carriers equipped to perform the service for that shipper, the long-continued operations conducted under the proviso by applicant and its prede-

cessor afford a basis for finding that public convenience and necessity require continuance of its present service after it becomes a multiple-State carrier; granted accordingly.—Pedler—Control—All States Freight, Inc., 90 M.C.C. 491 (498).

Evidence that vendor has been providing a substantial and continuous service under single-State proviso, commensurate with its facilities and limited operating authority, constitutes evidence of public need for continuance thereof by vendee (38 MCC 547 and 58 MCC 507).—Hart Motor Exp., Inc.—Purchase—Lake Superior Motor Frt., 90 M.C.C. 652 (654); vendor prior to exercise of temporary authority under §210a(b), and vendee's predecessor thereafter, provided adequate and satisfactory service to shipping public in interstate commerce under the proviso in vendor's authorized area. Shipments shown to have been transported, and fact that shippers have been using applicants' combined service, establish that they have handled significant volume of traffic in operations fulfilling a real need. Certificate granted vendee for all of vendor's intrastate routes to extent that they are complementary to its own.—United Truck Lines, Inc.—Purchase—United Freight Lines, 90 M.C.C. 337 (346).

The relatively short period (not over 7 months) of vendor's operations under single-State proviso preceding vendee's exercise of temporary authority provides no valid reason for refusing to apply the principle that past performance of lawful transportation under the provisio is in and of itself evidence of public need for continuance thereof by a multiple-State vendee; joint board properly considered applicants' interline operations during that period. Likewise, evidence of service by vendee under temporary authority, while not conclusive, is properly to be considered in determining whether proposed unified operation would be consistent with public interest; evidence of shippers interested in vendee's express service is convincing that it will fulfill a need in the public interest; certificate granted.—Mistletoe Exp. Service—Purchase—Central News Exp., Inc., 90 M.C.C. 797 (803).

Applicant's argument that past operations of contract carrier commonly controlled with it warrant a fining of need for its proposed common carrier service is patently unsound; at most, one shipment weekly was transported to one destination, while no traffic was handled to the other two destinations involved. More important, the transportation was not performed by applicant seeking to take advantage thereof, and it was performed unlawfully.—Johnstown Motor Freight, Inc., Extension, 94 M.C.C. 167 (170).

The mere fact of past unauthorized operations conducted in honest belief that they were within scope of applicant's authority does not establish per se a public need for their continuance.—Momsen—Investigation and Revocation of Certificates, 88 M.C.C. 343 (346-7); but evidence of past operations under color of right is entitled to consideration as bearing on the issue of public convenience and necessity.—Southern Forwarding Co. Extension, 91 M.C.C. 221 (228).

Although evidence of past operations does not alone suffice to support a finding of public need, it may be an important factor when considered in conjunction with other evidence. As result of its past operations under color of right between Canadian boundary and Buffalo and Niagara Falls, applicant has developed a service which has attracted a substantial volume of international traffic and has satisfied transportation requirements of a significant number of shippers, who expressed strong interest in its continuance. Since applicant is already serving those shippers, grant of authority will not alter the competitive situation to detriment of existing carriers.—Fess Transport, 91 M.C.C. 924 (926-7)*.

Applicants' operations embracing transportation of a substantial volume of pressure cement pipe from Waukegan, Ill., to various States are of long standing, and though their claim to a reasonable color of right to transport that commodity is not entirely convincing, supporting shipper should be permitted to have their continued services available to same extent as before their authority to do so was challenged. They otherwise provide a generally complete service from Waukegan for that shipper on other commodities, and shipper continues to need them for transportation of pressure pipe, since protestants's

services will not as satisfactorily meet its needs in territories involved; both applications granted accordingly.—Ace Lines, Inc., Extension, 91 M.C.C. 559 (568).

Applicant's past transportation of soap and related articles for supporting shipper was performed under a misinterpretation of its authority for "groceries" in disregard of interpretation thereof in 53 MCC 703, 61 MCC 311, and in absence of other factors may not be relied on as indicative of present or future need.—C & E Trucking Corp.—Modification of Permit, 88 M.C.C. 391 (396); likewise, even if applicant's and its predecessor's past unauthorized service for supporting shipper could properly be considered, it would not take the place of a showing of real public need for continuance thereof and would not justify a grant of authority.—Kroblin Refregerated Xpress, Inc., Extension, 89 M.C.C. 255 (263)*.

Although prior to the Descriptions case (61 MCC 209), decided in 1952, petrochemicals were generally not considered "petroleum products," applicant's transportation thereof since that report, under general-commodity authority excluding petroleum products in tank trucks, was based on self-serving interpretations of operating rights, was clearly unauthorized, and is not a proper evidentiary basis for permanent authority.—Consolidated Freightways Corp. of Del., Extension, 92 M.C.C. 443 (445, 449)*.

Applicant's unauthorized operations, regardless of whether or not performed under an honest belief that they were within scope of its authority, have for many years deprived authorized carriers of traffic they were qualified to handle, thus preventing a fair test of existing authorized services; they can therefore be given little weight in determining whether need exists for applicant's proposed service.—Keystone Motor Exp., Inc.—Investigation of Operations, 89 M.C.C. 567 (585)*.

Since applicant's past transportation for supporting shippers was performed under some color of right, evidence thereof is entitled to some consideration; however, even recognizing that such past operations, together with shippers' evidence, demonstrate a continuing need for service, such evidence does not truly bear on adequacy of existing service; right of existing carriers to transport all traffic they can efficiently and economically handle must still be recognized before granting competitive authority to another carrier.—Nash—Investigation of Operations, 89 M.C.C. 463 (469).

Although applicant's past transportation for nonpackinghouses of various commodities classified as packinghouse products was performed in good faith and under bona fide color of right prior to decision in 63 MCC 625, that decision should have put it on notice that such transportation was beyond scope of its authority for packinghouse products; its operations over a 4-year period following that decision were therefore not bona fide in character and may not be considered as bearing on issue of convenience and necessity for such transportation.—Argo-Collier Truck Lines Corp. Extension, 88 M.C.C. 253 (257, 258)*.

Evidence of past operations presented solely through uncorroborated testimony of applicant's son, who assists in management of the business, is insufficient to establish public need for continuance of charter operations conducted for many years from unauthorized points in good-faith belief that they were permissible under §202(c); if applicant's services have been satisfactory to the educational and civic organizations that have used them in the past, and a need for those services still exists, it should not be too onerous a burden to obtain testimony of representatives of several of those organizations in his behalf. Denied.—Rose Extension, 86 M.C.C. 723 (724). [But see dissent.]

There are two ways to prove a public need for continuance of a vendor's single-State proviso operations by vendee, i.e., through evidence of past lawful operations in interstate commerce, or by testimony of supporting shippers or other public witnesses that such need exists. Where applicants do not offer testimony of any public or shipper witnesses, but elect to rest their case on evidence of past operations, the commission has consistently found that proof of such operations must convincingly and comprehensively show that the past operations conformed substantially to the scope of authority sought; application of the "test of substantiality" enunciated in 87 MCC 267 and 90 MCC 899 is limited

to proceedings involving transfer of a certificate previously issued on basis of either established "grandfather" rights or proof of public convenience and necessity.—Joyce Trucking Co.—Purchase—Selig, 97 M.C.C. 1 (7).

Evidence relating to scope of vendor's proviso operations under his State authority for a 10-mile radius of Chicago in Illinois shows that no operations were conducted for some 4 months prior to vendee's temporary lease of his rights, that before May 1962 his service was confined to points in the northwest portion of that area, and that for the period of about 5 months thereafter until his discontinuance of operations he served only a single point in that radius. That evidence falls far short of meeting the requirement of a convincing and comprehensive showing of past operations substantially conforming to the authority sought; and the reason given for the curtailed and finally discontinued operations —vendor's adverse financial condition and ultimate bankruptcy—is entitled to little weight in determining the issue of public convenience and necessity. Both certificate and purchase applications denied.—Id., p. 8.

Vendee cannot rely on vendor's operations beyond scope of its authority as proof of need for a complete heavy hauling service after purchase. Commodity description "machinery, equipment, and supplies used in maintenance and operation of industrial plants" in vendor's certificate is not patently ambiguous or capable of misconstruction by reasonable persons; vendor's transportation of commodities not used in operation of industrial plants was manifestly unauthorized and cannot be relied on to show an established and continuous operation. A person seeking to establish or obtain a benefit or right ordinarily will not be permitted to qualify therefor on basis of his own unlawful acts, and in that respect vendee must stand in vendor's shoes.—Home Transp. Co., Inc.—Purchase—Chattanooga Transfer, 97 M.C.C. 173 (190).

Evidence of past operations by a vendor under the former single-state proviso of §206(a)(1) constitutes evidence of a public need for the continuance of such operations by a multiple-state vendee; and the same principle applies to past operations under §206(a)(6) and (7).—Sanborn's Motor Exp., Inc.—Purchase—Bemis Exp., Inc., 93 M.C.C. 728 (735).

When evidence shows that vendor's purported interline of traffic with vendee prior to latter's temporary authority was not a valid interchange arrangement under the commission's lease and interchange rules, but that vendor's claimed bulk operations were in fact commenced and continued under vendee's direction and control, thus amounting to an unlawful lease of that portion of vendor's operating rights; and when, additionally, the claimed point of interchange was not an authorized common point of service, considered operations, which were the sole bulk-commodity operations performed under vendor's "grandfather" rights under §206(a)(7), may not be relied on to justify issuance of a certificate to vendee for their continuance, in view of their unlawfulness.—Liquid Transporters, Inc.—Purchase—Black, 93 M.C.C. 423 (428-9).

Past continued performance of lawful transportation in interestate or foreign commerce under single-State proviso is evidence of public need for continuance thereof; public convenience and necessity exists in such operations in same manner as in lawful operations performed under a certificate, where the operations were real, vital, and active prior to existence of influence by an acquiring multistate carrier, and show a continued use thereof by the shipping and receiving public. However, where the proviso carrier has not been operating in interstate commerce or operations so performed have been negligible, no public convenience and necessity exists which would justify issuance of a certificate. —Roush—Control—Southern California Freight Lines, 90 M.C.C. 459 (466)*.

Long-continued operations under single-State proviso are in themselves adequate evidence of need for their continuance in interstate commerce by a multiple-State vendee; and evidence of vendee's operations under temporary lease of the rights must be considered along with all other evidence.—Dorn's Transp., Inc.—Purchase—Mayberry Motor Freight, 90 M.C.C. 269 (275).

While vendor's operations under its New York proviso rights have undeniably been

substantial, they have been conducted primarily in east-west service; north-south movement of interstate traffic interlined at Albany has consisted almost wholly of inbound shipments, the few southbound shipments shown being entitled to little weight in determining nature and scope of its past operations; and while vendee expanded the north-south operations under temporary authority, such service also was primarily inbound. As no real shipper need is shown for outbound service from points on certain routes, grant of certificate to vendee is conditioned on cancellation of certain of the proviso rights which were utilized in a limited manner, and on restriction of others against their use in connection with vendee's existing rights to perform operations not previously conducted to a significant degree.—Id., pp. 277-9.

Petroleum, petroleum products; stringing pipelines: [Vols. 18, 19].—Stringing, etc., of pipelines other than for gas and oil industries, see J.O. (Red) Willett Pipeline Stringing Extension case, under *Special services*, below.

While contract carrier authority to transport gasoline and petroleum oils, in tank vehicles, from Belton and Camp Croft, S.C., to points in Georgia cannot be granted because of absence of a continuing carrier-shipper bilateral contract for such service, a need for service is amply demonstrated by the evidence; therefore, the application is considered as one seeking a certificate. Supporting shipper has established a number of accounts throughout Georgia which it seeks to serve from its pipeline terminals at Belton and Camp Croft; and since protestant failed to present any evidence of its authority or operations, its ability to meet the shipper's needs is not of record; nor can any possible adverse effect that a grant of authority would have on protestant be determined. Viewing the substance of the application, proposed service is actually that of a common carrier for which a public need is shown; common carrier authority granted.—Infinger Transp. Co., Inc., Extension, 96 M.C.C. 551 (552-3).

Although a trend toward increased bulk movement of petroleum treating compounds has been demonstrated, the preponderance of supporting shippers' traffic will continue to move in 30-and 55-gallon containers. The three applicants have transported much of those shippers' traffic both in bulk and in containers under their petroleum products authority, which is found to include compounds, and the territorially broad bulk authority applied for is largely duplicative of such authority they collectively hold. Applicants' existing services and those of regular-route common carriers appear adequate to meet shippers' reasonable needs for transportation of compounds in containers; however, adequate bulk service does not appear to be available from named Oklahoma origins to 7 destination States which applicants may not serve, or may serve only to a limited extent. Granted accordingly, for petroleum treating compounds in bulk, in tank vehicles.—Hugh Breeding, Inc., Extension, 95 M.C.C. 720 (725-7).

Though applicant seeks to enlarge its origin areas in vicinity of Chattanooga and Knoxville to encompass pipeline outlets, so as to continue emergency transportation of petroleum products formerly provided from barge terminals, and shipper's only reason for supporting application is its fear that in emergencies the supply of available equipment might be insufficient for its needs, what those needs are is not made clear and no evidence is presented of nature of past emergencies, when and how they have occurred, or from and to what points transportation was needed; the only commodity names for which emergency transportation was needed is kerosene.—Petroleum Transp., Inc., Extension, 94 M.C.C. 777 (778, 780).

There is no evidence regarding the volume of traffic which has moved or may move to North Carolina destination counties, extent to which existing services have been utilized or investigated, locations of present or prospective consignees, or locations of terminals at the origin points; furthermore, supporting shipper's witness is not attached to its division controlling transportation from Knoxville and Chattanooga, and could not testify as to nature of shipping or transportation facilities at those points. There is therefore no factual basis for determining whether or not the pipeline outlets which may be built at Knoxville or Chattanooga will be within scope of applicant's present authority, or that which it

now seeks. Denied.—Id., p. 780.

The commission has recognized that the type of service developed over the years by applicant pipestringers should be made available generally to industries which require laying of pipelines in producing fields and the open country. That service should now be made available to shippers promoting the growth of Alaska mineral production; exploration appears to be active and there is reasonable expectation that substantial resources will be developed. Protestants have not shown that they can provide the type of service required; the only one with any experience in such operations lacks the organization and equipment to handle a major project unaided. Authority granted for transportation within Alaska of commodities embraced in part (2) of the Mercer description (74 MCC 459), restricted only against transportation in connection with water or sewerage pipelines.—J.O. (Red) Willett Pipe Line Stringing Corp. Extension, 92 M.C.C. 41 (44, 45)*.

Shipper needs motor carrier service for transportation of petroleum products from its plant to construction sites along interstate highway; applicant is better equipped than protestant to provide the expeditious call-on-demand service needed because it has a terminal nearby and can provide needed intrastate service and proposed interstate service at same time and in same vehicles.—Blue Ridge Transportation Co., Inc., 89 M.C.C. 616 (619).

Although need is shown for proposed transportation by one applicant of named petroleum products from Newport, Minn., to Chicago and Griffith, Ind., evidence submitted is too indefinite, particularly as to volume of traffic expected to move to or from any specific points or areas, to support grant of remainder of authority sought; also , as one protestant holds authority for fuel oil solvents from Newport to Chicago, those commodities are excluded. Nor is any reasonable basis shown for authorizing the more limited and substantially duplicative service proposed by another applicant; present and probable future volume of traffic from Newport is insufficient to support operation of more than one carrier. One application granted in part.—Dahlen Transport, Inc., Extension—Newport, Minn., 89 M.C.C. 131 (135-6). [But see dissent.]

Prior denial: [Vols. 13, 18, 19].—See also Campus Travel, Inc. v. U.S., 28 USC §2325, n. 56.

Prior denial of application for similar authority by same applicant is not controlling in present proceeding on entirely new record; the doctrine of res judicata can have no application in a proceeding involving determination of present or future public convenience and necessity; administrative agencies have, and must have, power to change their minds. —Edwards Motor Transit Co. v. United States, 201 F. Supp. 918 (924-5)*.

Public interest: [Vols. 11, 17-19].—See also Argo Trucking Co., Inc., case, NTP, n. 5 *Private-common carrier.*

Applicant's proposed lease of terminal facilities from supporting cement shipper will not adversely affect public interest and does not require denial of application; rental charges assertedly will be adequate to amortize shipper's cost of construction and there is no indication that any improper practices would result or that applicant would derive any undue transportation advantage; construction of terminal facilities on shipper's plant site is virtually required by available plant facilities and by practical aspects of its plant expansion program and cement loading and distributing activities. Should such arrangement result in improper discrimination between shippers or in unlawful rebates, appropriate remedies are available under the act.—Southern Bulk Haulers, Inc., 88 M.C.C. 299 (306).

That proposed service may be more attractive to certain shippers than to others affords no real basis for denial of application.—United Parcel Service, Inc., Extension, 89 M.C.C. 709 (743)*.

Public need: [Vols. 13, 18, 19].—Notwithstanding opposition, of lack of it, of certain parties to some applications, public need is a fact, and not something which can belong to any applicant.—C & H Transp. Co., Inc., Extension, 88 M.C.C. 285 (294)*.

Public need for additional motor service to all points within confines of White Sands Missile Range is clearly demonstrated by representative of the Department of Defense who

appeared at hearing in consolidated proceeding on two applications; and, while testimony as recorded in that proceeding was properly rejected at hearing on third carrier's application, public need, once established, is a fact and not something that belongs to any applicant. Moreover, the Department of Defense is primarily interested in service shown to be needed and does not support any specific carrier; accordingly, third carrier's application is entitled to consideration on that basis. Applications of all three carriers granted in part.—Whitfield Transp., Inc., Extension, 95 M.C.C. 576 (582-3, 584-5)*.

Public convenience and necessity are not the property of any particular applicant, and it is the commission's function to determine, in furtherance of aims expressed in the national transportation policy, which of 21 applicants seeking similar authority should be selected to provide the service shown to be needed.—Younger Bros., Inc., Extension, 95 M.C.C. 1 (18)*.

Inasmuch as the only shipper supporting application for irregular-route authority between Albuquerque, N. Mex., and Arizona points is one desiring service from Colorado Springs to points in Arizona, there is a total lack of any evidence of public need for applicant's service between points actually named in application; denied.—Denver-Albuquerque Motor Transport, Inc., Extension, 91 M.C.C. 582 (584).

Technological advances and development of new types of equipment must be recognized when advantages thereof will enure to benefit of shippers, receivers, and the public; however, advent of new and different types of equipment designed to transport commodities in different ways or to move those not previously handled in motor carriage must generally result in economic advantage to the shipper before being generally accepted; therefore, regardless of the novelty of a proposed service and inability of other motor carriers to provide it, it is axiomatic that before a new service of any type will be authorized there must be a reasonable certainty that a public need for it exists that cannot be adequately met by existing transportation facilities.—Barsh Truck Lines, Inc., Extension, 88 M.C.C. 579 (584-5)*.

Railroad service considered: [Vols. 18, 19]. —While Texas producer of salt is presently shipping by rail, it finds that mode inadequate for all its transportation needs because the 5-day delivery time does not meet most customer needs; it is not flexible enough in that off-rail customers cannot be served directly and the necessary multiple-delivery service cannot be rendered; and the number of customers willing and able to receive carload quantities is declining. Also, shipper attributes the great decrease in its share of the market, in past 5 years, to inadequate transportation facilities; and, since it intends to continue shipping by rail to extent the competitive situation allows, it anticipates little reduction in its use of rail service. Granted as to one applicant.—Argo Trucking Co., Inc., Extension, 96 M.C.C. 434 (436-7).

Although supporting shipper of acids and chemicals, in bulk, uses and expects to continue using available rail service, rail lines do not provide tank cars; and some shipments from time to time require expedited motor delivery. Also, some of shipper's customers require small-quantity or split-delivery shipments, are located off-rail, and/or request motor delivery which if not available results in the customers purchasing elsewhere from shipper's competitors. Need is shown for the advantages (including flexibility) of motor service, in addition to rail service; granted as to both applicants.—Robertson Tank Lines, Inc., Extension, 95 M.C.C. 234 (242-3, 249)*.

Railroads cannot provide such advantages as flexibility and speed which shippers of liquid chemicals, in bulk, require; also they cannot serve potential customers located at off-rail points. Furthermore, though certain points are served by rail, shipper also is entitled to have the inherent benefits of motor service. Additional motor service authorized. —Pacific Truck Service, Inc., Extension, 94 M.C.C. 262 (265, 267).

Proper marketing of supporting shipper's synthetic resins requires rapid and reliable bulk motor carriage in pneumatic vehicles in addition to rail service, and lack of such service has placed shipper at a competitive disadvantage. Rail carriers cannot meet shipper's requirements for flexibility, economy, and speed, nor can they assure timely provision of

pneumatic equipment; furthermore, a number of present and potential customers are located away from rail sidings, and some request deliveries in l.c.l. quantities. Shipper requires a complete single-line service covering its entire 25-State marketing territory; however, as no need is shown for service of both applicants, authority is granted the one which appears best qualified from a service standpoint. —Younger Bros., Inc., Extension, 92 M.C.C. 624 (630).

As neither supporting lumber shipper's plant nor facilities of many of its customers are located on rail sidings, rail shipments require prior and subsequent truck movements, resulting in extra costs; moreover, an increasing number of its customers request motor transportation in order to obtain expeditious delivery of orders placed on short notice, and many require split shipments. However, as lumber traffic is an important source of revenue to rail protestants, authorization of a new competitive service from other than the two Montana counties named is not warranted by highly speculative testimony as to need therefor. Granted in part.—Babcock & Lee Transp., Inc., Extension, 92 M.C.C. 408 (410, 412).

Shipper requires expeditious service for movement of fertilizer directly to farms and planting areas when conditions are favorable for planting; rail service is generally unsatisfactory as it requires 10 days to reach destination area and service is often needed where no rail siding is available; granted.—Porter Transp. Co. Extension, 91 M.C.C. 178 (180, 181).

Although rail protestants handle a large amount of involved salt traffic, which represents important revenue, they cannot provide the flexible service shown to be required; motor service is also needed as a supplement to rail service, for deliveries to consignees not located on rail sidings, those requiring expedited service, and those that carry small inventories and require frequent fast deliveries of small shipments.—Maas Transport, Inc., Extension, 92 M.C.C. 534 (540)*.

Although rail service will continue to be used to transport major portion of involved meat products, such service is not entirely adequate because many consignees are not located on rail sidings. However, only one additional motor carrier service, from only two origins, is shown to be required.—Indiana Refrigerator Lines, Inc., Extension, 91 M.C.C. 71 (79-80).

While a substantial volume of considered traffic now moves by rail, proposed motor service possesses certain inherent advantages; motor carriers can provide consignees with expedited deliveries in emergencies, enable them more effectively to control inventories, reduce congestion at their yards, and allow for faster unloading. Need demonstrated for services of applicants in transportation of imported salt cake from Jacksonville to three points in Florida to which motor service is not now available.—Petroleum Carrier Corp. Extension. 89 M.C.C. 139 (141)*.

Substantial need is shown for proposed transportation of petroleum products from Oklahoma to North Dakota, even though rail service generally has been satisfactory; shippers additionally require a dependable motor carrier to provide expeditious, split-delivery service to points, many of which are off-rail, in North Dakota and adjacent States, and have used applicant's service substantially to South Dakota and Minnesota; granted.—Kroblin Refrigerated Xpress, Inc., Extension, 89 M.C.C. 657 (659)*.

Rail carriage is unsuitable for transportation of tall oil rosin because of damage by deterioration and contamination when black iron cars are used; there is a shortage of stainless steel cars, and they can be obtained by shipper only by entering into a costly 15-year lease; grant of authority to two applicants between points named will assure supporting shipper of adequate service.—McKenzie Tank Lines, Inc., Extension, 88 M.C.C. 554 (556, 557).

Authorization of motor carriage of photographic and X-ray machines and equipment is warranted when railroads are interested in transporting those commodities only when packaged or crated and are not shown to be willing to provide service thereon in uncrated form as shown to be needed by the shippers. —Neptune Storage, Inc., Extension, 88 M.C.C. 25 (30).

Shippers are dissatisfied with rail service on bananas from gulf ports to the Northwest

because carloading cannot be supervised by their personnel; railroads do not inspect or check shipments in transit to determine their condition and temperature; shippers cannot control rail routing; time in transit is longer because of circuity and layovers; rail movements are difficult to coordinate with sales operations because of poor scheduling and unpredictable times of arrival; and instances of excessive transit time and delays are shown. Thus, rail service cannot meet shippers' demand for flexibility, speed and personalized handling, or provide a closely coordinated delivery service; shippers are entitled to benefits of a complete and flexible motor carrier service.—Lowrance Extension, 86 M.C.C. 787 (791, 792). [But see dissent].

See also Mitchell Transport, Inc., case under *Existing carriers*, above.

Although rail transportation of cement has generally been satisfactory in the past, supporting shippers now also require motor-carrier service to meet customer demands and remain competitive with other cement producers who already have available, and use, motor service to destination areas involved; on balance, benefits to be derived by supporting shippers outweight fact that some traffic may be diverted from rail protestants. —Ruan Transport Corp. of Kansas, 88 M.C.C. 65 (66)*; Ruan Transport Corp. Extension, 88 M.C.C. 123 (125); rail protestants will not be unduly prejudiced by diversion of some traffic.—Southern Bulk Haulers, Inc., 88 M.C.C. 299 (305); shipper is entitled to inherent advantages of motor service in addition to rail even though some traffic will be diverted from rail protestants.—Orscheln Bros. Truck Lines, Inc., Extension 88 M.C.C. 569 (573); Daniel Hamm Drayage Co. Extension, 89 M.C.C. 563 (565, 566)*; Best Transport, Inc., 91 M.C.C. 82 (84)*.

Evidence abundantly establishes need for proposed transportation of cement and/or lime from 4 Alabama origins to 8 southern States; though rail service has been generally satisfactory in the past, supporting shippers now require motor service additionally to enable them to comply with customer requests for direct deliveries to plants or construction sites not located near rail sidings, and to remain competitive with other producers who have, or soon will have, available motor service in same destination areas. While some traffic will undoubtedly be diverted from rail protestants, on balance the public interest will best be served by institution of additional competitive service.—Baggett Bulk Transport, Inc., 88 M.C.C. 403 (411).

Where supporting shipper prefers rail service for southbound movement of acetic acid in large quantities, and delays caused by necessity of preheating rail shipments in winter months are not a serious objection, its willingness to divert a portion of that traffic to applicant solely to obtain reduced rates proposed by applicant on related northbound movement of fatty acids does not warrant grant of authority sought for southbound movement of acetic acid.—Liquid Commodities between Va. and N.J., N.Y. & Pa., 316 I.C.C. 609 (611, 612).

Supporting shipper's products have moved primarily by rail and a substantial amount would continue so to move when such service would be most economical and convenient; grant of application is not warranted by shipper's desire for supplemental motor service to meet peak demands and, to a lesser extent, for delivery to off-rail customers, when service of an existing motor carrier is available. Denied.—Petroleum Transit Co., Inc., Extension, 88 M.C.C. 399 (401); similarly, major portion of lime and limestone shippers' traffic moves in bulk by rail and there is no showing of inadequacy of rail service. Though the commission is mindful of the inherent transportation advantages motor service offers, inquiries regarding bulk truck service will not support grant of authority sought; denied.—O'Boyle Tank Lines Extension, 89 M.C.C. 499 (500-1).

Rates: [Vols. 10-12, 15-19].—In failing to consider whether Railway Exp. Agency's rates were in fact premium rates, before granting it authority sought, the commission followed a long-settled and judicially approved procedure in holding that the proper place to test the legality of REA's rates was in a complaint proceeding and not in a certificate proceeding; its decision not to depart from that procedure was entirely within its discretion.—Auclair Transp., Inc. v. United States, 221 F. Supp. 328 (333-4)*.

The commission's findings concerning published tariff minima of protestant tank truckers are not inconsistent with its denial of plaintiffs' applications for authority to transport bulk commodities in premounted C & S containers; shippers have long had statutory remedies to determine if tank truckers' rates are too high. While protestants' current high minima may limit usefulness of C & S containers, they may lower their tariff minima pursuant to specific provisions of the act, and the court is not now prepared to find that the tank truck industry will renege on its unequivocal willingness to satisfy shippers' needs. Should tank truckers do so, new proceedings under §§206(a) and 207(a) might be received with more favor by the commission or a reviewing court.—Roadway Exp., Inc. v. United States, 213 F. Supp. 868 (877)*.

Rates are generally not an issue for consideration in determining whether public convenience and necessity require a proposed operation. Level of rates is a factor to be considered only where it is shown that existing rates are so unreasonably high as to constitute; in effect, an embargo; however, evidence of record does not support shipper's claim that protesting carriers' rates amounted to an embargo of shipper's traffic. Denied.—Trans-Cold Exp., Inc., Extension, 98 M.C.C. 10 (12-13); likewise, it cannot be found that protestant's rates constitute a virtual embargo on movement of shipper's traffic, such as would warrant a grant of competitive authority, when protestant transports the commodity regularly to destination territory involved.—Monkem Co., Inc., Extension, 94 M.C.C. 749 (758).

Supporting shipper's major interest in proposed service is the low rate offered by applicant; however, that rate is not shown to be economically feasible and appears to be little more than a cost-cutting or profit-shaving device. Protestants not only have not sought to embargo shipper's traffic, but have done and are doing all they reasonable can do, including downward adjustments of rates, to obtain it. Denied.—Hagen Extension, 92 M.C.C. 479 (485, 486).

Supporting shipper's only real interest in applicants' service is their proposed lower rate; however, shipper concedes that it discontinued service of one protestant solely because of reduction in rail rates, and that it could continue to market its shipments at protestant's present rate. Moreover, that protestant has repeatedly attempted to regain the traffic by proposed reductions of its own; protestants thus have not sought to embargo the involved traffic, but have done all they could to obtain it; application denied.—Hulme Extension, 91 M.C.C. 575 (578, 581).

While fact that prospective patrons in low income bracket consider protestant's charter service charges prohibitive does not justify grant of authority to applicant, since cost of service is not an issue properly to be considered in a certificate application unless carrier's charges are so high as to constitute an embargo, which is not established, grant is justified by greater suitability of applicant's service to needs of the public in the largely rural origin area involved. And though protestant questions propriety of applicant's rates, it has an appropriate forum for its contention under other sections of the act.—Blunt, 92 M.C.C. 306 (308-9)*.

If the basis of protestant carrier association's concern regarding enhanced competition from Railway Exp. Agency through proposed extension of its all-motor service to replace discontinued passenger-train service formerly utilized is what it believes to be an inequity in comparative rate structures on small-parcel and volume traffic, such matters must be settled in appropriate proceedings, not in extension application.—Railway Exp. Agency, Inc., Extension, 91 M.C.C. 311 (327)*.

That supporting shipper would divert part of its southbound rail movement of acids to applicant to obtain a reduced rate for northbound movement (under proposed rates restricted to apply only when there is a movement in both directions) is not a sufficient or compelling reason for grant of authority for operation over southbound routes shorter than that already authorized.—Liquid Commodities between Va. and N.J., N.Y. & Pa., 316 I.C.C. 609 (611, 612-3).

See also Webb's Transfer case, under *Desire for particular carrier*, above.

To raise in application proceeding the issue of what rates will apply on mutliple delivery

of combined intrastate and interstate shipments is premature, especially in absence of evidence that applicant and shipper are planning to violate any applicable law.—T. M. Zimmerman Co., Extension, 89 M.C.C. 150 (153).

See also Fess Transport case, under *Fitness*, above.

Applicant has not established that t.l. minimum weights in protestant's latest tariffs have so effectually embargoed supporting shippers' traffic as to warrant finding that it is unwilling to serve them, or to justify a grant to applicant within principle of cases cited. While shippers express dissatisfaction that protestant's t.l. rates are based on minima somewhat higher than all shipments they wish to make, this has not prevented protestant from carrying shipments in quantities smaller than those minima. Practice of transporting shipments of less than applicable minimum volume is not uncommon and does not reflect any unwillingness or inability of protestant to render adequate service. If shippers believe protestant's rates to be unjust or unreasonable, they may contest their lawfulness by filing complaint under §216.—Fleet Transport Co. of Ky., Inc., Extension, 88 M.C.C. 762 (765).

Further, the record shows that protestant is rendering satisfactory service to supporting shippers, that it needs and can handle all of the traffic involved, and that it is willing to institute a lower alternate minimum at an equalized rate if shippers want it. Application denied.—Id., p. 765.

While protestant motor carrier professes willingness to serve shipper of bulk sand, it indicates that its charges will not be less than $6 a ton on considered traffic, whereas applicant's rate on such traffic, transported under its temporary authority, is $3.05 a ton. The record is convincing that supporting shipper cannot utilize protestant's service at the level of rates it charges and still remain competitive with other producers shipping bulk sand to consignee's plant from other origins; therefore, by its adherence to rates which will not move the commodity involved, protestant has in effect embargoed shipper's traffic.—J-E-M Transp. Co., Inc., Extension, 94 M.C.C. 573 (575-6)*.

Without departing from the general principle that reasonableness of rates is not an issue in §207 proceedings and that §216 affords an adequate remedy for excessive rates, authority to transport malt beverages should be granted when protestant's rates are nearly double applicant's and, in the 5 years since denial of applicant's previous application, protestant has neither solicitated nor transported any of involved traffic, nor has it made any effort to discuss rates with shippers. While protestant's rates may be entirely reasonable, its failure to negotiate with shippers indicates either a decision to forego the traffic except at its existing rates, or a lack of interest in it at rates which will move it, since it is clear that considered traffic will not move at protestant's existing rates.—Edwards Extension, 88 M.C.C. 318 (320-1)*; likewise, authority is granted when protestants' fertilizer rates, though maybe not intrinsically unreasonable, are too high to move supporting shipper's traffic between the points involved.—Porter Transp. Co. Extension, 91 M.C.C. 178 (181).

Contention that applicant's low charges are predicated on selection of the cream of parcel traffic by use of commodity and weight restrictions like those proposed is not substantiated; evidence shows that in its present operations, by development of more efficient methods of handling and consolidating package shipments, applicant has been able to accord a more expeditious and economical service for type of traffic formerly handled by parcel post than its competitors; fact that applicant and its affiliates have maintained rates comparable to those of parcel post is significant indication of its ability to do so in future, and the many advantages of proposed service over parcel post constitute effective inducement for use of its service even at rates higher than parcel post level.—United Parcel Service, Inc., Extension, 89 M.C.C. 709 (739, 745)*.

Though proposed operation in which shipments of frozen and unfrozen commodities would be combined into mixed truckloads of both types might result in a more advantageous rate than that obtainable on t.l.t.l. shipments, latter service is available only for the separate shipments and is not being used by supporting shippers because of their fear of product deterioration or damage, later deliv-

eries, and loss of their relative competitive position; therefore, any collateral rate differential that might be obtained is not the ultimate advantage of the proposed service.—Barsh Truck Lines, Inc., Extension, 88 M.C.C. 579 (585)*.

Refused, rejected, returned, damaged shipments: [Vols. 14-19].—Return of rejected or damaged shipments refused at tender of delivery requires no specific authority, and no need is shown for return of rejected or damaged shipments at a later date. Paul Marckesano & Sons Co., Inc., Extension, 86 M.C.C. 727 (731).

Since authority for transportation of cement includes return of rejected shipments and of pallets used in the outbound movement, and no need is shown for return movement of shipments previously accepted by a consignee or of pallets not used in the outbound movement, that part of the application is denied.—Ruan Transp. Corp. of Kansas, 88 M.C.C. 65 (67)*.

Seasonal operation: [Vols. 10, 11, 13-15, 18, 19].—Peak period demand does not justify a grant of motor carrier authority; the demand must be reasonably consistent and determinable and not dependent on any extraordinary peaks which arise in the course of any business.—Petroleum Transit Co., Inc., Extension, 88 M.C.C. 398 (401).

Special equipment: [Vols. 12, 13, 17-19].—Grant of authority is not warranted merely shipper desires "palletized" service similar to that rendered by another carrier from other origins; use of accessories such as rollers and pallets does not constitute a service by "special equipment" which cannot be performed by transporters of commodities generally.—Colonial Refrigerated Transp., Inc., Extension, 91 M.C.C. 369 (372).

Supporting shipper has experienced a trend from packaged to bulk shipments of its dry synthetic resins, and provision of pneumatic-type equipment is important, since its loading facilities and receiving facilities of several of its principal customers use pneumatic devices. As volume of its traffic will support only one motor-carrier service, authority is granted applicant which, among other things, has a far more extensive and more readily available fleet of pneumatic vehicles than the other.—Younger Bros., Inc., Extension, 92 M.C.C. 624 (629, 631).

Need for proposed transportation of nitric acid is established when protestant owns no equipment suitable for that traffic, whereas applicant operates stainless steel equipment in which additional freight can be accommodated. Protestant's claimed transportation of two tankloads for supporting shipper in leased equipment savors of an unlawful lease of operating rights; moreover, there is no certainty that it would be willing to purchase the needed stainless steel tank trailer in view of its high cost and limited volume of traffic involved. Granted.—Walker Hauling Co., Inc., Extension, 88 M.C.C. 607 (609).

Proposed transportation of mixed shipments of frozen and unfrozen commodities in refrigerated trailers with movable insulated partitions is a new service which will afford greater flexibility and permit more rapid consolidation of truckloads by combining smaller shipments of both types in same vehicle. Equipment applicant proposes to install in its vehicles is designed for such service, is commercially available, and its principle has been employed successfully by one shipper and an intervening carrier; proposed operation thus appears feasible and is responsive to a public need which cannot be adequately met by existing services.—Barsh Truck Lines, Inc., Extension, 88 M.C.C. 579 (584, 585)*.

Special service: [Vols. 12, 18, 19].—Bananas, because of price fluctuations and widespread consumption, require expeditious transportation and timely delivery and, due to their perishable nature, they also require careful handling by experienced personnel and temperature control during transit. In addition, evidence shows that when shiploads of bananas—in quantities ranging from 20,000 to 100,000 stems—arrive in port, there is a heavy demand for equipment, experienced drivers, and flexible service which results in a need for additional service, and which existing carriers are unable to provide. Granted.—Hirschbach Extension, 96 M.C.C. 339 (341)*.

Supporting shipper, a manufacturer of ranges and stoves at Murray, Ky., cannot maintain large inventories of parts and materials at its plant because of lack of storage space; therefore, in order to maintain produc-

tion, a constant supply of component parts is essential. Regular-route carriers, including protestant, transport a substantial volume of parts for the shipper, and protestant conducts a peddle run between Nashville, Tenn., and Paducah, Ky., for 1.t.1. shipments, which arrives at shipper's plant around noon, 5 days a week. However, applicant proposes to provide service 24 hours a day on a call and demand basis, and the irregular-route authority granted will enable it to supplement existing service in emergency situations, when shipper needs rapid delivery of certain parts, by intercepting a carrier's vehicles en route, reloading the needed parts, and immediately delivering them to shipper's plant.—Paschall Extension, 96 M.C.C. 652 (654).

In addition, dies used in manufacturing ocassionally have to be shipped from Murray for repairs and, since shipper does not keep extra dies at the plant, expedited service is required for such shipments. Shipper also need fast dependable service for transporting steel stock between its plant and Nashville because of the possibility that parts essential to its operation might have to manufactured from its own steel and, in such event, expedited service would be essential because entire plant operation might have to be suspended until necessary parts were available; while the need for such service is somewhat indefinite, possibility exists that it might arise, and the consequences of its not being available are enough to justify authorization of the service. Protestant's regular-route service would hardly suffice in such emergency situations; and the limited scope of territory involved minimizes the possibility that the competitive picture would be changed. Granted accordingly. —Id., pp. 655-6.

Inasmuch as applicant has demonstrated a need on the part of supporting shipper for a specialized transportation service closely coordinated with its production and sales efforts, such service is no more specialized than that provided by common carriers for other shippers who are faced with similar merchandising problems, and protestant regular-route carriers clearly cannot provide the complete service required, common carrier authority (rather than permit applied for) granted.—Major Extension, 94 M.C.C. 652 (655)*.

In view of time in transit, specified delivery times, and increased demand for bulk motor shipments, shipper of vegetable oils and animal fats and blends thereof, in tank vehicles, requires direct motor carrier service from Memphis, Tenn., to destination and, where specific delivery times are involved, immediate availability of suitable equipment. Protestant's service has not been satisfactory, and it has not furnished equipment when needed or promised; but shipper would again try to use that service if protestant would reestablish a terminal at Memphis. Though applicant could provide service from Memphis to all destinations involved, through tacking of existing authorities, certain of the operations would involve considerable circuity; also, shipper's delivery schedules render impracticable its use of a substantial portion of the service applicant now can perform. Evidence is sufficient to establish need for applicant's proposed service; granted.—Commercial Oil Transport, Inc., Extension, 94 M.C.C. 244 (245-6).

Banking institutions and other companies supporting application for interstate authority to transport commercial papers, business records, sales audit media, and exposed or processed film and prints require expeditious service on small shipments at certain times of the day, usually not during normal business hours, and their needs cannot be gaged by tonnage potential or by the number of carriers now authorized to operate in the involved territory. Proposed service is necessary to effect expeditious settlement in clearance of checks and other financial papers, maintenance of credit, and preparation of billing and sales, and maximum speed in forwarding of such papers is most desirable, especially in the banking business. Applicant now transports those commodities intrastate in Texas, serving country banks, correspondent banks in larger cities, and clearinghouse banks in a flexible, coordinated service which protestants cannot provide in the proposed territory under their existing authorities as passenger carriers and a regular-route express carrier.—Southern Couriers, Inc., Extension, 94 M.C.C. 111 (115-6).

But while supporting shippers have evinced

need for the services proposed, which will be superior to existing services in speed of delivery and efficiency of handling, need is shown for transportation of commercial papers only between Dallas, Fort Worth, and Wichita Falls, Tex., and Oklahoma, and of sales audit media only from Oklahoma (other than the Panhandle) to Dallas; and the shipper of film and prints requires only transportation of unprocessed prints and film to its processing laboratories, together with return movements to dealers of processed film and prints, complimentary replacement film, and incidental dealer supplies. Authority granted is therefore limited accordingly.—Id., pp. 116-7.

Applicant armored-car operators have established need for common carriage of commercial papers, records, documents, etc., and of film, prints, and related articles between points named. Supporting shippers require dependable and expeditious door-to-door pickup and delivery service, often outside of normal business hours, which existing carriers apparently cannot provide. In order to use available bus service, shippers would have to coordinate their operations with existing bus schedules, and use of private cartage or messenger service would be necessary unless shipments were made ready during normal business hours when the bus company could provide pickup service; moreover, those protestants render essentially a passenger service, which under their certificates cannot be changed to type required by shippers. Authority granted one applicant, but applications of the other two held open for 90 days to permit them to seek conversion of outstanding permits to bring their operations into conformity with §210.—Armored Carrier Corp. Extension, 92 M.C.C. 336 (363, 365).

Both applicants have clearly demonstrated public need for transportation of passengers in limousine service between specified Connecticut points and La Guardia and Idlewild airports. Substantial numbers of passengers flying to and from those airports live or work in or near those communities, and denial of applications would leave them entirely dependent on private transportation or on multiple-line services of railroads and buslines; only one protestant specializes in type of service normally required and expected by airline passengers, and its service limited to a point near Bridgeport would not meet reasonable needs of Bridgeport passengers. And though each applicant opposes the other's desire to serve Norwalk, their operations branch out therefrom, one extending east and the other north, and as routes of both pass through Norwalk, both should be authorized to serve it. Granted, but issuance of certificates withheld for reasons stated.—Hatom Corp., 91 M.C.C. 725 (733, 734)*.

Authorization of transportation, in special operations, of stockmen between Ames, Iowa, and Chicago stockyards, serving intermediate Iowa points on US Highway 30, is justified when protestant Greyhound's time schedules,even ondays when the market closes early, would not allow the stockmen time to change into travel clothing and would require them to forgo lunch and dinner, endure an additional 3 hours' travel, and alight at less convenient points on Highway 30; and if they failed to catch the 1:15 p.m. bus, they would have to wait until 7 o'clock the next morning. —Myers, 89 M.C.C. 125 (128)*.

Proposed transportation of liquid fertilizer from Susquehanna River barge landings at or near Havre de Grace, Md., to farmsites in Delaware and certain Maryland and Pennsylvania counties, including stationing of storage or nursing tanks at farms which lack suitable tanks, will meet a demonstrated public need. In many instances the only feasible method of delivery is to pump the liquid fertilizer from the line-haul vehicle into applicant's nursing tanks, and protestants are unwilling to provide that service. Supporting shipper, which is pleased with applicant's service on dry fertilizers, has experienced an increasing trend to use of liquid fertilizers, and applicant has or will obtain suitable equipment for the complete service it desires; granted.—Delaware Exp. Co. Extension, 92 M.C.C. 718 (720, 722-3).

Ordinarily a proposal to provide an auxiliary service which an existing carrier is unable or unwilling to provide is not in itself sufficient basis for a grant of new operating authority; otherwise, those seeking to enter the transportation field might be encouraged to propose novel transportation services as a means of thwarting the effort of existing car-

riers to provide economical and efficient service within scope of their authorities.—Star Carriers, Inc., Extension, 88 M.C.C. 282 (283).

However, with present-day methods, the only efficient and useful way for shippers to transport agricultural limestone to farm sites is by use of the type of dump vehicles with spreader equipment for direct application of the limestone to the soil which applicant utilizes; as protestant cannot provide this spreader service to the portion of proposed destination territory which it may serve, application should be granted..—Id., pp. 283-4.

Real need exists for proposed transportation of shipper's experimental and show display tractors and farm and industrial equipment, much of it requiring flat-bed or low-bed trailers not possessed by protestants; applicant is well equipped to render required specialized service and has transported numerous loads of considered commodities under temporary authority. Authority granted for transportation of such experimental and show display articles and incidental paraphernalia, when moving for purposes of display or experiment only, throughout United States except Alaska and Hawaii.—Donaldson Transfer Co. Extension, 89 M.C.C. 651 (652)*.

Applicant, which pioneered in transporting complicated machines, uncrated, has shown that supporting shippers' photographic and X-ray machines and equipment require the specially designed equipment and careful and experienced handling which applicant has, by its lawful transportation thereof under its existing household-goods authority, shown itself best able to provide, and has established public need for transportation of those articles to and between specified points and areas beyond its household-goods territory, to enable it to provide the complete service required by its shippers. Granted.—Neptune Storage, Inc., Extension, 88 M.C.C. 25 (33).

Though pipestringers contend that, in view of their experience in handling materials for pipeline construction in the oil and gas industries, their specialized services should be made available to all industries desiring to transport their products through pipelines, prospective pipeline users named by applicants and supporting contractors are predominantly builders or operators of water or sewage systems for municipalities which can provide complete access to construction sites; occasional location of construction sites far from highways does not justify a plethora of grants to Mercer-type carriers to transport pipe for municipal sewers and water mains when it is not shown that adequate service cannot be rendered by carriers which do not engage in pipestringing but are fully authorized to carry pipe and unload it where needed. —J. O. (Red) Willett Pipeline Stringing Extension, 89 M.C.C. 427 (435).

However, true overland pipelines are now used and are expected to be used increasingly for transmission of commodities other than products of gas or oil, some of which cannot now be identified; such pipelines will require large-scale stringing operations in areas which cannot be served by general-commodity carriers or heavy haulers lacking applicants' special vehicles, and industries contemplating use thereof need service of carriers with oilfield experience and equipment. Each applicant is therefore granted extension authority for service to pipelines other than those used for gas and oil, coextensive with and complementary to that it now holds under part (2) of the Mercer description (74 MCC 459); nothing less will meet the predictable shipping needs expressed. Such grant, however, contemplates service only to pipelines used for transmission of articles of commerce, which excludes municipal water systems, sewer lines, or irrigation ditches.—Id., pp. 435-6.

Speculation; trafficking in certificates: [Vols. 15, 16, 18].—While grant of authority to an applicant which intends, not to utilize it, but to sell it to another should be discouraged, a grant is not necessarily precluded where the operations would be under control of the same person even if transferred to a new corporation. However, where noncarrier applicant, shortly after hearing on its applications, proposed to transfer whatever rights it obtained to an affiliate, which was subsequently granted temporary authority corresponding to that sought by applicant, authority for which a public need is shown should be granted to the successor, but only upon proof of latter's fitness and ability to provide service. Proceeding held open for 90 days, during which

applicant should either inform the commission by affidavit of its intent actually to use the authority granted, or petition to have its affiliate substituted as applicant, in which case the proceedings will be set for further hearing on issue of latter's fitness.—Hatom Corp., 91 M.C.C. 725 (731, 734)*.

Sporadic, irregular service: [Vols. 11, 18, 19].—The joint board erred in classifying the numerous shipments received by several supporting shippers as "emergency" shipments which were fairly infrequent, sometimes rare, especially in those instances where orders for such shipments are daily or weekly occurrences. Applicant proposes to furnish a daily service for which a public need is shown; and its failure to provide such service over another route has no probative value in determining need for daily service over route sought.—Brown Transport Corp. Extension, 89 M.C.C. 354 (355-6).

Temporary authority: [Vols. 12, 15-19].—Evidence of plaintiff's operations under temporary authority or of grants of temporary authority to other carriers has no ligical bearing on issue of whether plaintiff sustained its burden of showing public convenience and necessity at the hearing; the mere fact that plaintiff may have been operating successfully and in accordance with the commission's regulations does not prove that public convenience and necessity was served. The grant of temporary authority in no way eased plaintiff's burden of proof, since it is granted without a thorough investigation into the public need or the operations of the carriers; and to say that the commission thereby restricts its freedom of ultimate determination is not contrary to the statute, but against common sense.—Colorado-Arizona-California Exp., Inc. v. United States, 224 F. Supp. 894 (900, 902)*.

Although the commission, during course of hearings, has admitted evidence of operations by an applicant under temporary authority for purpose of determining issues of convenience and necessity or of applicant's fitness, its refusal to grant petition of plaintiff (unsuccessful applicant) to reopen the record for purpose of hearing evidence as to temporary operations instituted after closing of the record is not shown to have been arbitrary or capricious. It was clearly within the commission's competence to weigh plaintiff's allegations as to changes in conditions and circumstances since hearing closed and during period of its operation under the temporary authority against matters alleged in answer filed by the successful applicant; it must be presumed that the commission gave those factors such consideration and concluded that plaintiff's charges dud not require reopening of the record.—Suburban Transit Corp. v. United States, 215 F. Supp. 717 (725)*.

Plaintiff acted at its peril in undertaking obligations of performance under the temporary authority granted it at its own instance, and character of those operations was not of such extraordinary importance as to deprive the commission of its discretion to deny plaintiff's petition; moreover, in its successful petition for review by the commission of the prior decision of Division 1, at which time it had been operating under that authority for nearly 6 months, plaintiff sought only reconsideration and oral argument, and cannot now complain that the commission's denial of its subsequent petition for reopening was an abuse of discretion.—Id., pp. 725-6.

Although the commission may officially notice temporary authorities issued by it, grant of such authority creates no presumption that corresponding permanent authority is required. Moreover, as temporary authorities cited by applicants, for transportation of same commodities from same origin to some of same destinations for which they seek permanent authority, involve four nonparty carriers as well as applicants and in some instances are supported by different shippers than those supporting instant applications, and all of the temporary operations were performed after the hearing, they may not be considered evidence or a proper factor in determining the §207 applications on the merits.—Colorado-Arizona-California Exp., Inc., 92 M.C.C. 89 (91)*.

Applicant's transportation of new motor vehicles other than automobiles from Spokane to considered Washington and Idaho counties under temporary authority does not establish need for continuance thereof.—Transport Storage & Distributing Co. Extension, 92 M.C.C. 566 (571).

There is no inconsistency in the commission's adoption of examiner's report denying the application notwithstanding a prior grant of temporary authority. Applications were decided in essentially different proceedings, the temporary authority being granted informally without hearing, responsive to shipper representations of urgency and immediacy, while the permanent authority was denied on the record made upon formal hearing. Those differences in evidentiary standards are recognized in §210a which specifically provides that a grant of temporary authority creates no presumption in favor of a grant of corresponding permanent authority. And since the examiner accepted supporting shipper's projected traffic volume, evidence of applicant's temporary operations would not vitiate his conclusions as to need for permanent authority. Furthermore, admission in case cited of evidence of operations under temporary authority prior to hearing did not involve administrative delay entailed in applicant's proposal to reopen instant proceeding to receive such evidence.—Convoy Co. Extension, 91 M.C.C. 461 (463-4)*.

Where other evidence indicates that continuance of service previously performed under single-State exemption would meet a public need, evidence of service by an acquiring multistate carrier under temporary authority may be corroboration; however, such evidence by itself cannot support a finding of public convenience and necessity, particularly when scope of the resulting unified operations is considered and there is no showing of inadequacy of service of existing carriers.—Roush—Control—Southern California Freight Lines, 90 M.C.C. 459 (469)*.

Although there may be occasional need for transportation and pipestringing in connection with water systems for mining operations or in other locations inaccessible to ordinary motor carriers, the rare situation in which a construction site is located far from highways ordinarily traversed presents an appropriate circumstance for seeking of temporary authority by a qualified applicant and would not justify a plethora of grants for such service to Mercer-type carriers.—J. O. (Red) Willett Pipeline Stringing Extension, 89 M.C.C. 427 (435).

Through service: [Vols. 12, 18, 19].—Although shippers almost unanimously expressed preference for straight line rather than joint-line service for transportation of frozen foods, in determining whether need exists for proposed additional service, a mere preference for single-line service is not sufficient to show inadequacy of joint-line service, in absence of demonstrated service deficiencies.—Lester C. Newton Trucking Co. v. United States, 264 F. Supp. 869 (885)*.

While applicant seeks authority to transport frozen foods from Kansas City, Kans., to points in States east thereof and the District of Columbia, it would actually perform through single-line transportation, by use of transit, from points west of Kansas City to the destination territory. Considering the application on the basis of the through service actually involved, therefore, applicant not only failed to afford interested parties adequate notice, but it also failed to establish need for such through service when its whole presentation was directed toward need for service east of Kansas City, and for transit at that point; no need is shown for service from origins west of Kansas City to destinations east thereof; nor does the record show that potentially competitive carriers cannot provide satisfactory single-line or joint-line service via that transit point. Accordingly, absent appropriate notice and proof of need for single-line service, application is denied insofar as through service, via the transit point, is involved.—Willis Shaw Frozen Exp., Inc., Extension, 94 M.C.C. 495 (501-2, 505).

As to asserted need for service on shipments originating at Kansas City, the only evidence of any consequence of need for such service was that submitted for one shipper who ships frozen steaks to Landover, Md., and Chicago, Ill., and who uses applicant's service under temporary authority. However, no additional authority is needed from Kansas City to Chicago because applicant presently holds authority to that point and, in addition, two protestants hold appropriate authorities for such transportation. Also, that shipper's expected need for service to other points in requested destination territory is speculative; and the extensive coverage provided by protestants throughout the area is not shown to be

inadequate or unsatisfactory for the shipper's foreseeable requirements. Therefore, authority to transport frozen meat from Kansas City to Landover, restricted to shipments originating at Kansas City, is granted.—Id., pp. 505-6.

The recognized advantages of single-line motor carrier service do not justify institution of a new operation without a concomitant showing of existing detriment to shippers in form of presently inadequate for-hire motor service.—Lester C. Newton Trucking Co. Extension, 89 M.C.C. 269 (274)*.

National Aeronautics and Space Administration, though preferring single-line service for transportation of irradiated fuel elements in lead casks, agrees that its basic requirements could be met by joint-line, through-trailer service; two protestants, one of which has handled radioactive materials, are able and willing to provide that service; applicant has shown no need for operations which cannot be adequately performed by protestants; denied.—Dealers Transit, Inc., Extension, 88 M.C.C. 375 (379).

Under passenger authority sought by one carrier, a member of Trailways system, if all four separate segments of lines in North Carolina, South Carolina, and Georgia were authorized, applicant could provide service using two major north-south routes; also, if arrangements could be made with other Trailways members, it would participate in through passenger service between numerous northern points and Savannah, Ga., and points in Florida. While numerous supporting witnesses appeared, their needs for service are minimal, at most; nearly all residents in the area have direct interstate bus service available, and the others need travel only relatively short distances to points served by protestants; very limited need described by residents of rural areas not otherwise served does not warrant grant of authority sought. Moreover, other Trailways members are opposed to the grants, and show no intention of engaging in joint operations with applicant even if authority is granted. Routes sought are not needed to provide adequate through Trailways service and, in view of extremely limited need shown, all four applications are denied.—Queen City Coach Co. Extension, 98 M.C.C. 117 (118, 121-2, 124).

Grant of passenger authority between Charleston, S. C., and Savannah, Ga., sought by the other applicant, also a member of Trailways system, would permit establishment of through Trailways operations along the Atlantic seaboard between many northern points, on one hand, and numerous Florida points, on the other; however, supporting witnesses were generally unfamiliar with service offered by protestant Greyhound, and, with one exception, no need for additional service between the termini was even suggested. No inadequacy is demonstrated in the service provided by Greyhound. All supporting witnesses, except one, reside at intermediate points along proposed route and, in view of the argument that a grant of authority limited to overhead traffic is warranted on an alternate-route theory, applicant does not appear to be especially desirous of providing proposed intermediate point service. Considered on the basis of inadequacy of present service, or on alternate-route theory, application must be denied.—Id., pp. 121-2, 124-5.

Need for proposed interstate bus service over applicant's existing intrastate route is established by testimony of 11 witnesses, several of whom reside at points not served by any protestant, that it would be a convenience to them, particularly in purchase of through tickets and checking of baggage at their respective origin points. Granted.—Sheridan-Indianapolis Bus Line, Inc., Extension, 92 M.C.C. 285 (287)*.

In connection with approved purchase of operating rights of 14 inter- and intrastate bus lines operating in St. Louis area and concurrent application for authority to continue the intrastate service, eliminate certain restrictions, and serve additional points, the agency seeks to provide an entirely new through service by tacking the Missouri and Illinois operations. While there is no evidence by present or prospective passengers of need for unrestricted through service on an area-wide basis, in light of surveys conducted to ascertain benefits of a unified transit system, also prior passenger use of the various segments and fact that all local buslines will either cease to exist or discontinue all competitive operations, it is reasonable to conclude that such a

need exists.—Bi-State Development Agency —Purchase—Vandalia Bus Line, 93 M.C.C. 579 (594).

Grant of extension authority to one applicant between specified New Jersey points for provision of through bus service over two routes between those areas and New York City is justified by collective testimony of some 60 public witnesses showing need for both routes; few residents of areas involved can use rail service without incidental use of some other mode of transport, and the situation has been aggravated by one railroad's discontinuance of service at certain stations; because of the considerable distance between considered areas and New York, time in transit is important, and single-line service over the most expeditious routes is desirable. —Somerset Bus Co., Inc., Extension, 89 M.C.C. 107 (112)*.

Though another applicant now provides service to and from one involved point over combinations of its existing routes, there is no overall coordination of its schedules, and only one or two in each direction could afford satisfactory through service; moreover, its operations over certain routes are not of type attractive to local traffic. There is no showing that available combination service is being used; on the record as a whole, the demonstrated need for service is not being met by any existing carrier; however, magnitude of present need does not warrant authorization of more than one carrier over any route; two of three applications denied.—Id., pp. 112-4.

Evidence of supporting shippers convincingly demonstrates a need for proposed service between Ardmore and Tulsa, Okla., and for resulting single-line overnight service between Wichita Falls, Tex., and Tulsa which applicant would provide. Though two carriers apparently are providing overnight service between Wichita Falls and Tulsa, their services have failed to satisfy shippers' overall requirements established of record; moreover, those carriers did not appear as protestants, and there is no evidence as to their willingness or ability to provide desired service; also, their express service, while used extensively for smaller shipments, is considered too costly by shippers for general use. Most shipments move regularly in l.t.l. quantities, and a scheduled service such as that proposed is considered superior to one carrier's irregular-route service. Overnight service is essential to some shippers' maintenance of small inventories and their ability to compete more effectively with other merchants; one protestant provides a second day delivery, but evidenced no interest in providing required overnight service. Granted.—Nix Extension, 96 M.C.C. 374 (375-6)*.

Where applicant was only carrier offering direct, expeditious, single-line service from points in the Southwest to the East, and it applied for certificated authority to transport traffic from Cleveland to Newark (a route it had previously used as a deviation route until the commission had ordered it to cease) and it was demonstrated that if it had authority to use this route as requested it could continue to furnish fast, economical and safe service, application was granted in spite of the presence of other abundant motor carriage between Cleveland and Newark.—Strickland Motor Freight Lines Extension, 96 M.C.C. 732 (740-1).

Evidence establishes a need for proposed direct transportation of new furniture and furniture parts from Taylorsville and North Wilksboro, N.C., to points in New York, New Jersey, Delaware, and described portions of Maryland and Pennsylvania; applicant specializes in transporting new furniture, has served supporting shippers for several years under a costly leasing arrangement with local carriers whereby it leased equipment to carrier making the pickup, and presently is providing direct service under temporary authority. Without proposed service, supporting shippers have no direct service to most of the destination territory sought; they require services of a carrier authorized to carry both crated and uncrated furniture, and some mixed shipments, and capable of providing split deliveries or stops in transit for partial unloading. Protestants cannot provide shippers with the comprehensive service shown to be needed; however, they are entitled to transport all the traffic they are authorized to handle until their services have been tried and found lacking by the shippers. Granted accordingly.—Johnson Bros. Truckers, Inc., Extension, 96 M.C.C. 500 (501, 504-5)*.

Supporting shipper, a manufacturer of highly perishable frozen foods, needs a more direct and expedited refrigerated service than it is presently receiving, and one wherein the lading is not physically transferred from one vehicle to another, since a sudden rise in temperature can seriously limit shelf-life of its products and reduce their salability. Applicant's proposed single-line service will result in significant mileage savings and reduction in transit time, and will obviate the problem of physical transfer of lading; granted.—Trans-Cold Exp., Inc., Extension, 95 M.C.C. 300 (302-3)*.

Existing three-line service from Lincoln, Neb., to points in Virginia and West Virginia is clearly not responsive to supporting shipper's requirements for movement of such perishable products as meats and dairy products; however, available joint-line service to four other eastern States and District of Columbia has not been tried sufficiently or otherwise shown to be inadequate to meet shipper's demonstrated need for service to points therein; granted in part.—Nebraska Eastern Exp., Inc., Extension, 94 M.C.C. 799 (803).

Supporting shipper with packing plants at Macon and Springfield, Mo., needs expedited single-line service on meats and packinghouse products from those points to 17 States and District of Columbia, with second-morning delivery on meats and numerous stops for partial unloadings. Several carriers now serving Springfield have refused to provide the required transportation; one protestant lacks authority for meats, and another cannot perform single-line service because of tacking restrictions; interline service is unsatisfactory due to delays and loss of control of shipments. Although need shown relates principally to shipper's expectation of future sales, any hope of expanded business is now hampered by lack of required service; granted.—Bilyeu Refrigerated Transport Corp. Extension, 92 M.C.C. 633 (638-9).

Supporting shippers need proposed transportation of meats, meat products, and by-products (as defined in 61 MCC 209) from Denison and Fort Dodge, Iowa, to numerous eastern States and District of Columbia. Though applicants and protestants now participate in the traffic to some extent through various interline arrangements, this joint-line service is circuitous and occasions administrative disputes between carriers, causing delays and interruptions in service; because of perishable nature of the commodities, distance to eastern markets, and volume of available traffic, expeditious single-line service is required. However, although shippers require multiple carrier service to handle their large traffic volume, grant of similar authority to five applicants would in some instances result in all five serving one State; authority granted each, therefore, is limited so that not more than three will serve any one destination State.—Kroblin Refrigerated Xpress, Inc., Extension, 92 M.C.C. 669 (672-3).

Proposed single-line service on meats and packinghouse products from North Platte, Nebr., and Huron, S. Dak., to 17 States and District of Columbia is needed when no motor carrier service is available from North Platte and only joint-line service, which is shown to be generally unsatisfactory to shippers, is available from Huron; moreover, protestants lack authority to serve all destination points. However, volume of such traffic does not justify authorization of more than one service; one applicant granted authority from both origins.—Indiana Refrigerator Lines, Inc., Extension, 91 M.C.C. 71 (80).

While joint-line service is available from a number of opposing carriers on frozen potatoes and products from Presque Isle and Easton, Maine, to 15 States and District of Columbia, none of them is individually authorized to render supporting shippers a complete service, and collectively they cannot serve all destinations to which need is shown. Shipper's products will move to distant points and require careful handling because of their perishable nature, and their desire for the most efficient and expeditious type of motor carrier service to handle their full line of food products is justified; pattern of distribution and nature of commodities involved demonstrate need for single-line service, for which that proposed by applicant is most suitable; granted accordingly.—Midwest Coast Transport, Inc., Extension, 91 M.C.C. 812 (817)*.

Although applicant failed to meet gateway elimination tests, it presented shipper testimony to establish need for its proposed direct

service on frozen vegetables and products from Maine origins to numerous States. Nature of commodities involved and changes in customers' purchase patterns are convincing that furtherance of supporting shipper's activities is substantially dependent on a carrier's ability to provide rapid service, and that availability of a carrier offering single-line service is required. Granted in part.—Refrigerated Food Exp., Inc., Extension, 91 M.C.C. 779 (783).

Though on reconsideration authority sought from 3 Pennsylvania points to 10 midwestern States is found not justified on gateway elimination principle, supporting shippers have demonstrated present need for single-line l.t.l. service on frozen bakery products to 7 of those States and reasonably anticipate need for similar service to the other 3 in near future; authority granted to 7 States to which no motor service is shown to be available, but denied as to 3 which protestant can now serve as a common carrier.—Service Trucking Co., Inc., Extension, 88 M.C.C. 697 (701)*.

In the distribution of its fragile and perishable bakery products, shipper requires fast and flexible direct-line service from Macon, Ga., to each of its five locations, with split-deliveries between any two or more of such destinations, plus a final delivery at its main plant in the Cincinnati commercial zone. No protestant, individually, can provide this service; protestants' collective service involves extensive interline arrangements, which result in circuity, delays, and unnecessary exposure to possible contamination and damage. Shipper should not be obliged to change its normal business operations and distribution method to experiment with joint-line service which fails to meet its reasonable transportation requirements. Granted.—Newman & Pemberton Corp. Extension, 91 M.C.C. 662 (665)*. [But see dissent.]

Supporting shipper requires deliveries of yeast at precise times in order to coordinate movement of the traffic with distribution schedules of its branches, and also requires protective service with no transfers of lading, because of perishable nature of the product. For the past 4 years applicant and a connecting carrier have rendered a service highly satisfactory but for recurring delays at origin on part of the connection, whereas protestant has transported yeast for shipper to involved points during two separate periods and failed to provide reasonably adequate service. Need for applicant's proposed single-line service is thus established; granted.—Frozen Food Exp. Extension, 91 M.C.C. 592 (595-6).

Where four supporting shippers ship large yearly volumes of frozen foods from Florida to the Carolinas and are unable to obtain prompt single-line service needed from existing motor carriers, need is shown for applicant's proposed service; granted in part.—Alterman Transport Lines, Inc., Extension, 91 M.C.C. 43 (46-48).

Authorization of southbound service by applicant from Bowling Green, Ky., to Memphis is warranted when supporting shippers have established need for expedited service on a constant basis to meet their competitive situations, which protestants' interline and indirect service cannot consistently meet; granted.—Southern Forwarding Co. Extension, 91 M.C.C. 221 (227-8).

Supporting shipper requires applicant's more expeditious and flexible service in proposed transportation of cheese from three Wisconsin points to Kansas City, St. Joseph, Omaha, and Sioux City; the traffic moves in l.t.l. shipments of individual orders comprising different types of cheese produced at different points, and customers normally require single rather than piecemeal deliveries of their orders; at present such shipments must be interchanged at Chicago for consolidation because no protestant can serve all points involved; applicant will provide a multiple pickup service at the three origins, a direct, temperature-controlled service on consolidated shipments, and multiple deliveries of individual orders to consignees. Proposed service will eliminate time now consumed in circuitous operations through congested Chicago area and in physical interchange and consolidation thereat, will eliminate deterioration of the cheese due to extra handling and inability to maintain required temperature in transit, and will enable shipper more efficiently to serve its customers and meet competition in the destination area; granted.—Zuzich Truck Line, Inc., Extension, 89 M.C.C. 69 (72-3).

Supporting shippers require a carrier which can provide expeditious single-line service on asphalt and road oils from Billings, Mont., to construction sites throughout South Dakota; authority sought will enable applicant to improve joint-line service in which it now participates, by operating economically over the most direct and efficient route; granted.—Babcock & Lee Petroleum Transporters Extension, 91 M.C.C. 517 (521).

Supporting shippers have need for vendee's single-line service between Knoxville, Tenn., and involved southwestern North Carolina area over regular routes in lieu of limited irregular-route authority authorized to be purchased. While all protestants but one are substantial carriers, they cannot provide shippers with the same personalized service as vendee who would continue to operate in a relatively small compact area, and his additional competition in serving Knoxville would not endanger services of the larger protestants in that area. While the somewhat duplicative operations of the smaller protestant would be more severely affected, it does not serve Knoxville and cannot provide the single-line service shippers require; weighing all the evidence, public interest would not be served by denying vendee a certificate solely because he could compete more effectively with that carrier at a relatively few points; tacking restrictions imposed will afford it some protection. Granted for two of three routes sought.—Cope—Purchase—Hill and Burdick, 90 M.C.C. 71 (77)*.

Public witnesses supporting vendee's application for conversion of acquired irregular-route authority to regular route all indicated a need for regular-route service, and their uncontradicted testimony shows that there is no single-line, regular-route service between Salt Lake City, Utah, and certain major Texas points and, also, that existing service to Arizona points has not been entirely satisfactory. Vendee's through service under vendor's rights has met a public need and should be continued; regular-route authority granted.—Consolidated Copperstate Lines—Purchase—Nielsen, 90 M.C.C. 483 (488).

See also Trans-Cold Exp. extension case, n. 26 below.

While shippers are not entitled to single-line service as a matter of right, it will be authorized where existing joint-line service is inadequate. Applicant has established need for single-line service from Maryville, Tenn., to Atlanta when existing service has resulted in undue delays; one shipper's use of private carriage is based on need for better service, and smaller consignees have resorted to bus or railway express service. Granted, except as to one intermediate point from which existing service appears adequate.—Brown Transport Corp. Extension, 89 M.C.C. 354 (355-6).

Need is shown for transportation of meats, meat products and byproducts, dairy products, and articles distributed by packinghouses from Fremont, Nebr., to Arizona, New Mexico, and defined Texas area; originating carrier with which applicant formerly interlined supporting shipper's traffic under its "peddle" authority from Oklahoma City has discontinued its service; shipper desires single-line service because interchange involves risk of spoilage and damage; rail service is inadequate because of length of time in transit. Protestant offering through service cannot handle "distributed" articles or dairy products, which, though a small percentage of the total tonnage shipped, are an integral part of shipper's overall distribution pattern. However, although shipper regards Oklahoma, Colorado, and Utah as potential sales territories, it has no definite plan for obtaining business therein. Granted in part.—Fox-Smythe Transp. Co. Extension, 88 M.C.C. 57 (62-3).

Although applicant formerly interchanged equipment with a connecting carrier at Utica for transportation of fresh and frozen meats to New York points north thereof, that service is no longer available and present two-line service is unsatisfactory to shippers because shipments must be physically interchanged and may become defrosted; grant of authority for single-line service to that part of destination territory sought is warranted. However, single-line service desired to points south of Interstate Highway 90 is presently available to all but five; granted as to those five points.—Refrigerated Food Exp., Inc., Extension, 89 M.C.C. 795 (799)*.

As demand for bananas fluctuates greatly according to season, quality of the fruit, and prevailing market prices, fast and timely ar-

rival of shipments in desired condition is of utmost importance; shippers show need for single-line service from gulf ports to specified northwestern points and States which can offer shortest possible transit time, personalized responsibility for rigid temperature control in transit, and accurate scheduling and dependable arrival times, with some split deliveries; such service must be flexible, serving off-rail points, and closely coordinated with shippers' marketing activities. Though shippers will continue to receive most of their banana shipments from west coast ports, present and prospective volume from gulf ports warrants grant of authority to both applicants.—Lowrance Extension, 86 M.C.C. 787 (791, 792).

Truckaway, driveaway, secondary movement: [Vols. 18, 19].—Record establishes a need for proposed driveaway transpoatation of private passenger automobiles from New York City area to points in Florida using casual drivers, obtained from newspaper advertisements; applicant would solicit customers through advertising and charge a fee of $75; nonprofessional drivers, employed for one one-way trip, would be paid expenses. Testimony of nine nonprofessional shippers, i.e., private automobile owners, shows that similar driveaway service offered by protestants between the same points at a one-way rate of $340 is unresponsive to the needs of private automobile shippers; and where proposed transportation normally is provided infrequently for laymen, rather than regularly for businessmen, presence of nine supporting nonprofessional shipper witnesses is not insignificant. Moreover, protestants give no indication of means used to acquaint the public with their services; their published rates clearly would not move considered traffic; and nonprofessional shippers are in no position to attempt rate negotiations with established carriers.—Bell Transp. Co., Inc., Extension, 96 M.C.C. 264 (266, 268-9).

Because proposed driveaway service entails the use of drivers virtually unknown to applicant, and operating free of any effective control, it raises the question of applicant's ability to conform to the commission's safety regulations. While applicant will have obvious problems in compelling driver compliance with the safety regulations, particularly those prohibiting a driver from allowing unauthorized persons to ride in or operate vehicles assigned to him, such problems need not be insurmountable. Applicant is an experienced regulated motor carrier, is now providing service similar to that proposed, and is in substantial compliance with the safety regulations. Moreover, grant of authority sought will make available to those desiring it the service of a carrier subject not only to the safety regulations but, also, the regulations requiring insurance protection and the naming of an agent for service of process in each State through which it operates; and introduction of those protective elements into a segment of the industry which heretofore has been unregulated is in the public interest. Granted.—Id., pp. 270-1.

Applicant proposes a unique driveaway chaffeur, but not for-hire passenger, service to owners of private passenger automobiles when the automobile is accompanied by owner, his dependents, agents, and their baggage. Record indicates that need for this service cannot be met by either protestant bus operators or automobile transporters. Although the commission has generally refrained from authorizing the transportation of a particular class of passengers, it will, nevertheless authorize such a grant in a situation where public need exists, as here, and the protestant carriers do not engage in the more extensive type of operation. Application granted, subject to specified limitations.—Adams, 94 M.C.C. 290 (294).

Evidence justifies grant of extension authority to applicant for truckaway of new automobiles in secondary movements from Spokane, Wash., to 11 Washington counties and Idaho in and north of Latah and Shoshone Counties, restricted to shipments having prior rail movement from plant sites of General Motors Corp.; but no need is shown for proposed service to other Washington and Idaho counties sought, or for driveaway service. Expansion of applicant's commodity authority to include new vehicles other than automobiles, particularly trucks, is not warranted when it would be a new competitive service, which protestant is authorized and willing to provide for supporting dealers; that

transportation of new trucks in mixed shipments with new automobiles might improve applicant's overall operations or be of some convenience to dealers is insufficient to establish future need for that service. Granted in part.—Transport Storage & Distributing Co. Extension, 92 M.C.C. 566 (569, 571).

The primary question in determining whether restriction to traffic originating in California should be removed from applicant's existing authority for secondary movements of new automobiles from Spokane to other destinations in those States is whether public convenience and necessity require such removal to enable applicant to provide a complete secondary-movement service in its authorized area; effective and efficient operation requires that it be able to do so; request for removal of the restriction, granted.—Id., p. 571.

Shippers have shown a need for proposed fast service in transportation of replacement motor vehicles for wrecked and disabled vehicles in driveaway service from Charlotte, N. C., to points in 38 States, and of wrecked or disabled vehicles on return; none of protestants can offer complete service or meet need shown because of restrictions upon their territories or methods of operation; granted.—Kiser, 89 M.C.C. 750 (753).

General statements concerning need for service in emergencies from Chicago and other Great Lakes ports to Minnesota do not justify grant of authority, for tacking with applicant's existing authority, for secondary truckaway of automobiles between Minnesota and surrounding States, when no specific instances of inadequacy of protestants' services are shown; like considerations militate against grant of authority which would round out applicant's operations in the Northeast by adding Maine and Delaware to its already extensive service area, and enable it to serve Maine from Boston; even if weight is given to testimony of supporting automobile manufacturers, who do not control secondary movements, as to need for service between Maine points, such evidence is too general and speculative to support grant of authority.—Howard Sober, Inc., Extension, 88 M.C.C. 755 (756, 759).

But authority for secondary movements from Buffalo and Springfield, Mass., to Maine is justified to provide supporting shipper with a complete service which existing carriers cannot supply; shipper plans to use Springfield as a marshaling point for ex-rail shipments from Buffalo and Michigan for delivery to New England points, and as applicant already serves it from Buffalo and Detroit, additional authority granted will enable it to coordinate its shipments.—Id., p. 760.

Volume of traffic: [Vols. 13, 18, 19].—While there is a lack of specific figures as to the expected tonnage of salt to be carried and the number of consignees not located on rail lines, evidence is sufficient to establish a need for proposed service. Supporting shipper is attempting to recapture a formerly held percentage of the salt market; it is not entering a new field or strange territory; and its efforts have been hindered by a lack of transportation. Also, protestant does not contend that the general statements in applicant's presentation are untrue, but merely asserts that general statements are always insufficient to serve as a basis for granting authority; that is not a valid premise in instant case.—Argo Trucking Co., Inc., Extension, 96 M.C.C. 434 (437).

Substantial amounts of dry fluorspar presently move from Wilmington, Del., to points throughout involved destination territory, and volume to be made available by supporting shippers in the foreseeable future will approximate 50,000 tons annually, provided speedy and flexible transportation service, with suitable facilities and equipment for preventing loss and damage by wind, leakage, and contamination, is available. Rail service cannot meet these requirements, and suitable motor service is available only to a single destination; lack of such service precludes installation by principal consignees of facilities for receiving fluorspar by tank or hopper type vehicle. In the circumstances, grant of authority to both applicants is warranted.—Coastal Tank Lines, Inc., Extension, 92 M.C.C. 149 (154-5).

As to the eastbound aspects of proposed operations, record is convincing that there is need for some additional service, but not to the extent sought by the two applicants. While supporting evidence relates primarily

to potential traffic, volumes, and destinations of which are indefinite, products of liquid chemical producers in the Pacific-coast States are likely to move to considered marketing area in the foreseeable future. Opposing motor carriers either do not hold necessary authority or can provide needed service only through tacking or joinder over unduly circuitous routes; and many prospective consignees are located at off-rail points; granted in part to one applicant.—Pacific Truck Service, Inc., Extension, 94 M.C.C. 262 (264-5. 266).

In view of the relatively vague and indefinite evidence, sole supporting shipper's preference for multicarrier service is insufficient basis for premature authorization of three duplicating services in order to develope and transport anticipated future traffic. Though shipper's assertions and expectations as to estimated volume of future sales do not justify authorizing multiple and identical services, a need exists for one carrier to provide service on bulk shipments to certain of shipper's present and potential customers. Granted as to one applicant.—Coastal Tank Lines, Inc., Extension, 94 M.C.C. 206 (211); similarly, while four applications for similar authority are supported by the same shipper, there is no indication or estimate of the volume of traffic that would move to any specific point or area. Certainly the meager shipper evidence shows no need for services of more than one carrier to any destination; granted accordingly.—Wilson Bros. Truck Line, Inc., Extension, 94 M.C.C. 426 (430, 431).

Although supporting shipper anticipates an increase in volume of salt traffic available for motor carriage and supports all five applications, an estimated 7,300 tons of its current production is annually tendered to motor carriers. Based also on the volume so tendered during the 20-month period beginning August 1960, grant of authority only to the three applicants whose operations are centered in involved area is all that is needed for adequate transportation of shipper's traffic.—Maas Transport, Inc., Extension, 92 M.C.C. 534 (539, 540)*.

Only some 200,000 pounds of supporting shipper's products will move monthly in motor carriage from Ector County, Tex., to points in 25-State destination territory; this relatively limited traffic volume is not enough for both applicants to develop economically feasible operations. Though shipper supported both applications, its mere desire for services of two carriers forms no basis for the requisite finding of public convenience and necessity; only one application granted.—Younger Bros., Inc., Extension, 92 M.C.C. 624 (631).

Volume of steel reinforcing rods and dowel assemblies available for transportation from two new plants controlled by supporting shipper in Kankakee County, Ill., to points in 12 destination States will aggregate some 80,000 tons a year, with larger production facilities both under construction and in the planning stage; expected production will greatly exceed capacity of shipper's private-carrier fleet, which it wishes to discontinue, and when full production is reached it will also channel a portion of the output to customers now receiving shipments from other plants. In the circumstances, a substantial amount of motor carrier service is required to meet shipper's present and prospective needs, and quantum available is inadequate to meet those demonstrated requirements.—Steel Transp. Co., Inc., Extension, 92 M.C.C. 387 (396-7).

However, while volume of traffic to be shipped is considerable, when viewed in relation to the large number of applicants it does not warrant grant to each of authority for all destination areas sought by each; and no need is shown for service to points in New York and Upper Peninsula of Michigan where relevant evidence is speculative or demonstrates such a paucity of traffic moving that available service is adequate to meet shipper's foreseeable requirements. Authority granted 17 applicants to extent shown in appendix B.—Id., p. 397.

Inasmuch as a substantial volume of supporting shipper's traffic moves to Iowa, grant of authority to two applicants is warranted. But additional service is not shown to be needed for the infinitesimal tonnage now moving to Nebraska, Illinois, and the Dakotas, and shipper was unable to state whether the big potential market it anticipates in the Dakotas would materialize in the foreseeable future. Denied as to those States.—Dahlen Transport, Inc., Extension, 91 M.C.C. 609

(613, 614).

Facts that, according to supporting shipper's tonnage abstract, the volume of traffic moving from its Illinois plants to Tennessee is the greatest for any State to which examiner recommended grant, and that both applicant and protestant have participated therin, lend weight to shipper's claim that it requires service of more than one carrier, and is convincing that broadened commodity authority granted applicant will not upset existing competitive balance.—Ligon Specialized Hauler, Inc., Extension, 91 M.C.C. 356 (358, 360).

Large volume of cement which will move from supporting shipper's plant at Harleyville, S. C., to North Carolina and Georgia warrants provision for adequate motor carrier service; though 2 carriers have recently been granted authority from Harleyville, as well as 4 Tennessee origins, to North Carolina, neither may serve Georgia destinations and neither has equipment necessary for all service required; considering shipper's expressed need for a single carrier to transport cement to all receivers in its normal marketing area, grant of authority sought is warranted.—Southern Bulk Haulers, Inc., 88 M.C.C. 299 (305).

About half of supporting shipper's annual production of pianos moves as uncrated shipments; as part of its high estimate of three truckloads a week is already being handled by one applicant, volume which will move under authority sought to 25 destination States is not so substantial as to require services of more than one carrier; authority granted applicant which is now serving shipper to extent of its existing authority.—Trans-American Van Service, Inc., Extension, 89 M.C.C. 48 (50).

Volume of supporting shipper's traffic which applicant is now moving at peddle rates under temporary authority from Fremont, Nebr., to Arizona, New Mexico, and defined Texas area is sufficient to justify permanent authority; while specific customer locations in those States are not shown, it is clear the service will be used to make deliveries of contents of a single truck to numerous consignees at the same or widely scattered points.—Fox-Smythe Transp. Co. Extension, 88 M.C.C. 57 (62, 63).

See also East-West Motor Transport case, under *Interchange*, above.

Although supporting shipper does not now have voluminous sales orders to all States collectively sought by four applicants, in light of its greatly expanded manufacturing facilities and intensified sales program thoughout the area, transportation of silos, silo unloading devices, and related parts, equipment, and materials is required from Kankakee, Ill., to all States sought. However, in view of availability of adequate service to much of the destination territory, authority granted each applicant is limited to areas to which a complete direct-line service is not authorized to be provided by one of the others or by protestants, except that to New York and Pennsylvania, where shipper's traffic is expected to be considerably heavier than to other States, grant of authority to two applicants is warranted.—C & H Transp. Co., Inc., Extension, 88 M.C.C. 285 (294-5)*.

Though grant of authority to two applicants to transport tall oil from two Arkansas origins to Oakdale, La., is justified, authority for a third origin is denied when no estimate was given of amount of traffic to be generated by unfinished plant at that point.—Hearin Tank Lines, Inc., Extension, 88 M.C.C. 189 (192, 197)*.

See also Convoy Co. Extension case, §206(b), n. 25.

While it may conceivably develop that supporting shipper's very large anticipated future expansion of bulk chemicals traffic to involved destination area will require service of one or both applicants, protestants have been largely able to keep up with past increase in volume, comparable to that envisioned for the future, and it appears likely that they will be able to provide an adequate quantity of equipment to meet shipper's reasonable requirements. Denied.—Mason & Dixon Tank Lines Extension, 91 M.C.C. 7 (13).

26. Operation over irregular routes.—[Vols. 10-19]. —Charter or special passenger service, see §208(c), n. 10.

Authority granted for transportation of household goods, over irregular routes, will enable applicant to continue service over more direct routes between the States involved. For about 10 years, applicant had misconstrued its irregular-route radial author-

ity and had transported an extensive volume of traffic between considered States in an operation which the commission found, in 84 M.C.C.269, to constitute an unauthorized crosshaul, thus eliminating a direct route to certain points in Arizona, New Mexico, and California. Not only will applicant suffer a material revenue loss if not permitted to continue service to those States, but operations of many smaller interstate carriers with limited territorial authority will be drastically curtailed. Moreover, record is not convincing that protestants will be adversely affected by a grant of the limited authority sought.—King Van Lines, Inc., Extension, 98 M.C.C. 19 (22-4)*.

Shipper of candy needs services of an irregular-route carrier who can give extremely flexible, miltiple deliveries on small shipments averaging between 65 and 500 pounds from its Texas plant to retail drugstores at some 105 specified points through Florida; also, shipper needs expedited service for supplying new accounts, store openings and handling holiday orders, and prefers single-line service to eliminate exposing the candy to unfavorable temperatures. As protestants are regular-route carriers who only offer interline service and can not serve more than 60 or 70 percent of the involved points, they cannot provide service for which need is shown; approved.—Alterman Transport Lines, Inc., Extension, 96 M.C.C. 478 (481)*.

Supporting shippers require the direct, single-line service proposed by applicant for transportation of certain farm machinery, involving multiple deliveries en route, which can be provided only by a carrier operating over irregular routes. Protestant's authority does not embrace all points at which service is or may be required, and their respective operations are not flexible enough to permit them singularly or collectively to provide the complete service needed by shippers. Granted, subject to restriction against tacking.—International Transport, Inc., Extension, 95 M.C.C. 360 (363)*.

A clear need is established for applicant's transportation of gilsonite, in bulk, from Bonanza, Utah, to points in southwestern Wyoming. Supporting shipper has many customers in that area, most of whom receive bulk gilsonite in substantial quantities, they are located at out-of-the-way places and often need expedited service in emergency situations. Protestants cannot serve the destination territory, and there is no indication that the service required is now available. While regular-route authority was sought, applicant's proposed operation involves call-on-demand transportation of t.l. shipments to diverse points; such service is clearly irregular-route in nature; therefore, irregular-route authority is granted.—Bonanza Trucking Co. Extension, 94 M.C.C. 620 (624)*.

By rail affiliate, see New England Transp. Co. case, n. 35, below.

Applicant has established need for irregular-route transportation of frozen foods from Pacific Coast States to Arizona and from California to New Mexico. Supporting shippers' traffic consists of l.t.l. lots of perishable commodities produced at widely divergent points in Pacific coast area for sale and distribution in the Southwest, and distances up to several hundred miles separate the numerous points of origin and destination; while existing service appears adequate for some of the traffic handled for large shippers between key points, it is not sufficiently complete or flexible to accommodate the greater proportion. Proposed operation will in large measure replace service of a carrier which has recently ceased operations, and in which traffic protestants have not participated to any appreciable extent. Full scope of proposed service is required, and manner of its performance should be left to applicant's managerial discretion and not burdened with routing restrictions which at the outset would impede development of the service to its full potential; granted accordingly.—Zero Refrigerated Lines Extension, 91 M.C.C. 857 (863).

Where effect of a grant of irregular-route authority will merely be to allow applicant to continue the same operations it has been performing, but under authority more consonant with its actual nonscheduled, call-on-demand service, the conversion should be authorized; most of applicant's authority and its overall methods of operation are those of an irregular-route carrier, and conversion of its sole regular-route operation would be more compatible therewith. Granted, subject to request

for cancellation of its regular-route certificate.—Deaton Truck Line, Inc., Extension, 89 M.C.C. 231 (234, 235).

Irregular-route authority granted for transportation of stockmen between Ames, Iowa, and stockyards at Chicago, to permit flexibility in choosing the least congested highways for entering and leaving Chicago under various traffic conditions.—Myers, 89 M.C.C. 125 (129)*.

Overall character of proposed parcel-delivery service is territorial when it extends between all points in territory sought; necessity for regular use of certain highways between operating centers and/or sorting hubs on a daily basis to provide efficient, expeditious, and economical handling of such traffic does not change basic character of service offered. Purpose of requiring irregular-route carriers with more than usual number of regular-route characteristics to obtain regular-route authority or alter their operations is to protect authorized regular-route carriers, but because of voluntary restrictions in applicant's proposal it is opposed by only two such carriers, neither of which would be appreciably affected by grant of authority sought. The special or unusual features of proposed operation outweigh its regular-route characteristics; considered in entirety, it is essentially an irregular-route service. Irregular-route authority granted.—United Parcel Service, Inc., Extension, 89 M.C.C. 709 (714-5, 744)*.

See also Public Service Coordinated Transport Extension, §208(c), n. 1.

Need for proposed irregular-route transportation of roofing and siding from Little Rock, Ark., to specified area in eastern Oklahoma is established when Little Rock shipper has customers at points in that area not generally served by regular-route carriers, and many points in same area can be served by such carriers only in a circuitous manner.—Boswell Extension, 88 M.C.C. 219 (221)*.

While a carrier may join separate grants of irregular-route authority, that is not the proper method of seeking extension of irregular-route operations, and the commission would be warranted in denying an application where additional service contemplated would be of major scope in relation to that specifically proposed. Applicant requests authority for irregular-route transportation of food products from eastern origins to Martinsville, Ind., for joinder with its similar authority from that point to Texas and Oklahoma; all supporting shippers find existing service, where available, too slow for their perishable products, and lack of service has hampered them in expanding into Oklahoma or meeting demands of Texas customers; as they do not ship frozen foods, it is unlikely that other carriers would be affected. Therefore, in lieu of proposed restriction to through traffic destined to Oklahoma and Texas, authority is granted for unfrozen food products from named origins to points in those States, subject to republication in Federal Register.—Trans-Cold Exp., Inc., Extension, 92 M.C.C. 739 (741).

Where existing motor carriers have adequate authority, equipment, and experience in handling type of traffic involved, and their services have been used by shipper satisfactorily in other areas, and applicant can operate between considered points over a combination of its existing routes, no need is shown for grant of irregular-route authority sought to permit use of more direct routes.—Liquid Commodities between Va. and N.J., N.Y. & Pa., 316 I.C.C. 609 (611, 612).

Evidence of need for service from points beyond the origin point specified in an application for irregular-route authority is insufficient to warrant grant of such authority in the absence of a showing of need for proposed service from the origin point itself. Application seeks irregular-route authority from Wendover, Nev., to two Utah points, but record is devoid of any evidence that shipper has facilities at origin point specified or conducts operations therefrom; applicant testified that traffic would move from Ely, Nev., 120 miles south of Wendover. It is clear that proposed authority is sought only for purposes of tacking with applicant's presently held authority. There is no evidence of public need for applicant's service from and to the points actually named in the application denied.—Oxborrow Extension, 95 M.C.C. 96 (97-8)*.

Under principle of 84 MCC 239 and 92 MCC 220, a carrier seeking irregular-route authority for purpose of tacking or interchange must inform the public in its applica-

tion of the true nature of the service proposed; failing this, it must, in absence of special circumstances, show need for service from and to the origin and destination points named in the application. No need is shown for proposed irregular-route transportation of feeds from East St. Louis to Dupo, Ill.; the only evidence relates to service from East St. Louis to unnamed destinations; denied.—Kreider Truck Service, Inc., Extension, 92 M.C.C. 662 (663); Denver-Albuquerque Motor Transport, Inc., Extension, 91 M.C.C. 582 (584).

While regular-route authority has in the past been granted many common carriers of only limited commodities, in recent years, where regular-route authority is sought by a specified-commodity carrier, it has generally been found inappropriate and irregular-route authority granted instead; operations involving special commodities or special service or both, such as distribution of motion picture films, have historically and consistently been considered within the legitimate service area of an irregular-route, specified-commodity carrier.—Motor Common Carriers of Property—Routes and Service, 88 M.C.C. 415 (430).

Even if an operation involves handling of a large proportion of l.t.l. shipments for a number of shippers, entailing provision of a city pickup service, maintenance of a terminal for consolidation of small shipments, and scheduling of departures for certain days of the week, those factors, while noted in 47 MCC 23 as possible indicia of regular-route service, are necessary adjuncts to performance of a specialized service by a carrier of limited commodities, for which irregular-route authority has frequently been granted.—Id., p. 431.

28. Change in route; alternate route.—[Vols. 10-19].—The proper rule of three concurrent tests which applicant for alternate-route authority must meet was applied in proceeding wherein an alternate route between Nashville, Tenn., and St. Louis, Mo., was granted intervening defendant; however, while the examiner found that applicant (intervenor) failed to meet any of those tests, the commission concluded, from the same facts, that it had met all three. The commission's conclusion that applicant was operating under appropriate authority over a practical and feasible route, the first test, was based on its interpretation of carrier's certificates which it held permitted combination of its north-south route with subsequently acquired east-west route; and, in suit to set aside the commission's order, the court feels bound by the commission's interpretation of its own certificates when that interpretation does no violence to principles of logic and common sense.—Campbell Sixty-Six Exp., Inc. v. United States, 258 F. Supp. 529 (532, 533)*.

As to the second (or "actual competition") test, the commission without modifying the examiner's finding of fact that, while overhead freight must be considered, by the same token so must local traffic, simply concluded that intervenor's annual tonnage was comparable with tonnage handled by protestants (plaintiffs); however, the court finds no basis for that conclusion of the commission. In applying the "transporting a substantial amount of traffic" test, all traffic between "affected points" must be taken into consideration; but the salient point is that gross tonnage which intervenor transports between its St. Louis and Atlanta terminals is no measure of its "actual competition" with plaintiffs in transporting freight between authorized points of plaintiffs in each of those areas.—Id., pp. 533-4.

While the commission devised the test of present "effective competition" and, not being bound by the rule of stare decisis, it can abolish that test as a prerequisite to issuing an alternate-route certificate, the commission's report stated it was following that test; however, no findings were made in the report which can in any way justify its conclusion (diametrically opposed to that of the examiner on uncontradicted facts) that intervenor had met the test. The commission's "ultimate conclusion" on the actual competition test is not based on any "adequate subordinate findings" [230 F. Supp. 646] and is therefore, in a legal sense, "arbitrary and capricious" [239 F. Supp. 591]; therefore, its order is set aside and declared void.—Id., pp. 534-5.

The commission's denial of plaintiff's alternate-route application, on ground that applicant should not be authorized to do indirectly, by an alternate route, that which it is not au-

thorized to do by its existing service route between the same points, sustained. The commission's action is consistent with that it has taken an analogous and similar situations; there is judicial support for this principle, and it appears to be based on good logic. Applicant railroad's motor-carrier authority is restricted to service which is auxiliary to and supplemental of its rail service; grant of alternate-route authority sought would contemplate a new service, for which no need was shown, and would require removal of key-point restrictions in the certificate. Moreover, in view of decision in 209 F. Supp. 230, instant action represents a request for a part of that the whole of which has been denied.—Great Northern Ry. Co. v. United States, 209 F. Supp. 234 (236-7)*.

Before alternate-route authority may be granted on the basis of operating efficiency and economy, over routes substantially the same as two routes applicant operated over—under the deviation rules—for 3 years before the commission disapproved its use of both deviation routes, applicant must show, among other things, that compared with operation over authorized service route, proposed alternate would not result in improvement of service so as to create a new competitive situation detrimental to existing carriers. Thus, since record clearly shows that proposed routes are so much shorter and faster that the proposed operation would create a markedly different competitive situation, applicant has failed to show need for its proposal based solely on economy and efficiency. However, a shipper need for proposed improved service is established; supporting shippers, particularly those who ship between eastern cities and southwestern points, are entitled to retain improved services applicant has provided over the deviation routes; granted as to one route.—Strickland Motor Freight Lines Extension, 96 M.C.C. 732 (735-7, 739, 741).

Although applicant does not now have a service route to which proposed routes (2) and (3) would be alternate, authority is granted to operate over those routes, not on basis of alternate route proof, but for same reasons that authority over proposed service route is granted; however, alternate route authority is granted over those routes, as sought, in order to reflect actual function of proposed operations over such auxiliary routes.—Railway Exp. Agency, Inc., Extension, 94 M.C.C. 731 (736).

Where carrier seeks authority to transport explosives over the same regular-route network over which it presently transports substantial amounts of general-commodity traffic and, also, seeks explosives authority over pertinent alternate or nonservice routes, all the traffic handled by each of the parties should be considered in assessing probable competitive effect of applicant's operation over proposed alternate routes, which are essentially local in nature. Grant of pertinent "alternate routes" would merely enable applicant to minimize safety hazards by avoiding metropolitan areas without altering its present pattern of operation to an extent that would materially affect the competitive situation; and operation over such routes should be authorized, not necessarily on the basis of strict alternate-route proof, but for same reasons that authority over proposed service routes is granted; however, to reflect the actual function of proposed operations over such auxiliary routes, alternate-route authority is granted.—Ryder Truck Lines, Inc. Extension, 96 M.C.C. 771 (779).

Applicant is a substantial carrier conducting extensive general-commodity operations in some 25 States over a multiplicity of regular routes; its existing routes between Dallas, Fort Worth, Tulsa, and Oklahoma City, on one hand, and such points as Chicago, Milwaukee, Detroit, Cleveland, Louisville, and points east thereof, on the other, are feasible and practical, and use of proposed alternate routes between St. Louis and Tulsa and Checotah, Okla., for traffic moving between the aforementioned points would result in insignificant mileage savings and would not enable applicant to institute a new or materially different service that would materially improve its competitive position; thus applicant has justified grant of authority sought in connection with that portion of its operations.—Transamerican Freight Lines, Inc., Extension, 91 M.C.C. 841 (847)*.

But use of the alternate routes in connection with traffic moving between points in St. Louis-East St. Louis commercial zone and

Tulsa, Oklahoma City, Dallas and Fort Worth would enable applicant to increase its competitive effectiveness by providing more direct and expeditious service, to the substantial detriment of other authorized carriers. Considering the general scope of applicant's operations, the total volume of its traffic between those points is extremely light, attributable to circuity of its routes and incidental longer transit time, and it cannot be considered a presently effective competitor for such movements. Authority granted is therefore restricted against use of the alternate routes for movement of traffic between the St. Louis area and those southwestern points.—Id., pp. 847-8; in order to clarify the restriction imposed, and consented to by applicant, on reconsideration the authority granted is restricted against use of described routes for movement of traffic between St. Louis-East St. Louis commercial zone, on one hand, and Tulsa, Oklahoma City, Dallas and Fort Worth, and their commercial zones, on the other.—Id., 95 M.C.C. 637 (640)*.

Though applicant railroad has no existing service routes between termini of proposed alternate routes, the same considerations of operating efficiency and economy found to justify grant of regular-route authority for substituted motor service also justify concurrent grant of alternate-route authority, subject to the same rail-auxiliary restrictions as imposed on authority for the service routes.—Erie-Lackawanna R. Co. Extension, 91 M.C.C. 21 (32).

See also Illinois Central R. Extension, n. 35 *Substituted service*, below.

Applicant has met the three tests for grant of alternate operating-convenience route sought between Birmingham, Ala., and Meridian, Miss. Though its failure to establish that its past traffic either moved entirely over its service routes, or that it moved via applicant's existing alternate route but could have moved over its service routes, is a formal failure of proof, the 13-mile elimination involved is de minimis and not a controlling factor. The traffic could have moved over the service route with substantial facility, and the shortening of transit time is not crucial.—West Bros., Inc., Extension, 91 M.C.C. 523 (530)*.

Considering the overall volume applicant has been transporting between Birmingham and New Orleans or Gulfport and the volume accorded overnight service, applicant has been substantially competitive in the past and protestants have not had any substantial competitive edge. Moreover, elimination of about 12 percent of mileage between Birmingham and New Orleans is unlikely to enable applicant to offer a new and substantially different service. While operational disabilities suffered from applicant's stub-end operation at Meridian would be alleviated by the grant and institution of described Hattiesburg turnaround, this is primarily an internal operating matter. Granted with restriction against traffic between Birmingham and points short of New Orleans or Gulfport.—Id., p. 531.

See also Ringsby Truck Lines case, n. 25 *Fitness* above.

Since applicant is already operating between New York City and Newark over other authorized routes, new route granted via George Washington Bridge, serving no intermediate points, is in nature of an alternate route although technically a service route, since it will result in a saving of about 30 minutes operating time and will ontribute to safer operation by bypassing heavy traffic congestion in central part of New York, City.—Safeway Trails, Inc.—Investigation and Revocation, 91 M.C.C. 936 (951).*

Though applicant in seeking elimination of its Hoffman, Ill., gateway, has justified grant of authority allowing it to operate in the most direct manner between Chicago and Centralia, Ill., it has been providing service of marked consistency between certain fixed termini under its irregular-route authority, and apparently intends to continue oerating in the same manner; such operations would be more appropriately classified as regular-route. Therefore, to allow it to operate with some degree of flexibility, authority is granted for two routes, between Chicago and two points adjacent to Centralia; and since it would be inappropriate to grant a regular alternate route where a carrier has only irregular-route authority, both are granted as service routes. Since no intermediate-point service is authorized, competitors should not be affected.—Centralia Cartage Co. Extension, 91 M.C.C. 749 (753-4).

Applicant also seeks authority for a number of 'alternate' routes connecting its various regular (service) routes and authorized off-route points, grant of which would allow it to perform its peddle operations more efficiently. However, certain points it is authorized to serve in connection with its existing routes would become intermediate points on the proposed routes; as service at intermediate points is inconsistent with nature of an alternate route, grant of those routes, also, as service routes would be more appropriate and would not change the character of the proposed operations.—Id., p. 754.

Although vendor and vendee have provided a coordinated service between Boston, Mass., and points in Maine on vendor's routes north of Bangor by combining or tacking their respective authorities at Bangor, vendee seeks authority to operate, after proposed purchase, over a shorter route via Augusta instead of Bangor as a gateway, in order to provide a more expeditious overnight service. Vendee transports, under temporary authority, a substantial amount of traffic over the Bangor route and is competing effectively with existing carriers; its useof the Augusta route would not create any substantial change in its service to the public, except in the substitution of single-for joint-line service; thus, it has satisfied the criteria for a grant of alternate-route authoriy.—Sanborn's Motor Exp., Inc.—Purchase—Bemis Exp., Inc., 93 M.C.C. 728 (735).

Since applicant is willing to accept passenger authority between Charleston, S. C., and Savannah, Ga., sought either on basis of inadequacy of present service or on an alternate-route theory, with any authority granted being limited to overhead traffic, it does not appear that it is especially desirous of providing the proposed intermediate point service. Furthermore, applicant has not met required alternate-route criteria when it failed to show (a) that it is operating between the termini under appropriate authority over a practical and feasible route, (b) is effectively competing for traffic with existing carriers operating between the termini, and (c) that the competitive situation would not be materially altered to thedetriment of existing carriers. In alternate-route cases involving passenger carriers, additional factors are also to be considered, see 46 MCC 55; however, since the basic criteria are not met, the addtional factors need not be discussed. Denied.—Queen City Coach Co. Extension, 98 M. C. C. 117 (125).

See also Greyhound Corp. Extension, n. 7 above.

In determining an alternate-route application, the basis of comparison between actual and proposed operations must be the service actually performed. Fact that applicant is authorized to operate in a different, and superficially more efficient, manner than it did is not a pertinent factor because there is no way to ascertain whether the operation would actually have been a feasible one; also, in considering the effect of a grant of alternate-route authority, the commission is concerned not with the quality of the service applicant proposes, but with service it would be capable of providing. While applicant is transporting a substantial volume of freight over practical and feasible routes between pertinent termini, its use of proposed alternate route would allow institution of a new service which would alter the existing competitive situation; and since no need is established for such new service, the application must be denied.—Burlington Truck Lines, Inc., Extension, 96 M.C.C. 467 (471).

In both alternate-route and substituted-service cases grant of authority would result in a more economical and efficient operation, with ultimate benefits to the shipping public; however in an alternate-route proceeding it must be found that grant would not materially change the existing competitive situation, whereas in a substituted motor-for-rail application it must be shown that the service needed cannot as well be provided by existing carriers, and that grant of authority to a railroad affiliate will not seriously harm operations of independent line-haul motor carriers who compete not only with the highway service proposed, but also with the combined rail-motor service. Therefore, since alternate-route application seeks, in essence, to substitute one piggyback loading facility for another, it falls within purview of substituted service and is not one to be determined under standards applicable to alternate-route applications.—Pacific Motor Trucking Co. Ext., 95

M.C.C. 53 (54,56-7)*.

Although applicant states that it desires only alternate-route authority over route sought between Terre Haute and Vincennes, Ind., the only traffic it seeks to transport over that route moves to or from points east of Ohio-Pennsylvania line, and while it can now operate directly between Vincennes and those eastern points over routes of about same length as that proposed through Terre Haute, there is no showing that it is actually operating over those routes. On the contrary, much of its traffic to Vincennes and nearby points on same east-west route has been handled through its Terre Haute terminal, involving an unlawful haul to Vincennes and it is logical to assume that such freight required the intervening terminal operation and that applicant could not have handled the many small shipments that it did, had it observed its authorized service routes and operated directly from the eastern points to those destinations. Thus, it cannot be found that applicant is now operating over a feasible service route and lawfully transporting a substantial amount of traffic between the points involved. Eastern Exp., Inc., Extension, 92 M.C.C. 696 (700).

Additionally, grant of authority sought could materially affect operations of opposing carriers adversely by subjecting to diversion traffic they now transport between Terre Haute and Vincennee under interline arrangements with applicant. Nor is there any showing that it would permit institution of more economical or efficient operations which would work to benefit of the public generally, which is the basis of a finding of public convenience and necessity on the alternate-route theory; proposed service, involving rehandling of shipments at the Terre Haute terminal, can be and is as efficiently performed in joint-line as in single-line service. Denied.—Id., p. 701.

Where operations reflected in applicant's exhibit show overnight delivery on, at most, 30 percent of its traffic and then only after its insistence that service be "stepped up" applicant's present total service cannot be classified as next-day and, accordingly, is so unlike consistent next-day service provided by protestants that it cannot be considered competitively comparable. Granting of alternate route authority should not result in a new service. While some of the traffic would not move in next-day service because of applicant's operational practices, the alternate route sought would allow applicant to perform consistent next-day service on a majority of its traffic and, thus, would permit institution of a new and significantly different service which would materially improve its competitive position to the detriment of existing carriers. Denied.—Davidson Transfer & Storage Co. Extension, 91 M.C.C. 687 (689, 690)*.

Before alternate-route authority may be granted solely on basis of operating efficiency and economy, applicant must show (1) that it is presently operating between the involved termini over a practical and feasible route, (2) that it is in actual competition with existing carriers between those points transporting a substantial amount of traffic over such route, and (3) that the competitive situation will remain relatively unchanged if authority sought is granted. To satisfy the first two tests applicant usually must show that it has been conducting substantial operations over its service routes.—Capitol Truck Lines, Inc., Extension, 88 M.C.C. 212 (215-6); T.I.M.E. Freight, Inc., Extension, 89 M.C.C. 241 (244).

Although the substantial tonnage transported by applicant over its service route between Atlanta and Memphis warrants finding that the route is feasible and that it is in effective competition with other carriers for traffic between those termini, savings of 29 percent in mileage, and 3.5 hours in transit time from its present 15.5-hour average, over proposed alternate route would enable it to provide consistent next-day service, as well as next-morning service on shipments dispatched the previous evening. Even though applicant now generally renders next-day service, use of the shorter route would allow it to institute a new service significantly different in quality from that presently provided, and would materially improve its competitive position to detriment of other carriers. Denied.—Id., p. 245.

Criteria established in a long line of cases for grant of alternate-route authority to regular-route carriers are well recognized in the motor carrier industry, have been applied for a number of years, and have worked well; their application has permitted such carriers to enjoy operating economies in appropriate

situations without disrupting existing competition or allowing them to provide new services without a showing of public need. Such procedures, together with the Deviation Rules, are adequate to meet the aims of promoting more efficient and economical operations and more expeditious service to the public.—Motor Common Carriers of Property—Routes and Service, 88 M.C.C. 415 (417, 425-6).

Proposed alternate routes may not be approved solely on basis of operating efficiency and economy when they would reduce applicant's route mileage between Chicago and West Virginia points by 21 and 25 percent, would reduce operating costs by $32 and $38 per trip, resulting in annual savings exceeding $25,000, and, while not affecting second-day delivery of truckloads, would change delivery time for less-truckloads from third or fourth morning to second day; these benefits would enable applicant to provide a new service which would materially alter the competitive situation and adversely affect operations of existing carriers and their service to the public.—Eazor Exp., Inc., Extension, 89 M.C.C. 345 (347)*.

Alternate route to an alternate route:[Vols. 18, 19].— Applicant's past operations over its alternate route between St. Joseph, Mo., and Kansas City commercial zone, which authority is restricted against service between the termini, are considered in determining whether authority sought for operating-convenience route between St. Joseph and Indianapolis via US Highway 36 should be granted. Applicant could have operated over its less efficient but feasible service route between the alternate-route termini; record is convincing that it is an active competitor for traffic between St. Joseph and Indianapolis and, considering total distance between those points, elimination of the 142 miles involved will not permit it to institute a new service or materially affect the competitive situation. However, in view of its existing rights over portions of Highway 36, alternate-route authority is granted only between St. Joseph and Pittsfield, Ill., and between Decatur, Ill., and Indianapolis, restricted to traffic moving between St. Joseph and Indianapolis.—Transamerican Freight Lines, Inc., St. Joseph Alt. Routes, 92 M.C.C. 747 (751-2)*.

Furthermore, on reconsideration, although considered alternate-route authority over US Highway 71 is restricted against service between the termini, it is clear and unambiguous; that route may be joined with applicant's otherwise authorized regular routes for the purpose of transporting traffic originating at one of those termini and destined to points, other than points in Kansas on the service route, beyond the other. Prior report, to extent inconsistent with current finding, modified.—Id., 96 M.C.C. 243*.

In order to obtain alternate-route authority solely on the basis of operating efficiency and economy, applicant usually must show substantial past operations over its authorized service route; but an alternate to an alternate route may be granted where it is shown that, had there been no prior alternate-route grant, the past service could have been performed with equal effectiveness over the service route. Proposed route is an alternate to an alternate route and, also, is alternate to a segment of carrier's regular service route; and since applicant's present operations are conducted over a combination of the service and alternate routes, it is treated as an alternate to an alternate route. Applicant transports a substantial volume of overhead freight between points involved over its present route; reduction in mileage and operating time resulting from use of proposed route will not alter the competitive situation; nor will proposed operation constitute a new and substantially different service by applicant. However, as applicant has not effectively competed for local traffic between the termini, grant of alternate-route authority is restricted against transportation of such local traffic.—Bestway of Indiana, Inc., Extension, 95 M.C.C. 263 (265-7).

Although route sought as alternate to a segment of applicant's existing alternate route will increase distances between termini of the latter by about 17 miles, avoidance of a highway bridge with a low maximum weight limit on the present route will permit applicant to handle heavier loads and thus operate more efficiently and economically without affecting existing competitive situation; granted.—Vi-

king Freight Co. Extension, 88 M.C.C. 720 (721).

In addition to the three tests which must be met before alternate route authority may be granted solely on basis of operating efficiency and economy, where the present operations are conducted over an alternate route it must also be established that, had there been no prior grant of an alternate route, the past service could have been as effectively performed over the underlying service route.—T.I.M.E. Freight, Inc., Extension, 89 M.C.C. 241 (244).

Applicant has shown that it is conducting substantial competitive operations over its present route between Los Angeles and Oklahoma City embracing an authorized alternate segment, and that such operations could have been as readily conducted over its service route; mileage reduction of 14 percent compared with the service route, and reduction in transit time of 6 hours compared with the service route, or 3.4 hours compared with the route actually used, would not allow it materially to improve its present 40- to 50-hour operation or substantially alter its competitive position. Granted.—Id., p. 246.

Authority for an alternate to an alternate route may be granted without proof of existing operations over the service route where it can be established with assurance that, had there been no prior grant of an alternate route, the past service could have been performed with equal effectiveness competitively over the service route.—Capitol Truck Lines, Inc., Extension, 88 M.C.C. 212 (216).

Applicant, operating over a route embracing an alternate operating-convenience segment, could not compete effectively with existing carriers for traffic between considered termini if it operated over its service route and had not obtained authority for the alternate segment because of unsafe highway conditions on its service route; however, it was required by State authorities to transfer operations involving normal over-the-road equipment to that alternate route, and had the service route highway been maintained in safe condition for use of ordinary line-haul equipment it would be able to provide service thereover similar to that now provided over the alternate route. In the circumstances, an exception to the general rule should be made; applicant's operations over its alternate route considered in determining whether it has met the tests for alternate-route authority. Evidence of record meets those tests.—Id., pp. 216-7.

Nor is there any merit to contentions as to applicant's failure to provide service at intermediate points on the service routes. Ordinarily in alternate-route applications evidence of service at intermediate points on the appurtenant service route has no relevance in establishing substantial operations between the termini and beyond; no questions were raised as to any failure to provide service at points on applicant's present route, and it has continued to serve authorized points on the service route even though it cannot conduct normal operations over that route. [Decision in 79 MCC 806 distinguished.]—Id., p. 217.

Change in route, in general: [Vols. 18, 19]. —Applicant believes the service which it renders in Tennessee, under its present irregular-route authority, is becoming regular-route in character since it has five terminals there and, by request, provides daily, scheduled service to many Tennessee shippers; thus, it seeks two east-west regular routes in that State to permit the regular-route service demanded, and one shorter generally north-south route to tie its present regular-route operations in nearby States with the proposed service. Evidence of record reflects public need for proposed service at all points in Tennessee and, since applicant's service will be performed in conjunction with its regular-route operation, the only feasible manner of authorizing it to provide the needed service is to grant applicant authority to serve all Tennessee points not on its regular routes as off-route points. Granted accordingly.—Thurston Motor Lines, Inc., Extension, 94 M.C.C. 131 (132-3).

When vendor and vendee of irregular-route intrastate rights, used as basis for interstate operations for which issuance of certificate to vendee is authorized, have for at least 8 years conducted interline operations between their respective territories, using generally the regular routes sought by vendee, and that method of operation is the type required by the shipping public on both inbound and outbound traffic, conversion of the irregular-route rights to regular-route is warranted.

Competing carriers will not be affected because they have become adjusted to applicants' continuous joint-line operations over the years and most of them are authorized to perform similar single-line service.—Inland Exp., Inc.—Purchase—Frontier Dispatch, Inc., 93 M.C.C. 50 (54).

Where applicant's operation between Twin Cities and Minot, N. Dak., under its regular-route rights between St. Paul and Bismarck, N. Dak., and its radial irregular-route authority beyond has taken on the characteristics of regular-route service and it could not arrest that process without curtailing its legitimate business activities, it has properly sought to convert its authority. Since it is now transporting substantial amounts of general commodities between those points and will not be a new competitor, grant of regular-route authority between Bismarck and Minot should cause no substantial traffic diversion from protestants. Supporting shippers have used applicant's service extensively and it has become an integral part of the available transportation service; but as it is not shown to be serving any intermediate points on the Bismarck-Minot route, authority is granted only between those termini.—Hart Motor Exp., Inc. v. Midwest Motor Exp., Inc., 92 M.C.C. 558 (563-4)*.

As recognized in 47 MCC 23, irregular-route operations often tend to achieve such regularity as to gravitate into regular-route operations and, upon application, appropriate authority has generally been granted to carriers whose operations have taken on such a character. However, while applicant's operations have certain indicia of regular-route service such as established terminals, regular overnight service, and predominantly l.t.l. traffic, those elements are not so substantial or significant when considered in the context of its demonstrated operations as to warrant conclusion that its irregular-route authority between Ronoake, Va., and Huntington and Kenova, W. Va., should be converted to the regular routes sought.—Hatcher Trucking Co., Inc., Extension, 91 M.C.C. 853 (855-6).

Routes sought clearly are not applicant's customary and established ones as it depends primarily on the West Virginia Turnpike, which it uses under the commission's deviation rules, for the greater part of its West Virginia movements. Thus, applicant not only uses the turnpike route for a substantial part of its irregular-route operation in West Virginia which it does not wish to convert but, also, uses that route for more than 80 percent of the traffic involved. With only a small portion of considered traffic moving over the routes sought, and absent any convincing showing of the regularity or predictability with which either of those routes is traversed or points thereon served, record is not conclusive that such service as is rendered over either route is marked by such a fixed and definite periodicity as to warrant a grant of regular-route authority sought. Denied.—Id., p. 856.

Deviation rule: [Vols. 18, 19]. —See also Greyhound Corp. v. United States, 221 F. Supp. 440, §208 (b), n. 5. The Deviation Rules provide a means, in addition to procedures for obtaining alternate-route authority, whereby regular-route carriers can increase efficiency of their operations; rule allowing use of any superhighway extending in same general direction as carrier's service route, provided the competitive situation is not materially changed thereby, will be of even greater benefit to such carriers when the planned system of interstate highways is completed. Adoption of rule allowing regular-route carriers to use any route between authorized service points is not warranted.—Motor Common Carriers of Property—Routes and Service, 88 M.C.C. 415 (426).

When access to or from Interstate Highways 75 and 10, for considered segments of which extension authority is sought, will upon their completion be limited to specified interchanges, those highways are not suitable for use as service routes and are clearly superhighways within §211.1(c)(8)(i) of the commission's Deviation Rules; thus, those segments and four other routes ostensibly sought as service routes are clearly intended to be used as alternate routes, and the four access routes can be used as such under the deviation rules. Also, fact that distances over applicant's existing routes and over the Interstate Highways are similar, and that application is unopposed, indicates that no material change in applicant's competitive position will result. Applications dismissed.—Greyhound Corp.

Extension, 89 M.C.C. 65 (66-7).

Elimination of gateway: [Vols. 18, 19].—Criteria for determining circumstances under which an irregular-route carrier will be authorized to eliminate the necessity of observing a gateway without showing that proposed change of operations is responsive to a public need or that existing carrier services are inadequate (set forth in 61 MCC 421 and amplified in 88 MCC 415) require affirmative showing (a) that applicant is actually transporting a substantial volume of traffic between points involved by good-faith operations through the gateway in effective and efficient competition with existing carriers and (b) that elimination of the gateway requirement would not enable applicant to institute a new or different service that would materially improve its competitive position to the detriment of existing carriers.—Bowman Transp., Inc. v. United States, 267 F. Supp. 57 (59-60)*.

Evidence of record supports the commission's determination that plaintiff (applicant) failed to show that it was effectively and efficiently competing with existing carriers while operating through its five gateways in issue and that elimination of those gateways would not materially improve its competitive position to the detriment of existing carriers; thus, there was a rational basis for its decision (disagreeing with the examiner's recommendation of a partial grant) that the application should be denied in its entirety. The commission's conclusions were based on adequate findings supported by substantial evidence; action to enjoin and set aside its order denying plaintiff's substitution-of-gateways application in its entirety, dismissed.—Id., p. 60.

The commission, in exercise of its administrative authority and discretionary judgment, not only can promulgate standards for determining public convenience and necessity, but also is free to alter its policies and standards when in its judgment the necessity arises. Requirement that an applicant for gateway elimination show effective competition with other motor carriers in "substantially all" its authorized territory is not arbitrary, capricious, or novel to an application of the sort; that criterion is not new, having been inserted into the "substantial competitor" and "new service" tests in 61 MCC 421 and reiterated in 83 MCC 451. The commission found that plaintiff was not an effective competitor throughout its north Georgia territory on evidence that it had served only 8 localities, of which 5 were in Atlanta commercial zone and the other 3 in an almost direct line between Atlanta and the involved gateway; plaintiff's proposal for partial elimination of the gateway was never properly or timely presented to the commission, and failure to consider it was therefore not unreasonable.—Youngblood Truck Lines, Inc. v. United States, 221 F. Supp. 809 (818-9)*.

Even assuming that such a question was before the commission, there is ample evidence to support the commission's denial of plaintiff's application. Were even a partial elimination of the gateway granted, it is not unreasonable to conclude that resulting reductions of 15 to 71 percent in circuity of plaintiff's routes would afford it "new service" capabilities enhancing its competitive position with respect to opposing carriers. That the commission did not reiterate the facts stated by the joint board relative to the "new service" is immaterial when it expressly adopted the board's statement and finding of facts and adequately stated its conclusions on that point and the basis therefor. The commission's order sustained.—Id., p. 819.

Although applicant railroad subsidiary is currently transporting a portion of Railway Exp. Agency's traffic, and grant of authority for general commodities moving in REA's service over route sought would allow it to effect operating economies and reduce transit time by shortening its existing service route by some 38 miles, its proposal cannot be viewed as one for an alternate route, but is rather akin to one for gateway elimination. From that viewpoint, applicant has failed to demonstrate that the commodities it would transport over the proposed route are at all representative of the full range of commodities it is authorized to transport over its service route. Moreover, it would materially distort the concept of substituted motor-for-rail service to allow applicant to use this theory, with its concomitant lesser burden of proof, to institute a motor service which would replace a less direct highway movement rather than an inefficient rail operation.—Central of

Georgia Motor Transport Co. Extension, 94 M.C.C. 6(10).

Considering duplicative applications for extension authority from West Virginia points as seeking elimination of gateways, both applicants propose an essentially new competitive service that would unwarrantably dilute protestants' traffic. Elimination of circuity inherent in one applicant's proposal amounts to reduction of its 850-mile average trip by an average of 267 miles; moreover, fact that it has served only a limited area in Pennsylvania compels inference that it has not been competitive on supporting shipper's traffic to Pennsylvania points west thereof; and its service to western New York is explicable by greater distances and proportionately less circuity to such points.—Mason & Dixon Lines Extension, 91 M.C.C. 7 (13).

Second applicant's present authority does not extend to all the origin and destination territory sought; and in addition, when its claim of actual operation through considered gateway was challenged, it did not supply documentary corroboration thereof. Present operation through an authorized gateway is a specific element of the tripartite test for elimination thereof; in absence of probative evidence, applicant's claim as to volume of traffic transported through the gateway cannot be credited.—Id., pp. 10, 13-14.

Moreover, while both applicants urge that they are being penalized for their smaller size, compared to protestants, and that point would be very pertinent to question of whether they were transporting substantial volume of traffic in competition with existing carriers, the decisive issue is whether they propose what is, in effect, a new service; and required affirmative answer in no sense depends on applicant's size. Both applications denied.—Id., p. 14.

Applicant's use of Pittsburgh as a point for tacking its Cleveland-Pittsburgh routes and its irregular-route authority from Neville Island and Coraopolis, Pa., to West Virginia was based on erroneous interpretation of its authority to serve "Neville Island" as embracing a terminal area including Pittsburgh; consequently, those gateway operations were unlawful and may not be considered in determining whether its Neville Island and Coraopolis gateways should be eliminated. Moreover, applicant's operations do not meet the test of being "an effective competitor" as to substantially all commodities and points within scope of its pertient outstanding authority, nor has any need for proposed service been shown; denied.—Lattavo Bros., Inc., Extension, 91 M.C.C. 643 (644, 646)*.

While finding in 84 MCC 671 that elimination of applicant's Marietta, Ga., gateway was not justified is not binding on determination of same issue on record in instant extension proceeding, applicant has not established need for more expeditious service, but merely for expansion of its existing service; since none of supporting shippers complains about transit time of the existing service, continued observance of that gateway will be required. —Home Transp. Co., Inc., Extension, 88 M.C.C. 265 (272)*.

In failing to demonstrate need for expansion of basic heavy-commodity descriptions in its certificates, applicant has necessarily failed to demonstrate need for eliminating its gateways in independent movement of road-machinery parts. Applicant must observe its gateways in all movements of independent parts traffic in same vehicle with prime commodities which must be transported through a gateway point.—Id., 92 M.C.C. 677 (686)*.

While a carrier authorized to transport a limited number of specified commodities through a gateway might justify elimination of that gateway upon a showing of service to only limited points, applicant authorized to transport general commodities must show that it is an effective competitor as to substantially all points in its pertinent authorized territory; transportation of substantial volume of traffic is insufficient if it has served only a few points in a relatively large area. In addition, applicant seeks authority to provide direct service between two contiguous territories it can now serve only by operating through a gateway located beyond the borders of both, and the reduction in circuity would be so great as to constitute a wholly new service; denied. —Youngblood Truck Lines, Inc., Elimination of Gateway, 89 M.C.C. 541 (544)*.

An applicant desiring to change or eliminate an existing gateway must show affirmatively (1) that it is actually transporting a substantial volume of traffic from and to the points in-

volved by operating in good faith through the present gateway point or points and in so doing is effectively and efficiently competing with existing carriers, and (2) that the gateway elimination sought would not enable it to institute a new service or one so different from that presently provided as to improve its competitive position materially, to detriment of existing carriers; it must show that it is an effective competitor as to substantially all commodities and substantially all points within scope of its pertinent outstanding authority.—Southwest Frt. Lines, Inc.—Control—Direct Transports, 93 M.C.C. 439 (452).

While applicant's operations under general-commodity authority between radial points in Nebraska and Iowa and authorized points on its regular routes and in two Iowa counties via its King City, Mo., base area as gateway have been substantial enough not to warrant a finding of dormancy, its operations have undergone a change in the past 2 years and it has become primarily a carrier of t.l. shipments of meats and packinghouse products, principally to Iowa points; it has thus not been an effective competitor under its irregular-route general-commodity authority for those two States. A change of gateway should not be authorized for a limited number of commodities where the carrier is authorized to transport commodities generally; such a carrier cannot be said to be competing effectively with other general-commodity carriers when its operations are limited substantially to transportation of t.l. shipments of a specific class of commodities for a single industry.—Id., pp. 452-3.

The commission is unwilling to establish a precedent for partial elimination of a gateway by limiting applicant to transportation of meats and packinghouse products to points in Iowa and Nebraska, since it would then be necessary, in determining similar applications, to consider separately each and every commodity transported and point served in order to determine applicant's competitive status—a most difficult administrative task. Moreover, applicant admittedly has not picked up or delivered any freight at Kansas City for over a year because of circuity of its routing via King City, and at present its operations begin or end at St. Joseph, Mo., any traffic beyond being handled on interline basis with other carriers. Apparently it considers its operation through the King City gateway to be impractical; it follows that removal of that gateway would allow it to institute an entirely new service. Denied.—Id., p. 453.

Vendee at present has no authority to use Pittsfield, Maine, but must use Bangor, as a gateway on traffic between points on its regular routes south of Pittsfield and those in its 5-county irregular-route area in Maine; thus, grant of authority to serve Pittsfield, after proposed purchase, as an intermediate on the route between Augusta and Norcross, Maine, would enable it for the first time to operate over regular routes between Pittsfield and points south thereof and, by tacking such authority at Pittsfield, to provide an entirely new service between more southerly points, such as Boston, Mass., and the 5-county area. There is no satisfactory showing as to vendee's service at points in the 5-county area, hence it cannot be determined whether the substitution of Pittsfield for Bangor as a gateway would enable it materially to improve its competitive position; therefore, since criteria for gateway elimination have not been satisfied, authority to serve Pittsfield as an intermediate point is denied.—Sanborn's Motor Exp., Inc.—Purchase—Bemis Exp., Inc., 93 M.C.C. 728 (736-7).

Since applicant's joinder of its regular-and irregular-route authorities at point claimed as a common gateway for performance of through service described is found to be unlawful, consideration of application for elimination of the purported "gateway" under principle of 86 MCC 87 and 88 MCC 697 is unnecessary; denied.—Lattavo Bros. Inc., Extension, 89 M.C.C. 600 (603-4)*.

Elimination of gateways may be accomplished: (a) by showing that for reasons of safety, economy, or improved efficiency of authorized operations, an application should be granted, or (b) by showing that an actual need exists or will exist for the proposed service which either cannot or will not be met as well by existing carriers. To meet requirements of (a), applicant must show that it is transporting a substantial volume of traffic, is effectively competing with existing carriers, and that elimination of the gateway require-

ments would not enable it to institute a new service or one so different as to improve materially its competitive position to the detriment of existing carriers.—Yale Transport Corp. Elimination of Gateways, 89 M.C.C. 527 (533)*.

In view of its relatively light tonnage, and the percentage of circuity of its routes through considered gateways, applicant is not effectively competing for the traffic; elimination of those gateways would enable applicant to decrease its operating time between various points to such an extent that its operations would no longer correspond to those presently conducted, thereby increasing its competitive ability to the detriment of existing carriers whose service has not been shown to be inadequate; proposed service would be tantamount to a new service for which no need is shown. Denied.—Id., p. 534.

Although extension application is designed primarily to eliminate gateways, applicant has originated shipments at only one of three authorized points in Maine and has not established that it has handled substantially all authorized commodities to substantially all destinations within scope of its pertinent authority. However, it presented shipper testimony to establish need for its direct service; granted in part on showing of convenience and necessity.—Refrigerated Food Exp., Inc., Extension, 91 M.C.C. 779 (783).

While grant of extension authority to enable applicant to perform a more complete service for supporting shipper will incidentally eliminate a gateway through which applicant is now obliged to operate, such elimination may rest upon showing of improved efficiency or actual need, and applicant has met the test of need.—Ligon Specialized Hauler, Inc., Extension, 91 M.C.C. 356 (358, 359, 360).

In seeking elimination of Hoffman, Ill., gateway in connection with operations between Chicago and St. Louis, applicant has not shown that it is an effective competitor with protestants operating over the most direct route, who are transporting up to 20 times applicant's volume between those points; and since protestants operating over routes of approximately the same circuity as applicant's (12.5 percent) are apparently unable to compete on a scale comparable with the direct-route carriers, it is clear that even such a modest degree of circuity prevents a carrier from being an effective competitor between those points. Thus, applicant has not justified grant of irregular-route authority between Chicago and St. Louis.—Centralia Cartage Co. Extension, 91 M.C.C. 749 (753).

And while applicant satisfies the first test for gateway elimination in respect of operations between Chicago and Illinois points on U.S. Highway 50, since it serves those points regularly over a practical route and is clearly a major competitor, authorization of direct service to Flora and points east thereof would eliminate circuity of 25 to 38 percent, with time savings of 2 to 4 or 5 hours; thus applicant's present overnight service might well become a new same-day service. However, as virtually all shipments handled by it to points on the western segment of the Illinois portion of Highway 50 will continue to pass through Centralia, applicant should be allowed to operate in the most direct manner between Chicago and Centralia; and since consistency of its operations between those two points is in nature of regular-route service, authority is granted for two specific routes, serving no intermediate points.—Id., pp. 753-4.

Existing gateway-elimination procedures, including criteria considered in 83 MCC 451, 84 MCC 671, and 86 MCC 87, are adequate to meet legitimate needs of irregular-route carriers wishing to operate between authorized service points directly rather than circuitously; adoption of proposal which would allow indiscriminate tacking of irregular-route authorities is not warranted.—Motor Common Carriers of Property—Routes and Service, 88 M.C.C. 415 (420, 425).

Policy and rule of law laid down in 83 MCC 451, requiring a showing that applicant is transporting substantially all authorized commodities from and to substantially all authorized service points via gateway sought to be eliminated, is sound and controlling of similar issues in instant proceeding. Though applicant has trasported a substantial volume of traffic through its Delmarva Peninsula gateway, it cannot be said to have served substantially all pertinent service points when such traffic originated at only two points in a single

State, though its origin territory extends from Connecticut to Virginia; nor has it been an effective competitor for substantially all authorized commodities when under its frozen foods authority it transported only frozen bakery products during the preceding 2-year period. However, authority sought is granted in part, on showing of convenience and necessity.—Service Trucking Co., Inc., Extension, 88 M.C.C. 697 (701)*.

30. Extension of operations.—[Vols. 10-19].—Part I, §1(18), n. 29, 129.

Scope note: **the following are cited as examples of, or bases for, granting and denying extension applications. Similar points are annotated under note 25, which carries the bulk of decisions on extension applications.**

It is of no legal significance that the commission, in proceeding on application for extension of operating authority, reversed the decision of its employee board and entered an order granting the authority as initially recommended by the examiner. The commission is not only at liberty but is required to reach its own conclusions upon the evidence.—Clay Hyder Trucking Lines, Inc. v. United States, 234 F. Supp. 673 (675)*.

Although, in considering application for authority to extend passenger service to an Air Force Base, the commission referred to applicant's previous service as authorized by an administrative ruling permitting carriers to serve military installations which can be entered within one air mile of an authorized route, those references were solely for purpose of invoking principle that proof of public need may be shown by nature and extent of lawfully rendered past service. Application was treated as one for extension of service; the commission did not base its grant of authority on premise of validity of the administrative ruling, but gave real consideration to evidence it carefully discussed and upon which its findings and conclusions were based; sustained.—Carolina Scenic Stages v. United States, 202 F. Supp. 919 (924-5)*.

As Greyhound's present authority over two routes between Philadelphia and New Jersey Turnpike permits no service at intermediate points, and there are no parking facilities near its Philadelphia terminal, persons using its service between Camden area and points beyond Philadelphia or New York City must arrange to be driven to that terminal by others, or must use local bus service to a point four blocks away and walk or take a taxi for the remaining distance. In either case, northbound passengers must ride back through Camden en route to their destination, and similar inconveniences are encountered in reverse direction; also, as Greyhound can transport baggage from out-of-State points only to Philadelphia, it must be turned over to protestant for delivery at Camden, involving an extra day's delay, which is also incurred in handling express shipments. These inconveniences demonstrate public need for improved service between Camden area and points beyond Philadelphia or New York, which protestant cannot fully meet; extension authority granted between all intermediate points on the Philadelphia-New Jersey Turnpike routes and authorized points other than Philadelphia or New York.—Greyhound Corp. Extension, 95 M.C.C. 762 (764-6, 769)*.

See also Bell Extension, §212(a), n. 30.

Enlargement of applicant's existing authority for transportation of fertilizers to embrace statewide origin and destination areas is warranted to enable it to supply the complete service desired by supporting shippers. While a substantial portion of the traffic consists of bagged fertilizers, there is a growing demand for movement of dry fertilizer in bulk, and shippers need an efficient, economical, and flexible transportations service offering split deliveries to customers throughout the destination area, direct service to off-rail points, and transportation of straight or mixed shipments. There are present and potential customers in the considered territory, and shippers are constantly seeking to increase sales therein, but no motor carrier service is shown to be available. Granted.—Clark Tank Lines Co. Extension, 95 M.C.C. 422 (424)*.

Grant of extension authority for transportation of ex-rail shipments of various construction materials from Jersey City, N.J., and Queens, N.Y., to points in Nassau, Suffolk, and Westchester Counties, N.Y., is warranted by showing that adequate motor transportation from Jersey City will eliminate time

involved in floating rail cars across the harbor for movement to applicant's warehouses in Brooklyn and Queens and will result in more dependable and expeditious routing of traffic; service from Queens is required by consignee in that county for delivery of shipments moving to the destination territory.—Paul Marckesano & Sons Co., Inc., Extension, 86 M.C.C. 727 (731).

See also J. O. (Red) Willett Pipeline Stringing Extension, n. 25 *Special service*, and Denver-Albuquerque Motor Transport, Inc., Extension, n. 26, above.

Commodities:[Vols. 17, 19].— Shipper, a producer and distributor of acids and chemicals, has been producing a few products at considered plant for several years and recently began a research or expansion plan which has resulted in additional items to a total of nine announced to the public; in addition, 12 unannounced but definitely planned items for production and motor distribution from the plant in the foreseeable future would increase outbound commodities to 21 items, all moving in bulk. Shipper has actual and potential customers for its various products in all eight distribution States sought and anticipates an increase thereof; while volume of the traffic cannot be predicted (nor all destinations anticipated), apparently it will be substantial. To assure shipper of availability of appropriate equipment and the complete motor carrier service required at all times to effect distribution of its products, existing and new, grant to both applicants of authority to transport acids and chemicals to points in the eight States sought, except as specified, is warranted.—Robertson Tank Lines, Inc., Extension, 95M.C.C. 234 (242-3, 249-50)*.

Grant of authority to transport frozen french fried onion rings, potato products, and cooked squash, which applicant has been transporting under color of right for same shipper for many years in mixed shipments with frozen fruits and vegetables, is but a minor broadening of its commodity authority and will avert possibility of its losing about 99 percent of traffic it is satisfactorily handling for that shipper.—Colonial Refrigerated Transp., Inc., Extension, 91 M.C.C. 187 (191).

Broadening of applicant's commodity authority for specified foodstuffs to permit a more complete service is warranted; supporting shippers require a service providing multiple deliveries of consolidated truckloads of commodities usually moving under refrigeration, in mixed shipments with other foods not requiring refrigeration, to a large number of customers throughout the destination States; protestants generally cannot provide proper equipment or furnish the complete service needed; authority granted for foods, food preparations, and foodstuffs moving in equipment with mechanical refrigeration.—Refrigerated Transport Co., Inc., Extension, 88 M.C.C. 71 (73).

Shippers supporting extension application for road construction machinery and equipment chiefly desire more economical and expeditious handling of l.t.l. shipments of parts, which applicant cannot provide under its existing heavy-hauler authority; grant under which applicant could efficiently handle such shipments in mixed loads with machinery destined to other consignees in same destination territory would be consistent with commission's goal of promoting sound economic conditions in transportation, as it is unrealistic to require a shipper to use services of several different carriers, with terminals located at different places and using a variety of equipment, for service to a single destination point or to points in same area.—Home Transp. Co., Inc., Extension, 88 M.C.C. 265 (271)*.

However, no need is shown for expansion of basic commodity descriptions in applicant's present heavy-commodities authority; most of supporting shippers already use applicant's service extensively or exclusively, and there is scant evidence that its and protestants' services are not satisfactory for movement of their prime products. Nor does there appear to be need for independent authority for transportation of parts and attachments from all of proposed origins; no substantial evidence was adduced of any need for authority from Michigan, and evidence of movements from only three Indiana points would not support grant of statewide authority. Extension authority granted for parts, accessories, and attachments of road construction

machinery and equipment, when moving in same vehicle with presently authorized commodities, from and to points and areas specified in appendix.—Id., 92 M.C.C. 677 (685-6)*.

Application by vendee authorized to purchase rights to transport machinery, equipment, and supplies used in operation and maintenance of industrial plants, for enlargement of the commodity authority to embrace a complete heavy hauling service, also application of another carrier for duplicative authority, denied. Supporting shippers' testimony merely shows desire for a locally based heavy hauler at Chattanooga, and fails to show any material inadequacy in facilities or services of existing heavy haulers or any need for additional service of that type.—Home Transp. Co., Inc.—Purchase—Chattanooga Transfer, 97 M.C.C. 173 (189-90).

While applicant's proposal to integrate its current transportation of motion picture films and related commodities with small shipments of general commodities would not be impractical when observing fixed delivery times on all shipments it accepts, in initial phases of proposed operation applicant, with its limited vehicle space, would have to choose its traffic from selected shippers and neglect others. Denied, as existing carriers are able to meet the public's reasonable needs for handling of small shipments.—Transway, Inc., Extension, 89 M.C.C. 513 (521).

Extension authority sought to transport gas pipeline condensate, denied when that commodity is found to be within two protestants' authority for petroleum products, and supporting shipper is satisfied with service of one of them.—Bridge Extension, 89 M.C.C. 494 (495, 497)*.

35. Operations by and with railroads.—[Vols. 10-15, 17-19].—In finding that plaintiff had failed to establish that present or future public convenience and necessity required the alternate-route authority sought, the commission reached a permissible conclusion; its order denying the application is sustained by substantial evidence; it did not improperly exercise its statutory authority.—Great Northern Ry. Co. v. United States, 209 F. Supp. 234 (237)*.

See also Great Northern Ry. Co. v. United States, 209 F. Supp. 230, §206(b), n. 18, and n. 25 Necessity, above.

Grant of authority to serve supporting shipper's new plant at Oakbrook, Ill., sought by one rail-affiliated applicant, is unnecessary because Oakbrook is within its parent railroad's Chicago terminal area and, thus, applicant can provide proposed service under the partial exemption of §202(c)(2) as railroad's agent without specific authority therefor. Proposed plan III TOFC service is the same integrated service, albeit under the guise that applicant would act independently of its rail parent in offering shipper a different service, as plan II service now offered by the railroad; the difference is in form, not in substance. A carrier which can provide a transportation service under existing laws or regulations should not be granted additional authority, regardless of whether proposed operation can be performed by virtue of carrier's outstanding authority or because it is partially exempt from commission regulation.—New York Central Transport Co. Extension, 99 M.C.C. 94 (100-1)*.

But service proposed by second applicant, notwithstanding that it is an affiliate of another railroad, will not be performed as an incident of rail service; and, as Oakbrook is outside the Chicago commercial zone, applicant cannot serve that point, under the §202(c)(2) exemption, in connection with its authorized unrestricted regular-route operations extending from Chicago to a large number of midwestern points. However, record is convincing that "special circumstances" warrant a grant of the independent authority sought to serve Oakbrook as an off-route point. Applicant has been serving shipper's Chicago plant; shipper indicates a need for continuation of that service from its new Oakbrook plant; no competing carriers oppose the application, and there is no evidence as to service which competing carriers are ready, willing, and able to provide; and denying the application would deprive shipper of a service enjoyed in the past and which it needs in order to use effectively and economically its new facilities. Functionally unrestricted authority, subject to plant-site and certain locality restrictions, granted.—Id., pp. 98-100, 102.

See also American Trucking Associations

v. United States, n. 9, above.

Applicant railroad has met its burden of showing special circumstances justifying proposed operation by it as a motor carrier, without the usual rail-auxiliary restrictions, between Barron and Wheeler, Wis., serving certain intermediate points. Applicant's branch line serving those points has been abandoned, and motor carrier performing substituted service for applicant in that area can no longer serve them, since its authority is limited to points that are stations on the railroad, as well as to rail-auxiliary service. Applicant desires to continue serving shippers located at such former rail points, and no other motor service is shown to be available; where businesses have been established in reliance on transportation furnished by the railway, it should be permitted to continue supplying service. Granted for transportation of general commodities, with usual exceptions including class A and B explosives, as to which no affirmative showing of need has been made.—Soo Line R. Co. Extension, 94 M.C.C. 19 (20-1).

Inasmuch as there is no motor carrier opposition and the evidence shows an all-motor service to be needed, proposed operation by railroad subsidiary is authorized without the usual substituted motor-for-rail restriction, Primary objective of such restrictions is to protect competing motor carriers from the "dual competition of all-motor service (operated by a railroad) in addition to the rail service." In absence of any motor carrier opposition, however, reasons for the imposition of the restrictions largely disappear. Thus, where evidence shows that an all-motor service is needed, imposition of restrictions would prevent the authorized service from being responsive to the shown need.—Burlington Truck Lines, Inc., Extension, 94 M.C.C. 195 (198).

When rail-subsidiary applicant relied on a showing that certain operating efficiencies and economies would accrue if merchandise car traffic could be handled in proposed motor carrier service between Phoenix and Wickenburg, Ariz., but no special circumstances were shown, it failed to reasonably satisfy the criteria in 92 MCC 573 which warrant a grant of unrestricted authority to conduct substituted motor-for-rail service. However, record shows that significant savings would accrue if rail cars moving to and from Phoenix could be eliminated; therefore, in order to provide shipping public with optimum service and, also, make applicant's operations between Los Angeles, Calif., and Phoenix subordinate to those of its parent railroad, so as to protect existing motor carriers against a new competitive service, grant of the authority sought is subject to key-point limitations at Los Angeles and Aguila, Ariz., both points on applicant's previously authorized routes.—Santa Fe Trail Transp. Co. Extension, 94 M.C.C. 723 (725-6)*.

But on further consideration, on complaint of competing carriers, record shows that two months after respondent received its restricted Phoenix-Wickenburg authority it instituted joint-line motor service between Los Angeles and Phoenix with another motor carrier which hauled the loaded trailers between Los Angeles and Pomona, about 35 miles, where they were interlined. In the circumstances presented, however, such motor operations by respondent cannot reasonably be said to be subordinate to its parent's rail service; respondent is quite obviously performing what amounts to an independent motor service, functionally unrelated to the rail service. Therefore, in order to insure that respondent's future service is limited to that auxiliary to and supplemental of rail service, its Phoenix-Wickenburg authority is modified by replacing the key-point restriction with a restriction providing that the route authorized may be used only for transportation of shipments having a prior or subsequent movement by rail.—Id., 103 M.C.C. 164 (169-73)*.

Where requested authority will enable applicant railroad to initiate regular daily motor service in place of less frequent rail operations, boxcars will be released for more efficient use, and reduction in operating costs can be reasonably anticipated, improved public service will result. While applicant will contract for tractors and drivers required to move railroad-owned trailers, the railroad will exercise full and effective control over the proposed substituted motor operation. And as service will be limited to rail traffic, the operations of existing motor carriers should not be

affected materially; granted.—Erie-Lackawanna R. Co. Extension, 91 M.C.C. 21 (30-1).

And since, in view of grant of authority to the railroad, no need appears for additional auxiliary motor service, duplicative authority sought by motor carrier presently serving it under temporary authority is denied.—Id., p. 33.

In addition to authority granted railroad subsidiary, subject to rail-haul restriction, for transportation of bulk cement over its existing regular routes, unrestricted irregular-route authority is granted for distribution of cement from silo storage at Bridgeport, Conn., to points in Massachusetts and Rhode Island; there are no protesting motor carriers with requisite authority, and to deny unrestricted authority in face of established need for the service would not only create hardship for supporting shippers and their customers, but would deprive applicant of opportunity to retain traffic in which its parent railroad has been participating; benefits to the public from grant of unrestricted authority greatly outweigh any adverse effect which might result. —New England Transp. Co. Extension, 88 M.C.C. 703 (707).

Though applicants seek authority to transport certain traffic between Alabama railheads and other Alabama points to enable them to negotiate with supporting rail carriers for establishment of joint through routes and rates on (1) commodities which because of size or weight require line-haul movement by rail, or (2) shipments moving to or from jobsites beyond rail sidings, none of claimed advantages of proposed coordinated service can be related to a demonstrated service requirement of any supporting shipper or receiver in absence of any registered complaint about, or established deficiency in, the abundance of existing and available motor services. As those shippers have not demonstrated any interest in obtaining such coordinated service in connection with existing motor carriers, applications are denied.—Osborne Truck Lines, Inc., Extension, 94 M.C.C. 414 (418-9).

Limitations expressed in §5(2)(b) relative to railroad acquisition of motor carrier operations apply to §§ 207 and 209 proceedings, although the limitations may be relaxed upon a finding of "special circumstances"; ordinarily such a finding is justified only where authorized independent motor carrier service is nonexistent or not offered to the public. In effect, this means that the conventional standard of public convenience and necessity employed in §207 proceedings is inapplicable where the applicant is a railroad or railroad affiliate seeking unrestricted authority; in such cases the standard is one of compelling necessity.—Rio Grande Motor Way, Inc., Extension, 89 M.C.C. 199 (203).

Supporting shipper needs complete transportation service to the nearest standard-gage railhead where adequate and frequent rail service will enable it to be competitive with other shippers; its requirements are such that significant advantages are expected to be derived from coordinated motor-rail service; protestant is unable to handle ore and concentrates traffic with his present equipment and cannot provide the coordinated service offered by applicant. Proposed service, essentially a substituted motor-for-rail service, can be used to public advantage in railroad operations and without undue restraint of competition within meaning of §5(2)(b) as imported into §207; granted.—Id., pp. 201, 202.

No special circumstances are shown to justify grant of authority to railroad for cross-country routes not paralleling its rail lines, but with service limited to rail points. Proposed service is akin to all-motor service to off-rail points, and several protestants now serve supporting shippers at involved points with little complaint; though some shippers desire faster service to a number of small intermediate points, protestants' present service is in no way inadequate or unreasonable when relative size of those points is considered. Nor does protestants' ability to solicit same traffic give them unfair advantages; applicant's fears of loss of identity of shipments originated in its rail service, or even complete loss of that traffic, overlook inherent nature of both modes and fact that traffic moving economically by rail would not be diverted to all-motor movement. And that applicant would have to enter into multiple contracts to effect service to all those points through intermodal interchange cannot be considered unduly burdensome.—Illinois Central R. Co. Extension, 92 M.C.C. 106 (109).

"Special circumstances" do not exist which would justify grant of authority to rail-owned applicants to provide motor service essentially unrelated to rail service; although need for motor transportation of cement has been established, numerous independent motor carriers are willing and have been authorized to provide service adequate to meet transportation needs of cement producers and users in involved territory. While cement traffic has traditionally moved by rail, and applicants' parent railroads have derived a significant portion of their total revenue from such transportation, these facts do not constitute such "special circumstances" as would justify grant; denied.—Pennsylvania Truck Lines, Inc., Extension, 91 M.C.C. 167 (172-3)*.

Service by a railroad or affiliate at an off-rail point or a point on an unaffiliated railroad requires special justification. Applicant railroad's proposed interchange of TOFC traffic with Soo Line at a point on latter's line, to shorten the motor haul required by movement in substituted service for interchange at a point also on its own line, is as much a new service as an extension to points not served by rail at all. Not only is no special justification shown, but the record shows a plethora of existing rail and motor carriers authorized and willing to provide the type of service proposed; denied.—Green Bay & Western R. Co. Extension, 91 M.C.C. 363 (365-6).

Substituted freight service: [Vols. 17, 19].—See also Houff Transfer, Inc., Extension, §208(a), n. 30.

Authority for rail-auxiliary motor service recognizes the right of a railroad to retain traffic it has generated, by instituting a more efficient and economical operation; accordingly, an applicant seeking to provide a genuine substituted service may establish the requisite public convenience and necessity by showing that certain operating economies, efficiencies, or improvements in existing rail service will result. Proposed truckaway of automobiles and trucks from Phoenix and Tuscon to Hayden, Ariz., is genuine substituted service and applicant's showing of operating economies and attendant benefits entitles it to a certificate therefor; granted in part.—Pacific Motor Trucking Co. Extension, 89 M.C.C. 645 (647, 649).

While institution of proposed motor-for-rail service will result in operating economies and financial savings to applicant, grant to it of unrestricted motor carrier authority at Waukesha, Wis., would result in diversion of substantial traffic from opposing motor carriers; projection of representative traffic handled by two protestants, shown to have been originated at Waukesha and handled to or through Chicago (recommended as a key point by the examiner), for an entire year would amount to over 16 million pounds handled collectively by protestants from and to those points. Therefore, authority granted is subject to key-point restriction at Waukesha in addition to rail-auxiliary and key-point restrictions recommended.—Soo Line R. Co. Extension, 94 M.C.C. 302 (303-4).

Grant of authority to applicant railroad for two additional motor routes in Mississippi is justified when service provided will be a true substituted motor-for-rail service and will result in certain operating economies, efficiencies, and improvements in its existing rail service; elimination of rail way cars will result in direct savings, and service on l.c.l. shipments will be more satisfactory.—Illinois Central R. Co. Extension, 92 M.C.C. 106 (108).

But service proposed over cross-country "alternate" routes sought cannot be considered in nature of substituted motor-for-rail service; although applicant seeks to serve no point it cannot serve by rail, those routes do not parallel its rail lines and proposed method of operation materially distorts the concept of substituted service. In essence, applicant is seeking to provide an all-motor service akin to service to off-rail points, and in the circumstances it must show, not only that the service is required by public convenience and necessity, but that there are special circumstances justifying service to such "off-rail" points. Evidence adduced falls far short of meeting that burden; denied as to those routes.—Id., p. 108.

In a substituted motor-for-rail operation a railroad is not obligated to continue using services of an independent motor carrier, even when such service is reasonably adequate. Being dissatisfied with substituted

service formerly provided by intervener, railroad filed application on its own behalf, and its showing of resulting benefits entitles it to authority sought; such grant would not render intervenor's rights useless, in view of possibility that it can negotiate a satisfactory contract with the railroad.—Erie-Lackawanna R. Co. Extension, 91 M.C.C. 21 (31).

Applicant should not be precluded from transporting bulk commodities in its substituted service, even though they are not within usual scope of "merchandise traffic" and do not generally move in l.c.l. lots. Although claim that bulk shipments have been handled in its TOFC service is not substantiated, carrier which formerly performed its substituted service is authorized to transport general commodities without exception; applicant has thus held out to transport bulk commodities in substituted service over a long period, and grant of unrestricted general-commodity authority will merely continue the status quo. In addition, since applicant has been providing piggyback service in the territory involved, use of the substituted service in connection with TOFC operation will not amount to a new service, and will reduce unit costs of handling such shipments; restriction against TOFC movements, therefore, would not be justified.—Id., pp. 31, 32-3.

Applicant has shown that it cannot, in conjunction with its parent railroad, efficiently serve the intermediate points of Norden, Colfax, and Truckee, Calif., in movement of express shipments under its present authority which is subject to a key-point restriction on movements from, to, or through Truckee, but could do so upon elimination of Truckee as a key point; operating efficiencies having been proved, adequacy of existing motor-carrier service is not controlling; however, no need is shown for transportation of newspapers, milk, cream, or baggage moving separately from passengers, from or to any of those intermediate points; authority granted for transportation of general commodities moving in express service between Truckee and Reno, Nev., subject to rail-station restriction and observance of Reno and Sacramento, Calif., as key points.—Pacific Motor Trucking Co. Extension, 89 M.C.C. 81 (83-4, 86, 87).

While substantial improvement in operating efficiency and economy that could be achieved under any modification of petitioner's certificate permitting use of trucks alone between points now served by both rail and substituted motor service with lightly loaded cars and trucks is a desirable objective, proposed elimination of 33 of 45 key points would permit expansion of all-highway operations to a degree dangerous to operations of independent motor carriers. Examiner's plan under which substituted service would be authorized within each of 12 zones defined around the retained key points, but not between points in different zones except break points between adjacent zones, would broaden flexibility of petitioner's operations while affording a considerable measure of protection to existing carriers; subject to specified restrictions, petitioner's certificate is modified accordingly.—New York Central Transport Co.—Modification, 89 M.C.C. 389 (396, 407, 408).

Any increase in petitioner's operating costs as result of such modification would be negligible; although there would be some increase in loading and unloading costs and in highway mileage operated by its vehicles, it now conducts highway operations over all of its authorized routes from, to, and through each of the present 45 key points; operation under the zone plan would require no additional equipment, but would permit more efficient use of what it now has; and there would be some additional savings through elimination of need to domicile equipment and drivers at a number of locations.—Id., p. 406-7.

Although in a few zones highway distances between some points exceed 300 or 400 miles, the bulk of such long-haul operations can be performed under petitioner's present authority; frequency of service at rural points on those routes is necessarily limited by amount of traffic available, and utilization of truck instead of rail service over such long routes would not confer any marked competitive advantage. Necessity of a prior or subsequent rail haul in connection with interzone truck movements, involving time-consuming physical transfer of lading, provides sufficient guarantee that the highway portion of the operations will be subordinate to rail service. However, petitioner's request for a 150-mile high-

way exception so as to continue certain interzone transportation now permissible but barred under the zone plan is denied when it would unwarrantably enlarge scope of its operations.—Id., pp. 408-9, 412.

Grant of authority to railroad subsidiary for routes between Harrisburg and York and Lancaster, Pa., also certain connecting routes, in conjunction with elimination of York and Lancaster as key points, for performance of substituted freight service to and from Harrisburg as break-bulk point, will enable applicant and parent railroad to provide the public with an improved and more expeditious service. Proposed method of operation appears feasible and practical; and savings in boxcar miles and per diem payments, lower operating costs, and increased utilization of applicant's equipment are benefits reasonably to be anticipated.—Pennsylvania Truck Lines, Inc.—Key Points Restriction, 88 M.C.C. 505 (512).

Examiner's conversion of requested alternate-route authority into service-route authority was not error; proposed operation over the "alternate" routes will be substituted service auxiliary to or supplemental of the rail service, and applicant will not be permitted, nor does it propose, to provide a local service between Harrisburg and points in the authorized territory. Decision in 84 MCC 105 denying authority for an alternate route bypassing key points, because it would constitute new service, is not applicable.—Id., pp. 508, 512.

Though protestant has for 30 years performed satisfactory substituted service for the railroad between Harrisburg and York Haven (intermediate to York), and loss of that traffic would have substantial adverse effect on its freight business, the commission has long held that independent motor carriers are sufficiently protected so long as the substituted service can be considered auxiliary or supplemental to train service, and there is no prohibition against a railroad's having its own subsidiary perform the substituted service, with the commission's approval, even though it was previously performed by an independent carrier. Denial of applicant's request for a service route between Harrisburg and York would partially nullify the benefits anticipated from the proposed operation.—Id., pp. 514-5.

Restriction against applicant's transportation of l.c.l. freight having prior or subsequent rail TOFC movement is not warranted; applicant's transportation of trailers to or from railroad ramps will be a genuine substituted service, and it is immaterial whether the rail segment of the transportation is performed with boxcars or trailers loaded on flatcars. Although applicant's showing was confined to benefits anticipated from elimination of certain authorized classification cars, there is no reason why it should be restricted to boxcar traffic; so long as the service is subject to the usual restrictions designed to ensure that it will be a beneficial adjunct of the rail service, it may be approved without inquiring whether it can be used to equal advantage in all phases of the railroad's operations.—Id., p. 517.

And it will be permissible for applicant to provide a substituted service on express shipments transported by the railroad under its general contract with the Express Agency; authority granted includes, and applicant's outstanding authority is modified to include, shipments moving on through express receipts covering an immediately prior or subsequent rail movement to or from Harrisburg; such authority will not entitle it to provide the express company with any service auxiliary to or supplemental of service the express company is authorized to perform.—Id., p. 519.

But authority granted is restricted against transportation of household goods, bulk commodities, and those of unusual value or requiring special equipment; those classes of commodities do not generally move in l.c.l. service, and it is not shown that either applicant or the railroad has transported such traffic in the area involved; consequently, economies and operating benefits anticipated could not be realized from their transportation. However, a like restriction in the modified certificate issued in connection with the key-point elimination from applicant's existing authority would result in an unwarranted diminution thereof and is not imposed.—Id., p. 518.

While applicant's TOFC service involves traffic moving on parent railroad's billing and

having immediately prior or subsequent rail movement, it is not characteristic of the usual rail l.c.l. service; service is provided on demand, with relative infrequency, rather than on schedule; and shipments approach full t.l. volumes and are handled in standard, line-haul, motor vehicles. When transporting considered traffic, applicant is not acting in a subordinate capacity, aiding its parent's rail operations, but is competing directly with independent motor carriers; thus, its current and proposed operations are not auxiliary to and supplemental of its parent's rail service within the meaning of 340 US 419. Substituted TOFC service must be itself a bona fide substituted motor-for-rail service, auxiliary and supplemental to that of the rail carrier. Grant of authority sought would greatly enhance competitive position of the combined rail-motor service at the expense of existing motor carriers; and proposed route is completely unconnected with rail line of the railroad. Denied.—Pacific Motor Trucking Co. Extension, 95 M.C.C. 53 (59-60)*.

It would materially distort the concept of substituted motor-for-rail service to allow applicant railroad subsidiary, which seeks authority to transport traffic moving in express service of Railway Exp. Agency over a route some 38 miles shorter than its existing service route, to use the theory of gateway elimination, with its concomitant lesser burden of proof, (1) to institute a motor service which would replace a less direct highway movement rather than an inefficient rail operation, and (2) to provide an all-motor service over routes which are not appurtenant to a rail route which it owns or uses for movement of the traffic involved.—Central of Georgia Motor Transport Co. Extension, 94 M.C.C. 6 (10).

Genuine substituted motor-for-rail service by a railroad or its subsidiary is that performed in lieu of, and functionally related to, an existing rail operation of the railroad; therefore, authorized substituted service is generally restricted to points located on railroad's line. And while public convenience and necessity for a genuine substituted service may be established merely by a showing of resulting economies or improvements in the railroad's service, authorization of an unrestricted motor service by a railroad or an affiliate requires a showing of special circumstances. Application denied.—Green Bay & Western R. Co. Extension, 91 M.C.C. 363 (365).

Although independent motor carriers may be authorized to conduct substituted motor-for-rail service when a more economical, efficient, and improved service would result, and proposed highway transportation of TOFC trailers, in connection with a prior or subsequent rail movement, is genuine substituted service, applicant's burden of proof is not met when satisfactory motor carrier service is available and being used, and there is no apparent advantage in or need for additional service. Applicant has not shown that TOFC service is needed at points not served by protestant, which has served intervening railroad without complaint, and the sole basis for the railroad's support appears to be mere preference for applicant's service; denied.—Copey Trailers, Inc., 91 M.C.C. 551 (553).

Trailer-on-flatcar all-rail service: [Vol. 17]. —Highway transportation of piggyback trailers, with a prior or subsequent movement beyond by rail, is genuine substituted service; any restriction aimed at preventing TOFC service is an inappropriate limitation to place on substituted freight service.—New York Central Transport Co.—Modification, 89 M.C.C. 389 (411).

Authority granted railroad subsidiary for performance of substituted freight service between Harrisburg and other Pennsylvania points includes transportation of trailers having prior or subsequent movement in TOFC service; thus, though the railroad has arrangement with one protestant for distribution of TOFC traffic from Harrisburg to many of same points, which it considers satisfactory and intends to continue, it could terminate that arrangement and have its subsidiary perform the service. However, protestant's compensation from such service is a relatively small percentage of its total revenues; moreover, only traffic moving in plan II TOFC service would be affected; proposed restriction against applicant's transportation of such traffic is not warranted.—Pennsylvania Truck Lines, Inc.—Key Points Restriction, 88 M.C.C. 505 (517).

Regulations of the Commission

32 FR 16084, Nov. 22, 1967: Guide to Restrictions and Descriptions in Motor Carrier Operating Rights, appended to report in 106 MCC 1 (Appendix II), published for information.

NOTE: For Republication and Redesignation of Regulations, see 32 FR 20003, Dec. 20, 1967.

33 FR 2711, Feb. 8, 1968, Part 1041 [former Part 265a, formerly Part 165a]: Interpretation—Certificates and Permits, a new §1041.13 Truckload lot restrictions, added, effective March 15, 1968.

33 FR 4467, March 13, 1968, Part 1041: Interpretation—Certificates and Permits, effective date of order adding §1041.13 Truckload lot restrictions, (33 FR 2711) postponed pending determination of petitions for reconsideration.

33 FR 5780, May 2, 1968, Part 1041: Interpretation—Certificates and Permits, effective date of order adding §1041.13 (33 FR 2711) postponed to June 3, 1968

33 FR 7629, May 23, 1968, Part 1041: Interpretation—Certificates and Permits, effective date of order adding §1041.13 (33 FR 2711) fixed as June 19, 1968.

Section 207. (b) [§307 (b) US.C.] Certificate not to confer proprietary or property rights in highways. —[Unchanged. See vol. 10, p. 8020.]

Section 208. [§308 (a) U.S.C.] Terms and conditions of certificate—(a) Specification of routes and termini; extension of routes; restriction on additions to equipment. —[Unchanged. See vol. 10, p. 8021.]

Notes of Decisions

Volume 10—p. 8021; Volume 11—p. 9450; Volume 12—p. 10401; Volume 13—p. 11077; Volume 14—p. 11598; Volume 15—p. 12204; Volume 16—p. 12853; Volume 17—p. 13553; Volume 18—p. 14462; Volume 19—p. 15720.

2. Construction and interpretation. —[Vols. 12-19].—Authority provided by §208(a) to delineate the area of a motor common carrier's service is specifically limited to certificates issued under §206 or §207; therefore, the commission has no statutory authority thereunder to impose restrictions as to pickup and delivery points on certificate issued in a conversion proceeding under §212(c), which contains no such statutory authority.—J.B. Montgomery, Inc. v. United States, 206 F. Supp. 455 (459-60)*.

The statute authorizes, but does not require, the commission to limit carriers of freight to specified routes; if the operations authorized are "not over specified routes or between fixed termini," it is sufficient if the commission names the territory within which carrier is authorized to operate.—Railway Exp. Agency, Inc. v. United States, 205 F. Supp. 831 (836)*; Sloan's Moving & Storage Co. v. United States, 208 F. Supp. 567 (571)*.

30. Routes, streets, points, to be served. —[Vols. 10-19].—Construction and interpretation of terms of certificates generally, see §212(a), n. 1.

Findings and reasoning of record do not support the commission's conclusion that the part of plaintiff's 'grandfather' certificate authorizing service between Akron, Ohio, and points in Alabama and Georgia—between Akron and the Alabama and Georgia State lines over regular routes specified in first portion thereof (which includes service at intermediate points thereon) thence, over irregular routes between northern borders of, and points in, those States—does not authorize service from irregular-route origin to a regular-route intermediate point by joinder of the irregulate-route segment with authorized regular route at a border point. "Regular and irregular route" portion of the certificate is ambiguous; the grandfather decision does not clearly show that plaintiff may not serve all intermediate points while traversing its regular routes north of the State borders; and the commission's finding of willful violation because service in issue was not authorized, based only on a reading of the certificate and the decision, is erroneous. Proceeding remanded for further consideration and findings.—Dixie Ohio Express, Inc. v. United

States, 263 F. Supp. 993 (995, 999, 1001-02)*.

See also United States v. W. J. Dillner Transfer Co., §222(b), n. 14.

Plaintiff's authorized route between New York City and Orange, N.J., via Newark is generally an east-west operation, and to operate directly 'over city streets and connecting highways' via Newark to Orange only one adjoining municipality—East Orange—need be traversed. While there are numerous more circuitous routes entailing traversal of one or more adjoining or intermediate municipalities, it would be extremely unreasonable and a gross distortion of the rights conferred to permit a carrier by using such routes to operate the length and breadth of New Jersey, over city streets and connecting highways via Newark to Orange. To say that plaintiff's interpretation of its "grandfather" rights over city streets in East Orange and Bloomfield as authorizing operation over Garden State Parkway to Orange would not be tantamount to such unreasonableness would ignore the innumerable possibilities of logical extension to that point; its traversal of the Parkway in those municipalities in an unwarranted north-south direction is a convincing portent of such a possibility.—DeCamp Bus Lines v. United States, 224 F. Supp. 196 (207-8)*.

While plaintiff's New York-Newark-Orange route is unrestricted, it would not be reasonable to interpret that authority so broadly as to authorize extensive circuity. That the route over the Parkway in Bloomfield and East Orange may be the best or most practical does not bear on the issue if it is unauthorized and not within the scope of lawful operations. It was not used previous to its existence, and, even if it had been used for a considerable time, a motor carrier acquires no prescriptive rights by operation over an unauthorized route. The commission's determination that the questioned operations were unlawful is warranted; sustained.—Id., pp. 208, 209.

See also Alabama Highway Exp., Inc. v. United States, §5(2), n. 48 *Conditions*.

While Congress has entrusted to the commission delineation of the area a carrier may serve, characteristics of the transportation service involved, and the geographical area serviced, are relevant to territorial scope of authority that may be granted under the "grandfather" clause.—Winter Garden Co. v. United States, 211 F. Supp. 280 (285)*.

Defendant, whose authority to transport passengers between New York City and Long Branch, N.J., is neither restricted to specified streets nor otherwise limited, may serve any and all areas within the municipal limits of Long Branch including the northern portion which now, due to action of racetrack operators, can only be reached by way of a bridge over a stream and a private road over racetrack property that is outside Long Branch municipal limits. The commission has never permitted action of any city or municipality to remove any territory from a carrier which was originally encompassed in a grant of operating authority; it follows that the commission cannot permit action by individuals or corporate entities to withdraw from motor carriers that area included with a grant of authority which is predicated on proof of a public need for the service authorized. To permit such a result would be tantamount to a partial revocation of defendant's certificate by the racetrack operators. Asbury Park-Transit v. New York, K., L.B. Bus Line, 95 M.C.C. 452 (455).

Generally, grants of regular-route authority confer only authority to serve intermediate points and termini on routes involved, and carriers have implied authority to serve points within 1 mile of the highway traversed and points within the commercial zones and terminal areas of the communities served. The commission, in the absence of a specific need, will not grant authority to serve more extensive radii about regular routes. Applicant has failed to show such need for proposed service at points within 5 miles of service routes and 15 miles of principal points thereon; service is authorized only at the terminal and intermediate points of proposed service routes.—Braswell Freight Lines, Inc., Extension, 95 M.C.C. 457 (464)*.

As the route originally sought by applicant has a bridge with a 5-ton weight limit, it now proposes to use a detour route available for heavy trucks, which avoids the bridge. The two routes are substantially similar, as the detour route does not diverge from that originally proposed for more than 5 miles. Moreover, there appears to be no service points of consequence on the detour route; public wit-

nesses did not give evidence of need for service at points on the highway which are avoided by the detour, and a grant will permit applicant to provide service shown to be required. —Continental Tennessee Lines, Inc., Extension, 95 M.C.C. 728 (731)*.

The words 'Merrick, Long Island, Nassau County, N.Y.' in applicants present irregular-route authority refer to a single point of origin —Merrick, N.Y., and do not confer on it authority to originate the commodities concerned from any other point on Long Island, or from any other point in Nassau County, N.Y. That application sought authority 'within 50 miles of New York, N.Y.' and apparently the surplus wordage 'Long Island, Nassau County' was used in an effort to be specific in the location of Merrick, the only authorized origin. While applicant claims that its past service from origins other than Merrick was under a 'color of right,' it took advantage of a surplusage of words in its certificate to create an ambiguity which suited its purpose; past operations from points other than Merrick were unlawful.—Kennedy Motor Lines, Inc., Extension, 95 M.C.C. 499 (501).

Inasmuch as protestant's authority to transport household goods 'between all points in the United States' was issued prior to Alaska's admission as a State, it authorizes transportation between all points in the contiguous 48 States, but does not authorize service to or from Alaska. See 81 MCC 701.—Trans American Van Service, Inc., Extension, 94 M.C.C. 248 (250).

Since Alaska is not contiguous to the other 48 continental States and there are no common points of service for joinder of separate grants in Alaska and other States, neither recommended authority between interior Alaska points and Alaska ports of entry, restricted to traffic moving to, from, or through Idaho and Washington ports of entry, nor authority between points in Alaska, restricted to traffic moving to or from points in other States, would enable applicant to perform contemplated service between Alaska and Seattle or Tacoma, Wash. Since applicant's authority for latter points leads to one or more of the Washington and Idaho ports of entry, authority is granted between those ports of entry and points in Alaska, creating common points of service and permitting through service to Alaska and authorizing an operation coextensive with applicant's pertinent present authority.—Lynden Transfer, Inc., 92 M.C.C. 797 (801).

Where statewide "grandfather" authority within Alaska is sought, and applicant has conducted substantial operations before and since the critical date, no cogent reason appears for excluding portions of the State where improved roadways may be located at some future time, remote as such possibility may be in some areas, considering the terrain. —Alaska Truck Transport, Inc., 92 M.C.C. 787 (791).

Although applicant seeks regular-route authority between Twin Cities and Minot, N. Dak., it already has a route between St. Paul and Bismarck, N. Dak., and as additional route sought between Minneapolis and Bismarck is not wholly completed, authority is granted only for a route between Bismarck and Minot.—Hart Motor Exp., Inc. v. Midwest Motor Exp., Inc., 92 M.C.C. 558 (564)*.

While the commission does not ordinarily grant regular-route authority over nonexistent highways, and actual highway mileage on Kenai Peninsula is extremely limited, that area is undergoing what for Alaska might be termed rapid development; in view of the type of service rendered by applicants at Kenai points, their willingness to continue such blanket coverage, and prospective development of the area, restriction of their regular-route authority to the existing highway would be a short-sighted exercise of the commission's quasi-legislative powers. Authority granted over such highways as may in future be constructed on Kenai Peninsula, including all intermediate points.—Al Renk & Sons, Inc.—Alaska 'Grandfather' Application, 89 M.C.C. 91 (104, 105).

As stated in 79 MCC 491, while there is no definite rule as to how far an off-route point may be from the authorized route, off-route operations must be conducted in connection with a service route to which they may be said to be appurtenant. Applicant will use as regular routes the two major east-west highways in Tennessee, and almost all points in the State are located within 50 miles of one of those highways. Service is now being ren-

dered throughout the territory by applicant under its present irregular-route authority, and no other carrier is known to be able to render proposed scheduled service shown to be needed. The considered east-west regular routes being two of the most practicable for traversing the State, all points therein are functionally appurtenant to those routes; therefore, a grant of authority to serve all off-route points within Tennessee is appropriate. —Thurston Motor Lines, Inc., Extension, 94 M.C.C. 131 (133).

A unified certificate will generally confer that authority contained in its components; it may do otherwise, however, if in the commission's approval thereof a different intention is manifested by proper findings. Analysis of cases wherein petitioner acquired unrestricted rights between Indianapolis and Louisville, including intermediate points of Franklin and Columbus, Ind., which it could not serve under its own rights, is convincing that by the statement that after unification petitioner would not be entitled to serve Franklin, Columbus, or Louisville on traffic to and from points south of Louisville, division 4 intended simply to establish parity with operations permissible under the separate rights, and that language serves merely to proscribe operations which would extend the merged authorities. Therefore, as the unified certificate may fairly be interpreted more restrictively than was intended, it was incorrectly drawn; and petitioner is entitled to modification.—Terminal Transport Co., Inc., Petition for Modification, 94 M.C.C. 770 (772, 774).

Vendor's authority to transport uncrated furniture from Baltimore and points within 50 miles thereof to points in 14 States and District of Columbia, restricted against service to or from points within 35 miles of, but not including, Hagerstown, Md., precludes it from serving Hagerstown, since as issued to its transferor those rights were limited to points within 50 miles of Baltimore and Hagerstown is beyond that radius.—North American Van Lines, Inc.—Purchase—Hagerstown Motor, 93 M.C.C. 125 (126, 128).

Although vendee holds authority from "Doe Run, Ky.," to numerous States, Doe Run is not a "point" properly known by that name, but is officially shown on State highway map as only the designation of a creek extending some 5 miles from Ohio River, and its designation as an origin point in vendee's certificates apparently intended to authorize service from a plant on west bank of the creek, the source of the described commodities. Therefore, as Doe Run is not a town or unincorporated community, has no commercial zone, and is not the name of the location of vendee's terminal over 2 miles from the creek, that terminal is not an authorized point from which shipments may be moved, and vendee could not lawfully interchange shipments there under that authority. That vendee may have put "Doe Run" on its terminal list or maps, that other business establishments use those words in their names, or that a railroad map shows Doe Run as a point of service, do not establish it as the actual geographical name of any such location.—Liquid Transporters, Inc.—Purchase—Black, 93 M.C.C. 423 (428-9).

Restrictions in defendant's certificate against service at the intermediate points of Franklin and Columbus, Ind., and Louisville, Ky., on "traffic moving to and from points south of Louisville" are unambiguous and under commonly accepted rules of construction prohibit both direct and indirect service; to infer that only direct service is proscribed does violence to plain meaning of the language; also, those restrictions prohibit handling of such traffic by any indirect or circuitous means, regardless of gateways used. And described method whereby defendant handles traffic originated or delivered at the three restricted points in interline movement to or from points south of Louisville are likewise barred; performance of interchange or interline service at a point is a transporation service, and authority broadly restricted against service at a given point in connection with certain traffic also precludes interline service on the prohibited traffic at that point.—Alabama Highway Exp., Inc. v. Terminal Transport Co., 91 M.C.C. 635 (638-40).

Search of the record in lease and purchase proceedings underlying defendant's authority would not change these conclusions. The commission has broad authority to impose conditions and restrictions on unification of separate operating rights, and there is no legal

basis for defendant's theory that approval means that all permissible operations under the separately held rights are ipso facto authorized under unified grant. No distinction for purposes of a restriction is indicated in those decisions as between the most direct and less direct means of operation between involved points; the restrictions as interpreted were intended to be imposed. And since Buckner, Ky., may be served only as an off-route point in connection with operations authorized at Louisville, the same restrictions also apply thereat.—Id., p. 641.

Since considered "townships" which are mere political subdivisions of a county are found not to be municipalities, and housing development adjoining authorized highway is found not to be an unincorporated community for purposes of the commercial zone exemption, respondent may not serve plant site 4 miles from the highway as a point within commercial zone of any of them. Respondent's right to serve points adjacent to the highway, under its authority for all intermediate points, is therefore governed by Administrative Ruling No. 84 of Bureau of Motor Carriers (acquiesced in by the commission), which permits it to serve all points wholly within 1 mile of the highway; thus, it may serve only those points in the townships along its route which lie wholly within 1 mile of the highway, and considered plant site is not an authorized service point.—Cross Transp., Inc., Interpretation of Certificate, 91 M.C.C. 51 (53, 56-7).

As the whole of Neville Island is within 1 mile of one of applicant's Cleveland-Pittsburgh routes, under Administrative Ruling No. 84 any point on Neville Island is in effect an intermediate point on that route.—Lattavo Bros., Inc., Extension, 91 M.C.C. 643 (644)*.

Examination of record in applicant's "grandfather" proceeding reveals that ambiguously worded restrictions on its authority between Louisville and Memphis were intended to preclude southbound service from all intermediate Kentucky points except Camp Knox; direct movement from Franklin or Bowling Green is therefore forbidden. Pickup of Memphis-bound freight at those points and transportation thereof to Memphis after a backhaul to and from Louisville is likewise proscribed, since applicant may not transport freight from either origin to a point which lies south thereof; no combination of routes, circuitous or direct, and even though authorized in separate paragraphs of the certificate, can be utilized or tacked in such manner as to convert a southbound into a northbound movement.—Southern Forwarding Co. Extension, 91 M.C.C. 221 (223, 226).

Nor may the restriction be circumvented by applicant's pickup of Memphis freight at Franklin and interchange thereof with another carrier for movement to Louisville, after which applicant hauls it to Memphis; applicant may not in any manner originate traffic at either origin which at the time is intended for ultimate movement to a point south of either. But transportation to Memphis of traffic from Franklin or Bowling Green which applicant receives for the first time at Louisville as interline carrier is lawful provided it is in no way involved in pickup of the shipment at those origins; the restriction applies to extent of service authorized at a particular point, as opposed to a restriction on use of the routes involved.—Id., pp. 223, 226-7.

Since, when defendant's predecessor obtained his "grandfather" certificate his Boulder City, Colo. Phoenix, Ariz., route was his only interstate route, restriction of service at points between Phoenix and Kingman, Ariz., to traffic moving to or from points "north and west" of Kingman related to points on the Boulder City-Kingman segment or points beyond in same general direction. The same restriction in certificate issued defendant as subsequent purchaser of the Phoenix-Kingman segment therefore restricts service at intermediate points to traffic to or from points both north and west of Kingman.—Consolidated Copperstate Lines, Inc. v. Navajo Freight, 91 M.C.C. 597 (602)*.

Fact that in certificate originally issued for authority now held by respondent as fifth transferee the description of intermediate-point authority followed separate descriptions of the basic authority for transportation of general commodities from Charleston, W. Va., to Cincinnati and of gas cylinders and rubber tires in reverse direction, did not enlarge scope of the basic authorities and did not authorize eastbound transportation of

general commodities from the intermediate points. Respondent's present certificate describing authority for general commodities from Charleston to Cincinnati, serving specified intermediate points, and for gas cylinders and tires from Cincinnati to Charleston, serving the same intermediate points, thus accords with authority held by the original grantee and the four predecessor transferees; its transportation of general commodities eastbound from the intermediate points therefore was and is unlawful in violation of §206(a).—Keystone Motor Exp., Inc.—Investigation of Operations, 89 M.C.C. 567 (576, 578)*.

Under applicant's general-commodity authority between Clinton, Ky., and St. Louis, and its authority for malt beverages from Milwaukee to Jackson, Tenn., it may not transport beverages from Belleville, Ill., a point in St. Louis commercial zone, to Jackson via the common point of Union City, Tenn.; though order in 76 MCC 418 redefining the St. Louis zone vacated order in 61 MCC 489 insofar as it defined that zone, remainder of latter order, including portion removing the commercial zone exemption as to Belleville, was in no way affected.—Edwards Extension, 88 M.C.C. 318 (321)*.

Principle of the Philipp case, 64 MCC 542, that a restriction against serving a given municipality applies only to the point named and does not prohibit serving other points in the commercial zone thereof, has been recognized in subsequent cases and is controlling on interpretation of restriction in respondent's certificate against transportation, under combination of his rights, of traffic moving between St. Louis, on one hand, and Louisville and Cincinnati, on the other; that restriction applies only to points within municipal limits of those cities and does not restrict service when pickup, delivery, or interchange is made at points outside those limits. —Schroder's Exp., Inc.—Investigation of Operations, 89 M.C.C. 143 (145-6).

Two motor common carriers may interchange traffic at any point to which one is authorized to transport it and from which the other is authorized to transport it; restriction on applicant's authority for new pianos against transportation from De Kalb, Ill., does not preclude it from interchanging at Rockford, Ill., shipments originated at De Kalb by a connecting carrier.—Trans-American Van Service, Inc., Extension, 89 M.C.C. 48 (51).

Destination areas sought are the normal sales and marketing areas for considered cement plants; evidence concerning location of supporting shippers' customers, while somewhat general, is convincing that there will be definite and constant need for motor service to numerous destinations, which will change from time to time, throughout those areas; shippers' evidence is corroborated by that of opposing rail carriers respecting points and areas to which they have transported such traffic; therefore, since it would be impractical and unduly restrictive to limit authority to specific destinations, statewide destination authority is granted.—Baggett Bulk Transport, Inc., 88 M.C.C. 403 (411-2); and authority is granted to serve Alabama, in which authorized origins are located, since such service is needed for shipments having subsequent water movement to points beyond, or to enable shippers to reconsign shipments already enroute.—Id., p. 413.

When a city, town, or other incorporated municipality is traversed by the boundary line of a territorial grant of authority, only that part of the point in question which is within the boundary line may be served. But though the exact limitation of a radial territory surrounding a municipality may change from time to time as the city limits change, it will not be reduced.—Pilot Freight Carriers, Inc. —Purchase—Bison Fast Freight, 90 M.C.C. 709 (711-2).

Since vendee seeks certificate for precisely the same physical operations as are authorized by vendor's Kansas intrastate certificate covering its interstate "grandfather" operations under §206(a)(7), and vendor's irregular-route territory is almost entirely coextensive with that of its regular routes, authority for the irregular-route points is granted as off-route-point authority appurtenant to the several regular routes traversing the same area.—Denver-Limon-Burlington Transfer—Purchase—Kansas Interm., 93 M.C.C. 210 (214)*.

See also Deaton Truck Line case, §207(a), n. 26.

Where vendee seeks authority for three regular routes between Knoxville, Tenn., and a southwestern North Carolina area in lieu of limited irregular-route authority authorized to be purchased, examiner's selection of the most circuitous route to exclusion of the other two is unrealistic when it would tend to render useless vendee's terminal nearest that area in handling the Knoxville traffic in which supporting shippers are primarily interested, and would not meet their need for the most direct and expeditious service, but would enable him to provide new competition over the most direct route between Knoxville and Asheville, N.C., to and from his irregular-route territory east of Asheville embracing the most populous and industrialized portion of the State. Grant of the other two routes instead, for use as operating conditions dictate, will meet shippers' needs and tend to preserve protestants' competitive advantage in operating over the third route.—Cope—Purchase—Hill and Burdick, 90 M.C.C. 71 (76-7)*.

Authority to serve all points in named border States includes service at ports of entry on Canadian boundary line and no specific authority therefor is required.—Maas Transport, Inc., Extension, 92 M.C.C. 534 (541)*.

Since proposed service between New York City airports and seven points in Middlesex County, N.J., that are within airlines' terminal areas is found to be line-haul service of an independent motor carrier rather than pickup or delivery for air carriers, and no other motor service is shown to be available, those points are included in authority granted between the airports and points in Middlesex and Somerset Counties.—Con-Ov-Air Air Freight Service, Inc., 92 M.C.C. 526 (529).

Proposed substitution of plan I TOFC service between Charleston, W. Va., and Staunton, Va., on traffic moving between Charleston and points within 50 miles of Washington, D.C., and, by tacking at a point in the Washington area, certain points beyond, is within scope of applicant's existing authority. Though in its highway operations applicant must operate somewhat circuitously between Charleston and Staunton through a point in the Washington area, it holds authority between Staunton and all points it would serve in the manner proposed, and the through rail-highway operation contemplated is less direct than all-highway routes which it may now use. There is therefore no unlawfulness in the proposed operations.—Houff Transfer, Inc., Extension, 92 M.C.C. 702 (703).

Although authority for transportation of express between Atlanta and Macon, Ga., would not permit service at Robins Air Force Base, near Macon but not within commercial zone thereof, record as a whole is persuasive that service at the base was intended to be part of the authority sought, and that the chief aim of the proposed operation is to provide expeditious service for outbound military express traffic to all points in United States. Thus, grant of application as filed would not be responsive to a significant portion of evidence concerning requirements of the primary supporting shipper and would preclude applicant from rendering express service to same extent as when rail service was used between those termini, with applicant performing local motor pickup and delivery at the military site. As failure to specify Robins Air Force Base as a service point in application was merely an inadvertent error, authority granted will include the right to serve it as an off-route point.—Railway Exp. Agency, Inc., Extension, 91 M.C.C. 887 (889-890, 892)*.

Authority to serve points in a single State does not authorize a carrier to serve points on the boundary line between that State and a neighboring State.—J. O. (Red) Willett Pipe Line Stringing Corp. Extension, 92 M.C.C. 41 (46)*.

In territorial descriptions setting forth imaginary lines as boundaries between certain areas, words descriptive of direction have always been used in their generally accepted sense. In determining territorial scope of defendant's authority to serve points in New York "on and south of" a line beginning at Oswego and extending along specified highways between named points to the Massachusetts State line, it is significant and controlling that the commission did not describe any boundary extending south from Oswego to the Pennsylvania line as a limit on that authority; and in its absence none can be implied. This indicates the commission's intention to

grant all points in New York except those north of the Oswego line, and there is nothing in New York of such line and west of Oswego; therefore, defendant is authorized to serve points in all areas of New York which are not north of the Oswego line, including that portion which is west of Oswego.—Pilot Freight Carriers, Inc. v. Malone Freight Lines, 91 M.C.C. 58 (59, 60).

Authority to serve "all intermediate points" on U.S. Highway 11 between Mattawamkeag and Ashland, Maine, authorizes service only at points "on" the highway, which in case of New England type towns embraces only the communities located in such towns which are located on the highway.—Border Exp., Inc., Extension, 88 M.C.C. 491 (493).

Authority granted for transportation of cement from Alabama origins includes Alabama destinations because a load destined to one point is often reconsigned for delivery to a different point without return to origin, and such reconsignment may involve crossing the State line for ultimate delivery to an Alabama point; however, applicant is cautioned that such authority does not include intrastate traffic.—Schwerman Trucking Co. of Ala., Inc., 89 M.C.C. 628 (630)*.

Past grants of territorial authority in terms of a radius about a particular point have led to interpretive problems and are impractical and administratively undesirable; though application for broadened commodity authority proposes to duplicate the 250-mile radius of Texarkana described in applicant's present certificate, four important shipping points are situated at or near the periphery thereof; territorial description is therefore restated in terms of boundaries including those points, conditioned on applicant's requesting coincidental revocation of its duplicative authority for composition shingles in the radial territory.—Melton Truck Lines, Inc., Extension, 88 M.C.C. 723 (736).

Although the new description is somewhat broader than the Texarkana radial territory named in applicant's present authority for lumber and certain other commodities, latter authority is left unchanged, since those commodities are not at issue in extension application and apparently are not intermingled in transportation with those sought, so that the separate grants are not interdependent. Applicant is cautioned, however, particularly when operating within the radial territory, to ascertain the limits of its respective territories and avoid operating beyond them.—Id., pp. 736-7.

31. Combination of routes.—[Vols. 12-19].—In action to set aside the commission's grant of alternate-route authority to intervening defendant, the court feels bound by the commission's interpretation of its own certificate of convenience and necessity when that interpretation does no violence to the principles of logic and common sense. In view of the commission's holding that phrase "otherwise authorized routes" in intervenor's certificate for a north-south route had a prospective application and applied to routes thereafter acquired by it, that route could be combined with its subsequently acquired east-west route for through movement of traffic between considered Midwest and Southeast areas.—Campbell Sixty-Six Exp., Inc. v. United States, 258 F. Supp. 529 (533)*.

See also Kenosha Auto Transport Corp. v. United States, §212(a), n. 1.

It is clear that when plaintiff's "grandfather" authority for Route (3) between New York City and Orange, N.J., via Newark and Route (1) between New York City and Caldwell via Bloomfield was granted the commission determined that both were east-west operations and that plaintiff did not intend to perform a through service via East Orange and Bloomfield in a north-south direction. Though those routes separately authorize operation over all city streets and connecting highways in East Orange and Bloomfield, analysis thereof discloses no common gateway at which the right to serve East Orange under Route (3) may be tacked to the right to serve the adjoining municipality of Bloomfield under Route (1) to provide through service between New York and Orange via Garden State Parkway through those municipalities. The commission's conclusion that such tacking would be unlawful under its decision in 45 MCC 267, sustained.—DeCamp Bus Lines v. United States, 224 F. Supp. 196 (208-9)*.

Though respondent's authority to transport

raw and processed foodstuffs from New York City to Chicago is restricted against tacking with its right to transport similar commodities from Chicago to Council Bluffs and Sioux City, its purchased authority between latter points is not restricted against tacking, hence is not a duplication; therefore, respondent may lawfully tack its authority from New York to Chicago with the purchased authority, to perform single-line through service.—Cocoa Powder from New York, N.Y., to Council Bluffs, 322 I.C.C. 255 (256-7)*.

Applicant's alternate-route authority between St. Joseph, Mo., and Kansas City commercial zone over US Highway 71, restricted against service between the termini, is clear and unambiguous; and it can be joined with applicant's otherwise authorized regular-route authority for transportation of traffic originating at one of the termini and destined to points other than described points in Kansas beyond the other. Conclusions in prior report with respect to service applicant can perform in joining such restricted alternate route with its otherwise authorized regular routes, not being in accord with decision in 49 MCC 440, are vacated and set aside.—Transamerican Freight Lines, Inc., St. Joseph Alt. Routes, 96 M.C.C. 243*.

Where a carrier holds separate authorities for the same traffic from A to B and from B to C, with one or both restricted against tacking, through transportation of a shipment from A via B to C, with or without a dropoff at B, would constitute the prohibited tacking and would violate such restriction. However, though applicant's permanent authority to transport dairy products from Missouri points to California and its temporary authority from Missouri to Utah points are restricted against tacking, its past transportation of dairy products from Clinton, Mo., to Los Angeles, with a stop for partial unloading at Salt Lake City, is completely valid and is not prohibited by a tacking restriction. Applicant has merely provided service under two separate authorities by loading the shipment at an origin common to both, dropping off part at a destination authorized in one grant, and making final delivery at a point authorized in the other; such through operation, with service provided in the same vehicle, is entirely lawful.—Raye & Co. Transports, Inc., Extension, 94 M.C.C. 554 (558-9)*.

See also Public Service Coordinated Transport case, §208(c), n. 1.

The right of common carriers to tack separate grants of authority is well settled as long as (1) there is a point of service common to both authorities, (2) the physical operation actually is rendered through that point, and (3) the character of the service (regular- or irregular-route) is strictly preserved. Tacking operation must also be conducted subject to such limitations or restrictions as are applicable to the common point, whether in separate certificates or separate grants in same certificate, and "service" as so used may consist of interchange, as well as pickup and delivery.—Consolidated Copperstate Lines, Inc. v. Navajo Freight, 91 M.C.C. 597 (601-2)*.

All possibilities of service cannot be foreseen when certificate is issued; the plain language thereof must govern, but failure to specifically prohibit questionable service, not otherwise authorized, is no real predicate for contention that such service is authorized. Even though defendant may originate traffic at Phoenix, an unrestricted point, service at Wickenburg and Congress Junction, Ariz., the common points where the challenged interchange or tacking takes place, is restricted to traffic moving to or from points both north and west of Kingman, Ariz. Therefore, since Los Angeles is not north of Kingman, through service between Phoenix and Los Angeles via Wickenburg or Congress Junction as gateway is precluded; however, such service could lawfully be performed via the Kingman gateway which is not restricted.—Id., p. 602, 603.

However, at time defendant's purchase of the restricted Phoenix-Kingman rights was approved there was more than one school of thought as to whether a restriction on service at a given point related to interchange and tacking as well as to actual pickup and delivery of shipments; defendant's subsequent through service between Phoenix and Los Angeles via the restricted points was therefore performed under color of right. As the record and report in the purchase proceeding indicate the understanding of all parties involved, as well as former division 4, that defendant would acquire rights which com-

bined with those it then held, would allow through service between points on the purchased route and all major points on its existing routes, it appears certain that, had decision in 81 MCC 201 that service at a point includes tacking and interchange been previously rendered, approval would have provided for removal of considered restriction. In the circumstances, certificate granted in the purchase proceeding should be modified accordingly and complaint dismissed.—Id., 92 M.C.C. 516 (518-9)*.

Since Coraopolis, Pa., is an intermediate point on one of applicant's Pittsburgh-Cleveland routes and Neville Island, Pa., is made such by Administrative Ruling 84, its regular-route authority may be tacked with its irregular-route authority from those points to West Virginia, provided distinction between the two types of service is preserved. But since its authority to serve Neville Island is territorial and does not embrace a terminal area beyond the island, it may not tack those authorities at Pittsburgh on theory that Pittsburgh is within a commercial zone or terminal area of Neville Island.—Lattavo Bros., Inc., Extension, 91 M.C.C. 643 (644, 646)*.

A carrier's authority to serve any specific municipality includes the incidental right to serve all points in commercial zone thereof as its terminal area (54 MCC 21); therefore, defendant may tack its Philadelphia-Newton Square, Pa., route with its regular route authority between Holyoke, Mass., and Trenton, N.J., serving Bristol, Pa., as an off-route point, at the area where the commercial zone of Bristol overlaps the Philadelphia commercial zone and, thus, conduct operations between points on the Holyoke-Trenton route and those on the Philadelphia-Newton Square route. However, since defendant's right to serve the Philadelphia commercial zone appertains exclusively to its Newton Square route, it may not transport traffic between points in the commercial zone and points on its Trenton-Holyoke route.—Joint Northeastern Motor Carrier Assn., Inc. v. Creger, 91 M.C.C. 494 (495-6).

Under protestant's separate authorities for transportation of fresh and cured meats from six Georgia points to the Carolinas, and from Florida to points within authorized radial distances of five of the same Georgia points, points beyond the municipal limits but within the commercial zones of those five points are common points of service; therefore, protestant may combine those rights to transport frozen meats from all points in Florida to all points in the Carolinas, provided vehicles are routed through any point in commercial zones of the five Georgia points other than the municipalities themselves.—Alterman Transport Lines, Inc., Extension, 91 M.C.C. 43 (48).

The prohibition against automobile haulers' tacking of initial- and secondary-movement rights is directed towards immediate joinder of authorities by the same carrier to provide an unauthorized through movement. But where there is an intervening movement by another carrier, such as substituted rail-for-motor service, that limitation does not apply, since in genuine substituted service joinder of the pre-rail and post-rail movements of the same vehicle is not designed to circumvent the restriction; however, that conclusion does not apply to situations where circumvention is the sole or primary purpose of the arrangement.—National Auto. Transporters Assn.—Declaratory Order, 91 M.C.C. 395 (414).

Since the usual rail-haul restriction contains no specific prohibition against tacking, a Railway Exp. Agency certificate containing such a restriction may be joined with other certificates so long as the traffic moved thereunder is not transported in a wholly motor movement.—Railway Exp. Agency, Inc., Extension, 91 M.C.C. 311 (332-3)*.

But though REA's tacking of its certificates which contain rail-haul restrictions to perform wholly motor services is found not to be permissible, its practices in that respect are of such duration and the public interest as a whole is so affected that equitable opportunity should be afforded to resolve the situation openly. Therefore, in instances where REA is now conducting or proposes to conduct operations wholly by motor vehicle under certificates containing rail-haul or similar restrictions, it should file petitions for modification of such certificates; and in any future application by REA which involves joinder of existing certificates containing such restrictions it should fully set forth and develop such issues and concurrently seek any necessary modifi-

cation of the existing authority.—Id., pp. 333-4.

Limitation imposed by 62 MCC 261 on off-route-point service—that it be performed in connection with, and as an integral part of, a good faith operation over the regular route to which it appertains—does not prohibit tacking of separate regular- and irregular-route authorities at an off-route point which is a service point common to both routes; it is sufficient if the off-route point be served from the regular-route point over the most direct highway without traversal of the regular route to any great extent. Thus, initial carrier authorized to serve Philadelphia, Pa., and off-route points within 35 miles thereof may, so long as it serves Philadelphia, operate over most direct highways to New Jersey off-route points that are common points of service with delivering carrier's irregular-route operations, without passing through any point on its regular route north of Philadelphia.—Pennsylvania Public Utility Commission v. Jones Motor Co., 89 M.C.C. 605 (613)*.

Under the law the several authorities of a regular-route common carrier have always constituted a single system of routes; a certificate authorizing operation over two or more routes having one or more service points in common confers the right to operate over all combinations of such routes and between all the designated points thereon, unless otherwise specifically restricted in the certificate.—Motor Common Carriers of Property—Routes and Service, 88 M.C.C. 415 (419-20); however, the general requirement that motor common carriers provide adequate service [§216(b)] does not extend to service which may be provided under a combination of authorities.—Id., p. 424.

In considering proposals that common carriers of property be allowed to operate directly between points they may now serve only circuitously under combinations of their rights, the manner in which they may obtain authority to provide through service should not be overlooked. In case of irregular-route carriers, the authorities which may be tacked at common points have usually been obtained separately, without intention or realization that they might be used in combination; thus it is not any requirement of the act or the commission that forces such a carrier to operate circuitously, but rather its own wish to join its authorities to provide a through service not specifically authorized by its certificate and for which it has never shown public need. Moreover, while irregular-route carriers are permitted to tack separate authorities so as to use their equipment more efficiently, they cannot be compelled to do so.—Id., p. 423.

Adherence to the Brady criteria for distinguishing between regular- and irregular-route service (47 MCC 23) has not caused confusion or uncertainty, except possibly in requirement on tacking of regular- and irregular-route authorities that the separate character of each type of service be maintained. However, purport of §5 cases is that where such authorities are combined it is the characteristics of the irregular-route service that must be preserved; this is necessarily so because, although an irregular-route carrier is not permitted to provide a regular-route service, a regular-route carrier, so long as it provides reasonably adequate service at authorized points on its routes, is not required to operate on a fixed schedule and is not restricted against performing a call-on-demand, truckload type of service.—Id., pp. 434-5.

As vendee's present authority at Kansas-Colorado State line near Sharon Springs, Kans., does not physically connect with vendor's Kansas "grandfather" authority under §206(a)(7), since neither is authorized to cross the State line, route granted vendee between Sharon Springs and the State line is authorized to be joined to its present route at the State line. But as vendee's authority to serve Kanorado, Kans., is limited to traffic destined to that point, even though certificate granted is unrestricted as to Kanorado and would physically connect with its present route it cannot lawfully use Kanorado as a gateway for movement of either eastbound or westbound shipments under the combined rights; it will be expected to observe the restriction in its present authority and route Colorado-Kansas traffic through either Sharon Springs or Tribune.—Denver-Limon-Burlington Transfer—Purchase—Kansas Interm., 93 M.C.C. 210 (214)*.

Acquired carrier's authority from points in 15 States to Waunakee, Wis., and from Madi-

son, Wis., to 37 States could lawfully be tacked at Madison via Waunakee, which is within commercial zone of Madison. That the commission in granting the 37-State authority specifically denied application as to the identical territory carrier is tacking via Waunakee is not controlling; so long as the certificates are not expressly restricted against use in combination with another of carrier's certificates, they may be tacked at a lawful joinder point; question of circuity making tacking at that point improbable is likewise immaterial in absence of any specific evidence that the tacking point was not in fact observed.—Long Transp. Co.—Control—Marine Transit, Inc., 90 M.C.C. 261 (265).

While it is permissible for carrier holding radial authority between King City, Mo., base area and points in Iowa, Kansas, and Nebraska to transport a shipment from any point in the radial territory to any point in the base area which is common to its regular-route authority, thence to a point on the regular route, it may not again tack its regular-route authority to the same irregular-route authority to perform a through movement between two points in the radial territory. Thus, though King City and certain other points within the authorized 10-mile radius thereof are common to both authorities, transportation of shipments from Iowa to one such point, then over the regular route for a short distance to another, then to a point in Kansas or Nebraska, was unauthorized cross-hauling.—Southwest Frt. Lines, Inc.—Control—Direct Transports, 93 M.C.C. 439 (449).

Separate grants of unrestricted authority may be combined if there is a point of service common to both and "service" includes not only pickup and delivery by carrier, but also the interlining of traffic with other carriers or the tacking of two separate authorities; accordingly, a restriction in a carrier's certificate against performance of service at certain points prevents the carrier from tacking at one of those points for purpose of rendering a through service to another point. Therefore, since defendant's authority between Medford and Portland, Oreg., is restricted against performance of local service at certain intermediate points, including Eugene, Oreg., that authority may not be tacked at Portland with its separate authority between Seattle, Wash., and Portland for purpose of providing through service from Tacoma, Wash., to Eugene. And its past interlining of Tacoma-Eugene traffic at Portland also violated terms of the restriction and was unlawful; cease-and-desist order entered.—McCracken Bros. v. Oregon Nev. Calif. Fast Freight, 96 M.C.C. 192 (194).

However, as held in 62 MCC 694, a phrase in a certificate "restricted to traffic moving to and from" designated service points does not preclude a carrier from interlining or tacking said authority to provide a through transportation service to other points. That restriction is satisfied if the traffic moves to and from the designated service points, and separate operating authorities may be combined if any restrictions in each certificate are not violated. —Id., pp. 194-5.

Petitioner may not tack its regular-route authority between points in southern New England, restricted to traffic moving to or from Pittsburgh, Pa., and its authorized points west of Ohio-Pennsylvania State line, with other outstanding authority in order to conduct operations between such New England points and points in Ontario, Canada, via ports of entry at or near Buffalo, N.Y. The restriction is unambiguous and "authorized" as used therein refers only to points authorized by its existing certificates and does not refer to any points beyond the commission's territorial jurisdiction. Shipments transported under combination of considered certificate and petitioner's other certificates, which are destined to a point off its lines, may not be interchanged at any point east of that State line, except Pittsburgh; thus, it may not use that certificate to transport shipments between points authorized therein and ports of entry east of that line even though ultimate destination or origin in Canada is west thereof.—Transamerican Freight Lines, Inc.—Interpretation, 95 M.C.C. 121 (123-4)*.

Nor may that restriction be evaded by routing the traffic through Pittsburgh or a point west of the Ohio-Pennsylvania line either prior or subsequent to a movement through ports of entry east of that line. To hold otherwise would nullify the restriction with respect to points in Pennsylvania and western New York and, to that extent, defeat the purpose

for which it was imposed in the transfer proceeding in which the certificate was acquired. —Id., p. 125.

Protestant's proposal to join two separate grants of irregular-route authority by operating through a point of service common to both, despite the fact that one of these is restricted against joinder "...with any other authority held by it..." is not within scope of its existing authority. When the commission has determined that a no-tacking restriction should not be pertinent to other subsequently acquired authorities, certain qualifying words have been added to effectuate this purpose; considered restriction is clear and applicable on its face not only to authorities held by protestant at time of imposition thereof, but also to any operating rights thereafter acquired by that carrier. Consequently, proposed joinder is outside protestant's existing authority.—Alterman Transport Lines, Inc., Extension, 94 M.C.C. 187 (193).

Authority to serve points in a single State does not authorize a carrier to serve points on the boundary line between that State and a neighboring State; accordingly, since carriers may tack separate grants of authority only at a point of service common to both, separate authorities for operations in contiguous States may not be joined to provide a through service unless specifically authorized upon a showing of public convenience and necessity. —J. O. (Red) Willett Pipe Line Stringing Corp. Extension, 92 M.C.C. 41 (46)*.

Nor may separate authorities be joined for purpose of performing through service where the common point or area lies beyond the jurisdiction of the United States. Although applicant's existing authorities cover service between points in the 48 contiguous States, including Canadian boundary points, extension authority granted for service between points in Alaska may not be joined therewith, notwithstanding any permission that might be granted by Canadian authorities to traverse the intervening Canadian territory. Traversal of territory is not synonymous with service, and tacking by definition requires a common point of service, which in instant case the commission has no jurisdiction to authorize. Moreover, no public need was shown for through service to and from Alaska.—Id., p. 46.

When carrier's separate authorities between points in Missouri and Muscatine, Iowa, and between points in a 5-State area including Illinois are subject to restriction that they may not be tacked or joined for purpose of performing through transportation, it cannot perform single-line service from Missouri origins to eastern destinations by "bridging" those authorities with its unrestricted authority between Muscatine and Chicago.—Bilyeu Refrigerated Transport Corp. Extension, 92 M.C.C. 633 (639-40).

Separate grants of authority may be joined only at common points of service. Since applicant's authority between points in Mississippi and specified points in Arkansas is restricted against transportation of yeast moving between St. Louis and such Arkansas points, there are no common service points at which it could tack its authority between points in Missouri and Arkansas to perform through transportation of yeast from St. Louis to Jackson, Miss.—Frozen Food Exp. Extension, 91 M.C.C. 592 (593-4).

Applicant may not join its regular-route authority between Cleveland and Pittsburgh, including off-route points within a 25-mile radius of each terminus, and its irregular-route authority between "Neville Island" and points in Ohio and West Virginia not on its regular routes, for performance of through service on assumption that Pittsburgh is within the commercial zone of Neville Island and latter may therefore be used as a common gateway; "Neville Island" is not a municipality or unincorporated community, but a territorial description which confers no commercial zone rights.—Lattavo Bros. Inc., Extension, 89 M.C.C. 600 (602, 603)*.

Moreover, in performing through service between points in the Pittsburgh radial area and points not on or appurtenant to its regular route, via Pittsburgh and Neville Island, applicant would use its regular-route authority, not to accomplish any transportation over the regular route, but merely to enlarge the base area of its irregular-route service, contrary to established principle that off-route point service must be rendered in connection with and

as an integral part of operation over the regular route. Decision in 62 MCC 261, involving similar cross-hauling and identical radius, is controlling; applicant's described operations are unlawful.—Id., p. 603.

35. Duplicate operating rights.—[Vols. 11-16, 18, 19].—The phrase "with duplications eliminated" in a certificate issued to a vendee means that after purchase vendee would have only one right to render the same service; its purpose is merely to describe what actually happens upon consummation, namely, unification of the duplicating rights, emphasizing their future inseparability, and it does not preclude any service previously permissible under vendee's rights, under the purchase rights, or under a combination thereof.—Cocoa Powder from New York, N.Y., to Council Bluffs, 322 I.C.C. 255 (257)*.

Since vendee has authority for regular routes in Montana that duplicate certain routes sought in related §207 application, vendor holds certificated authority duplicating certain of its proviso operations, both of which are included in proposed purchase, and evidence justifies continuance of vendor's services by vendee in combination with its own, certificate granted vendee for continuance of vendor's proviso operations covers, as far as possible, only nonduplicating routes, and should not be construed as conferring more than one operating right between the same points.—United Truck Lines, Inc.—Purchase—United Freight Lines, 90 M.C.C. 337 (347).

Since authority granted petitioner in 86 MCC 327 to transport specified missile parts is partially duplicative of authority now granted for unrestricted transportation of missile parts, but no certificate has yet been issued therein, the authority now granted is conditioned on receipt of a written request from petitioner for dismissal of the duplicative portion of the application in that proceeding.—Leonard Bros. Transfer, Inc., Petition for Clarification, 96 M.C.C. 246 (256)*.

Extension authority granted for transportaion of fertilizer from and to additional points, to the extent that it duplicates any of applicant's existing authority, shall not be construed as conferring more than one right, and may not be severed by sale or otherwise.—Clark Tank Lines Co. Extension, 95 M.C.C. 422 (424)*.

In view of the limited extent to which regular-route authority granted between Bismarck and Minot, N. Dak., duplicates applicant's irregular-route authority between Bismarck and North Dakota points within 100 miles thereof, including Minot, cancellation of the duplicating authority is not required, but such duplication shall not be construed as conferring more than one operating right.—Hart Motor Exp., Inc. v. Midwest Motor Exp., Inc., 92 M.C.C. 558 (564)*.

Although ordinarily grant of "grandfather" authority duplicative of that embraced in applicant's existing certificates covering transportation of frozen fruits and vegetables would not be justified, it is neither feasible nor practical to eliminate such duplications physically from grant of "grandfather" rights established for frozen fruits, berries, and vegetables; however, authority so granted shall not be construed as conferring more than one operating right.—Home Transfer & Storage Co., 88 M.C.C. 223 (229)*.

Section 208. (b) [*§308(b) U.S.C.*] Deviation from route.—[Unchanged. See vol. 10,p. 8023.]

Notes of Decisions

Volume 10—p. 8023; Volume 11—p. 9452; Volume 14—p. 11600; Volume 15—p. 12207; Volume 16—p. 12857; Volume 19—p. 15732.

1. Construction and interpretation.—[Vols. 10, 11, 14-16, 19]. —Although authority conferred on the commission by §208(b) to permit a carrier "occasionally" to deviate from a

certificated route or terminal cannot be construed as authorizing a regulation governing designation of a regular alternate route which may become the carrier's principal route between the cities involved, those provisions of §211.1(c)(8) of the deviation rules are reasonably adapted to carry out the purpose of the Motor Carrier Act and therefore within the commission's general rulemaking powers under §204(a)(6).—Greyhound Corp. v. United States, 221 F. Supp. 440 (444)*.

5. Regulations governing.—[Vol. 19]. — Section 211.1(c)(8) of the commission's deviation rules, governing use of alternate operating convenience routes, applies only to a motor carrier previously certificated after a finding of convenience and necessity to serve the cities in question, and spells out the criteria which an applicant for such an alternate route must satisfy; if the commission after appropriate investigation determines the facts respecting those criteria, there is no reason for redetermination of all the numerous elements required in the initial certification. However, in its order authorizing plaintiff's competitor to use a shorter alternate route between Columbia and Orangeburg, S.C., the commission made no specific determination that any of the criteria established by it had been satisfied, but merely found generally that requirements of the deviation rules were met; neither the parties nor a reviewing court can determine whether such an order has a rational basis in fact. Order set aside and case remanded for further proceedings.—Greyhound Corp. v. United States, 221 F. Supp. 440 (444-5)*.

See also Greyhound Corp. Extension, §207(a), n. 28 *Deviation rules.*

Spaulding Turnpike and Interstate Highway 95 in Massachusetts are superhighways within §211.1(c)(8)(i) of commission's deviation rules when access thereto or exit therefrom is limited to specified interchanges. Applicant holds authority between Boston and Portsmouth, N.H., over service routes of comparable length to the turnpike and superhighway routes sought, and use of latter would not materially change its competitive relations with other carriers; applicant may obtain permission to use involved highways by filing appropriate notices under the deviation rules.—Trailways of New England, Inc., Extension, 92 M.C.C. 434 (437-8).

Adoption of proposals which (1) would allow property carriers holding regular-route authority to use any highways they wish in operating between service points on the same or different routes, so long as they furnish adequate service at terminal, intermediate, and off-route points and serve no points not specifically authorized; (2) would allow carriers holding separate irregular-route, or regular- and irregular-route, authorities to operate directly between authorized points instead of via common gateways; (3) would allow carriers holding radial authority to operate between radial points either directly or via the base point; and would require all common carriers of property, where practicable, to use the shortest and safest available route in performing authorized service, found not justified.—Motor Common Carriers of Property—Routes and Service, 88 M.C.C. 415 (419-21, 423).

While at first blush some merit may appear in allowing motor carriers to operate directly between points they are authorized to serve over circuitous routes and thus minimize inefficient use of equipment, adoption of those proposals would allow both regular- and irregular-route carriers to institute totally new services for which no public need has been shown, and in case of regular-route carriers might work to disadvantage of shippers and consignees at smaller points along their service routes. Though it is in public interest to encourage efficiency and economy in operation and promote best use of transportation facilities, means now open to all common carriers for obtaining alternate-route authority or elimination of gateways, together with existing Deviation Rules, are adequate to meet those aims.—Id., pp. 423, 424, 425.

The commission's deviation rules, particularly §211.1(c)(8)(ii), authorizing regular-route carriers to deviate from their authorized routes in certain circumstances without specific authority, apply only to deviations from authorized service routes as defined in §211.1(b)(4), and do not permit deviation from an alternate operating-convenience route.—Viking Freight Co. Extension, 88 M.C.C. 720 (721).

Section 208. (c) [§*308(c) U.S.C.*] Transportation of special or chartered parties.—Any common carrier by motor vehicle transporting passengers under a certificate issued under this part[1] pursuant to an application filed on or before January 1, 1967, or under any reissuance of the operating rights contained in such certificate, may transport in interstate or foreign commerce to any place special or chartered parties under such rules and regulations as the commission shall have prescribed. (Aug. 9, 1935, c. 498, §1, 49 Stat. 552; Nov. 10, 1966, Pub. L. 89-804, 80 Stat. 1521.)

1 Incidental special or charter-party rights eliminated by act of Nov. 10, 1966.

Historical Note, vol. 17, p. 13556; vol. 19, p. 15733.

Notes of Decisions

Volume 10—p. 8024; Volume 11—p. 9452; Volume 12—p. 10404; Volume 13—p. 11080; Volume 14—p. 11601; Volume 15—p. 12207; Volume 16—p. 12857; Volume 17—p. 13556; Volume 18—p. 14465; Volume 19—p. 15733.

1. Construction and interpretation.—[Vols. 10-19].—The statute authorizes transportation of special or chartered parties under such rules and regulations as the commission shall have prescribed, and failure of the commission to prescribe valid rules and regulations would raise serious doubt whether any such operation might be conducted; if the regulations adopted by the commission to implement §208(c) were held invalid, the result would be the same as if no regulations had been promulgated.—Atwood's Transport Lines, Inc. v. United States, 211 F. Supp. 168 (169)*.

Neither §208(c) nor the rules promulgated thereunder contemplate a distinction between "ordinary" regular-route passenger operations and all other regular-route operations which by reason of their specialized character are not typical; and when the commission grants regular-route authority, incidental charter rights are thereby created unless such authority is limited to "special operations" either expressly or by language of similar import. Though defendant conducts an airport limousine service restricted as to number of passengers per vehicle, it provides a regular, frequent, and expeditious service at designated stops under published schedules, which it could not do under special-operations authority, and the commission found in its application proceeding that it was entitled to ordinary regular-route authority. The commission has no authority in subsequent complaint proceeding to modify defendant's certificate, under guise of interpretation, by confining its regular-route operations to those classified as "special," and would not be warranted in doing so if it could. Defendant therefore holds incidental charter rights.—Arrow Lines, Inc. v. Connecticut Limousine Service, Inc., 96 M.C.C. 1 (4-6).

While the legislative history of §208(c) does not disclose whether Congress intended the scope of incidental charter authority to be governed by service limitations in the certificate on which it is based, such authority has always been regarded as incidental to or supplementary of the regular-route operations; thus, some degree of correspondence between incidental charter authority and the certificate which creates it is implied by the act. Further indication of congressional intent appears when subsection (c) is read in context of entire §208: subsection (a) authorizes the commission to specify the type of service to be rendered and the route and other geographical requirements respecting such service; subsection (b) provides for exceptions from those geographical requirements; and subsection (c) authorizes carriers to engage in charter operations "to any place" without regard to such geographical restrictions in their certificates. Had Congress intended to confer incidental charter authority irrespective of the type of service authorized under subsection

(a), it is reasonable to suppose that subsection (c) would have specifically provided that the carriers might engage in such operations.—Id., pp. 6-7.

In providing for incidental charter authority, Congress no doubt desired to facilitate optimum use of equipment by regular-route common carriers of passengers. Such carriers, being required to provide reasonably adequate service regardless of fluctuations in demand, should be permitted to use their excess capacity when demand for their regular-route service is relatively light; and it is significant that they are not obliged to provide service under their incidental charter authority. Use of buses in charter operations would not be incidental to defendant's certificated limousine service, nor would it foster economical service or sound economic conditions in transportation in manner contemplated by §208(c), as supplemented by the national transportation policy. Conclusion that the type-of-service restriction in defendant's certificate applies to its charter operations is consistent with interpretation of §208(c) in prior cases involving seasonal or intermediate-point restrictions, and is based, not on any assumed power to regulate competition among carriers engaged in such operations, but solely on the commission's understanding of the purpose and effect of §208(c).—Id., pp. 7-8.

This is not to suggest that all certificate restrictions as to type of service are applicable to incidental charter operations, as application of some service restrictions would nullify the command of §208(c) that incidental charter service be permitted "to any place." For example, to attach to such charter operations a service restriction to passengers having a prior or subsequent movement by air would in effect impose a geographical limitation forbidden by §208(c); similarly, a restriction to passengers picked up or discharged at a plant site could not be applied to incidental charter service at intermediate points without depriving the carrier of its right to transport charter parties to any place in the United States. Moreover, incidental charter authority is conferred by operation of law, and the commission lacks authority to restrict charter privileges conferred by §208(c) even though proposed by the carrier. However, no reason appears why defendant could not as a practical matter provide charter service "to any place" even though restricted to transportation of not more than 11 passengers in any one vehicle, as specified in its certificate.—Id., p. 8.

The incidental charter rights which under §208(c) automatically accrue to a regular-route passenger carrier, but impose no duty or obligation on the carrier to provide charter service, do not "duplicate" certificated charter rights arising out of a "grandfather" proceeding under §206(a)(1) or a public convenience and necessity proceeding under §207(a). —Ocean Drive Tours—Purchase—Carll, 97 M.C.C. 20 (24).

The commission's statutory authority to make such rules and regulations as are necessary to implement and enforce the provisions of §208(c) is clear from a plain reading of the act and section; and determination of limits of the scope of §208(c) charter rights which the commission must administer is an agency statement of general applicability and future effect designed to implement and interpret the Motor Carrier Act within meaning of §§ 2(c) and 4 of Administrative Procedure Act. Regulations thus promulgated are not solely for carriers' benefit: the public has an interest as well, and it is for the commission to balance and determine how such interests should be preserved.—Brunswick Transp. Co., Inc.—Revocation of Certificate, 91 M.C.C. 899 (904).

A carrier must be actually transporting passengers over its authorized regular routes in order for the incidental charter rights conferred by §208(c) to accrue to it.—Id., p. 903.

A carrier holding two or more separate grants of authority, each authorizing special operations over irregular routes from different origins but to the same destination, may utilize a single vehicle under such rights to transport passengers from both origins to the common destination and return them to their respective origins. Such combining of passengers in the same vehicle under different authorities does not amount to joinder of separate authorities or institution of a new unauthorized service.—Public Service Coordinated Transport Extension, 88 M.C.C. 382 (385).

3. Definitions.—[Vols. 11-19]. —***Charter operation:*** A certificate authorizing charter service contemplates the transportation of groups, such as lodges, bands, athletic teams, schools, or other travel groups, assembled by someone other than the carrier, who collectively contract for the exclusive use of certain equipment for the duration of a particular trip or tour.—Ocean Drive Tours—Purchase—Carll, 97 M.C.C. 20 (23).

Respondent's "lease" of buses to passenger groups for transportation to points outside California, with drivers used in his similar intrastate operations, is an unauthorized interstate charter service, which by definition contemplates transportation of groups assembled by someone other than the carrier, who collectively contract for exclusive use of the equipment for duration of the trip; and lease provisions designed to place ostensible control in the passenger group do not alter essential nature of the service thus provided.—Roesch Investigation of Operations, 91 M.C.C. 824 (825-6).

Special operation: See also Arrow Line, Inc. v. United States, §207(a), n. 5.

A certificate authorizing special operations contemplates a service rendered generally on weekends, holidays, or other special occasions to a number of persons which the carrier itself has assembled into a travel group through its own sale to each individual passenger of a ticket covering a particular trip or tour planned and arranged by the carrier. Special operations involving door-to-door service restricted to a limited number of passengers in any one vehicle are likewise distinguishable from charter service and are particularly attractive to family groups with small children or persons who are aged or infirm.—Ocean Drive Tours—Purchase—Carll, 97 M.C.C. 20 (23).

Applicant proposes to provide an unusual driveaway, by chauffeur, service to owners of private passenger automobiles when the car is accompanied by the owner, his dependents or relatives, employees, or others designated by him, and their baggage; however, proposed service is not intended to be a for-hire passenger service available to the public. While there would be occasions where the owner or his dependent is a passenger, and would have direction and control of the vehicle, it also is evident that there would be occasions where control and direction of the automobile would be questionable, particularly if the owner is not a passenger. Proposed operation is neither the regular-route type of passenger operation nor charter operation; it is, however, a type of special operation contemplated by the statute and will be so designated in the authority granted.—Adams, 94 M.C.C. 290 (292-5).

4. Evidence.—[Vols. 14, 17-19].— The record amply justifies the commission's grant of charter authority from Long Island to five applicants; the large and expanding population of that area—some 2 million at time of decision—was serviced by plaintiffs, two admittedly small carriers, and the commission could properly infer that their limited facilities would be inadequate to meet needs of the many residens of the Long Island counties. One of 31 supporting public witnesses testified that his booking of charter tours from Long Island had increased 500 percent during the 5 years preceding hearing, and that he had trouble in chartering buses when the field was limited to plaintiffs. In addition, while fact that four applicants had for many years conducted considerable charter business from Long Island, in good-faith albeit mistaken belief in their incidental right to do so under their existing authorities, may not conclusively establish necessity for such service, it is certainly competent evidence of need. Sustained.—Campus Travel, Inc. v. United States, 224 F. Supp. 146 (147-8)*.

See also Sechelt Motor Transport, Ltd., case, n. 10, below.

10. Special or charter party operations.—[Vols. 10-12, 14-19].—In complaint which is in effect an appeal from the commission's order granting certificate to defendant carrier, authorizing special and charter party operations originating in named New Jersey and Pennsylvania counties and extending to points in 30 States and the District of Columbia, the record reveals ample evidence that proposed charter and special services are needed by the public; and though plaintiff's (protestant) contention that it could meet present and future demands for service apparently was not disputed, that is of no importance decisionally. Also, the commission's

findings that applicant's past violations of the act did not justify finding it unfit, since they were not willfully or deliberately committed, and that such violations were not enough to destroy sound merits of the application, were within expert discretion of the commission; and that discretion was soundly exercised. Complaint dismissed.—Public Service Coordinated Transport v. United States, 247 F. Supp. 985 (986, 988)*.

Although authorization of applicant's proposed special and charter-party service may divert some traffic now handled by existing buslines, the amount of diversion will not be substantial. Moreover, the limousine service proposed, which involves a more flexible, nonscheduled, door-to-door service for the transportation of small parties, is a significantly different type of service from the bus service offered by protestants; it is a premium service involving a different rate structure. Since public need for such a distinctive service is demonstrated, the existence of a reasonably adequate bus service need not preclude a grant of authority to extent of need shown.—Canzano, 95 M.C.C. 568 (573)*.

Application for authority to conduct charter party operations beginning and ending at ports of entry on the international boundary in Washington and extending to points in 11 States is, in effect, a petition to eliminate restrictions at Canadian origin points which are in Canadian applicant's existing certificate; and evidence of record centered on need for service at the restricted Canadian points. However, in accordance with the decision in 92 MCC 82, since applicant holds authority from Canadian origins to appropriate border points, evidence of need for service at those origin points is not necessary for disposition of the matter. Restriction against traffic originating at two Canadian origins should be removed from applicant's certificate.—Sechelt Motor Transport, Ltd., Extension, 98 M.C.C. 128 (129-30).

Authority granted for round-trip charter operations from four eastern Virginia counties to New York City, Washington, D.C., and points in Maryland and North Carolina. Involved origin area is predominantly rural and prospective patrons in low income bracket consider protestant Greyhound's charges prohibitive. Moreover, applicant's past unauthorized service was found highly satisfactory, particularly in personalized services for both small and large groups which protestant does not provide, such as individual pickups at rural locations and return of passengers directly to their homes at late hours, which the public, because of its largely rural location, requires.—Blunt, 92 M.C.C. 306 (307-8, 309)*.

Authority granted for round-trip charter operations between described portion of Indiana County, Pa., and points in Kentucky, New Jersey, New York, Ohio, Virginia, and District of Columbia. Supporting school, religious, and civic organizations need a locally domiciled charter service to advance their health, cultural, and educational programs; owing to depressed economic condition of involved origin area, transportation costs, including deadhead mileage charges, tend to deter interstate charter travel by its inhabitants. However, as no definitely planned or contemplated trips by the supporting groups, or other requests for service, to four additional States sought are shown, application is denied as to those States.—Lanich Bus Lines—Charter Service, 92 M.C.C. 156 (157-8).

Authority granted five applicants for one-way or round-trip charter operations from Nassau and Suffolk Counties, N.Y., three to certain States, and two to all the continental United States. Considering potential capacity of the two existing operators to satisfy the present and prospective need for charter service on Long Island with their limited number of regularly available buses, there is real need for more service than they can be expected to provide. Four applicants are substantial regular-route operators to and from New York Metropolitan area, with large fleets of buses, and proposed service is a natural complement to their regular-route and incidental charter operations; fifth applicant is a close affiliate of a regular-route busline, and proposed operations can be an important source of revenue to help sustain latter's operations.—Hudson Transit Lines, Inc., Extension, 92 M.C.C. 586 (590, 591)*.

The size of Long Island, its geographical proximity to New York City, and capacity of its burgeoning population to generate traffic

are convincing that its residents are entitled to the charter services proposed. Difficulty of effecting connections with applicants' existing charter services in New York City is another persuasive factor; in many cases it involves use of taxis or private automobiles, and in others inconvenient and time-consuming transfers from one carrier to another. Bearing in mind that the New York City area is provided charter service by a large number of carriers, and that applicants served Long Island points under color of right for over 20 years, the competition arising from resumption of those services should not harm protestants.—Id., pp. 591, 592.

Authority granted one Canadian carrier for charter operations, in foreign commerce only, between ports of entry on international boundary at the St. Lawrence, Niagara, Detroit, St. Clair, St. Marys, Pigeon, and Rainy Rivers and all points in the 48 contiguous States; similar authority granted a second between ports of entry on the boundary in Michigan and New York and all of those States to which it does not already hold authority. In view of the broad territory sought and the numerous specific points to which public witnesses showed need for service, authority granted should not be atomized by limiting its application.—Norton, 92 M.C.C. 82 (87).

Authority sought by Canadian carrier for charter operations between ports of entry at Pembina, N. Dak., and Noyes, Minn., and points in those two States, denied when service available from three Canadian protestants holding charter authority for those States, as well as from Greyhound, is not shown to be inadequate in any material respect. Groups represented by supporting witnesses have little used those existing services in recent years, and their few complaints generally relate to occurrences long before hearing and before current management assumed operation of two protestants. Though Greyhound's service has apparently not been used because of its rates, they are not shown to be excessive or substantially higher than those of other existing carriers.—Eagle Bus Lines, 92 M.C.C. 793 (795).

Authority granted for transportation of stockmen in special operations between Ames, Iowa, and Chicago, serving intermediate points on US Highway 30 in Iowa, and restricted to passengers picked up or discharged at the stockyards; proposed service is analogous to assembly and distribution of mill workers or plant employees, which has been recognized as a special operation.—Myers, 89 M.C.C. 125 (129)*.

Though applicant may operate limousine-type service between Washington, D. C., and National and Dulles International Airports and between those airports under air-passenger exemption, that exemption does not apply to persons who will not travel by air themselves but have good reason to utilize the service proposed; while their number may not be large from standpoint of a scheduled regular-route operation, no reason appears for preventing them from using applicant's service, and though no present need therefor is shown, it is apparent that such need will arise. Authority granted for special operations in nonscheduled, door-to-door service between Washington and Dulles Airport without restriction on type of equipment, and between Dulles and National Airports, limited to transportation of not over 14 passengers in one vehicle, exclusive of the driver.—A.B. & W. Transit Co. Extension, 88 M.C.C. 175 (182-3, 185).

Authority granted for special operations in transportation of passengers in round trip ski tours beginning and ending at Newark, N.J., and extending to points in five States; protestant's service to ski patrons in the Newark area is inconvenient and inadequate, and in view of the small proportion of its patrons picked up at the Newark terminal grant to applicant will not adversely affect its operations.—Public Service Coordinated Transport Extension, 88 M.C.C. 382 (385).

Extension of special-operations authority granted two applicants for conduct of round-trip tours from Philadelphia, and from Philadelphia and nearby points, to points in 12 of 22 destination States for which authority is sought; broker protestants, in conjunction with applicants or with other motor carriers authorized to provide charter service in remainder of the territory sought, can provide tour services that are not shown to be inadequate.—Auch Inter-Borough Transit Co.

Extension, 88 M.C.C. 455 (457).

15. Applicability of rules.—[Vols. 11, 12, 18, 19].—Rules and regulations promulgated by governmental establishments have the force and effect of law and are subject to the same tests as statutes; while a statute must be specific enough to apprise persons affected by it of its requirements and of the elements constituting any criminal offense, the law does not require the impossible or even the impracticable. Absolute detailed certainty with the precision of a mathematical formula is not exacted; some leeway must be left to discretion of the courts and administrative agencies in interpreting and enforcing a statute or regulation, even if it has a criminal aspect; it is sufficient if members of the public are placed on notice as to what is required or prohibited, and what would be deemed a criminal violation. Even though a knowing and willful violation of the commission's charter service regulations is a criminal offense, Rule III thereof is not invalid for vagueness because it refers to origin points "within the territory served" by the carrier's regular route or routes.—Atwood's Transport Lines, Inc. v. United States, 211 F. Supp. 168 (170)*.

The commission has declined to define by purely mathematical standards or mileage formulas the incidental charter territory conferred by §208(c) on motor carriers actually transporting passengers over regular routes. Determination of such charter rights requires an exercise of judgment, considering all facts pertinent to the particular situation with due regard to practical administration of the commission's duties under the act. However, there should be some relationship between the territory served by carrier's regular routes and that claimed as its incidental charter area, and past decisions have delineated a number of criteria for determination of "territory served" which are pertinent where involved origins are not located on the regular routes; see 88 MCC 201 and cases cited therein.—Brunswick Transp. Co., Inc.—Revocation of Certificate, 91 M.C.C. 899 (903).

The incidental charter territory which may be served under §208(c) cannot be defined with mathematical precision; determination thereof requires exercise of judgment based on all facts pertinent to the particular situation. It is fundamental that there be some mutuality between the traffic served by carrier's regular routes and that to be served from the claimed incidental charter territory; moreover, boundaries which are generally well known should be observed and consideration given to the character of the terrain and its occupancy. [76 MCC 215].—Mohawk Coach Lines, Inc. v. Hudson Transit Lines, Inc., 89 M.C.C. 507 (511).

While in the West the origin territory authorized by the incidental charter section has been found to extend many miles, and application of the same rules would result in Plainfield, N.J., within 3.5 miles of defendant's regular route, being considered within its origin territory, rules applicable in the less populated sections of the West would be unworkable in the more densely settled East, for in fixing the origin territory it is of prime importance to keep carriers from encroaching on the charter rights of competitors.—Somerset Bus Co., Inc. v. Suburban Transit Corp., 88 M.C.C. 13 (16).

It was recognized in the Regulations case, 29 MCC 47, that a rigid rule or mathematical method of defining incidental charter authority would be unworkable, because the same standard would necessarily be applied in both sparsely settled and densely populated areas; therefore, to provide sufficient flexibility to encompass the varied factors involved in determination of what constitutes territory actually served, the phrase "within the territory served by its regular route or routes" was inserted in Rule III and has proved salutary in application.—Blue Line, Inc. v. Short Line of Connecticut, Inc., 88 M.C.C. 201 (202).

Definition of incidental charter territory requires exercise of judgment based on all facts pertinent to the particular situation, with due regard to practical administration; extent of territory which may be deemed to be served by a carrier's regular routes depends on terrain, density of population, proximity of other highways, and operations, if any, of competing carriers thereover; there must be some mutuality between traffic served by the regular-route operation and that proposed to be served in the claimed incidental charter territory. Moreover, boundaries generally well known should be used and consideration

given to character of the terrain and its occupancy, including distinctions between strictly urban communities and their suburban residential appendages. [52 MCC 670 and 76 MCC 215.]—Id., p. 203.

Thus, mere proximity of points to a carrier's regular routes is not controlling in deciding whether they may be served in charter operations as an incident to the holding of a regular-route certificate; and even if, as claimed by defendant, authority to serve a New England type town embraces the entire township rather than merely the urban community of the same name, it does not necessarily authorize charter service from a point in the vicinity of an authorized New England type town.—Id., p. 203-4.

The mere fact that a carrier has provided charter service from claimed points or territory for many years confers no right to continue such service; nor is it relevant or material that during such time existing carriers may or may not have failed to meet whatever demand for charter service there may have been at such points.—Id., p. 203.

16. Origins.—[Vols. 11-16, 18, 19].—In defining the permissible origins of charter operations which a passenger common carrier may conduct under §208(c) as "any point or points within the territory served by its regular route or routes," the commission acted reasonably in not defining or restricting the "territory served" more precisely; a reasonable flexibility is necessary in order that adequate service may be available to communities in sparsely settled areas, such as in the West, as compared with available service in the more densely settled areas of the East. Authorities cited amply support conclusion that the wording of Rule III of the charter service regulations is sufficiently definite and not vulnerable to objection that it is too vague; although not conclusive, it is significant that this regulation has been accepted and acquiesced in by the industry, without challenge of its validity, for over 20 years.—Atwood's Transport Lines, Inc. v. United States, 211 F. Supp. 168 (169, 170, 173)*.

The record fully justifies the commission's conclusion that Alexandria and Fort Belvoir, Va., are not within the "territory served" by plaintiff's regular routes: plaintiff has no authorized routes in Virginia, its only routes extending southwesterly and northerly or northwesterly from its terminal in downtown Washington, D.C., to specified points in Maryland without traversing any section of Virginia; Alexandria and Fort Belvoir are on the Virginia side of the Potomac River, the former being about 2 miles, and the latter 14.5 to 19.5 miles depending on the route used, from the District of Columbia boundary. The commission's order directing plaintiff to cease and desist from originating charter parties at Alexandria or Fort Belvoir, sustained.—Id., p. 173.

See also Greyhound Corp. v. Consolidated Term. & Travel Bureau, §212(a), n. 35

In authorizing two Canadian carriers to conduct charter operations in foreign commerce between ports of entry on international boundary and points in United States, no reason appears for restricting origin points to specific points within territorial limits of applicant's Canadian authorities.—Norton, 92 M.C.C. 82 (87).

West Point and Bear Mountain, N.Y., are "within the territory" in which defendant may originate charter parties under §208(c). West Point is a part of the Military Academy reservation, which comes within 1.3 miles of defendant's routes, and residents thereof rely on defendant's regular service for use in connection with taxicab or private automobile transportation; distance between West Point and the most convenient taxicab connection is about 7 miles, which, considering the sparsely settled character of the area, cannot be considered too remote for a finding of some mutuality between the traffic so served and that which defendant would serve under its claimed incidental charter right.—Mohawk Coach Lines, Inc. v. Hudson Transit Lines, Inc., 89 M.C.C. 507 (509, 511).

Though defendant's routes run through the westernmost portion of the Harriman section of Palisades Interstate Park and the contiguous Bear Mountain section lies generally east thereof, there is no well-known boundary between the two sections, which are connected by roads and hiking trails. Distances between defendant's routes and the point of Bear Mountain, where the questioned charter operations have originated, are not considera-

ble, and facilities at Bear Mountain can readily be reached by persons using campsites in the Harriman section. Thus, defendant's charter operations from Bear Mountain and West Point are not shown to be unlawful or in violation of the commission's regulations.—Id., pp. 509, 511.

The best method of ascertaining the origin territory authorized by the incidental charter rights section is to consider each proceeding on its own particular circumstances, taking into consideration the terrain, density of population, proximity of highways, practical administration of the service, and operations of competing carriers and their ability to perform the service involved. Since §208(c) was clearly intended to authorize charter operations incidental to or supplementary of regular-route operations, the problem is to determine whether there is a mutuality between the traffic being served by the carrier's regular-route service and that served under the claimed incidental charter authority.—Somerset Bus Co., Inc. v. Suburban Transit Corp., 88 M.C.C. 13 (15).

Such mutuality exists as to South Plainfield, N.J., approximately 1.6 miles from defendant's regular route and nearly equidistant between its routes and those of complainant; both services are important to commuters, terminate at same point in New York City, and patrons are drawn from South Plainfield to both lines; in addition, a connecting bus service between the Plainfields and defendant's regular routes facilitates use of its regular service. As areas within reasonable proximity of a carrier's regular routes are considered to be "within the territory" served by such routes, defendant's charter operations from South Plainfield are lawful.—Id., p. 16.

But no such mutuality is shown between traffic generated by the city of Plainfield and defendant's regular service; Plainfield is about 3.5 miles from its regular route and residents thereof have available the nearby service of complainant and are unlikely to depend on defendant's similar service; recognition of fact that in fixing origin territory it is of prime importance to keep carriers from encroaching on the charter rights of others, coupled with necessity for practical administration of §208(c), impels conclusion that Plainfield is not within defendant's origin territory as contemplated by that section.—Id., p. 16.

See also Rose Extension, §207(a), n. 25 *Past operation.*

As defendant's authorized route extends over highways a substantial distance to the east of Portland, South Portland, Gorham, and Lewiston, Maine, it would not be feasible for interstate passengers to or from those cities to use any part of its regular-route service. Also, the Portland area is separated from defendant's routes by 10 miles of open water and is 24 miles from Brunswick, while Gorham and South Portland are more distant; Lewiston is about 18 highway miles from Brunswick, and there is no discernible mutuality of traffic between Lewiston area and defendant's regular route. Considering nature of the points involved, all of which except Gorham are larger than the largest point on defendant's authorized route, and the character of the terrain and its population, it cannot be found that defendant's incidental charter rights extend to those four points; defendant's transportation of charter parties therefrom is unlawful; cease-and-desist order entered.—Brunswick Transp. Co., Inc.—Revocation of Certificate, 91 M.C.C. 899 (904).

Assuming that defendant's authority to serve New England type towns along its routes permits it to serve the entire township, no mutuality of traffic is shown between its regular-route operations and university at Storrs, Conn., in vicinity of a number of authorized New England type towns; assertion of a close relationship between the university at Storrs and Hartford, which it serves, because a substantial number of students reside in the Hartford area, is unsupported by any evidence that those students rely on or even use defendant's regular-route service; and a number of highways, served as regular routes by several competing carriers, lie much closer to Storrs than defendant's routes. No economic, social, or transportation relationship between the Storrs campus and the Hartford area which would justify defendant in performing incidental charter operations from Storrs is shown; cease-and-desist order entered.—Blue Line, Inc. v. Short Line of Connecticut, Inc., 88 M.C.C. 201 (204).

But since propriety of incidental charter

service at Storrs by other carriers mentioned in the record is not in issue, conclusions in instant proceeding should not be interpreted as approving or disapproving such service except as to defendant.—Id., p. 204.

Section 208. (d) [*§308(d) U.S.C.*] Transportation of baggage, newspapers, express, or mail.—[Unchanged. See vol. 10, p. 8028.]

Historical Note, vol. 17—p. 13557.

Historical Note

Under Pub. Law 88-239, Dec. 31, 1963, 77 Stat. 476 (39 USC §6402a), the Postmaster General may enter into agreements, under such terms and conditions as he prescribes, with motor common carriers of passengers for the transportation of mail in passenger-carrying vehicles over the carrier's authorized regular routes.

Notes of Decisions

Volume 10—p. 8028; Volume 11—p. 9459; Volume 12—p. 10406; Volume 13—p. 11080; Volume 14—p. 11602; Volume 15—p. 12208; Volume 17—p. 13557; Volume 18—p. 14469; Volume 19—p. 15737.

1. Construction and interpretation.—[Vols. 10-15, 17-19].—Though §208(d) provides that a certificate for transportation of passengers may include authority to transport express in same vehicle, 1 MCC 471 explicitly limited authority therein granted for such transportation to shipments which could be transported without disturbing the comfort and convenience of passengers or interfering with safety, speed, and other essential qualities of common-carrier passenger service; consistently with that view, certificates authorizing such transportation have been construed as not permitting transportation of express in trailers attached to passenger sedans or in combination vehicles constructed primarily for transportation of express.—Continental Southern Lines Extension, 88 M.C.C. 547 (549).

To adopt position that a trailer towed by a bus should be considered with the bus as one and the same vehicle, where the carrier's business remains primarily the transportation of passengers and transportation of express is related thereto, would overrule the commission's previous holdings based on sound principles. To assure good passenger service and to prevent passenger carriers generally from going into direct and aggressive competition with common carriers of freight, without proof of need for their services, they must be expected to handle express only as an incident to their primary passenger business. Application for authority to transport express in pup semitrailers drawn by passenger-carrying vehicles must therefore be considered as one for authority to operate as a common-carrier of property under §207.—Id., pp. 548, 550.

10. Property, mail, etc., transported with passengers.—[Vols. 10-12, 14, 18, 19].—Authority for transportation of express in same vehicle with passengers does not authorize transportation of express in carrier's buses when no passengers are transported therein, if it is being conducted for purpose of transporting express alone and not as an incident to transportation of passengers.—Armored Carrier Corp. Extension, 92 M.C.C. 336 (363).

Section 209. [*§309(a) U.S.C.*] Contract carriers by motor vehicle.—(a) (1)-(3) Permit essential to operate; carriers in bona fide operation on July 1, 1935; laws relating to national parks and monuments unaffected; traffic moving to and from Territories and possessions; "grandfather" provisions.—[Unchanged. See vol. 10, p. 8031, vol. 15, p. 12208.]

Amendments, see footnotes, vol. 10, p. 8031, vol. 15, p. 12209.

Historical Notes

In view of creation of the Department of Transportation by Public Law 89-670, effective April 1, 1967 (32 FR 5453), the Commission and the Department of Transportation entered into a Memorandum of Agreement on April 3, 1967 (32 FR 5744, Apr. 8, 1967) for the purpose of accomplishing continuity, liaison, coordination, and support with respect to transferring from ICC to DOT personnel and functions concerned with (1) motor carrier safety matters; (2) certain pending ICC proceedings; (3) pending court cases transferred to DOT; (4) housekeeping operations for ICC personnel transferred; (5) access to, and provision of, reports and other documents, and (6) liaison and cooperation between ICC and DOT.

The commission recommends that part II be amended to authorize the commission, after opportunity for hearing, to deny certificates, permits, licenses, or other operating authority when, in application proceedings, perjury, or subornation of perjury, has been committed before the commission, and the commission finds that the director, officer, or person convicted of such crime has such an interest in the business that the conviction affects the fitness of the carrier or broker.—Annual Report, 1962, p. 207.

Notes of Decisions

Volume 10—p. 8032; Volume 11—p. 9459; Volume 12—p. 10406; Volume 13—p. 11081; Volume 14—p. 11602; Volume 15—p. 12210; Volume 16—p. 12859; Volume 17—p. 13558; Volume 18—p. 14469; Volume 19—p. 15738.

4. Interstate and foreign operation.—[Vols. 10, 12, 18, 19].—Transportation currently being performed by Canadian applicant and that proposed from Seattle, Wash., to ports of entry on the international boundary in Idaho, Montana, and Washington constitutes a part of a through movement from Costa Rica to Canada and, under §203 (a) (11), such transportation is not subject to the permit or certificate requirements of the act; therefore, application for permit is dismissed.—B-Line Fast Freight, 94 M.C.C. 702 (703).

5. Contract carrier, in general; definitions.—[Vols. 10, 15, 16, 18, 19].—The court agrees with the commission that grant of contract carrier permit will not contravene the national transportation policy, even though applicant's president, who owns 50 percent of its stock, is superintendent of motor transportation for the sole supporting shipper. A contract carrier is under no obligation to render impartial service to the public; in fact, since shipper's need for unusual service is the primary basis for granting a permit, a carrier in close connection with shipper might be better able to fulfill shipper's needs than a totally unconnected carrier, thus the relationship would provide a further reason for granting permit. —Deioma Trucking Co. v. United States, 233 F. Supp. 782 (784)*.

Even assuming correctness of the commission's conclusion that, while applicants (plaintiffs) indicated willingness to accept a restriction of authority sought to service for named supporting shippers, they manifestly would do so only to become eligible to receive contract carrier permit, such a natural reaction should not be considered fatal to their permit application. The commission is empowered by §209(b) to impose such terms or limitations as may be necessary to assure that the business is that of a contract carrier; it may regulate the number of shippers with whom a contract carrier may contract, and also has power under §212(c) to reexamine each outstanding permit. Moreover, it made no finding that plaintiffs were unwilling to perform service of a contract carrier or to conform to the provisions of the law and the regulations and requirements of the commission. —Eddleman v. United States, 229 F. Supp. 231 (238-9)*.

Since supporting warehouse company owns the commodities other than frozen foods embraced in application and pays the freight for their transportation, it is a qualified shipper thereof. And though it does not own the frozen foods which it stores in its warehouses for its customers and in most instances does not pay the freight for their transportation, it is nevertheless a proper shipper qualified to enter into a contract with applicant for such transportation. It is bailee of the frozen foods and by agreement with the producers routes 70 percent of the local traffic passing through its warehouses and 40 percent overall; in such circumstances it is not required that it pay the freight for transportation of the traffic that it

routes, in order to qualify as a shipper.—Jacobs Extension, 96 M.C.C. 87 (90, 92)*.

And the contract entered into by applicant and shipper is bilateral even though it imposes no obligation on shipper to tender applicant any minimum volume of traffic, since performance of either of the promises is made to depend on performance of the other; the several conventions are commonly deemed one convention, which is then said to be "bilateral." Moreover, absence of fixed amounts of traffic in the contract terms does not render the contract invalid, and provisions therefor in the contract are not required by 1 MCC 628; however, it is necessary that the contract cover a series of shipments over a period of time.—Id., p. 92.

Contract carriers which were not converted to common carriers at time of the 1957 amendment of the act (which provided a statutory plan for conversion to common carriers of contract carriers not meeting the new definition of contract carriage), and those which instituted interstate contract carrier service after August 22, 1957, must be presumed to have sought and obtained contract carrier authority since that date with full knowledge of provisions of the amended statute and the restrictions thereby placed on contract carrier operations.—Connell Transport Co., Inc., Conversion, 95 M.C.C. 312 (318).

While decision that transportation by armored-car operators of business documents, film, optical or dental supplies, precision instruments, or the like is common carriage because it requires no special equipment or protective measures will have serious and far-reaching effect on applicants and other armored carriers holding contract-carrier authority, considering the history and development of armored-car service, and particularly the recent expansion of such carriers into areas other than their traditional field, there is no alternative but to foreclose continued expansion of their contract-carrier operations. However, as their contract carrier status has been confirmed and they now hold permits for transportation of commodities similar to those for which they seek extension authority, effect of instant decision is only to say that they may not be granted additional authority to transport commodities of types involved, as contract carriers.—Armored Carrier Corp. Extension, 92 M.C.C. 336 (362-3).

While grant of additional authority that will enable applicant under 7 permits to serve a total of 4 shippers all engaged in related activities in same geographical area is not inconsistent with the "limited number of persons" requirement of §203(a)(15), applicant is cautioned, in light of decision in 91 MCC 691, that continued pursuit of additional shippers may result in a de facto change in its status to common carriage.—Nationwide Carriers, Inc., Extension, 92 M.C.C. 1 (4, 6)*.

See also Major Extension case, §203(a)(15), n. 1.

Contract carriers whose services do not possess a high degree of specialization are put on notice that attempts to expand their operations by offering service to more than six or eight separate shippers will be scrutinized to ensure that they are not thereby serving more than the limited number of persons permitted by §203(a)(15).—Umthun Trucking Co. Extension, 91 M.C.C. 691 (697).

Although applicant now holds authority to serve but three shippers, his pattern of expansion is similar to that found in 91 MCC 691 to result in a common-carrier operation; his many temporary authorities and pending applications demonstrate beyond doubt that he intends to seek out new business in much the same way that common carriers do. While proposed operation for a new shipper, lasting for less than a year, will not cause applicant to serve more than a "limited number of shippers" and may be authorized, he is put on notice that he must either restrain his tendency to expand operations through offering service to additional shippers, or seek to convert his authority to common-carrier.—Williams Extension, 91 M.C.C. 929 (931).

Applicant holding a number of permits, with applications pending for several others and apparently intending to seek more contract shippers, cannot properly be said to be serving only a "limited number" of shippers within the definition of a contract carrier in §203(a)(15); applicant cautioned that continued pursuit of additional customers will almost certainly result in de facto change in its status to that of a common carrier.—Nation-

wide Carriers, Inc., Extension, 89 M.C.C. 675 (679).

It is the commission's constant duty to police activities of regulated motor carriers in such a manner as to preserve the essential distinction between contract and common carriage; rendition of purported contract-carrier services by vast numbers of commonly controlled carriers compounds this problem immeasurably, since scope and character of the collective services afforded must be evaluated to determine whether they are in fact unauthorized common carriage. Proposed system of multiple, commonly-controlled contract carriers would complicate regulation and increase administrative problems, contrary to public interest; it is therefore unnecessary to determine whether control applicants, through their present and proposed corporate carriers, would provide common-carrier service under guise of contract carriage.—Best Transport, Inc., 88 M.C.C. 147 (159)*.[But see dissent.]

Applicants' attempt to justify a multiplicity of commonly controlled contract carriers reflects a belief that creation of multiple carrier entities may be used as a device to avoid the statutory restrictions on contract-carrier service. While applicants' present or proposed operations, viewed as a whole, do not necessarily violate the statutory requirement that service of a motor contract carrier be confined to one or a limited number of persons, possibility exists that establishment of numerous commonly controlled carriers, each serving one or a limited number of shippers, could lead to performance of what are essentially common-carrier operations, and this possibility becomes probability with a wholesale increase in the number of contract carriers controlled or managed in a common interest.—Id., pp. 158-9.

7. Interchange arrangements.—[Vols. 10-12, 15-17, 19].—Proposed contract carrier operation from Hintington to New York, N.Y., limited to traffic delivered to common carriers or freight forwarders for subsequent movement in interstate or foreign commerce, involves an apparent interchange by a contract carrier. Since earliest days of regulation, however, such an arrangement has been held to contravene the commission's policy, except where the shipper employs the contract carrier as its agent for purpose of arranging for transportation by common carriers beyond points reached by it—the theory being that the agency relationship establishes constructive intervention by shipper at the connecting point and, thus, it is the shipper's tender, not contract carrier's. While all the cases involved union by contract with common carriers, rationale therein may be equally applied where proposed tender is to a freight forwarder. Therefore, since record discloses no facts that evidence an arrangement other than that born of described restriction, instant application is denied.—Holck Extension, 94 M.C.C. 393 (394).

See also National Auto. Transporters Assn. case, NTP, n. 10 *Substituted service.*

While contract carriers may not interchange freight moving beyond their own lines, they may act as shipper's agent in turning shipments over to another carrier at a common point of service. However, arrangement whereby applicant, purportedly as shipper's agent, turns traffic over to another contract carrier at Rochelle Park, N.J., for delivery to New York under a one-way equipment lease constitutes unauthorized through service by applicant in violation of the statute, even though shipper has a separate contract with the second carrier, when latter has no control over the service performed in its name and the arrangement amounts to an unlawful lease of its operating rights.—Connell Transport Co. Extension, 91 M.C.C. 113 (116, 120, 122).

10. "Grandfather" clause; bona fide operation.—[Vols. 10-14, 19].—The "grandfather clause" confers a special privilege on those carriers coming within its terms and extends only to carriers plainly within its terms; it contemplates substantial parity between future operations and prior bona fide operations as of the statutory date. Applicant for a grandfather permit is entitled thereto, as a matter of right, upon proof of substantial bona fide operations on and continuously since the statutory date; however, actual and substantial, rather than merely potential, sporadic or infrequent, service by applicant is required before such permit can be issued. The commission, by finding that carrier's evidence "falls

short" of substantiating allegations of its petition for reopening its "grandfather" proceeding, did not depart from established principles and establish an entirely new concept.—Zuzich Truck Line, Inc. v. United States, 224 F. Supp. 457 (465)*.

12. Competition.—[Vols. 10-19].—Although service of protesting common carriers in transportation of frozen foods has been generally satisfactory to supporting shipper, and grant of permit to applicant may result in some diversion of that traffic from them, such diversion should not cause them any significant loss, since they will retain shipper's outbound traffic entirely, and indications are that the overall volume of traffic available will increase. Protestants cannot provide the flexible "house carrier" service applicant offers, and whatever loss of traffic protestants may suffer is outweighed by shipper's needs and advantages accruing to the public from proposed service. Granted.—Jacobs Extension, 96 M.C.C. 87 (90, 93)*.

Grant of authority sought by applicant will not materially harm protestant common carriers when even collectively they lack sufficient territorial and commodity authority to provide the complete service shown to be required; they now handle only a small portion of supporting shipper's traffic, and additional traffic applicant will receive will apparently be diverted from private carriage. Moreover, the protestant holding the most extensive authority is controlled by and provides most of its services for two competitors of supporting shipper, and another holding authority for a large part of the territory involved has allowed applicant to provide the actual transportation for shipper under a lease arrangement. Potential advantages to shipper far outweigh any possible disadvantages to protestants.—George W. Kugler, Inc., Extension, 95 M.C.C. 288 (298)*.

Satisfactory performance of essentially comparable service by authorized common carriers may not be disregarded; lawful carriers that have dutifully submitted to regulation have been deprived of the opportunity to transport traffic within their authority, and of revenues therefrom, as a result of an unlawful lease arrangement between supporting shipper and applicant or its affiliates; and grant of the application would enable shipper to divert to applicant much of the substantial volume of traffic now being handled satisfactorily by protestants. Denied.—Interstate Distributing Co., 91 M.C.C. 36 (41)*.

Since transportation of truckload traffic is likely to be more profitable than the handling of l.t.l. shipments, it would not be sound regulatory practice to authorize a contract carrier to skim off the more profitable volume traffic while leaving the motor common carriers of general commodities—which are obligated by law to accept whatever freight is tendered to them—with nothing but the less profitable small shipments; denied.—Sears, 89 M.C.C. 173 (178).

Where no definite need for applicant's proposed service is shown and there is no showing that either it or supporting shipper would suffer materially from denial of application, whereas it is clear that shipper would deprive protestants now serving it (other than heavy haulers) of some 15 to 20 percent of traffic which they now transport, directly or by interline, from the four origins involved, the material detriment to those protestants strongly outweighs any possible disadvantages resulting from denial to applicant and shipper.—Tractor Transport, Inc., 88 M.C.C. 117 (122-3).

The Supreme Court in 368 US 81 rejected the raising of a presumption that a grant of competitive contract carrier authority would adversely affect existing carriers, stating that the commission should not load the scales in favor of any one of the criteria of §209(b) where another has contrary implications; thus, where a grant of authority would adversely affect operations of protesting carriers, whereas denial would adversely affect supporting shipper, the commission must carefully consider the conflicting interests without giving undue weight to either.—Moyer, 88 M.C.C. 767 (775).

While private carriers can avoid some of expenses incurred by authorized carriers, they often suffer the disadvantage of one-way movements; therefore, if the private carrier can overcome that disadvantage by operating as a for-hire carrier in one direction, advantages which it enjoys as a private carrier will enable it to compete on better than even terms

with for-hire carriers, both common and contract. For this reason the commission has frequently held, beginning in 7 MCC 369, that an applicant's private-carrier operations bar a grant of authority.—Derrico Co., Inc., 88 M.C.C. 17 (18).

14. Desire of shipper to engage particular person.—[Vols. 10-13, 16, 18].—When authorized common carriers, with or without dedication of equipment, are satisfactorily providing an essentially comparable and sufficiently dedicated service on supporting shipper's traffic, to disregard that service by grant of contract carrier application would weaken the fabric of the regulated transportation system upon the mere whim of a shipper who may be shopping for an overabundance of service, and would open the door to grants based on desires shaped purely in terms of how likely they are to produce such grants. Denied.—Interstate Distributing Co., 91 M.C.C. 36 (41)*.

Where applicants have been serving shipper from its East St. Louis pipeline terminal for more than 10 years under intrastate authority and have been helpful to shipper in soliciting sales and in developing good customer relations, denial of authority from its new terminal near Oakland City, Ind., would seriously inconvenience not only shipper but its consignees, all of whom deal with applicants on thoroughly tested basis; applicant can best provide shipper with service it desires; granted.—Cox, 91 M.C.C. 275 (276,278)*.

15. Violation of act as affecting fitness.—[Vols. 10-12, 16-19].—Applicant has stated, and there is no evidence to the contrary, that it conducted prior challenged buy-and-sell operations in the belief they were in the realm of private carriage; its bona fides is demonstrated by fact that when informed that those operations were suspect it filed instant application. In the circumstances, applicant acted in good faith, and the prior unlawful operations are not a bar to an otherwise warranted grant.—Petroleum Marketing Co., Inc., 94 M.C.C. 782 (786).

Though applicant has conducted certain operations on behalf of supporting shipper for several years without appropriate authority, and such past unauthorized operations are not condoned, he has recently made amends and indicates a desire to comply with all regulations; accordingly, present circumstances do not require that applicant be penalized by an unfavorable fitness finding. Granted.—Feagin, 94 M.C.C. 695 (698); similarly, since applicant has not flouted regulation, and professes willingness to comply with the commission's requirements, he has demonstrated his fitness to perform proposed service.—Hoyt, 92 M.C.C. 189 (194).

Past unauthorized operations do not necessarily bar grant of authority to perform a needed service. Although at time of hearing applicant had not entirely discontinued unauthorized interstate operations and in the following month was fined on 9 counts of such violation, he stated under oath at hearing that he would discontinue his unauthorized operations until he received the requisite authority, and explained that they had been conducted as the only means of supporting his family. While his past violations are not condoned, in light of his apparent lack of intent to flout the law, and his financial fitness, a finding of unfitness is not required.—Sears, 92 M.C.C. 602 (603-4).

Although past unauthorized operations are not an absolute bar to a grant of authority, since the commission is concerned primarily with applicant's present and future fitness to comply with the act and regulations thereunder, they must be weighed in determining such fitness. Applicant did not understand the leasing regulations and his limited knowledge indicates that in conducting unauthorized for-hire operations he did not willfully violate the act and commission's regulations; he has demonstrated he will operate lawfully in the future and is fit to hold authority for which need has been demonstrated. Granted with admonition to refrain from unauthorized operations in the future.—Trushenski, 91 M.C.C. 502 (506).

Although it is clear that applicant's parent corporation and principal supporting shipper has engaged in unlawful for-hire operations in performing some of same services as involved, evidence is insufficient for a like conclusion as to applicant's past operations; as applicant has applied for authority under direction of the parent corporation, and there

is no evidence that either has been indifferent to, or contemptuous of, motor carrier regulation, there is no justification for an unfavorable finding as to applicant's fitness; however, it is admonished to conduct its operations separately from those of its parent and to inform itself fully of the regulatory provisions under which it will operate as a contract carrier.—S. Klein Trucking Corp., 89 M.C.C. 53 (57).

Applicant has the burden of establishing his fitness to perform proposed service. While the commission has been lenient towards carriers acting in good faith under honest belief that they were exempt, applicant had full knowledge that he was conducting unauthorized operations, and fact that he may have acted on advice of counsel does not relieve him of responsibility; he has long been active in the transportation field and cannot plead ignorance of statutory requirements, especially since he was informed by a commission representative that his operations constituted for-hire carriage. Thus, his unlawful operations have been conducted willfully and finding of fitness would not be justified; application denied.—Kapke Investigation of Operations and Practices, 91 M.C.C. 377 (387-8).

The commission takes official notice that applicant was convicted by a federal court on eight counts of unauthorized interstate operations. And though it is not the commission's function to enforce State laws, it is its duty to assess all relevant factors bearing on an applicant's fitness; a clearly demonstrable violation of a State statute is such a factor, and applicant's employment of owner-operators who operate with tags authorizing private rather than for-hire operations violates Mississippi law. These matters, together with other indications of unfitness, would require denial of application even if applicant's operation were bona fide contract carriage.—T. P. Trucking Co., Inc., Extension, 91 M.C.C. 764 (769).

Motor carrier operations must be conducted in good faith without a shadow of subterfuge or attempted evasion of the letter or obligation of the law. Applicant's president and sole shareholder has been engaged in transportation for some 10 years and is familiar with the commission's regulations, yet has continued to operate illegally through lease of vehicles to shipper for which he is traffic manager, and for which he has performed an unauthorized transportation service under the guise of a purported private carrier operation. Such concealing of a for-hire operation evinces a clear, unmistakable intent to evade regulation, which cannot be permitted to succeed; in the circumstances, applicant cannot be found fit to conduct proposed operation; application, therefore, must be denied.—Frost Motor Exp., Inc., 89 M.C.C. 155 (157-8).

18. Conditions imposed; scope stated in permit.—[Vols. 10-19].—Construction of terms of permits generally, see §212 (a), n. 1.

Applicant's permit authorizing it to provide service for certain shippers from Milwaukee and Chicago is limited to traffic moving in mixed shipments with eggs from Random Lake, Wis., to the same destinations; and in attempting to effect technical compliance with that restriction, a case of eggs has been placed in each vehicle leaving Milwaukee. However, the eggs are not picked up by applicant at Random Lake, but are obtained from a supplier at that point who delivers them to Milwaukee, whence they are transported to the destination and then returned to applicant's president (who is apparently their owner) at his home; since such operation is obviously a subterfuge to evade restriction in its permit, transportation applicant has provided from Milwaukee and Chicago has been unlawful.—Connell Transport Co., Inc., Conversion Application, 95 M.C.C. 312 (314).

Since supporting shipper is interested in shipping wire cloth made of aluminum, brass, bronze, copper, iron, and steel, and since commodity description in the application is redundant and confusing, authority is granted simply for wire cloth.—Toomey, 95 M.C.C. 331 (337).

As trucks to be moved in proposed driveaway service include truck bodies which move with and as a part of the trucks, and considering contracting shipper's operation in which it installs its manufactured bodies on customer's chassis, authority is granted for driveaway of "trucks, chassis, and bodies, and parts thereof when moving in such vehicles."—Chadwick, 92 M.C.C. 271 (274).

Authority granted to transport processed foods is limited to pickles, sauerkraut, and peppers, those being the only products manufactured at contracting shipper's plants; and authority for inbound transportation of glass containers is limited to origins specifically named by shipper; but since the commodities authorized apparently do not require refrigeration, proposed restriction against transportation of goods requiring refrigerated equipment is unnecessary.—Dibble, 92 M.C.C. 610 (617).

Although applicant proposes to transport coke and pig iron in dump trucks, imposition of such an equipment restriction is unnecessary and administratively undesirable, especially where the service will be performed under contract for a particular shipper. But since the coke will be transported in a fungible mass, authority therefor is limited to shipments in bulk.—McFeeley Xtension, 92 M.C.C. 769 (772)*.

Certain of applicant's presently held authority is restricted to transportation of a particular appliance in mixed loads with other appliances; consequently, there is no reason why a similar restriction should not be put on instant outbound authority as requested by applicant.—Capital Exp., Inc., Extension, 91 M.C.C. 819 (823).

Supporting shipper is carrying out modernization and expansion programs at its plants at destinations named, and though proposed contract carriage of control panels and related equipment meets a distinct need for service not otherwise available, those programs are scheduled for completion by end of 1963; authority granted is therefore limited to a period ending December 31, 1963.—Williams Extension, 91 M.C.C. 929 (931).

Since irradiated (radioactive) fuel elements are within definition of class D poisons in the dangerous-articles regulations, permit for their transportation is limited to a period expiring 5 years from date of issuance.—Dealers Transit, Inc., Extension, 88 M.C.C. 375 (380); likewise, permit granted for transportation of explosives, blasting agents, blasting materials and supplies, and materials used in manufacture of explosives is limited to expire 5 years from effective date thereof. But since it appears that supporting shipper is developing an explosive slurry called flogel, which is to be delivered directly to the shothole in a tank truck, applicant should not be restricted against transportation of bulk liquids in tank vehicles.—H. Messick, Inc., Extension, 89 M.C.C. 209 (216)*.

Even though the commission has adopted a policy of not including a particular restriction in operating authorities, such a restriction in outstanding certificates or permits may not be flouted with impunity.—Fox-Smythe Transp. Co. Extension, 88 M.C.C. 57 (61).

See also Dyer-O'Hare Hauling Co. case, §5(2), n. 48 *Conditions imposed*.

Since applicants are engaged in proprietary motor carrier operations, grant of contract carrier authority is subject to condition that their private and for-hire transportation businesses shall be conducted separately and separate books maintained.—Cox, 91 M.C.C. 275 (278)*.

It is unnecessary to condition grant of permit for transportation of prefabricated buildings and related articles from Wadena, Minn., to points in seven States on surrender of applicant's certificate for a 47-mile route between Wadena and Alexandria, Minn., since both those termini and intermediate and off-route points are small towns and service consists principally of traffic interchanged with originating carriers for delivery.—Polman Extension, 92 M.C.C. 114 (115)*.

In view of applicant's failure to except to joint board's recommended denial of authority to serve Muncie and Evansville, Ind., in transportation of residual fuel oil from oil company's plant near Robinson, Ill., and its apparent lack of interest in that traffic, which protestants are handling in motor-barge service, those points are excluded from authority granted to points in Ohio and Indiana.—Kendrick Cartage Co. Extension, 91 M.C.C. 743 (746).

Though fact that applicant's parent corporation has separated most of its stores and retail activities into separate corporate entities for tax, liability, or other business purposes has little effect on its transportation problems, points authorized to be served must be limited to the stores and those facilities that qualify as warehouses of the parent company and its subsidiaries, otherwise the

description of service points would be too indefinite for practical regulation; however, between those store points concessionaires of the parent or subsidiaries may ship the involved commodities under contracts with applicant. So limited, there appears to be no possibility that applicant could invade the common-carrier field.—S. Klein Trucking Corp., 89 M.C.C. 53 (56, 57).

20. Operations by railroads.—[Vols. 10, 18, 19].—Special circumstances justify grant of contract carrier authority to railroad subsidiary, without rail-auxiliary restrictions, for initial-movement transportation of new automobiles and trucks from automobile manufacturer's assembly plant at Fremont, Calif., to points in Nevada on and off rail lines of the parent company. Applicant is presently rendering identical service from shipper's Oakland, Calif., plant which is to be closed, and is the only carrier able to provide both the interstate and intrastate service of type needed by shipper from its new plant being constructed at Fremont.—Pacific Motor Trucking Co. Extension, 91 M.C.C. 61 (63, 65).

Denial of the application would result in applicant losing traffic and revenue it has enjoyed for several years and, in effect, would deny shipper the privilege of negotiating a contract with carrier it deems best fitted to meet its particular requirements. Also, contract carrier protestant not only failed to take exception to examiner's ultimate findings, but did not challenge the finding that it is serving a competitor of supporting shipper, which it could favor in event of conflict in service requirements between them. Granted.—Id., p. 65.

24. Proceedings remanded.—[Vol. 19].—In its report and order denying plaintiff's contract carrier application, the commission did not properly employ the statutory procedures; nor did it properly evaluate the requisite §209(b) criteria in that its erroneous, and unnecessary, conclusion of no distinct need under the contract carrier definition in §203(a)(15) was apparently carried forward as the primary reason for a negative finding under §209(b). Furthermore, commission findings with regard to (1) nature of the proposed service, (2) effect a grant would have on protesting common carriers, (3) effect of denial on applicant and or shipper, and (4) the changing character of that shipper's requirements are not supported by substantial evidence. Therefore, the order is set aside, and the case remanded for the commission's further consideration consistent with the court's opinion. —Midwest Truck Lines, Ltd. v. United States, 269 F. Supp. 554 (560-1, 562-6, 567)*.

Proceeding in which contract carrier authority was granted is remanded to the commission solely for purpose of permitting plaintiffs (protestants before the commission) to examine proposed new contract between applicant and its supporting shipper, claimed to be bilateral, and present their objections thereto. Plaintiffs' request for an opportunity to examine that contract and state their objections was denied by the commission on authority of §220(a); however, since the commission requires that there be a bilateral contract as a condition to the right to operate as a contract carrier, plaintiffs are entitled to examine the contract as part of the formal application proceeding and it is consistent with the public interest to permit them to do so.—Exley Express, Inc. v. United States, 254 F. Supp. 363 (364-5)*.

The court, though not unmindful of the commission's wide range of discretion and the latitude extended to it to apply its expertise, must uphold the commission's orders on basis of the reasons given by it. This cannot be done where, in disposing of plaintiffs' contract carrier application, the commission failed to apply the standards of §209(b), but instead found the proposed operation to be common carriage and denied the application on ground that plaintiffs had failed to establish a public need for their service; the commission's failure, in so doing, to afford plaintiffs a full and fair hearing on the issues raised by their application was clear error; remanded for further proceedings consistent with the court's views.—Eddleman v. United States, 229 F. Supp. 231 (236, 238, 240)*.

In passing on contract carrier's extension application the commission, in discussing the five criteria which Congress directed it to consider and in applying them to the facts before it, erroneously assumed that those criteria might be treated as though they were factors in an algebraic equation which might

be solved mechanically. While the commission explicitly stated that "the weighing of all five factors warrants, on balance, a finding that issuance of a permit *** will be consistent with public interest and the national transportation policy," careful reading of its opinion and the entire record it was considering is persuasive that it attached equal weight to each criterion, thereby employing a standard which, in the circumstances of the case, was not a proper one. The proceeding must therefore be remanded for further consideration of the present record, supplemented in any manner the commission deems appropriate, in light of the views expressed.—Baggett Transp. Co., Inc. v. United States, 231 F. Supp. 905 (907)*.

The commission's report granting contract carrier authority on basis of shippers' need for the special services proposed does not distinguish between their transportation and nontransportation needs. The statute requires that distinction to be made, and before the commission may give weight to shippers' distinct needs it must first determine that those needs pertain to a transportation service. The court declines to make such determination in advance of commission action: delineation of what are transportation services is peculiarly within the competence and expertise of the commission; it should make the determination in the first instance and its decision may then be reviewed by the courts. The commission's order set aside and the case remanded for further action in accordance with the court's views.—National Trailer Convoy, Inc. v. United States, 227 F. Supp. 730 (734)*.

25. Necessity, demand, for service; in general.—[Vols. 10-19].—In granting authority to a contract carrier, the standard is whether a distinct need exists for the service requested by the shipper. Substantial evidence supports the commission's conclusion that protestant in application proceeding (plaintiff) could not afford to shipper the type of service and equipment necessitated by its business and that applicant, requested to secure the contract carrier authority, did meet all of shipper's requirements and needs. Sustained.—Erskine & Sons, Inc. v. United States, 235 F. Supp. 907 (908-9)*.

The court is satisfied that the commission approached considered contract carrier application in light of the Supreme Court's holding in 368 US 81 that willingness or ability of existing carriers to render the service involved is not determinative; that shipper's distinct need for the proposed service must be weighed against existing services; and that adequacy of existing services does not require denial of application if shipper's distinct needs can be better served by applicant. The commission had before it detailed evidence pertaining to supporting shipper's special requirements for service being furnished by applicant and to its difficulties encountered in using plaintiff's service; appraising the record in totality, the commission's finding that applicant was the only existing carrier able to provide shipper with the service it requires is supported by substantial evidence. The commission properly considered the criteria of §209(b) and did not load the scales in favor of any one; sustained.—Clark Transport Co. v. I.C.C., 233 F. Supp. 839 (842)*.

The commission's conclusion that a complete service was shown to be required by supporting shipper was a sufficient finding of "distinct need" for applicant's proposed service. Examiner's report, which the commission adopted, describes facts which caused shipper to seek the service applied for, and those facts clearly show a distinct need on shipper's part; his failure to list those facts under heading "Findings" or "Conclusions" does not detract from their weight or acceptance. His report reveals that he considered each of the five factors enumerated in §209(b) and made sufficient findings thereon. The commission's determination that a distinct need had been established for applicant's service, which plaintiffs could not meet, is supported by ample evidence of record; sustained.—Deioma Trucking Co. v. United States, 233 F. Supp. 782 (783)*.

While, in view of remand of application for reconsideration on other grounds, the court is not disposed at this time to decide whether or not the commission's finding that trailer retention is a transportation service was supported by substantial evidence, the commission should take another look at the facts in light of conclusion in 227 F. Supp. 730 (with which the court agrees) that before it may give

weight to a shipper's distinct needs it must first determine that those needs pertain to a transportation service. The undisputed fact that shipper has demonstrated a distinct need for trailer retention up to 14 days at jobsite or magazine, without additional charge, for purpose of storing nitro carbo nitrate merely frames the question wheter such service is tailored to its transportation or to its sales needs; activities pertaining to sale are beyond scope of transportation.—Baggett Transp. Co., Inc. v. United States, 231 F. Supp. 905 (908)*.

The needs of shippers are varied and diversified, some of which relate to transportation and some do not. In determining whether or not contract carrier authority should be granted, distinction between transportation and nontransportation needs of shippers must be made; and before the commission may give weight to a shipper's distinct needs, it must determine that those needs pertain to transportation service. Delineation of what are transportation services is peculiarly within the competence and expertise of the commission; it should make the determination in the first instance and its decision may then be reviewed by the courts.—National Trailer Convoy, Inc. v. United States, 227 F. Supp. 730 (734)*.

In denying plaintiff's permit application, the commission did not properly evaluate requisite §209(b) criteria when (though "nature of the service proposed" naturally involves the question of need for the service) its unnecessary conclusion of no distinct need under the definition in §203(a)(15) was carried forward and adopted as the primary reason for a negative finding under §209(b). Applicant (plaintiff) would serve one contracting shipper-consignee and devote nine tractor-trailer units to its exclusive use; would provide multiple pickup service on bus parts, equipment, and materials from shipper's suppliers from 15 named origins on a routing basis; and, to meet rigid delivery requirements of shipper's production schedule, would assure delivery within four days from initial-origin pickup. Also, considering the entire record, substantive evidence does not support commission findings that grant of the permit would adversely affect protesting common carriers, and that supporting shipper would not be adversely affected by a denial. Order set aside, and case remanded for further consideration consistent with the court's opinion.—Midwest Truck Lines, Ltd. v. United States, 269 F. Supp. 554 (557-8, 561-6, 567)*.

Supporting shipper has shown a distinct need for an "on-demand" service capable of rendering prompt pickup and delivery and expeditious transportation in round-robin movement of frozen foods and pallets and of emergency shipments of plant equipment and supplies between its cold-storage warehouses and customer's processing plants, to be available 24 hours a day, 7 days a week. Protesting common carriers, though they have satisfactorily served that shipper in transportation of frozen foods and will retain its outbound traffic therein, do not appear willing to handle the other traffic involved and thus cannot provide the flexible "house carrier" service applicant offers. On balance, the criteria of §209(b) have been satisfied; granted.—Jacobs Extension, 96 M.C.C. 87 (90, 92, 93)*.

Applicant is better equipped to meet contracting shipper's distinct needs than protestants who have handled very little of the type of traffic involved, and cannot offer territorially as broad and flexible a service as applicant proposes. Moreover, physical transfer of l.t.l. shipments, involved in protestants' service, would tend to damage shipper's fragile product. Grant would not adversely affect protestants' operations, whereas denial would deprive applicant of opportunity to provide a service shown to be needed, and deprive shipper of a service particularly responsive to its requirements, as well as force it to continue private carrier operations which it wishes to discontinue.—Toomey, 95 M.C.C. 331 (336-7).

While proposed service is one-way only, it will be economically feasible, since applicant can obtain backhaul loads of exempt commodities or lease its equipment for the return trip. Moreover, shipper has been operating in this way for years, and applicant has been assured that its outbound equipment will be fully utilized on return trips; granted.—Id., p. 336.

In weighing the criteria of §209(b), as was discussed in 368 US 81, there is no room for a presumption in favor of or against any of the

five factors which must be considered in determining whether or not issuance of a permit will be consistent with public interest and the NTP. In determining where the public interest lies, the distinct need that a contract carrier's service is designed to meet, and not the existence of reasonably adequate transportation, is the critical issue to be considered.—Russell Transfer Co., Inc., 95 M.C.C. 412 (419-20).

Applying criteria of §209(b), proposed operation is consistent with the public interest; applicant proposes to serve only a single shipper, offering a specialized service designed to meet shipper's distinct needs for transportation of butanes. Should application be denied, applicant would not be able to engage in the trucking business, and shipper would be denied the use of dedicated specially equipped vehicles, thus preventing it from obtaining scheduled and directed service from all its supply points; furthermore, absent dedicated equipment, the butanes remaining in a tank truck after unloading would be lost when the vehicle is cleaned, resulting in financial losses to shipper. Since protestants are not now participating in the involved traffic, effect of a grant on their operations would be minimal.Granted.—Petroleum Marketing Co., Inc., 94 M.C.C. 782 (787).

Shipper's outbound movement of dry fertilizer during the spring months is often made on exceedingly short notice; and, since those movements are either l.t.l. or truckload and dropoffs at more than one farm site frequently are necessary, shipper requires a coordinated service in order to assure its consignees of deliveries timed to meet their individual needs. On inbound shipments to its storage facility during the fall season, shipper requires a carrier able to furnish equipment promptly in order to move a large volume during a relatively short shipping season. Applicant would provide a specialized "house carrier" service closley integrated with shipper's operations with respect to both inbound and outbound movements. Grant of authority would produce no diversion of traffic from existing carriers since considered traffic has not been handled by any other carrier; on the other hand, denial would leave shipper without a service particularly well suited to meets its transportation needs.—Feagin, 94 M.C.C. 695 (697, 698).

Protestants have not established their willingness and ability to meet shipper's distinct needs; one does not hold authority to perform the required outbound service, and its limited authority would not be responsive to shipper's inbound requirements. The other could not perform the expedited and specialized service required, and there is no certainty that its equipment would be available to shipper on an assured basis.—Id., p. 697-8.

It is well established, see 368 US 81, that a protestant must show that it can meet supporting shipper's distinct needs for specialized transportation service as well as can the applicant. However, protestant holds no authority to serve the county where shipper's new store will be located, thus, it is not clear how it expects to meet shipper's complete needs. Moreover, protestant has failed to show that it could provide shipper the personalized service comparable to that provided by applicant, involving, among other things, the inspection of meat prior to its acceptance from the supplier.—Muzzillo, 94 M.C.C. 563 (565).

In construing the statutory requirements of §209(b) to determine whether or not grant of permit sought would be consistent with the public interest and the national transportation policy, all of the factors must be weighed in determining on balance where the public interest lies, see 368 US 81. Applying those criteria, grant of authority to perform an enlarged service for shipper already served will not affect applicant's contract-carrier status; applicant would provide an expeditious interstore and warehouse service tailored to particular needs of department store shipper, including ancillary services which protestant cannot render. Also, while grant of the permit will cause some diversion of protestant's traffic, latter failed to show that such diversion will result in impairment of its other services to the detriment of the public; on the other hand, denial would adversely affect shipper's business operations, since its manner of rotating stock at all its stores necessitates a flexible service of the type proposed; granted. —A.B.C. Exp. Co. Extension, 94 M.C.C. 386 (390-2)*.

Applicant is better equipped to meet the

distinct needs of shipper than protestants; applicant will backhaul shipper's papermill supplies to balance its presently authorized outbound deliveries of paper by the return movement from those delivery points. Use of private carriage gives shipper's competitors a more complete service than that which is now available to shipper from common carriage; furthermore, shipper cannot compete effectively if it is forced to pay higher rates for present outbound shipments. Protestant common carriers failed to show that traffic they would lose constitutes a critical proportion of their total operations; and, if application is denied, shipper will be forced to change to unregulated private carriage, to the ultimate detriment of applicant as well as the existing common carriers.—H.H. Follmer Contract Hauling, Inc., Extension, 94 M.C.C. 276 (279-80).

Ford Motor Co. has a distinct need for proposed truckaway of automobiles and trucks in secondary movements from its plant at St. Paul, Minn., to points in North Dakota by applicant which already serves it from that plant to four surrounding States. Rail shipments brought into that plant are reshipped in mixed loads with automobiles manufactured there in integrated operations performed with a high degree of efficiency, and closing of the gap in applicant's authority would enable Ford to reap full advantage of location of that plant at the railhead used by it for that traffic. Proliferation of automobile models in recent years has required Ford to manufacture about half the models sold in the 5-State area at other plants, and changes in distribution methods in the industry, emphasizing rail-motor movements, require service that will enable full use of the St. Paul plant as a rail terminal. Applicant is the only carrier able to meet those requirements, and denial would affect Ford adversely.—K. W. McKee, Inc., Extension, 92 M.C.C. 805 (808, 811-2)*.

Protestant's service is primarily designed to meet requirements of shippers not having their own railhead facilities at Twin Cities, and in adapting its service to Ford's needs it would have to engage in the wasteful operation of trucking Ford's automobiles across town to its own terminal for unloading and reshipment to destination; moreover, in using protestant's service Ford would be unable to control the composition of its loads and would have to provide extra handling and facilities at its plant for automobiles set aside for protestant. Though protestant would be adversely affected by grant to applicant, it should not suffer any serious financial crisis as a result, and any disadvantage it would suffer from loss of potenial traffic would be outweighed by advantages to Ford of applicant's service. Granted.—Id., pp. 811, 812.

In proposed transportation of processed foodstuffs applicant would furnish, as a substitute for contracting shipper's private carrier operation, an on-call, multistop service closely keyed to both shipper's distribution schedules and unloading schedules of its consignees. Applicant would station vehicles at shipper's plant for dispatch directly by shipper's personnel, which is required because its business is highly competitive, timely deliveries are essential to maintain its position in the market, and provision thereof can be assured only if it retains close control over its traffic movements. Proposed transportation of glass containers on return will fulfill shipper's need for periodic coordination between delivery of those items and its production schedules. Proposed operation would thus be virtually a part of shipper's organization and is designed to meet its distinct needs. Moreover, since its customers are located throughout a wide territory, its requirements may change in character and its distribution pattern is likely to vary from shipment to shipment.—Dibble, 92 M.C.C. 610 (615, 617).

While protestant common carriers, collectively, can serve most points where shipper has customers and all points where it purchases glass containers, they have not shown that they can meet its distinct needs; no one of them could provide all the service required, and their unwillingness to permit dispatch of vehicles by shipper's personnel renders their service deficient in a vital area. Patently, they are unable to offer the strictly controlled, territorially broad, flexible distribution service shipper requires to meet demands of its customers, or to assure the necessary coordination of container deliveries with its production schedule.—Id., p. 616.

Denial of the application would deprive

shipper of service particularly suited to its needs and would impel it to continue the proprietary trucking which it desires to curtail; and its motives for curtailing private carriage are immaterial, since common carrier service cannot meet its distinct needs. Furthermore, proprietary trucking is a form of carriage which, regardless of circumstances, contract carriage ought to be free to replace completely and satisfactorily. Weighing in balance the criteria of §209(b), grant of authority for the transportation shown to be required is warranted.—Id., pp. 616, 617.

Supporting shipper has a distinct need for multiple pickups of cheese, keyed to numerous manufacturers' production patterns and responsive to fluctuating purchase requirements of its customers; protestant common carriers have never handled the traffic and are unable to offer a service territorially broad and flexible enough to meet shipper's needs as satisfactorily as that proposed by applicant, thus would not be adversely affected by a grant, whereas denial would deprive applicant of opportunity to provide a service shown to be needed and would deprive supporting shipper of one particularly responsive to its shifting requirements, as well as unduly impeding realization of its desire to discontinue private carriage and concentrate on its primary business; granted.—Nationwide Carriers, Inc., Extension, 92 M.C.C. 1 (5-6)*.

The changing character of supporting shipper's requirements demands a flexible service of type proposed for transportation of animal feeds and ingredients from California points to Klamath Falls, Oreg. Though assignment of vehicles would meet a distinct need of that shipper, protestants have not shown that they could meet its scheduling requirements, and their failure to solicit shipper after receiving its inquiry regarding service indicates lack of interest in the traffic. As shipper has not used their services and would not use them if application were denied, grant would not adversely affect them, whereas applicant requires the authority sought in order to remain in the trucking business, and in event of denial shipper contemplates private carriage. Granted.—Hoyt, 92 M.C.C. 189 (193).

Permanent authority for applicant to continue serving contracting shipper in transportation of treated poles and piling from Winnfield, La., to eastern Texas is warranted. In view of changing character of shipper's requirements, service of rail carriers or their motor subsidiaries is inadequate on poles 50 to 85 feet long, which comprise about 30 percent of shipper's present business, and it lacks sufficient private equipment to take advantage of expanding sales opportunities in that destination area. Protestant motor carrier's nearest terminal for pole-trailer equipment is about 100 miles from shipper's plant, whereas applicant, from his nearby terminal, can provide on-call service with long-pole trailers responsive to shipper's need of timely service by a local-based carrier to off-road construction sites, which will supplement its private-carrier operations; granted accordingly.—Smith Extension, 92 M.C.C. 238 (239-40).

Proposed transportation of lumber used chiefly for oilfield decking or roadbuilding, between points in Louisiana and Texas, will meet supporting shippers' distinct needs. Shippers require jobsite delivery, usually on very short notice; as driving conditions are difficult, flat-beds used must be equipped with pull bars; and shippers' customers require delivery to out-of-the-way and almost inaccessible oilfields, with stringing of lumber through those oilfields for roadbuilding purposes. Shippers who have used or attempted to use protestant common carriers' service have found it wanting to extent that they consider private carriage the only feasible alternative to service proposed by applicant; and as all experience seasonal peaks in their business, and their sales in involved territory are increasing, they require a responsive transportation service such as that proposed. Granted, limited to service for the four shippers named.—Sears, 92 M.C.C. 602 (605, 606, 608).

As applicant's equipment is especially designed for transportation of lumber, its assignment of vehicles exclusively to supporting shipper, a manufacturer and wholesaler of lumber, would meet a distinct need of that shipper; protestants' equipment is designed for other commodities and therefore less suitable, whereas applicant, by use of specialized equipment, would provide a distinctive serv-

ice that protestants are unable or unwilling to furnish. Granted.—Bursch Extension, 91 M.C.C. 953 (957)*. [But see dissents.]

Applicant can provide a service better suited to supporting shipper's distinct needs for transportation of aircraft assemblies from Montreal to California points than could protestant. Although the commission can issue authority only from the international boundary, shipper requires a complete specialized service from Montreal, which applicant would provide, whereas protestant can only provide service from the boundary to destinations, and though it claims it could interline with a Canadian carrier there is no evidence as to facilities or experience of such a carrier. Denial would deprive applicant of traffic it has handled from a previous origin and leave shipper without a carrier that could perform the complete service needed, whereas protestant has not handled involved traffic in the past. Granted.—J-T Transport Co., Inc., Extension, 91 M.C.C. 911 (916-7)*.

Since overwhelming preponderance of applicant's interstate service is performed for supporting shipper and applicant has provided it with almost a complete service for many years in what is tantamount to house carrier service, a denial would prevent applicant from providing service it has provided in the past and would deprive shipper of the comprehensive service relied on for more than 30 years. Shipper desires to modify its marketing practices by bringing two commodities not previously shipped from Grand Rapids, Mich., to that point for reshipment in consolidated loads to dealers and distributors. Although opposing carriers can provide service to and from some points in the area, they can not provide complete outbound service required. Granted.—Capital Exp., Inc., Extension, 91 M.C.C. 819 (823).

The highly competitive nature of the sugar industry and consequent low margin of profit, together with customers' demand for prompt service and frequent need of l.t.l. deliveries, are special circumstances evidencing a "distinct need" of supporting shippers for applicant's proposed service, which includes exclusive assignment of vehicles, timely delivery of lading, split deliveries and dropoffs in transit, and Saturday pickups. Protestant motor carrier cannot provide the flexible, multiple-delivery service required, and rail service is not feasible because most consignees are located off-rail and are unable to receive c.l. shipments. Supporting shippers have customers at a sufficient number of points in Texas and Oklahoma to warrant grant of statewide authority, but since Clovis is the only New Mexico point where any of the shippers has a customer, only that point may be authorized in that State. Permit granted from three Louisiana points to those destinations.—Redland Oil Co., Inc., 91 M.C.C. 771 (776-7).

Supporting shipper has shown a distinct need for exclusively assigned, calibrated tank vehicles to achieve fast, flexible, and dependable transportation of its residual fuel oil from plant site at Robinson, Ill., to points in Ohio and Indiana. Protestants are handling the traffic to Muncie and Evansville, Ind., but are unable to offer the territorially broad and flexible service required, and would not be adversely affected by grant of permit to applicant, whereas denial would prevent applicant from rendering service from a new origin on traffic it has been handling from another, and would deprive shipper of a service particularly well adapted to its changing requirements, compelling it to resort to private carriage to satisfy its transportation needs. Granted, except to Muncie and Evansville.—Kendrick Cartage Co. Extension, 91 M.C.C. 743 (746).

Weighing the evidence relative to §209(b) criteria as interpreted in 368 US 81, applicant's proposed fast, flexible delivery service would be "better tailored to fit the special requirements of the shippers' business" and the "select nature of the delivery service that is desired" than service now available from opposing carriers—which are either limited to points on their regular routes or to relatively small areas; applicant is better equipped than protestants to meet supporting shipper's distinct needs for delivery of l.t.l. shipments on short notice, and denial of application would probably lead shippers to continue to use or to institute private carriage; granted.—Reddish, 91 M.C.C. 543 (547-8)*.

Outbound movements of shipper's products are frequently required on exceedingly short notice and applicant's proposed service,

closely integrated with shipper's operations, will be virtually part of shipper's organization designed to meet its distinct needs. The volume is small, thus any loss which protestants might suffer will be outweighed by advantages to supporting shipper. Weighing in balance the above criteria, grant is warranted.—Trushenski, 91 M.C.C. 502 (505-6).

Applicant's proposed operations will provide a service closely integrated with shipper's processing operations respecting both outbound and inbound movements of perishable meat and "kosher" products involved, using temperature-controlled equipment with overhead "tram" rails and switches which shipper considers necessary. As protestants are unable to provide the type and quantum of service required, shipper would be adversely affected by a denial and, while several of protestants might lose some traffic, any losses are outweighed by advantages to supporting shipper of the personalized service applicant would give.—Garmarc Transp. Co., Inc., 91 M.C.C. 489 (492)*; however, as all shipper's traffic moves to or from Rochester, N.Y., radial authority is granted instead of nonradial requested.—Id., p. 493.

Applying statutory criteria of §209(b) in light of 368 US 81, and in view of carrier's place in shipper's overall organization and relationship between applicants and shipper's customers whom they have served under intrastate authority for many years, applicants can best provide shipper with service it desires; moreover, grant would divert no traffic from existing carriers since they have never handled involved traffic, while denial would cause applicants to lose practically all of their transportation revenues; granted from shipper's new out-of-State pipeline terminal to specified bulk plant localities.—Cox, 91 M.C.C. 275 (277-8)*.

Application of criteria of 368 US 81 warrants conclusion that applicant's service would be more responsive to supporting shipper's need for expeditious bulk transportation of sulphate of ammonia than that of protestants. Applicant has provided a "house carrier" service for that single shipper for many years, and closing of nearby source of supply has led shipper to seek sulphate of ammonia at out-of-State origins not served by applicant and, thus, has changed character of its transportation requirements. One protestant's service has been less than satisfactory because his waiting-time charges make it difficult for shipper to gage in advance its transportation costs and thus its overall production costs; also, that carrier might not be able to supply equipment when needed because of commitments to use in his own private-carrier operations; the other protestant, in past, has shown unwillingness to serve shipper and is not authorized to perform the complete service needed; permit granted.—Patterson Extension, 91 M.C.C. 249 (251)*.

However, since the plant in Falls Township, Bucks County, Pa., one of considered origins, and supporting shipper's plant at Yardville, N.J., are both within the commercial zone of Trenton, N.J., specific authority for that operation will not be granted.—Id., p. 252.

Weighing criteria of amended §209(b) in light of "distinct need" of each customer, as set forth in 368 US 81, existing common-carrier services, even though they might be considered adequate, cannot meet supporting shippers' distinct need for transportation of various building materials as well as could applicant, particularly where use of connecting carriers would be necessary. No protestant holds authority for complete service needed, nor is it shown that they could provide service at times and in manner required, and due to difficulty in obtaining service suited to their particular businesses shippers have turned to private carriage, thus denial would adversely affect those shippers; granted to extent shown in appendix.—Atlantic Truck Lines, Inc., 89 M.C.C. 687 (689)*.

In applying the broad principles stated in 368 US 81, each individual contract carrier application must be decided on its own facts in light of the Court's comments on the overall problem, since the particular characteristics of whatever specialized need may be present will vary from case to case. In holding that the standard is whether supporting shipper has a "distinct need" for a different or more specialized service, and that protesting carriers must show that they can fill that need, not merely that they can provide reasonably adequate service, the Court also held that it

must be determined whether advantage of lower rates or cost of service to the shipper, where relied on by applicant, establishes a "need" that overrides conterbalancing considerations; thus, cost to shipper is an additional fact to be weighed in determining where, on balance, the public interest lies.—Moyer, 88 M.C.C. 767 (771-2).

Grant of authority to applicant already serving supporting shipper's plant in outbound movements to States involved, for return-haul movements of liquid chemicals and vegetable oils used as raw materials, is warranted to meet shipper's changed transportation requirements resulting from a recent innovation in ratemaking by common-carrier tank truckers; as protestants are not now handling any significant portion of such traffic, grant will not adversely affect their services, whereas denial would compel applicant to discontinue operations; only common carrier holding two-way authority to serve the plant did not oppose application, and whether it could handle traffic applicant is now transporting is purely speculative.—Chemtrans, Inc., Extension, 88 M.C.C. 238 (240-1).

Recent reduction of about 50 percent in common-carrier rates for return movements arranged by consignor of outbound load applies to operations of carrier holding two-way authority to serve shipper's plant; neither applicant not protestants have two-way authority required to compete with that carrier; shipper cannot be expected to pay rates to applicant for outbound movements and to common carrier for inbound movements that exceed the two-way common carrier rate or cost of round-trip private carriage by $100 to $200; and, to extent the common carrier could not handle applicant's traffic, denial would probably force supporting shipper to resort to private carriage.—Id., p. 240.

Applicant's proposed transportation of farm equipment is not designed to meet any "distinct need" of shipper; in fact, authority sought is essentially the same as that proposed in an earlier application by same applicant. Further, there is no evidence of record of either deficiencies in existing service or of facts establishing that applicant's present authority is no longer responsive to shipper's requirements; and evidence of shipper's needs is vague and indefinite. Though shipper claims that proposed service is required to points in its entire sales area, its manifests cover shipments to only a few of those States and consist of items embraced in one of applicant's sub-permits; also, only reference to a multi-State movement involved cribs and roofing both of which commodities are included in applicant's permit. In those circumstances, there is hardly the pattern of distribution necessary to support the broad authority requested.—Sperry Transp. Co. Extension, 96 M.C.C. 95 (98).

In addition, proposed service does not provide any "specialized service" for shipper. Particular emphasis was placed on the shipper's requirement that drivers be familiar with the parts in order to instruct consignees as to assembly; however that problem arises principally in the case of transportation of cribs which commodities are already contained in applicant's authority; moreover, to the extent that its rendition constitutes a non-transportation service, consideration was inappropriate. Denied.—Id., p. 98.

Inasmuch as opposing common carriers are authorized to serve substantial portions of the pertinent territory and are specialists in the transportation of brick, and two of them have handled shipments destined to one or both of the supporting shippers, record is convincing that opposing carriers are equally as well qualified as applicant to provide the type of service required and to meet whatever distinct transportation requirements supporting shippers may have. Thus, denial of the application would have no adverse effect on the shippers, and a grant would place applicant in a position to divert from protestants traffic they now enjoy. Furthermore, it is not shown what effect a denial would have upon applicant and the changing character of shippers' requirements does not appear to be relevant to the issues presented. Denied.—James, 96 M.C.C. 272 (275).

While applicant concedes he will not assign vehicles to shipper's exclusive use, he argues that proposed operation meets alternative "distinct need" test of §203(a)(15) because the six enumerated services constitute the rendition of an overall service designed to meet supporting shipper's distinct need; how-

ever, it is clear that shipper will not use applicant's services unless the charges are lower than its private-carriage transportation costs. Therefore, in accord with the proper methods to be used in applying statutory requirements of §203(a)(15) and §209(b) in light of the decision in 368 US 81, as outlined in 88 MCC 767, the sole question is whether the burden is met of establishing that proposed service offers a bona fide economic advantage to the shipper. There is no evidence that proposed rate of 50 cents a mile either reflects any economies or advantages inherent in contract carriage or that it is economically feasible; also, applicant and shipper have not agreed as to just what such rate encompasses; burden has not been met. Denied.—Harris Extension, 94 M.C.C. 227 (229-30).

Applicant proposes to serve two affiliated shippers, to assign vehicles to their exclusive use, and to provide a repetitive motor service transporting t.l. shipments between two plants. This service is in no way specialized, and protestants which hold requisite authority should be able to meet shipper's indicated needs at least as well as applicant since they have adequate terminal facilities, maintain sizable fleets of equipment, and are experienced in transporting involved commodities. —Spruance Extension, 91 M.C.C. 864 (866, 867).

In view of the service available, the only way a denial might adversely affect supporting shipper is in depriving it of service better suited "to the length of its purse." The burden in this respect, however, is on applicant, who has failed to show he will provide service at lower cost than opposing carriers. Moreover, protestants appear willing to consider establishing commodity rates lower than class rates assertedly being charged. Denied.—Id., p. 868.

While both supporting shippers have manifested need for service closely coordinated with their assembly lines and using equipment individually designed and specially tailored to fit aircraft components and transport them efficiently and safely, protestant offers a highly specialized service which has been held out to the aircraft industry as a whole for a number of years; it is thoroughly experienced and has established its willingness and ability to meet shipper's requirements. Applicant has not established that it can better meet shippers' needs than protestant or that its proposed service is superior in any way to that presently available; shippers should be unaffected by a denial.—J-T Transport Co., Inc., Extension, 91 M.C.C. 507 (510-11)*.

Any adverse effect of denial on applicant would be difficult to measure, as it would consist chiefly of loss of traffic which might accrue to it if applications were granted, also possible loss in expense of reconverting certain equipment used under temporary authority; there is no indication that it would suffer any loss of traffic in its permanent operations. Considering both applications in light of the evidence, the public interest, the national transportation policy, and the criteria of §209(b), denial is warranted.—Id., p. 511.

While shipper's distinct need must be considered and not merely the existence of reasonably adequate service, applicant's proposal is not designed to meet any such distinct need. Even if shipper's desires for low-sided open-top equipment and overnight deliveries constitute "distinct needs," protestants have shown that they can meet these needs as well as applicant and in fact shipper intends to continue to use their service. Thus, denial could have no adverse effect on shipper while grant might adversely affect protestants' service. As applicant is not now handling any of shipper's traffic, denial could have no adverse effect on him.—Kotwica Extension, 91 M.C.C. 235 (237-8)*.

Shipper's general complaints about protestants' service do not establish need for applicant's service when it was unable to indicate definitely which carriers provided unsatisfactory service or when failures in service occurred; denied.—Id., p. 236.

Studebaker desires proposed secondary movement of its automobile traffic from St. Paul to surrounding four-State area, in mixed loads with shipments from Ford's St. Paul plant, to obtain advantage of efficient and economical distribution of its vehicles with the larger number shipped by Ford. But while proposed service is highly specialized, protestant common carriers are fully capable of providing it: one has a new terminal at St. Paul railhead from which it will distribute a

substantial volume of other manufacturers' traffic with which it can efficiently intermix Studebaker's smaller volume, with additional advantage that shipments need not be transported across town to the Ford plant; although that protestant does not serve Wisconsin, such traffic can be handled in connection with another. As protestants can thus provide service completely responsive to shipper's needs, denial will not adversely affect it; and as applicant would continue to serve Ford, there would be no adverse effect on its operations. Denied.—K. W. McKee, Inc., Extension, 89 M.C.C. 777 (781, 784).

Although supporting shipper claims that applicant's proposed service on tractors and other machinery is required to points in its entire sales area, evidence of its actual transportation needs is too vague and indefinite to support a grant of authority; applicant and protestant railroads currently transport all tractor shipments from the principal origin named, but tonnage and destinations of other shipments therefrom are not shown; nor are any data presented on volume or specific destinations of traffic which would move from the other origin points involved. Denied.—Tractor Transport, Inc., 88 M.C.C. 117 (122).

Specialized service: [Vols. 18, 19].—Supporting shipper desires proposed service because applicant's equipment can handle four of its machines in a single-load, single-line movement instead of interline service rendered by common carriers on l.t.l. shipments. However, single-line service cannot be considered a specialized service tailored to a shipper's distinct need, without a concomitant showing that shipper has an actual need for such service as distinguished from the normal desire therefor of shippers generally; without such a showing it cannot be found that denial of application would adversely affect the shipper. At most, shipper has shown a mere preference, rather than a specific need, for single-line service; denied.—Minnesota Trucking, Inc., 94 M.C.C. 58 (61).

Applicant proposes to perform for supporting shipper an operation akin to that of a house carrier, including services not strictly limited to transportation, in transportation of petroleum and products, with certain exceptions; salient features of its proposal include the use of double bulkhead trailers, taking orders directly from customers, the rendition of stopping-in-transit service, after-hour key deliveries, and inside pickup and delivery of packaged freight. Applicant has been performing similar service for contracting shipper in transporting similar commodities, and none of protestants is able to provide shipper with the specialized and complete service proposed for movement of bulk and packaged freight. Also, resultant advantages to shipper outweigh any possible adverse effect on existing carriers; granted in part.—Russell Transfer Co., Inc., 95 M.C.C. 412 (420).

Proposed transportation of clay products from all five of supporting shipper's plants to numerous additional States, with transportation of returned items and materials and supplies used in manufacture of clay products in reverse direction, will meet shipper's distinct need for a complete transportation service which existing common carriers cannot individually or collectively provide. About 75 percent of shipments require jobsite delivery, and 50 percent of sewer pipe shipments must be strung by carrier along the ditch where the pipe will be laid. Also, cranes mounted on the trailers for loading and unloading, which applicant has or will obtain, are an innovation which shipper's customers are demanding and must be provided to meet competition of other clay products manufacturers. Denial would deprive shipper of a complete personalized service to the broader destination territory required, and deprive applicant of traffic now moving in private carriage from those of shipper's plants it already serves. Granted.—George W. Kugler, Inc., Extension, 95 M.C.C. 288 (292, 293, 298)*.

Applicant proposes service which is specialized and devoted exclusively to serving shipper's needs. Applicant holds no authority from commission, but has provided the service sought here for supporting shipper for about 7 years, picking up meat in N.Y.C. and delivering it daily to shipper's stores. Applicant has become an integral part of shipper's organization, having performed, and proposing, in fact, a true house-carrier service. In addition, he would provide a number of services not strictly related to transportation, but which are necessary if the shipper is to con-

tinue to receive the service which it has come to expect. Denial of application would leave shipper without this service, and would clearly have an adverse effect on its operations; granted.—Muzzillo, 94 M.C.C. 563 (564).

Proposed contract carriage of malt beverages for four shippers affiliated with applicant will in substance preserve the status quo for those shippers, providing a service which they can control and coordinate to meet their inventory requirements and brewers' pickup schedules. Applicant would render a personalized, "house carrier" service fully integrated with shippers' operations as beer distributors, including keystop deliveries by drivers who will unload shipments with forklifts and rotate warehouse inventories when delivering shipments of fresh malt beverages; such ancillary services may be considered in comparing applicant's proposed service with protestants' services. Both motor and rail protestants have failed to show ability and willingness to provide the type of service those shippers require; giving due weight to other criteria of §209(b), grant of authority sought is justified.—Briggs, 92 M.C.C. 707 (714-5).

Applicant would provide a personalized driveaway service closely coordinated with contracting shipper's manufacturing operations and requirements of its customers, as a substitute for shipper's private carriage, and his services would be available on a 24-hour basis to any point in involved destination territory; owing to proximity of applicant's facilities to shipper's plant, he could furnish a driver within 1 hour after a request, and could render necessary maintenance to vehicles moving in driveaway service. Shipper requires proposed personalized service, which protestants cannot supply; granted.—Chadwick, 92 M.C.C. 271 (273-4).

Applicant proposes to render a specialized service in transportation of paint oils responsive to contracting shipper's distinct needs, which include provision of four-compartmented tank vehicles that are clean and available on short notice. Even if protestant's liquid chemicals authority were found to include paint oils, it is doubtful if, by dispatching equipment operating in the area or, if necessary, from distant terminals, it could provide the flexible and dependable service shipper requires; applicant is thus better able to meet shipper's distinct needs than protestant; one-way authority granted.—Manfredi Motor Transit Co. Extension, 92 M.C.C. 471 (474)*.

Although some of services proposed in connection with transportation of explosives are not strictly "over-the-road" services and may sometimes be considered accessorial, applicant is seeking authority for a contract-carrier operation closely akin to private carriage, and those services are directly related to the movement, loading, and unloading of the lading and are essential to shipper's total transportation requirements.—H. Messick, Inc., Extension, 89 M.C.C. 209 (215)*.

Service applicant proposes to render for supporting shipper is distinctive and highly specialized when it will (1) assign equipment specially adapted for explosives transportation to shipper's exclusive use; (2) spot equipment at plants prior to loading; (3) provide a trailer retention service at jobsites for storage of nitro carbo nitrate; (4) provide conveyors for loading and unloading; (5) conduct two-man operations with experienced drivers familiar with shipper's magazines who will assist in unloading; (6) provide 10-wheel trucks for delivery to points inaccessible to tractor-trailer units; (7) make dropoffs or deliveries at a definite day and hour at jobsite or magazine locations; and (8) furnish tank vehicles for transportation of explosive slurry.—Id., 92 M.C.C. 293 (297)*.

While the trailer retention service is an accessorial service, it may properly be considered in determining consistency with public interest of the proposed operation. It amounts to a dedication of equipment at destination, and is clearly a transportation service within meaning of the act, distinguishable from proposals of common-carrier applicants to provide such nontransportation services as spreading asphalt in road construction or washing and repairing foreign cars.—Id., pp. 299-300.

Applicant's parent corporation, its subsidiaries, and its concessionaires require an expeditious interstore, warehouse, and storage operation intransportation of general department store merchandise, with deliveries in some instances direct to selling floor or department locations; it does not appear that

protestants can provide the highly specialized service required; applicant has satisfied the tests prescribed by §209(b); granted.—S. Klein Trucking Corp., 89 M.C.C. 53 (55, 57).

Though National Aeronautics and Space Administration's representatives avoided stating a preference for contract-carrier service, applicant's proposed operation in transportation of irradiated fuel elements in lead casks will be considerably more responsive to its needs than common carrier protestants' joint-line service; ready availability of through service with same drivers will provide maximum control and flexibility; denial would cause NASA to resort to a service which by its nature could not provide the control and monitoring it believes necessary in handling such dangerous commodities. As none of the traffic has yet moved, and NASA intends initially to tender only one shipment a month, gradually increasing to three, diversion of that small volume of potential traffic will not adversely affect protestants. Granted. —Dealers Transit, Inc., Extension, 88 M.C.C. 375 (380).

Applicant's proposed transportation of pulpboard shipping containers from shipper's Rockford, Ill., plant to points in Iowa and Wisconsin would supply a distinct need which existing carriers cannot adequately meet; as shipper and many of its customers lack storage facilities, a service direct from its production line to customer's, with multiple dropoffs and prompt delivery of short-notice orders, is required. Due to dissatisfaction with common-carrier service, shipper has been transporting the bulk of its traffic from that plant in private carriage; applicant has been performing a satisfactory intrastate service for shipper and proposes a closely coordinated, personalized interstate service keyed to shipper's and its customers' production schedules. However, shipper concedes it has no need for for-hire emergency interplant movements of papermill rolling stock.—Moyer, 88 M.C.C. 767 (776-9).

Though protestants collectively serve all points where shipper has customers, they cannot provide the territorially broad and flexible service which shipper requires to meet demands of its customers; denial of application would therefore affect shipper adversely, whereas protestants would not be adversely affected by a grant, since they do not participate in the traffic to any great extent and will continue to enjoy shipper's patronage when time is not of the essence. Any disadvantage they might suffer from loss of potential traffic is outweighed by advantages to supporting shipper; granted for pulpboard boxes and containers.—Id., p. 779.

Denied as follows: [Vols. 18, 19].—It is doubtful that applicant's proposed operations would be those of a contract carrier since it has expressed no intention to dedicate equipment and there appears to be nothing inherent in nature of the service to warrant conclusion that it could be performed satisfactorily only by a contract carrier. There is no serious complaint about existing common carrier services and protestants should readily be able to provide all service for which need is expressed.—Estate of E.L. Northcutt, Deceased, Petition Proceeding, 94 M.C.C. 585 (602)*.

Even though applicant for contract-carrier authority to transport gasoline and refined petroleum oil for Humble Oil and Refining Company from pipeline terminals at Belton and Camp Croft, S. C., to bulk plants and highway service stations throughout Georgia would dedicate equipment to the shipper's service, imprint its trailers with the usual "Esso-Happy Motoring" sign, and equip them with double bulkheads and bottom loading devices, there is no positive assertion by applicant and/or its supporting shipper that they have entered, or would enter, into a bilateral contract for performance of proposed service. In the absence of such a continuing contract or contracts, the proposal fails to meet one basic statutory requirement of contract carriage as defined in the act. Accordingly, insofar as contract carrier authority is sought, the application is denied.—Infinger Transp. Co., Inc., Extension, 96 M.C.C. 551 (552, 554).

Applicant attempted to meet its burden of showing that proposed undertaking is specialized and tailored to shipper's distinct need by a mere showing that it intends to dedicate equipment to shipper's exclusive use; however, protestants have demonstrated that without such dedication of equipment they are

able to meet shipper's distinct need as well as applicant. Satisfactory comparable service by common carriers cannot be disregarded; denied.—Interstate Distributing Co., 91 M.C.C. 36 (41)*.

Although applicant's proposed service in transportation of uncrated airplane assemblies would meet supporting shipper's expressed need for a service closely connected with operation of its assemby lines, by which it would be supplied with equipment individually designed to fit particular aircraft components, protestant's service is likewise a highly specialized one, which it holds out to the aircraft industry as a whole. In performing such service, protestant has become thoroughly experienced in handling articles similar to those involved, and its willingness and ability to serve the shipper is clearly established. Applicant has not shown that its service would be superior to that available from protestant or that it can better meet shipper's specialized needs. Prior denial affirmed.—J-T Transport Co., Inc., Extension, 91 M.C.C. 911 (915)*.

While denial could have some adverse effect on applicant, there is no evidence that it would suffer any loss of traffic in its permanently authorized operations, and its service for supporting shipper under temporary authority cannot be considered. And fact that grant would not adversely affect protestant since only potential traffic would be involved has no significant bearing on reasons for denial.—Id., p. 915.

Considering §209(b) criteria and application thereof pursuant to 368 US 81, proposed transportation of coal is not designed to meet any distinct need of shipper whose only "distinct" requirement is its desire for repetitive dump truck service under direct control of its weighmaster, which 3 protestants are willing to provide. Shipper has shown only preference for a particular carrier, rather than need for a locally domiciled contract carrier; denied.—Bauman Extension, 91 M.C.C. 289 (290-1)*.

Supporting shipper's transportation requirements are not so specialized that they can be met only by a contract carrier; as shipper has adequate motor service available, denial of application should have no adverse effect on it; nor would applicant be adversely affected since it is not now an interstate carrier and cannot enjoy the traffic; denied.—Sears, 89 M.C.C. 173 (177-8); similarly, protestants are collectively authorized to provide required transportation, have adequate terminal facilities and equipment, and have shown that they are able and willing to meet shippers' needs in all respects. Applicants have failed to demonstrate that they are better equipped to meet supporting shippers' requirements than are opposing common carriers. Denied.—Sparacino, 91 M.C.C. 349 (352-3)*.

Proposed service of one applicant involves only a repetitive t.l. movement between two of supporting shipper's plants on a fairly regular basis, and no need is shown for service different from that which protesting common carriers are able and willing to provide. In view of availability of service completely responsive to shipper's every indicated need, denial cannot adversely affect it, nor is there any reason to believe that denial would have any adverse effect on applicant. Weighing criteria of §209(b) in light of requirement of national transportation policy to foster sound economic conditions in transportation, application must be denied.—Moyer, 88 M.C.C. 767 (774-5). [But see dissent.]

Though some need exists for proposed transportation of cement, increase in number of commonly controlled contract carriers by grant of permits to five new corporate applicants, each seeking to serve same shipper from a different plant site, would be inconsistent with public interest; as evidence does not establish that maintenance of separate corporations is essential to proper fulfillment of that shipper's reasonable transportation needs, but shows rather that they can be as well met by a single carrier entity capable of providing coordinated service to the plants involved, denial of applications is without prejudice to filing of petition for reconsideration and substitution as applicant of existing contract carrier affiliate already serving shipper from another location.—Best Transport, Inc., 88 M.C.C. 147 (160-1)*.

In view of denial of authority for control of applicant, a new corporation, in common with seven existing carriers all controlled by the same interests, its application for permit as a

contract carrier of cement must also be denied; but since some need for proposed service is established, denial is without prejudice to substitution of an existing affiliate as applicant.—Schwerman Trucking Co. of Ala., Inc., 88 M.C.C. 495 (498,499).

Even if existence of some need for applicant's proposed service be assumed, there is no showing that either it or supporting shipper would be materially adversely affected by denial of application; shipper is using protestants' considerable motor and rail services, without complaint, from the four plants involved to points throughout the destination area, for both t.l. and l.t.l. shipments, and could not recall a single occasion on which it had attempted to use applicant's existing authority for combination loads of much of the involved traffic to points in approximately one-third of the territory.—Tractor Transport, Inc., 88 M.C.C. 117 (122).

Although there is some evidence which, if believed, would indicate that one of applicant partners has terminated his association with a partnership holding common carrier authority, no application has been filed seeking applicant's elimination from that partnership, and common control is therefore an issue; however, as applicants have failed to demonstrate that proposed operation will be consistent with public interest, questions of common control, dual operations, or applicant's fitness need not be considered.—Sparacino, 91 M.C.C. 349 (350, 353)*.

27. Fitness, in general.—[Vols. 10-12, 15, 17-19].—Although applicant has performed unauthorized transportation for a number of years, and such past actions cannot be condoned, the facts and circumstances indicate that applicant's acts were not done in defiance of the commission's rules and regulations, but rather through his ignorance of the law. Applicant is found fit to receive permit, but is admonished to perform no transportation until the permit is issued, and to abide strictly by the terms of that permit in the future.—Muzzillo, 94 M.C.C. 563 (566).

Although examiner found that financial fitness of a new corporation proposed to be substituted for individual applicant had not been established, the substitution should have been allowed. In support of his substitution motion applicant submitted a pro forma balance sheet of that company, which was incorporated shortly before date of continued hearing, and though such a financial statement is by nature merely tentative, it did show the approximate condition of a corporation not yet functioning as an operating entity. Regardless of whether $1,000 cash is enough to launch a transportation venture, individual applicant is in complete control of the new company and is ready to use his personal resources to provide any additional capital needed; considering his net worth of about $140,000, the corporation has adequate support and is financially fit.—Briggs, 92 M.C.C. 707 (708, 713-4).

Applicant is financially fit to conduct proposed operation when, though he has no bank account, he has on hand an unspecified sum of money; has property assets worth $88,000 and liabilities of only $3,000; and has maintained vehicles leased to shipper in compliance with safety requirements.—Dibble, 92 M.C.C. 610 (613); likewise, while applicant conducts a small operation and his physical and financial assets are limited, his net worth and net profit for 1960 indicate that he is financially fit and able to perform proposed service.—Trushenski, 91 M.C.C. 502 (504).

Although applicant's current liabilities exceeded its current assets at time of hearing, it may be found financially fit to conduct proposed operations when it has conducted interstate operations for a number of years and has demonstrated its ability, financially and otherwise, to serve its contracting shippers adequately. Principal expense of launching proposed service will be downpayment on additional tractors needed, which will be provided by a stockholder who has already invested substantial sums in applicant's operations; his continued support seems assured both to protect his prior investment and by the community of interest between applicant and members of its closely held corporate structure. Further, applicant's overall financial condition indicates that it can meet its current obligations.—Nationwide Carriers, Inc., Extension, 92 M.C.C. 1 (6)*.

While applicant is under common control with supporting shipper, it was formed as a separate corporate entity to render a transpor-

tation service supplanting private carriage operations which shipper had terminated, and the common control is not objectionable in the circumstances.—Garmarc Transp. Co., Inc., 91 M.C.C. 489 (490, 492)*.

That one of three shippers applicant seeks to serve is in position to control its operations does not preclude grant of permit, since a contract carrier is under no obligation to render impartial service to the public. It may serve only those with whom it has contracts and, since other two shippers it is authorized to serve are free to negotiate contracts satisfactory to each, control of applicant by a third contracting shipper cannot realistically be used to disadvantage of the others.—Redland Oil Co., Inc., 91 M.C.C. 771 (775-6).

Nor does applicant's challenge in the Federal Courts of the decision in 89 MCC 281, which found that certain operations in which applicant and its principal stockholder (one of the shippers it now seeks authority to serve) buy and sell sugar constituted unauthorized for-hire carriage, warrant conclusion that it is unwilling to operate as a for-hire carrier.—Id., pp. 772, 773, 775.

Applicant cannot be found fit to conduct proposed operations when persons in charge thereof (who formerly operated as a family partnership), particularly its president who testified in its behalf at hearing, have a long history of noncompliance with certificate and permit requirements of the act. In fall of 1959 they were admonished by the commission to cease their unauthorized transportation, and soon afterwards the principal partner (applicant's president) was fined for unlawful operation; that lesson was apparently unlearned, for 2 years later he was again found guilty of violations of the act. Applicant's management should not be rewarded for their past unlawful activities by a grant of operating authority. Additionally, there is nothing to show that applicant is financially fit. Application denied.—Haywood Trucking Co., Inc., 92 M.C.C. 544 (546-7).

Even if applicant's operations were bona fide contract carriage, its application must be denied on issue of fitness. Its financial status is admittedly precarious, and it appears that needed additional capitalization will not be forthcoming. Also, applicant's safety program is deficient in that it is based on correction rather than prevention and falls short of the responsibility which should be assumed by authorized carriers.—T.P. Trucking Co., Inc., Extension, 91 M.C.C. 764 (769-70).

29. Operation in connection with other business.—[Vols. 10-12, 14, 15, 18, 19].—Although applicant would continue transporting potatoes in interstate commerce, grant of contract carrier authority to haul malt beverages would not result in an integrated private and for-hire operation contrary to principles of 7 MCC 369 and 92 MCC 248. Applicant has no financial interest in potatoes it might transport, but would serve unaffiliated shippers who regularly deal in that commodity; such operation is for-hire carriage. Moreover, transportation of potatoes in natural state is exempt from economic regulation, and any authorized interstate carrier may engage in such activities without affecting its status as a for-hire carrier under the act.—Briggs, 92 M.C.C. 707 (716-7).

Since applicant's proposed operation as a contract carrier of sugar will be its principal business, and its performance of intrastate backhauls of grain in private carriage for its principal stockholder will be subordinate thereto, it does not appear that its combined operations will be conducted in a manner detrimental to public interest; decision in 7 MCC 369, distinguished. However, as a safeguard authority granted is conditioned to require that applicant conduct its for-hire operations separately from any private carriage in which it or its stockholders may engage.—Redland Oil Co., Inc., 91 M.C.C. 771 (776).

A substantial part of applicant's operations consists of transportation of wastepaper and old bags in private carriage from the Bronx to supporting shipper at Whippany, N.J., and its present and proposed for-hire transportation of pulpboard from Whippany to Long Island and of skids, pallets, and chocks used in such transportation, on return, constitute a very small part of its total transportation. Evidence as a whole indicates that primary purpose of application is to provide a backhaul for the private-carrier operations; moreover, even though the for-hire operations were incidental to its regular business, applicant would be in position to deprive protestant common carrier

of traffic it is authorized to transport; such conduct of both private and contract-carrier operations would be inconsistent with the national transportation policy; denied.—Derrico Co., Inc., 88 M.C.C. 17 (19).

While there is some indication that proposed one-way transportation of nepheline syenite, as an incident of applicant's regular business of producing coal and clay and to help defray expenses of private carriage in reverse direction, would be common rather than contract carriage, there is no important difference—so far as application of principle of 7 MCC 369 is concerned—except that the effect of a grant on for-hire carriers might be more pronounced in case of mixed private and common-carrier operations. Grant of application would not be consistent with public interest or consonant with the national transportation policy.—Ralph A. Veon, Inc., 88 M.C.C. 279 (280)*.

34. Extension of operations.—[Vols. 10-19]. —Authority granted applicant, already serving supporting shipper in transportation of clay products from 4 of 5 plants in Pennsylvania and Ohio to a limited destination territory, to provide similar service from all 5 plants to numerous additional States, with transportation of returned products and materials and supplies used in manufacture of clay products in reverse direction, when protestants collectively lack sufficient territorial and commodity authority for the complete service required. Authority for returned items is necessary because, after some shipments are unloaded and stored at jobsites, concealed damage is discovered, and frequently a surplus remains after construction is completed. Also, since sources of materials and supplies change, shipper needs service on a statewide basis so that it can purchase those items from the most advantageous sources.—George W. Kugler, Inc., Extension, 95 M.C.C. 288 (294, 297-8)*.

But authority sought to transport plastic pipe, parts, and fittings, which supporting shipper is negotiating to have produced for its account by a manufacturer at another point, is denied when one protestant now serves that manufacturer to six of the destination States sought, and shipper has not established with reasonable certainty that it will have a need for any transportation from that point.—Id., p. 297.

In proposed extension of service for one of its present contracting shippers, applicant would transport coke and pig iron in dump vehicles in a service closely integrated with shipper's distribution schedules requiring timed deliveries keyed to customers' foundry operations, thus tailored to shipper's distinct needs. Granted.—McFeeley Extension, 92 M.C.C. 769 (771, 772)*.

Grant of authority to applicant for transportation of paint oils from Cleveland, Ohio, to Houston, Tex., will merely permit it to extend its service for one of its present contracting shippers and will not harm protestant, which has handled none of involved traffic, whereas denial would deprive applicant of additional traffic from shipper it now serves and would prevent shipper from obtaining an efficient transportation service coordinated with applicant's other operations for it. However, as no need is shown for similar transportation from Houston to Cleveland, only one-way authority is granted.—Manfredi Motor Transit Co. Extension, 92 M.C.C. 471 (474)*.

In addition to extension authority granted in prior report, transportation of explosives from points in Nebraska to contracting shipper's plants at Ishpeming, Mich., and Virginia, Minn., is needed when subsequent to hearing shipper purchased from the Government and stored at points in that State a large quantity of such materials which must be transported by applicant, since there are no rail facilities at the magazines. However, as no motor service is needed outbound from the plants to Nebraska, only one-way authority is granted.—H. Messick, Inc., Extension, 92 M.C.C. 743 (744-5)*.

Proposed operation is designed merely to extend applicant's service territorially for one of its present shippers and is clearly tailored to meet that shipper's distinct need for specialized split-delivery service n liquid acids and chemicals to points sought; existing carriers will not be adversely affected, whereas denial would be detrimental to both applicant and shipper, particularly to latter in view of changing nature of its requirements due to increasing consignee demands for less-than-tankload shipments; grant of application con-

stitutes a logical extension of applicant's present authority to transport liquid chemicals from considered origin area.—Harold Waggoner & Co. Contract Carrier Extension, 89 M.C.C. 1 (3-4).

Shipper which applicant has been serving as a contract carrier for years requires extension of service to its new warehouse facility at Hillside, N.J., and plans to expand its selling operations in New York commercial zone. Advantage to shipper of a flexible and complete service by applicant will more than offset any disadvantage to existing carriers through loss of potential traffic; extension granted for the additional destinations.—Connell Transport Co. Extension, 91 M.C.C. 113 (121, 123).

In proposed extension of service to additional territory, applicants would continue serving only the same two shippers they are now serving under continuing contracts. As only two protestants have been handling the shippers' traffic, and none holds authority to provide complete service to all of considered points, existing carriers are unable to meet supporting shippers' transportation needs as well as could applicants; thus, denial would adversely affect these shippers, which require direct, single-line service to various destinations, while a grant would not adversely affect opposing carriers. Granted to destinations named.—Rohrbaugh and Livelsberger Extension, 91 M.C.C. 618 (621)*.

Applicant presently has contracts with seven shippers, and grant of authority sought would permit it to serve an additional shipper; however, since its outstanding contracts at least approach the maximum number permitted a contract carrier, it cannot be considered to have made a significant showing under first criteria of §209(b). As to the nature of proposed service, applicant failed to show anything distinctive or specialized about it that differs essentially from that offered by common carriers, or that it is better able to meet the shipper's needs than are protestants; also, evidence with respect to any need for service to points other than those protestants serve is too vague and speculative to warrant consideration. Further, denial of the application would have no adverse effect on applicant, which does not presently handle the traffic, nor upon supporting shipper, as existing carriers can meet all its demonstrated needs; grant of authority could adversely affect existing carriers through diversion of some of their traffic; and no change in the character of shipper's requirements is shown. Denied.—Oyler Motor Transit Co., Inc., Extension, 94 M.C.C. 638 (641-2).

Regulations of the Commission

32 FR 16084, Nov. 22, 1967: Guide to Restrictions and Descriptions in Motor Carrier Operating Rights, appended to report in 106 MCC 1 (Appendix II), published for information.

NOTE: For Republication and Redesignation of Regulations, see 32 FR 20003, Dec. 20, 1967.

33 FR 2711, Feb. 8, 1968, Part 1041 [former Part 265a, formerly Part 165a]: Interpretation—Certificates and Permits, a new §1041.13 Truckload lot restrictions, added, effective March 15, 1968.

33 FR 4467, March 13, 1968, Part 1041: Interpretation—Certificates and Permits, effective date of order adding §1041.13 (33 FR 2711) postponed pending determination of petitions for reconsideration.

33 FR 5780, May 2, 1968, Part 1041: Interpretation—Certificates and Permits, effective date of order adding §1041.13 (33 FR 2711) postponed to June 3, 1968.

33 FR 7629, May 23, 1968, Part 1041: Interpretation—Certificates and Permits, effective date of order adding §1041.13 (33 FR 2711) fixed as June, 19, 1968.

Section 209. (a) (4), (5) Traffic moving from, to, and within Alaska; "grandfather" provisions.—[Unchanged. See vol. 19, p. 15758.]

Section 209. (b) [*§309(b) U.S.C.*] **Application for permit; form and contents; issuance of permit; terms and conditions.**—[Unchanged. See vol. 18, p. 14494.]

Historical Note

The commission recommends, in view of the prohibitions in 28 USC §1001, that §209(b) be amended so as to eliminate the mandatory oath provision therein, and that such requirement be made discretionary with the commission.—Annual Report, 1964, p. 72.

Notes of Decisions

Volume 10—p. 8057; Volume 11—p. 9468; Volume 12—p. 10410; Volumes 13—p. 11082; Volume 14—p. 11603; Volume 15—p. 12213; Volume 16—p. 12863; Volume 17—p. 13561; Volume 18—p. 14496; Volume 19—p. 15759.

2. Construction and interpretation.—[Vol. 19].—The five criteria which Congress directed the commission to consider may not be treated as though they were factors in an algebraic equation which might be solved mechanically.—Baggett Transp. Co., Inc. v. United States, 231 F. Supp. 905 (907)*.

In determining whether proposed contract carrier service is consistent with the public interest and the national transportation policy, the commission must evaluate the five §209(b) criteria. While distinct need is not mentioned in the criteria, evaluation of "the nature of the service proposed" naturally involves the question of need therefor; however, the term "distinct need" in §203(a)(15) is not the same as, and may not properly be used interchangeably with, determination as to need under §209(b) pursuant to the criteria. When the commission made an unnecessary finding of no distinct need under §203(a)(15) which clearly was carried forward to its §209(b) evaluation and adopted as the primary reason for its negative finding, such unnecessary finding may well have provided prejudicial coloration for the §209(b) evaluation. The commission did not properly employ the statutory procedures, and did not appropriately evaluate requisite criteria; order denying the permit is set aside, and case remanded.—Midwest Truck Lines, Ltd. v. United States, 269 F. Supp. 554 (560-1, 567)*.

While the commission found that contract-carrier applicant (plaintiff) would serve only one shipper, the brevity of its discussion of the first criterion of §209(b)—as to number of shippers—obscures the weight given that factor. Therefore, all parties are reminded that one of the militating factors in the 1957 contract carrier legislation was the desire to avoid the result of the Supreme Court's decision, 350US 409, which seemingly allowed a carrier to qualify as a contract carrier for an unlimited number of shippers. As the commission stated in 91 MCC 953, the first criterion means that an applicant's case is stronger r weaker in proportion to the number of its contracting shippers; and where an applicant seeks to serve only one shipper, no stronger showing under that test could be made.—Meat Packers Exp., Inc. v. United States, 244 F. Supp. 642 (648-9)*.

As to the second criterion—"nature of the service proposed'—evidence of record shows that applicant would provide the immediate, fast service in transportation of fresh and frozen meats and meat by-products that its contracting shipper requires; it would also meet shipper's need for split delivery or drop-off service, while common carriers would make a flat charge for each such stop. The commission should not disregard evidence of a saving to shipper of as much as $50 on a trip having four drop offs, through elimination of "drop-off" charges if the permit is granted, in its evaluation of the effect of a denial on applicant's supporting shipper; mere cost-cutting or profit-shaving need not be considered perhaps, but evidence of efficient operation must be heeded. Nor can it be said that benefit shipper would derive from its advertising on applicant's trailers would be "inconsequential" in the highly competitive meat-packing industry.—Id., pp. 649-50.

Also, record does not support the commission's conclusion that grant of plaintiff's application would have an adverse effect on competing common carriers; protesting carriers would not lose considered westbound tonnage because they have not heretofore

carried it; nor would they suffer competitively insofar as eastbound or return traffic is concerned, since plaintiff's proposed eastbound backhaul is limited to exempt commodities whereas protestants carry both regulated and exempt commodities on their eastbound hauls. It is only in an "unusual case" that new contract authority would adversely affect protestants not presently hauling the traffic; and, while such a case might include a situation where added backhaul competition has the adverse effect, it is not shown by the evidence of record. Order denying plaintiff's application set aside, and case remanded to the commission for further proceedings consistent with the court's opinion.—Id., pp. 650-2.

If the commission's action in denying plaintiffs' permit application on ground that the proposed operation was common carriage for which no public need wasshown were to be construed as a denial of contract carrier authority, it would have to be reversed for failure to apply standards prescribed by §209(b). In determining that the proposed service would not meet any distinct needs of supporting shippers, the commission gave no recognition to distinction between the questions (1) whether supporting shippers presented evidence that they have distinct needs, and (2) whether proposed operation is designed to meet those distinct needs; that distinction is crucial in light of philosophy expressed in the J-T case (368 US 81) that under the contract carrier statutes a shipper is entitled to have his distinct needs met.—Eddleman v. United States, 229 F. Supp. 231 (237, Note 2; 239)*.

The commission did not specifically find that supporting shippers had not shown a distinct need, and its conclusion that they had not shown service of existing carriers to be inadequate is not determinative: the J-T case made clear that the commission must consider the criteria of §209(b) without preferring any one of the five to others; it may not seize on one factor and ignore the rest. Thus, a showing of convenience to the shipper would at least be proper, though not a controlling factor, in determining an application for contract carrier authority; when placed in issue by evidence adduced at the hearing, it is a consideration to be weighed as an element of the fourth criterion—the effect of a denial on applicant and/or its shipper.—Id., pp. 239-40.

That services requested by supporting shippers are of type commonly performed by common carriers, thus tending to show that they meet no distinct shipper needs, cannot be controlling; otherwise many contract carriers would be driven out of business for inability to meet the test of performing service not provided by common carriers. And in determining whether supporting shippers have shown a distinct need, a finding that protestants, given adequate notice to enable them to schedule departures sufficiently in advance, can meet shippers' delivery-time requirements as well or nearly so as applicants is insufficiently supported unless it is clear that the commission has considered whether notice given adequately in advance to meet needs of existing carriers is also adequately short notice to meet needs of the supporting shippers. —Id., p. 240.

The context of §209(b) supports the view that "the nature of the service proposed," as a criterion for determining whether permit should be granted, relates to shipper's distinct need for transportation, as distinguished from nontransportation, services. Before setting forth the criteria to be considered, the statute says that a permit may be issued if the proposed operation is consistent with public interest and the national transportation policy; that policy is confined to transportation services. Further, the commission's jurisdiction under Part II is limited by §202(a) to regulation of transportation by motor carriers and the procurement of, and provision of facilities for, such transportation. Nothing in legislative history of the 1957 amendments of §§ 203(a)(15) and 209(b) indicates that Congress meant to give contract carriers the advantages which would ensue from furnishing nontransportation services. Therefore, in considering supporting shippers' distinct needs, the commission must first determine that those needs pertain to transportation services.—National Trailer Convoy, Inc. v. United States, 227 F. Supp. 730 (733-4)*.

Criteria inapplicable to applications for forwarder permit, see Frank P. Dow Co. case, §410(c), n. 2.

As the commission interpreta the criteria of

§209(b), criterion (1)—number of shippers served—means that applicant's case is stronger or weaker in proportion to number of its contract shippers; if number already served approaches the maximum permitted, its showing can be accorded little weight, whereas the strongest showing would be a proposal to serve but one shipper. Under criterion (2)—nature of service proposed—the controlling consideration is whether shippers have a distinct need for a service more specialized than that ordinarily provided by common carriers, and protestants must show that they can satisfy that need, not merely that they can provide reasonably adequate service.—Hoyt, 92 M.C.C. 189 (192-3); Sears, 92 M.C.C. 602 (606-7).

The question under criterion (3)—effect of grant on protestants' services—is whether protestants are willing and able to meet shipper's reasonable requirements. Criterion (4)—effect of denial on applicant or its shipper—is apparently intended to direct the commission's attention to possibilities of economic hardship. And criterion (5)—changing character of shipper's requirements—is satisfied by showing that shipper experiences unforeseeable peaks in its particular business and requires a service of the type proposed.—Hoyt case, pp. 193-4; Sears case, pp. 607-8.

Since it is a cardinal rule of statutory construction that language should not be regarded as mere surplusage if it can be given some reasonable interpretation consistent with the basic purpose of the statute when read as a whole, it would be improper to assume that the first criterion of §209(b)—as to number of shippers—is a mere reiteration of one element of the contract carrier definition in §203(a)(15). That criterion means that applicant's case is stronger or weaker in proportion to the number of its contracting shippers; if the number already served approaches the maximum permissible, applicant, even though qualifying as a contract carrier, cannot be considered to have made any significant showing under that test; but where applicant serves only one shipper and seeks to serve no other, no stronger showing could be made.—Bursch Extension, 91 M.C.C. 953 (956)*.

And the second test of §209(b), as to nature of service proposed, does not mean merely that applicant must qualify as a contract carrier within the §203(a)(15) definition. While an intention to assign vehicles to exclusive use of a shipper, without a showing that such dedication serves a distinctive need of the shipper or that the service proposed is specialized in character, is sufficient under that definition, such a meager showing would point toward a denial under the second criterion of §209(b). The standard is whether the proposed service meets a "distinct need" of the shipper for a different or more select or more specialized service (368 US 81).—Id., p. 957.

Under the third criterion, the commission may properly consider whether protestants are willing and able to meet the reasonable transportation requirements of the shippers involved. If protestants are actually providing such service, diversion of traffic by applicant would be a factor indicating that issuance of permit would not be consistent with public interest; but if protestants have not handled the traffic in question, a grant of authority would affect them adversely only in the unusual case.—Id., p. 957.

In connection with the fourth criterion—effect of denial on applicant and or shipper—it should be noted that the criteria of §209(b) are not mutually exclusive. If applicant proposes a highly distinctive service within the second criterion, denial would no doubt adversely affect the supporting shipper in most instances; however, the fourth test appears to be designed primarily to direct the commission's attention to evidence and to possibilities of economic hardship.—Id., p. 958.

10. Applications, in general; parties; notice.—[Vols. 10-15, 17-19].—Although pallets and certain other commodities described as plant supplies by supporting shipper are actually plant equipment described as plant supplies by supporting shipper are actually plant equipment and therefore beyond scope of application for authority to transport frozen foods and plant supplies, authority to provide service thereon should not be withheld in face of a showing of distinct need for transportation of plant supplies and equipment; furthermore, application as published is sufficient notice to the public that plant equipment might be involved in the authority sought.—Jacobs Extension, 96 M.C.C. 87 (92)*.

In granting contract-carrier application, commodity description is changed from "radioactive waste" to "irradiated fuel elements" to conform to the more accurate technical description, and destination of Arco, Idaho, is changed to Scoville to reflect the true location of consignee, the National Reactor Test Station. Because such changes may prejudice parties not receiving notice thereof, corrected notice will be published in Federal Register and 30 days allowed for petitions by such persons prior to issuance of permit.—Dealers Transit, Inc., Extension, 88 M.C.C. 375 (380).

Even though two applications involve similar commodities and are supported by same shipper, grant of one and denial of the other is not inconsistent; shipper's transportation requirements from its Rockford plant follow no preestablished or predictable pattern and thus differ substantially from its requirements for service between its Baltimore and Lynchburg plants, where the traffic moves in t.l. quantities at a fairly steady rate; facts presented by the two applications relative to shipper's specialized needs differ materially and compel opposite conclusions.—Moyer, 88 M.C.C. 767 (780).

It is well established that a contract carrier has standing to contest an application for motor carrier operating authority, and the commission has on occasion protected contract-carrier protestant's interests, see 71 MCC 367. This has been done only in unusual circumstances as when the protestant was already serving supporting shipper under contract, or when its authority had been obtained with that shipper's support. Under normal conditions, the commission has granted applications, at least in common carrier applications, if the alternative would be to impel a shipper to contract against its will with a particular contract carrier. That principle can be equally applicable to contract carrier proceeding where protestant has never served supporting shipper, and the latter is fully satisfied with applicant's services. Commission would not be justified in compelling shipper to contract with protestant unwillingly.—Muzzillo, 94 M.C.C. 563 (565-6).

The standing of common carriers to oppose contract carrier applications cannot be seriously questioned.—H. Messick, Inc., Extension, 91 M.C.C. 585 (588)*; the commission has always recognized the right of existing carriers to appear in opposition to applications for both common- and contract-carrier authorities. Also, §205(e) requires that interested parties be given an opportunity to be heard, and provisions of §209(b) contemplate appearance of opposing carriers; moreover, the Supreme Court in 368 US 81 recognized the right of common carriers to appear in opposition to a contract carrier application.—Moyer, 88 M.C.C. 767 (772).

Primary purpose of requirement of Rule 1.241(c)(1) of Rules of Practice that an applicant be given 10 days' notice of an opposing party's intent to file protest is to enable applicant to prepare its case more effectively by having definite knowledge of identity of its opponents prior to hearing. Although examiner refused to permit one protestant to participate as such on first day of hearing, because of its failure to give applicant timely notice, applicant became aware at that time of protestant's interest in the proceeding and cannot claim to have been surprised by its attempt to participate at continued hearing some 2-1/2 months later, during which time it gave applicant the required 10 days' notice. Under the circumstances, protestant complied with intent of Rule 1.241(c)(1) and was properly permitted to participate at the continued hearing; nor has applicant indicated any manner in which it was prejudiced thereby.—Briggs, 92 M.C.C. 707 (713).

Though only common carrier holding two-way authority to serve plant of supporting shipper did not oppose application of contract carrier serving the plant in outbound movements for return-load authority, there is no indication of any improper agreement between that carrier and applicant or the shipper.—Chemtrans, Inc., Extension, 88 M.C.C. 238 (241).

Although extension application seeks permit as a contract carrier, certificate is granted in view of conversion of applicant's outstanding authority to common-carrier since filing thereof.—Baggett Transp. Co. Extension, 88 M.C.C. 3 (9)*.

See also the Goodman Motor Transport Co. case, §203(a)(15), n. 1.

Though application seeks permit as a contract carrier of cement, certificate is granted, following decision in 86 MCC 447 that, regardless of form of authority sought, only common-carrier authority should be granted applicants seeking to participate in cement traffic that has recently become available to the motor carrier industry.—Baggett Bulk Transport, Inc., 88 M.C.C. 403 (412); Chemical Express Extension, 89 M.C.C. 452 (454-5); while that decision was concerned only with needs of the cement industry in a number of eastern States, the same considerations apply in considered Mississippi Valley and southwestern areas.—Ruan Transp. Corp. of Kansas, 88 M.C.C. 65 (67)*; Ruan Transport Corp. Extension, 88 M.C.C. 123 (125); and same considerations apply to proposed contract carriage of cement in the South. While the matter might be viewed somewhat differently were it one of first impression, the division feels constrained to accept conclusions reached by entire commission in that proceeding.—Southern Bulk Haulers, Inc., 88 M.C.C. 299 (305-6).

Although application of a new corporation for permit as a contract carrier of cement must be denied because of denial of authority for control of applicant in common with seven existing carriers, some need for proposed service is established, and denial is therefore without prejudice to substitution of an existing affiliate as applicant; since all seven affiliates now hold, or have been conditionally granted, certificates for transportation of cement, selection of the substitute applicant is left to the controlling parties.—Schwerman Trucking Co. of Ala., Inc., 88 M.C.C. 495 (498, 499).

18. Burden of proof.—[Vols. 10-13, 16-19].—The rule of the J-T case (368 US 81) means, among other things, that the burden of proving inadequacy of existing services is not to be placed on applicant, and that proceedings involving contract carrier authority differ from those involving certification of common carrier authority, wherein a showing of convenience to the shipper is not enough; such a consideration would at least be proper, though not a controlling factor, in determining an application for contract carrier permit.—Eddleman v. United States, 229 F. Supp. 231 (240)*.

Although prior report denied permit to one of instant applicants without prejudice to substitution of a specific authorized contract carrier controlled by same interests, designation of latter was inappropriate because it bears the trade name of one of supporting shipper's competitors; as no need is shown for service to that shipper by five carriers, each from a different plant site, and still another carrier under same control already serves shipper from another location, denial of applications is without prejudice to petition for reconsideration and substitution of that affiliate as applicant.—Best Transport, Inc., 88 M.C.C. 147 (161)*.

Applicant for a "grandfather" permit has the burden of establishing his right thereto; in other words, he must prove substantial bona fide operations on and continuously since the statutory date. Since it had that burden, complainant carrier was required to prove the allegations of its petition for reopening the "grandfather" proceeding and modification of its permit. Accordingly, the commission decided the basic issue and determined that carrier had not met its burden of proof when it found that the evidence "falls short" of substantiating the petition; sustained.—Zuzich Truck Line, Inc. v. United States, 224 F. Supp. 457 (465)*.

The commission properly denied considered applications for contract carrier authority because, following denial of its motion at the hearing for an indefinite postponement thereof, applicant failed to prosecute the applications after being afforded ample opportunity to do so. Plaintiff (applicant) did not identify any of its alleged witnesses, their residences, when or where they would be available, or what testimony they would give; there was no showing that it had requested the commission, or the hearing examiner, to issue subpenas for witnesses in accordance with rule 56 of the commission's Rules of Practice, nor was it shown that depositions could not be taken of any material witnesses, as authorized by rule 57 thereof; sustained.—Burnham Trucking Co. v. United States, 216 F. Supp. 561 (563-4)*.

The burden of proof required to show that a proposed contract carrier service for specified shippers is consistent with public interest and the national transportation policy is lighter than that of a common carrier proposing to serve the public at large; existing carriers will not be so ready to oppose the contract carrier's application, and if they do they will be required to show not only that they are able to render a reasonably adequate service, but that they are as well situated as the applicant to meet whatever distinct transportation needs the supporting shipper may have.—Connell Transport Co., Inc., 95 M.C.C. 312 (319).

Proof required of automobile haulers authorized to file petitions in lieu of applications for modification of their outstanding authorities to enable them to continue participating, by use of substituted rail service, in traffic formerly handled in all-motor movements, outlined.—National Auto. Transporters Assn.—Declaratory Order, 91 M.C.C. 395 (415).

Where alternative proposals are presented pursuant to formal application for common carrier authority, applicant has burden to delineate operations clearly enough so that each alternative may be considered on a reasonable basis. Although applicant seeking to convert its operation to common carriage requested alternative extensions of its contract-carrier authority, it has not met that burden; no specific plan of contract carrier operation is set forth, there is no evidence of "distinct" need of the shipper nor expressed desire for exclusive assignment of vehicles; alternative proposal is therefore not considered.—Goodman Motor Transport Co., Extension, 91 M.C.C. 206 (209-10).

Once applicant has demonstrated that its proposed service is tailored to shipper's distinct need, the burden shifts to protestants to show their ability and willingness to meet shipper's specialized need. Protesting carriers have not shown that they are able to provide shipper with type and quantum of transportation service required; granted.—Garmarc Transp. Co., Inc., 91 M.C.C. 489 (492)*.

Where applicant does not propose to assign vehicles to shipper's exclusive use, it must, in order to meet the criteria of §209(b), demonstrate that its proposed undertaking is specialized and tailored to shipper's distinct need; protestants then may present evidence to show they have ability and willingness to meet that specialized need; and if that is done, the burden then shifts to applicant to show that it is better equipped to meet shipper's needs than protestants. Protesting carriers established that they can provide a service completely responsive to shipper's described needs; denied.—K. W. McKee, Inc., Extension, 89 M.C.C. 777 (783-4).

Neither applicant nor shipper can be charged with burden of showing protestant's inability or unwillingness to meet distinct need shown. Applicant first must demonstrate that proposed undertaking is specialized and tailored to shipper's distinct need, whereupon protestants may show they have ability and willingness to meet that specialized need; if that is done, burden shifts to applicant to demonstrate it is better equipped to do so. (368 US 81.) Protestant has adequately met its burden of proof when it has established its experience in transporting aircraft parts and its willingness and ability to serve supporting shippers, whereas applicant has not established that it can better meet shippers' indicated needs. Denied.—J-T Transport Co., Inc., Extension, 91 M.C.C. 507 (510, 511)*.

In absence of a showing of shipper's "distinct need," proposal to assign equipment is not alone sufficient to require finding that proposed operation will be consistent with public interest and the national transportation policy. The question is whether dedication of equipment alone will result in service better designed to meet shipper's needs than the same service provided by common carriers, absent only the dedication of equipment. Protestants have conclusively demonstrated that without such dedication of equipment they are able to meet shipper's distinct need equally as well as can applicant; denied.—Interstate Distributing Co., 91 M.C.C. 36 (40, 41)*.

20. Evidence; admissibility.—[Vols. 10-19].—Since plaintiffs' application sought issuance of permit for contract carrier operation, they could reasonably be required only to present evidence relevant to standards set forth in §209(b); and though their evidence may not have fulfilled those requirements, it was de-

signed to establish propriety of a contract carrier grant. In treating their application as one for common carrier authority in substance, though not in form, and in denying it for failure to establish public need for their service, the commission effectually denied plaintiffs opportunity to know by what standards they would be judged.—Eddleman v. United States, 229 F. Supp. 231 (236-8)*.

In considering the §209(b) criteria, the commission must depend largely on evidence introduced by an applicant through its supporting shipper witness regarding shipper's need for motor service, its transportation problems, and the like. Applicant has not offered such evidence except in the most general terms; though shipper states that it needs proposed transportation of lumber in area involved, it has given little indication of where it obtains or might obtain lumber, or where in the 10-State area it has present or even potential customers, so as to justify a broad grant of nonradial authority; and its complaints concerning services of common carriers are not supported by any factual data. Therefore, even if applicant could be found fit to conduct proposed operation, application must be denied on the merits.—Haywood Trucking Co., Inc., 92 M.C.C. 544 (547).

Evidence offered to show that, under its "grandfather" permit, applicant continuously transported naptha, toluene, toluol, xylene, xylol, and petroleum-based alcohol from prior to 1935 until spring of 1961, when it was advised that transportation of those commodities was not within its "grandfather" authority for "refined and crude oils," was properly excluded by the joint board; such evidence was not germane either to an interpretation of its permit, which is not ambiguous, or to the question of whether proposed service would be consistent with the public interest and the national transportation policy, which are the principal issues in instant proceeding.—Russell Transfer Co., Inc., 95 M.C.C. 412 (415).

See also C & E Trucking Corp. case, §212(a), n. 30.

Testimony by protestant's operating witness, offered to refute supporting shipper's complaints about protestant's service, was based on information not within witness's personal knowledge but obtained by him during course of the hearing in a telephone conversation with other employees of protestant, and was clearly hearsay. That evidence was not admissible under exception to the hearsay rule covering information obtained in normal course of business; principle underlying that exception is that information acquired as result of established, routine office procedures may be presumed to be accurate and thus admissible even though the person having firsthand knowledge of the pertinent facts is not available for cross-examination. Though the information in question was apparently from records kept by protestant in normal course of business, it did not come to the witness in that way, but had to be sought from other employees while hearing was in progress. Such testimony was improperly admitted over applicant's objection and is not considered.—Dibble, 92 M.C.C. 610 (612).

Statements in affidavit submitted with protestant's reply to exceptions concerning events which occurred since the hearing have not been subject to cross-examination by applicant and are not considered.—K. W. McKee, Inc., Extension, 89 M.C.C. 777 (779, 780).

Although applicant contends that it serves only four shippers, the commission's records, of which official notice is taken, disclose that it had contracts with seven shippers at the time of the hearing.—Oyler Motor Transit Co., Inc., Extension, 94 M.C.C. 638 (639).

Examiner properly took official notice of common-carrier authority of existing carrier which is not a party and did not oppose contract-carrier application.—Chemtrans, Inc., Extension.—88 M.C.C. 238 (241).

Though there is little evidence of changing character of supporting shipper's requirements, evidence of record is sufficient for the commission to take notice of practices and operations in the explosives industry concerning advent of new products and innovations in marketing and distribution.—H. Messick, Inc., Extension, 89 M.C.C. 209 (216)*.

25. Hearing, generally.—[Vol. 18].—See also Zuzich Truck Line, Inc. v. United States, §204(c), n. 55

A full hearing is one in which ample opportunity is afforded all parties to establish the propriety or impropriety, from standpoint of

justice and law, of the step asked to be taken. [261 US 184.] In holding that because of nature of their proposed operations plaintiffs' application for contract carrier permit was one in substance, though not in form, for common carrier authority, and in denying it on ground that plaintiffs had not established a public need for their service, the commission effectively denied them the full and fair hearing on the merits of their application required by §205. This purported preference for substance rather than form effectually denied plaintiffs opportunity to know by what standards they were to be judged, and the commission's failure to afford them a full and fair hearing on the "step asked to be taken" must be regarded as clear error. Order set aside and case remanded for further proceedings consistent with the court's views.—Eddleman v. United States, 229 F. Supp. 231 (236-8)*.

In denying plaintiff's contract-carrier application, the commission did not properly evaluate criteria set forth in §209(b), due perhaps to a confusing of "distinct need" under §203(a)(15) with the determinations to be made under §209(b). The applicant would serve only one contracting shipper, would provide immediate, fast service on fresh and frozen meats and meat by-products that the shipper requires (including split delivery or drop-off service shown to be needed), and would station trailers at shipper's plant to be immediately available. Also, the commission's conclusion that grant of the permit would adversely affect protesting common carriers is not supported by the evidence. The statutory law was not properly applied, and effect of the commission's decision is to place on applicant a burden of proof greater than was required. The commission should review the case and, in its determination of "consistent with the public interest," give such weight to the §209(b) criteria as they are entitled. Order set aside, and case remanded for further proceedings consistent with the court's opinion.—Meat Packers Exp., Inc. v. United States, 244 F. Supp. 642 (648-52)*.

Renewal in exceptions of motion for continuance of hearing on application, overruled; prior denial of continuance was within examiner's discretion, and no sufficient cause is shown for now granting a continuance.—Estate of E.L. Northcutt, Deceased, Petition Proceeding, 94 M.C.C. 585 (586)*.

Regulations of the Commission

31 FR 6058, Apr. 20, 1966, Part 7: List of Forms, Part II, Interstate Commerce Act, §7.78 OP-OR-9, Application for Motor Carrier Certificate or Permit, Form OP-OR-9 prescribed and approved for use on and after May 20, 1966. Form BMC 78 discontinued as of May 20, 1966.

Section 210. [§*310 U.S.C.*] Dual operations.—[Unchanged. See vol. 11, p. 9469.]

Amendments, see footnotes, vol. 11, p. 9469.

Notes of Decisions

Volume 10—p. 8963; Volume 11—p. 9469; Volume 12—p. 10411; Volume 13—p. 11083; Volume 14—p. 11604; Volume 15—p. 12214; Volume 16—p. 12864; Volume 17—p. 13562; Volume 18—p. 14499; Volume 19—p. 15766.

1. Construction and interpretation.—[Vols. 10-16, 18, 19].—Purpose of the prohibition of dual operations in §210 is to preclude discriminatory practices which might arise if a motor carrier or carriers under common control were permitted to hold simultaneously a certificate and a permit. Possibility of engaging in such objectionable practices is not limited to situations where the contract and common carrier services are competitive as between identical points: the statute forbids dual authority "within the same territory," and determination of whether such operations are within the same territory must be made with

particular regard to the status of the shipper to be served and its transportation requirements.—Petroleum Transit Co., Inc., 92 M.C.C. 414 (417).

3. Discrimination resulting from dual operation.—[Vols. 10-19].—Grant of certificate to applicant which also served as a contract carrier to a limited degree did not violate §210. The commission gave the dual operation situation full consideration, imposed conditions, and reserved the right to impose additional conditions to protect the public interest and guard against discrimination; §210 permits the commission, for good cause shown, to authorize dual operations, and the appropriate finding, backed by evidentiary support, was made.—Sloan's Moving & Storage Co. v. United States, 208 F. Supp. 567 (573)*.

Applicant granted permit as an individual for transportation of frozen foods and plant equipment and supplies is sole stockholder of a corporation holding certificate for transportation in same territory of commodities which could be plant supplies or equipment, thus creating possibility of objectionable dual operations. As applicant is willing to surrender the corporate certificate for cancellation, issuance of permit is conditioned accordingly.—Jacobs Extension, 96 M.C.C. 87 (89, 93)*.

Various aspects of common carrier applicant's organization relating to its being commonly controlled with certain contract carriers, and to its dual operations, were considered and approved in 88 MCC 147 and 91 MCC 82; thus, there being no reason to disturb those previous findings, dual operations are approved in granting extension authority.—Mitchell Transport, Inc., Extnsion, 94 M.C.C. 450 (452, 453).

Dual operation by applicant was approved when its general-commodity certificate for a 47-mile route between Wadena and Alexandria, Minn., was granted, and in view of small size of those and intermediate and off-route points and fact that service thereto consists of delivery of traffic received from originating carriers, grant of extension authority for contract carriage of prefabricated buildings, etc., from Wadena need not be conditioned on surrender of that certificate. Opportunity for discrimination on that route and in the area can be completely eliminated by restricting the certificate against service for applicant's contracting shippers and against transportation of commodities authorized in the extension permit.—Polman Extension—Montana, 92 M.C.C. 114 (115-6)*.

Since applicant railroad subsidiary is already performing the same service as a contract carrier of motor vehicles for same shipper from Oakland, Calif., as it proposes to perform from Fremont following relocation of shipper's plant, and the present service is not restricted to service auxiliary to or supplemental of rail service, grant of application would not change the character of its dual operations as previously approved; modification of its certificates to eliminate authority for transportation of new trucks and new automobiles is therefore not required.—Pacific Motor Trucking Co. Extension, 91 M.C.C. 61 (62, 64-5).

Removal of equipment restriction from applicant's common-carrier authority for citrus products from Florida, and continued holding by its chairman of the board of contract carrier authority for shirts and carbonated beverages from Atlanta to points in same States, would not aggravate dual-operating situation previously approved.—Clay Hyder Trucking Extension, 89 M.C.C. 757 (763).

Holding by railroad subsidiary of common-carrier authority for substituted motor service auxiliary to train service of parent railroad and of contract-carrier authority for transportation of new automobiles, trucks, and buses between specified points in California and Nevada having been found unobjectionable in 77 MCC 605 and 84 MCC 575, the limited additional common-carrier authority granted for substituted service on express shipments between Truckee, Calif., and Reno, Nev., will not lead to the kind of abuses contemplated by §210.—Pacific Motor Trucking Co. Extension, 89 M.C.C. 81 (87); similar finding is warranted as to proposed truckaway service from Phoenix and Tucson to Hayden, Ariz. Nevertheless, certificate for truckaway service is conditioned on express reservation of the commission's right to impose further limitations to preclude any possibility of objectionable dual operations.—Id., 89 M.C.C. 645 (649, 650).

Extension authority granted applicant as a

common carrier of passengers, express, and newspapers will not be competitive with applicant's present authority to transport class D poisons for Atomic Energy Commission as a contract carrier, limited to transportation for United States Government. Since the two authorities are unrelated, there is no opportunity for the discriminatory practices which §210 is designed to prevent. However, jurisdiction is reserved to reconsider this issue at a future date.—Continental Tennessee Lines, Inc., Extension, 95 M.C.C. 728 (731)*.

Since commodities to be transported under common carrier authority granted (which excludes two commodities embraced in one of applicant's permit) differ substantially from those applicant is authorized to handle in his permits, his holding of the certificate and permits will not afford any opportunity for discriminating practices within §210; approved.—Major Extension, 94 M.C.C. 652 (656-7)*.

As proposed operation involves the transportation of sand, in bulk, it will not be competitive with operations of applicant's sole stockholder under his permit authorizing transportation of merchandise dealt in by persons who operate chain-retail and mail-order department stores in the same area. Straight van-type trucks are used to perform service under this permit, and they cannot be used for proposed bulk transportation. Holding by applicant of certificate applied for and by its stockholder of his permit, therefore, would be consistent with the public interest and the national transportation policy; however, approval should not be construed as a waiver of commission's right to reconsider this issue at a future date should the situation change.—J-E-M Transp. Co., Inc., Extension, 94 M.C.C. 573 (577)*.

Although applicant holds certain common-carrier authority, any operation thereunder would be for shippers other than the one supporting contract-carrier application, in movement of different commodities between different points than those involved; thus there appears little likelihood that grant of permit would lead to the discriminatory practices §210 is designed to prevent. Dual operation approved, but jurisdiction reserved to reconsider that issue should the situation change at any future time.—Nationwide Carriers, Inc., Extension, 92 M.C.C. 1 (6-7)*.

Applicant seeking extension of its common-carrier authority for package delivery service for manufacturers, wholesalers, and distributors also performs a similar service for retail stores as a contract carrier in part of same territory, and though shippers would prepay freight charges, thereby eliminating privity between applicant and receiving retail stores in its wholesale operations, it could alter that arrangement at any time, and even in absence of privity of contract with applicant some consignees might still be able to control shipments moving in the wholesale service; therefore, to prevent opportunity for discrimination, the common-carrier authority granted is restricted against applicant's serving any persons with whom it has contracts for service under its permits, and jurisdiction is reserved to impose any further limitations that may prove necessary to that end.—United Parcel Service, Inc., Extension, 89 M.C.C. 709 (713, 746)*.

Applicant's holding of common-carrier authority granted for liquid chemicals will not be inconsistent with its existing contract-carrier authority for dry cement in same territory, subject to future imposition of any conditions that may be found necessary.—Southern Tank Lines, Inc., Extension, 88 M.C.C. 127 (141)*.

Although applicant's stockholder and board chairman holds contract carrier authority in same territory applicant would serve as a common carrier, the proposed operation would not be competitive therewith in view of the different commodities transported and different class of shippers served; however, approval of resulting dual operations should not be construed as waiving the commission's right to reconsider the issue at any future date should the situation change so as to bring about discrimination or preference.—Refrigerated Transport Co., Inc., Extension, 88 M.C.C. 71 (74-5).

Since applicant's contract-carrier authority for specific commodities, and contract-carrier authority of another subsidiary of same railroad to transport diesel fuel for the railroad, are for territories remote from extension routes granted applicant for substituted

freight service as a common carrier, possibilities of discrimination are very slight; dual operations approved.—Pennsylvania Truck Lines, Inc.—Key Points Restriction, 88 M.C.C. 505 (519).

Grant of common carrier authority for cement will not result in objectionable dual operation because of applicant's affiliation with 10 contract carriers holding authority for other commodities and serving different shippers; and though applicant seeks authority from Union Bridge, Md., to Maryland points also served by an affiliated contract carrier of cement, only a minor portion of that traffic will move in interstate commerce and resulting dual operation may properly be approved, since opportunity for unlawful practices will be minimal. But authority sought from two Pennsylvania origins to Maryland would present opportunity for discriminatory practices; instead of denying that part of application, the parties are allowed a specified period to eliminate such dual operations.—Best Transport, Inc., 91 M.C.C. 82 (85-6)*.

Where commodity authorized to be transported by applicant as a common carrier is different from those transported by its affiliates under their permits and the operations will not be conducted for same shippers, there appears to be no opportunity for any of the discriminatory or undesirable practices against which §210 is aimed; dual operation approved.—Schwerman Trucking Co. of Ala., Inc., 89 M.C.C. 628 (630-1)*.

Although 2 of 3 affiliated applicants now granted certificates for transportation of mortar and or cement, as well as their parent company, each hold permits for other commodities, the common and contract carrier operations will not be conducted for the same shippers; opportunity is thus lacking for undesirable practices against which §210 is aimed. But as two other affiliates hold permits to transport cement or mortar for certain of same shippers served by applicants, though from different origins, resulting dual operations cannot be approved in view of opportunities presented for discriminatory practices and rate preferences. As grant of certificates to those affiliates in pending conversion proceedings will eliminate the objectionable dual operations, issuance of certificates to applicants is withheld pending determination of those proceedings.—Schwerman Trucking Co. of N.Y., Inc., Extension, 88 M.C.C. 661 (664-5).

Although carrier which will jointly control applicant granted certificate for transportation of cement holds permits as contract carrier of cement, their operations will not be competitive in view of the different territories and shippers involved; resulting dual operations may therefore be approved, especially as certificated authority granted acquiring carrier in 86 MCC 447 is conditioned on prior conversion of its outstanding permits, in which event no dual operations will exist.—Southern Bulk Haulers, Inc., 88 M.C.C. 299 (307).

See also Johnstown Motor Freight, Inc., case, §207(a), n. 25 *Fitness*.

Holding of contract-carrier rights authorized to be purchased by a carrier partnership and corporate carrier it controls, and of common-carrier rights by a partnership composed of two of the vendee partners, will be consistent with public interest in view of difference in nature of commodities transported and industries served.—Dyer-O'Hare Hauling Co.—Purchase—Merchants Transfer, 87 M.C.C. 768 (773).

Since purpose of §210 is to prevent the discriminatory practices described in 45 MCC 1, the circumstance that the common and contract carriers do not serve the same shippers and consignees is not controlling. The fact that opportunity would be afforded for discriminatory practices, even though carriers have no intention of engaging in them, is sufficient to warrant disapproval of the dual operations.—Lease Plan International Corp.—Control—National, 92 M.C.C. 173 (184)*; but dual operations resulting from common control of a common carrier and three contract carriers would be consistent with public interest and the national transportation policy when, owing to nature of the commodities transported and the shippers and receivers served under the respective rights, they would not be competitive.—Id., p. 180.

Objectionable dual operations contemplated by §210 include those within same territory as well as over same routes. Deceased vendor's contract carrier operations, upon their

acquisition by his widow as sole legatee, would be managed by their son who controls two common carriers, one of packinghouse products and groceries between points not too remote from extensive territory authorized by vendor's "chain grocery" rights, and the other of cranberries, fruits and vegetables, canned goods, and sugar in territory overlapping those rights and vendor's rights for fruits and vegetables. Therefore, the possibility of discrimination is sufficient to preclude approval of the holding of the certificates and permits, under common control.—McNichol —Purchase—McNichol, 90 M.C.C. 134 (137-8)*.

On reconsideration, based on certain revised terms of proposed transaction, while proposed cancellation of certain commodity rights of the common carriers controlled by the son would almost entirely eliminate the opportunity of affording a competitive common-carrier service, one common carrier's authority for "paper" embraces paper articles which might reasonably be expected to be stocked by chain food business concerns or industrial cafeterias served under the contract-carrier authority. Approval of proposed purchase and control through management by vendee's son, therefore, is conditioned on cancellation also of the affiliated common carrier's "paper" authority.—Id., 90 M.C.C. 429 (431)*.

Since vendee's contract-carrier authority for fresh meats overlaps common-carrier authority it seeks to purchase, and it does not expect to have further use for that permit owing to contract cancellation, purchase approval is conditioned on cancellation of that permit to remove an undesirable dual operation possibility; however, dual operations resulting under its remaining permit for liquified carbon dioxide and the purchase rights will not be objectionable.—Emsley Truck Rentals, Inc.—Purchase—Foodway Exp., Inc., 90 M.C.C. 414 (415-6).

Congress, by enacting §210, clearly intended to preclude any opportunity for motor carriers to discriminate. Issuance of certificate authorizing applicant to serve numerous shippers, many of which it can serve under its outstanding permit as an armored carrier, resulting in many instances in transportation of the same commodities in the same territory, would not be consistent with §210 in view of the clear opportunities for discriminatory practices and rate preferences; such opportunities extend to virtually all the contract-carrier authority held by applicant and its two affiliates. The most practical solution is that adopted in 92 MCC 336, wherein one of applicant's affiliates was required, if it elected to receive the common-carrier authority granted, to notify the commission within 90 days of service of the order that it had filed application for conversion of its outstanding permits to certificates, failing which its certificate application would stand denied. Not only must applicant meet this condition, but certificate may not be issued it unless both its affiliates elect or agree to similar action.—Southern Couriers, Inc., Extension, 94 M.C.C. 111 (117).

In as much as contract carrier's proposed service for two new shippers is found to be common carriage, and commodities involved are the same as, and areas to be served overlap, those authorized by its permit, grant of certificate would afford opportunities for discriminatory practices; while it is not implied that applicant would so operate, as a matter of general policy the door must be closed to even the possibility of such practices. Application denied.—E. W. Bohren Transport, Inc., Extension, 89 M.C.C. 266 (267-8).

Issuance of certificates to applicant armored-car operators for transportation of commercial papers, film, and related articles, thus authorizing them to serve numerous shippers they can now serve under outstanding permits, in many instances covering same commodities in same territory, would be inconsistent with §210 in view of resulting clear opportunities for discriminatory practices and rate preferences, which extend to virtually all their contract-carrier authority because of nature of the service provided; and, due to character of the commodities and service involved, imposition of restrictions or modification of the permits does not afford a practical solution. As denial of their applications because of the objectionable dual operations would work substantial hardship on applicants and a more immediate hardship on their supporting shippers, their application pro-

ceedings are held open for 90 days to permit them to seek conversion of their outstanding permits to certificates to bring their operations into conformity with §210.—Armored Carrier Corp. Extension, 92 M.C.C. 336 (364-5).

The clear intent of Congress in enacting §210 was to eliminate possibility of a carrier engaging in prejudical or discriminatory practices, and there is clear opportunity for such practices where carrier is in position to serve same shipper both as a common and a contract carrier. Since applicant can now serve supporting shipper as a common carrier of pipe from Livonia, Mich., and Dayton, Ohio, to all points in Ohio, Michigan, Indiana, and Illinois, and certain points in Kentucky, and as a contract carrier of concrete slabs and beams from Livonia to a northwestern Illinois area, grant of extension permit for contract carriage of slabs and beams for that shipper or its affiliates from same 2 origins to all points in 4 of those 5 States would seriously aggravate its dual operations.—Telischak Trucking, Inc., Extension, 92 M.C.C. 553 (555-6).

Prior approval of applicant's present limited dual operations is not controlling; record in the prior case does not clearly show that shipper at that time shipped any commodity by contract carriage which applicant could handle as a common carrier, or that it manufactured concrete pipe as well as slabs and beams; more complete record in instant proceeding makes obvious the opportunity for discriminatory practices. Though applicant might never engage in such practices, the possibility of doing so would be unwarrantably enhanced; denied.—Id., p. 556.

Although applicant's proposed common-carrier operation as a small package delivery service in Kansas City area would meet certain transportation needs of shippers not presently being met by affiliated contract carrier of department-store merchandise to points in same area, it does not follow that resulting dual operations would be consistent with public interest. Section 210 was enacted to prevent discrimination between carriers as well as between shippers; some of shippers applicant proposes to serve are also served by the commonly controlled contract carrier, with resulting possibilities for favored treatment of those which might use both services; to approve dual operations in such a situation would accord the dual operator a favored position vis-a-vis competitors not similarly situated. Application denied.—merchants Delivery Co., 92 M.C.C. 195 (218).

Since applicant's proposed transportation of canned goods and sugar from Philadelphia to 8 Pennsylvania counties, limited to specialized service for a few shippers and consignees, is found to be contract carriage, and it already holds a certificate for transportation of same commodities from Baltimore to 2 destinations in same counties, permit must be denied because of the opportunity for discriminatory practices arising from ability to offer both kinds of service to points in same destination territory.—Beatty Motor Exp., Inc., Extension, 89 M.C.C. 190 (194).

That supporting shipper proposes to concentrate its distribution of petroleum products to involved destination States at Guntersville, Ala., and applicant and its carrier affiliates are not authorized to originate or terminate such shipments at points in Alabama is not determinative of the issue of dual operations. Applicant proposes to transport for that shipper as a contract carrier to States served by it and its affiliates as common carriers; as shipper is a nationwide distributor of petroleum products, it is not unreasonable to assume that it frequently has shipments to or from points in area now served by applicant and its affiliates; nor is it shown that they are not now engaged in providing that service for it. Opportunities for discriminatory practices against which §210 is directed are therefore present to such degree that before permit may be granted applicant must establish by convincing evidence that resultant dual operation for that shipper will be consistent with public interest and the national transportation policy. Applicant has failed to meet that burden; denied.—Petroleum Transit Co., Inc., 92 M.C.C. 414 (417).

Since all but one of extension operations proposed by applicant contract carrier are found to constitute common carriage, grant of authority sought would permit objectionable dual operations, with applicant transporting similar commodities between same points as both a common and a contract carrier. As applicant has shown no need for additional

common-carrier services, applications are denied except as to the service found to be contract carriage.—Connell Transport Co. Extension, 91 M.C.C. 113 (123).

5. Relinquishment of dual operation.—[Vols. 10-15, 18, 19].—See also Bowser and Campbell purchase case, §5(2), n. 48 *Dual operations.*

Grant of common-carrier extension authority for cement to applicant already holding contract carrier authority for that commodity and affiliated with another such carrier raises problem of dual operations, which may not be approved in view of resulting opportunities for discriminatory practices and rate preferences; accordingly, applicant should notify the commission within 90 days whether it elects to convert its existing contract carrier operations and those of its affiliate to common carriage or to forego the common-carrier authority granted.—Chemical Express Extension, 89 M.C.C. 452 (455).

Section 210a. [*§310a U.S.C.*] Temporary authority.—[Unchanged. See vol. 18, p. 14501.]

Amendments, see footnote, vol. 11, p. 9472; historical notes, vol. 11, p. 9472, vol. 12, p. 10412, vol. 18, p. 14502.

Note.—Section 102 of the Second War Powers Act, March 27, 1942, amended par. (a) by striking out the words "but for not more than an aggregate of one hundred and eighty days", but by provision of the act of June 29, 1946, it was provided (§1501) that such amendment should expire March 31, 1947.

Historical Note

In view of creation of the Department of Transportation by Public Law 89-670, effective April 1, 1967 (32 FR 5453), the Commission and the Department of Transportation entered into a Memorandum of Agreement on April 3, 1967 (32 FR 5744, Apr. 8, 1967) for the purpose of accomplishing continuity, liaison, coordination, and support with respect to transferring from ICC to DOT personnel and functions concerned with (1) motor carrier safety matters; (2) certain pending ICC proceedings; (3) pending court cases transferred to DOT; (4) housekeeping operations for ICC personnel transferred; (5) access to, and provision of, reports and other documents, and (6) liaison and coordination between ICC and DOT.

Notes of Decisions

Volume 11—p. 9472; Volume 12—p. 10412; Volume 13—p. 11084; Volume 15—p. 12215; Volume 16—p. 12864; Volume 17—p. 13563; Volume 18—p. 14502; Volume 19—p. 15771.

1. Construction and interpretation.—[Vols. 11-13, 15-19].—The commission's order under §210a(b) authorizing vendee to take temporary control of vendor, pending determination of their §5 application, is permissive only and in effect grants temporary exemption from prohibitions of §5. If vendee never assumes authorized temporary control, or if it controls vendor other than "upon the terms and conditions set forth in the agreement filed with the application," it has not violated any express command of the commission. While doubtless the commission expects a carrier to use such permission in accordance with its agreement, so as to enable controlled carrier to resume independent operation if approval under §5 is ultimately denied, the court does not read the bland language of the order so that such expectations become commands of the commission, especially when the commission was careful to make it clear that it did not consider private disagreements of the parties to be its concern.—McFaddin Exp., Inc., v. Adley Corp., 346 F. 2d 424 (426)*.

The commission's orders granting temporary authority to intervening defendant cannot be set aside by the court when a review of the entire record shows that (1) the orders are adequately sustained by findings which are amply supported by the evidence and (2) that the commission acted within the scope of its authority and without abuse of its discretion; sustained.—Cooper Transfer Co., Inc. v. United States, 281 F. Supp. 917 (918)*.

The statute empowers the commission, in its discretion and without hearings or other proceedings, to grant temporary authority where there is a showing of immediate and

urgent need for such service to destinations having no carrier service capable of meeting that need. The commission considered an application, supported by numerous letters from shippers and receivers of freight, which it concluded, in its discretion and without a hearing, sustained a finding that an immediate and urgent need for the service existed and there was no carrier service capable of meeting that need. The application and supporting letters constituted a "showing" upon which the commission could make a discretionary finding which it had legal authority to make; and there is no showing that the commission acted arbitrarily, capriciously, or abused its discretion. Complaint dismissed.—Merchants Delivery Co. v. United States, 265 F. Supp. 669 (672-3)*.

The statute makes the grant or denial of temporary authority to provide motor carrier service discretionary with the commission. The court has no power to issue such an operating authority. The commission's order denying plaintiff temporary authority, sustained.—Great Western Packers Exp., Inc. v. United States, 246 F. Supp. 151 (155)*.

In action to set aside the commission's orders, which vacated finance board's grant of temporary authority under §210a(b) for acquiring carrier in proposed control transaction to operate the properties of acquired carrier pending determination of their §5 application for permanent control authority, examination of the entire record does not disclose an absence of a rational basis for the conclusions reached by the commission, which is further fortified by use of statutory language in both orders in question; complaint dismissed.—Three "I" Truck Line, Inc. v. I. C. C., 246 F. Supp. 410 (412)*.

Test of the validity of the commission's action in granting temporary motor-carrier authority is not whether it is supported by substantial evidence of a formal nature, as is the case where an order granting or denying permanent authority is under review, but merely whether the commission had legal authority to act as it did. The statute expressly empowers the commission, in its discretion and without hearings or other proceedings, to grant temporary authority where there is a showing of immediate and urgent need for such service to destinations having no carrier service capable of meeting that need. Information submitted to the commission, and which it was free to consider and weigh in light of its specialized knowledge and experience, clearly establishes that it had statutory power to grant the temporary contract-carrier authority in question; and nothing indicates that the commission's action was arbitrary, capricious, or an abuse of its discretion. Complaint dismissed.—Union Cartage Co. v. United States, 244 F. Supp. 1005 (1007-8)*.

The purpose of §210a(b), as clearly expressed therein, is to preserve the usefulness of motor carrier properties in performance of service to the public. Mismanagement and financial difficulties could dissipate the equipment, resources, and business of a motor carrier before the §5 petition for its acquisition could be acted upon, and the statute must be construed in such a way as to effect that basic purpose. Although §210a(b) does not expressly authorize a grant of temporary control where the acquisition is through ownership of the acquired carrier's stock, it does not appear that a corporation whose stock is purchased is thereby in less need of interim protection than the carrier whose assets are purchased directly; nothing has been presented which would indicate such an understanding by Congress. Control of a floundering carrier's assets is transferred as effectively through sale of its stock as through sale of physical properties, and the choice of method is unrelated to the congressional purpose of §210a(b).—North American Van Lines, Inc. v. United States, 240 F. Supp. 464 (466-7).

In effecting the statutory purpose, the commission has treated stock and asset acquisition alike for many years, and while the construction placed on §210a(b) by such an independent administrative agency as the commission is not controlling, it deserves great weight. To hold that the commission is not authorized to grant temporary control where the proposed acquisition is by purchase of stock as distinguished from purchase of the physical assets would contravene the basic purpose of §210a(b), as declared therein.—Id., p. 467.

Temporary operation as evidence of need for permanent, see §207(a), n. 25 *Temporary*

authority.

A grant of temporary authority under §210a(a) is neither a certificate nor a permit. "Certificate" is defined in §203(a)(5) as "a certificate of public convenience and necessity issued under this part to common carriers by motor vehicle"; temporary authority cannot be considered as falling within that category, as it is granted, not on proof of public convenience and necessity, but on a showing in informal proceedings of an "immediate and urgent need" for a particular service, and §210a(a) specifically provides that grant of temporary authority creates no presumption that corresponding permanent authority will be granted.—Wright, 92 M.C.C. 403 (406).

Provisions of §210a(b) are clearly applicable to all transactions proposing some form of acquisition, unification, or control of motor carrier properties. The commission's authority to grant temporary authority with respect to interstate operations conducted solely within a State pending disposition of an application for permanent authority under §5 or §212(b) has been neither eliminated nor diminished by the amendments to §206(a). Had Congress intended to single out one-State carriers, and exclude them from the benefits of this section, or terminate their interstate operations under former second proviso if temporary authority were granted to, and exercised by, a multi-State carrier, there would be some evidence of such intention; but there is no such evidence.—T.I.M.E. Freight, Inc.—Merger, 97 M.C.C. 310 (320-1)*.

See also Mason & Dixon control case, §5(2), n. 110 *Temporary authority.*

A grant of temporary authority under §210a(b) does not require exercise or continuance of such authority, that being at the option of the parties within terms of their contractual relationship.—C & H Transp. Co., Inc.—Purchase—Ferguson Trucking, 93 M.C.C. 741 (745, Note)*.

A carrier which is temporarily leasing operating authority under §210a(b) may combine the leased rights with its existing permanent authority to provide a through service under the temporary unification, and may properly advertise the availability of the unified service.—Pilot Freight Carriers, Inc.—Purchase—Bison Fast Freight, 90 M.C.C. 709 (712).

See also Burlington Truck Lines case, §207(a), n. 25 *Labor difficulties.*

Regulations of the Commission

30 FR 5836, Apr. 27, 1965, Part 240: Temporary Authority Applications Under Section 210a(a) of the Interstate Commerce Act, entire new Part 240 (§§240.1 - 240.6, inclusive) added, effective July 1, 1965.

31 FR 5474, April 6, 1966: General Temporary Order No. 1-§210a(a), on application to any Regional Director or District Supervisor, temporary authority for not more than 30 days, required because of railroad strikes, granted, effective on date of order.

31 FR 5800, Apr. 14, 1966, General Temporary Order No. 1-§210a(a), dated Apr. 1, 1966, vacated and set aside, normal rail transportation having been resumed, effective on date of order.

31 FR 9528, July 13, 1966, General Temporary Order No. 2, Motor Carrier Services Due To The Cessation Of Normal Air Transportation Occasioned By Work Stoppages, temporary authority granted, effective July 8, 1966, to expire first midnight after air service reinstituted.

31 FR 9528, July 13, 1966, General Temporary Order No. 2, Motor Carrier Service Due To The Cessation of Normal Air Transportation Occasioned By Work Stoppage, emergency 30-day temporary authority granted, effective July 8, 1966, to expire first midnight after air service reinstituted.

31 FR 12661, Sept. 27, 1966, General Temporary Order No. 2, Motor Carrier Service Due To The Cessation of Normal Air Transportation Occasioned By Work Stoppages, vacates and sets aside General Temporary Order No. 2, entered in FR July 8, 1966, effective on date of order.

32 FR 5956, April 13, 1967: General Temporary Order No. 3, Motor transportation of property; grant of temporary authority authorized because of trucking industry labor dispute, effective on date of order.

32 FR 8945, June 22, 1967: General Temporary Order No. 3 (32 FR 5956), vacated and set aside, normal motor transportation having resumed.

32 FR 10538, July 18, 1967: General Temporary Order No. 4, Motor transportation of passengers and property, grant of temporary authority authorized because of nationwide cessation of railroad service, due to strike, effective on date of order.

32 FR 11099, July 29, 1967: General Temporary Order No. 4 vacated and set aside, normal rail transportation having been resumed, effective on date of order.

Section 211. [*311(a) U.S.C.*] **Motor transportation brokers—(a) License required.** —[Unchanged. See vol. 10, p. 8067.]

Notes of Decisions

Volume 10—p. 8067; Volume 11—p. 9473.

5. Employment of carriers not authorized to operate.—[Vols. 10, 11].—See Greyhound Corp. v. Consolidated Term. & Travel Bureau, §212(a), n. 35.

Section 211. (b) [*§311 (b) U.S.C.*] **Issuance of license; brokers in operation prior to enactment of section.**—[Unchanged. See vol. 11, p. 9473.]

Amendments, see footnote, vol. 11, p. 9473, historical note, v. 14, p. 11605.

Historical Note

The commission recommends that part II be amended to authorize the commission, after opportunity for hearing, to deny certificates, permits, licenses, or other operating authority when, in application proceedings, perjury, or subornation of perjury, has been committed before the commission, and the commission finds that the director, officer, or person convicted of such crime has such an interest in the business that the conviction affects the fitness of the carrier or broker.—Annual Report, 1962, p. 207.

Notes of Decisions

Volume 10—p. 8068; Volume 11—p. 9474; Volume 12—p. 10413; Volume 13—p. 11084; Volume 14—p. 11605; Volume 15—p. 12215; Volume 16—p. 12865; Volume 17—p. 13564; Volume 18—p. 14503; Volume 19—p. 15772.

2. Construction and interpretation.—Legislative history of §211 reveals that the primary purpose of Congress in regulating brokers is to protect carriers and the public against dishonest and financially unstable middlemen in the industry; however, it does not follow that that is the sole objective. The statutory standard set forth in §211 requires a finding of fitness of applicant and, also, that proposed operation is consistent with the public interest. As "public interest" aspect of the statutory standard encompasses a broader range of deliberation than does the "fitness" aspect, it seems clear that Congress intended, by requiring consideration of the "public interest" in §211(b), that commission evaluation of broker applications not be limited to the issue of applicant's fitness.—Carla Ticket Service, Inc., 94 M.C.C. 579 (580-1)*.

While it is not clear from the legislative history whether the "public interest" aspect of the statutory standard requires consideration of relevant competitive factors in judging broker applications, Congress was cognizant of the fact that commission proceedings are usually adversary in nature, entailing development of evidence relating to competitive factors among others. Moreover, Congress has not seen fit to change this standard or otherwise suggest that the commission's prior interpretation of §211(b) is in error; and since the commission has interpreted the statute to include competition as a factor to be considered, with the continued acquiescence of Congress, it seems clear that Congress did not intend that the commission be precluded from giving any consideration to competition in broker application cases.—Id., p. 581.

3. Applications, generally; parties; notice.—[Vols. 11-15, 17, 18].—

Fitness of applicant: Joint board's finding that applicant for license as a broker of passenger service may not be found fit when he is the sole stockholder of an interstate motor common carrier of passengers is amply supported by the evidence; application denied, in absence of exceptions to the board's recommendation.—Anderson, 89 M.C.C. 786 (786, 787).

Applicant's past violations, consisting of arranging tours similar to proposed operations without obtaining authority from the commission, were not the result of a willful design on its part to evade regulatory jurisdiction, but appear to be the result of misapprehension of the applicable law and regulations; also, it filed instant application when informed that its operations were unlawful. Applicant has sufficiently demonstrated that it will operate lawfully in the future, and that it is fit financially and otherwise to perform proposed service.—Carla Ticket Service, Inc., 94 M.C.C. 579 (582)*; for similar reasons, applicant, a retired teacher, is found fit to perform proposed service. However, applicant is admonished that he must maintain strict broker relationship with the public and the carriers he deals with; that he cannot be employed in any capacity by a carrier; and that his operations should be conducted in conformity with requirements set forth in 54 MCC 291.—Ross, 94 M.C.C. 508 (510, 511-13)*.

Applicant is not unfit to operate as a passenger broker by reason of past operations of its officers; their organization of tours was undertaken openly, without intent to evade regulation, and without intention of profiting thereby; such operations did not require license and were not unlawful.—Millenburg Tours, Inc., 89 M.C.C. 703 (706-7).

4. Public interest, generally.—[Vols. 10-19].—Consistent with legislative history of §211, broker applicants must show that their service will contribute something of value or benefit to carriers or the public; and consideration of existing broker service is relevant, for creation of needless duplicative services would neither advance primary purpose of §211 nor benefit anyone. Past popular acceptance of, and participation in, excursions arranged by applicant indicate that the public will support proposed service in arranging round-trip tours from Buffalo, N.Y., area to Canadian ports of entry on Niagara River. Though protestants are establishing newly authorized services at Buffalo, there is no showing that persons supporting instant application would use their service; moreover, that populous area should provide sufficient business to justify an additional brokerage service. Proposed operation will serve a useful public purpose and benefit carriers by generating new traffic; granted.—Carla Ticket Service, Inc., 94 M.C.C. 579 (581-2)*.

While broker status has been rejected as effective opposition in a motor carrier application proceeding, a licensed broker is a valid protestant to a license application; existing broker services have consistently been considered in determination of such applications. Although brokers are licensed primarily for protection of the public against unscrupulous or dishonest purveyors of transportation, rather than from effects of ruinous competition between carriers, brokers in arranging all-expense tours perform a beneficial economic service. They also invest substantially in facilities and personnel, and if there were no protection of that investment the very conditions which Congress sought to avert by the regulation of brokers might arise.—Id., 91 M.C.C. 721 (722-3)*.

The board's conclusion that protestant Greyhound's allegations of unwarranted competition from proposed round-trip tour service are not entitled to consideration, in determining whether license should issue, was based on decision in 92 MCC 17; however, the commission recently determined in that proceeding on reconsideration, 94 MCC 644, that relevant operations of a motor carrier protestant are entitled to consideration and should be examined in determining whether or not a proposed brokerage service will be consistent with public interest and the national transportation policy. Reexamining the instant proceeding in light of the latter report, protestant has offered no specific evidence sustaining its allegation that proposed service will adversely affect its total operations. On the other hand, proposed service will serve a useful public purpose and will benefit both the traveling public and the car-

riers furnishing the transportation; it will be consistent with the public interest; granted.—Ross, 94 M.C.C. 508 (509-10)*.

An applicant need not establish inadequacy of existing broker service in order to obtain a license as a passenger broker. The essential requirements of proof are that the proposed operations will benefit the traveling public; that applicant has a reasonable prospect of generating traffic for authorized motor carriers of passengers; and that his character is such that he will not defraud the public or the carriers whose services he utilizes, or engage in discriminatory practices. Applicant has fully met this standard of proof; granted.—Weidner Travel Bureau, Inc., 92 M.C.C. 17 (19)*; however, as record indicates that applicant has served as an agent of protestant, Greyhound, it is admonished that its broker operations should be conducted in conformity with requirements set forth in the Tauk Tours case, 54 MCC 291.—Id., 94 M.C.C. 644 (648)*.

Need is shown for applicant's proposed brokerage of round-trip all-expense tours, restricted to youth groups; applicant's officials are experienced in operation of youth group tours, the public has shown good response to its promotional activities, and tour services offered by existing brokers are not tailored to meet specific requirements of youth groups. Proposed operations will serve a useful public purpose and be beneficial to carriers furnishing the transportation; services of protesting brokers are not shown to have so preempted the populous area involved as to be adversely affected by additional competition of character authorized. Granted.—All-American Excursions, Inc., 91 M.C.C. 67 (69,70).

Applicant is not disqualified to receive license as broker of passenger tours by fact that its officers would initially participate in proposed operations only on part-time basis; it is not unusual for authority to be granted applicants seeking to conduct such operations as part-time activity; tour operations tend to be seasonal and tours of type proposed lend themselves to weekends and other times outside customary working hours.—Millenburg Tours, Inc., 89 M.C.C. 703 (706).

While grant of authority to applicant may increase existing competition for tour business, promise inherent in ability of applicant's officers to organize new groups and bring additional charter business to passenger carriers in area outweighs such considerations; in addition, they have an established clientele which would probably not undertake tours with protestants or other passenger carriers.—Id., p. 705.

In contrast to the basic purpose underlying motor carrier regulation, i.e., protection of the public from effects of ruinous carrier competition, brokers, who have no comparable investment in property or equipment, are licensed primarily for purpose of protecting the traveling and shipping public against unscrupulous or dishonest purveyors of transportation.—Auch Inter-Borough Transit Co. Extension, 88 M.C.C. 455 (459).

5. License covering part of operations sought.—[Vols. 10, 12, 14, 18].—While applicant seeks general authority to arrange passenger tours, its evidence in respect to arranging transportation for persons other than youth groups is vague and indefinite. Authority granted, therefore, is restricted to youth groups.—All-American Excursions, Inc., 91 M.C.C. 67 (69, 70).

24. When license necessary, in general.—[Vols. 10-19].—Organization of tour groups does not require a license unless undertaken for compensation. Applicant's officers had no intention of profiting from tours they organized, and fact that they inadvertently profited from one tour and did not demonstrate validity of their nonprofit status by refunding any surplus to the passengers, or setting it aside to defray costs of tours resulting in loss, did not automatically change their status to that of a broker requiring a license; intent to obtain compensation would be manifest only if their operations were consistently and substantially profitable and they did nothing to change the situation.—Millenburg Tours, Inc., 89 M.C.C. 703 (707).

25. Utilizing holder of effective certificate, supplying authorized transportation.—[Vols. 15-18].—On reconsideration, in view of decision in 54 MCC 291, affirmed 143 F. Supp. 689 and 352 US 1020, approval of passenger brokerage application (which is supported by a carrier authorized only to engage in charter

operations) would place applicant in a position, when providing its services in conjunction with authorized charter services, to compete with protesting regular-route passenger carrier which may perform "special operations" over its various regular routes or segments thereof. In performing charter service a carrier may not sell individual tickets for a particular trip or tour, whereas rendering of special-operations service contemplates that carrier will assemble passengers through sale of individual tickets covering a trip or tour arranged by it; however, an authorized broker may sell tickets on an individual basis and then arrange with a charter operator to perform the actual transportation service; thus, intervention of a broker permits the charter carrier to enjoy certain traffic which it must otherwise forego.—Weidner Travel Bureau, Inc., 94 M.C.C. 644 (646, 647)*.

Although protestant is a special-operations carrier and applicant is a broker supported by a charter operator, the competitive situation is substantially similar to that in 88 MCC 455 wherein it was held that where a protestant broker was joined by a motor carrier authorized to engage in charter operations, their combined economic interest is entitled to consideration in application proceeding in which motor carrier special operations are proposed. Therefore, relevant operations of protestant are entitled to consideration and should be examined in determining whether proposed brokerage service will be consistent with the public interest and the national transportation policy.—Id., p. 647.

26. Transfer or sale of license.—[Vols. 10-12, 15, 17].—See Shamrock Van Lines purchase case, §5(2), n. 5.

30. Conditions imposed; scope of operations.—[Vols. 17-19].—Authority granted for operation at Baltimore, Md., as a broker of passenger transportation in charter operations from five Maryland counties to points in seven States and the District of Columbia; however, in view of its intention to sell individual tickets to tour groups, applicant is admonished to comply with requirements of 54 MCC 291, and 63 MCC 493, when it purchases charter transportation for groups.—Millenburg Tours, Inc., 89 M.C.C. 703 (707).

Although there is no evidence that applicant, as a former passenger solicitor for Greyhound Corp., intends to discriminate in its choice of carriers, it is admonished to retain strict broker relationship with public and carriers with which it deals; neither it nor its officers should be employed in any capacity by such carriers. License granted as broker of round trip all-expense charter tours beginning and ending at Philadelphia, restricted to youth groups (accompanied by supervisors) when engaged in educational and recreational pursuits, with further admonition that its operations be conducted in conformity with requirements of 54 MCC 291.—All-American Excursions, Inc., 91 M.C.C. 67 (70).

Section 211. (c) [*§311(c) U.S.C.*] Rules and regulations; bond or other security required.—[Unchanged. See vol. 10, p. 8072.]

Notes of Decisions

Volume 10—p. 8072.

Section 211. (d) [*§311(d) U.S.C.*] Inspection of accounts, records, etc.—[Unchanged. See vol. 10, p. 8073.]

Section 212. (a) [*§312(a) U.S.C.*] Suspension, change, revocation and transfer of certificates, permits, and licenses.—[Unchanged. See vol. 10, p. 8074, vol. 11, p. 9476.]

Amendments, see footnotes, vol 10, p. 8074, historical note, vol. 14, p. 11607.

Historical Note

The commission renews its recommendation that §212(a) be amended so as: (1) to make motor carrier operating authorities subject to suspension, change, or revocation for willful failure to comply with any commission rule or regulation lawfully promulgated; (2) to make the revocation procedure therein conform with procedure provided in §410(f) by eliminating "willfully" in first proviso thereof; and (3) to provide that the commission may, upon reasonable notice, suspend motor carrier operating authorities for failure to comply with insurance regulations issued pursuant to §215.—Annual Report, 1962, p. 205; renewed, Annual Report, 1963, p. 20; Annual Report, 1964, p. 77-8.

Also that part II be amended to authorize the commission, after opportunity for hearing, to revoke or suspend certificates, permits, licenses, or other operating authority, or to order divestiture of interest when such operating authority, or facility or instrumentality operated or employed in connection therewith, has been used to commit, or to aid and abet in commission of, a felony, and the commission finds that the director, officer, or person convicted of such crime has such an interest in the business that the conviction affects the fitness of the carrier or broker.—Id., p. 207; renewed, Annual Report, 1963, p. 21.

Notes of Decisions

Volume 10—p. 8074; Volume 11—p. 9477; Volume 12—p. 10416; Volume 13—p. 11085; Volume 14—p. 11607; Volume 15—p. 12218; Volume 16—p. 12866; Volume 17—p. 13566; Volume 18—p. 14505; Volume 19—p. 15775.

1. Construction and interpretation.—[Vols. 11-19].—Section 212(a) is a limitation on the commission's power, but constitutes no obstacle to the court and the statutory process of judicial review. The commission's administrative act of issuing a certificate does not preclude the court from inquiring into whether that act was lawfully done; thus, orders of the commission granting motor carrier authority, and denying petition for reconsideration, are reviewable by the court.—Whitfield Transp., Inc. v. United States, 254 F. Supp. 852 (854, 855)*.

Statute limiting the commission's power to revoke an outstanding certificate is not a limitation on the court's power of review; it was intended to limit the commission's power and nowhere includes the courts as subject to its provisions. While §212(a) makes issuance of a certificate or permit the final step in the administrative process, this does not mean it is the final step in the judicial process of review. There is a formal difference between an order authorizing issuance of a certificate and the certificate; and the court's power to review the commission's order and to take whatever action may be appropriate with respect to the certificate itself is not limited. While the court has no statutory power to set aside a certificate, the certificate would necessarily be of no effect if the order on which its issuance rested were invalid.—Asbury Transp. Co. v. United States, 236 F. Supp. 322 (324-5)*.

While it is not improper for the commission to rely on a prior order in interpreting a certificate so long as such prior ruling does not lack a rational basis, it may not ignore the record made in the case before it and place its sole reliance on its previous orders. In addition, the commission has no power to change or modify a certificate under the guise of interpretative action. Thus, having recognized but ignored undisputed testimony of record, the commission's reliance on three previous orders or decisions is "lacking in rational basis" for its finding that plaintiff's authority to transport buildings or prefabricated buildings, complete, knocked down, or in sections (without restriction) does not cover single unit mobile homes. Giving due weight to the prior orders, the commission's conclusion that commodity so described can only be transported in two or more units is not tenable; order requiring cancellation of rates on single unit homes, carriage thereof being beyond plaintiff's authority, is set aside, leaving any appropriate further action to the commission.—Pre-Fab Transit Co. v. United States, 262 F. Supp. 1009 (1010, 1013-16)*.

Interpretation of commodities authorized to be transported by a certificate is left largely to the commission's discretion, and its construction is controlling unless clearly erroneous, arbitrary, an abuse of discretion or in contravention of an established legal principle. The commission's findings that plaintiff's certificate authorizes transportation of commodities named therein only if intended for

use in, or in connection with, prefabricated houses or buildings cannot be said to be clearly erroneous. The Supreme Court has approved the commission's adoption of the intended use test and validity of that test is no longer open to question; furthermore, manner in which the commission applied the intended use test in the proceeding was not an abuse of discretion.—Whitehouse Trucking, Inc. v. United States, 261 F. Supp. 9 (10, 11)*.

And the fact that the commission construed the certificate differently than plaintiff's language expert, whose testimony supported its interpretation, is not controlling. The commission need not agree with language experts because it also has an expertise in interpreting the language contained in certificates of public convenience and necessity; that expertise is formidable and cannot be lightly regarded by the reviewing courts. The commission's order, requiring plaintiff to cease and desist from transporting commodities not authorized by its certificate as construed, sustained. —Id., p. 11.

The reviewing court must affirm the interpretation placed on carrier's operating authority by the commission unless it is clearly erroneous. The commission's determination that plaintiff's certificate authorizing transportation of the commodities listed in parts "A," "B," and "C" in appendix to the report in the Modification case, 46 MCC 23, permits it to transport commodities listed in parts A and B for any shipper without regard to the business of the manufacturer or distributor, but permits transportation of commodities listed in part C for any shipper if, and only if, such part C commodities have in fact been manufactured or initially distributed by meat packinghouses, is not clearly erroneous; sustained.—Argo Collier Truck Lines Corp. v. United States, 268 F. Supp. 942 (945-6)*.

Unless clearly erroneous, the commission's interpretation of a certificate of its own creation is binding on the courts. Since no criteria with which the commission must comply in interpreting its certificates are set forth in the statute, any reasonable standard may be used. In interpreting plaintiff's authority to transport aircraft and aircraft parts as not authorizing transportation of missiles and missile parts, the commission's decision to use ordinary, rather than industry, meaning of the words and its determination as to meaning of the terms in ordinary usage involved exercise of administrative judgment; and interpretation of intended meaning of those terms is not clearly erroneous, since the ultimate decision was based on an independent interpretation of the words and subsequent reference to intent was only to strengthen that conclusion. Nor was the commission's reliance upon its prior interpretive ruling in a similar case improper, since the the prior ruling does not lack rational basis and was rendered in a full and fair hearing; sustained.—U. S. A. C. Transport, Inc. v. United States, 235 F. Supp. 689 (692-3, 694)*.

The interpretation which the commission places upon a certificate issued by it must be upheld by the court unless it is clearly erroneous. Function of the reviewing court is not to determine de novo what is a proper construction of a certificate; the court is bound by the commission's interpretation unless it is capricious, arbitrary, constitutes an abuse of discretion, or does violence to some established principle of law. The commission's interpretation of restriction in one of plaintiff's certificates, and whether it prevented tacking of that authority with other of plaintiff's separately granted certificates to give it a route to Canada through Buffalo port of entry, was not erroneous; indeed, it was patently right; sustained.—Transamerican Freight Lines, Inc. v. United States, 258 F. Supp. 910 (919-22)*.

The commission has the primary responsibility for interpretation of certificates it issues and, while that authority is not limitless, if the proceedings conform to law, the commission's interpretation will be accepted unless it is clearly erroneous, or capricious, arbitrary or an abuse of discretion. And in a proceeding involving interpretation of a motor-carrier certificate, as in any case, the commission must consider all relevant evidence on the issues presented.—E. B. Law and Son, Inc. v. United States, 247 F. Supp. 846 (848)*.

Record in commission proceeding, wherein plaintiff sought a determination as to whether or not its authority to transport refined petroleum products, "except residuary petroleum products," authorized transportation of asphalt, clearly shows that due consideration

was given to all pertinent evidence on the questions involved. And the commission's findings and conclusion (that plaintiff's authority does not include asphalt) disposed of the issues before it, are supported by the record, are not arbitrary, and do not represent an abuse of discretion.—Id., pp. 848-51.

In action to set aside the commission's order approving purchase transaction, the reviewing court is bound by the commission's interpretation of considered certificate as authorizing the operations vendor had been conducting thereunder, on traffic interchanged with vendee, between the point of interchange and terminus of the purchase route.—Alabama Highway Exp., Inc. v. United States, 241 F. Supp. 290 (295-6)*.

In holding that sectionalized homes designed to be joined together to make a house permanently situated at point of destination lack the determinative characteristics of house trailers and therefore are not within plaintiff's authority to transport "trailers designed to be drawn by passenger automobiles," the commission has done no more than construe or interpret a certificate granted by it, and such an interpretation or construction will be overturned by the courts only if clearly erroneous. The commission's decision that the sectionalized home described, which is not built in single units and is not intended to retain any mobility, is not a trailer is reasonable and not clearly erroneous; sustained.—National Trailer Convoy, Inc. v. United States, 240 F. Supp. 286 (288, 289)*.

In action to set aside the commission's order interpreting scope of plaintiff's certificate, the reviewing court's function does not involve a de novo construction of the certificate or re-evaluation of undisputed facts as to services performed under pretended warrant thereof; scope of review is necessarily confined to interpretation placed by the commission upon a certificate of its own creation. Since the record is not persuasive that the commission's interpretation of "iron and steel articles" in plaintiff's certificate was capricious or arbitrary, that it constituted an abuse of discretion, or did violence to some established principle of law, the court is bound by that interpretation; sustained.—Eagle Motor Lines, Inc. v. United States, 236 F. Supp. 502 (504)*.

Even if the commission's present interpretation of plaintiff's certificate was adopted subsequent to issuance of the certificate, that interpretation must be allowed to stand unless it is irrational or clearly not in accordance with the plain meaning of the certificate. There is strong dictum in the commission's prior rulings which supports its interpretation of "parts thereof" in plaintiff's authority for "farm machinery and parts thereof" as precluding separate transportation of parts, and such interpretation is not irrational. It is not the court's duty to substitute its own reasoning for that of the commission; courts are not given carte blanche when reviewing the commission's interpretation of a certificate. The commission's order sustained.—Ace Lines, Inc. v. United States, 239 F. Supp. 804 (806)*.

The commission was merely interpreting the meaning of plaintiff's permit by applying well established definitions to "packinghouse products" and "canned goods" therein to determine lawfulness of its questioned operations; such interpretation, being simply a definitive declaration of rights existing under the permit from the beginning, cannot be equated with modification when it cannot be found clearly erroneous. And application of definitions developed many years after its permit was issued did not deprive plaintiff of rights without due process of law; nor is there merit to plaintiff's contention that the commission was estopped to question legality of its operations by virtue of letters from commision employees to its predecessor which plaintiff interprets as authorizing the questioned operations.—Zuzich Truck Line, Inc. v. United States, 224 F. Supp. 457 (463)*.

In action to set aside the commission's decision and order construing the restriction in plaintiff's authority to transport new trucks against combination thereof with authority of another carrier for performance of a through service, the common dictionary meaning of "combine" does not preclude interpretation reached that, as used in the tacking proviso, it comprehends any joinder of authority, directly or indirectly, in the performance of a through service. Direct, actual linkage in chain fashion of units sought to be combined is not required; an indirect linkage may also

serve to unite or join grants of authority necessary for a through service. Plaintiff's argument concerning proper construction of the right to combine grants of authority was presented to the commission; and it has not shown that consideration of that argument would have required a different conclusion than that reached. There being no showing of clear lack of rationality, arbitrariness, or error in law, the commission's construction of its certificates is controlling on the courts; sustained.—Kenosha Auto Transport Corp. v. United States, 236 F. Supp. 568 (570-2)*.

The interpretation of a certificate it issues is properly with the commission, not the courts; if that interpretation is supported by substantial evidence and is not arbitrary or capricious, the court will not substitute its view therefor. Conclusion of the commission in investigation proceeding that drop-frame trailers per se are not special equipment, and that use of such trailers by the respondent to transport certain commodities was not beyond the scope of its authority to transport general commodities with certain exceptions, including commodities requiring special equipment, is amply supported by the evidence; is not erroneous, arbitrary, or capricious; sustained.—Heavy-Specialized Carriers Conference v. United States, 231 F. Supp. 968 (970-1)*.

Primary responsibility for determining what items fall within commodity description in a certificate rests with the commission, which has an expertise of its own in interpreting certificates to determine scope of operations authorized thereby [citing 344 US 344]. Since plaintiff's authority for "oilfield equipment, machinery, and materials" is patently ambiguous as written and susceptible of varying interpretations, the court should not substitute another construction for that of the commission. Also, words may vary greatly in content according to the circumstances and the time in which used, and should be read in light of experience of those who framed them. In view of those principles, it cannot be said that the commission's interpretation of plaintiff's authority, arrived at through application of its cumulative expertise, as excluding machinery and materials unconnected with the oilfield industry is not a permissible one.—J. B. Acton, Inc. v. United States, 221 F. Supp. 174 (177-8)*.

The opinions of two professors of English that the adjective "oilfield" modifies and limits only "equipment" and in no wise modifies or limits "machinery" and "materials" were not binding on the commission, and no relief can be granted plaintiff because the commission failed to follow those opinions. Nor does the lack of continuity in underlining of the certificate description support plaintiff's claim of unrestricted right to transport "machinery" and "materials"; neither of its expert witnesses regarded the broken underlining as significant, and there is no general inflexible rule of construction which would make the nature of the underlining determinative, though it should be considered, as it has been, along with other indicia of construction. Further, plaintiff has not shown that the original holder of the "grandfather" authority interpreted it as allowing transportation of anything other than oilfield equipment, oilfield machinery, and oilfield materials. There is substantial basis for the commission's order; sustained.—Id., pp. 177, 178, 179.

In general, the scope of transportation permitted by a certificate is for the commission to determine, and its determination will not be overturned by the courts unless arbitrary or clearly erroneous. The proper interpretation and meaning of the authority under a given state of facts, and effect thereof under protection of the "grandfather" clause, is reserved for the commission, and its construction of a "grandfather" certificate is controlling on the courts. On the other hand, the commission has no power to change or modify a carrier's certificate under guise of interpretive action. The commission's finding that plaintiff's authority to transport building materials, heavy machinery, "and other commodities of similar nature" does not embrace such items as cable, veneers, transformers, and regulators is entirely consistent with logic and common sense; and its outline of circumstances under which plaintiff may accept shipments as building or construction materials without inquiry as to actual intended use of the articles was a valid exercise of its discretion; the commission's order sustained.—Mitchell Bros. Truck Lines v. Unit-

ed States, 225 F. Supp. 755 (758, 760)*.

Since the commission's determination that plaintiff's "grandfather" certificate was clear and unambiguous, and that it embraced the operating rights for which evidence was adduced in the "grandfather" proceeding, is not clearly erroneous, the court is bound by that interpretation. The language used in defining plaintiff's radial authority is not unusual or complex in that it does not conform to that generally used by the commission over many years to fix and identify radial base points "on the one hand" and radial destination points "on the other." While the authority may be complex because of extent and varied pattern of the operations authorized, it does not follow that the language used is neccessarily ambiguous, particularly when it is couched in phraseology which has come to have a commonly understood meaning for purposes of defining such grants of authority. Sustained. —Cardinale Trucking Co. v. United States, 232 F. Supp. 339 (345-6)*.

"Grandfather" certificate granted plaintiff's remote predecessor conferred authority for transportation of general commodities westbound from Charleston, W. Va., to Cincinnati and for transportation of gas cylinders and rubber tires eastbound from Cincinnati to Charleston, and language of certificate held by plaintiff as latest transferee carries the same authority, no more and no less. Changes in phraseology of the transferee certificates from time to time did not erode the "grandfather" rights or anywise reduce the authority originally conferred. Even assuming some ambiguity in language of either the "grandfather" certificate or the one presently held, the construction placed thereon by the commission would be controlling unless arbitrary or clearly erroneous; the commission's construction is consistent with its past holdings in similar cases, and its finding that plaintiff's eastbound authority does not permit transportation of general commodities from intermediate points was not arbitrary, discriminatory, or contrary to fact; sustained.—Keystone Motor Exp., Inc. v. United States, 228 F. Supp. 793 (796, 797-8)*.

The court's powers, in action to enjoin enforcement of the commission's order construing plaintiff's authority to transport canned goods as not including transportation of peanut butter, are clearly limited; it may inquire only to ascertain if there is a reasonable basis for the commission's construction of the certificate; it cannot by translation enlarge the authority. Though the court may disagree with the commission's conclusion, that conclusion cannot be disturbed if it is not contrary to law, is not capricious or arbitrary, and is premised on substantial evidence. The commission's construction of "canned goods" in plaintiff's certificate is accurate; it does not depart from common usage or understanding, nor is it an obsolete refinement. Complaint dismissed.—Archie's Motor Freight, Inc. v. I.C.C., 226 F. Supp. 487 (488-90)*.

The commission clearly has both jurisdiction and authority to determine scope of a carrier's lawful operations in the first instance (citing 355 US 554 and 114 F. Supp. 814); and in exercising authority to determine scope of unlawful operations of a carrier it invariably becomes necessary to construe or interpret the carrier's operating authority; in so doing the commission fulfills a function for which this expert body was created by Congress. However, the commission may not amend, modify, suspend, or revoke an outstanding certificate without compliance with provisions of §212, and limitations thereof may not be bypassed under guise of interpretative action; if the commission's interpretation of plaintiff's certificate in complaint proceeding were found to be a modification or revocation thereof in whole or part, it would be unlawful and should be set aside. The record shows that the commission merely attempted to determine plaintiff's rights under its certificates as they existed from the beginning; this cannot be equated with modification or revocation unless shown to be clearly erroneous.—DeCamp Bus Lines v. United States, 224 F. Supp. 196 (202-4)*.

See also W.J. Dillner Transfer Co. v. McAndrew, 28 USC §2201, n. 2.

Since certificates of public convenience and necessity speak for themselves, and extraneous or antecedent facts may not be looked to in absence of patent ambiguity or indefiniteness therein, considered certificate authorizing transportation of "mixed shipments" may not be considered as impliedly

limited to mixed truckload service by language of the commission's report.—Refrigerated Transport Co. v. United States, 214 F. Supp. 536 (540)*.

However, as restriction to transportation of "mixed loads," which the commission substituted for "mixed shipments" in motor carrier certificate in compliance with mandate of the court, is ambiguous and therefore subject to future construction in the light of extraneous and antecedent facts, language of the commission's decision (92 MCC 254) and the facts on which it is premised may be looked to in determining the meaning of a "mixed load." The report makes plain the transportation service which carrier may perform under the certificate and, in addition, the certificate granted is subject to imposition of such further terms, conditions, and limitations as the commission may hereafter attach; in light of those facts, construction of the term "mixed loads," should the question arise, is left to the commission. Petition to suspend, enjoin, or set aside the commission's report and order, denied.—Id., 227 F. Supp. 1021 (1022-3)*.

Delineation of the service authorized by a certificate of public convenience and necessity, as well as interpretation of such a certificate, is left to the commission and its construction thereof is controlling on the courts unless clearly erroneous, arbitrary or capricious, an abuse of discretion, or a violation of some established principle of law.—United Transports, Inc. v. United States, 214 F. Supp. 34 (39)*.

The law is clear that the commission's interpretation of a carrier's permit is binding on the courts unless clearly erroneous, arbitrary, or capricious; and the commission's interpretation of disputed portions of plaintiff's permit is not clearly erroneous or unreasonable; sustained.—P. Saldutti & Son, Inc. v. United States, 210 F. Supp. 307 (315)*.

Furthermore, the commission's failure to correct carrier in its mistaken belief regarding the scope of its authority does not estop the commission from asserting the proper interpretation of carrier's permit in an appropriate proceeding.—Id., p. 314.

In action to set aside the commission's decision that transportation of bulk commodities tendered by shipper in C & S containers is within authority of general-commodity carriers, but that when a C & S container is premounted on a flat-bed trailer and the commodity is loaded therein without any prior packaging by shipper the service is essentially a tank-truck service, plaintiff's claim that to treat the issue as one of analogy of such containers to packages or to tanks ignores the statutory command that operating rights shall not be "taken" except under §212(a) begs the question; if plaintiffs did not have the certificate authorization claimed, the commission's decision does not "take" any existing rights.—Roadway Exp., Inc. v. United States, 213 F. Supp. 868 (874)*.

The commission's power to construe words, terms, or phrases used by it in its own certificates should be given considerable latitude, and should prevail unless its interpretation be a plain abuse of discretion, arbitrary, capricious, or violative of established law. This is especially applicable to the meaning to be given terms denoting generic classification of commercial products relating to industrial transportation under regulatory purposes of the act. Clashes between precise scientific definitions of component parts of products and the general understanding in the commercial world are to be expected with advance of knowledge; assuming this to be the case with crude tall oil or pulpmill liquid, the commission cannot be said to have acted arbitrarily, or abused its discretion, or violated §207 in deciding that, for purposes of its certificates, crude tall oil and pulpmill liquid should be considered vegetable oils.—McKenzie Tank Lines, Inc. v. United States, 211 F. Supp. 876 (877, 878)*.

The commission's interpretation of plaintiff's certificate for transportation of "general commodities," followed by specific exceptions, "in truckload lots," as restricting transportation of general commodities to single shipments in t.l. lots is not shown to have been capricious or arbitrary, to have constituted an abuse of discretion, or to have violated some established principle of law. However, this does not mean that the court agrees with the commission's definition of the nebulous phrase "in truckload lots" as meaning a quantity that "substantially fills the carrying capacity of a vehicle ordinarily used in interc-

ity transportation"; there is pointed disagreement among carrier witnesses as to the understanding within the industry of the meaning of that restriction; it is indefinite, vague, and incapable of being enforced from a practical standpoint.—Bowman Transp., Inc. v. United States, 211 F. Supp. 354 (356, 358)*.

A court may not substitute its judgment for that of the commission with respect to the scope or coverage of a certificate or permit issued by the commission, if that question is at all doubtful. The meaning of words may be a question of law or a question of fact, and words may have one meaning when used in common speech and another when used in industry or in regulation of industry; in interest of uniformity in regulation and policing of the motor carrier industry it is essential that the commission be subjected to as little judicial interference as the law will permit.—Ballentine Produce, Inc. v. United States, 209 F. Supp. 679 (683)*.

While, in view of remand of application for reconsideration on other grounds, the court is presently unwilling to disagree with the commission's interpretation of a certificate of its own creation, that authority for "explosives and blasting supplies" does not embrace nitro carbo nitrate, the record in that area is so confusing that the commission apparently felt compelled to resort to artificial semantics and inapposite analogies. NCN, by definition an oxidizing agent, accounts for about half the total sales of explosives and blasting agents in the United States; the commission concluded that it is a "blasting material," the examiner that it is both a "blasting supply" and a "blasting material," while the manufacturer advertises it as, and considers it to be, a "blasting agent." It is suggested that the par ties supplement the present record by evidence relating to the functional use of NCN and the construction which other shippers and carriers have historically placed on the term "blasting supplies."—Baggett Transp. Co., Inc. v. United States, 231 F. Supp. 905 (908-9)*.

Construction of the scope of transportation permitted by a certificate is for the commission and will not be overturned by the courts unless arbitrary or clearly erroneous; the court is bound by the commission's interpretation unless it constitutes an abuse of discretition or does violence to some established principle of law. In view of conflict of the commission's interpretation of plaintiff's authority to transport contractors' machinery and equipment with that of its expert examiner, as well as concession of its counsel in brief filed on its behalf, plaintiff's authority is uncertain, indefinite, and vague as to what type of transportation it may perform. The interpretations decision should be clarified and made certain: definite guide lines should be established that are not ambiguous, so that plaintiff may continue its operation without jeopardizing its certificate; order set aside, and interpretations case remanded for further action in accord with the court's opinion.—W.T. Mayfield Sons Trucking Co. v. United States, 211 F. Supp. 619 (624-6, 628)*.

While the commission's interpretation of plaintiff's authority to transport "contractors machinery and equipment" complies with the court's direction to establish definite, unambiguous guidelines delineating scope thereof, restrictions thereby imposed effectively preclude service where consignee is a branch of the Federal Government or a county or State highway department, unless shipment is intended for use by a private contractor. However, considered authority was sought for the stated purpose of continuing service previously rendered under like-worded temporary authorities issued on basis of affidavits by plaintiff and a representative of the Army as to need for service between military projects and establishments. Question therefore arises as to scope of plaintiff's authority under those temporary rights, and whether issuance of permanent certificate contemplated continuance of service performed thereunder; if the evidence were developed it could show inconsistency of those facts with the limitations imposed by the commission's later interpretation.—Id., 234 F. Supp. 655 (658-60)*.

Operating authority issued by the commission may be limited, canceled, or revoked only pursuant to provisions of §212(a), and the commission may not circumvent requirements thereof under the guise of interpreting operating authority issued by it. Since it is possible that the commission's interpretation would improperly narrow the scope of plain-

tiff's authority, it should have given consideration to testimony showing the actual services rendered prior to issuance of the permanent certificate, and its failure or refusal to do so deprived plaintiff of a full and fair hearing. While the court is without power to perform the functions of the commission, it is its duty to declare that the commission's order in the interpretation case is erroneous for the reason that it gave no consideration to plaintiff's actual operations prior to issuance of the considered certificate. Remanded to the commission for action in accordance with the opinion.—Id., pp. 660-1.

Having found that plaintiff's certificate authorizing transportation of (1) "Oilfield equipment and supplies" and (2) "Pipe, pipeline material, machinery and equipment incidental to and used in connection with the construction, repairing, or dismantling of pipelines" is ambiguous as to whether the limitation "oilfield" in the first paragraph applies to the authority in the second for hauling pipe, etc., the commission applied the rule for interpreting Mercer-type descriptions (though admitting that plaintiff's authority is not phrased in exact words thereof) and, relying on the ambiguity as justification for looking behind the face of the certificate, found upon examination of the underlying application proceedings that plaintiff is not authorized to transport pipeline commodities other than in oilfield service. The commission does not contend that its interpretation may be upheld without the finding of ambiguity, for unless a certificate is ambiguous on its face the commission may not look beyond its terms.—Parkhill Truck Co. v. United States, 240 F. Supp. 842 (843-4)*.

However, the certificate in question is a consolidation of two separate authorities issued plaintiff's predecessor, one granted on a showing of convenience and necessity for the pipeline commodities, and a "grandfather" certificate issued later for oilfield commodities; there is merit to plaintiff's contention that it was arbitrary to read those authorizations together Mercer-style. While the ambiguity that does exist on the face of the certificate justified the commission's exploration of the extent of authority contained therein, the undisputed evidence indicates that the ambiguity is merely superficial, resulting only from the routine administrative consolidation of two separately issued grants, neither of which is ambiguous when separately considered. The ambiguity present in a Mercer-type certificate is inherent in the original certificate; but the apparent ambiguity in plaintiff's certificate is completely dissipated by the fact of its creation through a subsequent consolidation of separate authorities.—Id., pp. 844-5.

Such an ambiguity justifies inquiry only to the point of source of original authority and does not allow, and cannot premise, an examination of what is then indicated to be a secondary source—the original proceedings. To make the latter inquiry is but a thinly veiled violation of the protection allowed existent and operating authority by §212(a). The commission's order is faulty in law and clearly erroneous; set aside and enjoined.—Id., p. 845.

Motor carrier certificates have been held to be property of value, and entitled to constitutional protection; therefore, rule 1 of the commission's regulations governing transportation of household goods, which defines "household goods" as used in certificates authorizing such operations, defines the scope of a certain "property right" which cannot be taken or diminished without regard to due process of law.—Movers Conference of America v. United States, 205 F. Supp. 82 (84)*.

While an order of the commission would not be upset unless shown to be clearly erroneous, since order in 86 MCC 293 amending rule 1 and redefining "household goods" is erroneous, it is annulled and set aside. Redefinition of household goods narrows that term in that it requires change of a householder's dwelling or relocation of a business establishment before household goods carriers may engage in the move and, since this is done by procedure other than that set forth in §212(a), the order constitutes a deprivation of rights without due process of law; enforcement of the order, insofar as it relates to rule 1(a)(1) or 1(a)(2), enjoined.—Id., pp. 85, 86.

Respondent's argument that the commission cannot lawfully interpret a carrier's operating authority in a suspension proceeding is without merit. The commission has jurisdic-

tion to consider all matters of record relating to the lawfulness under the act of schedules under investigation.—Plastics, Sirup & Washing Compounds, Del. to N.Y. & N.J., 315 I.C.C. 351 (352).

Doctrine of the last antecedent is merely a decisional aid in interpretation of language whose meaning is somewhat uncertain. Where a certificate is ambiguous, it is proper first to examine the record in the proceeding which gave rise to its issuance; then, if such examination does not clearly reveal the intent of the commission, it is proper to apply the doctrine of the last antecedent. Where, but for absence of a comma following "boats" in the commodity description, the authority recited and each of the classes of commodities listed therein are typical of those found in certificates issued heavy haulers, one conversant with motor carrier regulation is led to suspect a drafting error; language of the certificate is not clear and it must be examined in light of the proceeding leading to its issuance; such examination leaves little doubt that respondent sought authority only for commodities requiring use of special equipment because of size or weight, and that only authority to transport such commodities was intended.—Road Paving Materials between Points in New England, 319 I.C.C. 95 (97).

The Supreme Court in 359 US 171 removed any doubt that the commission has the authority and initial responsibility of interpreting its certificates; and the commission in 88 MCC 745 made clear that, although the concept of interstate commerce embraces a movement between points in one State through another, nevertheless, when such operations are conducted under a commission certificate solely for the purpose of evading State regulation of the traffic concerned, such operations are in bad faith and violative of provisions of the act, and an appropriate action may ensue under provisions of §204(c).—Service Trucking Co., Inc.—Declaratory Order, 94 M.C.C. 221 (225-6)*.

Upon review of underlying case precedents and other historical factors, certificates and permits of carriers of meats and packinghouse products phrased by reference to sub-parts in appendix to the Modification case, 46 MCC 23, or in appendix I to the Descriptions case, 61 MCC 209, are interpreted as authorizing: (1) by specific reference to parts A or B in either appendix, commodities listed therein may be transported without regard to manufactured or initially distributed such commodities; (2) by reference to part C in either appendix, carrier may transport the listed commodities when they have been manufactured or initially distributed by meat packinghouses; and (3) reference to part D in Descriptions case appendix I authorizes transportation of commodities used in the meatpacking business when destined to or for use by meat packer. However, authorities framed in generic terms such as "packinghouse products," whether or not reference is made to the appendixes, remain limited to carriage of commodities produced or initially distributed by meat packinghouses.—Argo-Collier Truck Lines Corp. Extension, 99 M.C.C. 591 (599-602)*.

Although testimony of respondent's language expert (which supports carrier's interpretation of its prefabricated-buildings from an academician's point of view) is considered, the commission is not bound to accept his point of view as controlling its interpretation. Respondent's contentions as to the transportation permitted by its certificate, being so at odds with a meaning in harmony with normal usage of commission terminology, must be rejected.—Whitehouse Trucking, Inc., Investigation and Revocation, 99 M.C.C. 621 (623-4, 628)*.

Defendant's transportation of a passenger from the intersection of Cooperstown Road and Laurel Terrace, Cherry Hill Township, N. J., to Philadelphia, Pa., found to be within scope of its passenger authority. While that intersection is in an incorporated township, the township is an "unincorporated area" as that term is defined in the Commercial Zone case, 46 MCC 665, referred to in 49 CFR 165a.12; that report specifies, in reference to 203(b8), that "municipality" refers only to cities, towns, villages, and boroughs, and does not include townships and counties; and also states that "unincorporated area" means any area, regardless of its urban development, not included within an incorporated city, town, village, or borough. Although Cherry Hill Township is incorporated, it is not

a municipality; thus, since considered intersection is located in an "unincorporated area," within 46 MCC 665 and 49 CFR 165a.12, defendant's service to that point is proper and lawful. Complaint dismissed.—Public Service Coordinated Transport v. Red Arrow, 98 M. C. C. 16 (17-8).

See also Asbury Park—N.Y. Transit v. New York, K.L.B. Bus Line, §203(b), n. 60 *Passenger carriers.*

The commission in its discretion may entertain a request for determination of service which may be rendered under any certificate that it has issued. Issue raised by petition for interpretation of effect of restriction in one of petitioner's certificates does not require submission of evidence or any further proceedings, nor does disposition of the issue require reopening any proceedings in which it obtained its other certificates; replicant's request for dismissal, overruled. Effect of restriction in petitioner's regular-route authority between points in southern New England—to transportation of shipments between points authorized therein, on one hand, and, on the other, Pittsburgh, Pa., and authorized points west of Ohio-Pennsylvania State line—is to confine petitioner's service thereunder to overhead traffic moving between points authorized in that certificate and Pittsburgh and points west of that State line authorized in its other certificates, including ports of entry and interchange points.—Transamerican Freight Lines, Inc.—Interpretation, 95 M.C.C. 121 (123-4)*.

Contract carrier authority to serve "points in" named Virginia counties includes service to politically independent cities located within the boundaries of said counties; to exclude independent cities from scope of petitioner's permit would result in wholesale atomization of its operating authority; and it is almost beyond belief that a carrier would seek authority to serve points in Roanoke County, for example, but not the city of Roanoke which is a political entity separate and distinct from the county. However, insofar as the petition for declaratory order seeks a ruling that would interpret the county-wide authority as embracing all cities "having a common corporate boundary with the authorized Virginia counties," it cannot be granted. Such a broad interpretation would confer a windfall of authority on petitioner which it apparently does not seek.—Carolina-Virginia Courier, Inc., Extension, 95 M.C.C. 612 (614-5).

Effective administration of the act dictates that, in absence of patent ambiguity, the commission look only to the language of a carrier's certificate or permit in determining whether a particular operation is within scope of its authority.—Consolidated Copperstate Lines, Inc. v. Navajo Freight, 92 M.C.C. 516 (519)*; and the intent of the framers may generally be considered in interpreting a certificate only when it is patently ambiguous. There being no patent ambiguity in the description "iron and steel articles," reliance on respondent's "grandfather" authority to justify transportation of some questioned commodities as iron and steel articles is not warranted.—Eagle Motor Lines, Inc., Investigation and Revocation, 94 M.C.C. 704 (709)*; however, where a certificate is ambiguous, the commission may interpret the language therein so as to give effect to its true impost and meaning. This may require a review of the certificate as it was conferred upon its original owner and as issued to all subsequent transferees thereof.—North American Van Lines, Inc.—Purchase—Hagerstown Motor, 93 M.C.C. 125 (128).

In interpreting motor carrier operating authorities, consideration may properly be given to circumstances surrounding grant thereof only if the authority itself is patently ambiguous; if not, operating rights must be construed according to their terms, regardless of what may have been intended at time of their issuance.—C & E Trucking Corp.—Modification of Permit, 88 M.C.C. 391 (393).

Where a certificate is ambiguous in that, on its face, it does not describe clearly and accurately the type of service authorized, the commission may properly search record of the proceeding which gave rise to the language so as to ascertain its meaning. Review of the proceeding in which applicant's predecessor was granted authority to transport refined petroleum products, except "residuary petroleum products," warrants conclusion that quoted language was intended to embrace all commodities which fall within that generic description. Since no common understanding

in the transportation industry of the meaning of "residuary petroleum products" is shown, that description should be construed in conformity with prevailing usage and practice in the petroleum industry; expert witness stated that "residuary" and "residual" are synonymous, but latter is more frequently used, in petroleum industry. Therefore, "except residuary petroleum products" in applicant's certificate is construed to denote "except residual petroleum products."—E.B. Law and Son, Inc., Extension, 94 M.C.C. 532 (537-8)*.

See also Truck Transport, Inc., Extension case, §207(a), n. 25 *Commodity description.*

In previous report interpreting the generic description "canned or preserved foodstuffs" in applicant's certificate as not including the commodities specified "or any other similar foodstuffs unless such commodities are in fact canned or preserved within the meaning of those terms as heretofore construed," the modifying phrase "unless such commodities are in fact canned or preserved..."cannot detract from application of the finding to the specified commodities; it modifies "or any other similar foodstuffs." It was added for purpose of establishing a guideline for unspecified commodities in accordance with previous interpretation of "preserved foods," and other cases were cited clearly setting forth what was meant to be covered thereby. The interpretation is not ambiguous, nor does it strain reason or logic.—Coldway Food Exp., Inc., Extension, 94 M.C.C. 479 (483)*.

It is frequently necessary, in determining whether grant of authority sought is required by public convenience and necessity or is consistent with public interest, to determine whether a particular carrier is already authorized to transport the pertinent traffic. It would be an intolerable burden on the parties, the public, and commission personnel, and would hamper effective administration of the act, if the commission had to delay each time in making necessary determinations of protestants' authority to provide proposed service, and await institution and final determination of formal investigations into the scope of their operating rights. On the other hand, fair treatment and due process dictate that a carrier whose authority has thus been interpreted should have access to judicial review.—C & H. Transp. Co., Inc., Extension, 94 M.C.C. 711 (714-5)*.

Petitioner's certificates authorizing transportation of "such commodities as are manufactured, processed, or dealt in by rubber or rubber products manufacturers" is interpreted to authorize transportation of the 25 commodities specified; however, that conclusion is premised on "dealt in" being defined as "bought for resale." It is clear that intent in issuance of the certificates was to permit petitioner to render a complete service, not limited to specified commodities; its authority must be deemed to be as broad as required to keep pace with the growth of its shippers' businesses; and, in fact, a finding that petitioner is not authorized to transport a commodity not ordinarily dealt in by several principal rubber manufacturers would appear to constitute partial revocation of its certificate. Moreover, record is clear that such manufacturers ordinarily deal in a great number of nonrubber products, and that such dealings are an integral and important part of their business.—Renner Motor Lines, Inc., 94 M.C.C. 605 (613-4).

Unless words used in a certificate are patently indefinite or ambiguous, the commission will not go back of the certificate in interpreting authority granted, and where language considered is not ambiguous, it must be given its common and natural meaning. In certificates and permits the commission has always used words descriptive of direction, such as "north" or "south," in their generally accepted sense rather than in terms of metes and bounds.—Pilot Freight Carriers, Inc. v. Malone Freight Lines, 91 M.C.C. 58 (60).

Where a certificate is patently ambiguous, the commission may properly search the record of the proceeding which gave rise to the language in order to ascertain its meaning. Though certain Kentucky points in applicant's certificate for routes between Louisville and Memphis are subject to a single restriction as to direction of authorized traffic, the same authority contains a confusing, dual directional restriction of certain Tennessee points, thus is clearly ambiguous; examination of record in applicant's "grandfather" proceeding is warranted.—Southern For-

warding Co. Extension, 91 M.C.C. 221 (225).

In absence of an ambiguity or a specialized trade usage, the language used in commission certificates must be construed according to the plain and ordinarily accepted meaning of the words used therein; and where the language of the certificate is unambiguous the commission will not violate the integrity thereof by looking to the record in the underlying proceeding which gave rise to the language.—Alabama Highway Exp., Inc. v. Terminal Transport Co., 91 M.C.C. 635 (639).

Because permanent operating authority issued by the commission should state clearly and unambiguously the service which may be performed, it is a longstanding general rule that where a certificate or permit is phrased in terms which are clear and unambiguous in meaning the commission will not go behind that authority to seek out what was actually intended to be granted in the preceding in which it was issued. But when the meaning of the authority description is doubtful on its face, it is proper to reexamine the facts of its origination. Although articles listed in petitioner's certificates under heading "Building, roofing, and insulating materials" include scrap asbestos and automobile body panels, only in a strained or unusual sense can those commodities be classified as intended for use as such materials; thus there is sufficient ambiguity to warrant going behind those authorizations to determine their intended meaning. —Ace Lines, Inc., Extension, 91 M.C.C. 559 (563).

The language "new trucks, in secondary movements (other than those performed as a connecting carrier)," in paragraph (A) of respondent's certificate was clearly intended to limit its transportation of new trucks to those movements performed wholly under its own authority without interchange with other carriers; the word "combined" in the restrictive paragraph is unqualified and should be read as preventing respondent from combining its authority, directly or indirectly, with that of any other carriers; and the restrictive paragraph specifically applies to paragraphs (B), (C), and (D) of the certificate.—Kenosha Auto Transport Corp., Investigation, 89 M.C.C. 550 (552-3)*.

See also Campbell Sixty-Six Exp., Inc. v. United States, §208(a), n. 31.

Of necessity, language used in commodity descriptions is frequently cumbersome, and in the more obvious situations the commission attempts to eliminate unnecessary verbiage; though, occasionally, ingenious carriers seize upon an inappropriate rule of grammatical construction to conduct flagrantly unlawful operations in reliance on an interpretation which defies the clear intent of the commission and the common understanding of the industry, in every case in which a certificate holder has adopted its own fanciful interpretation in preference to the meaning readily apparent to others in the regulated motor carrier industry, the commission has repudiated the tortured constructions even where language experts supported the offending carrier.—J. B. Acton, Inc.—Investigation and Revocation of Cert., 89 M.C.C. 59 (62-3)*.

In restricting authority to transport materials, supplies, etc., to the appropriate industry, the limiting adjective is repeated whenever it is deemed necessary or desirable to convey the thought intended without ambiguity; but where only one interpretation is consistent with common knowledge and common sense, it is frequently not repeated throughout. In respondent's authority for "oilfield equipment, machinery, and materials," failure to underline "and" has no interpretative significance; restriction of the "materials" which may be transported to those peculiar to or intended to be used by the oilfield industry is unambiguous, and it is unnecessary to look to the records in the underlying proceedings to ascertain what authority the commission intended to grant.—Id., pp. 62, 63.

One cardinal rule for construing terms of a certificate is that the certificate must speak for itself; in absence of patent ambiguity, the commission refuses to consider extraneous matters, including record which gave birth to the certificate in question; and this rule is followed regardless of whether the practical result is to confer upon the carrier more or less authority than may have been intended to be granted originally. Although the record in an application proceeding might be presumed to contain the best evidence of the commission's intention in issuing a certificate, the commis-

sion has chosen to make the clear language of a certificate conclusive in absence of some form of misrepresentation or clerical error connected with its issuance; any other rule would contribute an intolerable uncertainty to the finality of any right granted.—T. I. McCormack Trucking Co., Inc.—Investigation, 89 M.C.C. 5 (9-10)*.

Section 212(a) prescribes the only method whereby a validly issued certificate may be "suspended, changed, or revoked, in whole or in part"; and the commission has consistently held that a validly issued certificate may authorize the transportation of commodities not contemplated at the time the certificate was granted, and service within a larger territory than was intended at the time of the grant; examiner erred in concluding that a certificate authorizing operations within a greater territory than was shown to be required by public convenience and necessity would be null and void.—Id., p. 9.

Canons of statutory construction are not so automatic in their application, nor rules of grammar so tyrannical, that the commission has no discretion in interpreting certificates issued under its authority. Although, according to doctrine of the last antecedent, which is a rule of statutory construction as well as of grammar, qualifying words, phrases, or clauses are to be applied to the word or phrase immediately preceding and should not be extended to those more remote unless clearly required by the context, most courts have recognized that doctrine to be only an aid to construction, rebuttable by a very slight indication of contrary intent. And while a comma separating a modifying clause from the word or clause immediately preceding indicates that it was intended to modify all the preceding clauses, it is accepted usage that no comma is necessary after the concluding word of a list when it is followed by a modifying word or phrase that unmistakably applies to the entire group.—Id., pp. 13, 14, 15.

In describing commodities by reference to their intended future use and in selection of generic or class terms, common industry or trade terms have been employed, and have generally been fairly construed by carriers according to their obvious intent; it is therefore unnecessary, save in unusual circumstances, to resort to extraneous matters, such as records of proceedings in which such authorities were granted, to construe such terms.—C & H Transp. Co., Inc., Clarification of Authority, 88 M.C.C. 87 (92).

Though applicants in effect request the commission to tell them whether shipments set forth in an abstract of representative shipments were within their operating authorities, their abstracts show merely the names of the commodities, the consignor and consignee, and the date of shipment; an intelligent determination cannot be made in absence of reasonably complete factual data on which to base conclusions; the guidelines set forth in the general discussion of applicants' authorities (pp. 93-4) can be applied by them to the facts as to such shipments, which are within their knowledge.—Id., p. 95.

When evidence establishes that sheet steel and steel bars and tubing are generally handled by wholesale and retail hardware stores, respondent may not be deprived of his right to transport those commodities under authority for merchandise such as is dealt in by hardware business houses, merely because of a tendency of such establishments in recent years, particularly in metropolitan areas, to limit their activities to sales of over-the-counter items; to hold otherwise would run counter to the commission's intention when original "grandfather" certificate was granted respondent's predecessor over 20 years earlier, and would amount to partial revocation thereof without resort to procedures provided in §212(a).—Momsen—Investigation and Revocation of Certificates, 88 M.C.C. 343 (345, 350-1).

10. Remedy of abuse, in general.—[Vols. 10, 12, 17-19].—That inadequacy in service due to refusal of trunkline motor carriers, because of "hot cargo" clauses in their union contracts, to interchange traffic with shortline carriers controlling appellee was first brought to the commission's attention by appellee's filing of certificate application under §207(a) in no way limited the agency's power to invoke, as a means of correcting the deficiency, §204(c) which empowers it to order carriers to comply with the transportation laws, §212(a) which authorizes it to suspend a certificate for failure to comply with duties

under the act, or §222 which affords other sanctions to enforce its orders. Where deviations from an otherwise completely service consist solely of illegal or discriminatory refusals to accept or deliver traffic from or to particular carriers or shippers, the commission's powers under those sections bear heavily on the propriety of §207 relief.—Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (162, 166)*.

The §212(a) complaint procedure would have provided a more adequate remedy than issuance of certificate to a new carrier at time the case was before the commission; there was every indication at that time that a cease-and-desist order would render the deficiencies purely temporary phenomena and would thus be effective in promoting adequate and efficient service and in fostering sound economic conditions among the carriers affected; moreover, 357 US 93 recognized the power of the commission to enter cease-and-desist orders against carriers' violating the transportation law and their tariffs.—Id., pp. 169, 170, 171 note.

However, in view of amendment to the Labor Management Relations Act which raised serious question as to legality of union-employer agreements to boycott another employer, the delinquent interlining carriers as well as the union would now be subject to injunctive and other processes of the National Labor Relations Board if their conduct violated the new statute, so that the pressures which generated the refusals to serve might well be effectively removed. Therefore, in choosing its remedy the commission must act with discriminating awareness of the possible consequences of its action on the functioning of the national labor relations policy; the policies of ICA and LMRA must necessarily be accommodated, one to the other.—Id., pp. 171-2.

While it is solely within the commission's province to determine that a carrier has abused its certificate, such abuse is not shown when a carrier makes an authorized use of its unrestricted certificates which the commission admits are validly tacked. Order directing plaintiff to discontinue transportation of traffic from one Pennsylvania area to another over a combination of its authorized routes through New Jersey really says that such use was unforeseen by the commission when it granted that authority. If the commission feels that this unforeseen use violates the law of Pennsylvania, Congress has provided the remedy in §212(a); the commission cannot by its order take away part of plaintiff's certificated authority without following the procedure outlined therein, whereby it may protect the State's interest by changing plaintiff's certificate; cease-and-desist order reversed.—Jones Motor Co. v. United States, 218 F. Supp. 133 (138)*.

Defendants' arguments that imposition of percentage restriction on authority granted in application proceeding premised on need for mixed truckload service would put an undue enforcement burden on the commission, and that a restriction is unnecessary because the commission can revise or cancel existing certificates if applicant engages in subterfuge, under §212(a), or impose such reasonable conditions or limitations as public convenience and necessity may from time to time require, under §208(a), are without force. A restriction can be formulated that will not add to the enforcement problem; and answer to the reserved statutory power argument is that record does not support grant of authority not restricted to mixed truckloads, and authority granted could be construed otherwise.—Refrigerated Transport Co. v. United States, 214 F. Supp. 536 (540)*.

Though protestants express fear that in granting motor-carrier authority to Railway Exp. Agency the commission is creating a nationwide railroad-controlled carrier fully competitive with general freight carriers, express service, in providing expedited movement at premium rates of all types of commodities capable of handling in van-type vehicles, is largely policed by fact that express carriers' rates must be naturally encouraging to movement of small shipments. The commission is aware that the transportation industry is an ever-changing one, and will continue to scrutinize REA's operations with a view to forestalling any developments which threaten to change the character of its services to serious detriment of other carriers. To this end, various procedural devices are available: character of express service is closely related

to REA's tariffs, which are subject to the commission's review; the commission may from time to time investigate REA's practices; and carriers having evidence of specific irregularities may file complaint. Moreover, if authority now granted REA is misused so as to restrain competition, the proceeding can be reopened to impose any necessary corrective restrictions or conditions.—Railway Exp. Agency, Inc., Extension, 94 M.C.C. 62 (76-7).

See also Evans purchase case, §5(2), n. 110 *Routing practices*.

It is the commission's duty to investigate any operation which may be so conducted as to circumvent and evade, and thus violate, the provisions of the act. Record in application proceeding does not permit positive determination of whether certain practices of, or permitted by, Greyhound Corp., which allegedly prevented use of its service by some prospective patrons, are lawful or unlawful; to aid Greyhound in determining propriety of the questioned practice, the matter is referred to Bureau of Motor Carriers' field representative in the area.—Kirk, 89 M.C.C. 587 (588).

15. Change of status.—[Vols. 10-15, 19].—See also Tar Asphalt Trucking Co. v. United States, 28 USC §2325, n. 45.

Facts that almost all defendant's traffic moving between Twin Cities and Minot, N. Dak., via Bismarck is less-than-truckload, that there is only one available highway between latter points, that Minot is the largest point in its radial area served from Bismarck, and that its terminal operation at Minot is part of its intrastate service, afford no basis for finding that in operating daily through service it has deliberately sought to destroy the irregular-route nature of its operations or that it could arrest the conversion process otherwise than by curtailing its legitimate business activities. Volume of its traffic and consolidation of l.t.l. shipments account for its daily movements, and though it advertises daily direct service to Minot from Twin Cities, it does not hold out to provide it at specified times or on prearranged schedules. Situation is a borderline one where dividing line between regular- and irregular-route operations is indistinct; it would be difficult under the circumstances for defendant to operate its service in any other manner, and it has properly sought to convert its authority.—Hart Motor Exp., Inc. v. Midwest Motor Exp., Inc., 92 M.C.C. 558 (562-3)*.

20. Abandonment, generally.—[Vols. 10-15, 17-19].—Part I, §1(18), n. 56-68.

In dealing with fictitious equipment-leasing arrangements, the commission has invariably found that the lessor was engaged in unlawful operations over lessee's routes and that latter's operations were therefore dormant. Operations from St. Louis to Tulsa are those of connecting carrier and not of respondent holding the authority therefor; though they were conducted under unauthorized lease of latter's operating rights, such lease is without legal force or effect as a conveyance; respondent is not now performing and never has performed a motor common-carrier service under its certificate since coming under control of its present owner; order entered requiring it to institute and maintain reasonably continuous and adequate service under its certificate, failing which consideration will be given to revocation thereof.—Stewart—Investigation of Operations, 87 M.C.C. 681 (697-8).

25. Revocation of authority.—[Vols. 10-19].—The commission's determination that plaintiff was not entitled to transport chemicals derived from petroleum under its authority to transport general commodities, except liquid petroleum products, in bulk, in tank trucks, did not in any way constitute partial revocation thereof and was not arbitrary or capricious; since commodity description in its certificate specifically excepted petroleum products, plaintiff never had any authority to transport petrochemicals.—Consolidated Freightways Corp. of Del. v. United States, 237 F. Supp. 391 (392)*.

While §212(a) purports to make issuance of a certificate the final step in administrative process for obtaining operating authority, the courts have held that the commission has power to revoke wholly or partially certificates issued as result of inadvertance or mistake; however, as pointed out in 358 US 133, such power may not be used as a guise for changing prior decisions because the wisdom thereof appears doubtful in light of changing policies. Since it is not reasonable to assume that the commission intended to grant authority to transport dump-truck commodities

throughout Illinois and Indiana when the only evidence of need therefor concerned the northern area and not over 50 miles across the line from point of pickup, the court finds that the contested unrestricted certificate was issued as result of inadvertance or mistake; therefore, the commission has the power to revoke or modify the certificate. Case remanded for further consideration in light of that determination.—Willey v. United States, 245 F. Supp. 669 (676-7)*.

Plaintiffs' contention that unless the commission is restrained by preliminary injunction from issuing certificate to intervenor (pending determination of their complaint on the merits) the court would have no jurisdiction to determine the case and recall the certificate, if it is unlawfully issued, is without merit. Though the court has no express statutory authority to set aside a certificate, and the commission may not revoke a certificate except as provided in §212(a), there is no limitation on the court's jurisdiction to review orders of the commission which result in issuance of a certificate. The court would neither issue nor revoke the certificate; but however its judgment affects the commission's order that a certificate issue, the certificate is commensurately affected and the court's power over the certificate is implicit in the power granted it by Congress to review the order. Preliminary injunction denied.—Asbury Transp. Co. v. United States, 236 F. Supp. 322 (324-6)*.

Plaintiff's argument that the commission's determination of scope of its operating authority, in a proceeding on applications of another carrier which plaintiff protested rather than in one especially for the purpose of interpreting its authority, amounted to an unlawful partial revocation of its operating rights, is without merit. The scope of a protestant's authority is necessarily subject to interpretation when it protests an application pending before the commission; since the commission must determine whether public convenience and necessity require the proposed service, an important factor for its consideration is whether the authority applied for is already covered by protestant's certificates. —Worster Motor Lines, Inc. v. United States, 226 F. Supp. 603 (606-7)*.

The commission's approval of proposed purchase of motor carrier operating rights on condition that those rights could not be tacked with rights already held by the vendee did not constitute an unlawful partial revocation of operating authority; vendee was deprived of nothing it had previously had or to which it had been entitled. Nothing was taken from vendee that required §212 action; a condition was simply attached to its acquiring more.—Cope v. United States, 222 F. Supp. 596 (602)*.

On further hearing in "grandfather" application proceeding, the examiner recommended a grant of certain additional authority, but also disallowed certain other authority heretofore authorized in applicant's previously issued certificate; however, such revocation of certificated authority is not proper except as in accordance with provisions of §212. Accordingly, the entire record is considered and the additional authority warranted is granted. —Querner Truck Lines, Inc., 102 M.C.C. 616 (617, 619-20)*.

The holder of a dormant certificate may reactivate operations thereunder at any time unless and until the certificate is revoked under §212(a). Though complainant alleges that reactivation of corresponding interstate operations by carrier whose intrastate rights it had purchased and used as basis for interstate proviso operations was depriving it of traffic, that purchase was apparently not related to the issue of competition in interstate commerce, and interstate operations by vendor over their common route after complainant acquired the intrastate certificate could reasonably have been expected. Neither §212(a) nor any other section of the act confers jurisdiction to summarily and finally revoke vendor's interstate certificate on basis of complaint alleging unlawful common control of vendor with another carrier and reactivation of its operations in connection therewith.—Jimmy Stein Motor Freight Lines, Inc. v. Mercury Frt., 93 M.C.C. 635 (640-1).

While evidence of respondent's numerous infractions of the commission's leasing, safety, and other regulations (as well as of its unauthorized operations) fully supports a finding that the actions of respondent and its president bordered on a willful and deliberate

disregard for those regulations, the violations found do not warrant such drastic action as suspension or revocation of the carrier's rights at the present time; however, respondents are admonished that willful failure to comply with the cease-and-desist order entered may result in such action, since any future violations, especially of the nature shown, will weigh heavily in favor of imposition of drastic penalties.—C&R Trucking Co. —Investigation of Control, 93 M.C.C. 669 (681).

Contention that conditioning of purchase approval on certain restrictions of vendor's retained rights would wipe out portions of its service rights without recourse to §212(a) procedures, in violation of the act, misconstrues the nature both of the conditions imposed and of the purchase proceeding. Although terms of the order of authorization contemplate cancellation of certain rights, they can in no sense be characterized as a prescriptive revocation of rights by the commission; on the contrary, the order is a grant of authority, purely permissive in nature, setting out terms under which the transaction can be found consistent with public interest, in fulfillment of the commission's statutory obligation under §5. Any cancellation of rights would be of those which vendor, under the purchase contract submitted, has agreed to convey, not of those stipulated for retention, and would result entirely from applicants' voluntary action in consummating the transaction on the modified terms approved; proceeding on that basis is consistent with all pertinent provisions of the act.—Knox Motor Service, Inc.—Purchase—K & A Truck Lines, Inc., 93 M.C.C. 26 (32-3).

Commission interpretation of the authority involved does not take from defendant any right which existed from the beginning under the pertinent certificate; a reasonable construction of the certificate does not support defendant's position as to scope thereof; and gratuitous consideration of underlying proceedings indicates an intention contrary to defendant's argument. Under such circumstances, interpretation of the authority cannot be equated with modification or partial revocation under procedure which results in deprivation of a valuable property right without due process.—Alabama Highway Exp., Inc. v. Terminal Transport Co., 91 M.C.C. 635 (642).

As a certificated carrier, respondent is obliged to comply with all provisions of Part II and any requirements established by the commission pursuant thereto, and failure to do so is sufficient ground for suspension or revocation of its certificates. However, the commission's power to take such action is circumscribed by §212(a), under provisions of which revocation of a certificate may be effected only after notice and hearing, and then only for willful failure to comply with an order issued after a notice and hearing under §204(c), which expressly confers the power to investigate that is only implied in §212(a). Thus, unless expressly or impliedly waived by the holder, a second notice and hearing is required before a certificate may finally be revoked.—Safeway Trails, Inc.—Investigation and Revocation, 91 M.C.C. 936 (948-9)*.

See also Brunswick Transp. Co. case, §216(a), n. 10

If operating rights serve no public need for a substantial period of time, they should be revoked in an appropriate proceeding.—E. & L. Transport Co.—Purchase—Dealers Transport Co., 87 M.C.C. 785 (789).

27. Suspension of authority.—[Vols. 15, 16, 18, 19].—Although respondent's willful and flagrant violations of the act in conducting operations beyond scope of its commodity authority must be discontinued, immediate suspension of its certificate would work hardship on those shippers which it is authorized to serve. However, continuance of the unauthorized operations after entry of cease-and-desist order will be met by prompt action to suspend or revoke its certificate.—J. B. Acton, Inc.—Investigation and Revocation of Cert., 89 M.C.C. 59 (64)*.

30. Amendment of certificate or permit.—[Vols. 12-19].—See also Movers Conference of America v. United States, n. 1, above.

When the reviewing court has set aside that part of the commission's order and of plaintiff's certificate, authorizing a new service between certain points which the court found not supported by the evidence, the commission is without power to act except in accord with the court's mandate. Therefore, by inad-

vertently fashioning the certificate so that it was not consistent with the mandate, the commission became bound to amend it to conform thereto whether it took two or two dozen later efforts to properly effectuate the court's order; furthermore, a tribunal has an inherent right to correct mistakes resulting from oversight or inadvertence. Accordingly, considering the commission's expressed desire to conform to the court's opinion and in view of its failure at first to accomplish this, the commission had the power to further amend plaintiff's previously issued certificate to conform to terms of the court's remand without having to comply with hearing requirements of §212(a); report and order, on further consideration, sustained.—Strickland Transp. Co. v. United States, 274 F. Supp. 921 (924-6)*.

Although the commission's power to revoke wholly or partially certificates issued as a result of inadvertence or mistake may not be used as a guise for changing previous decisions because wisdom thereof appears doubtful in light of changing policy, it cannot be said that to modify the considered unrestricted certificate (which is found to have been issued as result of inadvertence or mistake) to comply with proofs submitted in the application proceedings would be a change in policy. On the facts of record in the case, the commission has the power to modify or revoke the certificate in issue, but whether it should be modified or revoked is for the commission's decision; case remanded for further consideration in light of the court's determination.—Willey v. United States, 245 F. Supp. 669 (676-7)*.

The commission had authority to grant petition of carrier holding initial-movement authority to transport automobiles from place of manufacture in Michigan to destinations in Florida and Georgia, and performing all services thereunder, for modification of its certificate to permit rail TOFC or MLRC movement from Michigan to Atlanta, Ga., and Jacksonville, Fla., and motor carrier movement therefrom. In accordance with procedure established in 91 MCC 395, the commission properly took cognizance of fact that TOFC and MLRC methods of movement had caused substantial trend from motor to rail transportation and accepted petitioner's affidavit that that trend had caused it substantial loss in income; and truthfulness of the affidavit was not controverted. While there was no hearing as to need for proposed movement from Atlanta and Jacksonville, need for transportation by petitioner had previously been shown, it was already supplying that need, and its petition for modification only sought the right to permit railroads to do part of its hauling. Sustained.—Motor Convoy, Inc. v. United States, 235 F. Supp. 250 (251, 253)*.

Petitions for modification of a "grandfather" certificate present an example of the gray area wherein it is not easily determined whether a certain factor or attitude will or will not vitiate a claim of bona fide operation, and where factors must be weighed and conclusions reached with specificity and automatic conclusions eschewed. The gist of a successful petitioner's case must be to establish that he is entitled to enlargement of his certificate precisely because he has, in effect, exceeded the authority of that certificate continuously from and before date of issuance; and the mere fact of such consistent violation is not enough to vitiate bona fide operation.—Nashua Motor Exp., Inc. v. United States, 230 F. Supp. 646 (651)*.

Restrictions placed on modification of operating authority may not be bypassed under guise of interpretation; however, since the commission's interpretation of the commodity description in plaintiff's certificate is not clearly erroneous, that interpretation is but a definitive declaration of what rights plaintiff had from the beginning and in no way constitutes modification.—U. S. A. C. Transport, Inc. v. United States, 235 F. Supp. 689 (692, 694)*.

The commission has no power to change or modify a motor carrier's certificate under the guise of interpretative action. Language used in plaintiff's certificates authorizing transportation of "prefabricated buildings, complete, knocked down, or in sections" and of "buildings, complete, knocked down, or in sections" is not ambiguous and plainly describes the commodity authorized; and rationale of the commission's conclusion, in decision requiring cancellation of proposed rates on portable buildings (single unit homes), that

those commodity descriptions did not authorize transportation of single unit mobile homes would require elimination of word "complete" therefrom. This in effect, and in fact, constitutes a modification of plaintiff's authorities that is not permissible under the guise of interpretation.—Pre-Fab Transit Co. v. United States, 262 F. Supp. 1009 (1011-13)*.

The commission itself has held that it has no power to change, modify, revise, or enlarge certificates except in keeping with standards of §§ 206 and 207; and the court accepts that determination as controlling law in holding that the "15,000-pound rule" prescribed in 79 MCC 285, as applied by the commission in finding that heavy-hauler's authority entitles it to transport Army trucks weighing over 15,000 pounds each, even though no special equipment is required or used, served to enlarge the carrier's authority in a manner not prescribed by law. The commission's finding set aside and declared a nullity.—United Transports, Inc. v. United States, 214 F. Supp. 34 (43-4)*.

Although the commission has no right to incorporate authority for general commodities, in lieu of upwards of 30 specific commodities in plaintiff's permit, in certificate issued in conversion proceeding under §212(c), plaintiff is not left without a remedy; if, as it contends, operations on which its original authority was based would entitle it to general-commodity authority as a common carrier, the remedy is to petition the commission to reopen the "grandfather" proceedings.—P. Saldutti & Son, Inc. v. United States, 210 F. Supp. 307 (315)*.

The commission, having found in defendant's application proceeding that it was entitled to ordinary regular-route passenger authority for its airport limousine service, has no authority in subsequent complaint proceeding to modify defendant's certificate, under guise of interpretation, by confining its regular-route operations between fixed termini to those classified as "special." Even if such power existed, its exercise would not be warranted, since the regular, frequent, and expeditious service defendant has been rendering at designated stops under published schedules could not be performed under special-operations authority.—Arrow Lines, Inc. v. Connecticut Limousine Service, Inc., 96 M.C.C. 1 (6).

If applicant desires to modify the language of its outstanding certificate so as to reflect more fully the extent of its heavy-hauling authority and have it conform with the commodity description approved in 61 MCC 209, it should file a properly prepared petition requesting modification for that purpose.—Leroy L. Wade & Son, Inc., Extension, 92 M.C.C. 451 (454).

Although the Southern Tank Lines case (88 MCC 127) provided that carriers holding authority to transport liquid chemicals as defined in the Maxwell case (63 MCC 677) might seek modification thereof to conform to the revised definition eliminating the intended use test, by filing petition in each proceeding in which such authority was originally granted, that procedure was devised in interest of administrative simplicity, and there is no reason why the same result may not be accomplished by filing extension applications, particularly where applicant considers that it has reasonable cause for seeking broader authority than might be obtained throug modification of outstanding certificates.—Bell Extension, 92 M.C.C. 276 (281).

Although the commission modified defendant's authority without prior publication of notice in the Federal Register, defendant's petition for correction was essentially a part of the proceeding on purchase of the rights and order of correction was served on all listed parties-in-interest in that proceeding. Modification was made as a matter of form, since the certificate was incorrectly phrased; such procedural matters require no notice in the Federal Register, and the order allowed ample time for any aggrieved party to show cause why such change should not be made. The essential portion of the certificate remained the same, and the commission's action cannot affect ultimate determination in instant complaint proceeding as to extent of the service authorized at intermediate points.—Consolidated Copperstate Lines, Inc. v. Navajo Freight, 91 M.C.C. 597 (600, 601)*.

See also Curtis Keal Transport Co. case, §206(b), n. 15.

Depressive economic effect on established motor carriers of automobiles of the development of rail TOFC and multilevel-car service is due, not to any shift in origin of the traffic, but to a shift in methods of distributing the traffic from the same origins. Carriers formerly enjoying initial movement traffic seek to continue participating therein by substituting the new rail service for part of the movement to same destinations, but only the prerail or post-rail portion of the haul remains, and appropriate secondary authority is required of the motor carrier completing the movement, unless it is the one which originated it; and similar situations confront holders of secondary authority. The public interest is the commission's primary concern; and, under existing law, it may grant such relief as considerations of public interest and the national transportation policy indicate to be needed.—National Auto Transporters Assn.—Declaratory Order, 91 M.C.C. 395 (413, 416).

Since filing of new individual applications for modification of automobile haulers' initial- or secondary-movement authority to enable them to continue utilizing substituted rail service where ther authorities, as now interpreted, do not cover such movements would place a great burden on all parties, they are authorized to file petitions for such modification, in the manner outlined, in the same docket in which their present authority was granted. If existing authority is modified, the petitioner will not be required to relinquish its present authority, but any modification will be appropriately restricted so as not to place it in position to infringe on rights of existing carriers. And no motor carrier will be barred from seeking such relief merely because of denial of a previously filed application for authority needed for its continued participation in traffic previously enjoyed.—Id., pp. 415-6.

In view of duration of Railway Exp. Agency's practice of tacking its certificates containing rail-haul restrictions to perform an unauthorized all-motor service, and extent to which the public interest as a whole is affected thereby, equitable opportunity should be afforded to resolve the situation openly. Therefore, in instances where REA is now conducting or proposes to conduct a wholly motor service under certificates containing rail-haul or similar restrictions, it should file petitions for modification of such certificates, setting forth fully the complete motor service it desires to perform, within 90 days from service of report or within such further time as the commission may authorize.—Railway Exp. Agency, Inc., Extension, 91 M.C.C. 311 (333-4)*.

While under some circumstances an application filed under §207 is a proper vehicle for seeking modification of a carrier's operating authority, a more appropriate remedy is a petition for modification in each proceeding in which the authority was granted. Whatever procedural device is used, the burden rests on the one seeking modification to establish by clear, concise, and unequivocal evidence that the relief sought is warranted.—C & H Transp. Co., Inc., Clarification of Authority, 88 M.C.C. 87 (95).

When petitioner applied for and was granted authority to transport aircraft parts not requiring special equipment or handling, supporting witnesses made no mention of missile parts requiring special handling, because of security restrictions then in force and because of the prevailing albeit mistaken belief, based on an informal opinion of Bureau of Motor Carriers, that airplane or aircraft parts included missile parts and that applicant could transport the latter under its existing heavy-hauling authority for airplane parts. And though the Air Force's exceptions filed some 6 months after original hearing revealed that missile parts were involved, there was no reason for petitioner, upon receipt of those exceptions or the report and order granting airplane parts authority, to seek modification thereof at that time; its reasonable reliance on the Bureau's interpretation justified its belief that under that authority it could transport missile parts. These unusual circumstances require reexamination of all pertinent underlying facts leading to issuance of the considered authorities.—Leonard Bros. Transfer, Inc., Petition for Clarification, 96 M.C.C. 246 (252-3, 254)*.

The record as a whole clearly reveals intention at time the certificate in question was granted to authorize petitioner to provide its supporting shippers a complete service. It is

undisputed that it has transported missile parts and related commodities continuously since initial movements thereof; that at time of original hearing it was transporting missile parts, including those requiring special handling, for supporting shippers; and that, had it been able under the security regulations to seek authority for missile parts as a separate commodity, it would have shown that it was already providing a heavy-hauler service thereon under color of right. On basis of the evidence of shipper need adduced both at original hearing and at hearing on instant petition for modification, petitioner should be authorized to continue to transport missile parts and related commodities used in the supply, service, repair, operation, or maintenance thereof, without restriction.—Id., pp. 252-3, 254, 255-6.

Testimony of disinterested witnesses appearing on petitioner's behalf, also copies of freight receipts and shipping orders submitted at his predecessor's "grandfather" proceeding, show that the predecessor in fact transported numerous steel products other than those embraced in the description "structural steel" from and to the considered points to a substantial degree on and prior to the "grandfather" date, and that she and her successors have continued to do so except for interruptions beyond their control. Though records of the predecessor's service have long been destroyed, the oral testimony presented, together with some documentary proof in the "grandfather" proceeding, is sufficient to warrant modification of petitioner's certificate to authorize transportation of the items named, in addition to structural steel. The predecessor's truckdriver was able to recall pertinent facts concerning her operations with relative definiteness, and shipper witnesses, some of whom used her service both before and after the critical date, were likewise able to describe the operations with some particularity; those witnesses were qualified to testify to the facts concerning extent of the involved "grandfather" operations.—Simpson—Modification of Certificate, 94 M.C.C. 120 (128).

While petitioner could have filed petition for modification of his certificate shortly after the determination in 62 MCC 348 of the scope of authority to transport "structural steel," he apparently relied on the outcome of his own investigation proceeding instituted some 14 months later; and his purchase of additional rights for transportation of iron and steel articles over 2 years after commencement of the investigation and during its pendency could at most be considered merely hedging against an adverse decision therein and does not dilute his sincerity in filing the instant petition. In the circumstances, his request for modification of the "grandfather" rights should be granted as set forth in the findings.—Id., pp. 128-9.

Although division 1, following decision in 81 MCC 201 that "service" at a point includes interchange and tacking, correctly found that defendant's performance of through service between Phoenix, Ariz., and Los Angeles by tacking its preexisting rights with pruchased rights between Phoenix and Kingman, Ariz., at intermediate points restricted to traffic to or from points north and west of Kingman was unlawful, had that case been decided prior to decision in the purchase proceeding, it appears certain that approval would have provided for removal of such restriction, since record and report in that proceeding indicate understanding of former division 4 and all parties involved that defendant would acquire rights permitting through service to and from all major points on its then existing routes. In the circumstances, the commission is not required to leave the situation as found and thus reach an inequitable result that might work severe hardship on defendant. To avoid unnecessary further proceedings, the purchase case is reopened and certificate issued therein modified to authorize service at intermediate points without restriction.—Consolidated Copperstate Lines, Inc. v. Navajo Freight, 92 M.C.C. 516 (518-9)*.

When in authorizing purchase of unrestricted rights between Indianapolis, Ind., and Louisville, Ky., including intermediate points of Franklin and Columbus, Ind., which petitioner could not serve under its own authority, division 4 did not intend to restrict any service permissible under the separate rights, but restriction in unified certificate against movement of traffic between Franklin, Columbus, or Louisville and points south of

Louisville can be interpreted more narrowly than was intended, the unified certificate was incorrectly drawn and petitioner is entitled to modification. Certificate should be amended by inserting after each reference to intermediate points of Franklin, Columbus, and Louisville a restriction against direct movements between those three points and points south of Louisville, which will not prevent any other routings between those points or prohibit tender of traffic there to interchange carriers for their own direct movement.—Terminal Transport Co., Inc., Petition for Modification, 94 M.C.C. 770 (774).

And while restriction in petitioner's prior certificate of service at the off-route point of Speedway, Ind., to traffic moving to or from Birmingham, Ala., or points beyond was not vitiated by acquisition of vendor's nonradial rights for Marion County (including Speedway), no reason appears why petitioner should not be able, as was vendor, to serve Speedway in connection with its authority between Chicago and the now intermediate point of Louisville. Certificate will therefore be further amended to provide that restrictions at Speedway apply only to the authority therein for service between Indianapolis, on one hand, and on the other, Birmingham and Atlanta, thus giving petitioner the same rights at that point as were enjoyed by vendor.—Id., p. 775.

However, since certain off-route authority appurtenant to a route between Indianapolis and Birmingham has been carried in petitioner's certificate since June, 1947, if it was erroneously preserved in the unified certificate, as contended, the error is not in the drafting of that certificate, but rather in the circumstances surrounding its original issuance, and modification thereof need not be considered. —Id., p. 775.

When applicant's authority for frozen vegetables was issued it was intended that it should be able to offer supporting shipper a complete service in transportation of its commodities, and evidence shows that shipper was then producing frozen cooked potatoes. Thus, owing to subsequent interpretation of frozen vegetables authority as not embracing frozen cooked products, including potato products, that authority does not include the full range of commodities which applicant and shipper had reason to believe could be handled thereunder; certificate modified to authorize transportation of frozen vegetables and frozen vegetable products.—Refrigerated Food Exp., Inc., Extension, 91 M.C.C. 779 (782).

Examination of supporting evidence in proceedings wherein petitioner or its predecessors were granted authority for numerous articles, including cement pipe, listed in petitioner's certificates under heading "Building, roofing, and insulating materials," reveals that applicants proposed and shippers required trench site deliveries of pipe of type now considered. Supporting shipper has produced that type of pipe for use in water and sewer systems for some 30 years and has used services of petitioner and its predecessors extensively in transporation thereof, and it is sufficiently clear that transportation of cement pipe and the other commodities so listed was meant to be authorized without regard to their intended future use. Petitioner is entitled to modification of its authority by deletion of the controversial heading.—Ace Lines, Inc., Extension, 91 M.C.C. 559 (563-5).

Directional restrictions on service at intermediate Kentucky and Tennessee points in applicant's "grandfather" authority between Louisville and Memphis are so ambiguously worded as to render unclear the otherwise precise words "northbound" and "southbound." Examination of record in the "grandfather" proceeding reveals that no restriction was intended at any Tennessee point except Nashville, which was intended to be restricted to northbound traffic only, and that service at all intermediate Kentucky points was intended to be restricted to northbound traffic, except Camp Knox, which is restricted to southbound. Clarified certificate will be issued upon applicant's written request for cancellation of the existing restrictions.—Southern Forwarding Co. Extension, 91 M.C.C. 221 (225-6, 228).

Though original shipper's use of description "wrapping paper" for considered commodity was reasonable, since it has all transportation and visible characteristics of wrapping paper, shipper's successor reclassified it as "wood pulpboard," which it markets

under name "Kraft saturating," and declined to use petitioner's service under its "wrapping paper" authority. Since that authority was granted on a specific showing of need for transportation of that shipper's product, which is manufactured for sole use of consignee which uses it as a filler in laminated plastic board, such a broad description authorized more service than need was shown for; as petitioner seeks modification thereof, certificate description is amended to read "Kraft paper, saturating," which appears to be the most apt for that traffic.—Herndon Extension, 89 M.C.C. 278 (279-80).

Reformation of all outstanding authorities for liquid chemicals to conform with broadened commodity description now adopted, in interest of uniformity and to enable chemical carriers to provide a complete service, is long overdue; though some expansion of operating rights may ensue, the overall result would clearly be in public interest and to advantage of both carriers and chemical producers. Cooperation of the chemical carriers and other interested parties is essential: therefore, procedure for those desiring to substitute the revised description for their present authorities is outlined and instant report transmitted to National Tank Truck Carriers with request that it be called to attention of its members; if desirable, informal conferences between commission's staff and the carriers or other interested persons, for purpose of implementing the matter, can be arranged.—Southern Tank Lines, Inc., Extension, 88 M.C.C. 127 (143-4)*.

Although fact that 9 of 13 shippers supporting application in which considered certificate was granted were not meat packinghouses is not alone conclusive of applicant's right to transport commodities embraced in "packinghouse products" for nonpackinghouses, since the certificate also authorizes transportation of "canned and preserved foodstuffs," reexamination of record therein is convincing that authority granted does not adequately encompass all commodities for which need for service was shown by such shippers; "canned or preserved foodstuffs" would not embrace dairy products such as oleomargarine, butter, cheese, and eggs unless they had undergone some process of preservation; that certificate should accordingly be modified to include dairy products and shortening as set forth in instant findings.—Argo-Collier Truck Lines Corp. Extension, 88 M.C.C. 253 (257)*.

Separate authorities (1) from New York City to Miami area and (2) from Connecticut-New York-New Jersey area to New York City, both restricted to traffic having immediately subsequent movement by air from airports in the Miami area, may not be tacked for rendition of through service, since the movement under (1) vitiates the restriction on (2); moreover, latter authority, as worded, appears to be a nullity. Since application for authority (2) was unopposed, supporting shippers clearly showed need for service from that origin area to Miami area, and examiner obviously intended to authorize a through operation, that proceeding is reopened and certificate amended to authorize service restricted to traffic having immediately subsequent movement by motor vehicle to commercial airports in the Miami area, followed by an air movement therefrom.—Armellini Exp. Lines Extension, 88 M.C.C. 539 (541-2).

Although certain operations conducted by petitioner since 1935 under color of "grandfather" rights have not been conducted in willful defiance of the law, but under a misapprehension of the true scope of its certificate, and in the circumstances cannot be considered other than bona fide, the commission has no power to enlarge any operating authority except in accordance with the standards established by the act. To warrant the proposed modification of petitioner's certificate it must be shown that it is necessary to eliminate a patent ambiguity or to correct a manifest injustice. At the least, it must reasonably appear that the broader authority sought would more accurately reflect what should have been issued on basis of the evidence adduced in the original "grandfather" proceeding. Petitioner's certificate is clear and unambiguous, and modification is not warranted on basis of evidence presented either originally or on instant petition, which is therefore denied.—Nashua Motor Exp., Inc.—Petition for Modification, 96 M.C.C. 583 (584-5)*.

In seeking modification of its "grandfather" certificate to authorize transportation of heavy and cumbersome commodities instead

of machinery, equipment, and supplies used in operation and maintenance of industrial plants, the burden of proof is on petitioner. But while there is evidence that it held out to transport such commodities before issuance of its certificate, there is little or none that such interstate shipments were actually handled, and a mere holding out without performing substantial service is inadequate to establish a bona fide "grandfather" operation; nor do photographs of loaded heavy commodities, advertisements, or the self-serving and vague recollections of its employees suffice to do so. Petitioner had counsel and knowledgeable consultants in preparing its "grandfather" application, and it may reasonably be inferred that such application adequately described the authority sought and the operations on which it relied. Such was the authority granted, which has remained unchallenged for over 20 years, and in absence of probative evidence to the contrary the prior determination must be presumed sound. There is nothing to indicate any intent to authorize a complete heavy-hauling service or that the commodity description in the "grandfather" certificate was erroneous; petition denied.—Home Transp. Co., Inc.—Purchase—Chattanooga Transfer, 97 M.C.C. 173 (184).

Carriers seeking modification of their certificates must establish by clear, concise, and unequivocal evidence that the relief sought is warranted. Evidence submitted is not persuasive that restriction of petitioner's general-commodity authority against transportation of petroleum products means less than the ordinary meaning of that term, which includes petrochemicals. Contention that at time of its "grandfather" proceeding it was handling some petrochemicals is uncorroborated by evidence warranting reopening thereof; documentary evidence shows pertinent movements of those commodities only after 1957. While testimony, based only on personal knowledge of shipper witnesses, that some of that traffic was handled during and after 1946 may be the best evidentiary source now available, it cannot be inferred therefrom that petrochemicals were being transported on and since the critical time in 1935; nor can probative matter be constructed from evidence rejected in extension proceeding. No convincing evidentiary basis is presented for modification of petitioner's authority to include petrochemicals.—Consolidated Freightways Corp. of Del. Extension, 92 M.C.C. 443 (449)*.

Though simplification and restatement of applicant's operating rights may be desirable, extension proceeding is not the proper forum for modifying its authorities as proposed. Requested changes would (1) incorporate deviation and alternate routes as part of applicant's service routes, (2) redesignate routes without showing that they have been changed, (3) extend deviation routes to include points on routes purchased, without showing that the changes are within purview of §211.1(c)(8)(i) of the deviation rules, and without publication in Federal Register, and (4) grant authority for which need has been shown in the past but for which no certificate has been issued. Authority to operate deviation or alternate routes as service routes may be granted only on appropriate findings in a §207 proceeding; extension of authority or correction of erroneously described routes should be made in original docket before request is made to consolidate such certificate with others; and where applicant seeks issuance of certificate in a pending proceeding, relief should be sought in that docket. Such modifications are outside scope of instant extension proceeding and may not be considered.—Trailways of New England, Inc., Extension, 92 M.C.C. 434 (439-40).

While "grandfather" certificates have been modified on a showing that authority granted a predecessor was not responsive to its traffic pattern, or that more comprehensive service was conducted than its authority might now allow, applicant claiming right to perform heavy-hauling service is required to show that commodities transported by its predecessor do not fit description in "grandfather" certificate of "heavy machinery" or "contractors' machinery, tools, and equipment." It has not done so. While all items handled cannot be classified with certainty, that authority is broad enough to embrace the bulk of them, and those not readily assignable to either description do not go to make up a heavy-hauling service. Modification to embrace all commodities which because of size or weight re-

quire special equipment, not justified.—Jetco, Inc., Extension, 91 M.C.C. 673 (677, 678-9).

No sufficient cause has been demonstrated for reopening of applicant's "grandfather" proceeding for purpose of broadening its commodity authority for "equipment used in the manufacture of" specified articles to authorize transportation of equipment used "or useful" in manufacture of wearing apparel, so as to legitimize applicant's transportation of sewing machines without regard to their use for commercial purposes. Grant therein was predicated on a showing of service for a manufacturer of women's foundation garments, and no probative evidence is tendered which would justify broader authority, or which indicates that authority granted was not fully responsive to the proof adduced in the "grandfather" proceeding. Petition denied.—I.L. & C. Corp. Modification of "Grandfather" Authority, 89 M.C.C. 161 (164).

"Grandfather" rights, determined many years ago, should not be modified except where there is a definite and positive showing that a miscarriage of justice has occurred. "Grandfather" applicants expressly sought eastbound authority over considered route only for gas in cylinders and rubber tires, which was granted, and neither they nor any of four successive transferees prior to petitioner sought any reconsideration or extension of that grant; analysis of abstract of shipments submitted in the "grandfather" proceeding indicates that no enlargement of those rights would be justified upon reconsideration and that there has been no miscarriage of justice; reopening of the "grandfather" proceeding would serve no useful purpose.—Keystone Motor Exp., Inc.—Investigation of Operations, 89 M.C.C. 567 (574)*.

Petitioner seeks modification of the "grandfather" authority, as described in its present certificate which differs somewhat in wording from those held by its predecessors, for general commodities from Charleston, W. Va., to Cincinnati to read "between" Charleston and Cincinnati, to permit it to handle eastbound shipments of general commodities, including service in both directions at authorized intermediate points. However, the grant of authority to serve the named intermediate points, as originally described at the foot of the two basic commodity grants, was not intended to and did not enlarge those grants so as to authorize transportation of general commodities eastbound from the intermediate points; conclusion is warranted that petitioner has at no time acquired any greater operating rights in that respect than those held by its predecessors, and that its present certificate adequately describes the rights originally granted in the "grandfather" proceeding; petition for modification of the certificate, denied.—Id., pp. 575, 576.

Although modification of railroad subsidiary's certificate to eliminate 33 present key points and authorize substituted highway service within each of 12 defined key-point zones, but not between zones, will bar transportation of certain interzone traffic it can handle under present key-point restrictions, denial of its request for a 150-mile highway exception to continue such transportation is not inconsistent with refusal to allow any alteration requested by protestants of present commodity descriptions and exceptions in its certificate; latter modifications would work an absolute diminution of its present authority, whereas net effect of the zone modification is a substantial gain in territorial scope of its substituted service.—New York Central Transport Co.—Modification, 89 M.C.C. 389 (412).

See also Northern Pacific Transport Co. case, NTP, n. 10 *Restrictions*.

Petition for amendment of permit for "groceries" to authorize transportation of commodities dealt in by grocery stores was filed 7 years after "groceries" was defined (53 MCC 703, 61 MCC 311, sustained 159 F. Supp. 717) as articles customarily served as food or used in preparation thereof; during those years petitioner continuously transported many articles not within that definition; claim that it was entitled to do so on strength of its predecessor's operations is not tenable, since every carrier subject to the act is charged with knowledge of the commission's pertinent interpretative decisions, and those cited should have put petitioner on notice that such transportation was on its face unauthorized. It should have taken steps to clarify its authority within a reasonable time after those decisions; no justification appears for its contin-

ued operations in ignorance or disregard of transportation which it should have known its permit authorized.—C & E Trucking Corp.—Modification of Permit, 88 M.C.C. 391 (394).

To acquiesce in petitioner's position would condone a practice which is not responsive to a carrier's duty under the act and which would be both administratively unsound and unfair to other carriers who operate within scope of their authorities; it is of no significance that petition was filed shortly after petitioner was notified that it was conducting operations in excess of its authority; circumstances compel conclusion that petitioner's "groceries" authority is definite, unambiguous, and not justifiably susceptible to the modification sought at this time.—Id., p. 394. [But see partial dissent.]

Even if resort to extraneous matter were warranted, no different result is justified. Had petitioner acted at an earlier date, documentary evidence of predecessor's actual operations might have been available. However, record is far from convincing that the predecessor's transportation of certain items was of commodities to be sold in grocery stores, rather than supplies to be used in a meat and grocery business; such meager evidence does not justify authorizing petitioner, whose authority was recently converted, to operate as a common carrier of any commodity dealt in by wholesale or retail grocery stores.—Id., pp. 394-5.

35. Cessation of operations exceeding authority.—[Vols. 15-19].—See also Jones Motor Co. v. United States, 28 USC §2325, n. 57.

In corporation's action seeking review of the commission's order requiring plaintiff and its predecessor (the individual who is now its president and major stockholder) to cease and desist from engaging in unlawful for-hire motor carriage, there is no substantial evidence of record to show that the corporation conducted any illegal activities after it was organized when virtually all the evidence of unlawful transactions related to operations conducted by its predecessor prior to the date of its incorporation. Though predecessor engaged in unlawful for-hire transportation, this does not show that plaintiff conducted illegal activities; mere fact that a person is the major stockholder of a corporation does not of itself make him the alter ego of that corporation. A one man corporation can be valid; and, since record does not show plaintiff corporation to be a sham, or mere shell, its corporate entity may not be disregarded. Record fails to disclose a rational basis for the commission's opinion that a cease and desist order should issue against the corporation; order reversed and set aside.—Farmers Feed & Supply Co. v. United States, 267 F. Supp. 72 (75-6)*.

Plaintiff engaged in operations not within scope of its permit authorizing transportation of "packinghouse products" and "canned goods" when considered commodities were either transported for shippers not engaged in the business of operating meat packinghouses or do not come within the accepted meaning of canned goods. Accordingly, the commission properly entered the cease and desist order in issue when, after thorough consideration of all evidence in plaintiff's reopened "grandfather" proceeding, and application of proper statutory standards therein, it determined that plaintiff's permit reflected all the "grandfather" rights to which it was entitled; sustained.—Zuzich Truck Line, Inc. v. United States, 224 F. Supp. 457 (463, 466)*.

Order requiring respondent air carrier to cease and desist from all unlawful motor-carrier operations until proper authority is obtained therefor was stayed because of court action to set aside the prior decision; and it being found, on reconsideration, that respondent's motor transportation of property, having a prior or subsequent movement by air, between Greater Wilmington (Del.) Airport and Baltimore, Md., 65 miles, does not fall within the partial exemption of §203(b)(7a), an appropriate order will be entered at the conclusion of the court proceedings.—Zantop Air Transport, Inc.—Investigation of Operations, 102 M.C.C. 457 (458, 463)*.

Motor carrier respondent's transportation, without appropriate authority, of property having a prior or subsequent movement by air and moving on air freight forwarder bills of lading between Memphis, Tenn., airport, on one hand, and points in that and adjoining States which are not named in air carrier tariffs on file with the C. A. B., on the other, is not within the §203(b7a) exemption; respondent has been, and is, engaged in unlawful

motor carrier operations. And record is convincing that air freight forwarder respondent knew, or had reason to know, that activities of the motor carrier constituted a for-hire transportation service requiring interstate operating authority and, to some extent, benefited by its participation therein. Cease and desist order, directed to both respondents, entered.—Film Transit, Inc., and Air Dispatch, Inc.—Investigation, 98 M. C. C. 145 (152).

Though defendant authorized to conduct regular-route airport limousine service, restricted to transportation of not over 11 passengers in any one vehicle, has incidental charter rights under §208(c), the type-of-service restriction in its certificate applies to any charter operations conducted under those rights. Defendant admits that it has performed at least one charter trip with a vehicle larger than the 11-passenger vehicles used on its certificated routes, and the commission takes official notice of its charter tariff naming charges, rules, and regulations for chartered vehicles "having a seating capacity of more than 11 passengers." Moreover, defendant asserts that it is entitled to engage in charter operations of type found to be beyond scope of its incidental authority; it is therefore ordered to cease and desist from such unauthorized operations.—Arrow Lines, Inc. v. Connecticut Limousine Service, Inc., 96 M.C.C. 1 (9).

Since defendant's transportation of passengers in charter operations originating at Portland, South Portland, Gorham, and Lewiston, Maine, and extending to out-of-State points is beyond scope of its incidental charter rights under §208(c) and without certificated authority, in violation of §206(a), cease-and-desist order is entered.—Brunswick Transp. Co., Inc.—Revocation of Certificate, 91 M.C.C. 899 (905).

Inasmuch as Storrs, Conn., is found not to be embraced within defendant's regular-route territory for purpose of §208(c) and the commission's regulations thereunder, defendant is ordered to cease and desist from transportation of passengers in charter service from the University of Connecticut at Storrs to points beyond that State.—Blue Line, Inc. v. Short Line of Connecticut, Inc., 88 M.C.C. 201 (204-5); similarly, Plainfield, N.J., being found not to be within the origin territory appurtenant to defendant's regular routes, as contemplated by the incidental charter rights provisions of §208(c), defendant is ordered to cease and desist from originating charter parties at that point unless and until appropriate authority is obtained.—Somerset Bus Co., Inc. v. Suburban Transit Corp., 88 M.C.C. 13 (16).

Problems posed as to extent of terminal areas based on Beaumont and other Texas towns in Jefferson County, resulting from annexation by the City of Orange of a circular strip bringing its municipal limits within radial distances of such adjacent municipalities conforming to mileage-population formula prescribed for determining commercial zones and terminal areas, are unusual. Defendants' unauthorized transportation to and from those portions of the unannexed, unincorporated area enclosed by the strip which are found not to be within the commercial zones of their authorized base municipalities therefore does not reflect unfavorably on their bona fides. However, in view of the finding of unlawfulness of transportation to and from such encircled unincorporated areas exceeding the prescribed radii from the base municipalities, entry of a cease-and-desist order is deemed appropriate.—Central Freight Lines, Inc. v. East Texas Motor Freight, 96 M.C.C. 150 (158)*.

Since respondents are found to be providing, jointly and in concert, an unauthorized for-hire freight forwarding service in violation of §410(a), it follows that motor-carrier operations conducted in their behalf by respondent cartage company within terminal areas of Miami and Fort Lauderdale, Fla., are also unlawful in violation of §§ 203(c) and 206(a) or 209(a); cease-and-desist order entered.—Federal Shippers Assn., Inc.—Investigation, 316 I.C.C. 523 (527)*.

Respondents holding general-commodity authority which excepts commodities requiring use of special equipment are not authorized to transport new automobiles with either standard carryall type trailers or convertible "Durabilt" trailers, and performance of such transportation in substituted motor-for-rail service violates §206(a); cease-and-desist

order entered.—Motor Vehicles—Idaho, Nevada, and Utah Origins, 318 I.C.C. 859 (866-7, 868).

Record is conclusive that principal respondents, a vehicle leasing company, a company purporting to furnish drivers to shippers, and a meatpacker which transports its own goods, are jointly providing for-hire motor carrier service to shippers without appropriate authority; and that secondary respondent-shippers were interested in and affected by operations of the principal respondents within meaning of §2 of the Elkins Act. Cease-and-desist order issued against all respondents.—Transport Rental Systems, Inc., Investigation, 94 M.C.C. 402 (412-3).

In dealing with fictitious equipment-leasing arrangements the commission has invariably found that lessor was engaged in unlawful operations over lessee's routes; operations from St. Louis to Tulsa under purported lease-and-interchange arrangement are those of respondent connecting carrier and not of carrier holding the authority therefor; even though they were conducted under unauthorized lease of latter's operating rights, such lease is without legal force or effect; as respondent has no certificated authority for such operations it is in violation of §206(a); order entered requiring it to cease and desist from such unauthorized operations.—Stewart—Investigation of Control, 87 M.C.C. 681 (697-8).

The fact that applicant did not agree with commission interpretation of the extent of its authority, in earlier Interpretations case, and fact that it was unable to obtain review of that decision because of lack of finality of the order affords no reason for applicant to engage in unlawful operations in defiance of the commission's orders, and warrants issuance of a cease and desist order in embraced complaint proceeding.—Coldway Food Exp., Inc., Extension, 94 M.C.C. 479 (483-4)*.

However, since applicant is found fit to receive authority sought—which covers operations found to be unlawful in embraced complaint case—on reconsideration, a cease and desist order will be entered unless it complies with the insurance, tariff, and reporting requirements within the time specified.—Id., 95 M.C.C. 780 (785, 787-8)*.

Since the commission by DANDO adopted examiner's finding in another proceeding that respondent's permit for transportation of petroleum products in containers did not authorize transportation of bulk asphalt between points in same territory, and also adopted his recommended denial of extension authority for that service, respondent's continuance of such bulk operations would violate §209(a), and it should immediately cease and desist therefrom if it has not already done so.—C&R Trucking Co.—Investigation of Control, 93 M.C.C. 669 (672); and as respondent's purchase of additional rights to transport petroleum products was consummated in violation of §5(4), it follows that, with exception of a 30-day period during which it performed the service under temporary authority granted pursuant to §210a(a), its performance thereof under color of vendor's permits has also been unlawful in violation of §209(a); cease-and-desist order entered.—Id., p. 681.

Since respondent's "prefabricated houses and buildings" certificate authorizes transportation of commodities named therein only if they are intended for use in, or in connection with, a prefabricated house or building, its transportation under that authority of commodities classified as "building materials" which are not intended for such use constitutes a clear and continuing violation of the act. Cease and desist order entered.—Whitehouse Trucking, Inc., Investigation and Revocation, 99 M.C.C. 621 (623-4, 629-30)*.

Inasmuch as transportation of binder and baler twine is found not to be authorized by commodity description "farm machinery and parts thereof," and such authority does not permit independent transportation of parts, respondent's transportation of twine and of separate shipments of rake teeth and harrow teeth has been unlawful; cease-and-desist order entered.—Ace Lines, Inc., Investigation and Revocation, 94 M.C.C. 96 (98, 100)*; similarly, insofar as respondent's transportation of electric cable, dry glue, glue stock, furfural residue, wood veneers, transformers, and regulators is found not to be within scope of its authority for building and construction materials, cement, forest products, lumber, or heavy machinery, it is ordered to cease and desist from such unlawful operations.—

Mitchell Bros. Truck Lines—Investigation, 91 M.C.C. 267 (274)*.

Carrier's authority for transportation of "supplies" intended for use in mines or oilfields, or in discovery, development, and production of natural gas and petroleum, does not authorize transportation or stringing of pipe used in a pipeline right-of-way; and though such unlawful operations have been discontinued, entry of a cease-and-desist order is still deemed necessary.—Great Western Motor Lines, Inc.—Investigation, 96 M.C.C. 522 (525, 527).

Since "oils" listed under heading "Meats, Meat Products, and Meat Byproducts" in section A of appendix I to the Descriptions case embraces only those oils derived solely from animal matter, defendant's authority to transport commodities in that list does not authorize it to transport vegetable oils, vegetable oil shortenings, or oils and shortenings blended from vegetable oils and animal oil or fat; and the fact that defendant has performed such unauthorized transportation for the past 10 years under an honest misinterpretation of its certificate is not a mitigating circumstance. Cease-and-desist order entered.—Modern Truck Line, Inc. v. Colonial Refrigerated, 94 M.C.C. 149 (152).

Though the evidence does not support a conclusion that unlawful transportation respondent performed was a willful violation of the act, but indicates it was performed under a mistaken assumption that its existing certificate authorized the service, a cease and desist order is entered respecting those operations. —North American Van Lines, Inc., Investigation, 94 M.C.C. 663 (669); respondent has sincerely construed its certificate in good faith and its unauthorized operations were the result of an honest misinterpretation of its operating authority. Therefore, entry of cease-and-desist order should not be construed as a conclusion that respondent is unfit to receive a grant of authority in any pending proceeding in which it is an applicant.—Eagle Motor Lines, Inc., Investigation and Revocation, 94 M.C.C. 704 (710)*.

Transportation by defendant carrier, under contract of lease between it and complainant's predecessor, was performed without having in force a certificate authorizing such operation; cease-and-desist order is entered requiring defendant to abstain from such illegal operations.—Ayres v. Northern Tank Line, 95 M.C.C. 468 (470-1); likewise, since respondent is found to have been transporting new trucks as a connecting carrier without appropriate authority in violation of §206(a), a cease and desist order is entered.—Kenosha Auto Transport Corp., Investigation, 89 M.C.C. 550 (553)*.

Respondent ordered to cease and desist from transportation of commodities found to be beyond scope of his authority.—Momsen—Investigation and Revocation of Certificate, 88 M.C.C. 343 (347); of 50 shipments alleged to be unauthorized, only 2 were within respondent's authority to transport "heavy machinery, contractors' equipment, and parts and accessories, in special equipment, in quantities of not less than 10,000 pounds." Other shipments are not shown to have been moved in, or to have required, special equipment. Respondent ordered to cease and desist from unauthorized transportation.—Ray Carter, Inc.—Investigation and Revocation, 91 M.C.C. 653 (656-8); similarly, since respondent's interstate transportation of self-propelled streetsweepers and road rollers was not within either its heavy-hauler or tractor authority, cease-and-desist order is entered enjoining such operation until proper authority is obtained.—Daily Exp., Inc.—Investigation of Operations, 98 M.C.C. 661 (672, 674-5).

Both carrier respondent and affiliated corporation, jointly and severally, have been, and are, engaging in unauthorized interstate transportation of fuel oil and diesel oil to shipper's plant facility, and shipper participates in the unauthorized operations; cease and desist order entered against all three.—Schirmer Transp. Co., Inc.—Investigation, 91 M.C.C. 869 (875-7)*.

Respondent carrier's buy-and-sell operations in the direct transportation of sugar from refinery to customer-consignees, found to be unlawful for-hire transportation; and record is clear that refiner respondents and broker respondents are interested in and affected by the carrier's unlawful operations within §2 of the Elkins Act. While some of the respondents have ceased dealing with the car-

rier, their ability to reinstate similar unlawful operations remains and poses a continuing threat. Cease and desist order, directed against all respondents, entered.—Utley Lumber Co., Inc., Investigation of Operations, 94 M.C.C. 458 (463-5); also, while record is not sufficient to provide a basis for cease and desist order against refiner and broker respondents broad enough to prevent them from future participation in similar arrangements with other such carriers, they are admonished to examine their operations and take steps to insure against participation in similar transactions in the future.—Id., p. 466.

Carrier respondent has cooperated with individual respondent holding no authority in an overall plan for providing their complementary services as one in performance under purported equipment-leasing arrangements of transportation beyond scope of the carrier's commodity authority. Cease-and-desist order entered.—Zirbel Transport, Inc., Investigation and Revocation, 91 M.C.C. 705 (709).

Carrier holding certificate for operations between St. Louis and certain Illinois points and affiliate holding only Illinois intrastate certificate have jointly and severally been operating in interstate commerce between points in Illinois, Missouri, and Indiana beyond scope of their authorities, in violation of either §206(a) or §209(a); cease-and-desist order entered.—State Transport Co., 91 M.C.C. 373 (375).

Plant site located some 4 miles from highway is found not to be an authorized point of service in respondent's operations between Philadelphia and New Brunswick, N.J., and although respondent had discontinued service to the plant pending outcome of investigation, cease-and-desist order is appropriate when its unlawful activity extended over a period of 10 years.—Cross Transp., Inc., Interpretation of Certificate, 91 M.C.C. 51 (57).

Since defendant's authority to serve points in Philadelphia commercial zone stems from its authority for a route between Philadelphia and Newtown Square, Pa., it may not do so as an incident to line-haul service over its Trenton, N.J.-Holyoke, Mass., route merely because commercial zone of an off-route point appurtenant to latter route overlaps the Philadelphia zone; thus its transportation of traffic between Philadelphia and points on the Trenton-Holyoke route violates §206(a)(1); cease-and-desist order entered.—Joint Northeastern Motor Carrier Assn., Inc. v. Creger, 91 M.C.C. 494 (496).

Restrictions in defendant's certificate preclude any service at Louisville and Buckner, Ky., and Franklin and Columbus, Ind., whether direct or indirect or by interline, on traffic moving to and from points south of Louisville; defendant's various described methods of operation between such restricted points and the prohibited area are therefore unlawful; cease-and-desist order entered.—Alabama Highway Exp., Inc. v. Terminal Transport Co., 91 M.C.C. 635 (639, 640, 642).

Based on the most reliable method of measurement used by the parties' witnesses, air line distance from Grant Park, Chicago, to shipping docks of plant at Woodstock, Ill., is shown to exceed defendant's authorized radial distance of 50 miles from Grant Park; transportation performed for that shipper is thus beyond scope of defendant's authority; cease-and-desist order entered.—Peet Frate Lines, Inc. v. W.O.D., Inc., 89 M.C.C. 206 (208).

Respondent's authority to serve points "in Connecticut, Pennsylvania, New Jersey, and New York within 100 miles of Columbus Circle, N.Y.," is found not to authorize service to or from points in Connecticut, Pennsylvania, or New Jersey that are over 100 miles distant from Columbus Circle; therefore, respondent is ordered to cease and desist from any such unauthorized operations.—T. I. McCormack Trucking Co., Inc.—Investigation, 89 M.C.C. 5 (16, 18)*.

When unrefuted evidence shows that Lincolnton, Ga., is beyond defendant carrier's authorized radial territory within 100 miles of corporate limits of Atlanta, and that transportation of shipments from Lincolnton is therefore unlawful, it is unnecessary to determine whether destination point at Cleveland, Ohio, is within its authorized 25-mile radius of Akron; and though defendant shipper is admonished to discontinue use of carrier's unauthorized service, in view of cease-and-desist order entered against latter entry of similar order against shipper is unnecessary.—Hennis

Freight Lines, Inc. v. Ohio Southern Exp., Inc., 88 M.C.C. 168 (172).

Operation as a motor carrier under authority from the commission involves compliance not only with the act but also with many regulations and requirements, and successful regulation requires the cooperation of the carriers. Although applicant has consistently asserted a right to perform the challenged operations ever since it acquired the certificate involved, has conducted them allegedly on advice of counsel, and may be assumed to have acted in good faith prior to being advised, first by the commission's district supervisor, and second, by the Director of the Bureau of Operating Rights, that they were unauthorized, it took no action thereafter to clarify its authority until after institution of investigation proceeding some 18 months later. This does not reflect a commendable attitude on part of respondent or its counsel; neither was diligent in seeking a formal ruling by the commission when they became aware that responsible officials of the commission questioned the legality of the operations.—Keystone Motor Exp., Inc.—Investigation of Operations, 89 M.C.C. 567 (578, 579)*.

While admittedly a carrier may rely on advice of its counsel, albeit misadvice, both carrier and counsel have a clear duty to seek resolution of any question raised by a responsible official of the commission as to operations under its authority with which they take issue; dilatory tactics disclosed should not be condoned on part of either respondent or its counsel, upon whose advice it claims it has been and is relying in support of its continued unauthorized operations. However, considering changes in wording of the involved authority in course of five successive transfers since issuance of original "grandfather" certificate, and fact that for over 5 years respondent has conducted considered operations openly, under color of right, and on advice of counsel, it cannot be found to have acted willfully in violation of §206(a). Cease-and-desist order entered.—Id., pp. 579, 580.

Though respondent's certificate limits it to transportation of equipment, machinery, and materials peculiar to or intended for use by the oilfield industry, it has for years engaged in what amounts to a general-commodity operation under color or its claimed authority for "materials," its traffic having been restricted only by its ability to attract business. Its self-serving interpretation of its certificate is too tortured for conclusion that such flagrantly unlawful operations were not willfully conducted; and the violations are not mitigated by fact that unauthorized traffic was solicited openly, continuously, and vigorously over a long period. Also, the commission's failure to reject a tariff listing rates for unauthorized commodities operates neither to convey new authority nor to condone the unlawful conduct. Effect of the willful violations has been to deprive authorized carriers of revenues to which they, not respondent, were entitled; cease-and-desist order entered.—J. B. Acton, Inc.—Investigation and Revocation of Cert., 89 M.C.C. 59 (64)*.

Defendant passenger carrier's eastbound transportation of part of all-expense tour group assembled in New York City, which had traveled to Pacific northwest points by air service, was unlawful when it holds no specific charter-operations authority between considered points and, under its regular-route authority between certain New Jersey points and New York City, it may perform such service only under the incidental charter authority of §208(c); and defendant passenger broker's use of such unauthorized transportation is in violation of §211. While the commission does not condone defendants' engaging in such unlawful operations, since they have voluntarily discontinued them and desire to comply with the commission's regulations in the future, entry of a cease and desist order is unnecessary; defendants should be afforded an opportunity to manifest their good faith without a compliance order; however, they are admonished to so conduct their operations as to avoid future violations.—Greyhound Corp. v. Consolidated Term. & Travel Bureau, 94 M.C.C. 283 (285).

Passenger carrier's transportation of express in its buses when no passengers are transported therein is unlawful if it is being conducted for purpose of transporting express alone and is not incidental to transportation of passengers. Any such operations should be immediately discontinued and not resumed until appropriate authority therefor

is obtained.—Armored Carrier Corp. Extension, 92 M.C.C. 336 (363).

As order entered in 91 MCC 936, directing applicant to cease and desist from violations therein found, though held not to bar approval of purchase of additional operating rights in 93 MCC 217, was made applicable to any certificate issued as result of that purchase, it should also apply to authority granted for such portions of proposed operation between Boston and Berlin, N.H., as may not be performed under the purchased rights, and acceptance of certificate issued in instant proceeding will be deemed agreement by applicant to application of that order.—Trailways of New England, Inc., Extension, 92 M.C.C. 434 (439).

Petitioner's transportation of l.t.l. freight originating at and destined to points in Maryland, in consolidated truckloads with l.t.l. shipments to or from points beyond that State, over circuitous routes via Bridgeville, Del., is not authorized by its certificate, and such operations are conducted as a subterfuge to evade the laws of Maryland. Petitioner is admonished to discontinue such unlawful operations.—Service Trucking Co., Inc.—Declaratory Order, 94 M.C.C. 221 (225, 226)*.

See also Jones Public Utility Comm. case, §204(c), n. 251.

Though respondent's permit authorizes transportation only of merchandise dealt in by wholesale, retail and chain grocery and food business houses, it has admittedly been serving under contract shippers or receivers who do not operate retail chain grocery stores, the business of which is selling food, and apparently much of the traffic transported in such operations is commoditywise beyond the scope of its permit. If its operations were confined to authorized shippers or receivers there would be little likelihood that it would be tendered unauthorized traffic.—Estate of E.L. Northcutt, Deceased, petition Proceeding, 94 M.C.C. 585(600-1)*.

Protestant's argument that regulated carriers' certificates do not authorize a pool-truck distribution service to and from points beyond the New York and Philadelphia commercial zones is devoid of any support in the record. If there are any such unauthorized operations, procedures are available whereby protestant may bring the facts to the commission's attention for appropriate action.—Distribution Rates in Eastern Central Terr. Cities, 319 I.C.C. 410 (416).

Although petitioner has clearly been operating beyond scope of its commodity authority, cease-and-desist order may not be entered in proceedings on petition for modification of its permit or extension application seeking authority to transport the commodities involved; however, petitioner is admonished to discontinue the unauthorized transportation.—C & E Trucking Corp.—Modification of Permit, 88 M.C.C. 391 (396); nor is an application proceeding an appropriate place for applicant to request issuance of a cease-and-desist order against protestant for allegedly exceeding scope of its authority.—Alterman Transport Lines, Inc., Extension, 91 M.C.C. 43 (45).

Although applicant bases its claim of right to handle traffic to or from Vincennes, Ind., through its Terre Haute, Ind., terminal on theory that because Vincennes is an authorized service point on its east-west routes it must necessarily be an authorized point on its northsouth route between Terre Haute and Evansville, which passes through Vincennes, the northsouth route is unequivocally restricted against service at intermediate points, and applicant has advanced nothing to warrant finding that its Terre Haute-Vincennes operation is conducted under even the barest color of right. It should immediately discontinue such operations until it obtains proper authority.—Eastern Exp., Inc., Extension, 92 M.C.C. 696 (698-9).

Although there is some question as to propriety of respondent's use of plan III TOFC service under its initial-movement authority as a contract carrier of automobiles when at shipper's direction and under terms of its contract it handled shipments in through motor-rail-motor movements under its sole responsibility, in its trailers, and on its billing, and was shown as consignor-consignee on railroad billing for the substituted rail movement, in view of the confusion generated in the automobile industry by the new rail transportation methods no cease-and-desist order is entered, and its use of the TOFC service at shipper's

specific direction is found lawful. However, respondent is admonished to conform to the commission's present rules barring its participation in TOFC transportation in its own right.—National Auto. Transporters Assn.—Declaratory Order, 91 M.C.C. 395 (402, 414, 417).

Applicant's transportation of palletized bags of bonding mortar and ferro alloys in palletized boxes is clearly beyond scope of its heavy-hauling authority and should be discontinued.—W. J. Dillner Transfer Co. Extension, 91 M.C.C. 667 (671); similarly, since applicant's authority for "heavy machinery" does not embrace all commodities whose transportation requires the use of special equipment, it is admonished to discontinue such operations as are beyond the scope of its certificate.—Jetco, Inc., Extension, 91 M.C.C. 673 (678-9).

Even though applicant stipulated that a cease-and-desist order might be entered against him respecting any transportation of regulated commodities other than those for which authority is granted, no such action is necessary in view of the cooperative attitude displayed by him in voluntarily discontinuing transportation of certain commodities on advice of counsel, plus absence of any intent willfully to violate the act.—Hughes, 89 M.C.C. 471 (484)*

While applicant's and protestants' unauthorized past transportation of certain commodities is not condoned, such operations were conducted under a mistaken interpretation of their authorities; however, they are admonished to refrain from such transportation in future unless appropriate authority is acquired.—Case Driveaway, Inc., Extension, 89 M.C.C. 633 (635)*.

Though applicant is admonished to refrain from operations found to be beyond scope of its commodity authority until certificate granted in extension proceeding is issued, those operations were performed under some color of right and application was filed as soon as its authority was questioned; issuance of a cease-and-desist order is therefore unnecessary.—Melton Truck Lines, Inc., Extension, 88 M.C.C. 723 (734).

Applicants' past participation in any traffic beyond scope of their commodity authorities does not warrant continuance thereof; rather, the circumstances dictate that they should be, and they are, admonished to comply strictly with terms of their certificates and to apprise themselves of and be guided by the decisions of the commission in the conduct of their operations.—C & H Transp. Co., Inc., Clarification of Authority, 88 M.C.C. 87 (96); and, since it is now found that applicant may not transport butter and meat, fresh or frozen, under its authority for "agricultural products," it is admonished to discontinue such unlawful practices.—Yeary Transfer Co., Inc., Extension, 88 M.C.C. 473 (478).

Although, following decision in 86 MCC 327 that missiles are not aircraft, defendants' transportation of jet thrust units for interceptor missiles was beyond scope of their authority for aircraft parts, since such units are parts of commodities which are not aircraft, and are not shown to be interchangeable with any similar components of aircraft, that decision was a recent one and prior thereto it was at least arguable that authority for aircraft parts included missile parts; hence defendants cannot be held accountable for their good-faith performance of transportation later held to be beyond their authority. Entry of cease-and-desist order is not warranted, but defendants are cautioned not to continue such transportation until appropriate authority is obtained.—Baggett Transp. Co. Extension, 88 M.C.C. 3 (8, 11)*.

Applicant's unauthorized transportation of airfreight between Salt Lake City Airport and points on its authorized routes beyond air carriers' terminal areas has deprived authorized carriers of traffic they are qualified to transport; it is admonished to discontinue such operations.—Wycoff Co., Inc., Extension, 89 M.C.C. 369 (374)*.

Since applicant's joinder of its regular- and irregular-route authorities for performance of through service between points and in manner described is found to be unlawful, it is admonished to discontinue such transportation.—Lattavo Bros. Inc., Extension, 89 M.C.C. 600 (604)*.

Past operations of railroad subsidiary authorized to provide service auxiliary to and supplemental of rail service, in providing joint rail-motor service on interstate shipments

moving to off-rail destinations, constitute a willful and deliberate avoidance of the requirements of the act; applicant admonished not to engage in such unauthorized operations in the future.—Milwaukee Motor Transp. Co., Extension, 89 M.C.C. 41 (45-6).

Since applicant's certificate limits it to transportation of interstate traffic from Brooklyn, transportation of shipments from its terminal facility in Queens County to Westbury in Nassau County, N.Y., is beyond scope of its authority; and since continuity of the interstate movement is not broken by applicant's storage of shipments prior to delivery, and Westbury is not within the New York City commercial zone, such transportation is not exempt from regulation; applicant is admonished to bring its operations within the provisions of the act.—Paul Marckesano & Sons Co., Inc., Extension, 86 M.C.C. 727 (732).

Even though vendor's authority to transport cement is restricted to movement thereof in dump trucks, it freely admits that it has been performing such transportation for some time in hopper and tank-type vehicles; such transportation, except to three points to which it is specifically authorized to haul bulk cement in tank trucks, is clearly unlawful; and its transportation of cement to any point in other than dump trucks or tank-type vehicles is also unlawful. Vendor is admonished to cease such unlawful activity immediately in the absence of appropriate authority.—Mitchell Transport, Inc.—Purchase—John Schutt, Jr., Inc., 97 M.C.C. 10 (19).

Although St. Paul is the sole origin from which contract carrier is authorized to transport paper products, its abstract of shipments indicates that it has performed such transportation from numerous other origins; and while under another commodity description incidental to paper products its territorial scope is broad enough to embrace those movements, that description does not include paper products. It is therefore admonished, if in fact those movements were beyond scope of its authority, to discontinue all such unlawful operations immediately and advise the commission promptly that it has taken steps to do so.—La Casse—Control—Interstate Exp., Inc., 97 M.C.C. 230 (237)*.

See also Nigro Freight Lines case, §206(a)(1), n. 26.

Following lease of vendee's tank vehicles by vendor general-commodity carrier, which had previously conducted no bulk-liquid operations, all of vendor's bulk-liquid traffic was handled under the control and influence of vendee, which retained 85 percent or more of the revenues therefrom. Such arrangement constituted an unauthorized lease of a portion of vendor's operating rights in violation of §5(4), and an unauthorized for-hire common-carrier operation by vendee in violation of §206(a); purchase authority being denied, the parties are admonished to terminate such unlawful activities.—Tank Lines, Inc.—Purchase—S & N Freight Line, Inc., 90 M.C.C. 381 (385, 386, 387)*.

Section 212. (b) [*§ 312(b) U.S.C.*] Transfer of operating rights.— [Unchanged. See vol. 11, p. 9479.]

Amendments, see footnote, p. 9479.

Historical Note

In view of creation of the Department of Transportation by Public Law 89-670, effective April 1, 1967 (32 FR 5453), the Commission and the Department of Transportation entered into a Memorandum of Agreement on April 3, 1967 (32 FR 5744, Apr. 8, 1967) for the purpose of accomplishing continuity, liaison, coordination, and support with respect to transferring from ICC to DOT personnel and functions concerned with (1) motor carrier safety matters; (2) certain pending ICC proceedings; (3) pending court cases transferred to DOT; (4) housekeeping operations for ICC personnel transferred; (5) access to, and provision of, reports and other documents, and (6) liaison and coordination between ICC and DOT.

Notes of Decisions

Volume 10—p. 8077; Volume 11—p. 9479; Volume 12—p. 10418; Volume 13—p. 11087; Volume 14—p. 11608; Volume 15—p. 12222; Volume 16—p. 12872; Volume 17—p. 13573; Volume 18—p. 14523; Volume 19—p. 15790.

10. Transfer of operating rights, including "grandfather" rights.—[Vols. 10-19].—See also §5(2), n. 110 *Transfer of operating rights.*

The intent of Congress in exempting transfers of operating rights of small motor carriers from the stringent requirements of §5(2) was to provide a means whereby such transfers could be effected easily and without delay under such rules as the commission deemed appropriate. Neither the statute nor the commission's transfer rules requires a hearing on an initial transfer application and the transfer may be approved ex parte; however, after notice of order approving the transfer, an interested party may file a petition for reconsideration and if a request for oral hearing is contained in the petition, it must be supported by an explanation as to why evidence to be presented cannot be submitted in affidavit form. The commission's rules and regulations governing approval of small transfers and petitions for reconsideration thereof are reasonable.—A. L. Root Transportation, Inc. v. United States, 280 F. Supp. 152 (155-6)*.

In action to set aside the commission's order denying plaintiffs' petition for reconsideration of order approving §212(b) transfer and for oral hearing thereon, neither the statute nor due process requires a hearing on plaintiffs' petition, or any oral presentation thereon; moreover, since the APA provides for hearing only in cases where a hearing is "required by statute," that act does not apply. Prior notice of, and participation in, a small transfer proceeding need be accorded only to the immediate parties and, if other persons are not entitled to take part originally, they would not logically be entitled as a matter of right to subsequent participation; therefore, the commission's denial of plaintiffs' request for oral hearing did not deprive them of due process of law. In addition, mere fact that plaintiffs might suffer some pecuniary loss as result of approval of the transfer is not sufficient to show deprivation of property in violation of the Constitution; plaintiffs have no right to exclusive use of highways over which they operate and, while they may face increased competition from transferee, freedom from competition is not constitutionally protected. Commission order sustained.—Id., pp. 155, 157.

The commission acted reasonably and within scope of its authority in finding that application for approval of proposed transfer of operating rights was subject to §212(b) and not §5, and denying plaintiffs' petition for reconsideration and request for hearing. Plaintiffs submitted no affidavits and no concrete evidence to support their allegation that the aggregate number of vehicles used by transferor and transferee in interstate commerce exceeded 20, except transferee's annual report which listed a total of 26 vehicles without a breakdown showing those used in interstate and intrastate commerce; however, only those units used in interstate commerce are counted for jurisdictional purposes under §212(b), and affidavits of presidents of both transferor and transferee certified that aggregate number of units used by both in interstate commerce did not exceed 20.—Chemical Leaman Tank Lines, Inc. v. United States, 251 F. Supp. 269 (273-4)*.

As to plaintiffs' contention that transferor's authority to transport chemicals in bulk was dormant, and therefore could not be transferred under §212(b) and rules and regulations thereunder, transferor's certificate granted an unrestricted right to transport chemicals between certain points but did not require it to transport chemicals in bulk; such a certificate permits any type of equipment to be used. Furthermore, a motor carrier's authority is not automatically considered dormant under an unrestricted certificate if it fails to use every possible means of transportation. In view of transferor's certificate and its affidavit that it made frequent and diversified movements in transporting chemicals, and plaintiffs' fail-

ure to present concrete evidence to the contrary, the commission did not abuse its discretion or wilfully violate its own regulations in not finding dormancy and in denying a hearing on that question. Orders authorizing the transfer and denying requested hearing are sustained.—Id., pp. 274-5.

The language of §212(b) and that of §5(10) are equally explicit; read together, the two sections can only mean that a transfer involving not more than 20 vehicles is governed by §212(b) and the regulations prescribed pursuant thereto. The commission's distinction between §5 and §212(b) in 52 MCC 97 is an administrative interpretation of the statute by the agency charged with its application and enforcement, which, though not binding on the courts, is entitled to great weight.—Ship-By-Truck Co. v. United States, 208 F. Supp. 847 (851)*.

The commission acted within its statutory authority in permitting separate transfers of operating rights of two transferors to same transferee under separately filed applications when, at time of consummation of the first transfer, transferee was a noncarrier, thus the transaction was not subject to §5; and though at time of the second transfer both parties were carriers subject to the act, that transaction did not involve more than 20 vehicles and therefore was exempted from §5 by provisions of §5(10). As there is no evidence that either transferor knew of the other's proposed sale or that they were in any way affiliated with each other or with transferee, the commission's rejection of contention that the two transfers constituted a single transaction involving over 20 vehicles, and thus was subject to §5, was not error.—Id., p. 852.

Jurisdiction under §212(b) or §5; see §5(2), n. 2 *Vehicles operated.*

Before the merits of carriers' application under §212(b) may be considered under the transfer regulations, it must first be determined whether the purchase was exempted from §5 by provisions of §5(10) respecting the number of vehicles owned, leased, controlled, or operated by the parties, in light of the facts existing at time of actual consummation 2 years before filing of transfer application. As the evidence sufficiently establishes that during the period centering on date of the transfer agreement the parties normally operated an average of over 20 vehicles in interstate commerce, even if they did not do so at any one time or on any one day, the transaction was subject to §5, and the application, having been improperly filed under §212(b), must be dismissed.—C&R Trucking Co.—Investigation of Control, 93 M.C.C. 669 (674-5, 677-8).

Order reopening transfer proceeding for purpose of determining whether the transaction was subject to §5 recited that there was reason to believe that the application contained false and fraudulent information concealing transferee's relationship with a third carrier, resulting in their operation together of over 20 vehicles, and the parties concerned were further notified by letter that evidence would be introduced in the reopened proceeding and related §5(7) investigation to show an intent to conceal the real party in interest and the purchase price. Adequate advance notice having thus been given, the commission has inherent power to determine whether the transfer order was properly entered, and evidence of happenings prior to and at time of the transfer was properly admissible.—Kowalsky's Exp. Service—Control and Merger, 93 M.C.C. 272 (273-4, 277-8).

Respondents' contention that their actions in the transfer proceeding (as detailed in appendix) were mere variations of representations made in the transfer application and not contrary to established precedent is completely without merit. The case is even stronger than that considered in 329 US 223, wherein the Court held that denial of license because of insufficiency or deliberate falsity of information lawfully required to be furnished is not a penal measure and, though it may hurt or cause loss, is not thereby made illegal, arbitrary, or capricious, even though the commission [FCC] failed to find that the concealment was of material facts or had influenced it in any decision. Instant application misrepresented and concealed material matter on which the commission relied in approving the transfer, and the transfer order, having been procured through fraud and misrepresentation, is void and must be set aside.—Id., pp. 278-9.

And as issuance of certificate to transferee

was merely ministerial in carrying out the intent of the transfer order, the certificate was void ab initio and must be considered a nullity upon vacation of that order. Transferor should comply with provisions of §§ 215, 217, and 221(c) to retain its right to the operating authority tendered for transfer.—Id., p. 278.

See also United States v. Polin, §5(2), n. 45 *Violation of §5(4)*, and the T.I.M.E. Freight, Inc. case, §210a, n. 1.

Transferee cannot be found fit to conduct operations he seeks to acquire, when within 2 years after his conviction on 27 counts of unauthorized operation it was discovered, through three separate compliance surveys by a staff member of Bureau of Motor Carriers, that he was again performing interstate transportation beyond scope of his authority, in violation of §206(a)(1), which continued until the last survey. After each of the first two compliance surveys, a letter was addressed to him directing his attention to those violations and other irregularities in his practices, and requesting that duplicate copy furnished therewith be executed and returned to the Bureau as certification that steps were being taken to correct those conditions, but such certifications were never returned. Transferee never denied the unlawfulness of such transportation, and the hollow excuses offered at hearing cannot be accepted as mitigation for a carrier of over 14 years' experience, who during that period has had numerous requests for expansion of his operations considered by the commission.—Burns Motor Freight, Marlington, W. Va., Transferee, 93 M.C.C. 629 (631-2).

Nor may the violations be condoned because they occurred while the operations were under supervision of transferee's son. The law provides for regulation of the carrier, not of its individual employees, and clearly places responsibility for compliance on the carrier. Transferee cannot escape this responsibility by attributing such shortcomings as are found to his employees or agents. The duty Congress has placed on the commission to regulate motor carriers under the act can be effectively performed only by holding the carriers accountable.—Id., p. 632.

The situation as to 77 shipments shown in a documented abstract as examples of unauthorized transportation services performed by transferee is further aggravated by disclosure that as to 21 movements there were discrepancies between billing documents of the shippers served and those of the carrier. While honest error may have accounted for a few of those discrepancies, there is no conceivable reason for the repeated misbilling other than to hide evidence of transportation performed beyond scope of the carrier's authority. Moreover, of 41 movements of fertilizer performed after transferee had filed application for the appropriate authority, 31 were performed after his request for temporary authority was denied, and 21 were performed after elimination of the involved origin from that extension application.—Id., p. 633.

Additionally, though the matter is not controlling, transferor's operations following execution of the purchase agreement were almost entirely conducted by purported trip leases of transferee's equipment with drivers, and though the parties maintained paper compliance with the commission's lease-and-interchange regulations, the vehicle arrangement was in fact used as a means of leasing transferor's operating rights to transferee in violation of §§ 206(a)(1) and 212(b). Transferee, which has never established his fitness to operate under transferor's rights, has performed the physical operations, and it would be improper in the circumstances to find a bona fide agency relation between transferor and those conducting the actual operations.—Id., pp. 633-4.

It is transferee's burden to prove that he is fit to perform the involved operations, and while he has taken certain corrective steps which he urges will ensure full compliance in future, his argument that his past violations are not determinative of what he may do hereafter fails when those violations have persisted despite penalty and admonitions. Transfer application denied, and transferee directed to refrain from all unauthorized operations in future and to take immediate steps to correct any and all irregularities that may now exist.—Id., p. 634.

Transferee partnership, a Pennsylvania intrastate carrier, for a period of about 6 months commencing some 2 months after execution of purchase contract transported

steel between Philadelphia and Baltimore under transferor's heavy hauling rights, with its consent and under its trade name, and thereby conducted operations in interstate commerce in transportation of traffic which transferor had not previously handled, under what was in effect an unlawful lease of a portion of transferor's operating rights; and in absence of a lawfully effective lease such operations were those of a motor common carrier for compensation, without a certificate, in violation of §206(a).—White's Delivery Service, Transferee, 93 M.C.C. 312 (313, 315).

However, the question thereby raised as to transferee's fitness may properly be resolved in its favor and the transfer approved in view of facts that it has not previously been a participant in proceedings before the commission; the application, having been filed before the illegal operations began, was not designed to validate an existing unlawful situation; and the unlawful operations were discontinued immediately upon the managing partner's being personally advised of their improper nature. That transferor had initially agreed to assign his trade name to transferee also tends to reduce the taint of subterfuge arising from its use of that name in connection with filing of tariffs, billing of customers, and maintenance of a bank account. Nevertheless, the illegal action of the parties is not condoned, and transferee should bear in mind that its conduct in the matter is now a matter of record, and that any repetition of such "poor judgment" will take on the appearance of an intentional or careless disregard for regulation inimical to a finding of fitness.—Id., pp. 316-7.

Transfer authorized to same transferee of household goods rights of two transferors, subject to cancellation of both transferors' duplicative rights for emigrant movables between same points. Although interline between transferee and one transferor was for all practical purposes an unlawful lease of latter's operating rights, the arrangement was undertaken on advice of counsel and appears to have been due primarily to ignorance of the commission's regulations; and that transferee appears also to have occasionally trip-leased owner-operated equipment without benefit of a long-term lease, in violation of the leasing regulations, such violations are not shown to be deliberate and do not bar approval of transfer. However, transferee is cautioned to familiarize itself with the commission's regulations and bring its leasing operations into conformity therewith.—Cartwright—Purchase—El Reno Transfer & Storage Co., 93 M.C.C. 72 (77-8, 79)*.

Certain of transferee's exhibits, prepared by a certified public accountant who testified to contents thereof and was extensively cross-examined by protestants, were properly admitted although witness had been in transferee's employ for less than 4 months prior to hearing. That the exhibits were compiled from records not maintained by the witness is insufficient to warrant their rejection; considering the witness's professional standing and fact that no serious question as to authenticity of the underlying data was raised at the hearing, it may be assumed that the exhibits were compiled from records kept in normal course of business.—Id., p. 78.

Proposed transfer of transferor's remaining assets to noncarrier transferee, following latter's acquisition of its stock and distribution of its cash and physical assets to transferee and latter's 13 noncarrier affiliates under described liquidation plan, requires the commission's approval, since its remaining assets include its interstate operating rights. However, transfer of transferor's majority stock to transferee by latter's stockholders, the original purchasers, was subject to its assumption of their debt to the bank which financed the purchase, and a transaction resulting in control of a carrier wherein the carrier itself would be obligated to pay part of the purchase price is generally contrary to sound financial practice and not in best interest of the industry and the public.—Limestone Corp., Dallas, Tex., Transferee, 90 M.C.C. 553 (555, 556, 558)*.

Though use of a carrier's credit to finance in part the acquisition of the carrier's business is not favored, tax benefits were a principal factor in formulating transferee's capital structure in manner described in prior report, 90 MCC 553, and tax considerations cannot wisely be ignored in such matters. Additional information presented, particularly concern-

ing transferee's increased earnings and more favorable debt-to-equity ratio, supports finding that upon consummation its financial condition will be sufficiently improved to meet objections stated in that report and that, subject to condition imposed as to nonpayment of dividends or other distribution of property or assets, authority for proposed transfer and issuance of a note for $3,000,000 for purposes described in prior report should be granted.—Limestone Corp., Dallas, Tex., Transferee, 93 M.C.C. 58*.

Regulations of the Commission

28 FR 867, Jan. 30, 1963, Part 179: Transfers of Operating Rights, §179.1(b) amended, and §§179.10 through 179.14 added; rules added govern transfers of certificates of registration issued or to be issued pursuant to §206(a)(6) and (7) of the act, effective on date of publication.

30 FR 12467, Sept. 30, 1965, Parts 7, 179, and 180: Following enactment of Public Law 89-93 (79 Stat. 284) which makes gross operating revenues the basis for determining whether proposed unification or acquisition of control comes within §5(10) exemption, Forms BMC-44 (Rev.), BMC-45 (Rev.), BF-200, and BF-201 are revised; footnote 1 of §179.1(a) is revised; §§180.2 Definitions, and 180.3 Computation of vehicles involved in unifications, are deleted; and new §180.3 Computation of gross operating revenues of carriers involved in unifications, substituted in lieu of deleted §180.3, effective Sept. 25, 1965.

Section 212. (c) [*§ 312(c) U.S.C.*] Conversion of authority.—[Unchanged. See vol. 18, p. 14523.]

Notes of Decisions

Volume 18—p. 14524; Volume 19—p. 15791.

2. Construction and interpretation.—[Vol. 19].—In enacting §212(c), in order to protect existing contract carriers when statutory definition in §203(a)(15) was amended, Congress intended to leave the contract carrier whose permit is converted to common carrier certificate in as good a position as it formerly enjoyed; moreover, that the "Keystone restriction" in permits received Congress' attention is shown by legislative history of §212(c). Thus, in conversion of appellee's permit which contained a "Keystone restriction," but was otherwise unlimited, the commission had no statutory authority to impose the restriction in question on the authority granted, in order to assure "substantial parity" between its permit and certificate operations.—United States v. Montgomery, Inc., 376 U.S. 389 (393-5)*.

When plaintiff's "grandfather" permit authorized it to transport certain commodities in described areas for the limited class of persons specified therein, but was otherwise unrestricted, the commission had no statutory authority to impose considered territorial restrictions in certificate issued in lieu thereof pursuant to §212(c), in conversion proceeding which was reopened following remand. Although the Supreme Court, in affirming lower court's previous remand, held that the commission would be free to contest carrier's factual claims as to service it performed under the permit and to limit certificate issued in lieu thereof to such activity, no action to contest plaintiff's claims, or determine scope of its service under the permit, was taken; to the contrary, the commission elected not to contest plaintiff's factual claims.—J. B. Montgomery, Inc. v. United States, 257 F. Supp. 188 (189, 191)*.

The commission's only action, on further consideration, was to add "warehouses or other facilities" to restrictions in the original certificate; that addition does not alter substance of the restrictions or their purpose. Present restrictions in issue are territorial limitations which were not contained in plaintiff's permit; this is contrary to specific Congressional mandate that plaintiff is entitled to common carrier authority to transport the same commodities between the same points and within the same territory as authorized by the permit. Moreover, legislative history of §212(c) recognized that the change from a

permit authorizing service for a limited class of persons to an operation as a common carrier serving the general public would probably result in an expanded scope of operations. The commission's order set aside and case remanded for further action in accordance with the court's opinion.—Id., pp. 189-90, 191.

Section 212(c) neither authorizes the commission to specify territory nor determine bona fides of prior operations. Provision therein that the certificate shall authorize transportation "of the same commodities between the same points * * * as authorized in the permit" is tantamount to saying that the commission shall not impose territorial restrictions beyond those in the permit. Although, in absence of restrictions to assure "substantial parity," scope of operations of plaintiff and other converted carriers may be greatly expanded as contrasted with their past contract-carrier operations, that possibility was recognized in legislative history of §212(c); there is no indication that Congress intended to restrict such enlargement of operations by "substantial parity" test or otherwise. The commission had no statutory authority to impose territorial restrictions on certificate issued plaintiff in its conversion proceeding, when such restrictions did not appear in its permit; order set aside, and matter remanded for further action in accordance with holding.—J.B. Montgomery, Inc. v. United States, 206 F. Supp. 455 (460-1)*.

Under §212(c), a converted carrier is entitled to receive a certificate that maintains parity with the operating authority contained in its permit; the controlling factor is the operating rights authorized by carrier's present permit. However, in accordance with the language of the statute, the commission does not have authority to issue such carrier a certificate for transportation of commodities not authorized in its permit, or to otherwise enlarge its operations beyond what was authorized therein. Thus, the commission did not exceed its statutory authority by imposing in certificate to be issued plaintiff, in lieu of its permit authorizing transportation of packinghouse products and canned goods, a restriction against tacking separate grants of authority for purpose of performing through service and also a restriction permitting it to transport packinghouse products only when moving "to or from" packinghouses. Sustained.—Zuzich Truck Line, Inc. v. United States, 224 F. Supp. 457 (469-70)*.

That the commission's interpretation of §212(c), in finding that plaintiff which entered into transportation contracts with any shipper requesting its service within the limited scope of its authority was a common carrier, accords with the congressional intent is evinced by the legislative history of enactment of that section in 1957, which overruled the Supreme Court's holdings in 350 US 409 by enunciating different criteria for determining whether a motor carrier is operating as a contract, as distinguished from a common, carrier.—Tar Asphalt Trucking Co. v. United States, 208 F. Supp. 611 (613)*.

There is no merit to contention, in suit to set aside the commission's order in conversion proceeding instituted on its own motion, that an attempt to convert plaintiff's status against its will amounts to a taking of private property for public use without just compensation or due process of law, in violation of the Federal Constitution; the act does not authorize, or the commission's order effect, a conversion of plaintiff from a private carier to a public utility. The statute does not require that plaintiff operate as a common carrier, but merely affords it opportunity to continue to operate, as a common carrier, to the same extent formerly authorized by its permits; it merely embodies a new definition of contract carrier and empowers the commission to determine whether the holder of a permit comes within that definition.—Id., p. 615.

And imposition of tacking restriction in certificate granted plaintiff, in order to maintain substantial parity with the operating authority contained in its permits, is in accord with the legislative intent implicit in §212(c), which provides for the transportation, as a common carrier, of the same commodity "between the same points and within the same territory" as authorized in the permit. The commission's contemporaneous construction in this regard, as set forth in the Brooks case, 81 MCC 561, is entitled to great weight.—Id., p. 614.

Section 212(c) does not authorize the commission to consider a carrier's "grandfather"

operations, but limits consideration to operations conducted under its permits held as of August 22, 1957, the effective date of §212(c). —P. Saldutti & Son, Inc., Conversion, 89 M.C.C. 338 (342)*.

5. Conversion of authority.—[Vols. 18, 19]. —In conversion of carrier's permit, authorizing transportation of commodities usually dealt in or used by businesses specified, to a common carrier certificate, the commission had no authority to limit the certificate "to shipments moving from, to, or between wholesale and retail outlets" when the permit was not so restricted. The record does not show whether appellee exercised claimed privileges to serve businesses other than wholesale and retail outlets and stores under its permit; however, if it did enjoy them, then it is entitled to have the same freedom in its certificate; Congress intended that operations conducted under the permit be continued under the certificate. Remand by lower court affirmed; on remand the commission will be free to contest appellee's factual claims as to what service it performed under its permit and to limit the certificate to such activity.—United States v. Montgomery, Inc., 376 U.S. 389 (393-5)*.

Under §212(c) a converted carrier is entitled to receive a certificate that maintains parity with its operating authority as a contract carrier; the controling factor is the operating rights granted by its present permit. The commission's findings that plaintiff's permit to transport general commodities to or from "port facilities, or places of storage before or after a movement by water" is clear and unambiguous, that the restrictive phrase applies to port facilities as well as places of storage (notwithstanding omission of a comma after "storage"), and that certificate for general commodities "having a prior or subsequent movement by water" would ensure substantial parity between its past and future operations, are buttressed by admission of plaintiff's own witness that all shipments transported by it had a prior or subsequent movement by water.—P. Saldutti & Son, Inc. v. United States, 210 F. Supp. 307 (313-4)*; and failure to correct plaintiff's mistaken belief that it had authority to serve port facilities regardless of whether a water movement was involved does not estop the commission from asserting the proper interpretation of its permit in an appropriate proceeding.—Id., p. 314.

There is no authority under §212(c) to issue a certificate for transportation of commodities not authorized in the carrier's permit; since paragraph 2 of plaintiff's permit does not authorize general commodities, but specifically names upwards of 30 commodities or groups, the commission would have no right to incorporate general-commodity authority in lieu thereof, or otherwise enlarge plaintiff's operations, in certificate to be issued in the conversion proceeding.—Id., pp. 314-5.

In affirming lower court's remand of instant proceeding, the Supreme Court held, in effect, that while applicant's authority upon conversion should not have been cut down under the "substantial parity" doctrine, the certificate granted in lieu of its permit may be limited to the scope of the actual operations performed under the prior permit. Thus, the commission is empowered to require proof of actual operations conducted under applicant's permit which cannot be conducted under restrictions incorporated in the certificate, but, significantly, it is not required to do so. Question of whether, and to what extent, to require proof of actual operations, rather than merely a showing of a type of operation authorized by the permit and not the certificate, is a matter properly to be determined by the commission in its administration of the act.—J. B. Montgomery, Inc., Conversion Application, 98 M.C.C. 262 (266-7)*.

However, §212(c) concerns solely the operating rights of carriers, not the actual operations conducted thereunder and, moreover, it does not require a showing of prior operations under a permit as a prerequisite to conversion. Therefore, the commission does not consider the scope and extent of transportation a converted carrier should be authorized to perform as dependent upon actual physical operations.—Id., pp. 266-7.

On the critical date applicant had effective contracts with 8 shippers, but held out to serve all willing to enter into contracts for service within scope of its permit; in general, it serves building contractors in movement of their materials from one jobsite to another,

and though it is frequently required to supply equipment on short notice, it neither dedicates equipment to shipper's use nor provides any other distinctive type of service; its operations are therefore common carriage and issuance of certificate for service corresponding to that authorized by its outstanding permit, but restricted against tacking of the separate territorial grants therein, is warranted.—Holwick, Inc., Conversion, 92 M.C.C. 724 (725-6).

Some restriction must be imposed on common carrier authority granted in conversion proceeding when the contract carrier authority it replaces contains "Keystone" restrictions, in order to ensure substantial parity between such certificate and the existing permits. However, recommended restriction of applicant's authority for commodities manufactured, processed, or dealt in by manufacturers and processors of asbestos products would limit it to something less than the service it may now perform as a contract carrier; such restriction is therefore rephrased to provide more liberal authority comparable to that it now holds. And since certain of applicant's authority which is subject to a "Keystone" restriction is duplicated substantially by other unrestricted authority, the two authorities are combined, with the "Keystone" restriction omitted.—Fischbach Trucking Co. Conversion, 89 M.C.C. 329 (330-1).

Since respondent's contract-carrier authority to transport general commodities to or from port facilities or places of storage "before or after a movement by water" is unambiguous, restriction of common-carrier authority granted in conversion proceeding to "general commodities having a prior or subsequent movement by water" will ensure substantial parity between past and future operation; similarly, substantial parity will be assured by authority to transport described commodities "used in the construction or repair of bulkheads, canal lock gates, dry docks, piers, water tanks and towers, and pipelines" regardless of where they are destined in respondent's authorized area.—P. Saldutti & Son, Inc., Conversion, 89 M.C.C. 338 (341-2)*.

Affidavits submitted in reopened conversion proceeding by transferor, made by representatives of two shippers formerly served by him and now served by transferee, and by an officer of transferee, establish that on the critical date transferor's service was offered to any shipper of his authorized commodities willing to enter into a transportation contract; that services rendered did not differ from those of common carriers of similar commodities in same area and were not designed to meet distinct needs of each individual customer; that he did not dedicate equipment to each shipper's exclusive use, and that operations of transferee as successor in interest have been conducted in like manner. Therefore, transferor's operations on the critical date were those of a common carrier, and transferee is entitled to a certificate therefor, thus eliminating dual operation found objectionable in prior report.—Highway Transp. Corp. Conversion, 88 M.C.C. 323 (325)*.

Among factors to be considered in §212(c) proceedings in conjunction with the number of outstanding contracts are the different types of commodities transported, the territory in which operations are conducted, the degree of specialization required by the nature of the business of shippers involved, and degree of similarity in services the carrier performs under its effective and continuing contracts. Weighing all these factors, respondent's services are not intrinsically different from those of common carriers; conversion certificate granted.—Tar Asphalt Trucking Co., Inc., Conversion, 88 M.C.C. 443 (445)*. The commission's order sustained, Tar Asphalt Trucking Co. v. United States, 208 F. Supp. 611 (614)*.

15. Parties; procedure.—[Vol. 19].—In seeking conversion of contract-carrier authority acquired from transferror Whittaker subsequent to grant of its own conversion application, applicant requests that the Whittaker conversion proceeding, if reopened, be handled under modified procedure, and with its petition submitted a number of affidavits; in absence of opposition, the verified statements submitted will be received in evidence and the matter disposed of on the record as made. Furthermore, since the decision to discontinue the Whittaker conversion proceeding was reached primarily on the basis of a questionnaire filled out by him without advice of coun-

sel, and he now states in his affidavit that he was then unfamiliar with the amended contract-carrier definition in §203(a)(15), that proceeding is accordingly reopened for reconsideration.—Highway Transp. Corp. Conversion, 88 M.C.C. 323 (325)*.

20. Evidence.—[Vol. 19].—Although carrier produced no evidence in conversion proceeding to show any past contract-carrier services which could not be continued under territorial limitations imposed on its certificate, since a certificate to be issued under §212(c) is not subject to test of "substantial parity," and there was no other issue to which such evidence would be material, carrier was under no compulsion to offer evidence of its previous operations.—J.B. Montgomery, Inc. v. United States, 206 F. Supp. 455 (461)*.

A regulatory agency has the right to take official notice of reports filed with it by a regulated company; there was no error in the commission's taking official notice, in conversion proceeding initiated by it, of information contained in reports filed with it by plaintiff as a contract carrier.—P. Saldutti & Son, Inc. v. United States, 210 F. Supp. 307 (313)*.

Plaintiff's argument, in suit to set aside the commission's order in conversion proceeding instituted on its own motion, that the burden of proving plaintiff was not a contract carrier was cast upon the commission, indicates a misconception of the meaning and effect of §212(c); assuming, without deciding, that plaintiff has preserved its right to contend that the burden of proof rested on the commission, the commission's statutory powers under §205(d) would have enabled it to reach the same conclusion if plaintiff had not presented its witness and exhibits before the examiner. —Tar Asphalt Trucking Co. v. United States, 208 F. Supp. 611 (615)*.

Whether conversion applicant is affiliated with, or unlawfully under common control with, another carrier is not relevant to disposition of a proceeding under §212(c).—Holwick, Inc., Conversion, 92 M.C.C. 724 (726).

Section 213. [*§313 U.S.C.*] **Validity and Perfection of Certain Security Interests in Motor Vehicles.**—[Unchanged. See vol. 18, p. 14525.]

Section 214. [*§314 U.S.C.*] **Issuance of securities.**—[Unchanged. except that by act of July 24, 1965, §2, 79 Stat. 263, the section was amended by striking the period at the end, inserting in lieu thereof a colon, and adding the following: "*And provided further*, That the provisions of this section shall not apply to the United States or any instrumentality thereof, the District of Columbia, or any instrumentality thereof, any State of the United States or political subdivision or municipal corporation thereof, or any instrumentality of one or more States, political subdivisions thereof, or municipal corporations." See vol. 18, p. 14526.]

Historical Note

The commission recommends that §214 be amended so as expressly to exempt from the commission's jurisdiction thereunder, securities issued by States, municipalities, or other governmental bodies which are carriers as defined in part I or part II of the act.—Annual Report, 1964, p. 60.

Notes of Decisions

Volume 10—p. 8122; Volume 11—p. 9480; Volume 12—p. 10419; Volume 13—p. 11088; Volume 14—p. 11609; Volume 15—p. 12223; Volume 16—p. 12874; Volume 17—p. 13574; Volume 18—p. 14527; Volume 19—p. 15798.

2. Construction and interpretation.—[Vols. 10-14, 16-19].—The commission is granted broad jurisdiction over issuance of securities, and its jurisdiction is exclusive and plenary; it must determine whether issuance will be compatible with public interest and whether it is necessary or appropriate for, or consistent with, proper performance by the carrier of service to the public. Necessity and type of hearings are left broadly to the commission's discretion; and the statute expressly recognizes that its action may be complete or partial, final or conditional, and that as conditions change it may from time to time, for good cause shown, make such supplemental orders as it deems necessary or appropriate.—Walker v. United States, 208 F. Supp. 388 (394)*.

Application to issue a $250,000 note in payment for liquidating carrier's stock and to assume liability on its outstanding obligations, dismissed when upon consummation of merger on those terms as of giving-effect balance-sheet date survivor's outstanding securities subject to §214 would have aggregated less than $1,000,000. However, should the circumstances so change by actual consummation date that survivor's total outstanding securities plus those it would issue and assume as result of the transaction would exceed that statutory exemption, merger approval should not be construed as authorizing any issuance of securities or assumption of obligation on those of others without the commission's prior approval.—Youngstown Cartage Co.—Control and Merger, 93 M.C.C. 318 (330-1).

The prime objective of §§ 20a and 214 is establishment of a soundly capitalized transportation industry, capable of adequate service at reasonable rates, and as a general rule a carrier's issuance of securities or use of proceeds thereof should be authorized only where it would be of benefit to its transportation business; it has generally been found incompatible with public interest for a carrier to issue securities whose proceeds are to be invested in property not held for or used in the service of transportation; see discussion in the New Haven case, 220 ICC 505. A carrier's major endeavors should be confined to matters related to transportation, and in no event should issuance of securities or use of proceeds, or assumption of obligation or liability on securities of any other person, be authorized where it is not for some lawful object within the carrier's corporate powers or would in any way impair its ability to perform its service to the public.—Greyhound Corp. Stock, 90 M.C.C. 215 (220-1, 222-3).

However, reserves and surplus funds should be available for production of income, including investments such as are permissible for savings banks or trustees. Any investment in noncarrier enterprises should be consistent with proper performance by the carrier of service to the public, and public interest would not be adversely affected provided issuance of securities for such a purpose is limited and constitutes a proper use of funds. Judicious and limited common carrier investment in stable noncarrier business enterprises would contribute to provision of a soundly financed common carrier system and would not do violence to principle that corporations endowed with a public interest should direct their primary activities to the public service nature of their operations.—Id., pp. 221, 223.

Proposed stock issue is not within exemption of §214 when applicant represents the fair market value thereof to be in excess of $1,000,000.—Southwest Freight Lines, Inc., Stock, 90 M.C.C. 375 (378).

Although obligations shown in survivor's and liquidating carrier's financial statements that are clearly securities within meaning of §214 aggregate only $701,700, the commission takes official notice of survivor's notification of its exercise of authority granted in another proceeding to issue promissory notes and assume obligations in aggregate amount not exceeding $759,628; in the circumstances, survivor's application to assume obligation and liability on liquidating carrier's notes in amount of $52,850 is subject to the commission's jurisdiction under §214.—Quinn Freight Lines, Inc.—Control and Merger, 90 M.C.C. 60 (62)*.

The commission's jurisdiction to determine applications for authority to issue securities is exclusive and plenary and independent of all other State or Federal authority, and it is not divested of authority to hear new applications merely because related proceedings are pending on appeal. Public interest would not be

served by delaying decision on application, by carrier authorized in a §5 proceeding to acquire control of another carrier and to issue promissory notes in partial payment of the consideration, for authority to issue an additional note in payment for stock of a noncarrier affiliate of acquired carrier, pending decision of the court on the merits of the control proceeding.—Central Freight Lines, Inc., Note, 90 M.C.C. 246 (247)*.

8. Securities defined.—[Vols. 10-19].—While it may be conceded that conditional sales contracts and chattel mortgages are in the broadest sense evidences of indebtedness, such contracts and mortgages do not constitute "stocks, bonds, notes, or other evidence of indebtedness" within provisions of §§ 20a and 214.—In re Independent Truckers, Inc., 212 F. Supp. 402 (405-6)*.

Equipment obligations evidenced solely by conditional-sale contracts are not securities within meaning of §214.—Youngstown Cartage Co.—Control and Merger, 93 M.C.C. 318 (330).

9. Carriers, corporations, individuals subject to section.—[Vols. 10, 11, 13, 15, 16, 18, 19].—State agencies, see Bi-State Development Agency of Mo.—Ill. Met. Dist., Bonds, §20a(1), n. 1, and §20a(7), n. 2.

Sale of shares of stock by carrier's stockholders is a matter over which the commission has no jurisdiction, and approval of carrier's issuance of additional stock for sale to the public should not be construed as either approval or disapproval of proposal of two of its principal stockholders to offer 76,000 shares of stock presently owned by them as part of the public offering.—Carolina Freight Carriers Corp. Stock, 93 M.C.C. 300 (301).

Though applicant's principal stockholder proposes to make a public offering of new stock he will receive in recapitalization of the carrier, his sale thereof is a matter over which the commission has no jurisdiction, and approval of the stock issue should not be construed as either approval or disapproval of that phase of the transaction.—Southwest Freight Lines, Inc., Stock, 90 M.C.C. 375 (376); Eazor Exp., Inc., Stock, 90 M.C.C. 388 (389)*.

Since noncarrier affiliate of carrier authorized to acquire control of another carrier desires not to be subjected to the securities provisions of the act and has indicated that it would not consummate its proposal to acquire control of acquiring carrier if as a consequence (and as is found necessary) it would be subjected to §5(3), the transaction is approved without authorizing the noncarrier to acquire control of any carrier and the requirements of §5(3) will not be applicable. In the circumstances the commission would have no jurisdiction over the noncarrier's proposed issuance of promissory notes to finance its acquisition of control of acquired carrier's noncarrier affiliates, and its §214 application is therefore dismissed.—Mason & Dixon Lines, Inc.—Control—Silver Fleet, 90 M.C.C. 829 (849).

Noncarrier holding company which would become a carrier upon merger into it of two carriers is a proper applicant for authority under §§ 20a and 214 to issue securities and assume obligations respecting securities of others.—Roush—Control—Southern California Freight Lines, 90 M.C.C. 459 (461)*.

Since transfer of transferor's remaining assets to its stock owner would include its interstate operating rights, transferee would thereby become a carrier, and its proposal to issue concurrently a promissory note in face amount of $3,000,000 to repay loans which financed the stock acquisition requires approval under §214.—Limestone Corp., Dallas, Tex., Transferee, 90 M.C.C. 553 (556)*.

10. Corporate powers considered; subsidiaries; corporate control.—[Vols. 10-13, 16, 19].—Greyhound Corp.'s proposed issuance of stock for purpose of acquiring sole control of a company engaged in leasing heavy industrial machinery and equipment to manufacturers and others is an investment that constitutes proper use of funds, is in public interest in that the added earnings from the noncarrier business would enhance Greyhound's ability to provide an improved motorbus service to the public, and is consistent with proper performance of service to the public as a common carrier. Resulting increase in Greyhound's capital stock would be but a small fraction of the total outstanding.—Greyhound Corp. Stock, 90 M.C.C. 215 (223). [But see dissent.]

See also Yale Exp. System case, §20a(2), n. 45.

11. Securities issued without authorization.—[Vols. 10, 11, 13-19].—See also TTC Corp.—Purchase—Terminal Transport Co., Inc., §5(2), n. 48 *Conditions*.

Merger of an existing carrier into a new sucessor corporation is approved with express understanding that the new company's outstanding capital stock, all owned by liquidating carrier, will be canceled, since such shares were issued without the commission's approval and are therefore void.—All States Freight, Inc.—Merger, 90 M.C.C. 51 (54).

Original issuance of stock by corporation organized for purpose of becoming a carrier through the merger was an integral part of the control-and-merger transaction and required prior approval under §214; therefore, its issuance without such approval was in violation of that section and renders such stock void.—Continental Tenn. Lines, Inc.—Control—Tennessee Coach, 87 M.C.C. 775 (777, Note).

12. Orders of the commission.—[Vols. 10, 12, 16, 19].—See Walker v. United States, §5(9), n. 10.

13. Assets capitalizable, generally.—[Vols. 10-19].—When a carrier's current liabilities substantially exceed its current assets, no amount may properly be included in capitalizable assets as working capital. But since, under the commission's accounting rules, vendee's accounts payable due its stockholders for substantial advances are not a current liability, they are properly an item of capitalization.—West Shore Transfer, Inc.—Purchase—Frear Motor Transfer, 93 M.C.C. 786 (789).

Although on basis of giving-effect balance sheet acquiring carrier would be overcapitalized by $523,856 after proposed stock issue to finance §5 transaction, the deficiency in capitalizable assets is due mainly to failure to include leasehold improvements and would be eliminated if title to the property were acquired; the overcapitalization therefore does not warrant disapproval of either application.—R. E. Short, Inc.—Control and Merger, 90 M.C.C. 80 (84)*.

The statutory findings prerequisite to authorization of issuance of securities by a carrier relate to the continuing ability of the carrier adequately to perform its service to the public as a common or a contract carrier; requirement of those findings precludes the commission from considering as capitalizable those assets which may be employed by carriers in businesses unrelated to their carrier functions. And in proceedings involving issuance of stock as a stock dividend, the commission has consistently adhered to the view that carriers must have assets intended for continuing productive use in the service of transportation sufficient to support the proposed capitalization. In absence of other arguments or evidence warranting a departure from long-established commission precedent, the fact that applicant's noncarrier assets exceed its carrier assets does not warrant inclusion of the former in capitalizable assets for §214 purposes.—K. W. McKee Inc. Stock, 93 M.C.C. 1 (3)*.

And though in the Greyhound case (90 MCC 215) the commission found that issuance of stock by a carrier to obtain funds to invest in nontransportation activities may be approved where the investment is judicious and will enhance rather than impair the carrier's ability to serve the public as a carrier, Greyhound had an excess of carrier assets properly capitalizable for the purpose. Proposed stock issue is not for investment of any kind, but is an effort to capitalize cash expenditures previously made for noncarrier purposes, and no basis is shown for departing from principles of that case or 76 ICC 718 and 254 ICC 653.—Id., 93 M.C.C. 643 (646-8)*.

The commission has generally found issuance of securities in payment for intangibles to be inconsistent with public interest and with sound financial practices where it would result in substantial overcapitalization of the issuing carrier. Issuance of promissory note in face amount of $2,100,000 for acquired carrier's operating rights would be incompatible with public interest when it would result in overcapitalization of acquiring carrier by $1,227,623, and such overcapitalization would continue for some time.—Red Ball Motor Freight, Inc.—Control—Couch Motor, 87 M.C.C. 627 (629, 631, 634).

Applicant's capitalizable assets, consisting of working capital, tangible property exclusive of leasehold improvements, and investments in subsidiaries, are exceeded by its cap-

italization, consisting of preferred and common stock and advances and notes payable, by $786,982; its present ratio of long-term debt to combined long-term debt and stockholders' equity is already an unfavorable 66.7 percent and would be increased to 70.9 percent by issuance of proposed note. Though its overcapitalized condition was called to applicant's attention by Director of Bureau of Finance, it has furnished no evidence of correction of that condition or justification for proposed increase in its overcapitalization; authority denied.—American Transport Corp. Note & Assumption of Obligation, 90 M.C.C. 297 (299, 300).

14. Interest.—[Vols. 10, 12, 15, 19].—Proposed interest rate of 6-1/2 percent for a long-term note exceeds that for any motor carrier financing considered in last 6 months, and applicant's only explanation is that it is in line with prevailing rates; however, insofar as prevailing rates are reflected in bank acceptances, Federal Reserve Bulletin for April 1962 indicates that rate on prime 90-day acceptances increased from an average of 2.81 percent in 1961 to 3.00 percent in March 1962; such slight increase in the money market rate does not support the increased interest rate proposed.—American Transport Corp. Note & Assumption of Obligation, 90 M.C.C. 297 (301).

18. Cost of issue and sale of securities.—[Vols. 15, 18, 19].—Based on market value of stock of noncarrier company to be exchanged for stock to be issued by applicant holding company, the estimated costs of issuance totaling $172,200, including a $135,000 fee for financial consultants, amount to approximately 1.8 percent of the transaction's monetary value; applicant's proposed stock issue is consistent with each of its subsidiary carrier's proper performance of service to the public, will not impair ability of any such carrier to provide such service, and is otherwise consistent with public interest.—Greyhound Corp. Stock, 97 M.C.C. 27 (31, 32); in concurrently considered proceeding, estimated costs of issuance of additional stock to be exchanged for stock of another noncarrier company, totaling $410,000, including financial consultant's fee of $340,000, would amount to 1.5 percent of total value of the issue, based on monetary value in terms of market price of applicant's stock. Proposed stock is also found consistent with the public interest.—Id., 97 M.C.C. 34 (36-7).

While the commission has no jurisdiction over proposal of two of applicant's principal stockholders to offer 76,000 shares of stock presently owned by them as part of proposed offering to the public of additional shares to be issued by applicant, expense incident to sale of their stock is not a proper charge against the carrier, and approval of the stock issue is subject to condition that applicant shall pay, or assume obligation to pay, only that portion of the expense properly applicable to the shares to be issued and sold by it.—Caroline Freight Carriers Corp. Stock, 93 M.C.C. 300 (301, 305).

Stock

24. In general.—[Vols. 10-14, 16-19].—Authority to issue 350,000 shares of common stock, 250,000 shares to be exchanged for carrier's outstanding stock and the remainder to be sold to the public, denied. Primary purpose of proposed recapitalization, to comply with commission divestiture order, would not be achieved since plan whereby applicant's present sole stockholder would dispose of his stock over a period of about 15 years envisions his continued participation in applicant's management during that time, while the commission's order called for immediate complete divestiture.—U. S. A. C. Transport, Inc., Stock, 90 M.C.C. 445 (448).

Applicant's principal stockholders, who together own about 90.16 percent of its outstanding shares and are also officers and directors, propose to sell a portion of their own stock as part of a public offering of additional stock to be made by applicant, and agreed to waive dividends for a stated period on about 75 percent of the stock retained by them; thus the selling stockholders, who after consummation would own some 73.89 percent of applicant's stock, would be offering a dividend advantage as an inducement to the public to buy shares, but declaration and payment of dividends would be entirely within their control. This introduces an unnecessary and undesirable speculative element incompatible

with public interest or the best interests of the motor carrier industry; confidence of public investors in motor carrier securities generally is not fostered, and may be impaired, by such unconventional provisions. Approval of the stock issue is therefore conditioned to require that any dividends declared on the common stock be payable on all outstanding shares thereof, that waivers executed by the stockholders be canceled, and the prospectus amended accordingly.—Carolina Freight Carriers Corp. Stock, 93 M.C.C. 300 (302, 304).

In authorizing issuance of securities by a motor carrier, the commission is obligated to give due regard to the public interest, assuming possibility that they may be sold to the public by stockholders not subject to its jurisdiction, and to resulting effect on securities of other motor carriers dealing with the public in securing equity financing. Confidence of investors in motor carrier securities will not be fostered, and is likely to be impaired, if securities subject to unusual and speculative features are distributed among the public.—Eazor Exp., Inc., Stock, 90 M.C.C. 388 (389-90)*.

Provisions of proposed recapitalization which would be used to induce investment in common stock by offering a dividend advantage, which might or might not materialize since declaration of dividends would be indirectly subject to control of applicant's principal stockholder, are speculative. Also, under provisions for conversion of new class A no-dividend stock into common, advantage offered common stockholders would be of limited duration and could be diminished within about a year, or sooner upon death or complete disability of the principal stockholder. Creation of such an unconventional stock structure would not be compatible with public interest or in best interest of the motor carrier industry. Application denied.—Id., p. 390.

Stock market evaluation of securities is largely dependent on earning power thereof, but although dividends would be payable only on the common stock (which carrier's principal stockholder would offer to the public), there is no requirement that any dividends be paid before conversion of the class A stock. Moreover, the common stock would be only 25 percent of the total stock outstanding; assignment of all dividends to such a percentage of common stock invites investment of a speculative character. The 100-percent dividend provision is highly unstable and could be avoided by carrying all earned income in carrier's surplus account until all class A stock had been converted to common, and control of applicant's dividend policy would remain in hands of its principal stockholder before and after any such conversion, since the two classes would have equal voting rights.—Id., 90 M.C.C. 391 (394, 395-6)*.

Another objectionable feature is provision which would give holders of class A stock preemptive rights to subscribe to any future issue of common stock or any security convertible into or carrying options or rights to acquire common stock, since carrier's principal stockholder could exercise those rights in further dilution of the dividend and voting rights of purchasers of the common stock. Issuance of securities with such characteristics would not further the stated objective of improving carrier's ability to accomplish any necessary equity financing in future; on the contrary, its ability to do so might be impaired by issuance and public marketing of the stock as intended; such action would not enhance the public's confidence in motor carrier securities in general. Denial affirmed.—Id., p. 396.

Revised proposal eliminates the objectionable provisions relating to preemptive rights and limits exercise of the conversion privilege to a period of 2 years during each of which 125,000 shares of class A common stock would be convertible provided certain dividends on the common stock had been paid or set aside, and thereafter the conversion privilege would be exercisable without restriction as to prior or subsequent dividend payments. While the controlling stockholder would still hold power to withhold dividends for the entire period, denial on that ground is not warranted, following 85 MCC 592; however, in conformity with the period of exclusive rights to cash dividends approved in that case, in order to enhance probability that such dividends will be paid, the term of conversion restriction should be extended for an additional 2 years.—Id., 90 M.C.C. 235 (238).

Although applicant proposes payment of 10 cents a share per quarter on the common

stock as a prerequisite to class A stockholders' exercise of their conversion rights, its 1961 earnings would cover 10 times that amount, and under a conservative dividend relationship (reinvestment of $1 for every $1 of dividends) its earnings would still provide 5 times the minimum proposed. As the public offering price of the common stock to be sold by applicant's principal stockholder is represented to be at least $10.20 a share, and even the modest dividend proposed could be avoided by carrying all earned income in carrier's surplus account until all the class A stock had been converted, equitable treatment of the investing public requires that the amount of cash dividends required as a prerequisite to conversion during the restricted period be increased to 20 cents.—Id., p. 239.

Under the revised proposal, holders of class A stock, while not entitled to dividends in cash, would be entitled to dividends in class A stock, and though issuance of a stock dividend would require prior approval under §214, such a provision would make it possible for applicant's controlling stockholder to dilute the outstanding stock; hence, requirement is imposed that in event any dividends are declared and paid on the class A stock, in shares of that stock, dividends in equal amount shall be paid on the common stock in shares of common.—Id., p. 239.

The proposal also includes the granting of an option to applicant's president to purchase 6,250 shares of common stock at an option price equal to 110 percent of the initial public offering price of like stock to be sold by its principal stockholder. Since applicant advises that such public offering will probably be at $10.20 to $14.58 per share, it should receive not less than $11.22 per share for the optioned shares; and approval is further conditioned to require that exercise of the stock option be limited to a period no longer than 10 years from date of order of approval, and that the proceeds from sale of such stock be used by applicant only for investment in carrier operating property.—Id., pp. 237, 240.

Under proposed recapitalization, right of conversion of class B common stock to be issued into class A common is restricted only until June 1, 1963, and thereafter is not dependent on payment of dividends. Following views expressed in 90 MCC 235, approval is conditioned to require that none of the class B stock may be converted before June 1, 1966, unless total cash dividends on the class A stock, computed as indicated, paid or set aside during the period from June 1, 1962, to end of calendar quarter next preceding date of conversion, equal at least 12 cents a share. Further, proposed mandatory requirement for payment of a dividend of 48 cents on the class A stock, provided the corporation earns 96 cents a share on the issued class A stock, should in public interest terminate no later than June 1, 1966, in order not to burden applicant with an inflexible dividend requirement which may affect its ability to render service to the public in future.—Southwest Freight Lines, Inc., Stock, 90 M.C.C. 375 (379).

Proposed stock issue will strengthen applicant's financial structure and credit by improving its debt-equity ratio, and stock issued will be held by its controlling stockholder rather than the general public. However, considering price at which proposed preferred stock will be sold and its dividend rate (equal to 50 percent per annum of its proposed $1 par value), it should have par value equal to the sale price, or $10 a share. Also, since the preferred stock is entitled only to noncumulative dividends as declared by the board and will represent about 80 percent of carrier's total equity, it would be incompatible with public interest for holders thereof to have no voting rights unless dividends are passed for 12 quarters; they should have equal voting rights per share with holders of the common stock. Approval conditioned accordingly.—R. E. Short, Inc.—Control and Merger, 90 M.C.C. 80 (84)*.

25. Exchange for other stock.—[Vols. 10-14, 16-19].—Authority granted Greyhound Corp., a holding company, to issue not over 203,824 shares of its $3-par-value common stock, to be exchanged for all shares of a corporation operating various tourist accomodations at a rate of 0.3667 share of applicant's stock for each share of acquired stock, or, in lieu thereof, to issue not over 407,648 shares of its $1.50-par-value reclassified common stock, if exchange is effected after a 2-for-1 split of applicant's stock as previously author-

ized. Proposed transaction is consistent with proper performance of service to the public by each carrier controlled by applicant; affiliation with applicant would contribute to acquired company's earnings through additonal sales to passengers of applicant's subsidiary, Greyhound Lines; and coordinated operation with applicant's restaurant subsidiary, Greyhound Post Houses, should effect operating economies.—Greyhound Corp., Stock, 97 M.C.C. 27 (28-9, 32).

Authority also granted Greyhound Corp. to issue not over 582,964 shares of its $3-par-value stock, to be exchanged for outstanding common stock of a company operating a contract catering, restaurant, and food vending business at a rate of 7 shares of applicant's stock for 12 shares of acquired company's, or, in lieu thereof, to issue 1,165,892 shares of its reclassified $1.50-par-value stock, to be exchanged at a rate of 14 for 12 shares. Proposed coordination of that company's operations with those of company acquired through transaction approved in 97 MCC 27 and applicant's subsidiary Post Houses to form a new Greyhound food division is expected to result in operating economies and improved service to the traveling public, and will not impair services of applicant's carrier subsidiaries.—Id., 97 M.C.C. 34 (35-6).

Issuance of 24,738 shares of applicant's common stock of $5 par value and book value of approximately $10.25 each, in exchange for 12,369 shares of stock, book value $25.18 a share, of a Texas carrier which it already controls through majority stock ownership, for purpose of acquiring sole stock control and facilitating accomplishment of operational, financial, and management transactions under Texas law, approved when resulting ratio of applicant's capitalizable assets to its capitalization will not be adversely affected.—Bekins Van & Storage Co. (Calif.)—Control—Bekins (Tex.), 93 M.C.C. 335 (338, 340).

Subject to conditions imposed, authority granted for recapitalization of applicant by issuance of (1) 125,000 shares of common stock and 375,000 shares of class A common stock of $1 par value each, in exchange for all its presently outstanding capital stock, (2) 375,000 shares of common stock upon conversion of the class A stock on a share-for-share basis, and (3) 6,250 shares of common stock pursuant to an incentive stock option.—Eazor Exp., Inc., Stock, 90 M.C.C. 235; similarly, authority granted for recapitalization of applicant by issuance of 75,000 shares of class A common stock and 225,000 shares of class B common stock of 25 cents par value each, in exchange for 666-2/3 shares of no-par-value common stock outstanding, and 225,000 shares of class A stock to be reserved for conversion of the class B stock.—Southwest Freight Lines Stock, 90 M.C.C. 375.

Survivor in approved merger authorized to issue not exceeding 7,570 shares of its prior preferred capital stock, par value $33 a share, 1,569 shares of its second preferred capital stock, par value $100 a share, and 150,000 shares of its reclassified common capital stock, par value $3 a share, in exchange share-for-share for its presently outstanding preferred and common capital stock.—Roush—Control—Southern California Freight Lines, 90 M.C.C. 459 (471)*.

Issuance by survivor in approved merger of 300,000 shares of common capital stock of $1 par value to replace void stock issued without prior approval, authorized.—Continental Tenn. Lines, Inc.—Control—Tennessee Coach, 87 M.C.C. 775 (779, 784).

28. Stock dividends.—[Vols. 10-13, 15-19].—Authority to issue 7,128 shares of $100-par-value preferred stock in exchange for shares void because unauthorized, which were issued as a stock dividend to holders of applicant's common stock, denied. Though applicant is a closely held corporation whose stock is unlisted and rarely traded, and purpose of proposed issue—which would have effect of permanently capitalizing a portion of its earned surplus—is to enable its principal stockholders to preserve their voting rights and provide a means of paying taxes in event of their deaths, resulting capitalization would exceed applicant's capitalizable carrier assets by $633,021.—K. W. McKee Inc. Stock, 93 M.C.C. 1 (2-3)*.

Although declaration of a stock dividend is ordinarily an entirely legitimate corporate purpose, the commission's duties under §§ 20a and 214 must be administered so as to place uppermost the preservation of the financial soundness of the carriers to ensure

their continued ability to render essential and efficient service to the public. Without adequate carrier assets to be capitalized through proposed stock dividend, the proposal cannot be found to be provident, nor can it be found that the resulting capitalization may not impair carrier's ability to render transportation service to the public, or that the stock dividend would be judicious and likely to improve carrier's financial condition or service to shippers.—Id., 93 M.C.C. 643 (648)*.

While the commission should not substitute its judgment for that of management as to whether fractional interests in proposed stock dividend may be paid in cash or stock, in finding that stockholders entitled to fractional interests are being fairly and justly treated it must determine whether the price to be paid therefor is reasonable and commensurate with fair market value of applicant's stock immediately or within a reasonable time prior to declaration of the proposed stock dividend. —Yosemite Park & Curry Co. Stock Dividend, 90 M.C.C. 211 (213).

Authority granted to issue not over 76,300 shares of common stock of $5 par value as a 10-percent stock dividend, stockholders entitled to fractional shares to be paid in cash at rate of $5.50 a share; latter amount is reasonable for fractional interests when, based on unrefuted evidence of high and low bid and asked prices in over-the-counter market during a period of approximately 8 months, the average bid and offered prices before declaration of the dividend were $5.04 and $5.50, and such prices have since increased owing to ethusiasm created by the proposed dividend. —Id., p. 213.

30. To finance acquisitions.—[Vols. 10-19].—Issuance by applicant vendee of 100 shares of no-par-value common capital stock having a stated value of $1,500,000, to be exchanged for operating rights and certain property of three vendors, authorized.—Anchor Motor Freight, Inc.—Purchase—Anchor Motor Freight, 93 M.C.C. 778 (781).

Authority granted a new corporation, organized by a subsidiary of New York, N.H. & H. R., to issue 20,000 shares of class A and 11,250 shares of class B capital stock, both of $100 par value each, in exchange for the parent subsidiary's right to engage in special and charter passenger operations, plus certain assets, that company's capital stock having been pledged as collateral for a loan guaranty granted the New Haven under part V and having been delivered to the Secretary of the Treasury upon the New Haven's defaulting on the guaranteed loans.—Connecticut Bus Co. Stock, 93 M.C.C. 763 (765, 766).

Issuance by acquiring carrier, subject to filing of certified copies of amendments to its articles of association in conformity with conditions imposed on acquisition of control, of (1) 260,000 shares of common capital stock of $10 par value, of which 210,000 shares are to be reserved for conversion of its preferred stock, and (2) 210,000 shares of noncumulative convertible preferred stock of $10 par value, to finance purchase of acquired carrier's stock, authorized.—R.E. Short, Inc.—Control and Merger, 90 M.C.C. 80 (82,86)*.

Issuance by Greyhound Corp. of not over 294,137 shares of its $50-par-value 4-1/2-percent cumulative preference stock in exchange for all outstanding capital stock of a noncarrier corporation, as part of a diversification program designed to stabilize and increase its earnings and thereby improve its ability to serve the public as a common carrier, also issuance of not over 534,794 shares of its $3-par-value common stock for conversion of such preference stock, authorized as a proper use of carrier funds and compatible with public interest. Though Greyhound's funds are adequate to effect the transaction for cash, such a transaction would be taxable to acquired company's stockholders and is therefore unacceptable to them; resulting increase in aggregate par value of Greyhound's capital stock will be but a small fraction of the total outstanding.—Greyhound Corp. Stock, 90 M.C.C. 215 (218, 223).

In payment for vendor's operating rights and properties, vendee would issue shares of its fully paid and nonassessable stock in sufficient number and total assigned value equal to vendor's adjusted net worth as disclosed by audit, the assigned value to be determined by described formula; on that basis, 9,359 shares would have been issued as of assumed consummation date. As it would be undesirable in the public interest to authorize issuance of an

indefinite number of shares of stock, vendee is authorized to issue not exceeding 10,000 shares of its common capital stock of $1 par value, the actual number to be determined by the formula described.—Overnite Transp. Co.—Purchase—Hill City Transfer, Inc., 90 M.C.C. 749 (751, 752, 756).

Issuance by acquiring carrier of a sufficient number of shares of its common capital stock, par value $10, to equal a book value not exceeding $500,000 at close of last accounting period preceding consummation of authorized control transaction, in exchange for 20,000 shares, par value $1, of outstanding capital stock of acquired carrier, approved when it has sufficient capitalizable assets to support the issuance of such additional stock.—Mason & Dixon Lines, Inc.—Control—Silver Fleet, 90 M.C.C. 829 (852, 853).

Survivor in approved merger authorized to issue not over 2,100 shares of its 5-percent cumulative preferred stock, par value $100, and not over 38,500 shares of its common capital stock, par value $2, in part payment for all stock of liquidating carrier.—Jones Motor Co., Inc.—Control—Mundy Motor Lines, 90 M.C.C. 899 (901, 909-10).

Issuance by a new corporate subsidiary of noncarrier previously designated a carrier under §5(3), of not over 9,990 $100-par-value shares of common capital stock, in payment for operating rights and properties authorized to be acquired by the parent noncarrier through merger of an existing subsidiary, and for certain operating rights to be transferred to it by another subsidiary, authorized.—Pittston—Control—Brink's Armored, Inc., 87 M.C.C. 637 (640, 651).

34. To provide working capital.—[Vols. 12, 13, 18, 19].—Issuance of 24,000 shares of applicant's common stock of $1 par value, to be sold at a public offering price of not less than $11.25 a share, the proceeds to be used for working capital necessary to sustain its expanded operations, for renovation of its home office and terminal, and as part payment for additional equipment, authorized, subject to condition that the underwriters' commission shall not exceed 9 percent of the offering price of the stock, and to other conditions imposed respecting payment of dividends and expenses incident to sale of the stock.—Carolina Freight Carriers Corp. Stock, 93 M.C.C. 300 (302, 304-5).

Issuance by vendee of not exceeding 6,000 shares of 5-percent, noncumulative, convertible preferred capital stock of $100 par value, also 6,000 shares of common capital stock of like par value to be reserved for conversion of the preferred, to be purchased by vendee's controlling stockholder at aggregate par value, for purpose of improving its working capital position and debt-equity ratio upon consummation of approved purchase, authorized.—Oregon-Nevada California Fast Frt.—Purchase—Coast-Lee, 90 M.C.C. 45 (46, 49)*.

Notes

76. To retire; refund, or exchange for other notes; bonds.— [Vols. 10-14, 16, 19].—Though use of a carrier's credit to finance in part the acquisition of the carrier's business is not favored, tax benefits were a principal factor in formulating transferee's capital structure in manner described in prior report, 90 MCC 553, and tax considerations cannot wisely be ignored in such matters. Additional information presented, particularly concerning transferee's increased earnings and more favorable debt-to-equity ratios, supports finding that its financial condition upon consumation of transfer will be sufficiently improved to meet objections stated in that report, and that is issuance of proposed 10-year, 6-percent installment promissory note in principal amount no exceeding $3 million, for purposes stated in the prior report, should be authorized.—Limestone Corp., Dallas, Tex., Transferee, 93 M.C.C. 58 (60)*.

However, though the loan agreement between transferee and the bank restricts payment of dividends or other cash distributions, such restriction may be waived by the bank; therefore, to afford additional assurance that transferee will continue to improve its ratio of equity to debt, condition is imposed that for a 5-year period beginning from date of consummation of the transaction or until the note is paid in full there shall be no declaration or payment of cash dividends or other distributions of property or assets on or in respect of any shares of any class of transferee's stock, whether pursuant to or in connection with a

reduction of capital or otherwise.—Id., p. 61.

Authority for issuance by applicant management company of a long-term promissory note not exceeding $451,430 principal amount to Greyhound Corp. to complete purchase of a note issued to Greyhound by applicant's subsidiary in payment for a local bus operation acquired from Greyhound, denied; no justification is offered for resulting increase in applicant's overcapitalization, or for excessive interest rate of 6-1/2 percent. Moreover, proposed note would be payable over a period of approximately 48 months, whereas balance due on the present note will be repaid to applicant by its subsidiary in about 36 months, and no justification is shown for applicant's not using all the payments received from its subsidiary to pay for its note.—American Transport Corp. Note & Assumption of Obligation, 90 M.C.C. 297 (300, 301-2).

77. Payment for carrier property.—[Vols. 10-12, 14-19].—See also Walker v. United States and Central Freight Lines cases, §5(2), n. 110 *Securities*.

Issuance by acquiring carrier of secured promissory notes in aggregate principal amount not exceeding $690,000 for the balance of purchase price of acquired carrier's stock, payable in 10 annual installments of $69,000 each and bearing interest at 5 percent per annum on the unpaid balance, approved.—Tamiami Trail Tours, Inc.—Control and Merger, 90 M.C.C. 449 (450, 455)*.

Issuance of secured promissory note in principal amount not exceeding $2,100,000, with interest at not over 5-1/2 percent per annum, to finance authorized merger, approved.—Continental Tenn. Lines, Inc.—Control—Tennessee Coach, 87 M.C.C. 775 (778-9, 784).

Survivor in approved merger authorized to issue promissory notes in aggregate principal amount not exceeding $300,234.—Roush—Control—Southern California Freight Lines, 90 M.C.C. 459 (471)*.

See also Red Ball Motor Freight, Inc., case, n. 13, above.

Miscellaneous Securities

115. In general; authorization; terms, conditions.—[Vols. 17, 19].—Issuance by surviving noncarrier of not exceeding $142,947 principal amount of 5-percent debentures maturing 15 years from date of issue, in exchange for not over 4,538 shares of outstanding 6-percent convertible $25-par-value preferred stock of subsidiary terminal company (liquidating company in approved merger), on basis of $31.50 principal amount of debentures for each share of preferred stock, authorized as consistent with proper performance of service by each carrier under control of survivor and otherwise consistent with public interest.—Ryder System, Inc.—Control—Southern-Plaza Exp., Inc., 90 M.C.C. 87 (95)*.

Assumption of Obligation or Liability

125. Subsidiaries' or affiliated companies' obligations.—[Vols. 10-19].—Assumption by vendee, a wholly owned subsidiary of Greyhound Corp. and purchaser of its operating rights, of liability on secured interest-bearing obligations of Greyhound in aggregate amount of $33,779,600 may properly be approved when assets transferred under terms of the purchase will greatly exceed the liabilities assumed.—California Parlor Car Tours Co.—Purchase—Greyhound, 93 M.C.C. 392 (395).

Vendee's assumption of obligation and liability on an outstanding promissory note of its subsidiary terminal company in remaining principal balance not exceeding $341,054, authorized.—Oregon-Nevada California Fast Frt.—Purchase—Coast-Lee, 90 M.C.C. 45 (46, 49)*.

Authority granted survivor to assume obligation and liability on outstanding securities of liquidating carrier in remaining aggregate amount not exceeding $52,850, plus interest thereon.—Quinn Freight Lines, Inc.—Control and Merger, 90 M.C.C. 60 (63)*.

Assumption by acquiring carrier of obligation and liability as primary obligor on a note of acquired carrier in principal amount not exceeding $33,826, and as guarantor in lieu of acquired carrier of balance not exceeding $245,801 aggregate principal amount due on conditional-sales contracts of latter's subsidiary, authorized.—R. E. Short, Inc.—Control and Merger, 90 M.C.C. 80 (82, 86)*.

Survivor in approved merger authorized to assume obligation as guarantor of promissory notes to be issued by its existing noncarrier subsidiary in aggregate principal amount not exceeding $17,476.—Roush—Control—Southern California Freight Lines, 90 M.C.C. 459 (471)*.

Assumption by surviving noncarrier of obligation and liability on outstanding notes of subsidiary terminal company (liquidating company in approved merger) in aggregate principal amount not exceeding $399,548, authorized as consistent with proper performance of service by each carrier under survivor's control and otherwise consistent with public interest.—Ryder System, Inc.—Control—Southern-Plaza Exp., Inc., 90 M.C.C. 87 (95)*.

Approval of assumption, by three affiliated carriers authorized to acquire control of survivor in approved merger, of obligation, jointly and severally, as guarantors of promissory note for not over $2,100,000 to be issued by survivor to finance merger, is justified by its value to them as a connecting link between their operations and by fact that each is a financially stable company, able to bear its share of obligation assumed.—Continental Tenn. Lines, Inc.—Control—Tennessee Coach, 87 M.C.C. 775 (782-3, 784).

Authority for applicant management company's assumption of obligation and liability as guarantor of two secured promissory notes aggregating $400,000 principal amount, proposed to be issued by its subsidiary, a local bus company, to evidence a bank loan to be used to repay applicant the principal amount of a note to be issued to Greyhound Corp. to complete purchase of a note issued by the subsidiary to Greyhound, denied. Not only is no justification offered for increase in applicant's overcapitalization resulting from issuance of the proposed new note, but any benefit to the subsidiary from the proposed financing is doubtful, as it would be required to continue payments to applicant under the present note while also making installment payments on its notes in the bank at increased interest rate.—American Transport Corp. Note & Assumption of Obligation, 90 M.C.C. 297 (298, 300, 301).

126. Vendor's obligations.—[Vol. 19].—Survivor in approved merger authorized to assume liability on liquidating carrier's obligations which qualify as securities under the act, in aggregate amount not exceeding $408,070.—Jones Motor Co., Inc.—Control—Mundy Motor Lines, 90 M.C.C. 899 (901, 910).

Regulations of the Commission

29 FR 11127, July 31, 1964, Part 56: Issuance of Securities, Assumption of Obligations, and Filing of Certificates and Reports, entire 49 CFR Part 56 revised, effective Oct. 1, 1964.

30 FR 11210, Sept. 1, 1965, Parts 51 and 56: General Instructions and Issuance of Securities, Assumption of Obligations, and Filing of Certificates and Reports, §51.8 revoked, and §56.3 Procedure and §56.6 Reports amended, effective Oct. 15, 1965.

Section 215. [§*315 U.S.C.*] Security for protection of public.—[Unchanged. See vol. 10, p. 8134, vol. 17, p. 13577.]

Historical notes, see vol. 10, p. 8134, vol. 11, p. 9483, vol. 12 p. 10422.

Notes of Decisions

Volume 10—p. 8134; Volume 11—p. 9483; Volume 12—p. 10423; Volume 13—p. 11091; Volume 14—p. 11612; Volume 15—p. 12225; Volume 16—p. 12878; Volume 17—p. 13577; Volume 18—p. 14533; Volume 19—p. 15811.

2. Construction and interpretation.—[Vols. 10-18].—In suit concerned with obligations of two insurance companies, one for carrier lessee and one for lessor of truck (leased with driver) involved in highway accident, lessee's insurer has primary coverage and is liable for

entire amount of joint and several judgments obtained by plaintiffs against lessee, lessor, and driver of the truck. Lessee's status as a certificated carrier made it liable as a matter of law for negligence of the driver, which jury in the damage suit found to be the proximate cause of the accident; and it was definitely intended that policy issued by carrier's insurer would provide coverage for it in a situation such as that in question. In addition, since the truck was being operated "exclusively in the business of" the carrier, and under its certificate, when the accident occurred, the lessor and driver thereof are "insureds" as defined in the policy issued by carrier's insurer.—Walters v. Dunlap, 250 F. Supp. 76 (78-80).

50. Cargo insurance.—[Vols. 10-17].—Both the insurance company and insured carrier (who was undergoing reorganization) were obligated to shippers under cargo insurance policy which contained a $5,000 deductible clause and also an endorsement, as required by §215 and the commission's regulations thereunder, that obligated the company to pay any shipper or consignee for all loss or damage to property coming into carrier's possession for which carrier might be held legally liable and that was to apply irrespective of carrier's financial responsibility or lack thereof or insolvency or bankruptcy. Carrier's promise to reimburse the company for any payments made solely by virtue of the endorsement showed that it, rather than the company, was the principal who "should perform"; and the company stood as surety for carrier with respect to claims under the endorsement. Shipper-claimant's power to satisfy their damage claims in whole or in part by deducting their liability for unpaid freight charges was security for the principal's performance to which the surety is subrogated.—In re Yale Express System, Inc., 362 F. 2d 111 (114)*.

No authority is cited to support intimation by carrier to claimants that the act forbids offsetting damage claims against freight charges; the contrary seems to be established. In settling shippers' damage claims against debtor carrier, the insurance company, as surety, was equitably entitled to deduct any outstanding unpaid freight charges; and, since such equitable right would be recognized in an ordinary bankruptcy proceeding, it could be enforced in a reorganization proceeding if it would not unduly interfere with the rehabilitation objective of the reorganization. Lower court's order denying company's right to set off amounts owed to debtor for freight charges vacated; cause remanded for determination of whether even a limited setoff would be compatible with the reorganization or what limits would be appropriate.—Id., pp. 114, 115-7.

Regulations of the Commission

27 FR 6674, July 13, 1962, Part 174: Surety Bonds and Policies of Insurance, §174.8 Insurance and surety companies; authorized—(a) State authority and designation of agent, revised, effective July 15, 1962.

NOTE: For recodification, see 49 CFR, Editorial Note, 32 FR 5606, April 5, 1967.

32 FR 14557, Oct. 19, 1967, Part 274 [formerly Part 174]: Surety Bonds and Policies of Insurance, §274.8 Insurance and surety companies; authorized—(b) Financial resources, amended, effective Dec. 31, 1967.

Section 216. [§316 U.S.C.] Rates, fares and charges—(a) Duty to establish reasonable rates, etc.; service and equipment; rules and regulations; reasonable divisions of joint fares.—[Unchanged. See vol. 10, p. 8142.]

Historical note, see vol. 11, p. 9487.

Notes of Decisions

Volume 10—p. 8142; Volume 11—p. 9487; Volume 12—p. 10425; Volume 13—p. 11092; Volume 14—p. 11614; Volume 15—p. 12227; Volume 16—p. 12880; Volume 17—p. 13579.; Volume 19—p. 15811.

10. Duty to furnish service.—In action against bus line for personal injuries suffered while plaintiff was riding on bus of connecting carrier, initial carrier was not liable for the injuries when, although it sold plaintiff a through round-trip ticket, its ticket stated that it was acting only as agent and was not responsible beyond its own line and it had filed a tariff to protect itself from liability for torts committed on lines of connecting carriers, without fault on its part. Absent a finding of fault on part of initial carrier, it may not be held liable for torts of a connecting carrier which occur on line of the connecting carrier. —Ephraim v. Safeway Trails, Inc., 341 F. 2d 815 (818-20). [Not arising hereunder.]

Although respondent apparently conducted no interstate passenger operations for a period of years prior to August 1960, it subsequently undertook various measures to bring itself into compliance with terms of its certificate and the commission's regulations, including retaining counsel, publishing tariffs, issuing powers of atorney, joining a national bus association, and keeping records of its operations. It now operates 2 to 3 daily round trips between its authorized Maine points, which are coordinated with Greyhound schedules, transporting over 100 passengers traveling between points on its routes and Boston or New York during year preceding hearing, and its drivers sell through interstate travel tickets. Thus it has brought its operations into reasonable compliance with the commission's regulations and requirement of its certificate to render reasonably adequate and continuous service, and revocation of its certificate is not justified, notwithstanding its prior record of noncompliance.—Brunswick Transp. Co., Inc.—Revocation of Certificate, 91 M.C.C. 899 (902).

However, its past failure to perform its authorized regular-route services for a number of years, while yet performing substantial charter operations under claim of §208(c) incidental rights, raises doubt as to bona fides of its present efforts and its intent to remain in compliance with the act and the commission's regulations thereunder. Order is therefore issued specifically requiring it hereafter to maintain reasonably adequate and continuous service, failing which its certificate will be subject to cancellation.—Id., p. 902.

19. [Cost of service]—Wages; prices; taxes. —[Vols. 16, 17, 19].—See Whitehouse Sightseeing Corp. v. United States, §217(a), n. 16.

By act of June 28, 1962, § 5, provisions of statute imposing 10-percent tax on amounts paid for transportation of persons, 26 USC §4261, were amended so as to apply to such transportation beginning before Nov. 16, 1962. Public Law 87-508, 87th Congress, H. R. 11879.

75. Tickets; reasonable practices.—[Vols. 11, 12].—Nonsegregation notice on tickets, see Discrimination—Interstate M. Carriers of Passengers, §216(d), n. 30.

Section 216. (b) [*§316(b) U.S.C.*] Rates, facilities for carriers of property.—

[Unchanged. See vol. 10, p. 8145.]

Notes of Decisions

Volume 10—p. 8145; Volume 11—p. 9489; Volume 12—p. 10427; Volume 13—p. 11092; Volume 14—p. 11614; Volume 15—p. 1228; Volume 16—p. 12882; Volume 17—p. 13581; Volume 18—p. 14534; Volume 19—p. 15813.

5. Rates initiated by carriers.—[Vols. 10-18].—Part I, §1(5), n. 2.

A carrier has the right to initiate rate adjustments calculated to obtain desired traffic, provided the resulting charges are compensatory for the service performed and are not otherwise unlawful. Proposed proportional charges on all-freight in shippers' trailers, the same as those charged for performing similar service for a railroad under contract in

connection with plan II TOFC service, which are designed to afford like service to shippers using plan III TOFC service, meet criteria of §216(i) when they are compensatory and not shown to threaten existing rate structures.—Freight, All Kinds, & Empty Trailers bet. N.J. & N.Y., 322 I.C.C. 429 (430, 434).

6. Reasonable rate construed.—[Vols. 10-14, 16-19].—Whenever a motor carrier files a new rate, §216(d) requires that it be "just and reasonable," and declares that every "unjust and unreasonable charge" is unlawful; and §216(g) places on the carrier seeking a change in rates the burden of proving proposed changed rate is just and reasonable. These laws are very plain and their application is not difficult, in action to set aside that portion of the commission's decision which holds that intra- and inter-territorial general rate increases, to extent they result in a higher charge for hauling goods to a border point than for hauling the same goods to a point beyond the border point, over the same route, were unjust and unreasonable. Rates higher for short hauls than for longer hauls, via same carrier over same route, are so significant an element affecting reasonableness as to make such rates unreasonable on their face. To extent that such maladjustments occur, the increased rates are unjust and unreasonable; the commission's report and order are amply supported by the statute and the evidence; sustained.—Accelerated Transport-Pony Exp., Inc. v. United States, 227 F. Supp. 815 (818-9, 821)*.

A carrier may not make ownership of the property moved the criterion by which its charges for carriage are measured.—John F. Ivory Storage Co., Inc. v. Atlas Van Lines, Inc., 316 I.C.C. 224 (226)*.

Profit to the Carrier

10. Earnings on all services to be reasonable.—[Vols. 10-15, 18, 19].—Increased charges may be approved even though they do not entirely eliminate losses incurred in performing the service involved.—L.T.L. Pickup & Delivery Charges—from or to New York, 319 I.C.C. 230 (233).

To obtain needed additional revenues, eastern central carriers propose flat general increases in t.l. or volume commodity rates and in l.t.l. or any-quantity class or commodity rates on shipments under 2,000 pounds, a 10-percent increase in accessorial charges, and establishment of constant charges, graduated according to weight and distance, which will cover total cost of handling shipments under 300 pounds; based on evidence presented, and considering highly competitive nature of most of the traffic, proposed rates are just and reasonable when they will result in an operating ratio on all traffic somewhere between 93 and 95 percent. However, though an operating ratio of 93 percent has been found reasonable in the past, it is not an immutable standard; in view of numerous changes in the motor carrier industry, the matter should be explored in light of a more complete record; approval is therefore without prejudice to reopening, after a reasonable test period, either on petition of parties or on commission's own motion.—General Increases—Eastern Central Territory, 316 I.C.C. 467 (481-2, 486).

12. —Right of carrier to fair profit.—[Vols. 13, 15, 17].—Although in numerous motor carrier general-increase cases an operating ratio of 93 percent has been found reasonable, for the reasons discussed in 316 ICC 467 composite operating ratios are not an acceptable standard for measuring revenue needs; mere showing of present operating ratios above 93 percent, without a showing of factors that make up such a ratio, is not enough for that purpose. Carriers are admonished in future to supply the commission with all pertinent information, including transactions between involved carriers and their subsidiaries or affiliates, and to conform to instructions in annual report form in reporting details of arrangements between themselves and such affiliates.—General Increase—Middle Atlantic & New England Terr., 319 I.C.C. 168 (176-7)*.

Tests of Reasonableness

25. Competition considered.—[Vols. 10-13, 16-19].—See also Distribution Rates in Eastern Central Terr. Cities, n. 185, below.

Reduced rates on meats from midwestern to mountain-Pacific States are necessary to meet competition of private carriers and oth-

ers operating buy-and-sell or under guise of exempt agricultural cooperatives. When fresh meat is sold f.o.b. plant, purchaser arranges for the transportation, and substantial tonnage is moving by nonregulated carriers who change their rates at will and without notice, making it difficult for midwestern packers using only authorized carriers to sell on the west coast. Respondents and their shippers should not be denied opportunity to meet their major competition because of possibility of retaliatory reductions by the nonregulated truckers; where traffic has been lost to private and illegal transportation, regulated carriers must be allowed considerable leeway in meeting that competition, and disapproval of proposed rates would subject respondents to risk of further diversion of their traffic.—Meats and PHP, Central & Western to Far Western States, 319 I.C.C. 667 (671, 675).

As the proposed rates are higher than rail TOFC rates established to meet the same competition, they should not affect the volume of TOFC traffic. That service will continue to be used where practical, but it is difficult for smaller midwestern slaughterhouses to assemble the rail minimum of 66,000 pounds in one day, shipping time is inflexible, time in transit is longer than by truck, there are no stopoff privileges, and it is difficult for some purchasers to handle such large shipments.—Id., p. 672.

Reduced joint rates proposed on tobacco products to meet competition of rail plan III TOFC service are necessary for respondents to continue participating in movement of shipper's interplant traffic between the points involved. Establishment of reduced rates reflecting shipper's costs on plan III shipments will not alter its competitive relations with shippers at other origins, since the bulk of the traffic is now moving in the plan III service.—Cigarettes and Tobacco between Greensboro and Louisville, 319 I.C.C. 679 (684).

When most of involved traffic is moving by rail and respondent's service is used only when expedition is required, reduced t.l. rate 17 cents higher than the rail rate, which is necessary for respondent to continue participating in the traffic, is not competitively destructive.—Brushware & Cleaning Articles, Easthampton to Atlanta, 319 I.C.C. 164 (166)*; reduced rate on wrapping paper, which is shown to be compensatory, is necessary to enable respondent to share in the movement when at its present rates all the traffic has been diverted to rail carriage.—Wrapping Paper from Rhinelander, Wis., to Toledo, Ohio, 316 I.C.C. 455 (456, 459).

If the proposed rate on ribbon bows is not approved, it is likely that the traffic will move via rail rather than by the respondent. Since the facts and circumstances attending movement of the traffic by the respondent must be considered, proposed rate, which is shown to be compensatory, is just and reasonable.—Dry Goods and Telephone Housings within Central Ter., 318 I.C.C. 175 (177).

Carriers should not be required to forego rates which are fully compensatory solely to protect competing carriers; moreover, purpose of proposed new and reduced rates is not to meet rail or other carrier competition, but to establish rates to additional points and to increase respondent's per-truck revenues. Proposed rates are compensatory, will result in substantially increased revenues, and do not constitute an unfair and destructive competitive practice; approved.—Petroleum Products from Kansas City, Kans., to Texas, 316 I.C.C. 307 (309-10).

See also Alcoholic Liquors case, §15a(3), n. 2.

Where evidence is convincing that disapproval of proposed rates would probably result in diversion of the traffic to private carriage, such action by the commission should be based on a clear conviction either that respondent has failed to show that the rates would cover out-of-pocket costs, or that the rates would be in some other manner unlawful. Feasibility of private carriage for considered traffic is established by sworn testimony, and proposed rates would cover at least out-of-pocket costs; approved.—Bakery Goods, Chattanooga, Tenn., to Southern Points, 316 I.C.C. 573 (574, 576).

Reduced rates on artificial rubber from Sarnia, Ont., to New England points are necessary to enable shipper to meet competition from other origins; though distances from Sarnia and from Akron, Ohio, are approximately the same to most destinations, shipper's costs even at the reduced rates are

greater per hundredweight-mile than those at rail rates available to Akron competitors, and this competitive disadvantage would be aggravated if the reduced rates were disapproved. —Rubber, Sarnia, Ontario, to Conn., Mass., Mo., and R.I., 315 I.C.C. 707 (708, 709)*; the reduced rates are also necessary to forestall substantial diversion to private carriage, since shipper testified that unless rates on the reduced level are continued it will be compelled, in order to remain competitive, to enlarge its present private-carrier operations.—Id., pp. 708, 709.

Where respondent relies on rail competition to justify reduced rates, actual existence of such competition should be shown with particularity; respondent failed to establish competitive justification when it did not show competitive rates under which the traffic is purportedly moving.—Phosphoric Acid and Fertilizer Solution—Utah and Idaho, 316 I.C.C. 683 (686); while the necessity to meet competition is a strong and compelling factor and is entitled to consideration, the statute places the burden of proving reasonableness in a suspension proceeding on proponent of the rate. Minimum showing to meet that burden is convincing evidence that the changed rate would be compensatory; and a desire to meet competitive rates, standing alone, is not adequate.—Dog or Cat Food from Boston to Middle Atlantic Points, 318 I.C.C. 59 (64).

Proposed reduced alternative rate on iron and steel and other articles, the same as rail rate and minimum on iron and steel articles, is lower than competitive motor rates and would apply on many articles not named in competitive rail list, thus would undercut all competition on at least some articles; not approved.—Iron and Steel Articles from St. Louis to Kansas City, 318 I.C.C. 45 (48).

No competitive necessity for absorption of pier loading and unloading charges on class-rated traffic at Virginia ports is shown where no evidence was submitted as to extent, if any, that like traffic now moving through other Atlantic ports might move through Virginia ports if proposed rule became effective; protestant's exhibit indicates that from many Virginia points class rates to Norfolk-Newport News would in every instance be lower than corresponding rates to north Atlantic ports.—Absorption Pier Loading and Unloading Charges, 316 I.C.C. 577 (579).

Though proposed reduced stopoff charge for partial loading or unloading of t.l. shipments is purportedly to meet competition of lower charge of another motor carrier, protestant's testimony that latter charge applies in connection with only a few rates competitive with respondent is not rebutted; and other motor carriers said to maintain charges as low as or lower than that proposed are not shown to be competitors of respondent; moreover, respondent did not attempt to show that the proposed charge would be compensatory; not approved.—Stopoff Charges between Points in Central Territory, 315 I.C.C. 301 (302).

Where threatened private competition is relied on to justify reduced rates, evidence must show that such competition is impending, and the potential competition must consist of something more tangible than a mere intention expressed by a shipper to engage in transportation of his own products. Manner in which considered traffic has moved in the past, approximate cost of private carriage to shipper, or other convincing evidence that threat of private competition is real, has not been shown; proposed rates not approved.—Wallpaper, Paint between Mechanicville, N.Y., and N.Y., 316 I.C.C. 11 (13); similarly, where shipper is presently moving in private carriage only 30,000 pounds a month, compared to 1,900,000 pounds per month of its traffic moving in for-hire carriage, proposed rate reduction is not justified by its mere statement that its private-carrier operation "could be expanded" to carry that tonnage.—Iron & Steel from or to Pennsylvania Points and Ind., 316 I.C.C. 705 (707).

Competitive need for reduced rates on sugar is not established when there is no substantial evidence that motor carrier named participates in the traffic or is a serious competitor of respondent; there is no convincing showing of private carriage to the destination; there is little evidence of competition at rail rates subject to 40,000-pound minimum, and respondent admittedly cannot compete with railroads at higher minima.—Sugar, New York and Philadelphia to Bellefontaine, Ohio, 316 I.C.C. 27 (29-30).

Proposed reduced rates are not shown to be

necessary to meet competition of similar forwarder rates when respondent presented no evidence as to amount of tonnage diverted from it and no shipper support for the proposal.—Drugs & Toilet Preparations, N.J. to Baltimore & Wash., 316 I.C.C. 252 (254).

Reduced rates named from two New Jersey origins are designed to meet a competitive situation encountered at only one, on shipments made by one shipper; no evidence was adduced as to the other origin, nor any cost evidence; approval would ignore the uneconomic effect of those rates on other common carriers and from other origins; proposed rates are not shown to be competitively necessary and thus not to constitute a destructive competitive practice; not approved.—Foodstuffs from N.J. to Conn., Mass., & R.I., 315 I.C.C. 179 (180).

35. Back-haul traffic; empty movement.—[Vols. 11, 12, 14, 16-19].—Showing that proposed reduced rates would attract badly needed backhaul tonnage in direction of respondent's light flow of traffic is not decisive; rates which would be compensatory only on the added-traffic theory may not be approved.—Iron and Steel Articles from St. Louis to Kansas City, 318 I.C.C. 45 (48); similarly, reduced brick rates proposed to meet rail TOFC competition are not justified by respondent's contention that a loss of 50 percent of its present brick traffic would increase its empty return movement and result in a higher operating ratio.—Brick and Related Articles, St. Louis, Mo., to Chicago, 316 I.C.C. 227 (229).

Rates which can be defended only on added-traffic theory may not be approved as just and reasonable. While respondents claim that reduced rate proposed for joint-line movements would provide traffic for what would otherwise be empty backhauls and contribute to cost of return hauls, cost data submitted by one respondent are deficient and the other, which would perform a substantial part of the through haul, submitted none; not approved.—Coolers from Fort Smith to Louisville, 318 I.C.C. 336 (338).

Respondent's need for traffic to balance its operations is insufficient justification for rates which may be below a compensatory level.—Sugar, New York and Philadelphia to Bellefontaine, Ohio, 316 I.C.C. 27 (30); reduced rates may not be approved solely to supply backhaul tonnage for equipment which otherwise would be operated empty. Carriers may not establish noncompensatory rates which can be defended only on the added-traffic theory.—Hides and Pelts from Texas to Ill., Mo., and Wis., 316 I.C.C. 243 (245); Titanium Dioxide from Baltimore, Md., to Cleveland, Ohio, 316 I.C.C. 655 (657).

While respondent's temporary authority would allow its vehicles to travel empty for a considerable portion of any return trip, sound business practice requires an irregular-route carrier, with its inherent flexibility, to coordinate movements to achieve maximum utilization of vehicles, with consequent increase in revenue, for entire round trip over whatever route or routes it selects. Respondent claims to have practically eliminated such empty mileage by hauling exempt commodities or leasing vehicles to authorized common carriers; though no examples are given, it cannot be assumed that return movements would necessarily be without revenue, especially as proposed rates would alleviate an existing backhaul problem; proposed initial rates are not shown to be noncompensatory or otherwise unlawful.—Meats & Related Articles, Wis. to Chicago & Twin Cities, 315 I.C.C. 588 (589-90).

40. Distance considered in determining reasonableness.—[Vols. 10-14, 16-19].—Though carriers' manipulation of distances in order to cut rates charged, which was one of primary reasons for investigation of iron-and-steel scales of eastern motor carriers, is still a cause for concern, there is merit to contentions of irregular-route carriers that requirement for specific rates could not be complied with because deliveries are often made to construction sites off the beaten path; that, since intermediate rules for irregular-route movements have been condemned, publication of a specific rate prior to a movement would ordinarily result in a 30-days delay, to great inconvenience of carrier and shipper; and that mileage guides used in determining rates for other commodities would be appropriate for the same purpose in connection with rates on iron and steel articles. Moreover, prior findings have provided a standard of minimum rates with which to compare any

reductions; investigation discontinued.—Iron and Steel Articles—Eastern Common Carriers, 314 I.C.C. 755 (757-8)*.

45. Disruption of rate adjustment.—[Vols. 10-12, 16-19].—While proposed joint rates on tobacco products between Greensboro, N.C., and Louisville, Ky., which reflect shipper's costs for interplant movements in rail plan III TOFC service, represent a departure from an established rate structure, they are shown to be necessary for respondents to continue participating in movement of the traffic, and respondents cannot be expected to adhere to the existing rate structure when as a result they would be excluded from such participation.—Cigarettes and Tobacco between Greensboro and Louisville, 319 I.C.C. 679 (684).

Respondents' reduced minimum charges per shipment when five or more minimum-charge shipments are picked up at one time at West Roxbury, Mass., are not shown to have had disruptive effect on other movements in the territory when there is no evidence that any member of protestant conference has lost traffic through diversion by reason of such charges, or that private-carrier competition at other points is similar to that at West Roxbury.—Reduced Minimum Charges—West Roxbury to Mid. Atl. Ter., 315 I.C.C. 675 (679).

Possibility that proposed reduced rate may precipitate other reductions in rates and disrupt existing rate structure from Miami Valley area of Ohio would not alone warrant a finding of unlawfulness when proposed rate is compensatory and no lower than necessary to meet existing carrier competition; moreover, present rate structure is not of long standing nor has it been approved or prescribed by the commission.—Printing, Wrapping Paper, Pulpboard—Ohio to New York, 318 I.C.C. 49 (51-2).

Where respondent proposes to establish reduced class rates from Greenville, Miss., only to some 20 Arkansas points, nonapplication of proposed bases to other Arkansas points served by it would without adequate justification disturb existing relationships and precipitate widespread changes in its present class rates and those of common carriers generally in territory involved; not approved.—Class Rates between Greenville, Miss., and Arkansas, 316 I.C.C. 629 (631).

Value; Grade or Condition of Commodity

48. In general.— [Vols. 17-19].—Rates on high-grade commodities, such as cigarettes, should not be allowed to gravitate to the lower segment of the rate scale, without a convincing showing of competitive need; proposed commodity rate on cigarettes lower than minimum level prescribed in 293 ICC 133 on manufactured tobacco in the same area, not approved.—Cigarettes from Richmond, Va., to Baltimore, Md., 316 I.C.C. 68 (70).

49. High vs. low-grade commodities.—[Vol. 15].—Evaluation of cost evidence must be made in light of facts and circumstances attending movement of the traffic by the carrier to which the rate is applicable. Charges at assailed scrap-iron rates represent a substantial portion of the delivered price, and respondent's contention that those rates are necessary to prevent diversion of the traffic to private or illegal transportation is not seriously contested. Authorized motor carriers generally are not interested in handling scrap iron because it is oily and tends to contaminate trailers, and because its low value tends to preclude any substantial profit; and shippers served by respondent are not located on rail sidings and generally would not ship by rail; thus there is no occasion to consider inherent advantages of competing carriers or modes.—Iron or Steel Scrap from Conn., Mass., and R.I. to Pa., 318 I.C.C. 567 (569).

Weight as Factor

60. Weight basis.—[Vols. 10-12, 14, 16, 18, 19].—Rates and the minimum weight applicable thereto are inseparable and must be considered together.—Hardware, LTL, New Britain, Conn., to Mid. Atlantic Terr., 322 I.C.C. 249 (252).

Contention that reduced rate on meats, minimum 30,000 pounds, from Colorado points to Chicago will result in increased traffic and heavier loadings is not supported by the record; fact that one respondent handled nearly 18 million pounds of such traffic

during first half of 1962 at former 13-cent higher rate on 25,000-pound minimum indicates that decline in bureau respondents' traffic during same period is not attributable to the higher rate. That minimum revenue under the reduced rate compares favorably with that under the higher rate does not overcome cost evidence showing the reduced rate to be noncompensatory; average shipments are below 30,000 pounds, and though the reduced rate has been in effect for a year, no attempt was made at further hearing to show that traffic had increased or that the bureau respondents' estimate of 33,000-pound loads was correct; thus there is no warrant for use of that weight in determining compensativeness of the reduced rate. Moreover, the record would not support a finding that the reduced rate is compensatory even at the heavier loading; not approved.—Fresh or Fresh Salted Meats from Colorado to Chicago, 322 I.C.C. 174 (178).

Defendants' continued use of l.t.l. weight breakdowns and t.l. minimum weights in effect prior to revision thereof by complainant rate bureau as result of permissive general increases is not shown to be unlawful; the lower weight scales or minima maintained by defendants on involved traffic are not shown to be in themselves unlawfully disruptive of the rate structure.—New England Motor Rate Bureau, Inc. v. Stone's Exp., 321 I.C.C. 767 (769, 774).

Although reduced rate on alcoholic liquors from Peoria, Ill., to Pittsfield, Mass., fails to cover respondent's out-of-pocket costs on proposed 30,000-pound minimum, it is shown to be compensatory on shipments of 35,000 pounds and is approved for latter minimum.—Alcoholic Liquors from Peoria, Ill., to Eastern Points, 321 I.C.C. 142 (149)*.

While respondents concede that proposed rail-competitive rate on soap and related articles would not be compensatory for proposed 20,000-pound minimum, the traffic actually moves in loads averaging over 30,000 pounds; costs computed for single-line service on that weight indicate that on a 30,000-pound minimum proposed rates would be compensatory; so approved.—Soap and Related Art. between Kansas City and Jeffersonville, 316 I.C.C. 421 (422-3).

Proposed minimum weight of 34,000 pounds is just and reasonable on considered movements; although average loadings do not normally exceed 32,000 pounds, evidence discloses that intervening shipper is capable of loading 34,000 pounds or more per trailer.—Printing, Wrapping Paper, Pulpboard—Ohio to New York, 318 I.C.C. 49 (50, 52).

See also Drugs and Related Articles from N.J. and N.Y. to Tex., §216(c), n. 10.

Provision that minimum weight governing proposed rate on sodium hydroxide solution shall be shell capacity of tank, but not less than 40,000 pounds unless a smaller tank is furnished for carrier's convenience, in which case charges apply on actual weight, is not indefinite; phraseology is clear and rule is similar to rules frequently appearing in both rail and motor tariffs covering transportation of liquids in bulk.—Phosphoric Acid and Fertilizer Solution—Utah and Idaho, 316 I.C.C. 683 (684, 685).

Although respondent claims it is experiencing average loadings of 44,000 pounds on considered traffic, since it holds out to accept a shipment of 35,000-pound minimum, compensativeness of proposed rate should be determined by use of latter weight.—Paper Articles between Ohio & Ill., Ind., N.J., N.Y., Ohio, Pa., 316 I.C.C. 390 (391); likewise, while respondent claims its average load slightly exceeds proposed minimum of 38,000 pounds, proposed reduced rate would be offered on that minimum and compensativeness thereof must be determined on that weight.—Silica Flour from Millville and Newport, N.J., 316 I.C.C. 645 (647).

To eliminate continuing losses from handling of shipments weighing less than 300 pounds, respondent eastern central carriers propose to establish scales of constant or flat charges on 6 weight brackets, progressing by 50 pounds each from column 1 on 1-to-49 pounds to column 6 on 250-to-299 pounds, such charges increasing with distance and from column to column for same distances to reflect the greater weights. Although the constant charges disregard classification ratings and will result in substantial increases on lower-rated shipments while reducing charges on those rated class 100 or higher, the disproportionately high cost of handling such small

shipments justifies treating them as a separate classification. Proposed charges are not inherently unlawful, appear sound in theory, and in the aggregate are not excessive since they would do no more than return total costs.—General Increases—Eastern Central Territory, 316 I.C.C. 467 (468-9, 474, 484-5).

While the sharp increases on low-rated traffic may have severe impact on some shippers, those shipping commodities rated class 50 by reason of high density and low value can obtain a relatively low rate by shipping in larger quantities. Disruption of commercial practices and hardship to individual shippers is unlikely to be as great as shipper protestants fear, and both carriers and shippers should benefit from having to ascertain only weight of shipment and corresponding rate basis number. Proposed constant charges are an experiment in ratemaking and a step toward tariff simplification, and should not be condemned merely because they are a departure from traditional practices. However, in view of their admitted imperfections, approval is without prejudice to reopening of the proceeding for further hearing, if it appears warranted, after a reasonable test period.—Id., pp. 485, 486. [But see dissent.]

See also Alcoholic Liquors, Detroit, Mich., to Long Island City, §202(b), n. 6.

61. —Alternative minima.—[Vols. 10, 17].—Although proposed alternative rates on paint, minima 28,000 and 32,000 pounds, are not shown to be compensatory, the higher rate proposed for the lower minimum, if made subject to the higher minimum, would exceed the out-of-pocket costs shown by slightly over 2 cents, and would be compensatory; as a competitor of respondent is actually transporting some of the traffic at same rate on a lower minimum, it may be approved for the 32,000-pound minimum as reasonable and necessary to meet existing competition.—Paint & Paint Materials, Chicago to Kansas City, Kans., 318 I.C.C. 331 (334).

Comparison of Rates

72. Comparison of rates; with rates of other motor carriers, common and contract.—[Vols. 10-14, 16, 18].—Absent probative cost evidence, comparison of respondent's initial cement rates with those found compensatory for another carrier between points in same general territory is adequate to support finding that respondent's rates are likewise compensatory when they are on equal or higher level than the approved rates for comparable distances.—Cement from Hudson, N.Y., to New England and Pa., 319 I.C.C. 235 (249).

76. —In the same territory; in different territories.—[Vols. 10-13, 15, 17-19].—Respondent's operating ratio of 92.9 percent, together with fact that its rates on cement from New York and Pennsylvania points to destinations in New England and middle Atlantic States exceed cement scales approved for middle Atlantic territory in 313 ICC 103 and for New England in 314 ICC 459, as extended for distances up to 660 miles, are convincing that its rates are compensatory. And fact that rates of another respondent from Pennsylvania points to same destinations, as recently increased, also exceed those scales indicates that they are now on a reasonable basis.—Cement from Hudson, N.Y., to New England and Pa., 319 I.C.C. 235 (242, 248, 249).

Agreed compromise scale of l.t.l. rates on envelopes is on higher level than rates in central territory on numerous other paper articles which appear to have similar transportation characteristics; fact that level of rates may be lower than that in other territories does not warrant finding that considered scale is unlawful. Considering competitive and other circumstances which affect this traffic in central territory, and requirements of previous orders in 68 MCC 429, 301 ICC 156, 306 ICC 573, agreed scale is lawful.—American Envelope Co. v. A. & H. Truck Line, Inc., 316 I.C.C. 563 (568)*.

78. —Value dependent upon similarity of circumstances.—[Vols. 12, 14, 17-19].—Part I, §1(5), n. 222.—In absence of definite showing of similarity of transportation characteristics and conditions, comparisons of rates on fertilizing compounds with rates on animal or poultry feed are entitled to little weight.—Fertilizers and Feed, Central & Middlewest Territories, 318 I.C.C. 298 (300).

Inasmuch as load restrictions imposed by other northwestern States for varying periods during early spring of each year are not shown to have an impact on defendants' operations

substantially similar to that of South Dakota restrictions imposed during March and April, compared rates and charges on class- or exceptions-rated traffic moving in interstate or foreign commerce to and from those States, which do not include "frost law charges," are not a proper standard for measuring reasonableness of assailed rates and charges on like traffic to and from South Dakota during March and April, which are 10 or 11 cents higher than normal class rates because of application of frost law charges.—Traffic Bureau of Sioux Falls v. Barber Transp. Co., 316 I.C.C. 325 (330, 335-7).

79. —With rates on like commodities, like transport characteristics.—[Vols. 13, 15, 18, 19].—Although respondent's l.t.l. rate on paperboard is substantially lower than l.t.l. class rates of conference carriers on same commodity between same points, latter are not shown to be moving any of the traffic, due apparently to private-carrier competition; they are therefore not a proper standard for measuring minimum reasonableness of respondent's rate.—Paperboard between New Jersey and New York, N.Y., 315 I.C.C. 187 (189).

80. —With divisions of through rates.—[Vol. 18].—Although proposed assembling rates from points in the Carolinas to Charlotte and Greensboro, N.C., are higher than average divisions of through transcontinental motor carrier rates, those divisions are of slight probative value in determining reasonableness of proposed rates.—Assembling Rates at Charlotte and Greensboro, N.C., 318 I.C.C. 429 (436).

Presumptions, Evidence, Admissions as to Reasonableness

92. Rates higher at intermediate than at more distant points.—[Vols. 14, 15, 17-19].—See also §216(c), n. 12.

Rates higher for shorter than for longer hauls via same carrier and over same route are so significant an element affecting reasonableness as to make such rates unreasonable on their face; and principle that, apart from statutory enactment, it is prima facie unreasonable to charge more for a shorter than for a longer haul has been applied by the commission since the earliest days of its administration of the Motor Carrier Act. Plaintiffs do not contend that principle is inapplicable to territorial rate increases resulting in higher rates to border points than to points beyond, merely because the longer haul terminates in a different territory, or that the border-point rates are unremunerative without the increases; and their contention that rates resulting in such maladjustments may not be condemned because they have no control over rates beyond the border was specifically rejected by the commission. To extent that such maladjustments occur, the increased rates are unjust and unreasonable; order requiring cancellation of such unlawful rates, sustained.—Accelerated Transport-Pony Exp., Inc. v. United States, 227 F. Supp. 815 (819, 820, 821)*.

Although flat increases in class and commodity rates in middle Atlantic territory and between that territory and New England do not exceed reasonable maxima, where they result in rates to border points higher than to points beyond over same routes such rates are obviously unlawful and must be canceled. If a carrier chooses to participate in the lower rates for the longer hauls it should arrange to maintain rates no higher at intermediate border points.—General Increase—Middle Atlantic & New England Ter., 319 I.C.C. 168 (177)*.

In absence of sound reason therefor, maintenance of class rates to intermediate points higher than to more distant points on same route is prima facie unreasonable.—Class Rates between Greenville, Miss., and Arkansas, 316 I.C.C. 629 (632).

Cost of Service

100. Costs considered; truck capacity.—[Vols. 10, 11, 19].—Rates below out-of-pocket costs may not be justified on theory of "top loading." Respondents' reduced rates on syrup, starch, and corn oil that are less than out-of-pocket costs are not just and reasonable; cancellation required.—Syrup between Kansas City, Mo., and Chicago, Ill., 321 I.C.C. 214 (217, 218).

In absence of any competitive need or other special circumstances, common carrier rates should return at least the full cost of the serv-

ice, so as to avoid placing an undue burden on other traffic.—Foodstuffs, Candy, Feed from Chicago to Sharon, Pa., 318 I.C.C. 422 (423, 424).

Though "frost law charges" assessed on certain traffic to or from South Dakota during March and April of each year were established to compensate defendants for increased operating costs due to imposition of special State load restrictions during those months, where increased costs are incurred they are attributable to all traffic transported, not only that in issue; traffic subject to such charges is transported in same vehicle with like traffic not subject thereto, the only difference in circumstances being that the one shipment may be destined to a point in South Dakota and the other to a point in another State; moreover, frost law charges of same amount apply on like shipments regardless of differences in distance; application of such charges only on the traffic in issue and irrespective of length of haul does not place the burden of increased costs solely and fairly on that traffic which directly causes the expense. —Traffic Bureau of Sioux Falls v. Barber Transp. Co., 316 I.C.C. 325 (339-40, 346).

For the same reasons as those stated in 62 MCC 117 in condemning surcharges designed to offset additional costs due to State truck-mile taxes, any increases incurred by defendants as result of imposition of the load restrictions in March and April should be treated as a normal operating expense and should be reflected in defendants' class-rate structure rather than in frost law charges.—Id., p. 347.

101. Terminal services.—[Vols. 10-19].—Cost of interchanging over-the-road for local tractors in terminal areas would be negligible, and failure to include such cost is of no material consequence.—Alcoholic Liquors, Detroit, Mich., to Long Island City, 319 I.C.C. 404 (407).

Move to strike cost data for pickup and delivery service at points in area just north of New York City and on Long Island, based on experience of one respondent's Newark terminal, on ground of irrelevancy, denied. Although the Long Island traffic appears to be actually routed via New York Port Authority terminal rather than the Newark terminal, both are in same general area and operations would be conducted under similar conditions; thus it is reasonable to assume that costs incurred at the Newark terminal are representative of those incurred at the New York terminal.—L.T.L. Pickup & Delivery Charges—from or to New York, 319 I.C.C. 230 (232).

Since under ordinary line-haul rates shipper is entitled to one delivery at no extra charge, cost of one of deliveries under respondents' distribution rates on all-freight at Chicago and St. Louis is properly chargeable to the line-haul movement.—Distribution Rates at Chicago, Ill., and St. Louis, Mo., 318 I.C.C. 145 (148).

Amount of physical terminal service required on l.t.l. shipments, including pickup and delivery, transfer at interchange points, platform handling, and billing and collecting, is proportionately greater than on t.l. shipments; tendency is to bypass platform handling as weight of shipment increases, so that t.l. traffic is only occasionally platformed and terminal handling of larger l.t.l. shipments is reduced to a minimum. Relative costs of terminal and line-haul services on t.l. shipments are approximately 20 and 80 percent, respectively, 45 and 55 percent on l.t.l. shipments generally, and approximately 80 and 20 percent on small shipments. Labor constitutes about 41 percent of direct expenses in line-haul service, and in terminal service about 62 percent of total pickup and delivery cost and 77 percent of platform and billing-and-collecting costs, the composite figure being about 68 percent. Proposed general increases under which about 20 percent of needed additional revenue would be received from t.l. or volume shipments and 80 percent from shipments under 2,000 pounds therefore appear just and reasonable.—General Increases—Eastern Central Territory, 316 I.C.C. 467 (471, 477-8, 482).

While order bill of lading shipments may well be more costly to handle than other types, record does not establish a meaningful cost comparison for the different types; respondents' cost study based on a test month for one carrier does not establish that cost of terminal handling of order shipments exceeded that for straight-bill-of-lading shipments; showing of additional expense incurred for services peculiar to order shipments is re-

quired before separate charge theron can be approved.—Terminal Charge on Order Bills of Lading Shipments, 315 I.C.C. 327 (332)*.

102. Operating costs; system average costs.—[Vols. 10-19].—Part I, §1(5), n. 95.—See also §216(g), n. 66.

Where individual carrier costs are not available or are found inadequate, data from the commission's cost statement No. 2-60 may be used as representative of average costs in the territory. As those studies cover all representative carriers of general commodities and are conducted under exacting and refined studies, the results are reflective of the most reliable costs available. However, there is no reason for use of short highway miles adjusted for circuity where the carrier involved operates over irregular routes.—Fresh or Fresh Salted Meats from Colorado to Chicago, 322 I.C.C. 174 (181-2).

Though cost of service is an important element in measuring rates, it cannot be made the sole consideration. While unit costs of one respondent's cement traffic are not shown specifically, and it admits that on minimum weight shipments for short distances its rates are below cost, the relatively small movement of cement during the short time since effective date of the rates precludes refinement of costs to the degree possible over a longer period. Its average truck-mile revenue for the 17 round trips shown exceeds per-mile cost of all its operations during preceding year by a substantial margin, and other factors, such as extent to which its needs are met by other traffic, are persuasive that its cement rates are just and reasonable.—Cement and Mortar—Ill. & Mo. to Ill., Ind., Iowa, & Ky., 321 I.C.C. 166 (169-70).

Protestants' cost study, using Highway Form F and reflecting general average costs for transportation of petroleum in bulk, with adjustments made in attempt to show costs of transporting bulk cement, lacks the evidentiary value of another respondent's study based on its actual experience, even though for a relatively short period. Respondent's cost data sufficiently indicate compensativeness of its rates when ratios of rates to cost show that they are clearly compensatory for average loads and approximate compensativeness on minimum weight loads.—Id., pp. 171-2.

On basis of restated costs, cement rates of two respondents for their respective operations out of Davenport (Linwood), Iowa, and St. Louis approximate total costs for distances up to about 150 miles, which distance generally exceeds the average haul for those carriers. Costs shown for the Davenport operation are representative of movements by that carrier from other origins, and because of the brief experience of that carrier and its affiliates on other movements it is doubtful if cost evidence of any greater value could be developed from individual studies of the various operations. As a whole, those respondents' rates cover their full costs and are compensatory.—Id., p. 181.

Rail protestants' cost evidence is entitled to little weight to show cost of considered transportation of meats and packinghouse products when commission's cost statement 7-60, on which it is based, reflects average costs of 8 regular-route, general-commodity carriers in same general territory, whereas respondents are essentially irregular-route operators who specialize in transportation of the commodities involved, use owner-operators almost exclusively, interline very little freight, normally transport shipments weighing over 30,000 pounds, and have directionally balanced traffic movements. Respondents' studies based on data from their annual reports are the more reliable in the circumstances.—Meats and PHP, Central & Western to Far Western States, 319 I.C.C. 667 (673-4).

Although ordinarily a comparison with respondent's system average expense per vehicle-mile is of little value in determining whether or not a rate is compensatory, as it falsely assumes that all expenses are caused by miles operated, two exceptions have been recognized: (1) where the margin of revenue per vehicle-mile greatly exceeds the system average expense, the wide spread indicates probability that the rate is compensatory; (2) where a carrier specializes in transportation of single commodity or group of commodities in a particular area, system average expense is a fairly reliable measure of cost in that area in absence of contrary evidence.—Canned

Goods—Md., Pa., Va., & . Va. to Iowa, Mich. & Mo., 318 I.C.C. 171 (174).

Therefore, since respondent specializes in transportation of involved canned goods, proposed rates to points in Michigan which yield revenue exceeding its system average expense by substantial amounts are compensatory; but proposed rates to Iowa and Kansas City which fall below its system average expense are not.—Id., p. 174.

Though comparison of system average expense per vehicle-mile with revenue per vehicle-mile is ordinarily of little value in determining whether or not a rate is compensatory, as it falsely assumes that all expenses are caused by miles operated, a margin of revenue greatly exceeding system average expense indicates probability that the rate is compensatory in absence of precise costs or evidence to the contrary; however, the precise spread acceptable as showing compensativeness depends on facts and circumstances of each case.—Alcoholic Liquors from Eastern points to South Dakota, 318 I.C.C. 195 (197-8).

Although protestants' cost data based on operations of motor common carriers of general commodities in central territory are not determinative of actual costs of respondents in transporting traffic under considered all-commodity distance rates, they are the best evidence available to protestants and may not be ignored in absence of effective rebuttal by respondents.—All Freight between points in Ohio, 318 I.C.C. 731 (735).

System-average expenses are of little value in determining whether or not a rate is compensatory, since they falsely assume that all expenses are caused by miles operated.—Candy and Confectionery, Hoboken & New York to Chicago, 316 I.C.C. 671 (672); however, where a carrier specializes in transportation of a single commodity or group of related commodities in a particular area, its system-average expense may be regarded as a fairly reliable measure of its costs on such traffic, in absence of evidence to the contrary.—Soap & Related Art. between Kansas City and Jeffersonville, 316 I.C.C. 421 (424); Iron & Steel from or to Pennsylvania Points and Ind., 316 I.C.C. 705 (706-7); and since carrier specializes in transportation of bulk liquids, its system-average expenses may be regarded as a fairly reliable measure of approximate costs of handling involved acids between considered points.—Liquid Commodities between Va. and N.J., N.Y. and Pa., 316 I.C.C. 609 (614).

While ordinarily average costs are of limited value in determining lawfulness of rates on particular movements, they are entitled to full consideration when they have been adjusted to meet the particular situation and show that the assailed rates are substantially below a compensatory level; such a showing, if not overcome, justifies a finding of unreasonableness. While motor carrier bureau's more representative cost studies show that costs computed by Bureau of Inquiry and Compliance are somewhat overstated as to motor respondents, its studies confirm its admission that considered rate on petroleum and products is noncompensatory. Cancellation required.—Petroleum and Products from Oklahoma to Illinois, 318 I.C.C. 425 (428).

Average costs on all types of commodities, high as well as low grade, have substantial probative value to show whether rates are compensatory where comparisons show a wide spread between such costs and the rates; the wide spread between proposed rates 80 to 87 cents and costs ranging from 102 to 123 cents indicates that such rates are not compensatory.—Clay from Points in the South to Ohio, Pa., and W. Va., 316 I.C.C. 1 (3).

While a comparison of system-average expenses per vehicle-mile with truck-mile earnings ordinarily is of little value in determining rate compensativeness, where such expense is well in excess of minimum revenues under considered rates, considerable doubt is cast on their compensativeness.—Hides and Pelts from Texas to Ill., Mo., and Wis., 316 I.C.C. 243 (245).

Protestants' use of system-average load of respondent to develop average load factor in computing line-haul cost for that carrier's portion of the movement was proper in absence of any evidence of average return load from considered points; out-of-pocket cost thus determined exceeds proposed rate; not approved.—Aluminum from The Dalles, Oreg., to Adrian, Mich., 316 I.C.C. 625 (627-8).

Where line-haul costs are determined in the going direction only, and the jointness inherent in line-haul costs thus ignored, the resulting cost computations are unacceptable for ratemaking purposes. However, respondent's costs, adjusted to reflect roundtrip load factors computed by averaging the respective minimum weights for proposed rates with its system-average load for the year, may be accepted, in absence of more specific costs, as a general approximation of its costs of performing the considered service.—Wrapping Paper from Rhinelander, Wis., to Toledo, Ohio, 316 I.C.C. 455 (458).

Since truck-mile costs developed by rail respondents are average costs for handling all traffic between all points within area served by each protestant, they may not be accepted as representative of motor costs for handling considered traffic; moreover, it is impracticable to compare unit costs for the respective modes when rail costs are stated per 100 pounds and motor costs per truck-mile; this, as well as absence of other factors, does not permit determination of the low-cost mode.—Exceptions Ratings on Agric., Roadmaking, Other Articles, 315 I.C.C. 9 (16)*.

Composite costs of carrying general commodities, based on operating data of a number of carriers, cannot be accepted as costs incurred by a respondent in transporting a specific commodity in specialized service from and to particular points. Protestant's regional cost evidence does not show noncompensativeness of assailed l.t.l. rate on paperboard between three New Jersey origins and New York City.—Paperboard between New Jersey and New York, N.Y., 315 I.C.C. 187 (189).

Cost data based on respondent's system average for all hauls on all commodities handled over a period of a year may not be accepted as indicative of cost of transporting a single commodity from one origin to one destination.—Oleomargarine from Columbus, Ohio, to Twin Cities, Minn., 315 I.C.C. 504 (506).

When preponderance of respondents' traffic is peddle traffic in no way related to movement of iron and steel fasteners under proposed l.t.l. commodity rates, protestants' cost analysis based on premise that system average unit costs would apply to such movements has little probative value.—Iron or Steel, LTL, Rockford, Ill., to Anderson, Ind., 315 I.C.C. 683 (687).

See also Glass Bottles from Muskogee, Okla., to Chicago, and Aggregate Weight Provisions on Paper, Mass. to N.Y., N. J., cases §216(g), n. 10.

104. Ascertaining cost.—[Vols. 12, 14, 18, 19].—The commission's basic criticism of plaintiff's cost study purporting to show compensativeness of reduced rates on beer, which was prepared with use of Highway Form B (published, though not formally adopted, by the commission), is that that formula was designed primarily for determining costs of general-comodity carriers and would require "considerable adjustment" for application to plaintiff, a special-commodity carrier. However, nothing on cover page of Highway Form B suggests such a limitation, and the commission stated in a recent case that, with information specialized carriers are required to furnish in annual reports, Highway Form B can be applied to develop cost of a particular movement; no reason appears why considerations stressed therein should not apply to plaintiff's rates, unless specific criticisms of its study discredit it so substantially as to warrant its rejection without a hearing.—Davis & Randall, Inc. v. United States, 219 F. Supp. 673 (680-1)*.

Since application of the Highway Form B formula for computing empty return mileage would charge the beer movement with a greater percentage of empty mileage than plaintiff's system average for the preceding year, plaintiff's cost analyst increased the line-haul costs as developed under the formula by the prior-year ratio—the method used in the commission's rail cost formula, and conservative in that an empty mile actually costs less than a loaded mile. As applied to plaintiff's operation, the commission's method is not shown to be more accurate than the analyst's; and whether outbound movements are more productive of empty return mileage than inbound, whether this applies to plaintiff's operations generally and the proposed beer movement in particular, and if so how much the analyst's figures should be increased on that account, are inquiries that should have been made at a hearing.—Id., p. 681.

Though ascertainment of owner-operator costs may be difficult, the need for production of such evidence to show compensativeness of rates covering service provided with owner-operators, in order to meet standards of the national transportation policy and requirements of §216(b), (d), and (g), outweighs the burden placed on the carrier and owner-operator. Prior to decision in 318 ICC 567, a carrier using owner-operators had to furnish the same proof of compensativeness as self-sustaining carriers; now it has only to show that its retained revenue substantially exceeds its costs, and that amount paid the owner-operators is enough to acquire and retain their services. Thus, carrier can attract an owner-operator willing to be employed when his income will not defray his expenses; this makes a rate noncompensatory, and therefore unjust and unreasonable, contrary to §216(b) and (d). In absence of sufficient reasons, full production of evidence is required for both a self-sustaining carrier and a carrier using owner-operators, when costs are used to prove compensativeness. Remanded for further consideration.—Eastern Central Motor Carriers Ass'n v. United States, 239 F. Supp. 591 (599-600, 601)*.

Determination of overhead expenses on a percentage-of-gross-revenue basis rather than by a specific study is improper because it erroneously assumes that such expenses will vary with the amount of revenue received.—Aluminum Sheets & Scrap, Oswego, N.Y., and Warren, Ohio, 322 I.C.C. 788 (791).

Respondents' use of density-adjustment table in public statement No. 1-62 to construct an average for northbound movements is in conformity therewith and with their use of Highway Form B to compute out-of-pocket cost of representative carrier. While carrier's line-haul operations are conducted on a relay system, and considered movement includes two intermediate relay points, average return loads are properly computed when weight moving from one relay point to another is included for each loaded trip and wholly empty trips are included in total number of trips. Though resultant figures differ from the system average load reported in carrier's annual report, respondents gave full weight to traffic moving on each relay segment in computing the average thereof, and it should not be duplicated when average load over several segments is computed. What is desired is the average load on one vehicle for entire distance which then is combined with a vehicle load of considered traffic moving in opposite direction to produce a round trip average; a system-average load estimate is not pertinent when a point-to-point average load is available.—Jams, Jellies, or Preserves, Oklahoma City to Chicago, 325 I.C.C. 95 (96, 97-9)*.

Respondents' adjustment for density is not erroneous because based on a computed density for the return load instead of actual density for commodities transported; combined density of entire load of return-haul freight (not average densities of individual commodities) is significant, as equivalent load weight is desired rather than equivalent weight of particular shipments; thus, density as computed is a constructive figure which does not, and need not, represent actual average density of separate shipments carried. Nor is the computation erroneous because carrier's largest vehicle, instead of average of all its vehicles, was used therefor; since traffic in issue has a density greater than the 20.4-pound density at which the vehicle would be loaded to both weight and space capacity, its density is limited to that figure in the adjustment table; and when vehicle is loaded to either weight or space capacity in a given direction, the equivalent weight is weight capacity of the vehicle. In view of the capacity round trip vehicle utilization, the computation of average density, and application of the density adjustment to representative carrier's line-haul cost, are correct.—Id., pp. 99-101.

Respondent's use of density-adjustment table in public statement No. 1-62 to construct an average weight for southbound movements is in conformity therewith and with its use of Highway Form B; such adjustment is for purpose of taking into consideration both space and weight capacity of a vehicle, and was used by respondent to give effect to light-loading traffic moving in one direction and heavy-loading in the other. And though respondent included mileage expense of empty northbound haul of 32 miles from Texarkana to Hope (origin of involved traffic) in pickup cost, its failure to include corresponding

southbound movement in round-trip line-haul cost was not improper, since it is not shown that southbound trailers move empty from Hope to Texarkana, and southbound mileage expense is borne by shipper or consignee. Even including that cost and vehicle-mile 'cost of 8-mile off-route movement to serve shipper's plant, proposed rate exceeds out-of-pocket cost and is compensatory.—Boards or Sheets from Hope, Ark., to Chicago, 319 I.C.C. 399 (401-2).

Upward adjustments of unit costs for density—on a light and bulky commodity—may properly be applied only where transportation characteristics of the entire region are under consideration, and may not be applied to a specific carrier or specific movement costs when evidence does not show whether the commodity involved has a density less than the carrier's average traffic. Also, use of density adjustment factors pertaining to truckload movements is improper in competing pickup and delivery and terminal platform expenses on l.t.l. movements.—Boots or Shoes from Columbus, Ohio, to Chicago, Ill., 316 I.C.C. 239 (241)9

Method of computing line-haul costs contained in cost finding section's public statement No. 2-60 is an arbitrary procedure to give equal cost effect to both space occupied by shipments and weight thereof when a vehicle is not loaded to either space or weight capacity, and was intended to be applied only when traffic moving at proposed rates is of light density. Space-weight adjustments based thereon are inappropriate for such heavy-density traffic as ground-wood boards, especially when certain vehicles embraced in traffic study moving in reverse direction were loaded to weight capacity, and vehicles hauling the heavy-density commodity involved would be loaded to weight capacity.—Ground Wood Boards, Sheets—Bemidji, Minn., to Chicago, 314 I.C.C. 774 (777).

The only accurate way to obtain the density of traffic for cost purposes is to divide the weight load by the volume of the particular shipment.—Salt from Williston, N. Dak., to South Dakota, 314 I.C.C. 787 (789).

Complainant's cost study based on 1961 expenses of 61 allegedly typical motor common carriers in middlewest territory, applied to Highway Form B, does not afford a reliable indication that defendant's tariff rates are noncompensatory, since there is no showing that expenses of the 61 carriers are representative of defendant's expenses for that year and, also, complainant has not added the carriers' system average load (as a return load factor) to the outbound minimum weights and divided by two to obtain appropriate round-trip load factors. Likewise, complainant's cost study based on defendant's 1961 annual report is unreliable because defendant is a carrier of special commodities and its reports do not contain sufficient detailed data to permit development of costs on Highway Form B.—Middlewest Motor Freight Bureau v. Beaver Transport, 325 I.C.C. 175 (179-80).

Intervener's study of both out-of-pocket and fully distributed costs, grounded on public statement No. 1-61 of the commission's cost-finding section, which is based on 1959 expenses of 151 motor common carriers operating in central region, is also unacceptable due to lack of details concerning method of computing percentage increases (which appear to be considerable) applied to adjust the carriers' 1959 pickup and delivery, platform, billing and collecting, and line-haul costs to 1962 levels. These studies do not show the assailed rates to be noncompensatory.—Id., p. 180.

In computing cost of transporting meats and related commodities from Colorado points to Chicago, no justification is shown for departure from the commission's usual practice of including an amount for interest or return on investment.—Fresh or Fresh Salted Meats from Colorado to Chicago, 322 I.C.C. 174 (177).

Cost estimates based on one-way operation, which assumes the same load for return as for outbound movements, and which make no allowance for circuity, are understated; but platform costs should be omitted when no such service would be performed. "Pay mileages" (fixed distances for which driver is paid regardless of actual distance traveled) used by one respondent are unacceptable for cost purposes; also, as that carrier uses double-bottom service between key points, use of average cost of single- and double-bottom operations for its overall vehicle-mile costs

overstates cost for single-trailer operation and understates that for double-bottom service, which entails added cost per tractor-mile and additional cost for the second trailer. Restatement of costs by application of Highway Form B to that respondent's 1960 operating data, giving consideration to circuitous miles, round-trip average load, and elimination of platform expense, approximates out-of-pocket costs for the contemplated operation and is acceptable as the best cost evidence of record.—Alcoholic Liquors from Peoria, Ill., to Eastern Points, 321 I.C.C. 142 (146-9)*.

In computing line-haul costs, where actual mileages are not available, short-line miles should be increased by 6 percent to allow for circuity.—Paper Bags from Chicago to Kansas City, 321 I.C.C. 732 (736); however, since respondent is an irregular-route carrier, presumably free to use the shortest route available, protestant's use of a 6-percent distance allowance for circuity in computing out-of-pocket cost for considered movement is not justified.—Foodstuffs from Hudson, N.Y., to Chicago, Ill., 315 I.C.C. 184 (185).

Cost computations based on short-line mileages are understated when there is no indication that the operations would be conducted over the short-line route; to extent that respondent's operation would not be over the most direct route, allowance should be made for circuity. Also, even though shipper does the loading, other costs such as running costs are associated with pickup and delivery service, and should be included in cost thereof. In addition, respondent's cost estimates are deficient when the movement involved is joint-line and the connecting carrier's costs are not taken into consideration.—Candy and Related Articles, New York to Detroit, Mich., 314 I.C.C. 759 (761).

Although complainant rate bureau's evidence of cost of transporting considered traffic is based on regional averages, defendants are same type of carrier as complainant's members and operate in same general area, transporting involved commodities between same points, and their operations appear to be in all material respects comparable to those of complainant's members. Overstatements and understatements in complainant's study largely cancel out, and in the circumstances, especially as defendants presented no cost evidence of their own in refutation, complainant's cost showing, as set out in appendix D, may be considered reasonably accurate and representative of defendants' costs.—New England Motor Rate Bureau, Inc. v. Stone's Exp., 321 I.C.C. 767 (772).

Because of the brief period of its actual experience as a common carrier of cement, and as a more representative showing of revenue and expense, one respondent submitted a pro forma cost study for a 4-week period, increasing actual revenues and appropriate costs by 50 percent. As the period selected covers one of the more lucrative and busier periods of the year, volume of traffic reflected in the pro forma study is possibly somewhat speculative; however, effect of the seasonal nature of the cement business on a new operation makes difficult the refinement of cost data to a greater degree.—Cement and Mortar—Ill. & Mo. to Ill., Ind., Iowa, & Ky., 321 I.C.C. 166 (177, 178).

Since seasonal fluctuation in volume of cement traffic is among the most extreme of all commodities, cost study reflecting operations during 1 of every 6 weeks would have been more representative than respondent's data for a 4-week period in August when cement traffic normally is at its peak; further, respondent's costs were based on movement other than that involved adjusted to reflect the subject movement at 70-percent utilization of capacity of dedicated equipment; while these costs give some indication of the general level, the many adjustments made indicate that they do not represent costs of involved traffic.—Cement—Memphis and Fredonia, Kans., to Ark., Mo. & Okla., 318 I.C.C. 273 (276).

While respondent's cost evidence does not take into account any operations during winter months when cement traffic is lighter, 5-month period used is the latest and only available period reflecting present plant loading conditions.—Cement from Dewey, Okla., to Points in Kansas, 318 I.C.C. 281 (283).

Respondents' cost data, constituting an updating of 1955 costs developed in commission's cost statement No. 7-56, may be considered fair approximations of 1960 costs for motor common carriers operating in and between involved territories. Insofar as per-

formance factors relate to current traffic distribution or method of operation, the partial effect of the load factor based on change in system average load for the various periods studied is considered in application of formulas for adjustment of the costs to a current level; for such adjustment traffic studies are not conducted to obtain all new performance factors, as past studies have shown that factor changes did not change costs in any degree. Exception thereto would be radical changes in carriers' operations or excessive lapse of time; however, record does not indicate any revolutionary changes in carrier operations, and the matter of time is not unreasonable.—General Increase—Middle Atlantic & New England Ter., 319 I.C.C. 168 (174)*.

Although respondent assigned office, administration, and supervision expenses to terminal cost, on theory that they are not related to distance, they are not direct terminal allocations, being generally considered departmental or general overhead expenses assignable to terminal or line-haul cost on basis of those expenses which are capable of assignment.—Cement from Hudson, N.Y., to New England and Pa., 319 I.C.C. 235 (243).

Respondent's system average cost data have little probative value when they include items not properly includible in computing cost of his carrier operations: in his figures for gross income from exempt transportation he included his profit from buying and selling grain, a nontransportation operation, and number of those transactions suggests that such profit may have been substantial, so that the revenue from exempt transportation cannot be found to have been stated with reasonable accuracy; also, in gross revenue earned in his carrier operations he included revenue from leasing equipment for operations conducted under authority of other carriers.—Animal Feed, Miss. and Tenn. to Midwest and Southwest, 319 I.C.C. 257 (260)*.

It would be virtually impossible to collect reliable cost data for purchased transportation when hundreds of owner-operators or contractors are involved, some of whom drive their own tractors while others supply drivers for leased equipment. Owner-operators do not keep accounts on any uniform basis, and the commission cannot require them to do so; nor, under existing law and regulations, may it audit the books of those whose costs might be cited as representative. Moreover, since many of these small business men appear to make a profit while others do not, any costs shown could not be considered representative. In disregarding the "true economic cost" of the movements involved, in 318 ICC 567, and considering actual costs borne by the authorized carrier rather than fictitious costs not reflected in its expense accounts, the commission acted wisely; that line-haul carriers employing local carriers for pickup and delivery under §202(c) do not base their costs for that service on the local carrier's cost of performance shows illusory nature of "true economic costs" in carrier accounting.—Meats and PHP, Central & Western to Far Western States, 319 I.C.C. 667 (677-8).

Protestants' allocation of all respondent's management expenses to company-owned equipment by dividing total out-of-pocket cost (less payments to owner-operators) solely by the company-operated miles was improper when mileage of company-owned equipment was only about one-fourth of respondent's total mileage.—Sugar from Ovid, Colo., to Iowa Points, 318 I.C.C. 636 (640).

Since respondent provides its line-haul service through owner-operators and states that 80 percent of its total expense is for vehicle rents, including services of drivers, protestants' assignment of total expense for owner-operator service directly to line-haul service, with no adjustment for pickup and delivery service included in total expense, results in overstatement of the line-haul costs. In addition, such expense items as insurance for cargo loss and damage, public liability and property damage, and for fire, theft, and collision should be assigned to general overhead, not to line-haul expense; but the profit to owner-operators should be included as an expense item, since it is a real expense to respondent. Morever, as respondent is an irregular-route carrier which can, and presumably would, operate over the shortest available routes, there is no justification for adding a factor of 6 percent for circuity.—Clay from Greybull, Wyo., to Points in the Middle West, 314 I.C.C. 705 (708).

Use of proposed minimum weights in com-

puting a round-trip load factor ignores the jointness inherent in line-haul movements. While respondent's actual average return load in connection with considered traffic would be the best evidence, since it is not shown respondent's system average load normally would be more appropriate for that purpose than regional average loads. However, since respondent's operations have been previously part common and part contract carriage but are now entirely common carriage, and it must serve the public indiscriminately, there is no assurance that its average return load will remain the same. As it also failed to allow for circuity in computing its costs, its data do not establish compensativeness of proposed rates.—Paint & Paint Materials, Chicago to Kansas City, Kans., 318 I.C.C. 331 (333-4).

Round-trip load factor obtained from actual studies of carriers moving the traffic and arrived at by combining the minimum proposed for rate from Oklahoma points to Chicago with average loads from Chicago to Oklahoma is more accurate than load factor based on system average loads.—Petroleum and Products from Oklahoma to Illinois, 318 I.C.C. 425 (426).

Respondent's cost study based on company records and short highway distances is defective in that it reflects one-way movement and fails to account for nonproductive costs. Use of minimum weight which respondent is obliged to accept if offered affords a better comparison between revenues and costs than average weight used. And though respondent is an irregular-route carrier, there is no evidence that it uses the shortest routes; rather, the record indicates that it uses toll roads instead of short highway routes for some of the heavier loads, which requires additional travel before getting on the toll ways and after leaving them.—Sugar, New York and Philadelphia to Bellefontaine, Ohio, 316 I.C.C. 27 (29).

Joint costs for the round trip should be distributed over total units hauled on the round trip; all of respondents' mileage in traveling to origin of considered film traffic cannot be assumed to consist of loaded miles; but any understatement of costs resulting from omission of terminal platform expense would appear nominal.—Cellulose Film, Not Printed, Marcus Hook, Pa., to Chicago, 316 I.C.C. 322 (323).

By its very nature cost of round-trip operation of a vehicle in motor carrier service is a joint cost; the round-trip movement constitutes an indivisible unit of production, and cost thereof must be distributed over total revenue units of traffic hauled in both directions. Where line-haul costs are determined in the going direction only, resulting cost computations are unacceptable for ratemaking purposes.—Candy and Confectionery, Hoboken & New York to Chicago, 316 I.C.C. 671 (674); costs submitted on the basis of a one-way movement are therefore not considered.—Sodium Silicate from N.J. & Pa. to Ill., Mich., Mo., & Ohio, 316 I.C.C. 699 (702); similarly, since respondent's cost statement reflects costs for one-way movement only, it may not be accepted as indicative of probable costs of considered movement of canned goods.—Foodstuffs from Hudson, N.Y., to Chicago, Ill., 315 I.C.C. 184 (185).

Protestants' restatement of respondent's costs has little probative value; as respondent had already distributed 100 percent of operating expenses, computing general-overhead expense as 11.26 percent of total expenses excluding overhead, protestants' use of a 13.73 percent overhead ratio would overstate the operating expense; also, instead of dividing only line-haul costs by the average round-trip load factor, they erroneously divided the total costs of the trip, including overhead, by that factor.—Wrapping Paper from Rhinelander, Wis., to Toledo, Ohio, 316 I.C.C. 455 (457-8).

Cost study based on all l.t.l. shipments billed by 27 respondents in a single day, and on all t.l. shipments in a given 5-day workweek, may be accepted as representative of the consist of respondents' total traffic. It is clear that respondents did not choose a particular day or period with a view to obtaining the result most favorable to their contentions; the sample embraced almost 80 percent of those carriers in considered territory; and checks against their actual experience show substantial reconciliation of the study with their reported data for same year.—General Increases—Eastern Central Territory, 316 I.C.C. 467 (471).

In adjusting out-of-pocket costs to total expense level, protestant assigned constant expenses to various service elements on same proportional basis as each bore to sum of out-of-pocket costs. Assignment of constant costs on any basis is arbitrary, but for shipments under 10,000 pounds resulting costs are greater when constant expenses are distributed on out-of-pocket basis than on alternative basis.—American Envelope Co. v. A. & H. Truck Line, Inc., 316 I.C.C. 563 (567)*.

Complainant's cost study is inconsistent with proper cost-finding procedures in treating every expense item (including terminal) as related to distance, thus increasing cost for long hauls and decreasing it for short hauls; cost should have been calculated on round-trip rather than one-way basis, with appropriate allowance for empty return mileage; each expense item is treated as either directly or not directly related to the traffic, though over a long period such items become only partially variable or partially constant; this long-period concept of variable and constant costs is appropriate for computing costs for rate-making purposes. Defendant's cost study embodies a number of same defects; neither study affords a reliable indication of expense of transporting a tank truckload of considered commodities between points involved; assailed rates are thus not shown to be unlawful.—Ryder Tank Line, Inc. v. Mason & Dixon Tank Lines, 315 I.C.C. 7 (8).

Respondent's cost computation is deficient in being based on aggregated loads rather than on 2,000-pound minimum governing considered l.t.l. rate; details from which to determine validity of amounts stated are not shown; nor is any mention made of cost of the several deliveries per movement or for unloading, or whether management expenses and other overhead costs are adequately covered. While respondent submits, as supporting the low cost shown, that it has a 20-year lease with a shipper under which latter stores carrier's 25 trailers for a nominal fee of $1 a year, that amount is not shown to be a reasonable charge for such storage; considered rate is not shown to be just and reasonable.—Paperboard between New Jersey and New York, N.Y., 315 I.C.C. 187 (189).

Protestants' cost study, based on public statement No. 1-59 of commission's cost-finding section, reflecting operating expenses of 54 class I and II oilfield carriers including respondent, is defective in using the outbound load of 32,000 pounds assumed therein instead of proposed minimum of 30,000 pounds, and in increasing short highway distances by 6 percent to allow for circuity, although that statement indicates that those carriers' circuity of operation does not exceed 2 percent.—Drilling Mud or Clay—Greybull and Gascoyne to Texas, 315 I.C.C. 191 (192-3).

Protestants' use of the first quarter of 1961 over data in respondent's 1960 annual report, to reflect a current cost period, does not recognize tonnage, load, or haul changes which may have occurred between those periods; nor is comparison of expense per vehicle-mile for the year with the first quarter of 1961 an acceptable method of adjusting costs to current levels; moreover, in stating costs on a total expense basis, protestants failed to recognize that not all expenses are variable with traffic volume; thus, rates are not shown to be noncompensatory merely because they fail to cover fully distributed expenses.—Salt and Related Articles, Kansas to Southern States, 315 I.C.C. 637 (638).

105. Expedited service.—[Vols. 14, 15].—See Freight, All Kinds—Expedited Service, §216(g), n. 66.

111. Wages; prices; taxes.—[Vols. 10-12, 14-19].—Federal income taxes are not ordinarily considered an item of expense in determining motor carriers' costs.—Freight, All Kinds, & Empty Trailers bet. N.J. & N.Y., 322 I.C.C. 429 (433).

Wage expense should include allowance for nonproductive time, social security taxes, workmen's compensation, welfare expense, and other costs related to a driver's wages.—Sugar, Beet or Cane, New Orleans, La., to Columbus, Ga., 316 I.C.C. 230 (232).

112. Out-of-pocket costs, with margin over, as basis.—[Vols. 10-12, 16, 18, 19].—The commission may in some circumstances permit a carrier to establish a rate not proved to cover out-of-pocket costs, but it is not required to do so.—Davis & Randall, Inc. v. United States, 219 F. Supp. 673 (677)*.

To be compensatory, a rate must equal out-of-pocket costs, which have been defined as

the added costs necessary to carry a particular class of traffic over a particular route; and though the commission under some circumstances may permit a carrier to establish a rate not proved to cover out-of-pocket costs, it is not required to do so.—Middlewest Motor Freight Bureau v. United States, 234 F. Supp. 151 (153-4, 155)*.

Even with adjustments to reflect backhaul weight and terminal-to-terminal distance claimed by respondents, also adjustment of pickup and delivery costs to reflect instances where full services are not performed, cost evidence shows that total out-of-pocket costs would exceed proposed reduced rate on meats from Denver and other Colorado points to Chicago by 2.37 cents; the reduced rate is therefore noncompensatory and not shown to be just and reasonable.—Fresh or Fresh Salted Meats from Colorado to Chicago, 322 I.C.C. 174 (177).

And respondent whose transportation of the traffic would be almost exclusively with owner-operated equipment has not met the first criterion announced in 318 ICC 567, that its retained portion of the gross revenue from the reduced rate covers all its costs. Total operating expenses shown in its study do not embrace all those shown in its annual report, and basis of the total out-of-pocket level is not explained in detail; also, its separation of expenses between fixed and variable is valueless when each was related to the same total overall intercity mileage. Out-of-pocket costs for that respondent, computed on data from cost statement No. 2-60 adjusted to reflect actual mileage, would exceed the reduced rate.—Id., p. 181.

Though in almost all instances assailed rates on cleaning and washing compounds, drugs and drugstore supplies, and foodstuffs between points in Massachusetts, Rhode Island, New York, and New Jersey are shown to be less than fully distributed costs, complainant's cost evidence, while a reasonably accurate estimate of defendants' costs, contains certain defects and thus is not so precise as to warrant condemning rates that equal or slightly exceed out-of-pocket costs, and such rates are therefore reasonably compensatory. In view of imperfections in the cost evidence, and in light of decision in 315 ICC 327, doubts should be resolved in favor of defendants; revenue from assailed rates generally exceeds cost of performing the service, and those that at least equal out-of-pocket costs are not shown to be unjust or unreasonable. But numerous rates in issue which are below out-of-pocket costs are clearly noncompensatory, and as no justification is shown for so severe a rate depression those rates are found unjust and unreasonable and ordered canceled.—New England Motor Rate Bureau, Inc. v. Stone's Exp., 321 I.C.C. 767 (773-4).

Though a rate should produce sufficient revenue to cover combined costs of carriers and owner-operators irrespective of how the revenue is divided, and data respecting actual costs of owner-operators would be helpful in obtaining an adequate cost picture, it is virtually impossible for carriers to collect and submit reliable cost data for representative owner-operator movements. While detailed information as to all operating expenses of authorized carriers is available from their annual reports, so that Highway Form B can be applied to develop cost of a particular movement, owner-operators are not subject to direct regulation by the commission and are not required to keep accounts and records in any particular form or to file annual reports; even if they were willing to supply cost data to carriers they serve, the commission would be unable to verify such information.—Iron or Steel Scrap from Conn., Mass., and R.I. to Pa., 318 I.C.C. 567 (574).

But though, under the present state of the law and the commission's regulations, it cannot be determined whether an owner-operator's division of revenue covers his costs, it is possible, under accepted cost finding principles, to determine whether the division retained by the carrier covers all its costs; and when such division fully compensates the carrier for providing the service in question, the rate producing that revenue must be considered reasonably compensatory. This does not mean that any particular revenue split calls for automatic approval of the challenged rate: the commission must be satisfied that the rate and the division thereof are sufficient to purchase the transportation service, i.e., to acquire and retain services of owner-operators in movement of the traffic to which the rate

applies.—Id., pp. 574-5.

Respondent has overcome the prima facie showing of unreasonableness of its rates on iron and steel scrap made by Bureau of Inquiry and Compliance's cost study. Although it submitted no traffic study data, it submitted detailed costs; its comparison of the rates with its out-of-pocket costs appears substantially correct and shows that the 30 percent of revenue retained by it is ample to cover all overhead expenses. Though it introduced no evidence of actual operating costs of owner-operators who perform all the transportation service, it has been able to attract and retain them for over 7 years by compensating them on basis of 70 percent of revenue from the assailed rates, and there is no reason to believe that it will be unable to purchase transportation on that basis in future. Thus, assailed rates appear to be compensatory to respondent and are not shown to be unlawful. —Id., pp. 570-2, 575, 576. [But see dissent.]

Out-of-pocket costs are the normal minimum level below which rates should not be permitted to fall. Although rates under agreed compromise scale on envelopes slightly exceed out-of-pocket costs on average weighted shipment of 590 pounds for shorter distances, on shipments of 2,000 pounds or more they exceed full costs, and proposed rates in general meet the minimum requirements of compensativeness; approved.—American Envelope Co. v. A. & H. Truck Line, Inc., 316 I.C.C. 563 (565, 568)*.

Proposed reduced rate will more than cover out-of-pocket cost of performing service; rates yielding more than out-of-pocket costs have been consistently approved as compensatory although below fully distributed cost where rates at that level are required by special circumstances. Respondent is in jeopardy of losing substantial traffic unless it meets competitive TOFC rate at level proposed; approved.—Chemicals and Related Articles from St. Louis to Chicago, 318 I.C.C. 369 (370).

Though respondents submitted no cost data in support of reduced minimum charges applicable when five or more minimum-charge shipments are picked up at one time, and protestant's cost data indicate that out-of-pocket costs exceed both considered charges and those for single shipments, protestant's costs gave no consideration to the lower cost per shipment when multiple pickups are made at one time, and did not separate costs for single-line and two-line traffic; as restated in acceptable manner, protestant's cost data show that for local hauls the reduced charges exceed out-of-pocket costs and are therefore compensatory.—Reduced Minimum Charges —West Roxbury to Mid. Atl. Terr., 315 I.C.C. 675 (678, 679).

A rate which fails to return something above out-of-pocket costs of transporting the traffic may not be approved even though it is proposed to meet rail competition.—Sugar, Beet or Cane, New Orleans, La., to Columbus, Ga., 316 I.C.C. 230 (232); even in competitive situations, a proposed rate must return something above out-of-pocket costs in order to be approved.—Brick and Related Articles, St. Louis, Mo., to Chicago, 316 I.C.C. 227 (229); and, in computing out-of-pocket costs, portions of such expenses as employee welfare expenses, office and related expenses, traffic expenses, fire, theft and collision expenses, and administrative and general expenses are properly includible.—Petroleum Products, Friendship to Bland and Rocky Gap, Va., 316 I.C.C. 114 (114-6).

For specialized carriers, 95 percent of total line-haul and terminal costs is deemed to be in the out-of-pocket category; operations of such carriers are less diversified than those of general-commodity carriers and plant capacity may be trimmed more nearly to the requirement actually experienced, with a tendency to a higher out-of-pocket percentage than the 90 percent generally applied.—Clay from Greybull, Wyo., to Points in the Middle West, 314 I.C.C. 705 (707, 708).

Rates by Commodities

125. Commodities; rates prescribed or approved.—[Vols. 10-19].—Part I, §1(5), n. 350; Part III §305(a), n. 125; Part IV, §404(a), n. 125.

Alcoholic beverages: [Vols. 10-13, 16-18].—New rates per truckload on wine, in bulk in tank vehicles, maximum 3,500 gallons, from Canandaigua, N.Y., respectively $560.50, $550.50, $726.50, and $641.50 to Montgom-

ery, Ala., and Jacksonville, Miami, and Tampa, Fla., found not shown to be unjust or unreasonable.—Wine from Canandaigua, N.Y., to Florida and Alabama, 316 I.C.C. 246.

Reduced rate of $2.26, minimum 30,000 pounds, on wines from Hammondsport, N.Y., to Aberdeen, S. Dak., approved as reasonable and necessary for respondent to attract the traffic.—Alcoholic Liquors from Eastern Points to South Dakota, 318 I.C.C. 195.

Reduced rate 92 cents, minimum 96,000 pounds when loaded and transported in not more than two trailers, on alcoholic liquors, n.o.i., in glass in cases, Detroit, Mich., to Long Island City, N.Y., found just and reasonable.—Alcoholic Liquors, Detroit, Mich., to Long Island City, 319 I.C.C. 404.

Reduced rates on alcoholic liquors, n.o.i., from Peoria, Ill., and points grouped therewith, 145 cents, minimum 70,000 pounds, to New York City and 162 cents, minimum 35,000 pounds, to Pittsfield, Mass., approved as just and reasonable.—Alcoholic Liquors from Peoria, Ill., to Eastern Points 321 I.C.C. 142*.

Aluminum; articles, scrap: [Vols. 10, 11, 14, 16-19].—Reduced rate 61.5 cents, minimum 34,000 pounds, on unfinished aluminum materials from Kansas City, Mo., to Chicago, Ill., approved as reasonably compensatory and no lower than necessary to meet rail competition.—Aluminum from Kansas City to Illinois and Wisconsin, 321 I.C.C. 432*.

Bakery goods, bakers' supplies: [Vols. 10, 11, 13, 14, 17-19].—Reduced l.t.l. commodity rates on marshmallow sandwiches ("moon pies"), Chattanooga, Tenn., to points in the Carolinas, effect of which is to apply class 65F rating and rates and eliminate small-shipments charge under present rates based on higher class 65C rating, found just and reasonable and necessary to prevent diversion to private carraige.—Bakery Goods, Chattanooga, Tenn., to Southern Points, 316 I.C.C. 573.

Bananas: [Vol. 16].—Rates from Charleston, S.C., to Chicago, Ill., Atlanta, Ga., Indianapolis Ind., Richmond, Roanoke, Norfolk, and Newport News, Va., and Greenville, Raleigh, and Elizabeth City, N.C., ranging from 75 to 170 cents on 20,000-pound minimum and 75 to 140 cents on 24,000-pound minimum, reflecting both increases and reductions, are compensatory and necessary to meet competition of other motor carriers.—Bananas, Charleston, S.C., to Ga., Ill., Ind., N.C., & Va., 315 I.C.C. 213.

Specific commodity rates on bananas, minimum 30,000 pounds, Tampa, Fla., to 76 destinations in 8 midwestern or southwestern States, and distance scale of commodity rates to unnamed destinations therein, ranging from 148 to 227 cents including 8-cent refrigeration charge, found just and reasonable, without prejudice to any different conclusion in pending general investigation of motor rates on formerly exempt commodities.—Bananas, South to the Midwest and Southwest, 319 I.C.C. 51.

Increased or reduced rates 125 to 200 cents on minimum 28,000 pounds and 200 to 315 cents on minimum 31,000 pounds, from Gulfport, Miss., to destinations in northern and northwestern States, except Washington, found just and reasonable; and initial mileage scale 149 to 204 cents, minimum 30,000 pounds, for distances 900 to 1,500 miles, found not shown to be unlawful.—Bananas from Gulfport to the East, South, and West, 321 I.C.C. 274.

Boots, shoes: [Vols. 10-13, 15, 17].—Commodity l.t.l. rate of 277 cents on boots or shoes, n.o.i., also boots or shoes, plastic or rubber and canvas, felt or wool combined, Columbus, Ohio, to Chicago and grouped points, approved as just and reasonable.—Boots or Shoes from Columbus, Ohio, to Chicago, 319 I.C.C. 92.

Reduced l.t.l. commodity rates, 286 to 333 cents, on boots and shoes, n.o.i., and on plastic or rubber, plastic or rubber and canvas, and felt or wool boots and shoes, Columbus, Ohio, to St. Louis, Mo., and seven Illinois points, approved as just, reasonable, and otherwise lawful.—Boots or Shoes, Columbus, Ohio, to Illinois and Missouri, 322 I.C.C. 687.

Brushware, cleaning articles: Reduced rate 120 cents, minimum 35,000 pounds, to alternate with present rate 127 cents, minimum 30,000 pounds, from Easthampton, Mass., to Atlanta, Ga., approved as just, reasonable, and otherwise lawful.—Brushware & Clean-

ing Articles, Easthampton to Atlanta, 319 I.C.C. 164*.

Canned goods: [Vols. 10-12, 14, 16, 19].—Rate of 53 cents, minimum 30,000 pounds, on canned goods and canning factory supplies, Chicago to Minneapolis and St. Paul, not shown to be unlawful.—Canned Goods from Chicago, Ill. to Twin Cities, 316 I.C.C. 221.

Commodity rates on canned goods and related articles, minimum 30,000 pounds, from origins in Pennsylvania, Maryland, Virginia, and West Virginia, to points in upper peninsula and other named Michigan points, and increased or unchanged rates from same origins to Clinton, Dubuque, Keokuk, and Laurens, Iowa, approved as compensatory.—Canned Goods—Md., Pa., & W. Va. to Iowa, Mich. & Mo., 318 I.C.C. 171.

Cement: [Vols. 10, 17-19].—Reduced rates on cement from Dewey, Okla., to points in Kansas, 32 to 138 cents on portland cement, minima 46,000 pounds in bulk and 47,000 pounds in bags, and 24 to 105 cents on masonry cement in bags, minimum 47,000 pounds, (as shown in appendix), found lawful.—Cement from Dewey, Okla., to Points in Kansas, 318 I.C.C. 281.

Point-to-point rates ranging from 156 to 306 cents per barrel, and mileage rates 34 to 537 cents, on portland cement in bulk and in bags minimum 100 barrels, from New York and Pennsylvania origins to destinations in New England and middle Atlantic States, also corresponding rates on mortar cement generally one-third lower and generally on 133-barrel minimum, found just and reasonable, or, where they are initial common-carrier rates of former contract carriers, not shown to be unlawful. Rates 54 and 57 cents per barrel of one respondent on natural cement from Rosendale, N.Y., to Danbury and Brookfield, Conn., found just and reasonable.—Cement from Hudson, N.Y., to New England and Pennsylvania, 319 I.C.C. 235.

Cloth, dry goods, fabrics: [Vols. 17-19, vol. 10 fabrics].—Reduced rate of 311 cents on ribbon bows or rosettes, minimum 6,000 pounds, from Louisville, Ky., to Chicago, approved as compensatory.—Dry Goods and Telephone Housings within Central Ter., 318 I.C.C. 175.

Commodity l.t.l. rates on rubber-coated cotton cloth, n.o.i.b.n., Canton and Rockland, Mass., to points in New York metropolitan area, $1.12 for less than 1,000 pounds, 97 cents for 1,000 to 5,999 pounds, 85 cents for 6,000 to 11,999 pounds, and 70 cents for 12,000 to 19,999 pounds, prescribed as minimum reasonable rates.—Miscellaneous Commodities from Mass. to N.J. and N.Y., 318 I.C.C. 226.

Reduced l.t.l. assembling rates on dry goods, flat goods, and finished and unfinished piece goods, ranging from 54 cents to $1.14, and reduced minimum charge of $2.50, from mills throughout the Carolinas to Charlotte and Greensboro, N.C., found just and reasonable.—Assembling Rates at Charlotte and Greensboro, N.C., 318 I.C.C. 429.

Containers, cores, etc.: [Vols. 10, 11, 13-15, 17].—Commodity l.t.l. rates on empty returned aluminum tote tanks of not over 400 gallons capacity, from Springfield, Ill., to Fort Madison, Iowa, 173 cents on shipments weighing less than 2,000 pounds, 152 cents on 2,000 to 4,999 pounds, and 118 cents on 5,000 pounds or more, found just and reasonable.—Aluminum Tote Tanks, Springfield, Ill., to Fort Madison, 315 I.C.C. 567.

Coffee: [Vols. 10-12, 17-19].—Reduced t.l. commodity rate of 95 cents, minimum 41,000 pounds, on tea extract from New Orleans to Chicago is necessary to meet rail competition and would be compensatory on straight shipments thereof, or on mixed shipments of tea and coffee extract if subject to a revised mixing rule which would not render the proposal noncompensatory.—Tea Extract, New Orleans to Chicago, 325 I.C.C. 103 (104-5)*.

Dairy products; dressed poultry: [Vols. 10, 11, 13-15, 18, 19].—Reduced rate of 190 cents, minimum 22,000 pounds, on dairy products from Chicago to Miami would be on a level with existing competitive rates, would be compensatory, and is not opposed; approved.—Dairy Products, Chicago, Ill., to Miami, Fla., 315 I.C.C. 441.

Drugs, medicines, toilet preparations: [Vols. 10-12, 15-19].—Reduced rate of 53 cents, minimum 25,000 pounds, on chemicals, acids, drugs and deodorants from St. Louis, Mo., to Chicago, Ill., approved as compensatory and necessary to meet competitive TOFC rate.—Chemicals and Related Articles from

St. Louis to Chicago, 318 I.C.C. 369.

Electrical equipment, appliances: [Vols. 11, 14, 16-18].—Initial rate of 6 cents per ton-mile on electrical cable, minimum 40,000 pounds, subject to minimum charge of $40, between North and South Dakota railheads and missile bases in South Dakota approved.—Cable, Iron & Steel, Lumber between S. Dak. and Missile Sites, 316 I.C.C. 427 (430).

Feeds, animal, poultry: [Vols. 10, 11, 13, 14, 18, 19].—Mileage rates of one respondent on dog or cat food from New York, N.Y., Long Branch, N.J., and New England points to points in 9 eastern or southern States, from 47 cents for distances up to 60 miles to 115 cents for 420-460 miles on shipments not over 5,000 pounds, from 40 cents to 236 cents for 1400-1500 miles on 5,001 to 14,000 pounds, from 32 to 209 cents on 14,001 to 20,000 pounds, and 23 to 181 cents on heavier shipments; also specific rates, minimum 36,000 pounds, 49.5 and 79 cents from Boston to Wilkes-Barre, Pa., and Pittsburgh, restricted to shipper loading and unloading, are not shown to be unlawful. Rates of a second respondent on same commodity from Boston to Baltimore and Washington, D.C., respectively 62 and 70 cents, would be lawful if made subject to a minimum of 36,000 pounds.—Dog or Cat Food from Boston to Middle Atlantic Points, 318 I.C.C. 59.

Distance commodity rates on animal or poultry feed, minima 20,000 and 30,000 pounds, the same as class rates on feed for comparable distances, are not shown to be unlawful.—Fertilizers and Feed, Central & Middlewest Territories, 318 I.C.C. 298.

Initial commodity rates $10.57 to $18.25 per net ton, minimum 40,000 pounds, on animal feed ingredients (except salt) in bulk or bags, other than in tank vehicles, from Tupelo, Miss., and Wales, Tenn., to destinations in 9 midwestern or southwestern States, found not shown to be unlawful.—Animal Feed, Miss. and Tenn. to Midwest and Southwest, 319 I.C.C. 257*.

Foodstuffs: [Vols. 17-19].—Reduced rates 41 and 35 cents, minima 20,000 and 30,000 pounds, on foodstuffs (not including nuts, tea, and yeast) in mixed truckloads, Chicago to Cincinnati, Indianapolis, and Louisville, found lawful.—Various Commodities, Chicago to Cincinnati, Ind., Louisv., 314 I.C.C. 749.

Commodity rates ranging from 93 to 156 cents, minimum 30,000 pounds, on extensive list of canned or preserved foodstuffs and on cocoa powder, specified New York origins to Milwaukee, Wis., and Minneapolis and St. Paul, Minn., approved, without prejudice to determination with respect thereto in pending investigation into respondent's rates. Proposed rates either reflect existing combination rates, are related thereto, or are no lower than competitive rates on which the traffic is moving; moreover, they are higher than minimum rates prescribed in 294 ICC 371.—Foodstuffs, New York Points to Milwaukee & Twin Cities, 315 I.C.C. 725 (726, 728).

Reduced t.l. commodity of 71 cents, minimum 45,000 pounds, on edible jam, jellies, or preserves, n.o.i., from Oklahoma City, Okla., to Chicago, Ill., subject to shipper loading and consignee unloading, found to be just and reasonable; approved.—Jams, Jellies, or Preserves, Oklahoma City to Chicago, 325 I.C.C. 95 (102)*.

Gasoline: [Vols. 10, 12].—Reduced rates ranging from 0.293 to 2.276 cents per gallon, minimum 8,100 gallons, from Clear Lake, Iowa, to Minn. and Wis. points and from Spring Valley, Minn. to Iowa and Wis. points, approved as just and reasonable.—Gasoline and Fuel Oil within Middlewest Territory, 316 I.C.C. 435.

Grain products: [Vols. 10, 11, 14].—Reduced rates on starch, 104 cents, minimum 10,000 pounds, from Chicago, Ill., to Kansas City and St. Joseph, Mo., and 66 cents, minimum 30,000 pounds, from Chicago to Kansas City; and reduced rates on corn oil, 104 cents, minimum 10,000 pounds, and 66 cents, minimum 30,000 pounds, from Chicago to Kansas City, and 64 cents, minimum 30,000 pounds, from Kansas City to Chicago, approved as just and reasonable.—Syrup between Kansas City, Mo., and Chicago, Ill., 321 I.C.C. 214.

Groceries: [Vols. 10-14, 17, 18].—Initial commodity rates on additional articles proposed to be added to grocery list in respondent's tariff, the same as present rates on other articles in that list, appear compensatory except on popped corn, potato chips, and pretzels, and with those exceptions may be

approved subject to publication of more specific commodity descriptions.—Bakery Goods, Foodstuffs & Groceries from N.J. & N.Y., 316 I.C.C. 639.

Iron and steel; articles: [Vols. 10-12, 14, 16-19].—Commodity l.t.l. rate 124 cents on iron and steel fasteners (bolts, nuts, rivets, screws, clips, washers, etc.), Rockford, Ill., to Anderson, Ind., found compensatory and otherwise just and reasonable.—Iron or Steel, LTL, Rockford, Ill., to Anderson, Ind., 315 I.C.C. 683 (687, 688).

15 cents, minimum 40,000 pounds, on certain iron or steel articles in straight or mixed shipments, Portage, Ind., to Chicago, Ill., approved as just and reasonable.—Iron or Steel Articles from Portage, Ind., to Chicago, 316 I.C.C. 255 (258).

Reduced rate of 45 cents, minimum 32,000 pounds, Bethlehem and Fairless, Pa., to Richmond, Va., approved on iron and steel articles, except angles, beams, and channels.—Iron or Steel from Pennsylvania to Richmond, Va., 316 I.C.C. 402 (404).

Initial rate of 6 cents per ton-mile on iron and steel articles, minimum 40,000 pounds, subject to minimum charge of $40, between North Dakota and South Dakota railheads and missile bases in South Dakota approved. —Cable, Iron & Steel, Lumber between S. Dak. and Missile Sites, 316 I.C.C. 427 (430).

Rates shown in appendix A on iron or steel scrap, having value for remelting only, minima 20,000 and 32,000 pounds, from origins in Connecticut, Massachusetts, and Rhode Island to western Pennsylvania destinations, found not shown to be unlawful.—Iron or Steel Scrap from Conn., Mass., and R.I. to Pa., 318 I.C.C. 567.

Lead: [Vols. 10, 17-19].—Reduced rates $7.61 and $6.93 per ton on lead and zinc concentrates, respectively, minimum 22 tons, from Salmo and Nelway, B.C., Canada, to Kellogg, Idaho, approved as compensatory. —Lead or Zinc Concentrates—British Columbia to Idaho, 318 I.C.C. 85.

Lumber, timber, logs; products: [Vols. 10-12, 17-19].—Initial rate of 6 cents per ton-mile on lumber, minimum 40,000 pounds, subject to minimum charge of $40, between North Dakota and South Dakota railheads and missile bases in South Dakota approved. —Cable, Iron & Steel, Lumber between S. Dak. and Missile Sites, 316 I.C.C. 427 (430).

Reduced rate 70 cents, minimum 36,000 pounds, on boards or sheets (not wallboard or insulating board), Hope, Ark., to Chicago, found just and reasonable.—Boards or Sheets from Hope, Ark., to Chicago, 319 I.C.C. 399.

Meats, packinghouse products: [Vols. 11, 13, 14, 17-19].—Commodity point-to-point and distance rates on fresh or frozen meats and packinghouse products, minima 21,000, 25,000, or 30,000 pounds, from Muncie, Ind., to points in middle Atlantic, New England, southeastern, and southwestern territories are just and reasonable when they are generally as high or higher than present rates maintained by respondent under intermediate rule and compare favorably with numerous rates maintained by other motor carriers on same commodities for comparable hauls.—Meats, Muncie, Ind., to New England, Middle Atlantic, South, & Southwest, 314 I.C.C. 799.

Initial rates 56 and 51 cents, minima 25,000 and 30,000 pounds, on meat products and byproducts and fresh meats (not suspended in vehicle), and 61, 56, and 52 cents, minima 25,000, 29,000, and 33,000 pounds, on fresh carcass meat (suspended in vehicle), from La Crosse and Whitehall, Wis., to Chicago; and 50 and 32 cents, minimum 32,000 pounds, on inedible packinghouse products from same origins to Chicago and Twin Cities, respectively, are not shown to be unlawful.—Meats & Related Articles, Wis. to Chicago & Twin Cities, 315 I.C.C. 588.

Reduced rates, 38,000 pounds, on meats and packinghouse products from origins in 10 midwestern States and Louisville, Ky., to destinations in mountain-Pacific territory, 30 cents under Cudahy scale approved in 309 ICC 551 on boxed or loose meats, minimum 33,000 pounds, and 20 cents under approved 11-percent-higher scale on hanging meats, minimum 30,000 pounds, to alternate with existing rates on the Cudahy scales, approved as just, reasonable, and otherwise lawful.—Meats and PHP, Central & Western to Far Western States, 319 I.C.C. 667.

Malt beverages: [Vol. 19].—Reduced rates on malt beverages, minimum 34,000 pounds, to Chattanooga, Tenn., 54 cents from Chicago, 35 cents from Cincinnati, and 33 cents

from Evansville, Ind., and Louisville, approved as compensatory and necessary to meet rail competition.—Malt Beverages—Ill., Ind., Ky., & Ohio to Chattanooga, 319 I.C.C. 787.

Miscellaneous: [Vols. 10, 11, 14, 15, 17-19].—Rate of 110 cents, minimum 36,000 pounds, on cellulose film, not printed, Marcus Hook, Pa., to Chicago, Ill., found compensatory and necessary to meet rail competition; approved.—Cellulose Film, Not Printed, Marcus Hook, Pa., to Chicago, 316 I.C.C. 322 (324).

Oleomargarine: [Vols. 12, 18, 19].—Joint through commodity rate 108 cents, minimum 32,000 pounds, Columbus, Ohio, to Twin Cities, approved as compensatory and not competitively destructive.—Oleomargarine from Columbus, Ohio, to Twin Cities, Minn., 315 I.C.C. 504.

Paint, varnish, etc.: [Vols. 10, 12-14, 16-19].—L.t.l. commodity rates ranging from $1.19 to $1.62 on paints, paint materials, and related articles between Chicago, on one hand, and Cincinnati, Ohio, and Louisville, Ky., on the other, found compensatory and justified.—Paints & Related Art. between Chicago & Cincinnati; Louisville, 315 I.C.C. 729 (732).

Initial rate of 78 cents on paint, paint materials, or putty from Chicago, to Kansas City, Kansas, would be reasonable if subject to a 32,000-pound minimum.—Paint & Paint Materials, Chicago to Kansas City, Kans., 318 I.C.C. 331.

Paper, paper products: [Vols. 10-14, 16-19].—Commodity rates on paper articles, Springfield, Mo., to 23 points in central territory, ranging from 167 to 236 cents on 7,000-pound minimum, 158 to 225 cents on 10,000 pounds, and 149 to 214 cents on 15,000 pounds, and generally reflecting approximately 52, 49, and 47 percent of first class, respectively, to alternate with lower existing rates on 18,000- and 24,000-pound minima, and with stoppage in transit for partial unloading and split deliveries at destination limited to rates on the 15,000-pound minimum, approved as compensatory and not competitively destructive.—Paper Articles, Springfield, Mo., to Ind., Ky., Mich., Ohio, 315 I.C.C. 579.

Initial rate 37.5 cents, minimum 40,000 pounds, on kraft paper, kraft paper bags and other paper articles between Chagrin Falls, Ohio, and Goshen, Ind., found compensatory and not shown to be otherwise unlawful.—Paper Articles between Chagrin Falls, Ohio & Goshen, Ind., 316 I.C.C. 393 (396).

Reduced rate 97 cents, minimum 25,000 pounds, on wrapping paper from Rhinelander, Wis. to Toledo, Ohio, approved as compensatory and necessary to enable respondent to share in the traffic.—Wrapping Paper from Rhinelander, Wis., to Toledo, Ohio, 316 I.C.C. 455 (459).

Initial t.l. rates 32 to 42 cents on wastepaper and other articles, minimum 20,000 pounds, from named Wisconsin points to Wabash, Ind., not shown to be unlawful.—Wastepaper and Other Articles, Wis. to Wabash, Ind., 316 I.C.C. 464 (466).

Agreed compromise scale of l.t.l. rates on envelopes, n.o.i.b.n., within central territory, based on class 55 for rate basis 1 through 200 and on class 70-A exceptions rates published pursuant to 68 MCC 429 and 301 ICC 156 for rate basis 401 through 500, is compensatory and otherwise lawful.—American Envelope Co. v. A. & H. Truck Line, Inc., 316 I.C.C. 563*.

Reduced rate, 104 cents, on printing and wrapping paper and pulpboard or fiberboard from Cincinnati and Hamilton, Ohio, to New York City, minimum 34,000 pounds, approved as compensatory and no lower than necessary to meet existing carrier competition.—Printing, Wrapping Paper, Pulpboard—Ohio to New York, 318 I.C.C. 49.

Rates 83 and 84 cents, minimum 20,000 pounds, on paper bags from Chicago, Ill., to Kansas City, Mo., approved as compensatory and otherwise lawful.—Paper Bags from Chicago to Kansas City, Mo., 321 I.C.C. 732.

Petroleum, petroleum products: [Vols. 10-12, 14, 16-19].—New or reduced rates ranging from 68 to 106 cents, minimum 30,000 pounds, and 64 to 104 cents, minimum 38,000 pounds, Kansas City to 96 points in Texas, approved as compensatory and otherwise lawful.—Petroleum Products from Kansas City, Kans., to Texas, 316 I.C.C. 307 (310).

Reduced rates on distillate fuel oil, ranging from 0.342 to 2.988 cents per gallon, minimum

7,000 gallons, from Clear Lake, Iowa, to Minnesota and Wisconsin and from Spring Valley, Minn., to Iowa and Wisconsin, found just and reasonable.—Gasoline and Fuel Oil within Middlewest Territory, 316 I.C.C. 435.

Plastic materials, products: [Vols. 18, 19].—51 cents, minimum 30,000 pounds, on synthetic plastic powder, Midland, Mich., to Chicago, Ill., approved as compensatory.—Plastics and Chemicals from Midland, Mich., to Chicago, 318 I.C.C. 105.

Reduced rate of 92 cents, minimum 78,000 pounds, applicable only when shipper loads and consignee unloads, and subject to minimum charge based on 39,000 pounds for each vehicle, found just and reasonable on plastic materials from Longview, Tex., to Chicago, Ill., for one respondent.—Plastic Materials, Longview, Tex., to Chicago, 325 I.C.C. 691.

Radios; cabinets; parts: [Vols. 11, 12, 16, 18].—Rate 261 cents, minimum 10,000 pounds, on radio, talking-machine, or television cabinets or parts named, separate or combined, metal or wooden, without mechanism; box type, n.o.i., s.u. or k.d., and console type, in cartons, Jackson, Miss., to Chicago, the same as present rate but without provision that each vehicle used to transport a shipment be charged for at the minimum weight, or actual weight if greater, found just and reasonable; as it is 23 cents higher than corresponding rail rate, it is not competitively destructive.—Radio & Television Cabinets, Jackson, Miss., to Chicago, 315 I.C.C. 171.

Salt: [Vols. 11, 12, 16, 18].—Initial commodity rates on salt and pepper, minimum 34,000 pounds, from Winnfield, La., and Hutchinson, Kans., to named counties in Alabama, Florida, and Georgia, the pepper shipped thereunder not to exceed 10 percent of total weight of the shipments, found not shown to be unlawful.—Salt and Pepper from Kans. and La. to Ala., Fla., and Ga., 315 I.C.C. 695 (698).

Initial commodity rates on salt and salt products, minimum 30,000 pounds, from Hutchinson, Kans., to points in 6 southeastern States, ranging from 110 to 162 cents to typical destinations, are not shown to be unlawful.—Salt and Related Articles, Kansas to Southern States, 315 I.C.C. 637.

Sirups: [Vols. 10, 11, 13, 18].—Reduced rates on syrup, 64 cents, minimum 30,000 pounds, from Kansas City, Mo., to Chicago, Ill., approved as just and reasonable.—Syrup between Kansas City, Mo., and Chicago, Ill., 321 I.C.C. 214.

Soap; powders, bluing, etc.: [Vols. 10, 11, 14, 16-18].—Multiple-truck rate of 72 cents, minimum 66,000 pounds, on soap and related articles between Kansas City and Jeffersonville, Ind., found not unlawful and necessary to meet rail competition; competitive 87-cent rate of other motor carriers between same points would be just and reasonable if made subject to a minimum of 30,000 pounds.—Soap & Related Art. between Kansas City & Jeffersonville, 316 I.C.C. 421.

Sugar: [Vols. 10-12, 17-19].—Commodity rate 79 cents, subject to shipper loading, on sugar in packages, cartons, or bags, minimum 32,000 pounds, from Houma, Mathews, and Supreme, La., to Granite Falls, Hickory, Lenoir, and Valdese, N.C., approved as just and reasonable, subject to cancellation of stopping-in-transit rule which is not shown to be lawful.—Sugar from Louisiana to North Carolina, 319 I.C.C. 107.

Talc: [Vol. 17].—Rates 56 to 80 cents on minimum 34,000 pounds in bags or sacks, Emeryville, N.Y., to points in Ohio, found not shown to be unlawful.—Talc from Emeryville. N.Y., to Ohio, 316 I.C.C. 197 (201).

Tea: See *Coffee*, above.

Tile; related articles: [Vols. 18, 19].—Rate of 49 cents, minimum 30,000 pounds, on tile and related articles other than asphalt-composition tile, Kearney and Secaucus, N.J., and New York City to Boston, approved; revenue from proposed rate compares favorably with that under rates for like hauls to other Massachusetts destinations; grouping of considered articles under tariff heading "Tile and Related Articles" is in accord with commodity grouping of other carriers in the area.—Commodities from N.J. and N.Y. to Conn., Mass., and R.I., 315 I.C.C. 733 (734).

Tobacco; products: [Vols. 10-12, 14-19].—Joint commodity rates on cigarettes and manufactured tobacco, minimum 30,000 pounds, $1.02 from Greensboro, N.C., to Louisville, Ky., and 90 cents in reverse direction, or 86 cents from Louisville to Greensboro when shipment is tendered by consignor

within 24 hours of an inbound shipment which moved from Greensboro at the $1.02 rate, found just and reasonable for considered interplant movement.—Cigarettes and Tobacco between Greensboro and Louisville, 319 I.C.C. 679.

Particular Descriptions of Freight Rates

160. Loading and Unloading.—[Vols. 10-12, 14, 15, 19].—Prescribed tariff rule providing that helper service for loading or unloading of t.l. freight in Pittsburgh-Wheeling area will be furnished only upon request of consignor or consignee does not impair validity of collective bargaining agreements between motor carrier employers and plaintiff labor unions. Prescribed rule provides that the t.l. rates will include loading and unloading service of one man per vehicle, whether he be driver, helper, or any other carrier employee; thus the rule does not prohibit a helper from doing the loading or unloading free of charge so long as the driver does not do it. Plaintiff carrier association does not claim that the order requiring publication of the prescribed rule is in any way illegal or beyond the commission's power to promulgate, and the claimed interference with the unions' right to bargain collectively on use of helpers is too remote and tenuous to give them standing to set aside the commission's order. Complaint dismissed.—Teamsters Joint Council 40 (J.C.) v. United States, 238 F. Supp. 301 (302, 306)*.

Pier loading and unloading charges assessed by pier operators at various ports are not for services which are normally included in motor carrier rates; under proposed rule respondents would absorb such charges for pier traffic at Virginia ports and not for traffic moving to other delivery points; not approved.—Absorption Pier Loading and Unloading Charges, 316 I.C.C. 577 (579-80).

Although complainant has not sustained its allegation that defendant's rates do not cover services of a helper and are unreasonably low when cost of that service is absorbed, defendant's rule providing that its rates include loading and unloading when the service can be performed by not more than two men is ambiguous, conducive to discrimination, and impossible to police when it fails to specify how many men will be furnished for loading or unloading, particularly when more than one vehicle is required to move a shipment, or who shall decide when the shipment "can" be loaded or unloaded by not more than two men. Assailed rule ordered canceled, and defendant admonished promptly to establish an appropriate rule in compliance with Tariff Circular MF No. 3.—Middle Atlantic Conference v. Transport Corp., 321 I.C.C. 308 (311, 312).

Carriers' obligation of loading into and out of trailers to and from the tailgate under line-haul rates is not universal: various rules have been established making consignor or consignee responsible for loading or unloading when nature of the freight or shipper's or consignee's facilities are such that one man cannot perform that service; also, numerous motor carrier trariffs require consignor or consignees to load or unload ordinary freight. When a carrier offers to perform a lesser service for a lower rate, it is not obligated to do more than it has offered to do at the lower rate where such offer at the lower rate is accepted by the shipper.—Middle Atlantic Conference v. A.A.A. Trucking Corp., 321 I.C.C. 406 (408)*.

When carrier furnishes helper service for loading or unloading, the published rates must include tariff authority or charge therefor, in order that carrier may render such services without acting unlawfully. Though rule 90 governing furnishing of helper service is applicable, under tariffs published by complainant conference and participated in by defendants, at all points in middle Atlantic and New England territories, it is not in effect between points in middle Atlantic territory and Pittsburgh-Wheeling area described in complaint. Evidence establishes that defendants have been and are unlawfully engaging in furnishing of helper service for loading and unloading of traffic moving between those areas, without tariff authority or charge, and that such practice has resulted in unjust discrimination and undue preference and prejudice as between various consignors and consignees.—Id., pp. 408, 409-10.

The record warrants prescription of a rule for future application by defendants concerning furnishing of helper service to load and

unload t.l. traffic moving between middle Atlantic territory and the Pittsburgh-Wheeling area. Suggested revised rule 90, which would provide a flat charge of $15.75 per man per day or fraction thereof, and would require carriers' records to show only the number of helpers used and number of days on which they were used, has attributes of simplicity, better enforceability, elimination of potential areas of dispute between shippers and carriers, and substantial reduction in carrier procedures and bookkeeping. The flat charge, which is equivalent to present minimum charge under rule 90, as recently increased by 5 percent, would be less onerous to shippers, and as present rule 90 has caused substantial curtailment of use of helper service with consequent decrease in operating expenses, it may be assumed that the flat charge will be equally effective.—Id., pp. 410-11.

However, since in practice a helper cannot normally be used on more than one loading or unloading per day, and under existing contracts a helper must be paid for a full day, it appears that defendants may incur expenses exceeding $15.75, and they will be free to increase the flat charge if it fails to meet their particular costs directly involved in providing the service. Also, to avoid any conflict between the rule and carriers' present commodity rates that are higher when services of two men for loading and unloading are specifically provided for, the phrase "Unless otherwise provided in individual rate items" or similar language should be inserted at beginning of the revised rule as set out in appendix B. The revised rule, as thus modified, prescribed.—Id., pp. 411, 412.

See also Nonapplication of Helper Service Rule, §216(g), n. 26.

165. Truckload and less-than-truckload rates.—[Vols. 10-19].—Exclusive use of vehicle: see also Campbell "66" Express, Inc. v. United States, Gov't. traffic, §66, n. 1.

Only exceptional conditions warrant establishment of l.t.l. commodity rates, and such rates require special justification. Cost data covering only shipments moving in truckloads of not less than 26,000 pounds, although the holding out in respondents' tariffs is for l.t.l. service, are clearly inadequate justification; moreover, as respondents also publish t.l. rates between same points with minimum weights lower than 26,000 pounds, publication of l.t.l. rates and acceptance of loads thereunder of the same or greater weights than the t.l. minima is an anomaly.—Cigarettes and Tobacco between North Carolina and Pa., 315 I.C.C. 297 (299).

General flat increases in class and commodity rates within middle Atlantic territory (except portions specified) and between middle Atlantic and New England territories, of 1 to 3 cents on t.l. shipments; of 30, 10, and 3 cents, respectively, on l.t.l. quantities under 2,000 pounds, 2,000-5,999 pounds, and 6,000 pounds or over, for distances upwards of 100 miles; and a 10-percent increase in rates or charges (except minimum charges) stated in units other than per 100 pounds, found just and reasonable except where resulting rates to intermediate border points exceed those to more distant points. While t.l. rates generally have exceeded costs, addition of the small increases thereon, and on shipments of 6,000 pounds or more, does not result in rates exceeding reasonable maximum levels. Terminal costs have increased disproportionately on smaller shipments and, in accord with 316 ICC 467, application of the flat increases to l.t.l. shipments is not inherently unlawful; considering respondents' cost estimates, the increases on shipments under 6,000 pounds do not result in rates which exceed reasonable maxima.—General Increases—Middle Atlantic & New England Ter., 319 I.C.C. 168 (169, 177)*.

175. All-commodity rates.—Vols. 10-12, 14-19.—Part I, § 1 (5), n. 495.—Expedited-service rates on freight, all kinds (except articles rated higher than class 150), in straight or mixed shipments, any quantity, between Atlanta and Chicago, $8.60 door-to-door and $5 terminal-to-terminal, found justified to meet air-freight competition, subject to elimination of $5.57 minimum charge and substitution of the rate on a 100-pound shipment as minimum in lieu thereof.—Freight, All Kinds—Expedited Service—Chicago-Atlanta, 314 I.C.C. 663.

In determining reasonableness of all-freight rates, such rates, while properly reflecting savings of handling compared with the ordinary vehicle full of separate l.t.l. shipments,

must also reflect transportation characteristics of the preponderant volume of freight carried thereunder; a general declaration by respondent is insufficient in this respect when the record is devoid of evidence as to volume of traffic which can be anticipated under proposed rates or the nature or classification of freight which would be transported.—Freight, All Kinds, Chicago, Ill., to Dayton, Ohio, 316 I.C.C. 405 (407).

Respondents' all-commodity distance rates, applicable on straight as well as mixed shipments, are unreasonable because they could break down existing reasonable rate structures unless restricted to reasonable mixtures. However, record shows that the rates are intended to be used as proportionals in conjunction with rail plan III TOFC service and, since they are restricted not to apply where there are specific commodity rates between same points, and respondents' local traffic moves on class rates, if they were further restricted to such TOFC service, respondents would be required to meet railroads' mixing provisions and there would be no opportunity to break down existing rate structures. Respondents will be expected to so restrict such rates published in the future.—All Freight between Points in Ohio, 318 I.C.C. 731 (735-6).

See also Proportional Rates between Harrisburg & Points in Pa., n. 180, below.

Reduced all-freight interterritorial and intraterritorial rates, maximum 30,000 pounds in one trailer, with overage rates on excess weight, on forwarder traffic between points in eastern, central, and middlewestern territories, to alternate with existing rates on 20,000-pound maximum weight between same points, also similar initial rates, subject to 20,000-pound maximum, between North Adams, Mass., and Chicago and St. Louis, and between Glens Falls, N.Y., and St. Louis, all subject to optional substitution of rail for motor line-haul movement, are compensatory and justified to encourage heavier loading and compete for forwarder traffic moving in rail plan III TOFC service.—General Commodities, Eastern, Central & Middlewest Ter., 321 I.C.C. 504.

See also n. 180, below.

176. Through, joint, local rates.—[Vols. 18, 19].—Part I, §1(5), n. 400.—See Great Western Packers Exp., Inc. v. United States, §216(c), n. 10.

180. Proportional rates.—[Vols. 10-12, 16-19]. Part I, §1(5), n. 402.—Initial proportional volume rates and charges on specified commodities moving in trailers furnished by shipper or consignee between railroad ramps in New Jersey and points in New Jersey, New York, and Pennsylvania, in connection with prior or subsequent rail movement, are not shown to be unlawful merely because they are lower or different from conference rates on like traffic between points in same general area; moreover, while the proportional rates are to be used in conjunction with plan III TOFC service, comparison of through charges is not relevant to determination of their reasonableness; the proposed rates are not shown to be unlawful.—Various Commodities—N.J. Railroad Yards, N.J., N.Y., Pa., 315 I.C.C. 704 (706).

Proportional all-commodity rates published as flat charges per trailer, loaded or empty as the case may be, for various mileage blocks, to apply in conjunction with rail plan III TOFC service where no commodity rates (other than distance rates) are published for movements in shippers' trailers between same points over same routes, are not shown to be unlawful.—Proportional Rates between Harrisburg & Points in Pa., 315 I.C.C. 499 (500, 503); Freight, All Kinds, between Harrisburg and Pa. Points, 316 I.C.C. 41 (44).

All-commodity distance rates intended to apply as proportionals in conjunction with rail plan III TOFC service would present no threat to existing rate structures, even though not restricted to mixed shipments, if they were restricted to apply only in connection with the TOFC service, since respondents would then be required to meet railroads' mixing rules for that service.—All Freight between Points in Ohio, 318 I.C.C. 731 (736).

There is nothing inherently unlawful in respondent's publication, within its managerial discretion, of proportional rates to apply in connection with a prior or subsequent movement in rail TOFC service. Proposed reduced rates on t.l. shipments of freight, all kinds, minima 20,000, 25,000, 30,000, and 35,000 pounds, ranging from 85 percent of class 35

on the 20,000-pound minimum to 75 percent thereof on the 35,000-pound minimum, when moving in trailers furnished by shipper or consignee, between rail terminals in Chicago group and specified points in Indiana, Michigan, and Ohio are shown to be reasonably compensatory and otherwise lawful; approved.—Freight, All Kinds, Chicago and Ind., Mich., Ohio, 322 I.C.C. 423 (424, 427, 428).

Proposed proportional charges per trailer on freight, all kinds, in trailers furnished by shipper or consignee, including loading, unloading, and return of empty trailers, ranging from $57.50 to $126.50 for movement between rail yards at northern New Jersey points and points on Long Island, in connection with prior or subsequent rail plan III TOFC service, are reasonably compensatory when they exceed respondent's cost estimates, based on reasonable mileage factors and time factors reflecting its actual experience, by $5.16 to $21.52 per truckload. Respondent has been experiencing a profit in performing substantially similar service, except for ownership of trailers, at like charges for Long Island, R. in connection with latter's plan II service, and there is no evidence that proposed charges would threaten existing rate structures or be competitively destructive; approved.—Freight, All Kinds, & Empty Trailers bet. N.J. & N.Y., 322 I.C.C. 429.

See also Butter from Mandan and Bismarck, N. Dak., §216(g), n. 66.

185. Pool-truck rates.—[Vols. 10-12, 14, 15, 17-19].—Assembly and distribution rates published for New York and Philadelphia areas in "S" tariffs apply to movement by line-haul carriers, generally within the commercial zone, of small shipments having a prior or subsequent line-haul by the same carrier as part of a pool truckload which usually consists of articles of the same class, whereas rates in "A & D" tariffs apply to service beyond commercial zones for forwarders and consolidators, whose traffic is varied, frequently light and bulky, and entails more paperwork. Moreover, service performed within the commercial zone under the "S" tariffs is in direct competition with unregulated local cartage operators whose rates are not published or subject to any statutory criterion of justness and reasonableness, whereas traffic subject to "A & D" tariffs moves beyond the commercial zones and may not be handled by exempt carriers. These substantial differences in nature of the traffic and services involved justify maintenance of a lower level of rates in the "S" than in the "A & D" tariffs.—Distribution Rates in Eastern Central Terr. Cities, 319 I.C.C. 410 (413-4).

The record clearly shows that the unpublished charges of the exempt local cartage companies control the level of regulated motor common carrier rates published in the "S" tariffs, not only within the New York and Philadelphia commercial zones but also to and from points beyond those zones where their maintenance is forced by competition with other regulated carriers whose rates are compelled by unregulated competition. Since the exempt local operators may negotiate rates, no meaningful comparisons with the rates under investigation can be drawn; those rates are necessary for respondents to meet the unregulated competition, and it would be manifestly unreasonable to require them to show that their rates precisely meet the unpublished and unknown charges of exempt operators. Though some of the rates involved appear noncompensatory, it does not follow that they are unreasonable or otherwise unlawful; in the exceptional circumstances, the considered rates may be found just and reasonable. —Id., pp. 414, 415, 416.

200. Class rates, in general.—[Vols. 10-19].—Part I, §1(5), n. 544.—Unless there are exceptional transportation conditions, l.t.l. shipments should move at class rates. Shipper's statement as to high cost of distributing considered commodities from its Atlanta warehouse and its interest in distribution from Jacksonville, Fla., is too vague and indefinite to support conclusion that exceptional and compelling circumstances justify establishment of proposed l.t.l. commodity rates. —Fluorescent Lamp Ballasts, LTL, Atlanta to Florida, 315 I.C.C. 412 (413-4).

Less-than-truckload traffic is essentially class-rate traffic, and establishment of rates on such traffic at a level lower than class rates is an anomaly which can be justified only by a showing of compelling circumstances.—Magazines, Old Saybrook, Conn., to New

Engl., N.Y. & N.J., 315 I.C.C. 281 (284); and despite shipper's and respondents' emphasis on desirability of magazine traffic and efficiency with which l.t.l. shipments would be handled and savings which would result under proposed commodity rates, present class-rate basis is not shown to be inappropriate for that traffic. Carriers' lowering of the rate level from class 85 to class 55 over the years reflects their recognition of the favorable transportation characteristics claimed for such traffic in l.t.l. quantities.—Magazines, Old Saybrook, Conn., to Middle Atlantic Ter., 315 I.C.C. 273 (275-6).

Since under ordinary circumstances l.t.l. traffic should move at class rates, a commodity rate on such traffic can be justified only by a showing of compelling circumstances; such circumstances do not exist where the traffic concerned appears to be moving freely within the area under l.t.l. class rates; moreover, establishment of proposed commodity rate might undermine an existing just and reasonable rate structure.—Boots or Shoes from Columbus, Ohio, to Chicago, Ill., 316 I.C.C. 239 (241-2).

Although present class rates between Greenville, Miss., and some 20 Arkansas points were established on basis of rail rate-making distances via other Mississippi River crossings, proposed reduced class-rate bases reflecting short highway mileages via highway bridge at Greenville are not just and reasonable when resulting rates would in some instances be higher than respondent's rates to more distant points over same routes, would be unduly prejudicial to excluded points served by same carrier or carriers, and would tend to disrupt existing class-rate adjustment in territory involved.—Class Rates between Greenville, Miss., and Arkansas, 316 I.C.C. 629.

Although addition of flat amounts to existing rates, regardless of classification ratings, further distorts percentage relation between classes, particularly in rates on l.t.l. shipments, as terminal costs have increased disproportionately on smaller shipments the flat general increases considered are not inherently unlawful. See 316 ICC 467.—General Increase—Middle Atlantic & New England Ter., 319 I.C.C. 168 (170, 177)*.

As a result of State law providing for imposition of special gross weight limits on vehicles operated over South Dakota highways during March and April of each year, defendants established assailed "frost law charges" for application on class- or exceptions-rated traffic between South Dakota and points in various States and Canada, in form of either arbitraries of 10 or 11 cents to be added to normal class rates, or increased rates reflecting like amounts, to apply only between March 1 and April 30, inclusive. Contention that it is anomalous to assess such charges on that traffic and not on commodity-rated traffic, because latter is subject generally to higher minimum weights and would be the more affected, does not warrant finding assailed rates unreasonable when record shows that defendants encounter severe competition from other motor carriers on commodity-rated traffic but do not encounter the same type of competition on class-rated traffic.—Traffic Bureau of Sioux Falls v. Barber Transp. Co., 316 I.C.C. 325 (330-1, 338).

And fact that the frost law charges were not applied on all class- or exceptions-rated traffic between all points in South Dakota and all points in the various States and Canada does not alone establish that their application to the traffic in issue was unreasonable per se, since defendants have attempted to broaden their application to embrace movements between South Dakota and various other States, but have held such efforts in abeyance pending disposition of instant proceeding.—Id., pp. 338, 345.

However, the maximum load restrictions have not been imposed on all highways or for uniform periods; transportation circumstances and conditions attending movement of the traffic in issue within South Dakota over unrestricted highways in March and April are substantially the same as those attending movement of like traffic during remainder of the year, and in such instances application of frost law charges on theory of increased costs of operation is unwarranted. —Id., p. 345-6.

In other instances the traffic in issue, which is subject to frost law charges, has been transported with like traffic not subject thereto in same vehicle over same restricted highway,

the only difference in circumstances being that the one shipment may be destined to a point in South Dakota and the other to a point in another State; any additional cost incurred on such movements is attributable in part to both shipments. Moreover, frost law charges of same amount apply on like shipments regardless of differences in distance; application of such charges only on the traffic in issue and irrespective of length of haul does not place the burden of increased costs solely and fairly on that traffic which directly causes the expense.—Id., p. 346.

Maintenance of the frost law charges as a permanent fixture of the rate structure, to recoup increases incurred in operating expenses during March and April, is subject to same criticism as surcharges designed to offset State truck-mile taxes, which were condemned in 62 MCC 117; for the same reasons, any increases in defendants' operating costs due to imposition of the load restrictions should be treated as a normal operating expense and should be reflected in their class rate structure rather than in frost law charges, either as additions to the prevailing rate structure in March and April, or in a separate rate structure which includes those charges and applies only during those months. Assailed charges are unjust and unreasonable; reasonable future charges will be the class rates and charges maintained by defendants on like traffic between the points involved just prior to March 1 of each year, unless otherwise authorized.—Id., pp. 347, 349.

See also General Increases—Eastern Central Territory, n. 694, below.

225 Commodity rates.—[Vols. 10-19].—Part I, §1(5), n. 566a-574.—Maintenance of l.t.l. commodity rates is an anomaly which must be specifically justified; except under extraordinary circumstances class rates should apply on such traffic.—Electrical Appliances, Milwaukee, Wis., to Chicago, Ill., 315 I.C.C. 286 (288); Magazines, Old Saybrook, Conn., to Middle Atlantic Ter., 315 I.C.C. 273 (276); however, considered l.t.l. traffic is extraordinary in volume and thus may move at a somewhat lower rate level than that provided by the classification basis. Proposed l.t.l. commodity rates are compensatory; approved.—Paints & Related Art. Between Chicago & Cincinnati; Louisville, 315 I.C.C. 729 (731-2).

Desirability of magazine traffic because it loads heavily, incurs little pickup expense, requires minimum handling at destination, and has incurred only negligible damage claims, does not justify commodity rates on less than truckloads; lowering of the class-rate basis over the years reflects carriers' recognition of favorable transportation characteristics of such traffic in l.t.l. quantities. Nor are l.t.l. commodity rates justified by alleged market competition with Philadelphia when there is no proof that the magazine distributed from that point is sharply competitive with that to be transported under proposed rates, or that freight rates are an important factor in any such existing competition. Existence of an anomalous rate basis from Philadelphia is no justification for extending the same basis to another origin, especially when l.t.l. commodity rates from that origin apply only to some of considered destinations, while class rates apply to the remainder. Moreover, it is not shown that proposed rates would be compensatory, nor that they would not constitute a destructive competitive practice.—Magazines, Old Saybrook, Conn., to Middle Atlantic Ter., 315 I.C.C. 273 (275, 276-7).

Class 200 rates currently applicable on empty returned aluminum tote tanks between considered points appear inappropriate for new type shipping container, which has capacity equal to 8 50-gallon steel drums but occupies space of only 6, thus conserving vehicle space and expediting loading and unloading; shipper has filed no loss or damage claims since using such tanks; proposed l.t.l. commodity rates are on class 70 level applicable on used barrels, drums, and kegs. Protestant's apprehension that the reduced rates will be used as a wedge to obtain further reductions appears groundless, since they are limited to apply only when loaded tanks are moved inbound by same carrier; approved.—Aluminum Tote Tanks, Springfield, Ill., to Fort Madison, 315 I.C.C. 567 (568-9, 570).

Establishment of l.t.l. commodity rates on iron and steel fasteners from Rockford, Ill., to Anderson, Ind., is justified when such traffic has been moving in substantial volume,

is desirable for respondents, and has favorable transportation characteristics; a lower level of rates has been established from competing origins, notwithstanding shippers at those points produce the same class of products, sell in same manner, and are no more advantageously located; in the past, rates from Rockford were on level comparable with those from the competing points, and as result of present spreads Rockford shippers can no longer maintain their sales position at Anderson. However, no justification appears for proposed l.t.l. rates on weight brackets upwards of 2,000 pounds; since most of the Rockford traffic moves in quantities less than 2,000 pounds, rate on that weight bracket, which is shown to be compensatory, will be reasonable for all l.t.l. shipments.—Iron or Steel, LTL, Rockford, Ill., to Anderson, Ind., 315 I.C.C. 683 (687-8).

While l.t.l. traffic should move at class rates and l.t.l. commodity rates should be permitted only where compelling circumstances and conditions are shown to exist, evidence indicating that otherwise the traffic would be diverted to private carriage is sufficient justification for l.t.l. commodity rates, particularly where all other producers of the particular commodity are moving such traffic in their own equipment or by contract carrier.—Bakery Goods, Chattanooga, Tenn., to Southern Points, 316 I.C.C. 573 (574-5).

Maintenance of l.t.l. commodity rates on rubber-coated cotton cloth from two Massachusetts points to New York metropolitan area is justified when volume of traffic averaged over 32,500 pounds daily during a representative period, and simultaneous tender of aggregate volume of at least 20,000 pounds is required before commodity rates apply. However, although the present rates were approved in 310 ICC 675, they are now below a compensatory level owing to increased costs of service. Cancellation required and minimum reasonable rates prescribed.—Miscellaneous Commodities from Mass. to N.J. and N.Y., 318 I.C.C. 226 (227-8).

Proposed l.t.l. commodity rate on boots or shoes from Columbus, Ohio, to Chicago, the same as existing class rate on 2000-4, 999-pound category, appears compensatory and is justified by respondent's increased average daily tonnage of 2,856 pounds and by fact that shipper's outbound traffic from Columbus is tied in with its inbound t.l. movements from Rock Island, Ill. Respondent's prima facie showing of reasonableness is not rebutted; approved.—Boots or Shoes from Columbus, Ohio, to Chicago, 319 I.C.C. 92.

Less-than-truckload shipments normally should move on class rates; commodity rates on such traffic should be established only under compelling circumstances such as movement in substantial volume and simultaneous tenders of a large number of shipments; handling of involved traffic by forwarders for several years cannot be considered a compelling circumstance when volume of the traffic is not shown.—Air Cleaners, Blowers, Fans—Buffalo to Ill., Ohio, Mo., 314 I.C.C. 779 (780).

Less-than-truckload rates below the class-rate basis require special justification; proposed l.t.l. commodity rates may not be approved when no competitive reason therefor, nor any examples of such rates claimed to be maintained in other territories, are shown.—Various Commodities, Chicago to Cincinnati, Ind., Louisv., 314 I.C.C. 749 (750).

Less-than-truckload commodity rates are anomalous; unless special circumstances affect the transportation, class rates should apply on l.t.l. traffic. Proposed l.t.l. commodity rates are not justified when volume of the traffic concerned is not shown, nor any competition by other carriers which would indicate that they are necessary for respondent to participate in the traffic.—Flavoring Sirup—Bonner Springs, Kans., to Southwest, 314 I.C.C. 781 (783).

Proposed joint l.t.l. commodity rates not only are not shown to be compensatory, but, since respondent's present rates and rates generally on involved l.t.l. traffic are class rates, would threaten existing class-rate structure on that traffic in southern territory; not approved.—Candy—Montgomery, Ala., to Points in South Carolina, 315 I.C.C. 96 (97, 98).

Though evidence indicates that proposed l.t.l. commodity rates were published primarily to meet competition by express, fact that under respondent's present rates a typical small shipment could have moved at lower

total cost, including distribution charges, by motor carrier than by express casts doubt on claim that the reduced rates would attract any more traffic; there are thus no exceptional circumstances which would justify commodity rates on considered traffic.—Electrical Appliances, Milwaukee, Wis., to Chicago, Ill., 315 I.C.C. 286 (288).

Considered l.t.l. commodity rates on cigarettes and manufactured tobacco are not justified by cost data covering only shipments in truckloads of not less than 26,000 pounds; moreover, rates on considered level, while returning substantially more than cost of service for shipments of record, are not shown to be necessary to place respondents on competitive basis with rail carriers, and are out of harmony with prescribed adjustment on like traffic moving under similar conditions between many of same points. Rates under investigation ordered canceled.—Cigarettes and Tobacco between North Carolina and Pa., 315 I.C.C. 297 (299-300).

Unless there are exceptional transportation conditions, l.t.l. shipments should move at class rates; proposed l.t.l. commodity rates on machinery and other articles not approved where evidence is not persuasive of exceptional transportation conditions pertaining to this traffic.—Machinery and Related Articles—Hampstead, Md., to New England Points, 316 I.C.C. 71 (74).

Generally a considerable volume of movement is required before establishment of l.t.l. commodity rates is warranted; a daily average of 2,368 pounds is in ordinary circumstances insufficient alone to justify special rates. While respondent claims that Columbus shipper is seriously disadvantaged by market competition at intrastate rates from Rock Island, there is no showing of extent of such competition or that shipper is compelled to absorb any difference in transportation costs. General declarations of fear that rising level of l.t.l. class rates may force shipper to divert its traffic from respondent's daily service to pool-truck movement do not justify a commodity rate.—Boots or Shoes from Columbus, Ohio, to Chicago, Ill., 316 I.C.C. 239 (242).

Less-than-truckload traffic is essentially class-rated traffic, and commodity rates should be established thereon only under special compelling circumstances; although for competitive reasons l.t.l. commodity rates have previously been approved on candy and confectionery between considered points, proposed further reduction is not warranted when the traffic is moving freely in respondents' service at present rates, competitive need is not compelling, and no evidence of compensativeness of proposed rate is presented.—Candy and Related Articles, Mass. Points to Camden, N. J., 316 I.C.C. 596 (598).

Commodity l.t.l. rates require special justification and should be established only under compelling circumstances, such as movement in substantial volume and simultaneous tenders of large numbers of shipments. Proponent's movement of only 30,000 pounds per month of involved traffic constitutes neither a substantial volume nor simultaneous tender of large number of shipments, and no evidence was offered to support claim of expected increase in volume. The traffic appears to be moving freely at present class rates, and there is no showing of any competitive necessity for proposed reduced rates which cost evidence indicates would be noncompensatory on lower weight brackets; not approved.—Glue from New York and Plainfield to Ransom, Pa., 318 I.C.C. 164 (166).

Ordinarily, commodity rates on l.t.l. traffic can be justified only by a showing of exceptional circumstances. Such circumstances exist where commodities for which respondent proposes to establish l.t.l. commodity rates on mixed shipments in carrier-furnished sealed containers now move regularly, almost daily, in 50 to 200 separate packages at one time from one origin to one destination. Such large volume offers considerable incentive for respondent to seek ways of reducing its costs for separate handling, checking, loading, rating, and billing of so many small individual shipments. However, proposed rates are disapproved because not shown to be reasonably compensatory.—Freight, All Kinds, Chicago to Cedar Rapids, Des Moines, 321 I.C.C. 380 (381, 384).

Less-than-truckload shipments normally should move at class rates; commodity rates on such traffic should be established only under compelling circumstances such as

movement in substantial volume and simultaneous tender of a large number of shipments. Proposed removal of restriction on existing l.t.l. commodity rates on hardware and other articles, requiring an aggregate of 12,000 pounds and five or more shipments, may not be approved when the rates without the aggregate are not shown to be compensatory.—Hardware, LTL, New Britain, Conn., to Mid. Atlantic Terr., 322 I.C.C. 249 (252).

Less-than-truckload traffic should normally move on class rates. Commodity rates on l.t.l. traffic are established only under compelling circumstances such as a substantial volume of movement, simultaneous tender of a large number of shipments, or competitive necessity. While respondent has lost considerable traffic due to tariff aggregate tender provision in effect, it failed to show that l.t.l. commodity rates which would result from removal of that provision would be just and reasonable.—Aggregate Weight Provisions on Paper, Mass. to N.Y., N.J. 323 I.C.C. 525 (531-1).

Commodity rates on l.t.l. traffic should be established only under special circumstances, and a considerable volume of movement is generally required to justify such rates. When shipper daily tenders applicant at one time an average aggregate of 5,562 pounds of shipments averaging 364 pounds each, of which 2,582 pounds move to the destinations involved, the special circumstances of regularity and substantial volume of movement, tender of multiple shipments at one time, and less-than-customary terminal services are present. As to competitive need, no reason appears for doubting respondent's statement that if the reduced rates are not approved the business will be lost; moreover, since all the rates substantially exceed fully distributed costs, the requirement to show competitive necessity is less significant. The proposed rates approved.—Boots or Shoes, Columbus, Ohio, to Illinois and Missouri, 322 I.C.C. 687 (690).

In absence of a positive showing of competitive need for departing from the class-rate basis, or a showing that aggregate volume of traffic is large enough to warrant l.t.l. rates on a lower level, proposed l.t.l. commodity rates on magazines to destinations other than New York may not be approved, particularly as it does not appear that savings to carrier as result of favorable characteristics of that traffic at origin would justify such a departure in light of the exacting delivery requirements. And even though shipments to New York are tendered in aggregates which constitute truckloads, this is not shown to justify a rate reduction on l.t.l. shipments which must be separately delivered.—Magazines, Old Saybrook, Conn., to New Eng., N.Y. & N.J., 315 I.C.C. 281 (284, 285).

Though it is respondents' intent to give shipper a reduced rate in consideration of a tender of 20,000 pounds or more, and 42,000 pounds is expected to move weekly to New York, it is not clear whether that volume consists of a single truckload, an aggregate of l.t.l. shipments, or both; assuming that the movement is in t.l. quantities, publication of a compensatory t.l. rate, minimum 20,000 pounds, with provision for separate charges to cover expense of additional deliveries at destination, would not be objectionable.—Id., p. 284.

230. Any-quantity rates.—[Vols. 11-13, 18, 19].—See Freight, All Kinds—Expedited Service, n. 175, above; See General Increases—Eastern Central Territory, §216(g), n. 5, *Justification for increases*.

250. Group rates.—[Vols. 14, 18, 19].—Part I, §1(5), n. 420-472.—The practice of grouping points for purpose of establishing rates is of long standing, and is generally an acceptable method of publishing lawful rates, since it precludes necessity of specifically publishing rates from and to numerous points, with resulting savings in tariff costs; rate groupings should not be changed to correct minor inequities without giving full consideration to the overall effect of such change on all carriers and shippers concerned.—Huntingdon Valley, Pa.—Rate Group Amendment, 314 I.C.C. 680 (682).

Proposed grouping of Huntingdon Valley, Pa., with Philadelphia instead of with Trenton, N.J., is not justified when no competitive necessity is shown therefor and resulting reductions from many points are not shown to be just and reasonable. As present grouping follows that employed by railroads in establishing the uniform class rates, proposed change would substantially alter the competi-

tive situation between the railroads and the motor carriers as a group, and earnings of a number of latter who do not favor the change, as well as earnings of respondents, would be affected.—Id., pp. 681-2.

Moreover, though Huntingdon Valley is about 18 miles south of Trenton city limits and only about 1.5 miles west of Philadelphia limits, it is some 14 miles from downtown Philadelphia; respondents' claim that the Huntingdon Valley station has been abandoned is not supported by the evidence, and it and all points north of it on same rail branch line take the Trenton rates.—Id., p. 681.

275. Minimum rates; minimum charges.—[Vols. 10-15, 18, 19].—Part I, §1(5), n. 14.—While the commission's minimum-rate power may concededly be used when proposed reduced rates are not objected to by other carriers, in a case where issue of compensativeness is close some weight ought to be given to management decision.—Davis & Randall, Inc. v. United States, 219 F. Supp. 673 (683)*.

Although present l.t.l. commodity rates on rubber-coated cotton cloth from two Massachusetts points to New York metropolitan area were approved in 310 ICC 675, they have fallen below a reasonable minimum level when some of them fail to cover increased out-of-pocket costs and others do so by only 0.2 cent. Reasonable minimum rates suggested by carrier actually transporting the traffic, approximately 6.11-percent higher than the present rates and 3 to 16.1 cents above out-of-pocket costs, prescribed on four weight brackets under 20,000 pounds.—Miscellaneous Commodities from Mass. to N.J. and N.Y., 318 I.C.C. 226 (227, 228).

A strong showing must be made to support a finding that compensatory rates, not fixed on a class-rate level resulting from permissive general increases, are unreasonably low. Complainant rate bureau has made no such showing as to assailed rates that equal or exceed out-of-pocket costs, nor has it shown that defendants' weight scales or minima, lower than those maintained by the bureau for its members, are in themselves unlawfully disruptive of the rate structure. Exercise of the commission's minimum-rate powers to freeze defendants' rates and weight limits at complainant's levels is therefore not warranted.—New England Motor Rate Bureau, Inc. v. Stone's Exp., 321 I.C.C. 767 (774).

Proposed any-quantity rates on all-freight in expedited service between Chicago and Atlanta, $8.60 door-to-door and $5 terminal-to-terminal, found lawful, except that proposed $5.57 minimum charge should be eliminated and the minimum charge be made the rate on a 100-pound shipment; approved on that basis.—Freight, All Kinds—Expedited Service—Chicago-Atlanta, 314 I.C.C. 663 (665, 667).

Respondents' reduced minimum charges per shipment, when five or more minimum-charge shipments are picked up at one time, would be reasonable for local hauls, provided the governing rules are amended as indicated, when protestant conference's cost data, as restated, indicate that for such hauls they would exceed out-of-pocket costs and may thus be considered compensatory; however, as considered charges are not shown to exceed out-of-pocket costs for joint hauls, they may not be approved for application thereto.—Reduced Minimum Charges—West Roxbury to Mid. Atl. Ter., 315 I.C.C. 675 (679).

To minimize losses from handling small shipments, respondents propose establishment in eastern central territory of scales of constant or flat charges on six weight brackets progressing by 50 pounds each from column 1 on 1-to-49 pounds to column 6 on 250-to-299 pounds, the column 6 charges to be the minimum for shipments of 300 pounds or over, to apply in lieu of present minimum charge per shipment, per-hundredweight charges on shipments under 300 pounds, and $1 surcharge on shipments of less than 1,000 pounds not subject to a minimum charge. Such constant charges, proposed as an experiment in ratemaking, are not inherently unlawful, and both carriers and shippers should benefit from having to ascertain only weight of shipment and corresponding rate basis, rather than having to analyze and rate such small shipments. —General Increases—Eastern Central Territory, 316 I.C.C. 467 (468-9, 485-6).

Although the constant charges will result in reductions on small shipments rated class 100 or higher, thus enabling shippers of

high-grade commodities to reduce total transportation charges by splitting shipments into multiples of 299 pounds, respondents' alternative suggestion that such charges be approved as minima for shipments under 300 pounds, which would make them applicable only when higher than the classification basis, is rejected; only experience can determine whether multiplication of shipment units would be so extensive as to require modification of the plan. Proposed charges approved, without prejudice to right of the parties to petition for further hearing after a reasonable period for testing their effect.—Id., pp. 480, 485, 486.

See also Clothing, in Multiple Shipments, from Nanticoke, §217(a), n. 10.

285. Express rates.—[Vols. 15, 16].—Such attributes of express service as transportation of small shipments at premium rates are descriptive rather than limiting in nature; most shipments attracted to express service weigh less than 500 pounds and cost of moving them expeditiously is greater than if they were held for aggregation into truckloads, so that cost of providing express service for all shipments tendered must necessarily be recovered by a level of rates generally higher than that of carriers whose service is influenced by economies to be derived from volume movement. However, Railway Exp. Agency has historically handled shipments exceeding 500 pounds, and traffic to which considered all-commodity l.c.l. container rates apply is moved just as expeditiously as its other traffic, often in same trucks; considering economic advantages of containerization, those rates are compensatory and are not shown to be competitively destructive.—Freight, All Kinds, L.C.L. Container Charges—U.S.A., 323 I.C.C. 468 (472, 475, 479-80)*.

While there is no specific evidence of extent of intercity line-haul highway movements performed by REA under the container rates, its motor-carrier authority is broad enough to permit some of such movements, and limitation in its certificates to commodities "moving in express service" does not preclude it from publishing compensatory nonpremium rates on containerized shipments. A highway express carrier is not required to publish any particular level of rates so long as it moves all the traffic it handles in express service; but neither REA nor any other express carrier may publish rates for delayed service (e.g., for aggregation of small shipments) that does not conform to the established criteria of bona fide express service, as economies to be gained from such a delayed transportation service are available only to ordinary freight carriers.—Id., pp. 477, 481.

300. Truck-water rates.—[Vols. 10-13].—See Drugs and Related Articles from N.J. and N.Y. to Tex., §216(c), n. 10.

310. Rates reduced under §22 (§217(b)) authority.—[Vols. 16, 17].—See Middle Atlantic Conference Nat. Frt. Traffic Ass'n. v. United States, §22(1), n. 5.

313. Rates, leased-equipment utilized.—[Vols. 18, 19].—Although, to establish compensativeness of proposed rates on urethane forms, the transportation being performed with owner-operators, respondent cites revenues accruing to owner-operators at same percentage division of revenue for transportation of such commodities as asbestos shingles, siding and wallboard, latter are not shown to have transportation characteristics similar to those of urethane; moreover, only 5 percent of respondent's past operations consisted of transportation of building materials. Such comparisons therefore have little probative value to meet the second test announced in 318 ICC 567, that the division of revenue to the owner-operators shall be sufficient to acquire or retain their services for movement of the traffic at the rates thereon. That "most" of the owner-operators have been with respondent for 5 to 10 years in no way establishes that they are willing to haul the involved commodity at the proposed rates; thus there is no meaningful record of employment to relate to the considered transportation; proposed rates not approved.—Building Materials, Middle Atlantic and New England, 322 I.C.C. 710 (714-5).

Bureau of Inquiry and Compliance's study of cost to respondent of transporting scrap iron from New England origins to western Pennsylvania, using owner-operators exclusively, based on data from its annual report and computed on Highway Form B formula as modified to reflect respondent's specialized type of operation, is a substantially accurate

reflection of the best available information and, because it shows great disparity between assailed rates and respondent's costs, makes a prima facie showing of unreasonableness. However, respondent's rate-cost comparison being accepted as adequate to show compensativeness of assailed rates in the circumstances, and in view of its showing that under its established practices regarding owner-operators it is able to attract purchased transportation as needed, conclusion is warranted that it has overcome the Bureau's prima facie presentation.—Iron or Steel Scrap from Conn., Mass., and R.I. to Pa., 318 I.C.C. 567 (570, 576). [But see dissent.]

Respondent whose transportation of meats from Denver to Chicago would be performed almost exclusively with owner-operators has not met the criteria of compensativeness announced in 318 ICC 567; it has not established that its share of the gross revenue from proposed reduced rate covers all its costs, or that the agreed division of 72 percent to owner-operators is sufficient to acquire and retain their services for movement of the traffic involved. Its mere statement that the operations would be conducted by owner-operators which allegedly have been associated with it for numerous years is inadequate proof; there is no showing of the percentage of revenue paid by it to owner-operators in the past, or any meaningful record of their employment. The reduced rate is thus not shown to be just and reasonable for that respondent.—Fresh or Fresh Salted Meats from Colorado to Chicago, 322 I.C.C. 174 (179, 181).

See also Eastern Central Motor Carriers Ass'n v. U.S., n. 104, above.

Rates for Special Classes of Services; Practices

400. Pickup and delivery; split pickup, delivery service.—[Vols. 10-19].—Increased pickup and delivery charges of 35 cents to $1.65 per 100 pounds, to be added to New York City line-haul rates on l.t.l. shipments moved through the city from or to points in area just north thereof and in six Long Island zones, are reasonable and justified by high cost of operations through the city due to extreme traffic congestion and tolls for use of tunnels, bridges, and ferries, also by divisions required to be paid local delivering carriers on Long Island, and by fact that Long Island traffic is predominantly eastbound, with consequent deadheading of equipment. Though resulting maximum charges of $3.50 to $16.50 do not completely cover costs of performing the service, they serve to reduce the burden formerly placed on respondents' entire operations.—L.T.L. Pickup & Delivery Charges—from or to New York, 319 I.C.C. 230.

Under proposed l.t.l. commodity rates on magazines, restricted to multiple shipments aggregating 20,000 pounds or more tendered by one shipper at one time, a shipper tendering 10 l.t.l. shipments aggregating 19,990 pounds would be charged the class rates, whereas shipper tendering 10 shipments aggregating only 10 pounds more would be charged rates approximately 10 percent lower, notwithstanding that services required would be practically identical. Thus, tender of shipments in aggregate t.l. quantities would not justify a rate reduction on less than truckloads which must be separately delivered, where no separate charge is made for multiple deliveries.—Magazines, Old Saybrook, Conn., to New Eng., N.Y. & N.J., 315 I.C.C. 281 (285).

Line-haul motor-carrier rates normally include one stop for pickup of lading and one for delivery; additional stops entail additional expense for which carrier should be compensated. Respondent's service in movement of paperboard from three New Jersey origins to New York City includes 1 to 5 deliveries, but evidence does not permit determination of cost of making such stops or of a compensatory charge per stop; considered l.t.l. rate found unreasonable, without prejudice to establishment of a reasonable line-haul charge subject to an aggregate t.l. minimum, with charges to be paid by consignor, and to establishment of a separately stated charge per stop for deliveries in addition to final delivery.—Paperboard between New Jersey and New York, N.Y., 315 I.C.C. 187 (190). [But see dissent.]

Pickup and delivery is the service of a carrier in calling for and collecting freight, receipting therefor from a dock, platform, doorway, or other facility directly accessible to highway vehicles, and includes transportation

therefrom by the highway vehicle to the motor carrier's terminal premises; a motor carrier may perform its own pickup and delivery, and loading and unloading service, or arrange to have it performed by another.—Investigation of Practices, United Warehouse Co., 316 I.C.C. 5(9).

Arrangement whereby respondent warehouse company performs such service under written contracts with respondent motor carriers has advantage of at least partly eliminating congestion resulting when several carriers attempt to pick up shipments at its dock at same time; there was apparently mutual agreement among all parties concerned in execution of those contracts, and to hold that in such service the warehouse company acted for the shipper would require a denial of existence or validity of the contracts—a conclusion which the record would not support.—Id., p. 9.

Although the commission stated in the Kansas City case, 272 ICC 331, that such contracts should authorize the draymen to sign receipts as agents for the carriers, it did not indicate how that authority should be extended or exercised; that respondent does not issue receipts or bills of lading in name of the line-haul carrier, and drays only its own warehouse merchandise to carriers' depots, is not unlawful. Principles of the Kansas City case are controlling; neither the warehouse company's practices in operation of its warehouse, nor respondent motor carriers' practices under which they pay drayage charges for pickup and delivery and loading or unloading charges, are shown to be unlawful.—Id., pp. 9, 10.

Respondents' distribution rates on all-freight at Chicago and St. Louis have been in effect for a substantial period, and protestant rate bureau's cost evidence designed to show their noncompensativeness is not shown to be representative of respondents' costs; thus the rates under investigation are not shown to be unlawful. And while the record indicates that numerous motor carriers maintain varying levels of distribution rates at those termini, and some revision of such rates should be made, it contains no adequate cost data for prescription of a scale of rates, and the few respondents concerned could not participate in the traffic if their rates were required to be increased without comparable increases in rates of carriers not parties to the proceedings. Finding that rates in suspension proceeding and ancillary investigation are not unlawful is therefore without prejudice to any finding which might be made on a more comprehensive record.—Distribution Rates at Chicago, Ill., and St. Louis, Mo., 318 I.C.C. 145 (148, 149).

404. Absorption of charges.—[Vols. 11, 18].—Rule providing for absorption of pier loading and unloading charges on class-rated traffic moving to or from Virginia ports is not shown to be compensatory or a competitive necessity; not approved.—Absorption Pier Loading and Unloading Charges, 316 I.C.C. 577 (580).

409. Palletized shipments.—[Vols. 16, 18, 19].—Advantages to both carriers and shippers accrue from use of pallets in transportation of freight, and agreements for interchange of pallets between shippers and carriers, such as that under consideration, are not unlawful provided the exchange of pallets thereunder is covered by appropriate tariff provisions and is accomplished without discrimination, and that charges collected are reasonable for the entire service performed. The matter is similar to exchange of containers considered in 54 MCC 139, and views therein expressed are equally applicable.—Legality of Pallet Exchange Agreement—Kraft, 322 I.C.C. 439 (443).

415. Handling; terminal charge.—While order bill of lading shipments may well be more costly to handle than other types, terminal charge of $3 per shipment cannot be approved in absence of showing that it is for services necessarily peculiar to order shipments and that it does not substantially exceed any additional expenses thereby incurred; charges under investigation ordered canceled.—Terminal Charge on Order Bills of Lading Shipments, 315 I.C.C. 327 (332)*.

425. Transit service, generally.—[Vols. 11-15, 17-19].—Part I, §1(6), n. 501, 512.—Since a volume of mixed interstate and intrastate commerce tendered to a motor carrier by a shipper on one bill of lading does not become wholly interstate in character when the intrastate portion is unloaded under provi-

sions of a stop-in-transit rule, mere filing with the commission of a tariff containing stopoff provisions does not make those provisions applicable on such intrastate shipments; and, not having jurisdiction over motor carriage in intrastate commerce, the commission may not prescribe a rule providing rates or charges on such commerce, nor may rates restricted to intrastate application be applied on interstate commerce. Thus, on a shipment handled in the described manner, carrier may not assess charges at the interstate rate to destination on the total weight picked up at origin, nor, if charges at the intrastate rate to the stopoff point are the higher when computed on the total pickup weight, may it assess that rate on the entire shipment.—Central States Motor Freight Bureau, Inc., Petition, 319 I.C.C. 745 (747, 749, 751)*.

However, stopoff rules on interstate commerce normally provide for application on the entire shipment of the rate to final destination or to any stopoff point, whichever produces the highest charge; and in the situation considered, if a tariff is filed with both the commission and the State commission and the rate to the stopoff point is the same for both interstate and intrastate commerce, that rate may be made applicable to the entire shipment when higher than the rate to final destination. Or, if the interstate and intrastate rates to the stopoff point are different, the rule might provide for application to the interstate portion, or to the combined weight if the State commission is willing, of the interstate rate to the stopoff point when higher than that to final destination. Where such provisions are filed, the commission will assume, in absence of information to the contrary, that the State either does not require the filing of rates with it or that carrier has ascertained that the State does not object.—Id., p. 751.

If the State concerned does not prohibit such publication, it would not be unlawful for a motor carrier to provide for stopoff for partial unloading at an intrastate point and to use the combined intrastate and interstate tonnage to determine the applicable interstate rate. This would not make an intrastate rate applicable on an interstate movement or vice versa, but would merely permit a single rate to have both interstate and intrastate application; nor would that method apply where it produced a total charge higher than would normally accrue under the application intrastate and interstate rates without use of the combined weights. Moreover, the commission's suggestions concern only the interstate rates and movements; a State may choose to approve a similar rate or tariff rule, but only the State concerned can so decide.—Id., 321 I.C.C. 726 (730)*.

See also Roasting of Coffee in Transit at Fort Worth, Tex., §216(g), n. 65.

430. Multiple-truck service.—[Vols. 18, 19].—Multiple-car shipments, §1(5), n. 648.—Rate on soap and related articles, minimum 66,000 pounds. predicated on use of two vehicles, is compensatory for respondent, a specialized carrier of such products, when minimum revenue therefrom exceeds its system-average expense per vehicle-mile; considered rate appears necessary to meet competition of reduced rail boxcar rates; found just and reasonable.—Soap & Related Art. between Kansas City & Jeffersonville, 316 I.C.C. 421 (424-5).

Although proposed rate on alcoholic liquors, minimum 96,000 pounds in not more than two vehicles, requires minimum trailer loadings of 48,000 pounds, mere mention of maximum weight laws of States traversed and fact that they are complex does not indicate that violations thereof would automatically follow, especially as protestants admit that no violations would occur if respondent used city tractors in pickup and delivery service. Protestants have failed to overcome presumption that respondent will operate in accordance with the State laws; proposed rate is not shown to be unlawful.—Alcoholic Liquors, Detroit, Mich., to Long Island City, 319 I.C.C. 404 (407, 408-9).

It must be assumed that two trucks would be necessary to carry proposed 60,000-pound minimum on malt beverages when respondent supplied no evidence as to tare weight of its equipment, and made no effort to rebut presumption raised by protestants that, in view of maximum gross weight permitted in the two States, proposed minimum could not be legally loaded on a single truck. Evidence indicates that, based on a two-truck movement, truck-mile earnings would be substantially

below respondent's system-average truck-mile cost and lower than its lowest estimate of out-of-pocket costs; proposed rates are shown to be compensatory.—Beverages and Empty Containers from and to N.J. & N.Y., 314 I.C.C. 792 (794-5).

445. Return loads.—[Vol. 19].—Clear intent of findings in 310 ICC 473 that return-load rules of motor carriers should provide, among other things, that consignee of return shipment be located at the same point or in the same commercial zone as consignor of the outbound movement, whether consigned to that consignor or another person, is that destination of the return load shall be the same point, or in same commercial zone, as the origin of the outbound load. Provision in proposed rule which would permit return loads to be consigned either to the outbound consignor or any person located at the same point or in same commercial zone as that consignor, regardless of whether or not destination of return load is the same as origin point of outbound shipment, does not conform to those findings.—Return Shipments Rule—Eastern, Southern Territories, 315 I.C.C. 267 (268).

Provision for application of the rule when excess mileage for the "return load movement" does not exceed 50 percent of mileage for the outbound shipment also fails to comply with those findings, since it would permit a return haul more than 50 percent greater than the outbound haul; "return haul" as used in that decision begins at destination of the outbound shipment, and the prescribed maximum excess mileage of 50 percent applies to distance from destination of the outbound load, not from origin of the return load.—Id., p. 269.

There should be a limit to excess mileage permitted under such rules even though a charge is provided for the empty mileage traveled to origin of the return load; assuming, in absence of challenge thereof, that proposed charge of 30 cents a mile is compensatory, such a charge nevertheless is generally substantially below the average loaded truck-mile revenue of motor carriers, and to permit empty mileage without limit, as would the proposed rule, would promote uneconomic transportation contrary to the national policy. Not approved.—Id., p. 269.

Any return-load rules which fail to conform to findings in 310 ICC 473 as thus interpreted should be promptly amended.—Id., p. 269.

Proposed rates on fatty acids from Franklin, Va., to points in New York, New Jersey, and Pennsylvania, and on acetic acid from Parlin, N.J., to Hopewell, Va., to apply only when there is a movement in both directions, do not conform with principles announced in 310 ICC 473, when proposed round-trip operation would entail empty movements up to 84 miles from northern destinations to Parlin and about 60 miles from Hopewell to Franklin, and respondent would absorb cleaning costs presently borne by shipper under a return-load rule.—Liquid Commodities between Va. and N.J., N.Y. & Pa., 316 I.C.C. 609 (612, 613).

See also Beverages and Empty Containers from and to N.J. & N.Y., §216(g), n. 65.

450. Routing; misrouting.—[Vols. 12-14, 16-19].—Part I, §1(6), n. 574, §15(8), notes.—Determination of rail carriers' routing practices has long been within the primary jurisdiction of the commission, and this jurisdiction is the more important in case of motor carrier routing where alternative routes are greater in both number and variety; furthermore, selection of the route is usually made on an ad hoc basis, precluding preshipment determination of its reasonableness. Unlike ratemaking, there is no statutory procedure by which routing practices may be challenged in advance, nor is the shipper by truck accorded the right given rail shippers by §15(8) to select and request a particular route of the carrier; survival of a damage claim for misrouting is therefore entirely consistent with the act and meets the proviso of the saving clause in §216(j).—Hewitt-Robins, Inc., v. Eastern Freight-Ways, Inc., Robins, 371 U.S. 84(87)*.

460. Demurrage.—[Vol. 13].—Schedules by which respondent proposed to cancel its participation in tariff rule governing charges for detention beyond specified free time of drivers and equipment, found not shown to be just and reasonable. Single instance referred to by respondent, by way of illustration, does not establish that the rule is unworkable, or that it is applied in a discriminatory manner; no shipper witness supported the proposal.

Some such rule is necessary to assure reasonably prompt release of equipment.—Removal of Detention Charges—Dixie Ohio Exp., Inc., 315 I.C.C. 389.

Failure of numerous and different rules to meet the problem in the past establishes need for a uniform rule, uniformly applied, to govern charges for detention of vehicles by consignors or consignees. However, proposed rule is concededly inappropriate for tank-truck and household-goods carriers, which maintain their own apparently effective rules; dump-truck operators should also be excluded in view of nature of their services. But iron-and-steel carriers should not be excepted merely because they consider the free time too generous; provisions of a rule for general application must apply to all members of the shipping public whose traffic is handled under similar circumstances, and to except one commodity, as distinguished from a wholly different type of service, would invite defeat of the rule by a multiplicity of claimed exceptions.—Detention of Motor Vehicles—Middle Atl. & New England, 318 I.C.C. 593 (606, 609)*.

And provisions of proposed rule defining consignor and consignee as parties to whom carrier delivers or from whom it receives the shipment, including warehousemen and connecting carriers with which it does not maintain joint rates, should be eliminated. The law is well settled that the party to whom shipment is consigned is the legal consignee, not the party in whose care the goods are shipped; status of warehousemen, pier operators, and carriers of other modes, who are not parties to the contract of transportation, cannot be changed by tariff provisions purporting to make them consignors-consignees for purpose of assessing charges in connection with transportation of a particular shipment (citing 59 ICC 205).—Id., p. 607.

Though in many instances the number of pieces in a shipment affects loading and unloading time more than its total weight, where varying free time is to be permitted weight is generally the most equitable basis, and actual weight should govern. However, restriction of the rule to shipments subject to "truckload rates" would cause confusion, since many rates are published on a "volume minimum" or only a specified minimum weight. Since conference exceptions to the classification provide for conversion of t.l. or volume minima upwards of 12,000 pounds to "truckloads," and such quantities are usually intended for handling as truckloads, rule should provide that where the rate on a shipment is subject to a minimum of 12,000 pounds or more it will be considered a truckload rate.—Id., pp. 606, 608, 609.

While provision for nonapplication when detention is wholly or partly attributable to carrier would be proper where tariff provides for shipper loading and unloading, where carrier has that responsibility the rule should be limited to delays caused by consignor-consignee, excluding time consumed by carrier in loading or unloading. Also, provision for computation of time where carrier is unable to meet a prearranged schedule should be eliminated as potentially discriminatory, since carrier could prearrange time for arrival at a preferred patron's premises and then arrive at a later, less convenient time, and in case of shipper loading-unloading free time would not commence until that had actually begun.—Id., pp. 608-9.

Proposed charges for detention include a penalty element, and shippers have no remedy under Part II for recovery of unreasonable charges. Prescription of lower charges at levels in effect under present conference rule will avoid such inequities, since current levels do not exceed adequate compensation for costs attributable to undue delays; should such charges prove too low fully to compensate respondents for such delays, increases will be considered upon a proper showing of costs. Amended rule prescribed for a 1-year test period for application by all respondents (with indicated exceptions) in Middle Atlantic territory and between that and New England territory.—Id., p. 610.

Carriers to Provide and Furnish Transportation

550. Duty to furnish transportation.—[Vols. 12, 13, 16-19].—Upon remand by the Supreme Court "for further consideration in light of Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., 371 US 84," the court holds that shipper's amended complaint, as-

serting a common law right of action against motor carriers for failure to provide service, states a common law right of action which survived enactment of the Motor Carrier Act. What effect that act or any other federal statute may have on the surviving common law cause of action will have to be determined by the District Court in further proceedings.—Pensick & Gordon, Inc. v. California Motor Exp., 323 F. 2d 769 (770)*.

Since the Hewitt-Robins case is not construed as holding that the Motor Carrier Act created a statutory cause of action cognizable in the federal courts in the first instance, or as changing the holdings in 359 US 464 or 216 F.2d 543, further proceedings in the lower court, grounded solely in common law rights, will be limited to plaintiff and those defendants as to whom diversity exists. Starting point for such further proceedings will rest on the long recognized doctrine that a cause of action exists against a common carrier for unjustified failure or refusal to transport freight. A situation where common law rights of the parties must be balanced in light of the pertinent federal statutes may well be disclosed; resolution can best be accomplished after a full airing and consideration of all the facts. Remanded for further proceedings consistent with views expressed.—Id., pp. 771-2.

While quantum of service required at a particular point and facilities needed therefor depend on the circumstances and are within defendant's managerial discretion, it is required to render reasonably continuous and adequate service at St. Joseph, Mo., so long as its authority for that point remains effective. Losses from operations do not justify discontinuance, without notice, of virtually all physical service and also of telephone service at that point. As a bare minimum defendant should reestablish a realistic holding out of service to St. Joseph shippers, including some reasonable means whereby the shipping public may contact it to request service; otherwise, revocation of its authority for St. Joseph will be considered. Compliance order entered.—Cham. of Com. of St. Joseph, Mo. v. Red Ball Exp. Co., 91 M.C.C. 513.

The general requirement that motor common carriers provide adequate service does not extend to service which may be provided through a combination of authorities.—Motor Common Carriers of Property—Routes and Service, 88 M.C.C. 415 (424).

Respondent is required by §216(a) and (b) to provide adequate service, equipment, and transportation facilities, and §§204(a)(1) and 208(a) authorize the commission to impose conditions respecting such service; also, respondent's certificate specifically requires the holder to render reasonably adequate and continuous service as authorized. Respondent has not complied with his certificate when he has not handled one shipment thereunder since it was issued, and now has no equipment suitable for performing service authorized; his infrequent and unsuccessful attempts to obtain traffic indicate either lack of interest on his part or lack of public need for the certificate; and there is no showing that he has any future intentions or plans to institute effective service. Order entered requiring respondent, within reasonable time as specified, to institute and maintain reasonably adequate and continuous service under his certificate and to comply with rule 1.99 of the Rules of Practice, failing which the question of revocation will be determined by further proceedings under §212(a).—Dallas—Revocation of Certificate, 94 M.C.C. 15 (17-8).

Classification of Property: Rules and Regulations

694. Purpose of classification, generally. —[Vol. 18].—The classification and the class tariff, though complementary, serve entirely different purposes: the classification is designed to reflect characteristics of each commodity by establishing relations of a multitude of articles to each other in the rate structure, all to end of insuring that relatively favorable or unfavorable characteristics are appropriately reflected in carrier's charges; the class tariff, on the other hand, reflects characteristics of the haul, not the commodity, by establishing a relationship between localities based on weight and distance. By use of the classification in conjunction with the class tariff carriers are able to publish reasonable charges for transporting all articles of commerce between all points in United States without necessity of publishing billions of separate and distinct rates.—General Increas-

es—Eastern Central Territory, 316 I.C.C. 467 (483).

695. Basis of distinction.—[Vols. 12-14].—Although language of §216(b) varies slightly from that of §1(6), the statutory duty imposed on rail and motor carriers to establish and maintain reasonable classifications of freight is the same. But though the commission has no authority to exempt carriers from that duty, it likewise has no authority to assume, contrary to fact, that elements considered in establishing reasonable classifications, such as density and value of service, have any material significance in transportation of shipments weighing less than 300 pounds. Labor represents a high percentage of cost of terminal service, which in turn is about 80 percent of total cost of handling small shipments, and the steadily rising cost of labor justifies treatment of small shipments as a separate and reasonable classification within meaning of the statute. Respondents have found it impossible to give effect to classification ratings on small shipments and at same time avoid continuing losses; proposed scales of constant or flat charges on six weight brackets of shipments under 300 pounds, regardless of classification ratings, are not inherently unlawful.—General Increases—Eastern Central Territory, 316 I.C.C. 467 (483, 484). [But see dissent.]

Difficulty of making classification revisions necessary to reflect current values of the various types of property transported and keep abreast of changes due to scientific, engineering, and industrial developments, noted.—Released Rate Rules—National M. Freight Classification, 316 I.C.C. 499 (500)*.

704. Density of commodity.—[Vols. 16, 18, 19].—See Overnite Transportation Co. v. United States, §216(g), n. 25.

735. Household Goods.—[Vols. 14-18].—Extra labor charges are not warranted merely because loading may be more difficult in one instance than another; it is carrier's obligation to perform the service contracted for by shipper, and number of men utilized is a matter of managerial discretion; if carrier wishes to speed up loading time, it is free to hire extra help at its own expense; and extra charges might be provided for shipments moving to or from a location above a certain floor, or where the goods are located more than a certain distance from closest point the vehicle can reach.—Koss v. A. A. Lexington Moving & Storage Co., 315 I.C.C. 355 (358).

Defendant's acceptance of order for movement of a shipment of household goods and giving of an estimate without first having viewed the goods to be moved violated §176.10(a) of the commission's regulations, which requires visual inspection of the goods by the estimator; purpose of estimate is defeated unless it is reasonably accurate, which requires such inspection.—Id., p. 358.

Divided-shipment rules of household-goods carriers are similar in principle to stopping-in-transit rules of other motor common carriers for partial loading and unloading.—John F. Ivory Storage Co., Inc. v. Atlas Van Lines, Inc., 316 I.C.C. 224 (226)*.

Certain of defendants' consolidation and divided-shipment rules are unjust and unreasonable because vague, indefinite, or ambiguous in that they fail to provide specifically that property of more than one family or establishment will be accepted as a single shipment when requirements of the rules are otherwise met; to provide that rates will apply, under a definite minimum weight, to combined weight of shipments consolidated under the rules, such entire shipment to move on one bill of lading; or to define points of origin or destination specifically, resulting in uncertainty of their application. Assailed rules ordered canceled to extent found unlawful.—Id., p. 226.

Proposed modified rule for settlement of household-goods claims, under which carrier moving goods of a shipper's employees at released rates undertakes, for a charge of $10 per shipment, to arrange for repair of damaged articles and make settlement with shipper for those lost or damaged beyond repair, subject to reimbursement by shipper for amounts exceeding carrier's liability, provides a lawful, economical, and efficient method of settling claims, beneficial to all concerned; carrier's agent at destination is in position to inspect shipment, see to repairs, and arrange for payment of claims without undue expense or delay, and proposed charge appears compensatory.—Claim Settlement on

Household Goods—U.S.A., 318 I.C.C. 359 (361, 362).

See also Time Payment Plan for Transporting Household Goods, §223, n. 5.

Regulations of the Commission

29 FR 6324, May 14, 1964, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, §§176.3(c), 176.7 and 176.8, amended, §§176.9 and 176.10, revised and §176.14 Claims for loss or damage, added, effective July 10, 1964.

29 FR 7390, June 6, 1964, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, §176.1 Definitions, revised, effective July 20, 1964.

29 FR 8481, July 7, 1964, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, effective date of order (29 FR 6324) postponed to Nov. 10, 1964.

29 FR 9711, July 18, 1964, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, §176.1 Definitios, effective date of order (29 FR 7390) postponed from July 20, 1964 to Oct. 1, 1964.

29 FR 16125, Dec. 3, 1964, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, effective date of order of May 6, 1964 (29 FR 7390) postponed to Dec. 30, 1964.

29 FR 19107, Dec. 30, 1964, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, effective date of order of May 6, 1964 (29 FR 7390) further postponed to Feb. 1, 1965.

30 FR 3597, Mar. 18, 1965, Part 176: Effective date of order of May 6, 1964 (29 FR 7390) postponed to April 2, 1965.

30 FR 3711, Mar. 20, 1965, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, §176.4 Accessorial or terminal services; tariffs providing therefor; packing and uncrating charges, amended and revised, effective on date of order.

29 FR 9835, July 22, 1964, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, corrections of order (29 FR 6324) in §176.8(c) and §176.12(a) and (b).

29 FR 14173, Oct. 15, 1964, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, effective date of order of May 6, 1964 (29 FR 7390) further postponed to Nov. 30, 1964.

29FR 15289, Nov. 14, 1964, Part 176: Transportation of Household Goods in Interstate of Foreign Commerce, §§176.3(c), 176.7, 176.8, 176.10 and 176.12 amended, and §176.14 Claims for loss or damage, added, effective Feb. 1, 1965.

30 FR 6117, Apr. 30, 1965, Part 176: Effective date of order of May 6, 1964 (29 FR 7390) postponed until further order, effective on date of order.

30 FR 16203, Dec. 29, 1965, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, effective date of regulations prescribed by order of May 6, 1964 (29 FR 7390) having been indefinitely postponed, currently effective regulations are published.

31 FR 8915, June 28, 1966, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, §176.1 Definitions, revised, effective August 1, 1966.

31 FR 8916, June 28, 1966, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, §§176.3(c), 176.7, 176.8 revised; §176.9(b) and (c) revoked and §176.9(d) renumbered as paragraph (b); §176.10(a) and (c) revised, §176.10(d) is renumbered as §176.10(f) and new rules numbered §176.10(d), (e), and (g) are added; §176.12 is amended, and a new rule numbered §176.14 is added, effective Sept. 30, 1966, and will apply only on household goods removed from shipper's premises on and after effective date.

31 FR 10193, July 28, 1966, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, effective date of regulations prescribed by order of June 7, 1966 (31 FR 8916) postponed effective date to Jan. 1, 1967.

31 FR 13446, Oct. 18, 1966, Part 7: List of Forms, Part II, I C Act, Form BOC 101, prescribed as required by §176.10(e); §7.101 BOC 101, Form BOC 101 to report to the Commission all instances in which actual charges exceed written estimates by 10 percent or more, pursuant to §176.10(e), effective Jan. 1, 1967.

31 FR 14879, Nov. 24, 1966, Part 176: Transportation of Household Goods In Interstate or Foreign Commerce, §176.10(f), amended, Estimates of Charges, Reweighting, effective on date of order.

32 FR 6843, May 4, 1967, Part 287: Freight Rate Tariffs, Schedules, and Classifications, §287.201 Released rates on household goods, amended, effective June 1, 1967.

Section 216. (c) [*§316(c) U.S.C.*] Through routes and joint rates.— [Unchanged except that the new sentence, below, was added at the end thereof by act of Aug. 24, 1962, Pub. Law 87-595, 76 Stat. 397. See vol. 10, p. 8195.]

* * *As used in this subsection, the term "common carriers by water" includes water common carriers subject to the Shipping Act, 1916, as amended, or the Intercoastal Shipping Act of 1933, as amended (including persons who hold themselves out to transport goods by water but who do not own or

operate vessels) engaged in the transportation of property in interstate or foreign commerce between Alaska or Hawaii on the one hand, and, on the other, the other States of the Union, and the through routes and joint rates so established and all classifications, regulations, and practices in connection therewith shall be subject to the provisions of this part.

Historical Note

The commission recommends that parts I, II, and III be amended to authorize the commission, after investigation and hearing, when necessary and desirable in the public interest, to require establishment of through routes and joint rates between motor common carriers of property and between those carriers and carriers by rail, express, and water.—Annual Report, 1962, p. 201; renewed, Annual Report, 1963, p. 19, Annual Report, 1964, p. 69.

Notes of Decisions

Volume 10—p. 8195; Volume 11—p. 9546; Volume 12—p. 10451; Volume 13—p. 11105; Volume 14—p. 11628; Volume 15—p. 12238; Volume 16—p. 12899; Volume 17—p. 13603; Volume 18—p. 14592; Volume 19—p. 15856.

3. Construction and interpretation.—[Vols. 10, 12-14, 16].— Authority for through routes and joint rates between motor carriers and railroads is in §216(c), and the Motor Carrier Act gives the commission power to regulate such routes and rates as well as standards and procedure for exercise of that power. Provisions of §216(c), (f) and (g) are almost identical with those in Part I applicable to railroads, except that establishment of joint rates and routes is voluntary under Part II and cannot be compelled; thus, on their face, statutes dealing with combined motor-rail operations from a complete, self-contained system of regulation. Language used by Congress in Part II leaves no doubt that provisions thereof, dealing with through motor-rail routes and rates, were intended to be exclusive. Reading Parts I and II together, exclusion of rail portion of motor-rail operation from Part I is inherent in its inclusion under provisions of Part II, while there is nothing to indicate that motor-carrier portion was intended to be included under Part I; and, absent a clear provision by Congress, courts have refused to cross-apply one Part of the act to another.—New York Central R. Co. v. United States, 267 F. Supp. 619 (626-8)*.

Section 216(c) is permissive in nature, and the commission has no authority thereunder to require carriers to establish through routes. Different modes may establish through routes and joint rates by voluntary arrangement; and while joint rates necessarily include through routes, latter may exist in their absence; a through route may be evidenced by an express or an implied arrangement, and its existence is a question of fact.—Freight, All Kinds, Chicago and Ind., Mich., Ohio, 322 I.C.C. 423 (427-8).

Under the 1962 amendment of §216(c), water carrier operating under jurisdiction of Maritime Commission between ports in Alaska and Washington became subject to the commission's jurisdiction, including any necessary administrative determinations under §5a, when it joined with a motor carrier subject to Part II in establishing through routes and joint rates between Seattle and points in Alaska; by its terms §5a applies to any common carrier subject to Part II, and the water carrier is subject to Part II to extent it engages in transportation described by §216(c) as amended.—Alaska S.S. Co. and Consolidated Freightways—Agreement, 322 I.C.C. 726 (728).

4. Interchange and transfer.—[Vols. 11, 12, 14-18].—In order that common carriers may fulfill their public obligation to provide adequate service and facilities for interstate transportation of property, the Act itself encourages interchange by providing, in §216(c), a correlative privilege of establishing through routes with other common carriers by motor, rail, and water. Therefore, restrictions against interchange are not readily imposed on authority granted.—Tompkins Motor Lines, Inc., Extension, 95 M.C.C. 472 (481).

10. Through routes and joint rates.—[Vols. 10-19].—Under §216(c) motor common car-

riers of property may establish through routes and joint rates, but no statute requires them, or authorizes the commission to require them, to do so. Therefore, carrier was free to discontinue its participation, with plaintiff and a third carrier, in tariff establishing through routes and joint rates for three-line transportation of meats and packinghouse products. After it did so the the three-line joint rate was no longer effective, since the through operation was eliminated by its action of withdrawing from participation.—Great Western Packers Exp., Inc. v. United States, 246 F. Supp. 151 (153, 154-5)*.

Although authority for establishment of through routes and joint rates between motor carriers and railroads is permissive, and the commission's conclusion in 219 ICC 245 (1936), that when a motor carrier enters into such joint rates and routes it assumes obligations similar to those of participating railroad in observance of §4, has been followed in a number of its later decisions, the very language used by Congress in enacting the Motor Carrier Act permits of no doubt that it intended to and did create a complete, self-contained regulatory scheme covering all-motor, joint motor-rail, and joint motor-water rates. While nothing in the law relieves the participating railroad from provisions of §4, nothing therein compels joint motor-rail rates to be treated as a unit to compel their treatment under §4(1). Entire thrust of Parts I and II of the act, read together, indicates a contrary conclusion.—New York Central R. Co. v. United States, 267 F. Supp. 619 (624, 626-7, 629)*.

Where it so intended, Congress explicitly covered by §4(1) carriers subject to another part of the act and, where intended, it explicitly subjected motor carriers to the same rules as railroads; exclusion of rail portion of joint motor-rail rates from Part I is inherent in its inclusion under provisions of Part II, while nothing indicates that the motor carrier portion was to be included under Part I; such a definite pattern of inclusions and omissions dictates the conclusion that provisions of Part II, dealing with through motor-rail routes and rates, were intended to be exclusive. Accordingly, the commission's ruling that motor-rail or motor-rail-motor rates are subject to §4, and its finding that considered joint rates for TOFC service violate long-and-short-haul provisions of §4(1), are annulled and set aside.—Id., pp. 622-3, 627, 630-2.

Motor carrier rates subject to a minimum weight in excess of the physical or legal carrying capacity of vehicles are not unlawful per se, nor are they contrary to law merely because on same level as rail incentive rates. Reduced joint motor-water-motor commodity rates on acids, chemicals, drugs, and toilet preparations from New York and New Jersey rate groups to Dallas, Fort Worth, and Houston, Tex., published as incentive rates on weight of shipments in excess of 40,000 pounds, are lawful when they are compensatory and no lower than necessary to meet competition of like incentive rates for rail-water-rail service.—Drugs and Related Articles from N.J. and N.Y. to Tex., 318 I.C.C. 67 (71-2, 76-7).

Proposed proportional rates published to apply in connection with a prior or subsequent movement in rail TOFC service do not violate §216(c) by requiring rail protestants to join in through routes with respondent against their will. Respondent does not seek to establish joint rates, and whether through routes would exist in their absence is a question of fact. The proposals do not require protestants to join in through routes with respondent, but they may freely agree to institute such through routes and to withdraw from such agreements. There is nothing inherently unlawful in the method of publication adopted by respondent within its managerial discretion.—Freight, All Kinds, Chicago and Ind., Mich., Ohio, 322 I.C.C. 423 (427-8).

Both proposed joint single-factor rail-motor rates from Flint and North Flint, Mich., and assailed joint rail-motor rates from Lansing and Pontiac, Mich., on automobiles in trilevel cars to Minneapolis, thence by motor carrier to destinations in Iowa, Minnesota, the Dakotas, and Montana, on somewhat lower level per vehicle for compact automobiles loading 15 per trilevel car than for standard automobiles loading 12 to a car, are shown to be generally compensatory on both out-of-pocket and fully-distributed cost bases and therefore just and reasonable. As the rail-motor routes are in all instances the low-cost routes com-

pared with protestants' truck-boat-rail or truck-boat-truck routes, and latter are not shown to possess any service advantage requiring protection, considered rates are not competitively destructive in violation of the national transportation policy.—Motor Vehicles (Trilevel-Truckaway) from Flint, Mich., 323 I.C.C. 215 (225-6); Wisconsin & Michigan S.S. Co. v. Grand Trunk W. R. Co., 323 I.C.C. 298 (306, 309, 312)*.

Joint rail-motor, under TOFC plan V, see Motor Vehicles from Kansas City to Ark., La., and Tex., §1(5), n. 663.

See also National Auto. Transporters Assn. case, NTP, n. 10 *substituted service*.

See also Intercoastal Any-Quantity Class and Commodity Rates, §305(a), n. 165.

11. Terminal carriers; or service terminal in character.—[Vol. 10].—Though proposed plan V TOFC rates ostensibly offer joint motor-rail-motor service, essentially they provide for a rail line-haul only, with motor pickup and delivery within terminal areas of the origin and destination points named, which under commission precedents is considered incidental to the line haul and performed for the line-haul carrier within meaning of §202(c)(2); and that 46 MCC 623, holding that motor carriers are not proper parties to joint rates when their service is performed within terminal areas, involved joint all-motor rates rather than motor-rail, is a distinction without a difference. As there is no showing whether any of the numerous points grouped with the named points are beyond the respective terminal areas thereof, and therefore no proof that respondent motor carrier would perform any line-haul service, the proposed rates are not shown to be lawful.—Rubber Articles, Philadelphia to Ill., Ky., Mich., & Mo., 319 I.C.C. 632 (635-6, 638).

12. Application of §4 of Part 1.—[Vols. 10-13, 17-19].—While the commission's ruling that §4 of Part I of the act applies to joint rail-motor or motor-rail-motor rates (derived from 1936 decision in 219 ICC 245 that has since been followed in a number of cases) may be well established, administrative interpretations do not become ruling law on the issue, regardless of the time they may have been in effect, if initial interpretation was erroneous or beyond statutory authority in the first place; administrative construction is merely an aid to judicial interpretation and is not binding on the courts. Provisions of the statute are clear. Part I of the act applies to transportation by railroads or partly by rail and partly by water, and §4(1) applies to railroads and interstate water carriers; Part II applies to motor carriers engaged in interstate or foreign commerce, and the term "interstate commerce" includes commerce which moves partly by motor vehicle and partly by rail, express, or water.—New York Central R. Co. v. United States, 267 F. Supp. 619 (624-5, 626)*.

Authority for establishing through routes and joint rates between motor carriers and railroads is §216(c), and Part II gives the commission explicit power to regulate such routes and rates; Part II provisions dealing with combined motor-rail operations form a complete, self-contained system of regulation that includes protection against the evil dealt with in §4(1); thus, Congress intended to and did create a self-contained regulatory scheme covering all-motor and joint motor-rail and motor-water rates. Also, where it was so intended, Congress explicitly covered carriers subject to another part of the act by §4(1), and explicitly subjected motor carriers to the same rules as railroads. Since inclusions and omissions form such a definite pattern, the maxim "Expressio unius est exclusio alterius" obviously applies, and leads directly to the conclusion that Part II provisions, dealing with through motor-rail routes and rates, were intended to be exclusive. Considered joint motor-rail or motor-rail-motor rates (for TOFC service) are not subject to provisions of §4; commission's order annulled and set aside.—Id., pp. 624, 626-7, 630-1.

Although Part II does not contain an aggregate-of-intermediates provision as does Part I, the commission has often held that through motor carrier rates which exceed the aggregate of intermediate rates are prima facie unreasonable. This presumption, however, is rebuttable.—Petroleum and Plastics from Texas to Indiana and Ohio, 316 I.C.C. 155 (156).

Section 216. (d) [*§316(d) U.S.C.*] Undue preferences or prejudices prohibited.—[Unchanged. See vol. 11, p. 9548.]

Amendment, see footnote p. 9548.

Notes of Decisions

Volume 10—p. 8200; Volume 11—p. 9549; Volume 12—p. 10453; Volume 13—p. 11107; Volume 14—p. 11629; Volume 15—p. 12239; Volume 16—p. 12900; Volume 17-p. 13605; Volume 18—p. 14593; Volume 19—p. 15858.

1. Construction and interpretation.—[Vols. 10-13, 17, 19].—While §216(d) refers only to common carriers, 18 USC §2 makes it an offense for any person to command, induce, or cause a violation of federal law; and the Elkins Act gives federal courts jurisdiction to issue injunctions to prevent violations of the Interstate Commerce Act. Therefore, anyone who commands, induces, or causes another to violate §216(d), dealing with discrimination, is a principal offender under 18 USC §2 and is subject to the court's injunctive power.—United States v. City of Jackson, Miss., 318 F. 2d 1(9)*.

The commission has power to implement §216(d) by issuance of a general order prescribing regulations to prevent race discrimination between passengers in vehicles or terminal facilities when used in interstate commerce; record of proceedings before the commission adequately supports its findings that the policy of requiring racial segregation in facilities used for interstate commerce has been practiced on such a regular basis that case-by-case action initiated by individual complainants is not an adequate remedy; existence of statutes in many states expressly requiring segregation by race is itself an adequate basis for such finding. The contested order is therefore a valid and binding order of the commission; injunction denied.—State of Georgia v. United states, 201 F. Supp. 813 (815)*.

Plaintiffs' attempt to inject a question of undue preference and prejudice is rejected as irrelevant to the issue or proof in suit to set aside order requiring cancellation of territorial rate increases resulting in higher rates to border points than to points beyond in another territory. Under §216(d) motor carrier rates must meet two separate and distinct criteria: (1) they must be "just and reasonable"; (2) they must not result in "undue or unreasonable preference or prejudice." The commission's report is clear that the higher border-point rates were condemned because in that respect they were not shown to be just and reasonable; it did not purport to find that they resulted in undue preference and prejudice, and such a finding was not necessary for the decision reached or the validity of the order.—Accelerated Transport-Pony Exp., Inc. v. United States, 227 F. Supp. 815 (821)*.

Condition of reduced rates on gasoline and fuel oil, that respondent be allowed continuous loading and unloading from 12.01 a.m. Monday to 11:59 a.m. Saturday, is not unlawful because it might possibly be prejudicial to other carriers; §216(d) specifically excepts from its prohibitions the traffic of another carrier.—Gasoline and Fuel Oil within Middlewest Territory, 316 I.C.C. 435 (439).

The commission has power to promulgate general regulations forbidding race segregation of passengers in vehicles or terminal facilities in use in operations in interstate commerce. Entry of orders under §216(e), after opportunity for hearing, requiring a particular carrier or carriers to cease and desist from discriminatory or prejudicial practices, is not an exclusive remedy for enforcement of prohibitions of §216(d); power to enforce provisions of part II by general rules or regulations is also conferred by §204(a)(6); rulemaking power there set forth is coterminous with scope of agency regulation and extends to the transportation of passengers and property by motor vehicle engaged in interstate or foreign commerce and to procurement and provision of facilities for such transportation [344 US 298].—Discrimination—Interstate M. Carriers of Passengers, 86 M.C.C. 743 (745)*.

Proviso of §216(d) excluding traffic of other carriers from its prohibition is not a defense against a finding of discrimination as between traffic of interstate shippers merely because assailed practice may also work to detriment of complaining carrier.—Armored Carrier Corp. v. B.D.C. Corp., 92 M.C.C. 665 (667).

15. Differences in and comparisons of rates.—[Vols. 10, 12-14, 16, 18, 19].—Part I, §3(1), n. 67.] General declarations as to competition, unsupported by evidentiary facts, and a mere showing of disparity of rates do not establish undue prejudice and preference.—Petroleum and Plastics from Texas to Indiana and Ohio, 316 I.C.C. 155 (158).

Although South Dakota shippers compete with shippers from other States in common markets, and rate relation existing for remainder of the year between South Dakota points and points in other States is disrupted during March and April of each year by application of frost law charges on class- or exceptions-rated traffic from South Dakota, general allegation that certain of the South Dakota shippers must absorb the frost law charges in order to compete in certain markets is insufficient to support a finding of undue prejudice. Complainants must demonstrate that the rate disparity caused by the frost law charges has operated to disadvantage of the South Dakota shippers, but evidence in this respect, particularly with reference to need of those shippers to absorb such charges, lacks the definiteness required to establish undue prejudice.—Traffic Bureau of Sioux Falls v. Barber Transp. Co., 316 I.C.C. 325 (348).

Nor is unjust discrimination established by showing that shipments subject to the frost law charges may move in same vehicle, over same highway, and for same distance within South Dakota as shipments not subject thereto, when there is no showing that shippers or receivers of freight in the same community within South Dakota pay different "prices" for movement of like shipments from same origin to same destination by same defendant or defendants [citing 168 US 144]. Thus the frost law charges are not shown to violate §216(d).—Id., p. 349.

A mere showing of differences in rates, coupled with general declarations respecting competition between shippers or receivers in same rate group, or between aggrieved localities and others, is insufficient to warrant a finding of undue preference and prejudice.—L.T.L. Pickup & Delivery Charges—from or to New York, 319 I.C.C. 230 (233).

Record does not support contention that protestant's t.l. minimum weight for interstate shipments of petroleum products, though higher than its intrastate minimum and exceeding volume of any shipments shippers supporting application wish to make, results in discrimination against interstate commerce in favor of intrastate. While the minimum weight is an integral part of any t.l. rate and is to be considered in determining nature of such a rate, whether discrimination exists can be determined only by reference to relation of the actual rates charged; no such evidence has been submitted.—Fleet Transport Co. of Ky., Inc., Extension, 88 M.C.C. 762 (765, 766).

20. Localities.—[Vols. 10-13, 16, 18, 19].—Part I, §1(4), n. 106.—Proposed multiple pickup-and-delivery and stoppage-in-transit rules provide that when Austin, Ind., is the origin no charge will be made for split deliveries at destination, and when it is the destination no stopoff charge will be made, also that charges on shipments originating at Austin will be determined on actual weight of each portion stopped in transit, at actual rate to point of stopoff, thus according Austin shippers and receivers lower charges for services provided under the rules than those at other points. As transportation circumstances affecting traffic to or from any of points involved do not appear to differ materially, there are no grounds for such preferential treatment of Austin; proposed rules found unlawful and ordered canceled.—Split Pickup, Split Delivery, Stopping—Canned Goods, 316 I.C.C. 202 (203-4).

Proposed establishment of reduced class rates reflecting short highway mileages between Greenville, Miss., and some 20 Arkansas points, while maintaining present rates on higher bases to other points served by same carrier or carriers, including certain intermediate points, appears fraught with undue prejudice and preference as between points excluded and included; not approved.—Class Rates between Greenville, Miss., and Arkan-

sas, 316 I.C.C. 629 (632).

That 6-percent increase proposed in transcontinental rates and charges excludes some areas and some traffic is not unduly discriminatory; lawfulness of particular rates is not in issue, and approval is restricted to lawfulness of the proposed increase as applied to the basic rates.—General Increases—Transcontinental, 319 I.C.C. 792 (804).

25. Shippers.—[Vols. 10-14, 16-19].—Evidence before the commission revealed that, though originally some carriers furnished helpers without charge for loading and unloading of t.l. freight in Pittsburgh-Wheeling area for their own convenience, others were forced to adopt the same practice to remain competitive, with result that a service costing some $28 per day for each helper was furnished free of charge to some persons and denied to others. There was substantial evidence that furnishing of such free service violates §216 in giving an undue and unreasonable advantage to persons who receive the service, to localities where the service is performed, and to t.l. traffic between the Pittsburgh area and origins or destinations in middle Atlantic territory, and in subjecting persons, localities, and traffic not receiving such free service to unjust discrimination and undue prejudice and disadvantage. The commission's order requiring carrier defendants before it to cease the unlawful practice and to publish the remedial tariff rule prescribed, sustained.—Teamsters Joint Council 40 (J.C.) v. United States, 238 F. Supp. 301 (307)*.

Since the competitive air-freight rates on higher-rated articles are lower than respondent's rates for normal service, possibility that proposed any-quantity all-freight rates for expedited service between Atlanta and Chicago will result in unjust discrimination between shippers is remote.—Freight, All Kinds—Expedited Service—Chicago-Atlanta, 314 I.C.C. 663 (666).

Section 216(d) is intended to protect shippers, not competing carriers; protestant carrier association's contention that proportional all-commodity rates established to apply in conjunction with rail plan III TOFC service unduly prefer larger shippers is not supported by complaint of any shipper.—Proportional Rates between Harrisburg & Points in Pa., 315 I.C.C. 499 (503); moreover, the proportional rates apply to traffic of all shippers who choose to use plan III service to or from Harrisburg.—Freight, All Kinds, between Harrisburg and Pa. Points, 316 I.C.C. 41 (44).

While holding in 236 US 662 that the statutory prohibitions against unjust discrimination include the giving of preferences by means of consent judgments or waiver of defenses open to the carrier had reference to carriers and limitations of actions under Part I, that principle applies equally to the giving of unlawful preferences to shippers under Part II. Since the defense of the statute of limitations may not be waived as to shipments barred through failure to file action at law during the statutory period, voluntary payment of any overcharge claims on such shipments would violate the anti-discrimination provisions.—Bemis Bro. Bag Co. v. Felten Truck Line, Inc., 316 I.C.C. 417 (418).

Condition of reduced rates on gasoline and fuel oil, that respondent be allowed continuous loading and unloading from 12:01 a.m. Monday to 11:59 a.m. Saturday, is not inherently prejudicial or preferential; the rates apply for any shipper at involved origins who meets those requirements, and there is no evidence that any shipper at another origin would be disadvantaged in any respect.—Gasoline and Fuel Oil within Middlewest Territory, 316 I.C.C. 435 (439).

Since a box is an indefinite unit, publication of rates on bananas in cents per box, without a tariff definition of "box," would open the door to undue preference and prejudice forbidden by §216(d).—Bananas, Mobile & New Orleans to Idaho, Mont., Oreg., 318 I.C.C. 140 (142).

Although refinery which distributes sugar from Port Wentworth, Ga., and in whose traffic respondent has participated, considers the south Atlantic States to be its primary market area and objects to proposed commodity rate from Louisiana origins to North Carolina destinations, on ground that its Louisiana competitors should not have such rates available to points in its primary market area, no undue prejudice is shown to result therefrom.—Sugar from Louisiana to North Carolina, 319 I.C.C. 107 (109).

Proposed increased pickup and delivery

charges to be added to New York line-haul rates on traffic moving through that city to or from points in area just north thereof and on Long Island are not shown to be discriminatory when protestants have available carriers serving Long Island which do not participate in those charges and render service at a somewhat lower level of rates, and do not show that they have used services of carriers participating therein. Moreover, protestants have not shown that services rendered for their competitors in or near New York-New Jersey metropolitan area are of like and contemporaneous nature and performed under substantially similar conditions.—L.T.L. Pickup & Delivery Charges—from or to New York, 319 I.C.C. 230 (233).

Proposed reduced rates on meats and packinghouse products from the Midwest to mountain-Pacific territory do not unduly prefer midwestern packers and unduly prejudice west coast packers and livestock growers. There is no substantial evidence that they will harm west coast packers, and as those States do not begin to produce all the hogs required to meet consumer demand in the area, freight rates can have only a negligible effect on competition between those large regions in a common market; west coast packers who slaughter will retain important advantage of supplying fresh pork, which commands premium prices. Moreover, the commission has no right to preserve any absolute freight-rate advantage enjoyed by west coast protestants in the face of convincing proof that respondents, midwestern packers, and some west coast packers would thereby be injured.—Meats and PHP, Central & Western to Far Western States, 319 I.C.C. 667 (675-6).

Proposed proportional rates on t.l. shipments of freight, all kinds, in trailers furnished by shipper or consignee, applicable in connection with a prior or subsequent movement in rail TOFC service, are not unjustly discriminatory in violation of §216(d) when they apply to traffic of all shippers or consignees who choose to use the service. Section 216(d) is intended to protect shippers, not competing carriers, and no shipper appeared to protest the proposals.—Freight, All Kinds, Chicago and Ind., Mich., Ohio, 322 I.C.C. 423 (427).

Applicant's proposed lease of terminal facilities from supporting cement shipper will not adversely affect public interest; rental charges assertedly will be adequate to amortize shipper's cost of constructing such facilities and there is no indication that any improper practices would result or that applicant would derive any undue transportation advantages; inasmuch as applicant will be required as a common carrier to serve all persons needing its service indiscriminately and without undue preference or prejudice, appropriate remedies are available under the act if its rental of terminal facilities from that shipper should result in improper discrimination and prejudice or unlawful rebates.—Southern Bulk Haulers, Inc., 88 M.C.C. 299 (306).

Contention that applicant's weekly charge for daily pickup in its parcel-delivery service discriminates against infrequent shippers, particularly individuals desiring to make shipments from their residences, affords no ground for denial of extension application; there is no showing that protestant has challenged such charge in an appropriate rate proceeding, or that applicant has refused shipments brought to its offices to avoid the service charge.—United Parcel Service, Inc., Extension, 89 M.C.C. 709 (743)*.

Defendant's provision of free intrastate service in transportation of cash letters to a Milwaukee bank specifically named in its Wisconsin intrastate authority from country banks which are correspondents thereof and also customers of defendant in interstate transportation of like papers to Chicago, for which it makes appropriate charge, while withholding such free intrastate service from its other interstate customers in Wisconsin and in Indiana and Michigan, falls directly within the proscription of §216(d). Cease-and-desist order entered.—Armored Carrier Corp. v. B.D.C. Corp., 92 M.C.C. 665 (667).

See also Claim Settlement on Household Goods, §217(b), n. 50.

30. Passengers.—[Vols. 10-17, 19].—Part I, §3(1), n. 103—No State may require racial segregation of intrastate or interstate transportation facilities. The question is no longer open; it is foreclosed as a litigable issue.—Bailey v. Patterson, 369 U.S. 31 (33). [Not

arising hereunder.]

Policy and practice of affording separate passenger terminal facilities according to race, enforced or authorized by state law or by any other form of state action, not only offends provisions of the statute but also violates the Fourteenth Amendment; in addition, insofar as state-imposed segregation bears upon interstate travelers, it offends the Commerce Clause. Defendant city and its officials, by maintaining signs on sidewalk adjacent to passenger terminal which indicate that any portion of those facilities are separated on the basis of race, effect racial segregation therein in violation of the Commerce Clause, federal statutes, and the commission's regulations. And defendant carriers, though not responsible for the signs, are proper parties in injunction proceeding since they utilize those terminal facilities. Injunction should be issued against carrier and noncarrier defendants.—United States v. City of Jackson, Miss., 318 F. 2d 1 (5-7, 10, 17)*.

Louisiana statutes requiring separation of passengers according to race in common carrier terminal facilities, and posting of signs therein designating those facilities for such separate use, conflict with the commission's order in 86 MCC 743 (Part 180a in Title 49 of the Code of Federal Regulations), contravene §216(d), and are unconstitutional and null and void; enforcement thereof enjoined.—United States v. Lassiter, 203 F. Supp. 20 (22-3, 25).

Inasmuch as enforcement by defendant city and its police department of racial segregation in the facilities, including restaurant facilities, of city bus terminal regularly used by interstate motor carriers of passengers violates both §216(d) and the Elkins Act, plaintiff is entitled to injunctive relief as a matter of law; permanent injunction granted.—United States v. City of Shreveport, La., 210 F. Supp. 708 (710-1).

Discriminatory practices in violation of §216(d) are being followed by regulated motor common carriers of passengers: in a substantial part of United States many Negro interstate passengers are subjected to racial segregation in several forms, including seating in buses and use of eating, restroom, and other terminal facilities; such segregation is sometimes enforced by carriers or their employees, in many cases by local officials purporting to apply State or local segregation laws and ordinances; many terminals display signs designating facilities by race, and Negro passengers are often unlawfully required to establish their interstate passenger status affirmatively to avoid racial segregation in use of terminal facilities—a showing not required of white passengers.—Discrimination—Interstate M. Carriers of Passengers, 86 M.C.C. 743 (745-6, 753)*.

The commission's experience in administering part II verifies the prevalence of such practices, and instant record is convincing that case-by-case action on individual complaints is not by itself an adequate remedy and that prescription of general regulations to supplement the remedy provided by §216(e) is warranted. As §216(d) is directed to common carriers, the regulations prescribed reflect this statutory limitation; and since commission's jurisdiction does not extend to operations of an interstate carrier when it is transporting no interstate passengers and its vehicle is in fact engaged exclusively in intrastate commerce, they reflect that limitation also.—Id., pp. 746-7, 753.

Although many bus operators, for reasons of efficiency, combine their operations in interstate and intrastate commerce, voluntary transportation of interstate and intrastate passengers on same vehicle does not justify separation of interstate passengers on a racial basis; nor may interstate passengers using such common facilities be subjected to any inquiry as to whether they are traveling in intrastate or interstate commerce. Therefore, to enforce the statutory prohibition of unjust discrimination against interstate passengers it is necessary to prohibit the use in interstate operations of any vehicle or facility on or in which segregation is practiced.—Id., p. 747.

Regulations (49 CFR 180a (1) et seq.) set forth in appendix B are reasonable, necessary, and lawful; prescribed.—Id., p. 753.

In connection with rule prohibiting seating of passengers on vehicles on basis of race, color, creed, or national origin, posting of appropriate notice to that effect aboard buses carrying interstate passengers is desirable. However, posting of such notice for an indefinite period will not be necessary, and that

requirement will terminate concurrently with effective date of requirement that plainly legible notice to same effect be printed on each ticket sold for transportation on a vehicle operated in interstate or foreign commerce.—Id., pp. 748-9.

Utilization in interstate commerce of terminal facilities involving separation of any portion thereof, or use thereof, on basis of race, creed, color, or national origin, including waiting room, restroom, eating, drinking, and ticket sales facilities, is prohibited. However, this rule would not apply to independent establishments where buses stop solely to pick up or discharge occasional passengers, or which merely sell tickets and post schedules, without more. Meaning of "terminal facilities" as used in the regulations, and sections thereof which that meaning affects, discussed.—Id., pp. 749-51.

For same reasons that justify posting of signs in buses, rule requiring posting of appropriate sign or placard containing full text of the regulations at "terminal facilities" utilized by carriers is also warranted.—Id., pp. 751-2.

A rule providing that carriers are not to be relieved of any obligations under the act is also justified; the regulations will not alter their duty to provide service to the public and to provide for the safety and comfort of passengers. However, it is not the purpose of the regulations to change any lawful functions of a carrier, and carrier may still exercise necessary reasonable control over its passengers; it may also continue to provide a bona-fide reserved-seat service, or offer its equipment for exclusive use of charter parties, provided that in so doing it engages in no discriminatory practice.—Id., p. 752.

And a requirement that respondents report to the commission any interference by others with their observance of the regulations, which the commission has power under §§204(a)(7) and 220(a) to prescribe, is a logical substantive aid to enforcement of the requirements of the act and will inform local officials and others of the requirement which the commission places on interstate motor carriers of passengers to refrain from unjust discriminatory practices.—Id., p. 752.

Applicant's transportation of stockmen between Ames, Iowa, and stockyards at Chicago is not a discriminatory service favoring desirable long-distance traffic, compared with Greyhound's inclusive service to all intermediate points, particularly in view of imposed restriction to passengers picked up or discharged at the stockyards; applicant offers a special service somewhat analogous to a door-to-door, on-call service, designed for a specific class of passenger for whom Greyhound's regular-route scheduled service has little appeal.—Myers, 89 M.C.C. 125 (129)*.

40. Preference within carrier's control.—[Vol. 19].—A motor common carrier has a duty to supply adequate and efficient service without undue preference, unjust discrimination, or destructive competitive practices. Extension authority for new furniture must be denied motor carrier which also conducts a storage and warehousing business, and in addition controls and is managed in common with a forwarder that routes a substantial volume of traffic to its warehouse and terminal; economic advantages resulting from those dual capacities and identity of controlling interests, coupled with applicant's ability to control routing of certain shippers' traffic, would enable it to compete on such preferential terms that proposed operation might seriously affect interest of the public dependent on existing motor carriers in the area; this situation offers opportunities for unjust discrimination and unfair competitive practices against the public, shippers, and retail furniture dealers.—M.G.M. Transport Corp. Extension, 89 M.C.C. 699 (701).

Section 216(e) [§316(e) U.S.C.] Complaints to and investigation by commission; power of commission to fix reasonable rates, regulations, etc.—[Unchanged. See vol. 10, p. 8204.]

Notes of Decisions

Volume 10—p. 8204; Volume 11—p. 9551; Volume 12—p. 10455; Volume 13—p. 11108; Volume 14—p. 11630; Volume 16—p. 12901; Volume 17—p. 13606; Volume 18—p. 14595; Volume 19—p. 15863.

2. Construction and interpretation.—[Vols. 10, 12, 13, 16, 17].—Although §216(e) provides that when the commission finds a rate or rule to be unlawful it shall prescribe a lawful rate or rule, instant record is too meager to warrant prescription of any rule in lieu of defendant's helper-service rule found unlawfully ambiguous. But though complainant contends that cancellation of the unlawful rule without prescription of a rule for the future will leave defendant without a tariff rule governing loading and unloading, thus permitting unlawful discrimination, should defendant engage in unlawful discrimination it will be subject to penalties provided by §222(c).—Middle Atlantic Conference v. Transport Corp., 321 I.C.C. 308 (312).

3. Complaints to, and jurisdiction of Commission.—[Vols. 10-12, 14, 17-19].—The Commission has no authority under part II to consider allegations of unreasonableness, unjust discrimination, or undue prejudice in motor-carrier rates on past shipments; but a carrier subject to the act may not charge or receive greater or less compensation than that specified in its tariffs, unless authorized to do so by competent authority.—Koss v. A. A. Lexington Moving & Storage Co., 315 I.C.C. 355.

While the commission had declined in the absence of unusual circumstances to entertain an adversary proceeding concerning unreasonableness under part II of the act prior to institution of a damage suit in court covering the same matter, it has ample authority to require motor common carriers to observe reasonable practices in connection with their rates and classifications and to consider complaints alleging unreasonable practices relating thereto.—Winthrop Laboratories Div., Sterling Drug v. Dorn's, 325 I.C.C. 654 (655).

See also the Hewitt-Robins case, §216(b), n. 450.

4. Parties.—[Vols. 12, 16-19].—See Arbet Truck Lines case, §216(g), n. 14.

5. Discrimination against interstate commerce; intrastate rates and practices—[Vols. 10, 12].—See Fleet Transport Co. of Ky. case, §216(d), n. 15.

Rules, Regulations, Practices Prescribed

81. When no order necessary.—[Vol. 17].—Where rates charged are found inapplicable, it at once becomes the duty of the carrier to refund any overcharges, without an order or other action by the commission.—Koss v. A. A. Lexington Moving & Storage Co., 315 I.C.C. 355 (356).

See also Bemis Bro. Bag. Co. case, §216(d), n. 25.

Section 216. (f) [*§316(f) U.S.C.*] Commission empowered to establish just division of joint rates.—[Unchanged. See vol. 10, p. 8207.]

Notes of Decisions

Volume 12—p. 10457; Volume 13—p. 11109; Volume 15—p. 12240; Volume 19—p. 15864.

Section 216.(g) [§316(g) U.S.C.] New rates; determination of fairness by commission; suspension.—[Unchanged. See vol. 11, p. 9552.]

Amendments, see footnotes, vol. 10, p. 8208, vol. 11, p. 9552.

Notes of Decisions

Volume 10—p. 8208; Volume 11—p. 9553; Volume 12—p. 10457; Volume 13—p. 11109; Volume 14—p. 11630; Volume 15—p. 12240; Volume 16—p. 12901; Volume 17—p. 13607; Volume 18—p. 14596; Volume 19—p. 15864.

2. Construction and interpretation.—[Vols. 10, 11, 15, 18].—The grant or denial of suspension of a proposed rate is discretionary with the commission and is not judicially reviewable, unless the commission's action exceeds the powers delegated to it by Congress. Suspension of tariff covering participation of a carrier in three-line through route and joint rate, filed at same time that participation therein of one of original participants was cancelled, was within the commission's power under §216(g); although the rate, established before considered tariff was filed, remained the same, withdrawal of one of participating carriers changed the status. The rate was new to carrier added as participant in the tariff and, in addition, that carrier's action created a new joint rate for transportation by it, plaintiff, and a third carrier; before then traffic could have moved over routing of those carriers only by a combination rate.—Great Western Packers Exp., Inc. v. United States, 246 F. Supp. 151 (154-5)*.

Even if three-line joint rate in issue be considered as not a new rate because it is the same as that under which plaintiff and two other carriers formerly operated, addition of a different carrier to the tariff [at the time one former participant withdrew] was a regulation or practice affecting the joint rate which the commission is authorized to suspend under §216(g). And the commission's finding that the taking effect of considered tariff schedule could result in rates, regulations, and practices in violation of the act, was a discretionary determination which the courts have no power to overturn. Suspension order of the commission sustained.—Id., p. 155.

Insofar as plaintiff seeks relief from the court looking to suspension of motor carrier rates in issue because the commission refused to exercise its discretion to suspend, the court is without jurisdiction under the decision in Arrow Transp. Co. v. Southern R. Co., 372 US 658. Therefore, the court lacks jurisdiction either to grant an injunction to vacate the Board of Suspension's decision not to suspend proposed rates, or to enter an order suspending the contested tariffs.—Movers' and Warehousemen's Ass'n v. United States, 227 F. Supp. 249 (251).

As to plaintiff's prayer for mandatory injunction that the commission be directed to investigate lawfulness of the contested rates, an order to the commission to do what it was free in the exercise of its discretion not to do in regard to proposed rate reductions, at least absent arbitrary and capricious conduct, is not available in action seeking relief on the narrow ground that the rates were illegal because published in violation of rate bureau's §5a ratemaking agreement approved by the commission.—Id., pp. 250, 251.

Although proposed assembling and distribution rates restricted to forwarder traffic are higher than respondent's contract rates under §409, which it claims are on depressed level, they are lower than like rates it maintains which are not so restricted, and thus, if made available to consolidators and others shipping under like circumstances, as required by interpretation of §408 in 272 ICC 413, would constitute a reduction rather than an increase.—Assembling and Distribution Rates between Points in N.Y., 316 I.C.C. 606 (607-8).

4. Reasonable rates required by statute.—[Vols. 10-15, 17].—The act directs that charges for motor carrier services be "just and reasonable" and declares unlawful "unjust and unreasonable" charges. It is this standard by which proposed rates are judged, and the burden of proof is on plaintiff to show that the proposed rate is just and reasonable. An essential element of a just and reasonable rate is that it be compensatory, and this is basic to the commission's approach to ratemaking. The function of the court on review is to determine whether the commission's finding that the proposed rate in issue is not compensatory should be affirmed; if so, it follows that the commission's ultimate conclusion, rejecting the proposed rate, must also be sustained,

for it is clearly within the commission's discretion to reject as unlawful a rate which does not return out-of-pocket costs to the carriers. And in view of the commission's finding that the proposed rate was not compensatory, it was unnecessary for it to take into consideration the national transportation policy or §15a(3).—Middlewest Motor Freight Bureau v. United States, 234 F. Supp. 151 (153)*.

Though plaintiffs argue that the commission's conclusion is unjustified because it failed to use a net revenue test to determine compensativeness, and that they would be "better off" at the proposed rate on butter than in carrying grain, their present eastbound traffic between the points involved, grain is exempt from rate regulation by the commission, and to base rates on regulated items on a net revenue comparison with items exempt from rate regulation would ignore the standards of compensativeness used by the commission and approved by the courts, and could lead to destructive ratemaking. While courts should be alert to make certain that no statutory requirement is overlooked, the administrative ratemaker has broad discretion to establish standards by which the statute is applied, and the cost evidence presents a rational basis for the commission's conclusion as to noncompensativeness of the rate in issue. The commission's order sustained.—Id., pp. 154-5.

5. Burden of proof.—[Vols. 10-19].—Part I, §15(7), n. 35.—Under the limited review permitted, it cannot be held that the commission erred in finding that plaintiff had not met its burden of proof when, in absence of a showing of costs of owner-operators performing the physical transportation, evidence relating to plaintiff's system average expenses, comparisons of proposed rates with those of other motor carriers and railroads on same commodities between same points (without reference to earnings under compared rates), and excess of total revenues under proposed rates over those under existing rates were inadequate to support a finding that proposed rates would be compensatory.—Malone Freight Lines, Inc. v. United States, 204 F. Supp. 745 (755)*.

Respondents have the burden of proving that rates resulting from proposed grouping of Huntingdon Valley, Pa., with Philadelphia instead of with Trenton, N.J., would be just and reasonable; that burden is not met by mere fact that Huntingdon Valley is closer to city limits of Philadelphia than of Trenton, when no competitive necessity for proposed change is shown, and, as present grouping follows that employed by railroads, the competitive situation as between motor carriers as a group and the railroads would be substantially altered, and earnings of a number who do not favor the change, as well as earnings of proponents, would be affected.—Huntingdon Valley, Pa.—Rate Group Amendment, 314 I.C.C. 680 (681, 682).

The burden of proof as to rates republished in suspended schedules without change rests with protestants; substantially all the evidence adduced by opposing parties relates to the proposed changed rates; those unchanged are not shown to be unlawful.—Beverages and Empty Containers from and to N.J. & N.Y., 314 I.C.C. 792 (795).

A respondent seeking rate changes has the burden of proving, as a minimum requirement, that the rates proposed would be compensatory, especially where the rates would be substantially below the normal level; proposed rates may not be approved when record is devoid of cost data or other evidence from which their compensativeness might be determined.—Chemicals, Other Articles, Kearney, N.J., to New York Area, 315 I.C.C. 71 (72).

When proposed rates, though not suspended, were made subject of investigation upon protest, and order of investigation specifically embraced any changes in those rates, subsequent increase of all the rates involved made no change in respondents' statutory burden of proof.—Magazines, Old Saybrook, Conn., to New Eng., N.Y. & N.J., 315 I.C.C. 281 (282).

Proposed point-to-point rate in same amount as rate now applicable under intermediate rule is not a reduction; respondent therefore has burden of proving it just and reasonable only insofar as it is affected by increase in minimum weight.—Iron or Steel Articles from Portage, Ind., to Chicago, 316 I.C.C. 255 (256).

Proposed commodity rates are not initial rates when carriers participating therein now maintain class rates on the traffic; according-

ly, burden of proof is on the participating carriers.—Dairy Products from Ill., Minn., and Wis. to Fla., 316 I.C.C. 693 (694).

Although proposed commodity rate on sugar is published to cover new service authorized in certificate recently issued, prior to issuance thereof respondent concurred in class rates published on sugar between the points involved, and while there is argument that such class rates were provided for joint-line movements with other carriers, they are not shown to have been restricted against application over the single-line routes authorized by the new certificate. Proposed rate is therefore a changed, rather than an initial, rate and the statutory burden of proving its lawfulness is on respondent.—Sugar from Louisiana to North Carolina, 319 I.C.C. 107 (108).

Section 216(g) imposes a statutory burden of proof on proponents of changed rates or tariff rules, but where a charge becomes effective before institution of an investigation by the commission there is no "changed" rate, and the statutory burden of proof is on those who assail the rates—not by terms of §15(7) or §216(g), but by §7(c) of Administrative Procedure Act. In such a case it must be determined whether protestants have met their burden of proof even though their evidence, standing alone, fails to establish by any clear preponderant weight the unjustness and unreasonableness of the assailed charges. —Terminal Charge on Order Bills of Lading Shipments, 315 I.C.C. 327 (329)*.

The public interest necessarily involved in the commission's quasi-legislative function of ratemaking cannot be determined merely on basis of who proved what by a clear preponderance of the evidence. Terminal charge in issue became effective without suspension following approval of a similar charge in 308 ICC 741; but, following reversal of that decision in 310 ICC 531, like charges published by other carriers were suspended. Thus, if "burden of proof" were construed in any strict or hypertechnical sense, charges in the suspension cases would stand condemned, while identical charge in instant proceeding would be permitted to remain in effect; such result would stultify the administrative process.—Id., pp. 328, 330.

As pointed out in 307 ICC 59, the question of who has the burden of proof is of more theoretical than practical importance; carriers involved in rate controversies are expected to aid in their disposition by making available all pertinent information within their knowledge, regardless of where the burden of proof lies. The commission is not required to view protestants' evidence in a vacuum; had they introduced none, it would have been obliged to supplement the record rather than permit the anomalous and discriminatory situation which would result from condemning and condoning identical charges.—Id., p. 330.

Although protestants' evidence, measured solely by its weight, falls short of clearly proving unreasonableness of the charge in question, they have submitted as much evidence as could reasonably be expected in light of information available to them; it was sufficient to require respondents to produce evidence justifying that charge on basis of facts peculiarly within their knowledge; respondents have not met protestants' showing as to comparative costs of handling order and straight bill of lading shipments by any showing that the charge is for services peculiar to order shipments and does not substantially exceed additional cost thereof; in such circumstances it may not be approved.—Id., pp. 331-2.

There is no affirmative burden of proof on respondent to establish lawfulness of proposed rates which became effective before institution of investigation.—Proportional Rates between Harrisburg & Points in Pa., 315 I.C.C. 499 (503).

There is no burden on respondent to justify a rate in effect when investigation concerning its lawfulness was instituted.—Canned Goods from Chicago, Ill. to Twin Cities, 316 I.C.C. 221 (223).

Though a proponent of changed rates has burden of proving that they are just and reasonable, where order of investigation included rates of another respondent which were already in effect, latter respondent has no statutory burden of proof.—Talc from Emeryville, N.Y., to Ohio, 316 I.C.C. 197 (198).

Because investigation of respondents' all-commodity distance rates was instituted after they became effective, respondents have no affirmative burden of proof. However,

protestants, by cost evidence indicating that a majority of considered rates are either noncompensatory or only slightly above out-of-pocket costs, have established a prima facie case that they are unjust and unreasonable, which is not rebutted by one respondent's evidence of revenues and earnings. Rates under investigation ordered canceled.—All Freight between Points in Ohio, 318 I.C.C. 731 (736).

Burden of proof is upon respondents to show that proposed reduced rates are just and reasonable. A minimum requirement in this respect is a convincing showing that the rate would be compensatory for the service to be performed; burden not sustained.—Glass Bottles From Muskogee, Okla., to Chicago. 323 I.C.C. 258 (263).

Since proposed rules providing a time payment plan for charges on household goods shipments are published as an alternative to present payment rules set out elsewhere in the tariff and are subject to them, they represent a change in the existing rules and burden of proving them just and reasonable is on respondent.—Time Payment Plan for Transing Household Goods, 323 I.C.C. 677 (678).

Though investigation of proposed rate on foodstuffs from Newark, N.J., group to Saylesville, R.I., was instituted before effective date thereof, and burden of proof is therefore on respondent, in view of respondent's stipulation to abide by decision in related complaint proceeding as to lawfulness of like rates from same origins to Providence, R.I., that aspect may be disregarded.—New England Motor Rate Bureau, Inc. v. Stone's Exp., 321 I.C.C. 767 (774).

See also Overnite Transportation Co. v. United States, APA, 5 USC, *burden.*

Initial rates: Where both initial and reduced rates are proposed from same origin, there is no burden on respondent to prove reasonableness of the initial rates, and record is devoid of any substantial evidence to show that they are unlawful; while permitting the initial rates to remain in effect will result in respondent's rates being improperly alined, distance considered, because it has not met its burden of proof respecting the reduced rates, this circumstance does not warrant finding the initial rates unlawful, and in view of the meager and inconclusive evidence submitted by the parties, the issues are resolved in favor of those not having the burden of proof. Respondent is free to initiate changes in its rates which it deems reasonable, and protestant to challenge lawfulness of the initial rates by filing complaint and assuming the burden of proof.—Frozen Foods from Caribou, Maine, to Midwestern Points, 314 I.C.C. 721 (724).

Where respondent, under temporary authority for substantially the same service, published initial rates per mile on considered traffic to three of four destination points, republication of same rates computed in amounts per truckload, upon receipt of permanent authority, represents merely a change in form of publication; as proposed rate to the fourth destination is an initial rate, there is no burden on respondent to justify level of any of the rates involved.—Wine from Canandaigua, N.Y., to Florida and Alabama, 316 I.C.C. 246 (247, 248).

Where the proposed rate is respondent's initial rate on considered traffic as a common carrier, in lieu of former contract-carrier rate, it does not have the burden of proving that the rate is just and reasonable.—Paper Articles between Chagrin Falls, Ohio & Goshen, Ind., 316 I.C.C. 393.

Since rates proposed are initial rates, respondent does not bear the burden of proof. Protestant's cost evidence, having little probative value, does not show proposed rates to be noncompensatory; protestant failed to meet its burden of proof.—Cable, Iron & Steel, Lumber between S. Dak. and Missile Sites, 316 I.C.C. 427 (430).

Burden of proof does not rest on respondent to show that proposed initial rates are just and reasonable; therefore, although record does not afford basis for determing whether they are compensatory and respondent's cost data are inadequate, proposed rates are not shown to be unlawful.—Wastepaper and Other Articles, Wis. to Wabash, Ind., 316 I.C.C. 464 (466).

Although respondent does not have the burden of proof as only initial rates are involved, proposed rates may not be approved when the evidence indicates that they fail to cover out-of-pocket costs.—Paint & Paint Materials, Chicago to Kansas City, Kans.,

318 I.C.C. 331 (334-5).

In proceedings involving initial rates the burden of proof is not on the respondent; protestants, having requested that the commission suspend and investigate the rate schedules involved and that ultimately an order be entered canceling the schedules, are proponents of an order within purview of §7(c) of Administrative Procedure Act, hence have the burden of proof. This follows from the basic structure of the Interstate Commerce Act, under which a carrier has the right to initiate rates as to which, aside from the suspension provisions, there is no presumption of unlawfulness and which their assailant in a complaint proceeding has the burden of proving unlawful; on their face, §§15(7) and 216(g) shift that burden only to the proponent of rate changes, as distinguished from initial rates which are published for the first time for a particular movement.—Animal Feed, Miss. and Tenn. to Midwest and Southwest, 319 I.C.C. 257 (259)*.

Protestants, in comparing initial rates proposed by respondent, a class III limited-commodity carrier, with average costs of class I and II general-commodity carriers, were aware of the differing character of his operations, since he had gone forward first with his evidence, and it was incumbent on them to adduce costs based on substantially the same type of operations in order to make a prima facie showing of noncompensatory nature of the rates. The best evidence available to protestants, if it does not meet the requirements of a prima facie showing, imposes no obligation on respondent to rebut such insufficient evidence or to assume the burden of proof.—Id., pp. 260-1. [See also concurrences.]

Where contract carriers have converted to common, their newly established common-carrier rates which are on same level as their prior contract-carrier rates are initial rates, as to which protestants have the burden of proving unlawfulness.—Cement from Hudson, N.Y., to New England and Pa., 319 I.C.C. 235 (238).

There is no statutory burden on a respondent to prove justness and reasonableness of initial rates; the only probative evidence to support protestant's contention that respondent's initial rates following its conversion to common carrier are too low is a showing that proposed rates on glassware would yield minimum earnings considerably below those under protestant's corresponding rates; such a meager showing does not warrant finding the proposed rates unlawful.—Various Commodities—Ill., Ind., Ky., Mo., Ohio, Pa., W. Va., 315 I.C.C. 576 (577-8).

Burden of proving initial rates just and reasonable does not rest on the respondent; in the light of deficiencies in protestants' cost study, record does not justify finding that proposed rates are unlawful.—Salt and Pepper from Kans. and La. to Ala., Fla., and Ga., 315 I.C.C. 695 (697-8).

Justification for increases: When a motor carrier files a new rate, §216(d) requires that it be just and reasonable; and when it seeks a change in rates, §216(g) places the burden of proof on the carrier. Plaintiffs were fully aware that lawfulness of proposed territorial rate increases, where they would result in higher rates to border points than to points beyond, was in issue and that such rates have been condemned in other general revenue proceedings. No uncontroverted evidence of segregated costs for the traffic subject to the rates found unlawful was presented to the commission, and plaintiffs do not claim that such border-point rates are unremunerative without the proposed increases; nor is there any inherent inconsistency in finding those rates unreasonable and finding that the increased rates of all the carriers as a group were otherwise reasonable. Plaintiffs did not meet their burden of showing that the increases resulting in higher rates for shorter than for longer hauls were just and reasonable; the commission's order requiring cancellation of such rates, sustained.—Accelerated Transport-Pony Exp., Inc. v. United States, 227 F. Supp. 815 (818-20)*.

Respondent eastern central carriers are in need of additional revenues, and proposed increases in commodity t.l. or volume rates, 5 cents on shipments of less than 24,000 pounds, 3 cents on those weighing 24,000 to 29,000 pounds, and 2 cents on heavier shipments, would result in operating ratios of 91.1, 97.7, and 107 percent for the three weight brackets, compared with present

102.7-percent ratio on all such traffic. Though those increases cover only about 20 percent of required additional revenue, and if operating ratios alone were the criterion a smaller increase on the lowest bracket and a larger increase on the highest would be more appropriate, the proposal reflects respondents' considered judgment as to competitive effect of the adjustment; such increases appear necessary to maintain versatile and adequate motor service and are just and reasonable.—General Increases—Eastern Central Territory, 316 I.C.C. 467 (468, 473-4, 482).

Proposed increases in l.t.l. and any-quantity class or commodity rates, 20 cents on shipments of 1,000 to 1,999 pounds and 32 cents on those of 300 to 999 pounds, are just and reasonable in relation to the aggregate additional revenues needed, are necessary for maintenance of a sound rate structure, and will aid respondents in maintaining their overall transportation service. Because of lower revenue return on the lower weight bracket a greater increase is needed thereon; resulting operating ratio will still be high (about 98.2 percent), and proposed increase is justified to minimize subsidization of that traffic by larger shipments; increase proposed on the higher bracket should produce a more favorable ratio of about 91 percent, and resulting difference in levels appears reasonable to maintain present relationship of those weight groups.—Id., pp. 468, 474, 482-3.

Proposed distance scales of constant charges on shipments under 300 pounds, graduated according to weight and without regard to classification ratings, are justified by disproportionately high cost of handling such small shipments, are not inherently unlawful, and in the aggregate are not excessive when on basis of a composite operating ratio of 99.4 percent they would barely cover total costs. Despite admitted imperfections, proposed charges are a step in direction of tariff simplification, and as an attempt to solve the small-shipment problem should not be condemned merely because they represent a departure from traditional ratemaking practices.—Id., pp. 474, 485, 486.

As labor is the predominant cost factor in accessorial services, proposed 10-percent increase in charges therefor, including handling of order-notify shipments, stopping t.l. shipments for partial loading or unloading, reconsignment and diversion, and storage and rehandling, appear necessary to avoid losses in providing such services in view of the rapid rise in clerical and platform labor costs.—Id., pp. 474, 482.

Proposed rates as a whole should result in an overall increase of about 2.6 percent in respondents' revenues, about 80 percent of which would come from shipments under 2,000 pounds, reflecting their proportionately higher terminal costs; based on all facts of record, the proposed rates should result in an operating ratio on all traffic somewhere between 93 and 95 percent, and are just and reasonable. However, as the constant charges on small shipments are an experiment in ratemaking which may not be successful, approval is without prejudice to reopening for further hearing after a reasonable test period, either on petition of parties or on commission's own motion.—Id., pp. 471, 478, 482, 486.

Though in numerous general increase proceedings considerable weight has been given average operating ratios of carriers concerned, as a group, and increases expected to result in average ratio of about 93 percent have been approved, a ratio of 93 percent is not an immutable standard. In view of recurring attacks on use of operating ratios to justify revenue needs, particularly respecting effects on such ratios of transactions between carriers and their affiliates or subsidiaries, carriers are admonished that, in future, expense items of representative carriers should be shown in greater detail, and all pertinent information regarding carrier-affiliate relations should be disclosed. However, since standards should not in fairness be changed without due notice, and record in instant proceeding was made before the first announcement of such future requirements, respondents in instant proceeding are not bound thereby.—General Increases—Transcontinental, 319 I.C.C. 792 (803).

Also, in future, studies should be made which reflect the carriers' revenues and expenses in relation to the specific traffic on which the proposed general increases are to apply, such as the transcontinental traffic for

which they are now proposed.—Id., p. 803.

Justification for reductions: Where a respondent seeks to reduce its existing rates below those of other carriers transporting the traffic, it must first be clearly established that the reduced rates are compensatory; without such a showing, the reduced rates must be condemned, irrespective of whether the reductions are desirable from standpoint of a particular locality or shipper.—Frozen Foods from Caribou, Maine, to Midwestern Points, 314 I.C.C. 721 (723).

Carrier proposing a change in its scheduled charges has the burden of proving as a minimum requirement that the proposed charge would be compensatory for the service performed, especially where it would be below the normal level, and a charge for a service may not be found just and reasonable merely because it is on the same level as that maintained by competitors. Record is devoid of probative cost data from which compensativeness of proposed reduced stopoff charge could be determined; not approved.—Stopoff Charge on Salt—Michigan to Central Territory, 315 I.C.C. 66 (68).

Though proposed l.t.l. commodity rates are stated to be pool-car distribution rates to enable respondent to meet competition of railroads and unregulated local cartage companies, volume of considered traffic handled by the railroads and local truckers is not shown and the rates are not restricted to distribution service; proposed rates are not shown by convincing evidence to be compensatory or necessary to meet existing competition; not approved.—Paper Articles from West Virginia to Kentucky and Ohio, 315 I.C.C. 270 (271, 272).

Although conversion of respondent's l.t.l. class rates on machinery and other articles to a point-to-point commodity-rate basis was designed to avoid application of general class-rate increases to that traffic, the commodity rates were not published until after effective date of the increased class-rate schedules published by respondent's tariff agent for its account; thus, although they are the same as the former class rates, they represent a reduction in the legal rates, and, having been suspended before their effective date, the burden is on respondent to prove that such changed rates are just and reasonable.—Machinery and Related Art.—Hampstead, Md., to New Eng., 316 I.C.C. 71 (72).

Proposed addition of iron or steel roofing or siding to tariff item allowing aluminum roofing or siding to move in mixed shipments with other building, roofing, and insulating materials would result in reduction in rates on the iron or steel material when moved in mixed truckloads; minimum requirement to sustain burden of proof not met where respondent failed to show that proposed rates would be compensatory.—Iron or Steel Roofing or Siding Between Illinois, Indiana, and Iowa, 316 I.C.C. 97 (97, 98).

Under §216(g) a carrier proposing to establish assembling or distribution rates lower than normal rates, under authority of §408, has the burden of showing that they would be just and reasonable, including the minimum requirement of compensativeness.—Assembling and Distribution Rates between Points in N.Y., 316 I.C.C. 606 (608).

Although burden is on respondent to show reasonableness of proposed reduced rates, it did not submit any cost data or other evidence of compensativeness of proposed rates on telephone housings, and extent to which protestant's cost data are overstated cannot be determined; not approved.—Dry Goods and Telephone Housings within Central Ter., 318 I.C.C. 175 (179).

An affirmative showing of compensativeness is a minimum requirement in meeting the statutory burden of proving that changed rates are lawful. Respondent has not met its minimum burden of showing compensativeness of proposed reduced t. l. rate on tea extract when its cost-revenue comparison was based on revenue from a straight shipment of tea extract although proposed rate was designed to apply on, and was published to meet rail competition on mixed shipments of coffee and tea extract. While existing rail competition justifies establishment of rates which are only slightly in excess of the out-of-pocket costs, to the extent that out-of-pocket cost exceeds the revenue which would be realized on particular mixed shipments, the proposal is not shown to be compensatory.—Tea Extract, New Orleans to

Chicago. 325 I.C.C. 103 (105)*.

Proposed 3-cent reduction in respondent's present rates on dairy and food products when trailers are spotted at shipper's dock after 6 p.m. for loading by shipper's employees, and picked up the same night or next morning, is not shown to result in compensatory rates or increased profit; while some reduction may be warranted, shipper's additional cost for loading without the driver's help is admittedly less than 3 cents and it also benefits from less congestion at its dock during productive daytime hours. Not approved.—Dairy and Food Products between Chicago and Ohio & Mich., 316 I.C.C. 373 (374, 376-7).

Respondent has not met its burden of proving lawfulness of proposed reduction of class rates between certain points to reflect reduced highway mileage, when it made no attempt to show kind or volume of traffic transported in either direction, nor were actual performance studies made to show specific routes and distances covered; further, respondent submitted no evidence in formal docket which would establish compensativeness of proposed rates; not approved.—Class Rates between Greenville, Miss., and Arkansas, 316 I.C.C. 629 (631-2).

A respondent is entitled to meet existing carrier competition if it otherwise sustains the statutory burden of proof, an essential element of which is compensativeness of proposed rates.—Air Cleaners, Blowers, Fans—Buffalo to Ill., Ohio, Mo., 314 M.C.C. 779 (780); fact that a competitor maintains a rate the same as that proposed does not relieve respondent of its burden of proving proposed reduced rate is just and reasonable.—Aluminum from Heath, Ohio, to Dolton, Ill., 316 I.C.C. 38 (40); and a mere statement of desire to compete with another rate, without further support, has no value to justify a proposed reduction.—Pie Filling from Duluth, Minn., to Fargo, N. Dak., 314 I.C.C. 797 (798); the fact of such competition, including if practicable the volume of movement, should be established by competent testimony. Moreover, proposed reductions cannot be approved without evidence from which it can be found that the rates will pay their way and thus not be burdensome on other traffic.—Meats and Packinghouse Products from Chicago to South, 315 I.C.C. 699 (701).

Respondents' statutory burden to establish justness and reasonableness of proposed reduced rates includes a showing that they would be compensatory.—Rags from Winnepeg to Twin Cities, 315 I.C.C. 147 (150); it must appear with reasonable certainty that proposed rates will be compensatory for the service to be performed. This requirement may be met by submission of dependable cost data or by comparisons with other rates on the same or comparable commodities in the same general area.—Wearing Apparel —Pennsylvania to New York, N.Y., Area, 315 I.C.C. 28 (30); burden not met when evidence is not convincing that proposed rate would be compensatory. Moreover, record fails to establish competitive necessity for such rate.—Iron and Steel Articles, Johnstown, Pa., to Newark, Ohio, 315 I.C.C. 716 (717, 718); nor is burden met where respondent presented no cost data but relied wholly on the rates of two competitors, particularly when rates on the commodity are being investigated by the commission because of the considerable variances and disparities between the same points.—Bananas, Gulfport, Mobile & New Orleans to Indianapolis, 316 I.C.C. 194 (196).

6. Issues in the investigation.—[Vols-12-19].—As issue raised by order of investigation was lawfulness of rates, charges, rules, etc., in schedules named therein, "or as the same may be amended or reissued," rates in issue are those currently in effect on the traffic concerned, as increased subsequent to issuance of that order.—Magazines, Old Saybrook, Conn., to New Eng., N.Y. & N.J., 315 I.C.C. 281 (282).

Where higher combination rates applied prior to effective date of joint commodity rates under investigation, the joint schedules constitute changes within meaning of §216(g).—Machinery and Equipment, Central, South, Midwest, 316 I.C.C. 236 (237).

Although shipper protestants suggest that there are substantial transactions between respondents and their subsidiaries or affiliates, involving rentals of terminals, offices, and equipment, not weighted in cost data presented in justification of proposed general

increases, protestants did not identify any such transactions and record does not permit finding that they have any important effect on average operating ratio of carriers concerned; however, the matter is worthy of further development, and in any further hearing in instant proceeding to consider effect of the approved increases, or in some similar proceeding, the parties, in cooperation with commission, should produce all information required to show the precise effect of such transactions on carriers' operating ratios.—General Increases—Eastern Central Territory, 316 I.C.C. 467 (473, 481).

As respondent now maintains all-freight rates on forwarder traffic between many of involved points, subject to a maximum weight of 20,000 pounds per trailer, and proposed rates on 30,000-pound maximum weight would alternate with the present rates, depending on which produces the lower charges, the proposed rates are in effect reduced charges.—General Commodities, Eastern, Central & Middlewest Ter., 321 I.C.C. 504 (507); and though revised rule in respondent's tariffs provides for substitution of rail line-haul service at carrier's, rather than at shipper's option, lawfulness of that rule is not in issue; however, as a practical matter respondent could not deny its principal shipper the privilege of choosing between all-motor and substituted rail-for-motor service; accordingly, merits of proposed rates are dealt with in light of fact that, whether or not shipper's option exists as a matter of law, it must be respected as a matter of fact.—Id., p. 509.

Although protestant questions legality of respondent's contractual arrangement with a railroad covering movement of loaded and empty trailers to and from rail yards in connection with plan II TOFC service, because there are no provisions in the rail tariffs for substitution of motor service under plan II rates, the railroad is not a party to suspension proceeding and none of its tariffs are in issue; therefore, protestant's contention regarding possible technical violations in any of the rail tariffs may not be considered. Moreover, as respondent has authority to serve the points involved and its operation between them cannot be considered unlawful, that contention has no bearing on lawfulness of proposed charges for moving shippers' trailers in like service in connection with plan III TOFC movement.—Freight, All Kinds, & Empty Trailers bet. N.J. & N.Y., 322 I.C.C. 429 (430).

10. Evidence, in general.—[Vols. 10-19].—Plaintiff's offer of evidence relating to rental rates of an unidentified truck leasing company and annual earnings of four unidentified owner-operators was not in rebuttal of any facts appearing in any statements in suspension proceeding, but served merely to aid plaintiff's case in chief after its deficiencies had been pointed out by protestants; under Rule 1.49 of the commission's Rules of Practice, such evidence was properly stricken.—Malone Freight Lines, Inc. v. United States, 204 F. Supp. 745 (755)*.

A commission is not bound to accept expert opinion evidence tendered by a proponent when the experts are in disagreement and interested, the subject is inherently uncertain, and the opinion is founded on a basic theory which the commission could lawfully disapprove; and the commission, as the tribunal appointed by law and informed by experience, would not be bound, even in absence of cross-examination or rebutting testimony, to accept cost evidence fallacious on its face. But none of those principles is decisive where the subject matter is fairly susceptible of measurement and the expert was concededly competent and purported to base his analysis on a cost-finding method published (though not formally adopted) by the commission itself. It would be inconsistent with policy underlying Administration Procedure Act for an agency to reject such testimony on basis of arguments which the expert never heard and which he might well have been able to answer.—Davis & Randall, Inc. v. United States, 219 F. Supp. 673 (678-9)*.

The proposal of plaintiff's counsel, upon request by a commission accountant for permission to examine the cost analyst's work sheets and other data underlying plaintiff's cost exhibits, that any such data which might go into making of the decision be made evidence of record and that, if the commission's examination developed any criticism of the study, plaintiff should have opportunity to cross-examine and offer rebuttal evidence,

was appropriate in light of aborting of the modified procedure as result of the railroads' withdrawal of their protest.—Id., pp. 676, 682.

Plaintiff's counsel refused to allow examination of the underlying data unless plaintiff was furnished all information conveyed by the cost section to the commission; and if, thus, plaintiff improperly refused access to data needed by the commission for a hearing, it cannot be heard to complain of lack of one. It was entirely proper for the commission to have its staff prepare a report, which could lead to abandonment of the investigation. Whatever plaintiff's rights would be if the commission used data dehors the record to support an order made without a hearing, it was not entitled to inspect that kind of internal communication in advance of a hearing; but if the employee who made the report testified, plaintiff would be entitled to see relevant portions of his report as a possibly inconsistent statement.—Id., pp. 676, 682.

Respondents' claim that Huntingdon Valley, Pa., station of Reading Co. has been abandoned, urged in support of proposed regrouping of that point with Philadelphia in lieu ofpresent grouping with Trenton, N.J., which follows rail grouping, is not supported by reference to any rail publication; Huntingdon Valley is not included in list of abandoned stations in railroads' rate basis tariff, and is included in their list of open and prepay stations.—Huntingdon Valley, Pa.—Rate Group Amendment, 314 I.C.C. 680 (681).

Motion to strike as incompetent certain testimony of an official of protestant railroad concerning pickup and delivery service to be performed under proposed motor rates, over-ruled; there is no definite indication that such testimony may properly be designated incompetent, and respondent was in the best position to clarify any misstatements concerning those services.—Salt from Williston, N.Dak., to South Dakota, 314 I.C.C. 787.

Protestant's statements regarding traffic study questionnaires, traffic survey reports, and photo copies of freight bills obtained from unnamed conference carriers have little value and are not considered when underlying data are not of record.—Wearing Apparel—Pennsylvania to New York, N.Y. Area, 315 I.C.C. 28 (29).

Although respondent claims that total vehicle mileage shown in its 1959 annual report was erroneous, and that a greater total mileage was actually traveled, resulting in a lower per-mile operating expense, its failure to attempt to correct the mileage shown in its annual report is not explained; latter figure is therefore regarded as correct, especially as in 1960 it reported a considerably lower mileage, for operation with a larger fleet of vehicles, than that claimed for 1959.—Lead, Aluminum, Brass, Bronze, Copper Metals—Kofman's, 315, I.C.C. 344 (345-6).

Motion to strike respondent's statement of fact for nonconformity with Rule 1.50 of Rules of Practice, overruled; although respondent's traffic manager, who attested the statement, did not state affirmatively that he had personal knowledge of facts set forth therein, statement consists chiefly of matters normally within personal knowledge of a traffic manager.—Roofing & Building Materials, Jersey City, N.J., to N.C., 315 I.C.C. 519.

Since affidavit accompanying respondent's opening statement fails to state affirmatively that affiant had knowledge of the facts stated as required by rule 50 of the Rules of Practice, it is deficient and respondent's statement of facts is not considered.—Salt and Pepper from Kans. and La. to Ala., Fla., and Ga., 315 I.C.C. 695 (696).

Though a cost comparison such as presented by protestants, based on a public statement of commission's cost finding section reflecting operating data for carriers in considered territory, may contribute a prima facie showing of noncompensativeness if unrebutted, it may not be accepted as proof of non-compensativeness as between numerous carriers of general commodities, usually over regular routes, and two limited-authority carriers of one low-valued commodity over irregular routes.—Talc from Emeryville, N.Y., to Ohio, 316 I.C.C. 197 (201).

Evidence in respondent's reply statement which does not rebut protestants' evidence but attempts to correct deficiencies in respondent's cost presentation is supplementary rather than rebuttal evidence, in contravention of Rule 1.49 of Rules of Practice; motion

to strike granted.—Sugar, Beet or Cane, New Orleans, La., to Columbus, Ga., 316 I.C.C. 230 (230-1).

Respondent's lower operating ratio during period since considered rates became effective has little probative value, standing alone, to show compensativeness of the rates, as the difference in operating ratio may have been caused entirely by other factors.—Machinery and Equipment, Central, South, Midwest, 316 I.C.C. 236 (238).

Protestants presented cost data purporting to show rates from Wabash to representative Wisconsin destinations would be below cost, but proposed rates were published to apply from specified points in Wisconsin to Wabash; such cost data, directed against rates which are not in issue and which do not in fact exist, are irrelevant and has no probative value.—Wastepaper and Other Articles, Wis. to Wabash, Ind., 316 I.C.C. 464 (465).

Motion to strike verified statements of two witnesses for protestant carrier conference, overruled when one witness is employed by the conference as a cost analyst and his statement is directed solely to statistics submitted by a witness for respondent, and statement of the other, who is manager of protestant's rate department, concerns matters within normal scope of knowledge of his position.—Bakery Goods, Chattanooga, Tenn., to Southern Points, 316 I.C.C. 573 (573).

Presentation of cost data for first time in respondent's reply to protestant's statement of facts and argument contravenes Rule 1.49(a) of Rules of Practice when protestant submitted no cost evidence in its statement; motion to strike granted.—Absorption Pier Loading and Unloading Charges, 316 I.C.C. 577 (578).

Statements of traffic manager and statistical and cost director of proponent, signed by witnesses and sworn to before duly commissioned notary public, containing declarations that they are familiar with issues involved and have knowledge of facts stated, are in substantial conformity with Rule 1.50 of Rules of Practice when their testimony relates to matters of which witnesses could reasonably be expected to have knowledge in course of their duties.—Aluminum from The Dalles, Oreg., to Adrian, Mich., 316 I.C.C. 625 (626).

Legality of certain commodity descriptions and probability of empty return movements are relevant and material to determination of lawfulness of proposed schedules; motion to strike protestant's statement concerning such matters, overruled.—Bakery Goods, Foodstuffs & Groceries from N.J. & N.Y., 316 I.C.C. 639 (640).

Motion to strike as immaterial and irrelevant that portion of protestant's statement of facts and argument relating to respondent's operating rights, denied; rates without proper operating authority are unlawful.—Iron and Steel Articles from St. Louis to Kansas City, 318 I.C.C. 45 (46).

Objections to certain exhibits on ground that the witness is not a cost accountant and was not qualified to testify as to cost data, overruled; the data are computations from respondent's records, and the objections go to their weight rather than admissibility.—Candy and Confectionery, New York State to Midwest, 318 I.C.C. 409 (410).

Knowledge of facts stated in testimony of respondent's assistant traffic manager relating to movement of considered traffic is implicit in his position; motion to strike as hearsay overruled.—Candy & Confectionery, Ill. & N.Y. to Ill., Ky., N.Y. & Pa., 318 I.C.C. 540 (541).

Protestant's motion to strike certain testimony on ground that statement was self-serving, overruled; witness is a traffic manager of respondent, presumably with knowledge of the facts given under oath.—Substituted Rail Service between Jackson and New Orleans, 318 I.C.C. 629 (631).

Time-and-motion study, purportedly representative of respondent's operations, is inadmissible when respondent refused to furnish underlying data on ground that protestants might use such information for customer solicitation; production or disclosure of underlying data, sufficient to permit verification thereof, is prerequisite to admissibility of an exhibit of this nature as a safeguard against introduction of spurious evidence.—Sugar from Ovid, Colo., to Iowa Points, 318 I.C.C. 636 (637).

An examiner's report in another proceeding is not good evidence, and ordinarily should

not be considered in disposition of an unrelated proceeding. However, when examiner's report and recommended order in case cited was affirmed and adopted by the commission as its own, that report may be considered as a decision of the commission.—Road Paving Materials between Points in New England, 319 I.C.C. 95 (96).

Although rail protestants' witness was not permitted to read into the record statements made in pleadings presented to Board of Suspension, the statements concerned were in respondent's reply to the petitions for suspension, a document open to public inspection and as such admissible in evidence. [See Rule 1.81 of Rules of Practice.] Those statements, to extent they are reproduced in rail protestants' brief, are therefore considered.—Sugar from Louisiana to North Carolina, 319 I.C.C. 107 (108).

Though evidence of State maximum weight laws is not irrelevant or immaterial where a carrier publishes a rate subject to a volume minimum with limitation of number of vehicles that may be used, it would be inconsistent with effective administration of the act to encumber records in rate proceedings with engineering studies relative to such State requirements when obligations of certificated carriers to comply with such laws are so clear and so generally recognized. Protestants have failed to produce evidence that there is such reasonable expectation that proposed rate on alcoholic liquors, minimum 96,000 pounds in not over two vehicles, will result in violations of maximum weight laws of States traversed as to cast on respondent the burden of producing evidence showing that its proposed minimum weight is realistic in light of its duty to obey those laws.—Alcoholic Liquors, Detroit, Mich., to Long Island City, 319 I.C.C. 404 (409).

Exhibit covering shipments by express agency was not prepared by respondent's witness, nor does it appear that he had any knowledge of facts asserted therein; there was no attestation by person who prepared the exhibit, nor was he offered as a witness; exhibit thus fails to comply with Rule 50 of Rules of Practice; motion to strike the exhibit and reference thereto in respondent's testimony, granted.—Clothing, in Multiple Shipments, from Nanticoke, Pa., 315 I.C.C. 181 (182).

Though examiner rejected protestant's and all but one respondent's statements of fact for noncompliance with Rule 1.50 of Rules of Practice because verifying witnesses excepted matters of "information and belief," the statements themselves and tenor of attestation indicated that witnesses were attesting to truth of the information presented, and matters stated were such as witnesses, all officials of high rank in their organizations, could reasonably be assumed to have knowledge of in their official capacities; considered statements are in substantial compliance with Rule 1.50 and pleadings of which they are a part are properly admissible in evidence; examiner's rejection thereof, overruled.—Magazines, Old Saybrook, Conn., to New Eng., N.Y. & N.J., 315 I.C.C. 281 (282).

Since respondent's reply statement was not sworn to as required by Rule 1.50 of the Rules of Practice, no weight may be accorded to cost data therein. Also, in accordance with rule 1.49 of the Rules of Practice, the reply statement should be confined to rebuttal of the opening statement; respondent's cost data should have been submitted in its opening statement.—Bananas, Gulfport, Mobile & New Orleans to Indianapolis, 316 I.C.C. 194 (196).

Although, upon reconsideration of order denying protestants' request for oral hearing to cross-examine respondent's cost witness, on ground that such request did not comply with Rule 1.53 of Rules of Practice, it appears that protestants' request was sufficiently in compliance with commission's rules, order of denial is sustained because approval of proposed rate is not based on respondent's cost evidence and therefore protestants' rights have not been prejudiced and requested cross-examination would serve no useful purpose.—Foodstuffs from Hudson, N.Y., to Chicago, Ill., 315 I.C.C. 184.

Objections to respondent's cost data on ground that witness was not qualified as a cost expert, did not have underlying data with him, and did not have personal knowledge concerning preparation of the study, overruled; witness was subjected to cross-examination by protestants, and objection goes more to

weight to be accorded the data introduced, rather than their admissibility.—Sugar, New York and Philadelphia to Bellefontaine, Ohio, 316 I.C.C. 27 (28).

Knowledge acquired in line of official duty or employment is not objectionable as hearsay.—Ground Wood Boards, Sheets—Bemidji, Minn., to Chicago, 314 I.C.C. 774 (775).

Copy of exhibit introduced by respondent at a hearing before State commission, which shows its operating expenses for 1958, 1959, and 1960, was properly received in evidence in suspension proceeding; motion to strike as hearsay, overruled.—Salt from Williston, N. Dak., to South Dak., 314 I.C.C. 787 (788).

Objection to certain exhibits showing proponent's estimated line-haul costs on considered traffic, on ground that underlying evidence supporting adjustments made is based on hearsay, overruled; the adjustments were based on results of a traffic study made by carrier's operating personnel and introduced in evidence by its general manager; though latter did not personally conduct the study, it was undertaken at his direction and under his supervision, and as general traffic manager it is his duty to keep informed of the factors developed by the study.—Ground Wood Boards, Sheets—Bemidji, Minn., to Chicago, 314 I.C.C. 774 (775).

Motion to strike entire testimony and exhibits of protestant's witness on ground that they are in nature of hearsay because derived from records which were not prepared by him and of which he had no personal knowledge, overruled; evidence in dispute was obtained under the witness's supervision in regular course of his employment.—Radio & Television Cabinets, Jackson, Miss., to Chicago, 315 I.C.C. 171 (172).

Exhibits introduced by protestant rate bureau based on reports of six member carriers who objected to proposed reduced rates, showing that those and other carriers have been transporting over 4,000,000 pounds monthly of considered traffic in territory involved at rates the same as respondent's present rates, and that to remain competitive they would have to make corresponding reductions resulting in annual revenue loss of over $30,000 on the traffic immediately concerned, are not objectionable as hearsay when the data therein were made available to the bureau in the regular course of its business.—Foodstuffs from N.J. to Conn., Mass., & R.I., 315 I.C.C. 179 (180).

References in testimony of protestant's witness to discussions with commission's staff employees in effort to ensure that protestant, in publishing a return-load rule, was complying with findings in 310 ICC 473, are not hearsay when witness participated in those discussions.—Return Shipments Rule—Eastern, Southern Territories, 315 I.C.C. 267.

Objection to statements of respondent's witness relative to movement of sugar by private carriage, on ground of hearsay, overruled; such information appears to have been gained by witness in ordinary course of his duties as assistant traffic manager.—Sugar, New York and Philadelphia to Bellefontaine, Ohio, 316 I.C.C. 27 (28).

In considering evidence concerning cost of proposed service to respondents employing owner-operators for the line haul, division 2 is bound by the recent precedent established by the full commission in 318 ICC 567; however, that decision does not require automatic approval of rates proposed by carriers who rely heavily or entirely on owner-operators for performance of line-haul movements. When proposed rates result in decreased gross revenues, and owner-operators are compensated on basis of a percentage thereof, respondents should show that the reduced level of compensation will not result in loss of services of owner-operators or require payment of a higher percentage of gross revenues on the traffic involved.—Meats and PHP, Central & Western to Far Western States, 319 I.C.C. 667 (674, 676).

Objections to testimony as to how the owner-operators were paid, expenses paid by the carriers, duration of leases, and other contractual arrangements, on ground that the contracts were the best evidence available and that oral testimony was inadmissible under the best evidence rule, were properly overruled. The question was not proof of the written contracts but of the relations between respondents and their owner-operators, and the witnesses properly testified of their own

knowledge concerning compensation, insurance, and other obligations, and stood cross-examination on their testimony.—Id., p. 669.

The commission takes official notice of quarterly reports of respondent class I and II motor carriers for the first 9 months of 1961, during which proposed general increase in transcontinental rates was in effect, as showing resulting improvement in their average operating ratios. And while respondents' ratios after payment of income taxes are an unreliable support for increased revenue need, they furnish a general indication of how much revenue is left to the carriers.—General Increases—Transcontinental, 319 I.C.C. 792 (795).

The commission takes official notice that investigation of virtually all of respondents rates is now pending.—Foodstuffs from Hudson, N.Y., to Chicago, Ill., 315 I.C.C. 184 (185).

While fact that over 50 percent of respondent's owner-operators have remained in its employ for periods of 4 to 8 years at agreed payment of 56 percent of gross revenue per shipment has probative value and is a matter to be considered, it does not, standing alone, justify conclusion that the owner-operators would be agreeable to a reduction in revenue on considered traffic, particularly when proposed reduced rates are below respondent's general rate level. There must be some definite evidence from which it can reasonably be concluded that they would supply the transportation for the particular proposal under consideration at the agreed percentage of revenue. Since evidence is insufficient for a finding that the agreed division will enable respondent to acquire and retain services of owner-operators for movement of the traffic on which the proposed rates apply, they cannot be found reasonably compensatory. Not approved.—Bicarbonate of Soda and Sal-Soda, Syracuse to Chicago, 321 I.C.C. 150 (152-3).

Protestants' objections to admission of data relating to cost of operating a tractor, on grounds that the basic books of record from which the figures were taken were not in the hearing room and that the witness could not be examined as to accuracy of such data, overruled because they go more to weight of that evidence than to its admissibility. The data were compiled under direction of the witness, who is responsibile for their keeping, and at hearing he had a stencil cut from the working papers of his subordinate, which reflected data from the original books of entry; he was extensively cross-examined as to the underlying cost and offered to bring in the basic work slips if necessary.—Freight, All Kinds, Chicago and Ind., Mich., Ohio, 322 I.C.C. 423 (424-5); and for like reason objection to admission of stated billing and collecting cost of 80 cents a shipment is also overruled; although respondent's exhibit showing other costs for that service was rejected because its witness was unable to stand cross-examination on it, witness testified from his personal knowledge that cost for that service, based on monthly studies made under his direction, was 80 cents.—Id., p. 425.

Respondents' witness testified that operating conditions for other carriers which would participate in movement of considered traffic are the same as for the carrier whose cost data they presented, though no supporting evidence was submitted. Predominant movement of traffic between considered points is southbound and consists principally of l.t.l. shipments, movements in reverse direction being mostly t.l. freight; most of the trailers used by the other respondents are comparable of those of representative carrier, and average mix of l.t.l. traffic is such that carriers cannot use full weight capacity of vehicles moving southbound; participating carriers are subject to same wage contracts for all drivers, and pickup and delivery cost for considered traffic would be almost identical; also, equipment used and cost of fuel are comparable among the carriers. Since elements of cost listed constitute most of the allocable cost of service for the traffic, respondents conclude that costs of other member carriers closely approximate those shown.—Jams, Jellies, or Preserves, Oklahoma City to Chicago, 325 I.C.C. 95 (96-8, 101)*.

Admission of respondent's cost evidence consisting of reproduction of appendix B to the commission's report in 323 ICC 416, which protestants move to strike as hearsay, will in no way prejudice protestants. Protes-

tants were parties to, and submitted evidence in, that proceeding, and their cost witness refers to same prior report in support of one of his cost computations; moreover, in the light of §14(3) and §204(d), the commission may take official notice of its own decisions. Official notice is taken of appendix B to the prior report; thus, it is unnecessary to pass on merits of protestants' motion to strike.—Candy and Confectionery, New York, N.Y., to Rockford, Ill., 325 I.C.C. 522 (523).

Although protestants did not press their objection to examiner's denial of a motion to strike portions of respondent's evidence pertaining to a 23-carrier cost study as provided in Rule 87 of the Rules of Practice, the commission can consider the motion in light of the evidence of record on its own volition. —Glass Bottles from Muskogee, Okla., to Chicago, 323 I.C.C. 258 (260).

While the value of automatic data processing is recognized in ascertainment of cost, proponent of reduced rates in issue must present sufficient acceptable evidence to establish a prima facie case. Any respondent should have no significant difficulty in assuring admissibility of cost evidence developed by automatic data processing. By properly qualified witnesses, it can show who selected the data imputs and the basis of that selection, in what fashion the data were processed, and that procedures followed comply substantially with those generally accepted, as outlined in public statement No. 4-62. Respondents' failure to produce a qualified witness for cross-examination on the 23-carrier cost study developed by automatic process, renders the study inadmissible; motion to strike granted.—Id., pp. 260-1.

The order authorizing oral hearing to permit cross-examination concerning that cost study comprehends that a qualified person responsible for preparation of the study would be presented for cross-examination. When respondents' witness testified that the study was developed by automatic data processing and was made by independent transportation consultants employed for the purpose, who in turn furnished the results to respondents, further cross-examination of the witness concerning his personal knowledge of the study could not have contributed evidence of value with respect to the cost data therein.—Id., pp. 259, 260.

Protestant's motion to strike respondent's cost studies, on the ground that the witness was unable to stand cross-examination, denied. The witness, a vice president and director of traffic for respondent, was able to explain the essential factors relating to the computations which he made, based on public statement No. 1-62; the objection goes more to the weight of the evidence than to its admissibility. Respondent's motion to strike certain testimony of a witness for protestant concerning the action of the standing rate committee of the Middle Atlantic Conference in originally imposing considered aggregate tender provision to prevent multiple pickup of small shipments is also denied. The witness was a member of that general rate committee and there is no reason to question his qualifications. If respondent doubted the facts asserted, or that the witness had personal knowledge thereof, it could have asked for his cross-examination.—Aggregate Weight Provisions on Paper, Mass. to N.Y., N.J. 323 I.C.C. 525 (527-8).

To the extent that respondent's reply statement attempts to introduce additional evidence, or relates to matters not of record, protestant's motion to strike on grounds that the statement contains new evidence which is unverified, in violation of Rule 50 of the Rules of Practice, is granted. However, portions of the matter complained of include verified opening statements and data based on respondent's annual report to the commission, and the reply statement includes certain corrections in reported statistics; those matters are properly before the commission.—Id., p.527.

Motion to strike copy of letter from the commission's cost finding section, concerning acceptability of a cost analysis using automatic data processing methods, from protestant's brief, granted; the matter violates Rule 86 of the Rules of Practice which prohibits submission of evidence after close of the hearing. And since cost study, which was developed by use of a computer and submitted by protestant in rebuttal, was not presented by a qualified witness, respondent's motion to strike the cost analysis because it did not

comply with Rule 50 of the Rules of Practice, granted. That the costs were developed on a computer is not the basis of the objection; while costs may be developed either manually or mechanically, they must be presented by a qualified witness; and underlying data must be available, upon proper request therefor.—Id., pp. 527, 530.

11. Presumption of reasonableness.—[Vols. 10, 12-14, 18, 19].—In absence of convincing evidence to the contrary, proposed reduced rate on foodstuffs is just and reasonable when it exceeds scale basis prescribed as reasonable minimum level throughout official territory in 294 ICC 371.—Foodstuffs from Hudson, N.Y., to Chicago, Ill., 315 I.C.C. 184 (185). [But see dissent.]

The mere fact that respondent's initial rates (following conversion from contract to common carrier) are lower than those of competing carriers raises no presumption of unreasonableness.—Various Commodities—Ill., Ind., Ky., Mo., Ohio, Pa., W. Va., 315 I.C.C. 576 (577).

Although the commission has often held that motor carrier rates which exceed aggregate of the intermediate rates are prima facie unreasonable, that presumption is rebuttable. Presumption that proposed rate is just and reasonable because it is equal to the aggregate of intermediate rates is rebutted by the showing that it fails to meet out-of-pocket cost of the service.—Petroleum and Plastics from Texas to Indiana and Ohio, 316 I.C.C. 155 (156-7).

While precise spread between revenue and system average expense that would be determinative of compensativeness depends on facts and circumstances of each case, revenues exceeding respondent's system average expense by 19.63 cents constitute a prima facie showing that one proposed rate is compensatory, but spreads of less than 10 cents do not constitute such a showing as to others. —Alcoholic Liquors from Eastern Points to South Dakota, 318 I.C.C. 195 (198).

12. Withdrawal of protest.—[Vol. 12].—See Davis & Randall v. U.S., APA, 5 USC, *Procedure*.

14. Parties.—[Vols. 17-19].—Motor carrier conference had standing to protest reduced rates published by plaintiff which is a member of the conference and a party to its ratemaking agreement; plaintiff is a voluntary member of the conference and had free and unrestrained right to take independent action to file its tariff, and to prove, independently of the agreement, that its proposed rates were just and reasonable; to assume invalidity of the agreement would not aid plaintiff in discharging its burden of proof.—Malone Freight Lines, Inc. v. United States, 204 F. Supp. 745 (755-6)*.

Contention that participation in suspension proceeding by motor carrier rate conference constitutes representation of other parties in violation of Rule 1.71 of Rules of Practice and is contrary to its obligations to a member proposing the suspended rates, is without merit. [See 297 ICC 603 and 302 ICC 622.]—Floor Covering from Lancaster, Pa., to Charleston, S.C., 315 I.C.C. 550 (551).

It is well settled that an organization sanctioned under §5a has the right to protest schedules filed independently by member carriers, and that such right is derived, not from §5a, but from §216(e) and (g); the same conclusion is warranted as to protests of schedules filed by nonmember carriers. Rate bureau's practice of filing protests and appearing in resulting proceedings before the commission is a lawful representation of interests of its member carriers; such participation is an aid to the commission in administration of the act, especially in preventing destructive rate-cutting practices. Defendant rate bureau is interested in lawfulness of rates generally prevailing in its territory and in encouraging establishment and maintenance of reasonable, nondiscriminatory, and competitively fair charges for transportation services; it therefore is entitled to make by representation an appearance in its own name without specifically designating any member carriers. —Arbet Truck Lines, Inc. v. Central States Motor Freight, 321 I.C.C. 460 (463-4, 465-6). [But see dissent].

15. Orders as to suspended rates.—[Vols. 10-14, 16-19].—Proposed changed rates are not shown to be just and reasonable, and though rates republished therewith which were unchanged are not shown to be unlawful, latter rates would continue in effect if the suspended schedules were canceled in entire-

ty; as such cancellation would eliminate an otherwise superfluous tariff publication, all the schedules under investigation are ordered canceled.—Beverages and Empty Containers from and to N.J. & N.Y., 314 I.C.C. 792 (795).

Although certain of proposed rates represent increases, they are an integral part of proposed adjustment; as proposed reductions are not shown to be compensatory and may not be approved, entire schedules are required to be canceled.—Lead, Aluminum, Brass, Bronze, Copper Metals—Kofman's, 315 I.C.C. 344 (346).

Finding that proposed reduced rates are not shown to be just and reasonable will permit respondent to republish on statutory notice the same or different charges for movement of the traffic involved, subject to protest and possible suspension or investigation, or both; it would not benefit protestants to require respondent to maintain rates too high to meet cost of private carriage. However, should respondent republish rates on same basis, it should be prepared to offer more adequate justification.—Wallpaper, Paint, between Mechanicville, N.Y., and N.Y., 316 I.C.C. 11 (14).

In view of determination that respondent's authority does not embrace the commodities on which rates are proposed, the schedules under investigation are ordered canceled.—Road Paving Materials between Points in New England, 319 I.C.C. 95 (97-8).

An order requiring cancellation of proposed rates must meet requirements of §7(c) of Administrative Procedure Act that it be supported by and in accordance with reliable, probative, and substantial evidence.—Animal Feed, Miss. and Tenn. to Midwest and Southwest, 319 I.C.C. 257 (260)*.

20. Comparisons of rates.—[Vols. 10, 12-19].—For rate comparisons to be of substantial evidentiary value, the transportation conditions must be substantially similar; and burden of establishing reasonableness of comparisons rests on the party submitting them.—Frozen Foods from Caribou, Maine, to Midwestern Points, 314 I.C.C. 721 (724).

Comparisons submitted are insufficient to establish reasonableness of proposed rates when rates on like traffic from compared Pacific Northwest points to the Midwest are generally higher than from New England origin involved, and distances are considerably longer; extent to which such traffic moves at compared rates from eastern origins is not shown, and in making latter comparisons respondent used its average load and the minimum weight for the compared rates, whereas a fairer comparison would be on basis of either average loadings or applicable minima for all. Moreover, it is more probable that transportation conditions from such widely scattered points are different than that they are similar.—Id., pp. 723-4.

The commission has consistently recognized comparisons of rates with other reasonable rates for like transportation; proposed rates on foodstuffs (except nuts, tea, and yeast), in mixed truckloads, are lawful when protestant publishes like rates between same points, whose reasonableness is not questioned.—Various Commodities, Chicago to Cincinnati, Ind., Louisv., 314 I.C.C. 749 (751); however, as no competitive reason for proposed reductions on nuts, tea, and yeast is shown, inclusion of those commodities in other mixed-shipment rates of protestant is insufficient reason, standing alone, for their approval.—Id., p. 750.

Mere fact that proposed reduced rate are the same, or on same level, as those published by one or more competitors does not warrant a finding that they are just and reasonable.—Bicarbonate of Soda and Sal-Soda, Syracuse to Chicago, 321 I.C.C. 150 (153); Candy & Confectionery, Ill. & N.Y. to Ill., Ky., N.Y. & Pa., 318 I.C.C. 540 (543); Candy and Confectionery, New York State to Midwest, 318 I.C.C. 409 (412-3); Machinery and Equipment, Central, South, Midwest, 316 I.C.C. 236 (238); Drugs and Toilet Preparations, N.J. to Baltimore & Wash., 316 I.C.C. 252 (254); moreover, respondent has proposed reductions from some origins where no competitive necessity is shown.—Canned Goods—Md., Pa., Va., & W. Va. to Iowa, Mich. & Mo., 318 I.C.C. 171 (174); also, fact that competing carrier has an operating ratio which indicates that its overall operation is profitable is no basis for concluding that particular rates would be compensatory for that carrier or for respondent.—Paper and Paper Articles from

Ohio to Chicago, Ill., 316 I.C.C. 570 (571, 572).

Mere comparison of proposed rates with lower forwarder rates, without a showing of cost considerations on which those rates are based or competitive circumstances surrounding their establishment is insufficient to establish compensativeness of the former.—Air Cleaners, Blowers, Fans—Buffalo to Ill., Ohio, Mo., 314 I.C.C. 779 (780).

Comparison of proposed l.t.l. commodity rates from Bonner Springs, Kans., to the Southwest with lower rates on similar shipments from Dallas has little probative value when distances from Dallas are considerably the shorter; it is reasonable that under normal circumstances rates from the less distant origin should be substantially lower than those from the more distant origin.—Flavoring Sirup—Bonner, Kans., to Southwest, 314 I.C.C. 781 (782).

That point-to-point and distance rates proposed on meats and packinghouse products in lieu of rates presently maintained under intermediate rule compare favorably with numerous rates of other motor carriers on same commodities for comparable distances is convincing, in absence of opposing evidence, that they are just and reasonable.—Meats, Muncie, Ind., to New England, Middle Atlantic, South & Southwest, 314 I.C.C. 799 (800).

Proposed reduced rates are not shown to be reasonable by comparison with rates most of which are below the minimum level prescribed for rates on like traffic.—Wearing Apparel—Pennsylvania to New York, N.Y., Area, 315 I.C.C. 28 (30).

Rates currently under investigation are not a proper standard for determining compensativeness of proposed rates.—Chemicals, Other Articles, Kearney, N.J., to New York Area, 315 I.C.C. 71 (72).

Mere reference to rates from another origin, without some indication of revenues and distances, affords little help in passing on justness and reasonableness of proposed rates.—Candy—Montgomery, Ala., to Points in South Carolina, 315 I.C.C. 96 (98).

Existence of an anomalous rate basis from one origin does not justify extending that basis to another origin; in absence of proof that magazine distributed from Philadelphia is sharply competitive with that to be transported under proposed l.t.l. commodity rates from Old Saybrook, Conn., or that freight rates are an important factor in any such competition that may exist, l.t.l. commodity rates from Philadelphia cannot be accepted as a standard of reasonableness of the proposed rates, especially as they apply to only some of destinations involved, while class rates apply to the remainder.—Magazines, Old Saybrook, Conn., to Middle Atlantic Ter., 315 I.C.C. 273 (276).

Mere fact that commodity column rates have been established on a commodity with less favorable transportation characteristics than that considered does not establish that the considered article is entitled to l.t.l. commodity rates on the same level. Circumstances surrounding establishment of those commodity column rates are not shown, and there appears to be no competitive relation between the two articles.—Fluorescent Lamp Ballasts, LTL, Atlanta to Florida, 315 I.C.C. 412 (413, 414).

Compensativeness of proposed provisions for roasting-in-transit of coffee at Fort Worth, Tex., is not established by comparison of truck-mile earnings thereunder with truck-mile earnings under storage-in-transit arrangement on tea at Fort Worth on traffic destined to representative points involved; respondent does not show that the compared storage-in-transit charges plus the line-haul rates on tea are themselves compensatory, that there is any traffic now moving under those rates and charges, or that service rendered thereunder is in any way similar to that to be accorded under the proposed arrangement.—Roasting of Coffee in Transit at Fort Worth, Tex., 315 I.C.C. 455 (457).

And comparisons of earnings under present rates on coffee from Houston to representative destinations over normal routes with those which would accrue under proposed arrangement over routes via Fort Worth, which to some destinations are circuitous, consist of charges for dissimilar services and thus have little probative value to determine compensativeness of proposed arrangement.—Id., p. 457.

Proposed joint rate appears just and reasonable when, though it would result in a re-

duction over route to be used, it would produce $30.60 more revenue than minimum under existing combination rate and compares favorably with rate in effect from Cincinnati to same destination.—Oleomargarine from Columbus, Ohio, to Twin Cities, Minn., 315 I.C.C. 504 (506).

Comparisons of truck-mile earnings under proposed rate with those under rates on like traffic from other origins are not persuasive when compared earnings were computed for hauls ranging from 96 to 474 miles longer than distance for which proposed rate would apply.—Floor Covering from Lancaster, Pa., to Charleston, S.C., 315 I.C.C. 550 (551).

While cost data are the most common means of determining minimum reasonableness of particular rates, this issue may be resolved by other evidence. Proposed l.t.l. commodity rates on empty returned aluminum tote tanks of not over 400 gallons capacity are on higher level and would produce greater earnings than protestant's rates for comparable hauls of empty returned iron or steel barrels or drums; protestant's mere assertion that the compared rates were published "mainly" to meet competition, and thus afford an improper standard of reasonableness, is not convincing that they are below a compensatory level, and it may be reasonably assumed that protestant regards them as compensatory; proposed rates approved.—Aluminum Tote Tanks, Springfield, Ill., to Fort Madison, 315 I.C.C. 567 (569-70).

Evidence in opposition to initial proportional rates to be applied in conjunction with rail movement at plan III TOFC rates consists mainly of comparison with class rates, which normally reflect the maximum reasonable basis; as transportation characteristics of the compared commodities are not revealed, such comparisons have little weight; and comparison of charges for the through motor-rail movement is not relevant to determination of reasonableness of the proportional rates.—Various Commodities—N.J. Railroad Yards, N.J., N.Y., Pa., 315 I.C.C. 704 (706).

Reasonableness of proposed reduced rates on sugar is not established by comparison with those of another motor carrier, which took effect about 10 years earlier and have not since been changed.—Sugar, New York and Philadelphia to Bellefontaine, Ohio, 316 I.C.C. 27 (29).

Respondent presented no rate comparisons on considered commodity, confining its showing to comparisons of proposed rates with its rates on analogous articles from and to points involved; however, protestant's comparisons of the proposed with existing rates on same commodity from and to a number of points in same territory show that proposed rates reflect 17.4 and 19.7 percent of first class while compared rates reflect 23.4 to 27.8 percent thereof. In the circumstances, respondent's rate comparisons are not persuasive of reasonableness of proposed rates.—Titanium Dioxide from Chicago, Ill., to Kalamazoo, Mich., 316 I.C.C. 150 (153).

Comparisons of proposed rates on plastic materials with rates on same commodity to same destinations from other origins in the area do not show compensativeness of proposed rates; record is devoid of any showing as to similarity of circumstances surrounding the rates. While the compared rates are entitled to weight, they do not constitute an appropriate standard with which to measure reasonableness of proposed rates.—Petroleum and Plastics from Texas to Indiana and Ohio, 316 I.C.C. 155 (157).

That respondent maintains higher commodity rates on other commodities between same points does not establish unreasonableness of proposed rate on canned goods when transportation characteristics and conditions surrounding movement of the compared commodities are not shown to be similar to those surrounding movement of canned goods.—Canned Goods from San Francisco to Pocatello, Idaho, 316 I.C.C. 296 (297).

That proposed rates compare favorably with others on the same or similar products between other points is insufficient reason for establishment of rates that are not compensatory.—Sodium Silicate from N.J. & Pa. to Ill., Mich., Mo. & Ohio, 316 I.C.C. 699 (704).

Respondent has shown that transportation characteristics of considered commodity compare favorably with those of similar traffic moving from same origin at rates on same level, which apparently are compensatory, and that proposed rates would cover at least out-of-pocket costs; approved.—Bakery

Goods, Chattanooga, Tenn., to Southern Points, 316 I.C.C. 573 (576); however, in view of cost data showing that proposed rate would not be compensatory, comparisons with rates on other commodities for similar distances on basis of percentage relations to first class may not be accorded controlling weight.—Titanium Dioxide from Baltimore, Md., to Cleveland, Ohio, 316 I.C.C. 655 (656).

While mere reference to rates maintained by another carrier, the same as those proposed, is of little value in proving reasonableness of the latter, and respondent has merely shown its proposed distribution rates at Chicago and St. Louis on all-freight from Rogers, Ark., to be the same as those of a competitor and has submitted no cost data to show their compensativeness, protestant rate bureau and respondents in related investigation submitted evidence showing that at lease five other carriers maintain distribution rates at Chicago on same level as those proposed, and assert that their rates are compelled by maintenance of comparable rates by numerous other motor carriers. The bureau also publishes distribution rates at Chicago on traffic from Twin Cities lower than the proposed rates, and no reason appears why traffic from Rogers should be charged higher rates than that originating elsewhere. In the circumstances the proposed rates are just and reasonable.—Distribution Rates at Chicago, Ill., and St. Louis, Mo., 318 I.C.C. 145 (149).

Rates maintained by other motor carriers for like service in same territory on same commodities or others with similar transportation characteristics are an acceptable standard of reasonableness. Proposed reduced assembling rates on textiles from Carolina mills to Greensboro and Charlotte, N.C., exceed many point-to-point commodity rates of conference carriers in that area, are substantially higher than rates in reverse direction to certain seaports, and compare favorably with distribution rates from Charlotte on comparable commodities as well as with many assembling and distribution rates in other territories. In absence of proof to the contrary it may therefore be reasonably assumed that the proposed rates are not below a compensatory level.—Assembling Rates at Charlotte and Greensboro, N.C., 318 I.C.C. 429 (439).

Although minimum truck-mile earnings under proposed rates would approximate those under compared rates of competing motor carriers, there is no showing that considered rates cover transportation similar to the compared rates or that latter are just and reasonable. The rate comparisons therefore may not be used as measure of compensativeness of the proposed rates; not approved.—Paper and Related Art., Ga., N.C. & S.C. to Pa. & W. Va., 318 I.C.C. 440 (442, 444).

Initial common-carrier mileage rates of a former contract carrier on mortar and portland cement from New York and Pennsylvania points to New England and middle Atlantic States are not shown to be unlawful when they are on higher level than scales approved for middle Atlantic States in 313 ICC 103 and for New England in 314 ICC 459, as extended for distances up to 660 miles.—Cement from Hudson, N.Y., to New England and Pa., 319 I.C.C. 235 (242, 247).

As none of costs shown are representative of those incurred by such specialized carriers as respondents, who transport bananas one-way and exempt commodities on return, the best evidence bearing on reasonableness of proposed changed rates and initial mileage scales on bananas from Gulfport, Miss., to northern and northwestern States is respondents' comparisons of revenues thereunder with rates and revenues of rail and other motor carriers. Those comparisons indicate that, except to Washington, the proposed rates, which include heating or refrigeration and allow two free stopoffs in transit, are just and reasonable and necessary to meet competitive rates of other motor carriers; however, to that State the proposed point-to-point and mileage rates are not justified by either rate comparisons or competitive need and in numerous instances result in greater compensation for shorter than for longer hauls over same route in same direction; the proposed rates to Washington ordered canceled.—Bananas from Gulfport to the East, South, and West, 321 I.C.C. 274 (278, 281-2).

Compared class rates on traffic moving in carriers' trailers, which normally reflect the maximum reasonable basis of rates, are not indicative of a minimum reasonable level for

judging lawfulness of proposed proportional charges per trailer for moving shippers' trailers, loaded and empty, in connection with TOFC service. Moreover, compared charges between Jersey City and New Jersey and Connecticut are not shown to apply on traffic moving under similar transportation conditions to involved movements between northern New Jersey rail yards and Long Island.—Freight, All Kinds, & Empty Trailers bet. N.J. & N.Y., 322 I.C.C. 429 (433); and that the proposed charges are lower than those maintained on like traffic by conference and other carriers is not controlling, as operations and generally costs of those carriers differ from those of respondent.—Id., p. 433-4.

Favorable comparison with rates in effect at same time between similar points of origin and destination under similar transportation conditions is acceptable evidence of reasonableness of a proposed rate. Respondent's comparison of proposed rate and earnings with those on other traffic from points in vicinity of considered origin to same destination commands greater weight than protestants' more selective comparisons.—Boards or Sheets from Hope, Ark., to Chicago, 319 I.C.C. 399 (400, 402).

While favorable comparison with other rates concurrently applicable on like traffic under similar transportation conditions is acceptable evidence of reasonableness of rates in issue, it commands little weight unless there is some indication that the compared rates are themselves just and reasonable and are actually moving traffic.—Cocoa Powder from New York, N.Y., to Council Bluffs, 322 I.C.C. 255 (259)*; Sheet Steel, Galvanized—St. Louis to Marshalltown, Iowa, 318 I.C.C. 589 (591) [But see dissent]; however such comparisons do not overcome protestant's showing that proposed rate would not be compensatory; not approved.—Aluminum Scrap from Jackson, Mich., to Madison, Ill., 316 I.C.C. 620 (621-2).

25. Classifications; comparisons; exceptions.—[Vols. 10, 12-16, 18, 19].—Suit to set aside commission order requiring cancellation of proposed increase of l.t.l. classification rating on stuffed animals, dolls, and toys, dismissed; record, as a whole, supports the commission's conclusion that proponent carriers failed to sustain their statutory burden to show proposed changed rating would be just and reasonable. A commodity classification develops from consideration of many factors, including weight per cubic feet, value, and liability to loss or damage; and, while commission finding that other factors would not warrant proposed higher rating for articles averaging 4 pounds or more in density clearly implied that if density were below 4 pounds, the higher classification would have been approved, plaintiffs' contention that, under the APA, the commission was obligated to fix average density of considered commodities at a definite arithmetic figure, cannot be upheld; that statute anticipates a decision based on paucity of proof. Duty of the commission, as the trier of fact, was to assay the proof; the court cannot find that its conclusion is without rational basis.—Overnite Transportation Co. v. United States, 266 F. Supp. 88 (90-91)*.

Proposed exception rating on 30,000-pound straight or mixed t.l. shipments of drugs and related articles, which would apply throughout a wide area, not approved; evidence of record fails to show that resulting rates would be compensatory.—Chemicals, Drugs, Toilet Prep.—Texas and Midwest-East, 315 I.C.C. 598 (599-600).

26. Reasonableness of regulations and practices.—[Vols. 10, 11, 16, 18, 19].—Proposed return-load rule for certain bulk commodities in tank trucks between points in various eastern, southern, and central States conforms with principles enunciated in 310 ICC 473 except insofar as it (1) fails to provide that destination of return loads shall be the same point or in same commercial zone as origin point of the outbound shipment, and (2) authorizes computation of the prescribed maximum excess mileage for return hauls (50 percent of the outbound mileage) over distances from origin point of the return load instead of from destination of the outbound shipment as contemplated by that decision. Proposed rule ordered canceled, without prejudice to establishment of a rule conforming with instant findings.—Return Shipments Rule—Eastern, Southern Territories, 315 I.C.C. 267 (268-9).

Proposed exception to tariff helper-service rule, which would eliminate charge for one

helper to load and unload in connection with t.l. shipments of foodstuffs from Baltimore to Philadelphia and New York City, found not justified. Present helper-service rule has general application for large number of carriers in the area, exceptions thereto are of little or no significance, and none of those exceptions affects considered traffic. Record fails to show that proposed rates are compensatory for the service to be rendered, including furnishing extra help in loading and unloading shipments, or that market competition necessitates proposed exception ro respondent's helper-service rule.—Free Helper Service on Foodstuffs from Baltimore to New York and Philadelphia, 315 I.C.C. 693 (694).

Proposed exception to tariff rule providing additional charges for helper service where additional labor is used at shipper's request, which would eliminate such charges on t.l. shipments moving to or from New York City zone 8 (New York Harbor piers and wharves), and on t.l. shipments on which shipper incurs inside delivery charges, is not shown to be just and reasonable. Although present rule precludes use of helper service in instances where it would benefit carrier, as on pier traffic where shipper does not request helper service and carrier must hire stevedore service, also where vehicle would otherwise be left unattended when driver alone makes an inside delivery, proposed exception is broader than necessary to meet the need shown; moreover, resulting charges are not shown to be compensatory for the service performed, including furnishing of extra help in loading and unloading shipments. —Nonapplication of Helper Service Rule, 316 I.C.C. 728 (729-30).

Proposed exception to general helper service rule, which would furnish loading and unloading service of an additional man without charge under line-haul rates on alcoholic liquors, is not shown to result in compensatory rates, nor is any competitive necessity shown therefor; not approved.—Helper Service, Alcoholic Liquors, Md. to N.Y. and N.J., 318 I.C.C. 102 (104).

Proposed tariff rule providing that line-haul rates would include loading and unloading services by not more than two men and canceling certain carriers' participation in the conference's present helper service rule, which provides for loading and unloading service of one man per vehicle, is not shown to be compensatory. Also, proposed rule would permit the use of two men at any time although it would not require their use; thus, the rule is objectionable in that it is uncertain, indefinite, and ambiguous, in violation of rule 11 of commission's Tariff Circular MF-No. 3.—Helper Service in Middle Atlantic Territory, 318 I.C.C. 810 (810, 813-4).

Proposal to eliminate minimum-tender requirement published in connection with l.t.l. commodity rates under which, in effect, the commodity rates would replace the class rates which now apply on shipments not meeting the required total tender, is not shown to be just and reasonable. Class rates on l.t.l. shipments apply with three rate scales published on less than 2,000 pound, 2,000 to 6,000, and over 6,000-pounds weight brackets. Alternate scaled commodity rates also are published for the same weight brackets and apply if shipper tenders a minimum weight at one time from one specified location. Minimum weights are integral parts of the related rates and they must be considered together. A primary requirement, of course, is that the resulting rates must be compensatory; respondent only shows that rates resulting from removal of the restriction would be compensatory on shipments under 2,000 pounds moving in single-line service. Proposal not approved, without prejudice to its establishment on less than 2,000-pound shipments in single-line service.—Aggregate Weight Provisions on Paper, Mass. to N.Y., N.J. 323 I.C.C. 525 (526-7, 531-2).

Although proposed multiple-vehicle provision, under which carrier performing stopoff service may for operating convenience use two or more vehicles in handling a single shipment and all portions of the shipment need not move through the stopoff point, is presently applicable for all rate-bureau members except respondent, respondent has undertaken to justify that provision solely in connection with proposed establishment of Charlotte, N.C., as a stopoff point for partial unloading of shipments moving from Chicago to Raleigh, N.C.; since latter provision is not shown to result in a compensatory operation,

the multiple-vehicle provision, as an integral part of same proposal, must likewise be found not shown to be just and reasonable.—Stopoff in Transit at Charlotte, N.C., for Unloading, 316 I.C.C. 317 (318, 321).

Condition of reduced rates on gasoline and fuel oil, that carrier be allowed continuous loading and unloading from 12:01 a.m. Monday to 11:59 a.m. Saturday, merely permits respondent greater utilization of its equipment by permitting access to shipper's facilities on 24-hour basis, 5-1/2 days a week; possible difficulty of policing the condition is no ground for finding it unlawful.—Gasoline and Fuel Oil within Middlewest Territory, 316 I.C.C. 435 (439).

Proposed rule providing for absorption of loading and unloading charges, not to exceed 7 cents, on all class-rated traffic moving to or from Virginia ports is not shown to be just and reasonable when respondent failed to show by properly submitted cost evidence that resulting rates would be compensatory, and as no competitive necessity for proposed rule is shown, it cannot be found that it would not constitute a destructive competitive practice; not approved.—Absorption Pier Loading and Unloading Charges, 316 I.C.C. 577 (580).

See also Gordons Transports, Inc. v. Strickland, NTP, n. 10 *Substituted freight service*; Removal of Detention Charges—Dixie Ohio Exp., Inc., §216(b), n. 460; Claim Settlement on Household Goods, §216(b), n. 735. See Claim Settlement on Household Goods, §216(b), n. 735.

65. Reasonableness of proposed rates.—[Vols. 14-19].—Whether proposed rates are just and reasonable within the nebulous statutory standard is a question of fact to be resolved by the commission after according appropriate weight to evidence offered in their support; obviously, rates which are not compensatory are not just and reasonable.—Malone Freight Lines, Inc. v. United States, 204 F. Supp. 745 (754-5)*.

Even though the commission found that proposed rates were not proven to be compensatory by cost study submitted under modified procedure, other evidence of reasonableness, such as shipper's need for the rates to meet market competition, fact that competing carriers were not moving the traffic, and higher truck-mile revenue produced by the reduced rates than by existing rates for shorter distances, could appropriately have been considered, particularly since absence of protest by, or evidence of adverse effect on, competitors left protection of the carrier against its own unwisdom and possible burdening of its other traffic the only bases for government intervention. However, while the commission may under some circumstances permit a carrier to establish a rate not proved to cover out-of-pocket costs, it is not required to do so.—Davis & Randall, Inc. v. United States, 219 F. Supp. 673 (677)*.

While the commission's minimum-rate power concededly may be used in absence of objection to the rates by other carriers, in a close case some weight ought to be given to management decision: there is no suggestion that plaintiff's management was incompetent or had any reason or desire to impair its operating ratio and return on capital by hauling involved traffic at a loss, thereby burdening other traffic. Considering also the apparently reasonable nature of plaintiff's cost evidence, that the commission's criticisms thereof are not so strong as to have necessarily survived a hearing or to call for affirmance no matter what a hearing produced, and the negligible possibility of injury to the public from allowing the rates to take effect, enforcement of the commission's cancellation order is enjoined, without prejudice to any future action it may take concerning those rates in a complaint proceeding under §216(e).—Id., p. 683.

Propriety of joint rate established for transportation by plaintiff and two other carriers does not establish that the same rate would be just, reasonable, and lawful for a three-line haul by plaintiff, one of former participants, and an entirely different carrier; existence of a joint rate for one group of carriers does not necessarily mean that the same rate would be proper for a different group.—Great Western Packers Exp., Inc. v. United States, 246 F. Supp. 151 (155)*.

Proposed rates that are not compensatory cast an undue burden on other traffic and are unjust and unreasonable.—Canned Goods, Cincinnati, Ohio, to Ind., Ill., Ky., Mo., & Wis., 315 I.C.C. 169 (170); Lumber from

Cimmaron, N. Mex., to Chicago, 315 I.C.C. 534 (536); Aluminum Siding, Chicago Heights, Ill., to Wis. Points, 315 I.C.C. 450 (453).

Proposed air-competitive any-quantity rates for expedited service on all freight (except articles rated higher than class 150) between Chicago and Atlanta, offering next-day delivery of shipments made available to carrier no later than 11 a.m. on date of pickup, are reasonably compensatory and otherwise lawful; $5 rate proposed for terminal-to-terminal service is higher than present class rates, which include pickup and delivery, on all but classes 125 and 150, and the line-haul movement is identical to "normal" service in transit time, billing-and-collecting costs, and platform handling; and the $8.60 rate per 100 pounds for door-to-door service, if also made the minimum charge, will be $2.31 higher than the rate for normal service on the highest-rated commodity that could be handled in the expedited service; approved on that basis.—Freight, All Kinds—Expedited Service—Chicago-Atlanta, 314 I.C.C. 663 (664, 666).

No special circumstances are shown to require establishment of proposed l.t.l. commodity rates on flavoring sirups from Bonner Springs, Kans., and since flavoring sirup is manufactured at numerous points in the same general territory, their establishment from that point would require that consideration be given to reducing the rates from other points, with unfavorable results on carrier revenues; not approved.—Flavoring Sirup—Bonner Springs, Kans., to Southwest, 314 I.C.C. 781 (782-3).

Although proposed reduced rates on salt are allegedly intended to enable Williston, N. Dak., to compete with Hutchinson, Kans., in South Dakota markets, no present or proposed relation between rates from those origins is shown, or why resulting rate spreads vary considerably where short-line distances are approximately the same from both origins; proposed rates are lower than corresponding rail rates and in many instances appear to be noncompensatory; moreover, they would in some instances result in higher rates for shorter than for longer distances over the same route, and that maladjustment would be aggravated if only the rates indicated to be compensatory were approved; proposed adjustment is therefore not approved.—Salt from Williston, N. Dak., to South Dakota, 314 I.C.C. 787 (790).

As respondent has not shown that proposed increased minimum of 60,000 pounds for malt beverages could be legally loaded on a single vehicle, like the present minimum, its meager cost evidence fails to show that the changed rates, including proposed any-quantity basis on returned containers, would be compensatory. Protestants' more nearly complete studies, reflecting need of two trucks for outbound movement of a minimum load, show that the proposed rates would yield round-trip earnings substantially below respondent's system average truck-mile cost; moreover, those studies assume that the return loading of containers would continue at the present level of 18,000 to 20,000 pounds, whereas respondent indicates that shippers prefer not to accumulate any minimum amount. Thus the proposed rates are not shown to be compensatory; not approved.—Beverages and Empty Containers from and to N.J. & N.Y., 314 I.C.C. 792 (794-5).

The proper basis for determining compensativeness is the rate and minimum weight proposed, or the average loading for the particular movement, not average truck capacity or system average weight. Though carrying capacity of trucks is 40,000 to 45,000 pounds, average loading of considered traffic is not shown; a shipper may offer and carrier may transport in one truck a shipment not exceeding proposed 20,000-pound minimum, and there is no evidence to show that other freight would be loaded with such a shipment or if so how the added cargo would affect the cost of performing the service. Proposed rate is not shown to be just and reasonable.—Pie Filling from Duluth, Minn., to Fargo, N. Dak., 314 I.C.C. 797 (798).

Rates which can be defended only on the speculation that a shipper may resort to another method of distribution may not be found just and reasonable.—Candy —Montgomery, Ala., to Points in South Carolina, 315 I.C.C. 96 (98).

Proposed reduced rates on foodstuffs are not just and reasonable when the traffic is

generally moving freely under present rates, and approval of the proposal would compel similar reductions from related origins, thus producing an extensive disruptive effect in the rate adjustment of many carriers.—Foodstuffs from N.J. to Conn., Mass., and R.I., 315 I.C.C. 315 I.C.C. 179 (180).

Though proposed l.t.l. commodity rates on multiple shipments of clothing in aggregate tenders of 2,500 pounds or more appear to be on general level of class rates maintained by respondent and other carriers, and therefore, in absence of contrary evidence, may be presumed not to be unreasonably low, they would have no effect without proposed minimum charges, which may not be approved because they are not shown to be compensatory and are insufficiently definite without a prepay requirement; not approved.—Clothing, in Multiple Shipments, from Nanticoke, Pa., 315 I.C.C. 181 (183).

Carriers have the right to adapt their rates and practices to needs of localities and industries they serve, so long as they do not contravene any provisions of the act or the national transportation policy. Over half of paper traffic moving between considered points on present 18,000 and 24,000-pound minima is accorded stopping-in-transit and split-delivery service, and shipper must often hold up small shipments to make the t.l. minimum, resulting in delays of several days; proposed volume rates on minima intermediate between present t.l. and l.t.l. quantities, with stoppage in transit and split deliveries limited to the 15,000-pound rates, substantially exceed fully distributed costs and will enable shipper to make more frequent shipments consistent with its customers' needs. Protestant's contention that proposed rates would tend to spread under pressure and thus undermine the rate structure has no substantial support of record; approved.—Paper Articles, Springfield, Mo., to Ind., Ky., Mich., Ohio, 315 I.C.C. 579 (581-2).

Proposed reduced rate, although compensatory, would result in reducing respondent's minimum t.l. revenue; other motor carriers of considered traffic could be expected to make a similar reduction in order to remain competitive; unnecessary dissipation of carrier revenues, both for respondent and competing carriers, would result; no shipper supports the proposal; not approved.—Vinyl-Coated Iron or Steel Sheet, Chicago to Kalamazoo, 315 I.C.C. 660 (661, 662).

Commodity rate proposed on iron and steel fasteners in shipments of less than 2,000 pounds from Rockford, Ill., to Anderson, Ind., is reasonably related to rates from competing origins, appears necessary to maintain sales position of Rockford shippers at Anderson, and is shown to be compensatory; however, rates proposed for higher weight brackets are not shown to be compensatory and would provide Rockford shippers with rates 7 to 12 cents lower than corresponding rates available to competitors at Cleveland and Detroit, somewhat closer to Anderson than Rockford, for which no justification is shown; as most of the Rockford traffic is in the lowest weight bracket, rate proposed thereon will be reasonable for all l.t.l. shipments.—Iron or Steel, LTL, Rockford, Ill., to Anderson, Ind., 315 I.C.C. 683 (687-8).

Proposed joint rates are not shown to be just and reasonable when delivering carrier submitted no evidence and initial carrier failed to show volume of traffic or to present competent cost estimates and supporting data, or any basis for making allowance for expense of the return trip.—Meats and Packinghouse Products from Chicago to South, 315 I.C.C. 699 (702).

Minimum truck-mile yields at proposed reduced rates and increased minimum weight on artificial rubber substantially exceed those at present rates, which are presumptively reasonable because of their long standing, and thus appear compensatory. That for loads only slightly above present minimum they will yield less than the present rates must be balanced against probable loss of the traffic to private carriage under the latter; the traffic is desirable to respondents because it is compact, easily loaded, of relatively low value, not susceptible to damage, and moves in direction of their light movement. Proposed rates are also necessary to enable shipper to meet competition from other origins; approved as just and reasonable.—Rubber, Sarnia, Ontario, to Conn., Mass., Mo., and R.I., 315 I.C.C. 707 (708, 709)*. [But see dissent.]

To establish reasonableness of proposed

reduced rates, it is incumbent on respondent to show that they are compensatory, even where they are designed to meet threat of private carriage.—Wallpaper, Paint between Mechanicville, N.Y., and N.Y., 316 I.C.C. 11 (13).

Proposed proportional all-commodity distance rates published as flat rates per trailer, to apply in conjunction with rail plan III TOFC service, between Harrisburg rail terminals and Pennsylvania points within 60 miles thereof, found just and reasonable; thourh respondent's cost data are deficient in some respects, it has made a prima facie showing that the proposed rates are compensatory, they are identical with rates of other motor carriers between the same points, which were found lawful in 315 ICC 499, and revenues thereunder would exceed that presently obtained in interline service with other motor carriers.—Freight, All Kinds, between Harrisburg and Pa. Points, 316 I.C.C. 41 (44).

Although respondent's operating ratios indicate its overall operations are being conducted at a profit, such data do not establish compensativeness of proposed rates.—Machinery and Related Articles—Hampstead, Md., to New England Points, 316 I.C.C. 71 (74).

Proposed service is an innovation in the motor carrier industry, with rates covering a pure line-haul service from terminal to terminal, in carrier-owned trailers, to enable carriers to compete more effectively with TOFC plan III service offered by railroads; in absence of adequate cost presentation, the evidence does not support a finding that the proposed rates are compensatory; not approved.—Automobile Parts and Other Articles, Central Territory, 316 I.C.C. 143 (143, 146). [But see dissent.]

Though proposed l.t.l. commodity rate on boots or shoes appears compensatory, it is not shown to be just and reasonable when neither volume of movement nor competitive conditions justifying a special rate are shown; the traffic appears to be moving freely within the territory at l.c.l. class rates, and proposed rate might undermine an existing just and reasonable rate structure; not approved.—Boot or Shoes from Columbus, Ohio, to Chicago, Ill., 316 I.C.C. 239 (241-2).

Since evidence submitted by the parties is meager and inconclusive, and there is no substantial evidence that proposed initial rate is unlawful, the issue of reasonableness is resolved in favor of respondent, which does not have the burden of proof; that rate and others representing merely a change in form of publication of initial rates are on same level as other rates of respondent on like traffic from same origin; proposed rates found not shown to be unjust or unreasonable.—Wine from Canandaigua, N.Y., to Florida and Alabama, 316 I.C.C. 246 (248).

Proposed point-to-point rate the same as rate applicable under intermediate rule but on higher minimum weight, resulting in a higher minimum charge per truckload and returning greater per-truck revenues than present rate, does not constitute a destructive competitive practice; evidence shows it is respondent's present rate which is causing an adverse effect on traffic of other carriers and not proposed schedules; approved.—Iron or Steel Articles from Portage, Ind., to Chicago, 316 I.C.C. 255 (257).

Compensatory nature of proposed all-freight rates, consignor to load and consignee to unload, is not clearly established when respondent failed to submit underlying data in support of its cost analysis; further, while rate comparisons submitted by respondent are entitled to weight, they do not constitute an appropriate standard with which to measure reasonableness of the proposed rates.—Freight, All Kinds, Chicago, Ill. to Dayton, Ohio, 316 I.C.C. 405 (406-7).

Proposed rate on soap and related articles, minimum 20,000 pounds, is noncompensatory when minimum truck-mile revenue therefrom is substantially below system average expense per vehicle-mile for respondent, a specialized carrier of such products, and no competitive reason for that rate is shown; not approved.—Soap & Related Art. between Kansas City & Jeffersonville, 316 I.C.C. 421 (424-5).

Initial rates on certain commodities from railheads in the Dakotas to South Dakota missile bases, on basis higher than respondent's Montana intrastate rates on like traffic, no lower than corresponding rates of another motor carrier on lower minimum weight, and

on same level as rates prescribed by South Dakota commission for intrastate movements of comparable commodities requiring special equipment, are not shown to be unlawful; approved.—Cable, Iron & Steel, Lumber between S. Dak. and Missile Sites, 316 I.C.C. 427 (429-30).

Although protestant objects to establishment of l.t.l. rates on envelopes for shipments of 2,000 pounds and over which would reduce spread previously existing between shipments of those weights and shipments of less than 2,000 pounds, former exceed full costs, and agreed scale rates in general are compensatory; mere reduction in spread between shipments of different weights is not indicative of unlawfulness.—American Envelope Co. v. A. & H. Truck Line, Inc., 316 I.C.C. 563 (565, 568)*.

That shippers and receivers regard present class rates between Greenville, Miss., and certain Arkansas points, established for rail ratemaking distances via other river crossings, as unjust does not, standing alone, establish that proposed rate bases reflecting short highway mileages via subsequently constructed highway bridge at Greenville are lawful.—Class Rates between Greenville, Miss., and Arkansas, 316 I.C.C. 629 (632).

A proposed rate may not be approved as just and reasonable in absence of positive evidence in form of either acceptable cost data or probative rate comparisons.—Lubricating Oil from Panama City, Fla., to Atlanta, Ga., 316 I.C.C. 696 (698).

Although respondent's cost data, in summary form without reference to underlying data, are entitled to little weight, the compensativeness of the proposed rate on ribbon bows is supported by a comparison of rates on other commodities actually transported by respondent from and to the same points; both vehicle-mile and ton-mile earnings are substantially higher than on such high-value commodities as cigars, cigarettes, and alcoholic liquors transported by respondent between points involved. Approved.—Dry Goods and Telephone Housings within Central Ter., 318 I.C.C. 175 (177).

As respondent holds itself out to accept minimum shipments of 33,000 pounds, rates must be compensatory at that weight.—Alcoholic Liquors from Eastern Points to South Dakota, 318 I.C.C. 195 (197).

Reduced rates and increased minimum weights on cement from Dewey, Okla., to Kansas points, proposed as result of increase in Kansas maximum weight limit, will yield more profit than present rates and will permit fuller utilization of respondent's equipment; approved.—Cement from Dewey, Okla., to Points in Kansas, 318 I.C.C. 281 (282, 284).

Proposed rate on sugar from Louisiana origins to North Carolina destinations, while on rather a low level, is compensatory and serves to balance respondent's operations. Furthermore, considering the troublesome situation confronting regulated carriers in transportation of sugar, due to competition of various "buy-and-sell" operators, a low rate level is justified. Respondent has met its burden of showing reasonableness of the proposed rate.—Sugar from Louisiana to North Carolina, 319 I.C.C. 107 (112).

While reasonably accurate cost data are helpful in determining reasonableness of particular rates, they are not the only criterion; a comparison of earnings yielded by transportation of shipments of varying size is also a factor of significance. Proposed reduced rate on brushware, minimum 35,000 pounds, is reasonable when it would yield slightly higher revenue than average loads of 32,960 pounds at present higher rate on 30,000-pound minimum.—Brushware & Cleaning Articles, Easthampton to Atlanta, 319 I.C.C. 164 (166)*.

It should not be inferred, from finding that comparison of initial rates of respondent, a class III limited-commodity carrier, with average costs of class I and II general-commodity carriers does not establish that the rates are noncompensatory and therefore unreasonable, that there are different standards of ratemaking as between the different classes of carriers. The relative size of a carrier has no bearing on requirement that just and reasonable rates be maintained.—Animal Feed, Miss. and Tenn. to Midwest and Southwest, 319 I.C.C. 257 (260)*.

While respondent shows that its southbound traffic predominates and that it needs northbound coffee traffic to balance its operations, it has not shown that rates and charges under proposed roasting-in-transit arrange-

ment would be compensatory, and the commission has repeatedly declined to approve rates justifiable only on added-traffic theory; proposal is not supported by any shipper witness, and respondent's statement that such transit provisions would divert traffic from private carriage to its common-carrier service lacks probative force; not approved.—Roasting of Coffee in Transit at Fort Worth, Tex., 315 I.C.C. 455 (457-8).

Averages of the minimum earnings which would be produced by the rates proposed and rates applying on other commodities moving in the opposite direction are entitled to little weight; earnings produced on traffic moving in the return direction cannot be considered in adjudging the compensativeness of a proposed rate, since rates which can be defended only on the backhaul or added-traffic theory may not be found to be just and reasonable.—Bananas, Gulfport, Mobile & New Orleans to Indianapolis, 316 I.C.C. 194 (195).

Proposed reduced rates on meats and packinghouse products, minimum 38,000 pounds, made 30 and 20 cents lower than previously approved Cudahy scales on boxed and hanging meats, minima 33,000 and 30,000 pounds, and designed to meet competition of private and illegal carriage of meats purchased f.o.b. plant, are higher than 66,000-pound TOFC rates established for same purpose and appear somewhat higher than charges of the gray area motor carriers and costs of private carriage. Proposed rates are amply compensatory and preserve same rate relations and groupings as under the Cudahy scales; approved as just and reasonable.—Meats and PHP, Central & Western to Far Western States, 319 I.C.C. 667 (669, 671, 675).

Proposed reduced joint rates on tobacco products between Greensboro, N.C., and Louisville, Ky., which reflect shipper's costs for interplant movements in rail plan III TOFC service, are just and reasonable when they exceed respondents' fully distributed costs for all movements and are necessary for them to continue participating in the traffic, most of which is now moving in the plan III service. The lower rates proposed for the movement from Louisville than in reverse direction are justified by differences in costs due to different load factors for movement of a single article in one direction and multiple articles in the other; and in round-trip service the proposed rates will result in an operating ratio of 83 percent at full costs.—Cigarettes and Tobacco between Greensboro and Louisville, 319 I.C.C. 679 (682, 684).

Proposed 6-percent increase in rates and charges on transcontinental traffic between points east and west of described line from El Paso, Tex., to Canadian boundary at Montana-North Dakota State line, except in commodity rates with minimum weights of 10,000 pounds or more and in all rates between specified points and areas, approved to provide revenues needed to meet increased operating expenses. As result of general increases in wages, equipment prices, and other operating costs, in 1960 the number of involved carriers with operating ratios below 95 percent was about half that for 1959, while the number with ratios of 100 percent or more had doubled; but during first 9 months of 1961, after proposed increase became effective, the number with ratios below 95 percent doubled, those with ratios of 95 to 100 percent declined by 102, and the number with ratios upwards of 100 percent was only about half that for 1960. Evidence is convincing that the transcontinental rates as thus increased do not exceed reasonable maxima.—General Increases—Transcontinental, 319 I.C.C. 792 (793-5, 803).

Respondents' detailed showing of the nature and extent of his operations sustains his claim that he must retain involved beer traffic in order to remain in business. He has been handling only a limited number of commodities, four of which provide over 90 percent of his total revenue, with beer and empty containers supplying over 40 percent thereof at time when his rates were substantially on same level as rail rates; and immediately following rail rate reduction he lost half his beer traffic and probably would have lost the rest had parity not been restored by the reduced rates in issue. Dissapproval of proposed rates would likely cause him to lose over $30,000 in revenue, with resulting impairment of operations that are partially balanced. Proposed rates appear compensatory in light of record as a whole; approved.—Malt Beverages—Ill.,

Ind., Ky., & Ohio to Chattanooga, 319 I.C.C. 787 (790-1).

Though the commission has frequently held that in determining compensativeness of t.l. rates the minimum weight should be used in computing earnings thereunder, rather than a speculative heavier load, that general rule is not controlling as to proposed 20,000-pound rates on paper bags, which cannot realistically be termed tantamount to t.l. rates when a 20,000-pound shipment fills only about one-fourth of a trailer. In view of probability that additional traffic would be carried on the vehicle, minimum earnings need not be considered the probable maximum t.l. earnings; respondents testified that are more than one 20,000-pound shipment would be transported in one trailer, and movements by certain respondents of paper bags and other articles average substantially over that minimum. Therefore, a departure from assumption in Highway Form B that the tariff minimum weight would exceed the average outbound movement is warranted in computing line-haul costs. Rates proposed are compensatory and the highest shipper will pay; approved.—Paper Bags from Chicago to Kansas City, 321 I.C.C. 732 (735-6).

Proposed motor rates on traffic moving on forwarder billing between points in eastern, central, and middlewest territories, subject to a maximum of 30,000 pounds per trailer and overage rates for excess weight, also subject to tariff provision for optional substitution of rail line-haul movement, are compensatory and are just and reasonable when they are higher than rail plan III TOFC rates they are designed to meet, and have substantially increased respondent's trailerload revenues due to heavier loading. Basic type of rate proposed was approved for same respondent on 20,000-pound maximum weight between eastern points and Chicago and St. Louis in 306 ICC 243; and proposed rates on 20,000-pound maximum between North Adams, Mass., and Chicago and St. Louis and between Glens Falls, N.Y., and St. Louis compare favorably with rates therein found reasonable for comparable distances. Approved.—General Commodities, Eastern, Central & Middlewest Ter., 321 I.C.C. 504 (508, 515-6).

Proposed l.t.l. commodity rates 68 and 69 percent of first class on mixed shipments of a specified group of articles, moving in carrier-furnished sealed containers without charge for tare weight thereof, but subject to conditions that a shipment consist of at least 10 differently described articles, be loaded and unloaded by shipper and consignee, and be subject to specified minimum charges, are not shown to be just and reasonable. Proposed rates would apply on over 400 different articles, some rated as high as class 300, and though overall rating of containerized articles handled during test period was 92.5 percent of first class, there is nothing to prevent shipment of a mixture of articles all rated class 200 or higher, or one consisting almost entirely of units of one high-rated article, so long as one unit each of nine other articles is included. Thus it cannot be found that savings from the proposed method of handling large numbers of small shipments would more than offset the revenue loss entailed plus cost of providing the containers. Not approved.—Freight, All Kinds, Chicago to Cedar Rapids, Des Moines, 321 I.C.C. 380 (384-5).

66.—Cost of service.—[Vol. 19].—See also §216(b), n. 100 through 113.—Plaintiff which does not own its own tractors, but leases them from other persons who also operate the equipment, did not meet its burden of proving compensativeness of proposed rates by merely showing that it paid the owner-operators 70 percent of the gross revenue per trip, without presenting any costs whereby the commission could determine whether that proportion of the gross revenue represented a compensatory return.—Malone Freight Lines, Inc. v. United States, 204 F. Supp. 745 (755)*. [But see 318 ICC 567.]

Although plaintiff's cost study prepared by a qualified expert, applying Highway Form B to data from its annual report, indicated that proposed rates exceeded out-of-pocket costs, the commission found that the cost data were not adequately supported and the rates were therefore not proved to be compensatory. But though the commission was not bound to accept plaintiff's uncontradicted cost evidence, it was not free to disregard the expert testimony offered without communicating its criticisms before decision. Though it criticizes the expert's use of Highway Form B as unsuita-

ble for a specialized carrier without considerable adjustment, in a subsequent case it accepted use of that formula for such carriers, and its specific criticisms of plaintiff's study appear to be matters that normally should be raised at a hearing; moreover, computation of plaintiff's costs according to Highway Form B as written shows the rates to be compensatory to nearly all of the destination territory. Considering the apparent reasonableness of plaintiff's cost evidence in light of other factors, the commission's rejection of the rates was not warranted. Cancellation order enjoined.—Davis & Randall, Inc. v. United States, 219 F. Supp. 673 (676-8, 680-3)*.

In a rate case, matters of cost are important and they are solely for the judgment of the administrative agency. To be compensatory, a rate must equal out-of-pocket costs, and it is clearly within the commission's discretion to reject as unlawful a rate which does not provide a return of out-of-pocket costs to the carriers; for, though the commission under some circumstances may permit a carrier to establish a rate not proved to cover out-of-pocket costs, it is not required to do so. The cost evidence presents a rational basis for the commission's conclusion that the rate in issue is not compensatory, and its finding reflects a permissible application of the statutory standards. Order rejecting the proposed rate, sustained.—Middlewest Motor Freight Bureau v. United States, 234 F. Supp. 151 (153, 154, 155)*.

The sole reason given by the commission in 318 ICC 567 for changing the evidentiary requirements stated in 313 ICC 530 for showing compensativeness of rates covering service provided with owner-operators was that it is virtually impossible for carriers to collect and submit reliable cost data for representative movements, because owner-operators are not subject to direct regulation by the commission and are not required to maintain accounts and records or file annual reports. This overlooks the commission's power to require submission of these data by the certificated carriers who can exact that information from their subcontractors who are their alter ego in the actual carriage. There is no question that the commission has full power and authority over the carriers hiring owner-operators, and it seems inescapable that it can require the carriers to obtain the necessary cost data; the owner-operator performs the function of a carrier and operates in accordance with the carrier's rights, and no rational basis is disclosed that makes the collection or submission of costs for owner-operator movements impossible.—Eastern Central Motor Carriers Ass'n v. United States, 239 F. Supp. 591 (598, 599)*.

While obtaining owner-operator costs may be difficult, the need for production of such evidence, in order to meet standards of the national transportation policy and requirements of §216(b), (d), and (g), outweighs the burden placed on the carrier and owner-operator. Requirement that a carrier using owner-operators has only to show that its retained revenue substantially exceeds its costs, and that amount paid an owner-operator is enough to acquire and retain his services, is based on the patently questionable assumption that latter will hire himself out to a carrier only if his earnings from the operation will exceed his expenses; but the commission has recognized that some owner-operators are not profiting from their operations with carriers. The whole is the sum of all its parts, and in owner-operator situations the total revenue expense comparison consists of that part dealing with carrier's revenue and expense and that part concerning revenue and expenses of the owner-operator. This second part may vary so as to make the applicable rates noncompensative but, under decision in 318 ICC 567, it is not even examined.—Id., pp. 599, 600.

The cost evidence problem arises because carriers with self-sustaining operations are vying with those using owner-operators to obtain a greater share of the available traffic; each faction would like to keep its rates lower than the other while realizing a profit. But unequal treatment is accorded on the one hand to carriers who own and operate the equipment and are required to submit refined and detailed cost data to assure compensativeness and, on the other hand, to carriers who lease the equipment and crew and who submit a lump sum covering the cost of rental equipment and crew and add to that only administrative and overhead costs and profit. This is

unjust discrimination against the self-sustaining carrier, as prohibited by the national transportation policy. In absence of sufficient reasons, when costs are used to prove compensativeness of reduced motor-carrier rates, full production of evidence is required for both the self-sustaining carrier and the carrier using owner-operators, in order to meet requirements of the national transportation policy and §216(b), (d), and (g). Accordingly, the order under review is set aside and the case remanded for further consideration.—Id., pp. 600-1.

While costs submitted by protestant may not be accepted as the precise equivalent of respondent's actual costs of transporting considered traffic, in absence of probative countervailing evidence they are the best evidence bearing on compensativeness of proposed rates and are acceptable as a reasonable approximation of cost of moving that traffic. Proposed rates cannot be approved when those costs show they would not cover out-of-pocket costs.—Paint & Paint Materials, Chicago to Kansas City, Kans., 318 I.C.C. 331 (334); when protestants' cost data shows that out-of-pocket costs exceed proposed rates to representative destinations by 99 to 204 percent.—Drilling Mud or Clay—Greybull and Gascoyne to Texas, 315 I.C.C. 191 (193); and when protestant's cost study shows out-of-pocket costs 9.92 cents in excess of proposed rate, since compensativeness thereof is not established.—Lubricating Oil from Panama City, Fla., to Atlanta, Ga., 316 I.C.C. 696 (698).

Cost data submitted will not support a finding as to compensativeness of proposed rates; those of protestants' study are overstated and are deficient; those of respondent based on average load is an inadequate study and is not supported by underlying data and respondent's costs are understated. Commission's restatement shows that the rates fail to meet respondent's out-of-pocket costs by substantial amounts, and in comparison with the combined costs for a seven carrier study, only the proposed 40,000-pound rate exceeds out-of-pocket costs, and that by the barest minimum of one-tenth of a cent. The burden of proof being on respondent, proposed rates are not approved.—Glass Bottles From Muskogee, Okla., to Chicago. 323 I.C.C. 258 (262-3).

When only cost evidence presented indicates that proposed rate is substantially below out-of-pocket cost of handling the traffic, proposed rate may not be approved.—Aluminum from Heath, Ohio to Dolton, Ill., 316 I.C.C. 38 (40).

Restatement of respondent's costs according to Highway From B shows that out-of-pocket costs exceed proposed initial rates by 2 to 40 cents per 100 pounds, and by 2 to 28 percent; proposed rates are therefore not compensatory; not approved.—Clay from Greybull, Wyo., to Points in the Middlewest, 314 I.C.C. 705 (709).

Cost data consisting of a summary of proponent's system out-of-pocket line-haul costs, which fail to take into account expense of performing proposed transit services, do not establish compensativeness of proposed transit charge.—Roasting of Coffee in Transit at Fort Worth, Tex., 315 I.C.C. 455 (457).

A minimum requirement of respondent's statutory burden of proving reasonableness of proposed rates is a showing that they would be compensatory for the service performed; although respondent criticizes protestants' cost data, it offered none of its own; protestants' showing thus constitutes the best evidence of costs prosented, and furnishes a reasonable guide as to compensativeness of proposed rates when it is based on respondent's annual report; wide spread between the proposed rates and costs shown indicates that they would not cover out-of-pocket costs.—Clay from Points in the South to Ohio, Pa., and W. Va., 316 I.C.C. 1 (3, 4).

Though respondent stresses that it needs the proposed rates to help improve its unbalanced operation, below-cost rates which can be defended only on the added-traffic theory may not be found just and reasonable. Not approved.—Id., p. 4.

When there is no substantiating evidence to show that cost data submitted are representative of movements anticipated, many cost items are omitted, and no attempt is made to determine proper apportionment of out-of-pocket costs to the traffic concerned, no conclusion of compensativeness can be made; proposed rates not approved.—Talc

from Emeryville, N.Y., to Ohio, 316 I.C.C. 197 (199).

Proposed removal of restriction on existing l.t.l. commodity rates on hardware and other articles, requiring an aggregate of 12,000 pounds and five or more shipments, may not be approved when the rates without the aggregate are not shown to be compensatory. Respondent's cost data, which admittedly are understated, show that charges on articles rated class 55 would not cover out-of-pocket costs for shipments under 2,000 pounds destined to points in a relatively short-haul area, and would not cover out-of-pocket costs for any shipment of class 50 articles under 2,000 pounds.—Hardware, LTL, New Britain, Conn., to Mid. Atlantic Terr., 322 I.C.C. 249 (252).

Rates which exceed out-of-pocket costs are not necessarily noncompensatory merely because they fail to cover fully distributed costs; proposed rate slightly exceeding out-of-pocket costs but less than fully distributed costs is compensatory and necessary to enable respondents to compete for film traffic all of which is presently moving by rail; approved.—Cellulose Film, Not Printed, Marcus Hook, Pa., to Chicago, 316 I.C.C. 322 (324).

Rates which exceed out-of-pocket costs are not necessarily noncompensatory merely because they fail to cover fully distributed costs; rate exceeding respondent's out-of-pocket costs, which is needed to retain the traffic, is not unlawful.—Canned Goods from Chicago, Ill., to Twin Cities, 316 I.C.C. 221 (223).

Proposed reduced rail-competitive rate on wrapping paper which would exceed fully distributed costs by 1 cent, approved as compensatory; but lower alternative rate on higher minimum may not be approved where it is substantially below respondent's out-of-pocket costs.—Wrapping Paper from Rhinelander, Wis., to Toledo, Ohio, 316 I.C.C. 455 (459).

Proposed new or reduced alternative rates on petroleum and products from Kansas City to Texas points produce minimum revenue exceeding variable costs in every instance except to Katy, Tex., and generally exceeding fully distributed costs by substantial amounts; approved, except the rate to Katy.—Petroleum Products from Kansas City, Kans., to Texas, 316 I.C.C. 307 (310).

Though protestant's computation of out-of-pocket costs is overstated to extent that pickup and delivery expense has not been adjusted to reflect shipper-consignee loading and unloading, such adjustment would not suffice to close the substantial gap indicated between the proposed rates and the out-of-pocket costs; not approved.—Ground Wood Boards, Sheets—Bemidji, Minn., to Chicago, 314 I.C.C. 774 (777-8).

Protestant's unrebutted showing that out-of-pocket cost for a 20,000-pound minimum load, based on data from respondent's annual report, exceeds proposed rate by 2.5 cents, even without provision for wage increases since incurred for over-the-road drivers under union contracts, indicates that the reduced rate is not compensatory; not approved.—Pie Filling from Duluth, Minn., to Fargo, N. Dak., 314 I.C.C. 797 (798).

Space and weight method used by respondents to compute line-haul portion of costs on considered sugar traffic fails to reflect accurate costs. Since density only affects line-haul costs when a vehicle is prevented from having a full weight load by bulkiness of the commodity carried, it would have no effect on the sugar traffic because density thereof of 50 pounds per cubic foot would provide weight capacity before space capacity became a factor. Respondents' unit costs as restated, with elimination of the space and weight principle and use of system average load in the reverse direction, show that total out-of-pocket costs exceed proposed rates in every instance; not approved.—Sugar, Colo., Nebr., S. Dak., and Wyo. to Iowa, Ill., Mo., 315 I.C.C. 371 (374-5, 376).

Although respondent seeks to justify proposed rates on basis of private-carrier and market competition, it is well established that out-of-pocket costs represent a floor below which rates may not be approved even to meet competitive situations.—Petroleum Products, Friendship to Bland and Rocky Gap, Va., 316 I.C.C. 114 (116).

One respondent's estimate of out-of-pocket expenses was not computed on any recognized cost formula and was not sufficiently

detailed to permit verification; out-of-pocket line-haul costs of another were not supported by any underlying data and were not sworn to by a person having knowledge thereof; protestants' cost evidence based on financial and operating statistics compiled from quarterly reports of class I and class II carriers indicates that proposed reduced rates would not be compensatory; not approved.—Hides and Pelts from Texas to Ill., Mo., and Wis., 316 I.C.C. 243 (244-5).

A minimum requirement in sustaining the burden of proof as to proposed reduced rates is a showing that they are compensatory. On the best cost evidence of record, proposed reduced rates, except to two destinations, fail to cover respondent's out-of-pocket costs and thus, with those exceptions, are not shown to be just and reasonable.—Alcoholic Liquors from Peoria, Ill., to Eastern Points, 321 I.C.C. 142 (147, 149)*.

Proposed rates convincingly shown to be noncompensatory where the proposed 10,000-pound minimum rates are below respondent's out-of-pocket costs in every instance for shipments to representative destinations, even assuming loaded return movement of exempt commodities, and the 20,000-pound minimum rates would similarily be below out-of-pocket costs in 6 of the 12 representative shipments, assuming a 75 percent loaded return. In addition, inclusion of probable dead-head mileage from respondent's terminal, to satisfy supporting shipper's requirements for expedited service would further reduce relative compensativeness of the 20,000-pound rates; moreover, record is convincing that it is unlikely that such rates would be used by supporting shipper.—Wooden Containers, Hebron, Md. & Suffolk, Va., to Florida, 322 I.C.C. 39 (45-6).

Though protestants show out-of-pocket costs for considered lumber traffic only from Cimarron, N. Mex., several hundred miles east of Albuquerque, it is reasonable to assume that operating costs from Albuquerque to Chicago would be at least no less than from Cimarron; based on similar average costs, similar rates proposed from those points were found noncompensatory in a prior proceeding, and in absence of rebuttal evidence protestants' cost evidence is convincing that proposed rate from Albuquerque is below a compensatory level; not approved.—Lumber from Cimarron, N. Mex., to Chicago, 315 I.C.C. 534 (535).

Special or expedited pickup and delivery trips have a higher proportion of running time than average trips and applicable unit costs per hour are greater because of additional consumption of fuel and wear and tear on vehicles, and if those services required a total of more than 30 minutes per 100 pounds their cost would wipe out the portion of proposed any-quantity, expedited-service rates intended to cover them; however, on a hundred-weight basis the proposed $3.60 increment to the terminal-to-terminal rates will exceed the cost of expedited pickup and delivery; proposed rates approved, provided the 100-pound rate is made the minimum charge.—Freight, All Kinds—Expedited Service—Chicago-Atlanta, 314 I.C.C. 663 (665, 666).

Though accurate cost data are desirable, they are not indispensable in establishing reasonableness of proposed rates. Proposed rates approved.—Rubber, Sarnia, Ontario, to Conn., Mass., Mo., and R.I., 315 I.C.C. 707 (708)*.

Costs presented by protestants, which are based on operations of numerous general-commodity carriers, are not shown to be representative of costs of respondent, a specialized carrier engaged primarily in transportation of foodstuffs; are therefore inconclusive.—Foodstuffs, New York Points to Milwaukee & Twin Cities, 315 I.C.C. 725 (727-8).

Protestants' cost estimates based on expenses of six class I and class II carriers are not a reliable indication of costs of respondent, a class III carrier; since respondent has shown that its operations are not confined entirely to one-way hauls, and costs submitted by protestants are not shown to be representative of respondent's costs for handling considered traffic, comparisons of revenue per vehicle-mile at proposed rates, computed over round-trip distances and assuming a 100-percent empty-return movement, with average vehicle-mile costs of those six carriers are not persuasive that proposed rates are noncompensatory.—Wine from Canan-

daigua, N.Y., to Florida and Alabama, 316 I.C.C. 246 (248).

Proposed reduced rate yielding greater minimum revenue than present rates on lower minimum weight is compensatory; although respondent's cost evidence did not include administrative or overhead expenses, margin of truckload revenue above costs is stated to be sufficient to cover such costs plus a profit. Proposed rate also exceeds costs for similar movement adduced by protestant in another proceeding based on a lower minimum and including loading and unloading, which would be performed by shippers under proposed rate.—Printing, Wrapping Paper, Pulpboard—Ohio to New York, 318 I.C.C. 49 (50-1).

As respondent's principal operations are limited to two commodities, it keeps separate records for its cement operations, and two terminals (including involved origin) are devoted exclusively to cement and all its cement vehicles serviced there, its statement of transportation, maintenance, and overhead expenses for cement can be accepted as reliable, considering simplicity of its operations. Comparison of its average truck-mile costs on cement with average truck-mile earnings under proposed cement rates to Kansas points of varying distances strongly indicates that proposed rates are compensatory; approved.—Cement from Dewey, Okla., to Points in Kansas, 318 I.C.C. 281 (283, 284).

Although cost data presented are too seriously defective to show compensativeness of proposed reduced assembling rates on textiles, indicated savings of 1.41 to 1.8 cents in collecting charges and about 19 cents in making deliveries, due to special conditions attendant on the proposed rates, together with favorable comparisons with other motor carrier rates, are convincing that they are compensatory; approved.—Assembling Rates at Charlotte and Greensboro, N.C., 318 I.C.C. 429 (437-8, 439).

Since unit costs computed from respondent's annual report through automatic data processing of Highway Form B were almost identical with those submitted by respondent, latter are acceptable; but its line-haul cost per hundredweight-mile was overstated due to its use of unit cost reflecting its average load rather than that reflecting round-trip load for the traffic in issue. Respondent's average costs are representative of most of its intercity operations, which are over toll-operated facilities, and use of express highways would not appreciably increase its costs. Applying respondent's unit costs to actual mileage, proposed rate is 110 percent of total out-of-pocket cost and is compensatory.—Alcoholic Liquors, Detroit, Mich., to Long Island City, 319 I.C.C. 404 (407).

As respondent recently converted from contract to common-carrier status referred to its 1960 annual report in preparing its 5-week cost study for that year, that report may be used to test its rate scale and costs. As restated, its costs show that its initial common-carrier rates on cement in bags cover total costs by a slight margin and that its lowest rates on bulk cement also approximate such costs for distances up to 125 miles. As that distance generally exceeds the average cement haul in that territory, respondent's rates as a whole cover its full costs and are compensatory.—Cement from Hudson, N.Y., to New England and Pa., 319 I.C.C. 235 (243, 244).

Though respondent holds out all-motor service, preponderance of involved forwarder traffic moves in substituted rail-for-motor service, and it properly included cost of purchased rail transportation in its cost study. But as both respondent's out-of-pocket costs and examiner's restatement are computed for short highway distances instead of either somewhat longer payment-mile basis on which owner-operators are paid or actual railroad mileages between points, its costs are understated to extent that rail mileages exceed highway distances. Also, there is no underlying evidence to show that trailer rental paid by respondent to its wholly owned subsidiary covers cost of furnishing trailers. However, as the restatement is calculated on movement of a maximum shipment of 30,000 pounds between typical points, whereas average shipment does not approach that weight, resulting overstatement more than offsets the understatements noted, and the restatement, which shows that proposed rates exceed out-of-pocket costs in all instances and fully distributed costs in all but three instances,

reasonably indicates cost of handling considered traffic.—General Commodities, Eastern, Central & Middlewest Ter., 321 I.C.C. 504 (513-4).

And though respondent's costs include expense of purchased motor transportation, without any showing of operating costs of the owner-operators, decision in 318 ICC 567, which laid down as test of adequacy of owner-operators' compensation that it be sufficient to acquire or retain their services for movement of the traffic to which the rate applies, is controlling. As most of owner-operators employed by respondent have served it for periods of 5 to 15 years, compensation paid them is clearly sufficient to retain their services; and since this compensation results from collective bargaining, it is fair to assume that the owner-operators are not being exploited. Proposed rates approved as reasonably compensatory.—Id., pp. 514-5.

While respondent has somewhat understated its costs in failing to include any amounts for supervision, administrative and general expenses, insurance and safety, and loss and damage, in other respects it has overstated its costs by a considerable margin, particularly in including trailer rental, since proposed rates apply only to shipments in shipper-furnished trailers. When adjusted to reflect average rental of tractors, exclusion of trailer expense, and corrected system average load, respondent's costs, even with addition of omitted items, show proposed proportional rates on all-freight, in connection with prior or subsequent rail TOFC movement, to be reasonably compensatory; approved.—Freight, All Kinds, Chicago and Ind., Mich., Ohio, 322 I.C.C. 423 (426-7).

Respondent's cost estimates for moving shippers' loaded and empty trailers, including loading and unloading, between northern New Jersey rail yards and Long Island points, while somewhat unorthodox, are convincing that proposed per-trailer charges are compensatory; mileage factors used are reasonable and time factors reflect respondent's actual experience; drivers' costs are about the same as for protestant conference members; and its assignment of 20 percent of operating expenses and administrative overhead to involved traffic is not disputed. Further, respondent has been experiencing a profit at like charges for similar service performed under contract for Long Island R., and mere difference in ownership of trailers in the two services would not alone affect respondent's costs.—Freight, All Kinds, & Empty Trailers bet. N.J. & N.Y., 322 I.C.C. 429 (432-3).

Proposed reduced t.l. commodity rate on edible jams, jellies, or preserves, n.o.i., subject to shipper loading and consignee unloading, will be compensatory when it exceeds out-of-pocket cost of carrier representative of respondents, motor carriers participating in certain Middlewest Motor Freight Bureau tariffs. Using unit costs from Highway Form B, respondents compute out-of-pocket cost for considered traffic on two bases, (1) line-haul cost for the average round trip load weight and (2) line-haul cost for the round trip load, adjusted for density; and cost computed on each basis is lower than proposed rate even before reduction to reflect shipper loading and consignee unloading. Also, respondents' cost evidence shows that, after pickup and delivery adjustment, proposed rate exceeds restated out-of-pocket cost on the first basis by 8.8 cents, and that it is 17.8 cents above such cost adjusted for density. Approved.—Jams, Jellies, or Preserves, Oklahoma City to Chicago, 325 I.C.C. 95 (97-8, 101-2)*.

Where equipment and terminal expense items, used in respondent's cost study on which review board based its finding of compensativeness of proposed rate, represent rental payments made to respondent's wholly owned subsidiaries which provided such service, the only question is the integrity of costs shown for the rental payments; and fact that respondent and its subsidiaries are separate entities is not shown to have a bearing on the cost of service issue. From an accounting standpoint, treating rental payments as expenses is wholly proper; but if such payments, which are within complete control of the parent company, are so exorbitant or inordinately iow, it can become necessary to scrutinize the costs underlying them. Facts of record do not in themselves warrant questioning reliability of the claimed rental payments, nor do protestants advance adequate justification for doing so.—Plastic Materials, Longview, Tex., to Chicago, 325 I.C.C. 691 (694).

Nothing in the record indicates that the rentals are grossly out of line with costs actually incurred by the subsidiaries in furnishing the equipment and terminals. Rental payments, most of which are made for use of line-haul equipment, are acceptable where the territorial average vehicle-mile cost computed by respondent is reasonably in line with that developed by the commission, of which official notice is taken, and little if any rental paid for terminals would be chargeable against considered traffic, which moves without terminal platform handling, and so would have an insignificant effect on the total costs.—Id., pp. 694, 695.

Cost data submitted will not support a finding as to compensativeness of proposed rates; those of respondent understate costs and are deficient; those of protestants, while tending to show that the rates are not compensatory, are inconclusive; the burden of proof being on respondent, proposed rates are not approved.—Candy and Related Articles, New York to Detroit, Mich., 314 I.C.C. 759 (762).

Proposed reduced rate may not be approved without a showing that it would be compensatory for the service to be performed thereunder. Underlying data on which proponent's revenue figures are based are not of record, its costs for handling considered l.t.l. traffic are not shown; record fails to show that proposed l.t.l. rates would be reasonably compensatory.—Fluorescent Lamp Ballasts, LTL, Atlanta to Florida, 315 I.C.C. 412 (414).

Respondent's cost exhibits do not reflect the joint cost of the round trip movement and make no allowance for the average load in the opposite direction; all equipment operated in one direction must eventually move in the return direction, thus, costs for movement of the vehicle must be apportioned to the traffic moving on the round trip.—Automobile Parts and Other Articles, Central Territory, 316 I.C.C. 143 (146).

While respondent criticizes protestants' costs based on public statement No. 1-61 of commission's cost finding section as not typical of its operations, it submitted no evidence of its own costs of transporting considered traffic; respondent, not protestants, has the burden of proof, and such cost evidence as was presented casts considerable doubt on compensativeness of proposed rates; not approved.—Brick and Related Articles, St. Louis, Mo., to Chicago, 316 I.C.C. 227 (229).

Respondents' study cannot be accepted as a reliable indication of t.l. cost on considered traffic when it is not calculated on a round-trip basis; truck-mile cost stated is not supported by underlying data; and wage expense makes no allowance for nonproductive time, social security taxes, workmen's compensation, welfare expense, and other costs related to a driver's wages. Protestants' computation of out-of-pocket costs is more reliable because based on an acceptable formula (Highway Form B) which provides a method whereby all expenses are accounted for; protestants' study indicates proposed rate would not cover out-of-pocket costs and thus casts doubt on its compensativeness. Not approved.—Sugar, Beet or Cane, New Orleans, La., to Columbus, Ga., 316 I.C.C. 230 (232).

A minimum requirement in proving reasonableness of a proposed rate is a showing that it would yield something above out-of-pocket costs of the service, even where it is proposed to meet competition. Respondents' cost data based on one-way movement are inadequate to reflect accurately the costs for considered traffic; protestants' cost study appears acceptable and indicates that proposed rates are not compensatory; not approved.—Brass, Bronze, Copper, Articles - Anderson, Ind., to Rochester, 316 I.C.C. 233 (235).

Though such line-haul expenses as drivers' wages, insurance covering vehicle operation, and registration fees are properly assignable on an hourly basis, expenses for repairs, fuel and oil, tires, and depreciation are properly mileage expenses, and use of a percentage of revenue to determine general overhead is improper because revenue is not a cost causative; cost data defective in those respects are not indicative of probable cost of considered movement. Proposed rates not approved.—Boot or Shoes from Columbus, Ohio, to Chicago, Ill., 316 I.C.C. 239 (240).

Proposed establishment of Charlotte, N.C., as a stopoff point for partial unloading of shipments moving from Chicago to Raleigh over a route beyond Greensboro 15 percent longer than respondent's normal route is not shown to result in a compensatory operation; no ba-

sis is shown for assumptions that pickup-and-delivery and platform costs would be one-half the average for all traffic, and that one-half the weight of a shipment would be unloaded at Charlotte; out-of-pocket line-haul costs claimed to consist solely of equipment and driver costs are not supported by underlying data, and respondent's study is further defective in excluding certain portions of general costs which are properly includible in out-of-pocket cost and in being calculated on a one-way basis. Proposed rule not approved.—Stopoff in Transit at Charlotte, N.C., for Unloading, 316 I.C.C. 317 (318-9, 321).

Both respondent's and protestants' cost studies are defective in allocating costs to mileage that do not vary directly with miles operated. Though respondent used short highway mileage in computing costs, it is not shown that its operation would be over the short route, and to extent that it would not, the short-line mileage should be increased by 6 percent to allow for circuity; moreover, no basis is shown for its assumption that administrative expenses for considered movement are 12.98 percent of other expenses listed. Neither study supports a conclusive finding as to compensativeness of proposed rate; not approved.—Soya Bean Oil, in Tank Vehicles—Lafayette-Cincinnati, 316 I.C.C. 461 (463).

Proposed reduced rates on fatty acids from Franklin, Va., to points in New Jersey area and on acetic acid from Parlin, N.J., to Hopewell, Va., restricted to apply only when there is a movement in both directions, are not shown to be compensatory. While truck-mile costs of contemplated round-trip operation would approximate respondent's system-average costs, round-trip earnings would not be profitable in connection with respondent's existing route from Parlin to Hopewell, but only over shorter route concurrently sought, authority for which is denied. Not approved.—Liquid Commodities between Va. and N.J., N.Y. and Pa., 316 I.C.C. 609 (614).

Respondent's cost study understates out-of-pocket costs of handling traffic when its computation of line-haul costs is based on one-way operation and fails to give any recognition to jointness of line-haul costs incurred in performing transportation as part of round-trip movement; resulting cost computations are unacceptable for ratemaking purposes; reduced rate not approved.—Aluminum from The Dalles, Oreg., to Adrian, Mich., 316 I.C.C. 625 (626-7).

Proposed initial rates on articles to be added to grocery list in respondent's tariff exceed out-of-pocket costs shown for 1955 in commission's public statement No. 7-56 for commodities of average density by 6 to 42 cents; subsequent adjustment of those costs to more recent levels based on experience of class I carriers is not shown to be reasonably applicable to costs of respondent, a class III carrier. However, protestant's showing that even on 1955 level out-of-pocket costs for weight brackets and distances involved, adjusted to reflect lower density of popped corn, potato chips, and pretzels, would exceed proposed rates thereon by substantial amounts is not rebutted; rates on those commodities therefore may not be approved. Otherwise, proposed rates are not shown to be unlawful except in failure of commodity descriptions to comply with tariff-circular requirements. —Bakery Goods, Foodstuffs & Groceries from N.J. & N.Y., 316 I.C.C. 639 (641-2, 644).

Respondent's computation of such expense items as safety, insurance, taxes, licenses, and general administrative expense by taking intercity portions of those expenses as reported in its annual report, dividing total miles operated to determine costs per intercity mile, and multiplying results by round-trip distance of considered movement, falsely assumes that such expenses vary directly with miles operated; costs so determined are not a reliable approximation of cost of considered service; as revenue from proposed reduced rate would exceed respondent's deficient cost estimate by only 94 cents per shipment, it is not shown to be compensatory; not approved.—Silica Flour from Millville and Newport, N.J., 316 I.C.C. 645 (647-8).

Respondent's cost study is deficient in numerous respects, principally in failing to consider jointness of line-haul costs incurred as part of a round-trip movement. Though percentages by which rail protestants in-

creased line-haul and terminal costs to allow for increases over 1956 levels are unsupported, even if no consideration is given to such increased costs, proposed rates are below out-of-pocket costs; and motor protestants' cost estimates based on Highway Form A and public statement No. 8-55 also indicate that proposed rates would not be compensatory. Protestants' cost studies are more nearly representative of cost of transporting considered traffic than respondent's; proposed rates not approved.—Candy & Confectionery, Hoboken & New York to Chicago, 316 I.C.C. 671 (674-5).

Proposed reduced rates on alcoholic liquors, including loading and unloading when such service can be performed by not more than two men, are not shown to be compensatory; cost data are in summary form and no basis is offered for assumption of 4 hours' labor for loading and unloading; thus cost of rendering the helper service cannot be ascertained; not approved.—Helper Service, Alcoholic Liquors, Md. to N.Y. and N.J., 318 I.C.C. 102 (104).

In determining compensativeness, consideration must be given to jointness of line-haul costs incurred in performing transportation as part of round trip movement; respondents' addition of 10 percent for empty mileage does not properly reflect round-trip joint costs for entire movement; protestants' cost data, including a proper round-trip load factor developed by averaging published minimum and respondent's system average loading, indicate that proposed reduced rate fails by substantial margin to yield out-of-pocket costs of line-haul movement alone; not approved.—Printed Matter from Philadelphia Port and Sharon Hill, 318 I.C.C. 191 (194).

Respondent's cost data are not acceptable as a satisfactory estimate of the probable cost of transporting considered traffic in that they are based on one-way costs, ignoring inherent jointness of expenses of round trip movement, and do not provide for expenses of nonproductive use of equipment and personnel; moreover, where joint-line service is necessary, expenses of the connecting carrier have not been furnished, and the costs are based on short-highway distances although respondent makes extensive use of toll roads which may not be the shortest routes; not approved.—Candy and Confectionery, New York State to Midwest, 318 I.C.C. 409 (411-12).

Respondent's cost data are deficient in that they contemplate use of substituted rail-for-motor service, though there may or may not be a substitution of rail service under proposed rates; while tariff provides that carrier may substitute rail service unless shipper directs otherwise, respondent holds out to perform an all-motor transportation service and showing of compensativeness must be based on cost of performing such service over motor routes.—Candy & Confectionery, Ill. & N.Y. to Ill., Ky., N.Y. & Pa., 318 I.C.C. 540 (542-3).

Although contending she can operate at lower costs because she is a small carrier, respondent presented no cost evidence and has not met the minimum requirement of proving compensativeness; proposed rates not approved.—Heavy Mach., Equip. & Supplies between Wis. and Ill. & Minn., 318 I.C.C. 545 (548).

Respondent's cost study is inadequate to show compensativeness of proposed reduced rates when circuity factor and empty-load factors used are unsubstantiated by any evidence. Protestants' study, as restated to correct certain defects, shows out-of-pocket cost generally exceeding the proposed rates. Not approved.—Sugar from Ovid., Colo., to Iowa Points, 318 I.C.C. 636 (639, 640).

Respondents' cost studies do not show proposed reduced rates on hides, pelts, skins and related articles to be compensatory. Vehicles must be cleaned after each movement, but no allowance is made therefor or for recent wage increases. The derived space-occupancy ratios reflect only 1-week periods, and it is unlikely that any appreciable volume of other traffic would move with that considered in view of its shipping characteristics. Moreover, the space-and-weight method of computing line-haul costs fails to reflect accurate costs because density only affects line-haul expense when light and bulky lading prevents capacity loading. Not approved.—Hides or Pelts from Oklahoma to Chicago and Milwaukee, 318 I.C.C. 766 (770).

Respondents' cost studies on transporta-

tion of butter from North Dakota points to Twin Cities for rail movement beyond to the East are defective in failing to reflect actual costs of man-hours required for transfer to rail cars, increases in expenses since 1960, and refrigeration costs during hot weather. Moreover, both States traversed prohibit loads above 45,000 pounds in average vehicles, and, though proposed minimum is 40,000 pounds, to compete with all-rail service the rail factor beyond would have to be that applicable on 50,000-pound minimum, and it is not clear how advantage could be taken of that rate without transporting l.t.l. quantities. As costs developed by respondents are so little below proposed proportional rate, consideration of those defects forces conclusion that it is noncompensatory. Not approved.—Butter from Bismarck and Mandan, N. Dak., to Twin Cities, 321 I.C.C. 386 (389)*.

Respondents' cost evidence is ambiguous and lacks support of underlying data; system average costs shown are particularly deficient in specificity. Though similarly deficient, protestant's cost summary, using commission's cost section's formula, increases doubts as to reliability of respondents' cost evidence. In the circumstances, respondents have not sustained their burden of proving proposed reduced rates to be compensatory; not approved.—Powdered Iron, Camden and Pennsauken, N.J., to Dayton, 321 I.C.C. 499 (502-3).

In any precise comparison of carrier costs in accordance with a Highway From B formula, it is necessary to use certain data described in instruction 27 of the Uniform System of Accounts and required to be filed by the carrier in its annual reports. However, only general-commodity common carriers are required to comply with instruction 27, and respondent as a specific-commodity carrier is not required to, and apparently did not, file the information required to compute costs in the precise manner contemplated by Highway Form B; respondent's cost data accordingly have little probative value. Though protestants' cost study likewise has certain infirmities, they have introduced the best study they could reasonably be expected to adduce, considering the information available to them; viewed qualitatively, it is a prima facie showing that the proposed rates are not compensatory, and rate comparisons are not an adequate substitute for respondent's burden to produce cost evidence showing them to be reasonable. Proposed rates are not shown to be just and reasonable.—Cocoa Powder from New York, N.Y., to Council Bluffs, 322 I.C.C. 255 (258-9)*.

Although, even with protestant's adjustments, costs to respondent for considered movements of building materials are below revenue retained by it from proposed rates, respondent's method of computing costs by dividing its total expenses for 1962 by total number of intercity miles operated to obtain an average cost per vehicle-mile does not accurately reflect its overhead costs on involved traffic, because not all overhead costs vary with miles operated, particularly when the line haul is performed by owner-operators. Respondent has thus not met the first test of compensativeness announced in 318 ICC 567, that its share of the revenue will cover all its costs; proposed rates not approved.—Building Materials, Middle Atlantic and New England, 322 I.C.C. 710 (713-4).

Proponent's cost study based on public statement No. 1-62, submitted to show compensativeness of l.t.l. commodity rates on paper and paper articles which would replace class rates thereon following proposed elimination of tariff aggregate-weight provision, shows that resulting rates exceed out-of-pocket costs only on shipments under 2,000 pounds which would move in single-line service. There is no cost data with respect to shipments in two higher weight brackets; moreover, although the proposal is not restricted to single-line service, there is no evidence that it would be compensatory over joint-line routes on shipments in any of the three weight brackets. Proposal to eliminate minimum-tender requirement, published in connection with existing l.t.l. commodity rates, is not shown to be just and reasonable, without prejudice to its establishment on under 2,000-pound shipments moving in single-line service.—Aggregate Weight Provisions on Paper, Mass. to N.Y., N.J., 323 I.C.C. 525 (526-7, 531-2).

Proposed reduced t.l. commodity rate of 95 cents, minimum 41,000 pounds, on tea ex-

tract, published to meet plan II TOFC rates and designed to apply on mixed shipments of tea and coffee extract, are not shown to be compensatory to extent that out-of-pocket cost exceeds revenue that would be realized on certain mixed shipments. Under applicable tariff mixing provisions, an integral part of the related rate which must be considered in determining compensativeness, rate charged would be that applicable on each commodity based on actual weight, subject to highest minimum weight for any article in the mixed shipment; thus, since tariff provides a rate of 85 cents, minimum 40,000 pounds, on coffee extract, revenue per shipment will decrease in direct proportion to amount of coffee in a mixed shipment. Not approved, without prejudice to establishment of proposed rate on straight shipments of tea extract or subject to a revised mixing rule.—Tea Extract, New Orleans to Chicago, 325 I.C.C. 103 (104-5)*

Respondent failed to show that proposed reduced truckload commodity rate is just and reasonable, a minimum requirement being a convincing showing that the proposal is compensatory, when the data submitted from another extensive adjustment is not shown to be representative of the particular movement under consideration and the 1961 cost basis used by respondent, which should be reasonably current to have probative value, is not current and was not brought up to date by application of pertinent percentages of wage and price increases experienced since that time. Also, protestants' cost evidence, which shows proposed rate to be non compensatory, is not rebutted; suspended schedules ordered canceled.—Candy and Confectionery, New York, N.Y. to Rockford, Ill. 325 I.C.C. 522 (525).

The commission has frequently pointed out that rates which can be defended only on the added-traffic theory may not be found just and reasonable because of probable deleterious effect thereof upon a just and reasonable rate structure.—Petroleum and Plastics from Texas to Indiana and Ohio, 316 I.C.C. 155 (156); Lumber from Montana to Illinois and Wisconsin, 315 I.C.C. 642 (644); Clothing, in Multiple Shipments, from Nanticoke, Pa., 315 I.C.C. 181 (182).

Reduced rate proposed for local movement in connection with water-rail movement beyond destination is substantially below out-of-pocket cost for handling the traffic. While proposed rate might result in tonnage for empty or partially loaded equipment without material increase in expense, added-traffic theory affords no basis for approving rates which otherwise could not be regarded as compensatory.—Copper Anodes from El Paso to Texas City, Tex., 316 I.C.C. 51 (52, 54).

While respondent states that additional traffic could be moved in same trailer with shipments under proposed minima, thus increasing overall per-trailer revenue, compensatory nature of rates may not be determined by speculating as to probable loading of other freight in the same vehicle; not approved.—Foodstuffs from Chicago, Ill., to Detroit, Mich., 315 I.C.C. 689 (691, 692).

That shipments at proposed 30,000-pound minimum would fill only about one-half the capacity of a trailer, thus additional l.t.l. traffic could be carried in the same vehicle, does not show compensativeness of proposed rates. Truckload minimum weight is an integral part of the t.l. rate; respondent holds itself out to transport the minimum, and the rate should be compensatory for transporting that weight. In a number of proceedings t.l. rates dependent upon top loading of other traffic have been disapproved; see 303 ICC 40 and 303 ICC 184.—Plastics from Odessa, Tex., to Ill., Kans., Mo., and Wis., 315 I.C.C. 722 (723).

Respondent's initial common-carrier cement rates are compensatory for service provided with purchased transportation when, though it pays its owner-operators more than the minimum payment negotiated by labor-management committees, the remaining percentage covers its own costs.—Cement from Hudson, N.Y., to New England and Pennsylvania, 319 I.C.C. 235 (247).

Proposed reduced rates and increased minimum on meats and packinghouse products from midwestern to mountain-Pacific States, covering transportation performed almost entirely with owner-operators, are reasonably compensatory by criteria established in 318 ICC 567 when (1) data taken from respond-

ents' annual reports, separted among direct out-of-pocket, variable overhead, and fixed overhead costs, show that they are amply compensatory to each; and (2) of the hundreds of owner-operators and contractors actually performing the line-haul service, a great majority have operated under contracts with respondents for periods of 3.7 to 11 years or longer, and all respondents have waiting lists of those who desire to participate in the traffic involved; as the reduced rates will not result in any decrease in gross revenues or in payments to owner-operators in agreed percentages thereof, they satisfy requirement that the division of revenue be sufficient to retain services of owner-operators for movement of the traffic. Approved.—Meats and PHP, Central & Western to Far Western States, 319 I.C.C. 667 (674, 676).

Respondent's computation of truck-mile expense and earnings based on total expenses and vehicle miles shown in its annual report is inadequate to show that proposed rates are compensatory when most of its transportation is performed with owner-operators. Purchased transportation agreements premised on a percentage of revenue afford no sound basis for determination of compensativeness of rates, and respondent admittedly does not know the owner-operators' costs in hauling frozen foods between the points involved.—Frozen Foods from Caribou, Maine, to Midwestern Points, 314 I.C.C. 721 (723).

Respondent's cost data based largely on cost of purchased transportation, which is 60 percent of gross revenue from the traffic, do not reflect actual operating costs; in measuring compensativeness of proposed rate on castings, protestant's cost data based generally on Highway Form B formula are more representative of actual costs; those data show a resulting operating ratio of 131.1 percent. Respondent's comparison of earnings on a minimum load at proposed rate with earnings on like traffic over lines of bureau members for comparable distances are insufficient, standing alone, to establish compensativeness; not approved.—Iorn or Steel Castings, Danville, Ill., to Saginaw, Mich., 315 I.C.C. 220 (221-2).

Respondent which utilizes owner-operators to perform line-haul service and attempts to justify its rates principally on cost basis must show that division of revenue retained covers its costs and that agreed revenue division is sufficient to acquire or retain owner-operators' services. As respondent has not attempted to show its costs, proposed rate is not shown to be just and reasonable; not approved.—Sheet Steel, Galvanized—St. Louis to Marshalltown, Iowa, 318 I.C.C. 589 (590-1).

Rationale of criteria announded in 318 ICC 567, that when using owner-operators carrier has no way of verifying actual costs incurred by the owner-operators and therefore cannot supply adequate cost data, does not apply where respondent leases only tractors from the owner-operators and primarily uses its own trailers or obtains them from a subsidiary leasing company; respondent's first cost study therefore has no probative value to show compensativeness of proposed rates when it does not include cost of operating its own trailers or charges for leasing them from its affiliate. Cost data in respondent's second study are so vague and imprecise that any attempted restatement thereof would serve no useful purpose; unit costs are not related to the particular movement under consideration, and since no round-trip average load can be computed no effect can be given to jointness of line-haul expenses. Respondent has failed to show that its share of revenue from the proposed rate will cover its costs of handling the involved traffic; proposed rate not approved.—Aluminum Sheets & Scrap, Oswego, N.Y., and Warren, Ohio, 322 I.C.C. 788 (791-2).

Proposed reduced rate on rags from Winnipeg, Man., to Twin Cities is not shown to be compensatory for single-line movement by two respondents when they introduced no evidence in that respect, and protestants' evidence, which as restated constitutes the most reliable evidence of record, indicates that it would not be compensatory for those carriers; nor is compensativeness of the proposed rate for joint-line movement by two other respondents established by showing of costs to the United States carrier for performing the entire service, when it lacks authority to serve Winnipeg and there is no contention

that its costs of record are representative of those of carrier which would perform the Canadian part of the haul; no costs were shown for latter, and recomputation of former's costs by protestants indicates that the proposed rate would not be compensatory; not approved.—Rags from Winnipeg to Twin Cities, 315 I.C.C. 147 (150-1).

Though proposed l.t.l. commodity rates on magazines exceed respondents' estimate of single-line out-of-pocket costs, which reflect savings due to expeditious loading by shipper and elimination of platform handling at origin, and apparently no platform handling would be required at numerous destinations, proposed rates as published apply for both local and joint-line hauls, and as many respondents lack authority to serve all destinations involved joint hauls would probably be required to many points. Protestant's study taking into consideration such joint hauls, which would generally require platform handling at interchange points, shows that out-of-pocket costs would in all instances exceed the proposed rates for joint-line hauls, and that the same would be true for single-line hauls to several desinations. Proposed rates are thus not shown to be compensatory; not approved.—Magazines, Old Saybrook, Conn., to Middle Atlantic Ter., 315 I.C.C. 273 (275-6).

Not only does proponent's system average expense per vehicle mile have little weight to show compensativeness of proposed reduced rate, but no evidence was presented concerning costs of connecting carrier which would participate jointly in the traffic; cost of performing the joint-line service should have been computed also, including interchange expense; not approved.—Floor Covering from Lancaster, Pa., to Charleston, S.C., 315 I.C.C. 550 (552).

Proposed reduced rate for joint-line movement cannot be approved when one respondent, which would perform a substantial part of the through haul, presented no cost data and the other's data were deficient in numerous respects; further, wide spread of system average expenses over anticipated revenue indicates probability that the rate would not be compensatory.—Coolers from Fort Smith to Louisville, 318 I.C.C. 336 (337-8).

Though cost studies of both respondent and protestants contain errors, both refer to statement No. 9-58 for territorial traffic; on basis of out-of-pocket cost shown therein for shipments of 5,000-5,999 pounds and for comparable mileage, and considering light loading of involved traffic and fact that, though average costs used reflect a round-trip load that probably understates costs, pickup and delivery cost is overstated because of customer loading and unloading, proposed rate, the same as present rate but without requirement that each vehicle used to transport a shipment be charged for at the volume minimum of 10,000 pounds, or actual weight if greater, appears compensatory.—Radio & Television Cabinets, Jackson, Miss., to Chicago, 315 I.C.C. 171 (174).

Cost study based on a reasonable estimate of particular movement is usually of greater value in determining compensativeness of a rate than one based on system average expenses. Respondent being a small operator serving farm communities and having only two tractors and two trailers, study of its operations appears more representative of its costs than data based on system average costs of representative carriers used by protestants. Proposed initial rates are not shown to be unreasonable.—Fertilizer, In Bulk, from Idaho, Utah, and Colo. to Nebr., 315 I.C.C. 496 (498).

Although protestant attempts to show that respondent's costs are greater than those of common carriers of other than general freight in northwestern and central regions, record does not permit determination as to similarity of expenses between operations of respondent as an irregular-route carrier of specific commodities and those of the regional carriers. Proposed initial rates are not shown to be noncompensatory or otherwise unlawful.—Meats & Related Articles, Wis. to Chicago & Twin Cities, 315 I.C.C. 588 (589).

While a comparison of system-average expense per vehicle-mile with revenue per vehicle-mile produced by a particular rate ordinarily is of little value in determining rate compensativeness, where revenue per vehicle-mile from the proposed rate greatly exceeds the system-average expense, the wide spread indicates probability that the rate is compensatory, in absence of precise costs or

evidence to the contrary; proposed rate approved—Iron or Steel from Pennsylvania to Richmond, Va., 316 I.C.C. 402 (404).

Respondent's cost study based on application of Highway Form F to origin terminals involved is more specifically related to considered movements than protestants' study which applied that formula to expenses for respondent's entire system; operating ratios for operations to and from those terminals demonstrate that system expenses are not representative of those in area where proposed rates would apply. Respondent's data, recomputed on basis of short-line distances increased 6 percent for circuity, show that proposed rates to representative points would exceed out-of-pocket costs: approved.—Gasoline and Fuel Oil within Middlewest Territory, 316 I.C.C. 435 (437, 439).

Where neither costs calculated by protestant nor those offered by respondent are acceptable, the best cost evidence available is that based on public statement No. 1-61; these costs indicate proposed initial rate would yield something above out-of-pocket costs; approved.—Paper Articles between Chagrin Falls, Ohio & Goshen, Ind., 316 I.C.C. 393 (396).

Although respondent applied system average costs to certain activities, it used costs developed from actual study of operations for a majority of expense items, and its costs may be somewhat overstated because loading and unloading expenses are usually treated as varying with weight handled, rather than on basis of length of haul; its use of actual average load for the study period was proper, and its study shows that proposed reduced rate would yield earnings exceeding costs by over 13 cents per truck-mile, and would be compensatory whether on basis of average load or minimum weight. Approved. —Lead or Zinc Concentrates—British Columbia to Idaho, 318 I.C.C. 85 (87, 88).

Costs based on regional averages are acceptable, except where known transportation characteristics are different from the average. Record shows that type of service performed by respondent in handling dog food, representing about 80 percent of its total revenue in a representative period, is different from average service of general freight carriers. Thus, its operations are in specialized category and protestant's evidence based on regional average costs does not prove the noncompensativeness of respondent's rates. Since the rates are already in effect and burden of proof is not on respondent, its rates are not shown to be unlawful.—Dog or Cat Food from Boston to Middle Atlantic Points, 318 I.C.C. 59 (63, 64).

As to a second respondent which is a general-commodity hauler, proposed rates are below territorial average out-of-pocket costs of other general-commodity carriers in same territory, which appear representative of those incurred by that respondent in absence of evidence to the contrary. Although proposed rates do not appear compensatory, evidence indicates that considered t.l. rates from Boston to Baltimore and Washington would more than cover out-of-pocket costs if minimum were increased to 36,000 pounds; respondent may republish at that minimum.—Id., pp. 64-5.

While comparison of a carrier's system average expense per vehicle-mile with average revenue produced by proposed rates is ordinarily of little value in determining whether the rates are compensatory, as it falsely assumes that all expenses are caused by miles operated, there are two general exceptions to this principle: (1) where the margin of revenue per vehicle-mile greatly exceeds the system average expense, the wide spread indicates that the rate is compensatory in absence of precise costs or evidence to the contrary; (2) where a carrier specializes in transportation of a single commodity or group of commodities in a particular area, its system average expense may be regarded as a fairly reliable measure of cost of handling such commodity or commodities in that area in absence of contrary evidence.—Bananas, South to the Midwest and Southwest, 319 I.C.C. 51 (53).

As respondent is primarily a transporter of commodities with similar characteristics to bananas, the average revenue yield under proposed specific commodity rates on bananas substantially exceeds its system average expense, and there are no specific cost data or other evidence indicating that the rates would not be compensatory, they may properly be found so. However, as all motor rates on

formerly exempt commodities, including bananas, are under investigation in Docket No. 32912, approval of respondent's rates is without prejudice to any different conclusion in that proceeding.—Id., p. 53.

Regional averages, while entitled to some weight in absence of more accurate data, are not determinative in appraising compensativeness of proposed rates where evidence has been presented which more nearly reflects actual cost of the operations involved. Protestants' estimates of respondent's line-haul costs, based on average operating expenses of southern region general-commodity motor carriers, particularly their average load, which includes handling of all types of traffic and all sizes of shipments, do not reflect transportation conditions peculiar to considered movements of sugar.—Sugar from Louisiana to North Carolina, 319 I.C.C. 107 (111).

And protestants' cost analysis consisting mainly of division of respondent's total expenses by its total intercity miles operated, with inadequate separation of expenses unrelated to distance, is of little value in determining compensativeness of proposed rate. Although they use 95 percent of line-haul and terminal total costs to develop out-of-pocket costs, suggestion of that formula in Highway Form F is based on assumption that specialized carriers are less diversified than general-commodity carriers and can trim their plant capacity to more nearly reflect out-of-pocket costs; but respondent's overall operations on which protestants' costs were based appear to be more of general-commodity type. Also, protestants' use of respondent's system average load in reverse direction ignores bulkiness of the furniture which moved in that direction, and though they include 6 percent of short highway distance for circuity, no reason appears why respondent as an irregular-route carrier should not use the shortest available routes.—Id., p. 110.

Respondent's cost study based on application of Highway Form B formula to data in its annual report, adjusted to reflect special studies and its method of operation, shows that proposed rate will cover out-of-pocket cost and make some contribution to overhead, and is therefore clearly compensatory. While respondent did not use a return-load factor in computing a round-trip load factor, it developed an estimate of actual costs for each direction by use of same vehicle-mile cost for the round trip; and where one of its principal commodities is light and bulky, use of the system average load without a density adjustment tends to overstate the cost.—Id., pp. 112-2.

Protestants' comparison of initial rates proposed by a class III limited-commodity carrier with average costs of class I and II general-commodity carriers does not establish, prima facie, that the rates are noncompensatory and therefore unreasonable. Principle that regional average costs based on differing operations are not necessarily representative of another carrier's costs is especially pertinent where the regional figures include both t.l. and more costly l.t.l. movements, while respondent's traffic is in truckloads; nor are the compared carriers' operations shown to be similar to respondent's in other respects. Protestants were aware of the differing character of respondent's operations, and it was incumbent on them to adduce costs based on substantially the same type of operations to make a prima facie showing of non compensativeness. As respondent's cost evidence is likewise of no material aid in resolving that issue, proposed rates are not shown to be unlawful.—Animal Feed, Miss. and Tenn. to Midwest and Southwest 319 I.C.C. 257 (260)*.

Territorial average costs of class I and II general-commodity carriers cannot be considered representative of costs of class III carriers, such as respondent, who handle only a few commodities in truckloads over irregular routes. Protestants' study based on respondent's operating statistics for 1958 likewise has little probative value when he has presented more up-to-date statistics for 1961, which show lower total expense for a greater mileage. Also, as respondent's showing that his actual miles are substantially the same as short highway miles was verified by "hubometers" attached to his tractor wheels, protestants' claim that costs per trip should be computed on short-line mileage plus 6 percent for circuity is without merit. While data indicating that truck-mile earnings at proposed rates

would in all instances exceed respondent's overall truck-mile costs would ordinarily be given little weight, he hauls only a few commodities, and entire record is convincing that the proposed rates are compensatory. Nor does it appear that his own costs are not reasonably representative of those of owner-operators he has used.—Malt Beverages —Ill., Ind., Ky., & Ohio to Chattanooga, 319 I.C.C. 787 (790, 791).

Respondent's initial common-carrier rates on canned goods may not be approved when comparison of its average cost with minimum truck-mile revenue under the proposed rates shows that to most of the destinations involved they would fail to meet that cost and therefore would not be compensatory. —Canned Goods, Cincinnati, Ohio, to Ind., Ill., Ky., Mo., & Wis., 315 I.C.C. 169 (170).

Although system-average costs are not the best evidence of compensatory nature of rates for particular movements, in absence of more specific evidence such costs are entitled to weight. Respondent's latest annual report filed with the commission was that of a contract carrier, it having recently converted to common-carrier status, and was limited as to data for use in cost analysis; protestant therefore developed costs for considered traffic based on system average costs of class I carriers of general freight in eastern-central territory. Respondent's cost study, based on one allegedly representative tractor-trailer unit, appears to be predicated on its experience in handling local traffic, fails to reflect joint-line nature of movements under considered rates, and is not helpful. Protestant's cost evidence shows that proposed initial rates would not be compensatory; not approved.—Paper, Hamilton, Ohio, to Mineola, New York, and Newark, 315 I.C.C. 385 (387-8).

Although system-average costs do not necessarily represent actual cost of transporting any commodity between particular points, they represent the best cost data available to protestants, and in absence of rebuttal by respondent are acceptable as a fair approximation of its costs; such evidence indicates that proposed initial rates are not compensatory; not approved.—Fats, Tallow, & Greases between Fargo, N. Dak., & Iowa-Kans.—Neb., 315 I.C.C. 553 (554).

In proceedings involving t.l. or c.l. rates the commission has recognized two general exceptions to the principle that comparison of system-average expense with revenue produced by a particular rate is of little value in determining whether or not the rate is compensatory, as it falsely assumes that all expenses are caused by miles operated; first is where margin of revenue greatly exceeds system-average expense, indicating probability that rate is compensatory in absence of precise costs or evidence to the contrary; second is where carrier specializes in transportation of a single commodity or group of related commodities in a particular area since, in absence of evidence to the contrary, carrier's system-average expense may be regarded as a fairly reliable measure of cost of handling such traffic in that area. Proposed rates not shown to be compensatory.—Alcoholic Liquors from Boston and Hartford to S. Dak., 315 I.C.C. 616 (617-8).

Regional average costs as summarized in public statements prepared by the commission's cost finding section, which are based on expenses of class I and class II carriers, are not generally a reliable indication of costs incurred by a class III carrier, particularly if latter engages exclusively in transportation of a single commodity; this does not mean, however, that regional costs necessarily must be disregarded where they are the best evidence available to protestants and proponents of proposed rates make no serious attempt to rebut such costs. Respondents' cost data based on actual operations are in summary form and cannot be verified. Costs submitted by protestants, though not the actual expenses which respondents would incur under proposed rates, come closer to such expenses than do costs shown by respondents; proposed rates w"uld not be compensatory; not approved.—Salt, Feed, Fishmeal, Kans., La., Tex., Maine & Minn. to Fla., 315 I.C.C. 748 (750)*.

Respondent's cost evidence consists only of a showing of its system-average expense; system-average figures are of little aid in determining reasonableness of rates on particular traffic; not approved.—Rubber from Borger, Tex., to Memphis, Tenn., 316 I.C.C. 46 (48).

Ordinarily comparison of system-average expense per vehicle-mile with revenue per vehicle-mile produced by a particular rate is of little value in determining whether or not the rate is compensatory, particularly where relatively short hauls are involved. While respondent's operations are substantially different from those of carriers contributing operating data on which protestant's cost study was based, it submitted no evidence of its costs on considered traffic, and its rate and earnings comparisons are not persuasive that proposed rates would be compensatory; not approved. —Titanium Dioxide from Chicago, Ill., to Kalamazoo, Mich., 316 I.C.C. 150 (152-4).

While a comparison of system average expense per vehicle-mile with revenue per vehicle-mile is of little value in determining rate compensativeness as it falsely assumes all expenses are caused by miles operated, where such expense is well in excess of minimum revenues under the proposed rates, considerable doubt is cast on their compensativeness. Proposed rates represent a substantial reduction, but respondent presented no cost evidence, and in view of protestants' unrebutted showing of its operating results the rates are not shown to be compensatory; not approved. —Chemicals between Cedartown, Ga., and Points in N.J., 316 I.C.C. 249 (250-1).

Rates must return something above out-of-pocket costs to be approved, even where they are proposed to meet competition; comparison of yield per vehicle-mile under proposed rate with respondent's system-average expenses has little value to show whether the rate is compensatory, as it falsely assumes all expenses are caused by miles operates; not approved.—Canned Goods from San Francisco to Pocatello, Idaho, 316 I.C.C. 296 (298).

Respondent's cost figures in support of initial common-carrier rates were not computed on an acceptable cost formula, and it submitted no underlying data; although costs submitted by protestants are averages for numerous carriers operating in the territory and as such may not precisely reflect respondent's actual costs on considered traffic, they constitute the best evidence bearing on issue of compensativeness and thus are entitled to consideration; such evidence indicates that in most instances out-of-pocket costs would exceed minimum revenues from proposed rates; not approved.—Paper Articles between Ohio & Ill., Ind., N.J., N.Y., Ohio, Pa., 316 I.C.C. 390 (391-2).

While average costs of motor carriers in central region are not the best evidence of compensatory nature of particular movements, they are entitled to weight in absence of more specific evidence; costs submitted indicate probability that some of proposed rates are noncompensatorym Moreover, respondent has not shown what would be saved in loading costs by spotting trailers at shipper's dock for pickup after shipper loading, and added cost for driver and tractor between leaving the dock and returning to pick up the loaded trailer is not accounted for.—Dairy and Food Products between Chicago and Ohio & Mich., 316 I.C.C. 373 (376).

Protestants' unrebutted cost evidence, based on data in public statement No. 1-61 of commission's cost finding section, increased to reflect 1961 cost level, and on short highway mileage increased 6 percent for circuity, shows that out-of-pocket expenses exceed proposed rates by amounts ranging from 10.9 to 23.3 cents; not approved.—Paper and Paper Articles from Ohio to Chicago, Ill., 316 I.C.C. 570 (572).

Although protestant's cost data, developed by use of public statement No. 7-58 of commission's cost finding section, do not represent actual costs of particular movements, they are the best cost data available of record, and respondent made no attempt to rebut them; they are therefore entitled to weight as a fair approximation of cost of performing considered service; such data indicate that proposed initial rates would not cover out-of-pocket costs; not approved.—Freight, All Kinds, between Arden, N.C., and N.C. Points, 316 I.C.C. 676 (678).

Comparison of system-average expense per vehicle-mile with revenue produced by a particular rate is of little value in determining compensativeness, as it falsely assumes that all expenses are caused by miles operated; none of recognized exceptions to that rule are shown to be applicable. Proposed rates are not shown to be compensatory; not approved.—Phosphoric Acid and Fertilizer So-

lution—Utah and Idaho, 316 I.C.C. 683 (686).

Respondent submitted no cost data, and though protestants' cost data are based on regional averages and do not represent actual costs of particular movements, they represent the best data available of record and are unrebutted by respondent; they are therefore entitled to weight as a fair approximation of costs of performing considered service and are more convincing on issue of compensativeness than respondent's evidence that other carriers maintain rates lower than or same as the proposed rates. Protestants' evidence indicates that proposed rates are not compensatory; not approved.—Dairy Products from Ill., Minn., and Wis. to Fla., 316 I.C.C. 693 (695).

While costs submitted by protestant association are average costs for carriers operating in territories involved and do not represent actual costs of particular movements, they represent the best cost data of record and are entitled to weight as a fair approximation of cost of performing involved transportation service. Intervening shipper's showing that, on same formula, other rates of association carriers would not yield out-of-pocket costs does not discredit protestant's showing; those rates are not in issue, and it may be that costs of performing services covered thereby are lower than regional average costs used. Respondent presented no cost evidence, and protestant's study indicates that with one exception proposed rates are below out-of-pocket costs; not approved.—Sodium Silicate from N.J. & Pa. to Ill., Mich., Mo. & Ohio, 316 I.C.C. 699 (703-4).

Where actual distance over route used by carrier in performing considered service is not known, distance to be used in determining compensativeness of rates is estimated short highway distance increased 6 percent for circuity. Based on such distance, truck-mile earnings under proposed rate would be less than one respondent's system average expense, and although higher than second respondent's system average expense for one quarter-year, such a brief period, plus fact that the other specialized-carrier respondent shows a much higher system average expense, casts doubt on reliability of second respondent's figures; not approved.—Iron & Steel from or to Pennsylvania Points and Ind., 316 I.C.C. 705 (707-8).

Protestant's cost data indicate that respondent's average expense per vehicle-mile exceeds corresponding revenue from proposed reduced rate; moreover, based on respondent's reported system average cost per mile, and fact that three vehicles would have to be used to handle a minimum shipment of 80,000 pounds, cost of providing service would be $23.57 more than minimum revenue under proposed rate; not approved.—Iron and Steel Articles from St. Louis to Kansas City, 318 I.C.C. 45 (47, 48).

Respondent's cost data are substantially understated when no consideration is given to empty mileage or return loading nor allowance made for respondent's salary as a proprietary carrier. Protestants developed out-of-pocket costs which exceed proposed rates, and while territorial costs of general commodity carriers used do not necessarily reflect respondent's precise cost as a specialized hauler, they are the best evidence available to protestants, and in absence of effective rebuttal by respondent may not be ignored. Consideration of all the cost evidence is convincing that proposed rates are not compensatory; not approved.—Bananas, Mobile & New Orleans to Idaho, Mont., Oreg., 318 I.C.C. 140 (144).

Respondent has not met its minimum burden of showing compensativeness of proposed reduced t.l. rates on ingots and reduced charge of $10 per stop for partial loading or unloading; its cost data concern only sums paid for vehicles leased from owner-operators and do not include such overhead items as insurance; operating expenses for considered traffic are not shown to be comparable with respondent's average cost, nor were costs submitted for traffic moved in company-owned trucks, and no evidence was submitted in support of proposed stopoff charge; not approved.—Various Commodities between Chicago and Ind., Mich., Ohio, 318 I.C.C. 27 (28, 29).

Protestants' evidence indicates that proposed initial l.t.l. commodity rates on cider or vinegar would be noncompensatory; while regional average costs shown do not necessarily reflect precise costs of involved transpor-

tation, such costs cannot be ignored when they are the best evidence available to protestants on the issue of compensativeness, and no attempt is made by proponent to rebut such data; not approved.—Id., p. 30.

Proponent's cost study is defective in omitting certain expenses shown in its annual report and ignoring joint nature of round-trip costs; protestants' study based on Highway Form B formula accepted in numerous proceedings is more representative than study based on operating statistics for 77 general commodity carriers, being based solely on proponent's expenses and properly including all related expenses; eliminating stop-time cost, since proposed rate provides for shipper loading and unloading, such costs would still exceed proposed rate by substantial margin; not approved.—Lumber from Denver, Colo., to Kansas City, Mo., 318 I.C.C. 214 (215-16).

System average costs used by protestants are not necessarily actual costs which respondent would incur, but they represent a closer approximation of actual results than those presented by respondent, which were based on one-way movement and failed to include such items as terminal and traffic expenses as well as empty mileage; failure to compute costs for round-trip movement is the major deficiency; proposed rates not approved.—Paper and Related Art., Ga., N.C. & S.C. to Pa. & W. Va., 318 I.C.C. 440 (444).

Section 216. (h) [*§316(h) U.S.C.*] Good Will, earning power or certificate inadmissible in proceedings to determine rates.—[Unchanged, See vol. 10, p. 8214.]

Notes of Decisions

Volume 10—p. 8214; Volume 12—p. 10459.

Section 216. (i) [*§316(i) U.S.C.*] Transportation needs and fair return considered in determining rates, etc.—[Unchanged. See vol. 11, p. 9554.]

Amendments, see footnotes, pp. 9554-9555; historical notes, p. 9555, vol. 13, p. 11112, vol. 14, p. 11633.

Notes of Decisions

Volume 10—p. 8216; Volume 11—p. 9555; Volume 12—p. 10460; Volume 13—p. 11112; Volume 14—p. 11633; Volume 15—p. 12243; Volume 16—p. 12906; Volume 17—p. 13613; Volume 18—p. 14623; Volume 19—p. 15896.

Section 216. (j) [*§316(j) U.S.C.*] Effect on remedy or right of action.—[Unchanged. See vol. 10, p. 8218.]

Section 217. (a)[*§317(a) U.S.C.*] Tariffs of common carriers by motor vehicle—(a) Filing, posting, and publication.—[Unchanged. See vol. 10, p. 8218.]

Historical notes, see vol. 11, p. 9558, vol. 13, p. 11105, vol. 14, p. 11634.

Notes of Decisions

Volume 10—p. 8218; Volume 11—p. 9558; Volume 12—p. 10461; Volume 13—p. 11112; Volume 14—p. 11634; Volume 15—p. 12244; Volume 16—p. 12908; Volume 17—p. 13615; Volume 18—p. 14624; Volume 19—p. 15896.

5. Duplicating or conflicting rates.—[Vols. 10-13, 19].—Respondent's rates in its individual tariffs that are lower than corresponding rates which it maintains in conference tariffs violate Rule 4(h) of Tariff Circular MF-3, which prohibits publication of class or commodity rates that duplicate or conflict with rates published in the same or any other tariff over the same route.—Basis for Rates to and from Unnamed Points in Tariffs, 316 I.C.C. 84 (86).

6. Territory, routes, points, "between", direction of movement.—[Vols. 11-16, 18, 19).—There was a rational basis for the commission's conclusion that proposed initial rates on crude rubber, filed by complainant in connection with its application under §7(c) of Transportation Act of 1958 for "grandfather" rights to transport that commodity, were unlawful because they would apply for transportation beyond scope of the carrier's existing authority and that potentially available to it under that statute; sustained.—Midwest Emery Freight System, Inc. v. United States, 202 F. Supp. 229 (232, 235)*.

A tariff establishes rates for transportation of goods which are embraced within the carrier's operating authority; tariff not based on authority is a nullity. Plaintiff must concede that it has no authority to transport firebrick and ferro alloys, and the commission construes the tariff in issue as including rates for those commodities; this the commission was privileged to do. Rejection of the tariff by the commission, sustained.—W. J. Dillner Transfer Co. v. United States, 214 F. Supp. 941 (945).

Order of the commission requiring plaintiff to cancel proposed rates on single unit mobile homes, on the grounds that its operating rights did not authorize transportation of such mobile homes, was clearly erroneous. Plaintiff holds authority to transport "prefabricated buildings, complete, knocked down,or in sections" and also authority to transport "buildings, complete, knocked down, or in sections"; neither of those certificates is restricted against transportation of trailers or mobile homes; thus, the commission's conclusion that a commodity so described could be transported only in sections (two or more units) is not tenable. The order under review is set aside, leaving to the commission any further action it may deem appropriate.—Pre-Fab Transit Co. v. United States, 262 F. Supp. 1009 (1010, 1014-5, 1016)*.

The commission's failure to reject a tariff listing rates for unauthorized commodities operates neither to convey new authority nor to condone the unlawful conduct.—J. B. Acton, Inc.—Investigation and Revocation of Cert., 89 M.C.C. 59 (64)*.

Rates not within scope of a carrier's operating authority are manifestly unlawful; respondent's applications for temporary authority to transport considered commodities from origin named having been denied for want of prosecution, proposed initial rates from that point are not supported by a grant of authority; cancellation required.—Bananas and Fresh Produce, Forest Park, Ga., to Ill., Ind., & Mo., 315 I.C.C. 1 (2).

Since respondent's commodity authority did not embrace authority to transport certain commodity, proposed rates thereon are ordered canceled.—Asphalt Cutback, Louisville, Ky., to Indiana & Ohio, 315 I.C.C. 439 (440); Road Paving Materials between Points in New England, 319 I.C.C. 95 (97-8).

The filing of tariffs publishing rates for service which cannot be provided by the carriers parties thereto is unlawful. Proposed rates on radio and television sets, deicing preparations, drugs or medicines, and other articles found not to be embraced in respondents authority for "such merchandise as is dealt in by wholesale and retail grocery and food business houses," ordered canceled.—Various Commodities, Illinois to Denver, 322 I.C.C. 554 (555).

Grouping, see §216(b), n. 250.

10. Plain and definite statement required.—[Vols. 10-19].—Minimum charges proposed in connection with l.t.l. rates on multiple shipments of clothing, to apply only when a stated aggregate volume is received from one shipper at one place and time, do not include a prepay requirement; such requirement is necessary because application of the minimum charges is dependent on volume and other incidents of tender by shipper; otherwise charges on like shipments could vary from day to day, depending on other shipments available from same consignor, and

consignee could not ascertain what the transportation charge on a given shipment would be; thus, in absence of the prepay requirement, proposed charges are not sufficiently clear and explicit.—Clothing, in Multiple Shipments, from Nanticoke, Pa., 315 I.C.C. 181 (183).

Rules providing reduced minimum charges per shipment when five or more shipments are picked up at one time in one calendar day are ambiguous and could result in controversy between carrier and shipper; use of phrase "on one calendar day" in addition to "at one time" adds nothing and should be eliminated: also, it should be made clear that all the pick-ups must consist of minimum-charge shipments. In addition, without requirements that such minimum charges be prepaid, and that billing for each shipment make reference to the other shipments, consignee of a collect shipment would have no means of checking accuracy of the charges. Approval of considered rules contemplates that they be revised accordingly.—Reduced Minimum Charges—West Roxbury to Mid. Atl. Ter., 315 I.C.C. 675 (678-9).

Rule in tariffs of defendant household-goods carriers, defining a divided shipment as one received at more than one place of pickup at origin or delivered to more than one place of delivery at destination, or both, is contradictory, where made subject thereto, of rule providing that property of two or more families or establishments will not be accepted as a single shipment; those rules should be made more definite by stating specifically that property of more than one family or establishment will be accepted as a single or divided shipment when requirements of that rule are otherwise met.—John F. Ivory Storage Co., Inc. v. Atlas Van Lines, Inc., 316 I.C.C. 224 (226)*.

Note to rules governing application of transportation charges to combined weight of divided shipments, which provides that carrier will separately weigh and issue a bill of lading on each shipment, even though shipments are consolidated and billed under provisions of such rule, requires clarification; if such rules mean what they imply, actual consolidation should be effected under a definite minimum weight for the entire consignment, and entire shipment should move under one bill of lading.—Id., p. 226.

Other divided-shipment rules which do not specifically define a point of origin or destination place no limits on such points with definiteness required by the commission's tariff circulars, and thus are uncertain in their application, especially in connection with defendants' pickup and delivery rules, several of which provide for different charges. Assailed rules ordered canceled to the extent they are found unlawful because vague, indefinite, or ambiguous.—Id., p. 226.

Proposed rules authorizing multiple pick-ups and deliveries or stoppage in transit are ambiguous in violation of §217(a) and Rule 4 of Tariff Circular MF-3 in that they can be interpreted as allowing only 3 pickups and 3 deliveries, or as many as 3 pickups at each point stopped for partial loading and 3 deliveries at each point stopped for unloading; also, the rules are in conflict when they provide a $5 charge for each pickup or delivery after the first, and a $10 charge for each stop exclusive of final destination, but make no clear distinction between pickup-and-delivery and loading-and-unloading services, which appear to involve similar operations and responsibilities on part of the carrier.—Split Pickup, Split Delivery, Stopping—Canned Goods, 316 I.C.C. 202 (203).

In addition, restriction of stopoff to complete loading to points through which the highway mileage from origin to destination is no more than 15 percent greater than over the shortest route over which carrier normally conducts business between such origin and destination is indefinite and uncertain, because shipper could not be expected to know the shortest highway route over which the carrier "normally conducts business." Proposed rules found unlawful and ordered canceled.—Id., p. 204.

Use of generic descriptions in National Motor Freight Classification to describe additional articles proposed to be included in grocery list in respondent's tariff violates rule 4(e) and (f) of Tariff Circular MF-3, which requires that commodity descriptions be specific whenever possible; and to avoid conflicts between specific descriptions and a broader description would include same articles, the

broader description should be followed by "Not more specifically described in the tariff." All articles respondent is authorized to transport could be named without resorting to generic description "groceries"; additional specific descriptions are necessary to provide rates for articles covered by proposed description "groceries, not otherwose indicated herein."—Bakery Goods, Food-stuffs & Groceries from N.J. & N.Y., 316 I.C.C. 639 (642-3).

Although suspended schedule names rates on bananas in cents per box, minimum 675 boxes, it does not define "box," and since a box is an indefinite unit, rates applicable per box without definition would violate rule 4 of tariff circular MF-No. 3.—Bananas, Mobile & New Orleans to Idaho, Mont., Oreg., 318 I.C.C. 140 (142).

Proposed tariff rule providing that line-haul rates would include loading and unloading services by not more than two men would permit the use of two men at any time although it would not require their use; thus, the rule is objectionable in that it is uncertain, indefinite, and ambiguous, in violation of rule 11 of commission's Tariff Circular MF-No. 3.—Helper Service in Middle Atlantic Territory, 318 I.C.C. 810 (813-14).

Although proposed plan V TOFC rates published in respondent motor carrier's tariff offer joint motor-rail motor service from and to named origin and destination points and points grouped therewith, essentially they provide for a rail line-haul between the named points, with the motor carrier performing the service to and from the railroad's ramps. Since those schedules do not provide a clear demarcation between the terminal areas of the named points and points beyond, and thus do not show whether the motor carrier would perform any line-haul service under the proposed rates, they lack definiteness and certainty as to their lawful application and are therefore unlawful.—Rubber Articles, Philadelphia to Ill., Ky., Mich., & Mo., 319 I.C.C. 632 (635, 638).

Defendant's rule providing that unless otherwise specified its rates include loading and unloading when the service can be performed by not more than two men is ambiguous, in violation of rule 11(a) of Tariff Circular MF No. 3, in failing to specify how many men will be furnished to load or unload, particularly when more than one vehicle is required to move a shipment, or who shall decide when the shipment "can" be loaded or unloaded by not more than two men. Rule proposed as alternative, providing for loading and unloading services of two men per vehicle, regardless of whether the service could be performed by one man, is likewise ambiguous in that it does not prohibit defendant from furnishing additional men at its convenience. Assailed rule ordered canceled, and defendant admonished promptly to establish an appropriate rule in compliance with rule 11(a).—Middle Atlantic Conference v. Transport Corp., 321 I.C.C. 308 (311-2).

Addition to tariff descriptions "Equipment, NOS," "Materials, NOS," and "Supplies, NOS" of reference mark leading to explanation "used or useful in the preparation, packaging, and sale of prepared food products, dairy products and byproducts" renders the three separate descriptions sufficiently specific to satisfy requirements of rule 4(f) of Tariff Circular MF No. 3. But mere addition of the symbol "NOS" to description "Canned Foods" does not alter conclusion that such description is too general; and publication of commodity description "Packing House Products" without reference to a tariff or item containing a complete list of such products is a violation of tariff circular rule 4(e) and therefore of §217(a) and (d).—Middlewest Motor Freight Bureau v. Beaver Transport, 325 I.C.C. 175 (177-8).

Though at time of hearing commodity descriptions "Chemicals" and "Machinery" were not accompanied by a list of the specific commodities embraced, defendant has since supplanted the "Chemicals" heading by two separate items, one, "Chemicals" followed by a list of specifically embraced commodities, and the other "Chemicals, NOS" (meaning not otherwise specified), both of which are subject to a tariff reference explained as "used or useful in the preparation, packaging, and sale of prepared food products, dairy products or byproducts"; and the "Machinery" description has been replaced by two items, "Machinery or machines, or parts named," followed by a specific list of ma-

chines, and "Machinery, NOS," subject to a tariff reference like that for chemicals. These current descriptions are sufficiently specific to satisfy the tariff circular rules.—Id., p. 178.

11. Notice chargeable to shipper.—[Vol. 16].—Complainant-consignee failed to show that defendant had engaged in an unreasonable practice in violation of §216(b) by failing to apprise shipper of availability of lower released-value rates on considered l.t.l. shipments of specified commodities; the alternative released-rate provision was clearly and fairly published in the pertinent tariff and shipper was put on notice, thereby, of availability of an alternative rate basis. Provisions in a carrier's tariff on file with the commission have the force and effect of statute, and carrier and shipper alike are charged with knowledge thereof and are bound thereby; carrier's obligation of public notice is fulfilled by the publication of rates, rules, and regulations in its tariff in clear, unambiguous language. Thus, complainant, as bearer of the charges, and shipper are chargeable with knowledge of availability of the lower released-value rates; complaint dismissed.—Winthrop Laboratories Div., Sterling Drug v. Dorn's, 325 I.C.C. 654 (655-7).

15. Posting required.—[Vol. 10, 15].—Defendant's institution of the practice of granting free intrastate transportation of cash letters for certain Wisconsin banks in connection with their interstate shipments thereof constitutes a change in value of the interstate service for which a charge is made, in violation of §217(c).—Armored Carrier Corp. v. B.D.C. Corp., 92 M.C.C. 665 (668).

16. Filing of tariffs.—[Vol. 16].—Although plaintiff bus company's tariffs were filed with the commission and, in absence of objection or investigation, had become effective, the tacit acceptance thereof by the commission does not foreclose the United States Court of Claims from looking into reasonableness of those tariffs as a factor in computation of transportation taxes.—Whitehouse Sightseeing Corp. v. United States, 300 F. 2d 449 (451).

Respondent's contention that its authority for "such merchandise as is dealt in by wholesale and retail grocery and food business houses" entitles it to transport any commodity whatever, provided the shipper or consignee in the slightest degree buys or sells food or groceries, was rejected by the commission and the court in a prior proceeding (see 163 F. Supp. 118). In view of its participation in that proceeding, it is at least questionable practice for respondent to again take the same position through medium of a tariff publication, without informing the commission at the time of filing as to the issue involved. A more orderly procedure would be to request an interpretation of its operating authority if it had a bona fide doubt as to its limitations.—Various Commodities, Illinois to Denver, 322 I.C.C. 554 (558).

17. Rejection of schedules.—[Vols. 14, 16-18].—The commission having found on examining plaintiff's certificate that it had no authority to transport firebrick and ferro alloys, it has authority under the statute to reject plaintiff's tariff naming rates on those commodities, although filed in proper form, because it was not in consonance with the statute and the commission's regulations thereunder. The court agrees with the commission that the tariff is an attempt to secure authority to haul those commodities; what the commission denied cannot be secured by rearranging language in the hope that in one way or another the previously denied authority will be approved.—W. J. Dillner Transfer Co. v. United States, 214 F. Supp. 941 (945, 946).

Since a tariff must be founded upon a valid certificate of authority to carry the commodities described therein, the commission could properly reject plaintiff's tariff without a hearing. The commission is an administrative body but exercises quasi-judicial duties; it exercises judgment and discretion; it may act of its own motion in certain instances and it may be petitioned to act by those having rights under the statute. The commission and the court (in 193 F. Supp. 823) previously held that plaintiff's certificate did not embrace the commodities in issue; due process of law does not require an administrative body any more than a court to retry issues which have been once decided. To compel the commission to retain files on every tariff and call a hearing thereon irrespective of whether it is based on a certificate would simply be senseless and bog it down in useless time-consuming ef-

fort.—Id., pp. 945-6.

Rejection, suspension, or condemnation of rates is appropriate where such rates apply to transportation beyond the publishing carrier's authority. In case of Railway Exp. Agency or any other express carrier this means that publication of rates applicable to delayed service which does not conform to the criteria of bona fide express service set forth in 63 MCC 573 would not be lawful; economies to be gained from such a delayed transportation service are available only to ordinary freight carriers.—Freight, All Kinds, L.C.L. Container Charges.—U.S.A., 323 I.C.C. 468 (481)*.

While proposed rule providing for time payment of charges for transportation of household goods through a prearranged loan to shipper by a financial institution may properly be published in carriers' tariffs, following rule determining amount of promissory note to be executed by shipper, reflecting the balance owing on the transportation charges plus a charge for credit, and providing a table of monthly payments, deals with matters beyond the commission's jurisdiction and is not properly published in a common carrier tariff, since the charges for credit recompense the financial institution for services rendered by it, not a service of the carrier. Such a proposal would normally be rejected upon submission for filing, but, since the second rule is so closely linked with the first (a proper subject for the commission's consideration), the schedules were accepted for filing. Order requiring cancellation of the second rule and of all references to it in the first will be deemed to have same effect as initial rejection of the improper filing.—Time Payment Plan for Transporting Household Goods, 323 I.C.C. 677 (679-80).

20. Joint rates.—[Vols. 12, 14, 17, 19].—By participating in a joint rate with a United States carrier a foreign operator subjects itself to the commission's jurisdiction and thus, to extent of the joint rate, becomes subject to terms of Interstate Commerce Act. And if the foreign operator fails or refuses to abide by provisions of the published tariff in which it is participating, it has committed a clear violation of the act.—Fess Transport, 91 M.C.C. 924 (927)*.

Although proposed plan V TOFC rates published in respondent motor carrier's tariff offer joint motor-rail motor service, with the motor carrier performing the service to and from the railroad's ramps, and they apply from or to numerous points grouped with the rail points named, there is no showing whether any such points are beyond the respective terminal areas within contemplation of §202(c)(2), and thus no proof that the motor respondent would perform any line-haul service. Therefore, under principle of 46 MCC 623 that motor carriers are not proper parties to joint rates when their service is performed within terminal areas, the proposed rates are not shown to be lawful and are ordered canceled.—Rubber Articles, Philadelphia to Ill., Ky., Mich., & Mo., 319 I.C.C. 632 (635-6, 638).

35. Distance provisions.—[Vols. 10-12].—Although investigation of iron-and-steel scales published by eastern motor carriers has been discontinued, one of the primary causes of its institution was carriers' alleged manipulation of distances to cut rates charged; respondents are therefore reminded that, in determining rates from mileage scales, tariffs publishing distance rates should clearly and definitely show application of the rates and publish distances between all points between which such rates apply, in accordance with rule 12 of Tariff Circular MF-3.—Iron and Steel Articles—Eastern Common Carriers, 314 I.C.C. 755 (758)*.

Proposed mileage rates, as published to utilize household-goods carriers' mileage guide, do not violate requirements of Rules 4(a) and 12(a) of tariff circular MF-No. 3 that all rates be plainly stated and that mileage rates clearly and definitely show the application thereof. The tariff circular authorizes the publication of distance commodity rates subject to a mileage guide for determination of mileages and, while protestant cites varying mileages to a point depending on method in which mileage guide is used, any deficiencies in respondent's publication are in the mileage guide rather than in method of publication. Further, respondent's traffic moves to large distribution points and not to all points, and the rates are published for mileage brackets rather than specific mileages.—Dog or Cat Food from

Boston to Middle Atlantic Points, 318 I.C.C. 59 (63).

Although six defendants have violated §217 by concurring in joint distance commodity rates published in tariff of a seventh, without participating in a distance guide as required by rule 12(c)(4) of Tariff Circular MF No. 3, they should be permitted to participate in the indicated mileage guide within the time specified in the order.—Middlewest Motor Freight Bureau v. Beaver Transport, 325 I.C.C. 175 (176, 177, 181).

36. Truckloads; equipment; weight.—[Vols. 10, 12, 19].—See Alcoholic Liquors, Detroit, Mich., to Long Island City, §202(b), n. 6.

37. Allowance to shippers.—[Vols. 10, 12].—Though carriers are not barred from publishing rates for less than a complete service, methods employed in providing the service must be lawful. Proposed terminal-to-terminal service in carrier-owned trailers is less than a complete service, since under proposed flat charge per trailer owners of the property transported would render a loading and unloading service for which they are entitled to publication of a just and reasonable allowance.—Automobile Parts and Other Articles, Central Territory, 316 I.C.C. 143 (144-5).

39. Transit.—[Vols. 12, 13, 15, 18].—Stopoff rules, mixed shipments of interstate and intrastate commerce, see Central States Motor Freight Bureau case, §216(b), n. 425.

40. Containers; returned containers.—[Vols. 16, 18].—While pallet-exchange agreement between named shipper and certain motor common carriers is not unlawful, exchange of pallets in manner therein described, in transportation of freight, is unlawful unless covered by appropriate tariff provisions. As, under the circumstances described, title to the pallets passes with each exchange, carrier would always be using its own pallets, and the transportation provided therewith is subject to tariff requirements of §217(a). Pallet exchange provisions similar to those quoted from tariff of one carrier would be appropriate and lawful, provided exchange thereunder is accomplished without discrimination and charges collected are reasonable for the entire service. But no mention should be made of exchange of pallets at carrier's sole option or convenience, since such a provision would violate the commission's tariff circular in that extent of the service would thereby become indefinite and uncertain.—Legality of Pallet Exchange Agreement—Kraft, 322 I.C.C. 439 (441-2, 444-5).

41. Intermediate or nearest point rule.—[Vol. 19].—Although 300 ICC 135 found that irregular-route carriers may not publish intermediate rules, 314 ICC 477 found that unnamed- or nearest-point rules were necessary to permit such carriers to establish rates for sporadic and infrequent movements; rule proposed by respondent, an irregular-route carrier, for intermediate application of class rates requires a more-distant point and is in fact an intermediate rule; cancellation required, without prejudice to establishment of a rule in conformity with views expressed in latter case cited.—Intermediate Point Rule between Points in Ill., Ind., & Mich., 315 I.C.C. 31.

For reasons stated in 314 ICC 477, respondent's unnamed-point rules, which provide for rates to or from points within a 25-mile radius of points named in the tariff, are unreasonable to extent they provide for a radius exceeding 15 miles from the named points. Also, as approved in that case, shortest highway distances rather than air-line distances should be used in determining mileage limits.—Basis for Rates to and from Unnamed Points in Tariffs, 316 I.C.C. 84 (85-6); in absence of a more specific method of naming the center of named points, as a basis for determining distances, the post office of same name as the named point, or in absence thereof of the business district, may be used where it is necessary to provide rates from or to small towns and open areas.—Id., p. 86.

Unnamed- or nearest-point rules should not be used by irregular-route carriers as a substitute for publication of specific point-to-point rates; specific rates should be published from or to major points in the area in which the rates are intended to apply, such points to include as a minimum all carriers' authorized points listed in tariff publishing agents' mileage guides.—Id., p. 86; and to ensure that unnamed- or nearest-point rules conform with the views expressed and are restricted to the

limited purpose intended, they may be published only in tariffs naming the rates in connection with which they are to apply, and only with special permission to depart from Rule 4(a) of Tariff Circular MF-3.—Id., p. 86.

Intermediate-point rule maintained by respondent is not authorized by Tariff Circular MF-3 and should be canceled; respondent may provide in lieu thereof an unnamed-point rule for determining rates over irregular routes as authorized in 314 ICC 477; establishment of a specific rate between particular points would not be inconsistent with such a rule.—Iron or Steel Articles from Portage, Ind., to Chicago, 316 I.C.C. 255 (257-8).

Since authority granted respondent to continue formerly exempt transportation is over irregular routes, in publishing rates therefor it may not maintain intermediate-point rules. See 314 ICC 477.—Bananas, Mobile & New Orleans to Idaho, Mont., Oreg., 318 I.C.C. 140 (141).

66. Special services.—[Vols. 10, 11, 14, 17].—Defendants' furnishing of helper service for loading and unloading of t.l. shipments moving between points in middle Atlantic territory and described Pittsburgh-Wheeling area, without tariff authority or charge, found unlawful in violation of §217. Reasonable rule and flat charge to be published for such service, prescribed.—Middle Atlantic Conference v. A.A.A. Trucking Corp., 321 I.C.C. 406*.

Although applicant's unloading of shipments of construction materials from rail cars, furnishing of special pallets, and storage of shipments prior to delivery, without compensation in addition to the line-haul charge, are not unlawful provided those services are extended without discrimination and the transportation charges are reasonable for the entire service performed, §217 requires that common carriers publish not only their rates and charges, but also any service extended in connection with the underlying transportation service. While applicant's failure to do so does not appear to be an intentional disregard of the obligations of a regulated carrier, it is admonished immediately to bring its tariffs into compliance with §217 and the commission's pertinent tariff circular rules.—Paul Marckesano & Sons Co., Inc., Extension, 86 M.C.C. 727 (731-2).

Applicant should give special consideration to its practice of providing storage without extra charge; while it is not unusual for carriers to provide storage when preliminary to delivery and incidental to the transportation service, storage for longer periods should be provided only at fully compensatory charges which are published in carrier's tariffs.—Id., p. 732.

72. Icing; refrigeration.—[Vol. 13].—Since respondent would perform refrigeration and protective services in transporting bananas, it must make tariff provision therefor in accordance with tariff circular MF-No. 3.—Bananas, Mobilé & New Orleans to Idaho, Mont., Oreg., 318 I.C.C. 140 (141).

Regulations of the Commission

27 FR 5142, June 1, 1962, Part 187: Freight Rate Tariffs, Schedules, and Classifications, §187.90 Suspension supplements, revised, effective on date of order.

29 FR 5006, April 10, 1964, Part 187: Freight Rate Tariffs, Schedules, and Classifications, §187.90 Suspension supplements, paragraph (f) revised, effective on date of order.

29 FR 15292, Nov. 14, 1964, Part 187: Freight Tariffs, Schedules and Classifications, §187.201 Released rates on household goods, amended to read as set forth, effective Feb. 1, 1965.

30 FR 8335, June 30, 1965, Part 187: Tariffs of motor common carriers; emergency transportation of property, Special Permission No. M-60160, §187.100 revised, effective July 1, 1965.

30 FR 13576, Oct. 26, 1965, Part 187: Freight Rate Tariffs, Schedules, and Classifications, §187.5, Form and Content of Schedules, effective Dec. 28, 1965.

31 FR 8919, June 28, 1966, Part 187: Freight Rate Tariffs, Schedules, and Classifications, §187.201 Released rates on household goods, amended to read as set forth; and released rates order nos. MC-2-B, MC-309, MC-330, MC-362, and MC-429, rescinded; effective on date of order.

31 FR 10469, Aug. 4, 1966, Part 187: Freight Rate Tariffs, Schedules, and Classification, §187.201 Released rates on household goods, paragraph (a) (31 FR 8919), amended as set forth, effective Sep. 30, 1966.

31 FR 12719, Sept. 29, 1966, Part 187: Freight Rate Tariffs, Schedules, and Classifications, §187.90 Supension supplements, paragraphs (a) thru (f) revised, effective on date of order.

NOTE: For recodification, see 49 CFR, Editorial Note, 32 FR 5606, April 5, 1967.

32 FR 8893, June 22, 1967, Part 287 [formerly Part 187]: Freight Rate Tariffs, Schedules, and Classifications, §287.100 Motor common carriers of property; establishment of rates, etc., covering emergency movements of property, revised, effective on date of order.

NOTE: For Republication and Redesignations of Regulations, see 32 FR 20003, Dec. 20, 1967.

32 FR 20654, Dec. 21, 1967, Part 1306 [former Part 286, formerly Part 186]: Passenger and Express Tariffs and Schedules of Motor Carriers, §1306.50 Released rates; express service, paragraphs (a) and (c) amended, effective on date of order.

Section 217. (b) [§*317(b) U.S.C.*] Deviation from rates and regulations enumerated in tariff forbidden; undue preferences.—[Unchanged. See vol. 10, p. 8224, vol. 11, p. 9561.]

Notes of Decisions

Volume 10—p. 8224; Volume 11—p. 9561; Volume 12—p. 10464; Volume 13—p. 1113; Volume 14—p. 11636; Volume 15—p. 12245; Volume 16—p. 12909; Volume 17—p. 13616; Volume 18—p. 14626; Volume 19—p. 15901.

5. Effect of tariff in force.—[Vols. 16-18].—The court is bound to apply a tariff as it is published; it is to be treated as though it were a statute binding both carrier and shipper to the rates, charges, rules, and regulations published therein; and no concessions contrary thereto may be made. No oral contracts or agreements may supersede or vary the tariff, and deviation from lawful rates and charges published therein is not permitted.—Miller v. Ideal Cement Co., 214 F. Supp. 717 (720).

When motor carrier's tariff named specific commodity rates, minimum 20,000 pounds, on steel wire from origin to destinations of defendant's shipments of wire, the lower court erred in holding that a lower 30,000-pound rate published therein from that origin to a more distant destination applied on the shipments (each of more than 30,000 pounds) under intermediate-points rule in the tariff. The intermediate rule is unambiguous, and can be applied only in absence of a specific commodity rate between given origin and destination points; and the tariff clearly contemplates application of the 20,000-pound rates to all shipments in excess of that minimum. Thus, no construction of the tariff was necessary, and it was error to apply the intermediate-points rule thereto. Furthermore, since reasonableness of a published motor carrier rate may not be in issue in a suit by or against a shipper, there was no authority to look beyond the tariff to determine whether plaintiff's charges were or were not reasonable.—Steffke Freight Co. v. Northwestern Steel and Wire Co., 329 F. 2d 308 (309-10).

A tariff may not be interpreted so as to extend its application beyond the statutory power of the governmental authority. Thus, since the States have exclusive jurisdiction over motor carriage in intrastate commerce, filing with the commission of a tariff containing a stopoff rule would not make those provisions applicable on intrastate shipments, even when commingled on one bill of lading with interstate shipments tendered at same time by same shipper as part of a single volume; nor may rates restricted to intrastate commerce be used for application on interstate shipments.—Central States Motor Freight Bureau, Inc., Petition, 319 I.C.C. 745 (749, 751)*.

Principles Governing Tariff Interpretation

10. In general.—[Vols. 13, 15-19].—Part I, §6(7), n. 10.—The court has primary jurisdiction to construe carrier's tariff when the question is "solely of law" but, on the other hand, primary jurisdiction lies in the commission where issue of tariff construction involves factors "the adequate appreciation of which" presupposes an "acquaintance with many intricate facts of transportation." Since language of tariff item in issue is ambiguous, and the litigants both urge readings as though a comma were inserted but disagree on where it should be placed, the court is without guidance in deciding between the alternative read-

ings without disclosure of factors underlying the tariff; record is not clear that factors underlying difference in rates charged and those claimed applicable were brought to lower court's attention. With exposition of the possible factors, the court will be in a position to say whether they involve specialized knowledge which only the commission possesses; judgment vacated and case remanded for further proceedings not inconsistent with the court's opinion.—Montgomery Ward & Co. v. Roy Stone Transfer Corp., 329 F. 2d 172 (174)*.

Were the problem of whether released-value classification ratings or exceptions ratings applied on considered shipments before the court as a strict matter of tariff construction by way of contract analysis, it would have to be referred to the commission for primary-jurisdiction determination of the transportation policies inescapably mixed up in the operative effect of classifications, exceptions, released and unreleased shipments, unless it could be decided by the court on principle that tariff ambiguities must be resolved in shipper's favor. However, there is still some room for court construction of tariffs without referral to the commission, and referral is unnecessary where the commission has already construed tariffs resembling the particular one at issue and has clarified underlying factors. If the policy reflected by the commission decisions is reasonably sound, then uniformity of application so essential in a regulated transportation industry makes it important that courts give it their imprimatur.—Strickland Transp. Co. v. United States, 334 F. 2d 172 (176-7, 178).

While tariffs must be applied as published, regardless of intention of the parties and irrespective of equities existing between carriers and shippers, since inadvertent omission of note in question did not ipso facto change the meaning of household goods tariff but, at most, created an ambiguity or uncertainty, traditional rules of construction of written documents are controlling in arriving at proper application of the tariffs; thus, intention of the framers and other considerations become relevant.—National Van Lines, Inc. v. United States, 355 F. 2d 326 (331-2)*.

A tariff should be interpreted to avoid unjust, absurd, or improbable results; if it is subject to different constructions, an interpretation which is reasonable and consistent with purposes of the tariff should be preferred to one which is impractical or which leads to absurd consequences. Also, a tariff should receive a construction which produces charges that are legal, in preference to one which produces illegal rates.—Id., pp. 332-3.

Furthermore, in accordance with the rule that in interpreting contracts the courts will give weight to what the parties themselves have done pursuant to their agreements, the practical application of tariffs by interested persons should be considered in determining the meaning of a tariff. Construction of household goods tariff in issue (which is found to be ambiguous) urged by carriers who allegedly collected overcharges in excess of the tariff rates presents a reasonable alternative to the commission's interpretation, accords with intention of the drafters, and would avoid possible violations of law; such a construction is to be preferred.—Id., pp. 332-3.

Since an article must be classified under a general description if it does not fall within a specific one and, admittedly, general classification descriptions apply to plaintiff's steel switch boxes, assailed higher rates were properly charged unless the shipments can be brought within specific description in item applicable to "14 gauge steel or thicker" switch boxes. Under Manufacturers Standard Gauge, the standard exclusively used and accepted in steel industries, plaintiff's .0710-inches thick steel is considered 14 gauge; and, while U.S. Standard Gauge (Revised) referred to in classification rule describes 14-gauge steel as of nominal thickness of .0749 inches, record does not support conclusion that "nominal thickness" must inflexibly mean "minimum thickness"; nominal thickness, being a measure of approximate thickness, should be interpreted to include generally accepted range of 14 gauge steel, which indisputably includes that used by plaintiff. The commission's finding that plaintiff's steel is not 14 gauge within the more specific description is not supported in the record; remanded for rehearing.—Roach Appleton Mfg. Co. v. United States, 265 F.

Supp. 568 (570, 574-6, 577)*.

The interpretation of a freight tariff presents ordinarily a question of law which does not differ in character from that presented when the construction of any other document is in dispute.—Strickland Transp. Co. v. Ling-Temco-Vought, Inc., 223 F. Supp. 253 (255-6).

The minimum weight is an integral part of the rate; though the record fails to show weight of any of considered shipments, no exception was taken to joint board's statement that shipments appear to have been under 2,000 pounds; therefore, in considering whether existence of volume commodity rates to involved destination precluded application of claimed l.t.l. rate under intermediate rule, shipments are assumed to have each weighed less than 2,000 pounds.—Bemis Bro. Bag Co. v. Felten Truck Line, Inc., 316 I.C.C. 417 (419, 420).

12. Ambiguities construed against maker.—[Vols. 15-18].—Where there is an ambiguity in the tariff and it is not made clear under which rating the article shipped comes, the ambiguity must be resolved in favor of the shipper and the lower rate awarded to him.—Strickland Transp. Co. v. United States, 334 F. 2d 172 (176).

Although any doubt about the meaning of tariffs is generally resolved against the carriers, as a corollary to the rule that written instruments will be construed strictly against their drafters, such rule should not be followed when it is outweighed by other equally settled and applicable rules of construction. Strict construction of tariffs against carriers who drafted them is not justified when such construction ignores a permissible, reasonable one which conforms to intent of the framers, avoids possible violations of law, and accords with the practical application of the tariff given by shippers and carriers alike.—National Van Lines, Inc. v. United States, 355 F. 2d 326 (333)*.

It is a general principle of tariff construction that any ambiguities in a tariff or classification are to be construed in favor of the shipper and against the carrier. That principle is applicable, though not conclusive in instant circumstances, since definition of "14 gauge" as used in classification description of switch boxes, "14 gauge steel or thicker," has been put into dispute, and since members of the steel industry consider steel having the thickness of that used by plaintiff to be 14 gauge.—Roach Appleton Mfg. Co. v. United States, 265 F. Supp. 568 (574)*.

15. Construction not to be strained or unnatural.—[Vols. 15, 16, 18].—In interpreting a tariff, terms used must be taken in sense in which they are generally understood and accepted commercially, and viewed in context of particular transportation operations. Dictionary definitions are not necessarily controlling, and neither carriers nor shippers can be permitted to urge a strained or unnatural construction.—Pickup and Loading Service—West Tennessee Motor Exp., 322 I.C.C. 162 (165).

16. Entire tariff to be considered.—[Vols. 10, 12, 14-16, 19].—All pertinent parts and provisions of a tariff must be considered together and given their reasonable effect; supplements are additions to or alterations of the tariff as originally published, are ingrafted upon it, and are to be read as a part of it. Thus, item in basic tariff providing for addition to the mileage or distance rates therein of a 10-cent per-mile charge for operation in mountain territory must be read with, and applies to, item in supplement to the tariff publishing applicable distance rates on defendant's shipments which moved over mountain-territory routes.—Miller v. Ideal Cement Co., 214 F. Supp. 717 (719-20).

17. Classification and exceptions.—[Vols. 10-19].—Commission decisions that an exceptions rating on articles shipped without release of value supersedes only unreleased classification ratings on same articles are based on sound reasoning that (1) by excluding ratings for released shipments from operation of the exceptions rating carrier declares that only unreleased shipments may move thereunder, (2) this necessarily supersedes that part of the classification calling for unreleased shipment, and (3) the exception, having no purpose to permit released shipments, could not reasonably be intended to supersede the released classification ratings, so that shipper may have benefit of the lower rate by making a released shipment. In holding that released-value ratings in national

motor classification applied on Government shipments of aircraft engines rather than higher exceptions ratings on engines shipped at full, unreleased value, and that the Government on post-audit properly deducted resulting overcharges, the trial court correctly applied that construction.—Strickland Transp. Co. v. United States, 334 F. 2d 172 (178-9).

25. Reasonable doubts resolved in favor of shipper.—[Vols. 10, 12, 15-19] Part I, §6(7), n. 13.—Doubts as to meaning of an ambiguous tariff provision must be resolved in favor of shipper. Viewed in light of considered shipper's facilities and loading problems, "directly accessible" and "immediately adjacent" to the truck, in rule governing placing of freight for free carrier loading, are susceptible of different meanings. Under a reasonable and practicable construction, those phrases do not require spotting of freight at tailgate of vehicle, but embrace shipments placed on shipper's dock; and, since the traffic involved is of some value and is subject to pilferage and to damage by rain, the general practice of placing shipments on the plant shipping room is reasonable. For years it has been carriers' practice, without charge and without objection, to pick up freight from the shipping room, from docks located as close as practicable to the loading dock, and from points close to door of shipper's warehouse; those locations are "directly accessible" and "immediately adjacent" within meaning of the tariff; but shipments placed in finished storage room located some distance from the loading dock are subject to the tariff loading charge.—Pickup and Loading Service—West Tennessee Motor Exp., 322 I.C.C. 162 (165-6).

Observance of Published Tariffs

30. Rates applicable to articles as commercially described.—[Vols. 12, 14-18].—The commission has frequently found that the description of a commodity for sales purposes fixes its identity for transportation purposes. [Citing 262 ICC 410.] Where an article is expressly designed for a single purpose, such as the aluminum aircraft skins shipped, a tariff description of that article couched in terms of such single purpose or use is an apt and appropriate description of the article itself. Classification ratings on aircraft skins, rather than those on aluminum blanks, stampings, or unfinished shapes, found proper for application on considered shipments.—Strickland Transp. Co. v. Ling-Temco-Vought, Inc., 223 F. Supp. 253 (254, 256).

Tariff terms must be taken in the sense in which they are generally understood and accepted commercially. While an automobile drive shaft has sometimes been referred to as including universal joints (which are not permanently attached to it), the automotive industry generally regards drive shafts and universal joints as separate and distinct articles, and complainant admits that what it refers to as a drive shaft is in reality a combination of articles. Since universal joints are separately described, classified, advertised, and sold, complainant's drive shaft assembly is part of the driving gear apparatus, and ratings on driving gear parts applied on considered shipments.—Ford Motor Co. v. Adley Exp. Co., 322 I.C.C. 156 (160).

33. Commodity description; analogous articles.—[Vols. 13, 14, 16-19].—Part I, §6(7), n. 49.—A proper test of applicability of a rate is whether the article may be reasonably identified by the tariff description. Hinge assemblies for automobile hoods, while more than a simple hinge, are sold as a hinge, are so identified in automobile parts catalog, and were so described on bills of lading; while hinges shipped were for use as automobile parts, that type hinge is also used for other purposes; is therefore embraced in both descriptions "Automobile Parts" and "Hardware, Hinges, or Butts." Specific description "Hinges" found applicable.—Petition of Rock Island M.T. Co. for Declaratory Order, 315 I.C.C. 482 (483-4).

Since the nature and character of article shipped, at time tendered, determines its status for rate purposes, complainant had burden to show kind of fresh meat shipped and whether carcass or part carcass within meaning of these terms as used in commodity tariff description governing rate sought. Neither that tariff nor defendants' testimony defines those terms as used therein, and complainant failed to establish that the meat shipped was within the claimed description;

rates charged are thus not shown to have been inapplicable.—Agar Packing & Provision Corp. v. Blue Arrow Transport, 316 I.C.C. 411 (413-4).

But when tariff naming rates to another destination defined carcass or part carcass meats as hung meats or whole, half, and/or quarter carcasses, and meat shipped was not suspended in trailer and did not consist of large pieces, rate applicable for purpose of applying mixing rules was that named on meats other than in carcasses or part carcasses.—Id., p. 415.

Tariff naming distance rate per animal on racehorses provided that lead ponies transported in same vehicle with livestock other than ordinary would be charged for at half the rate on the latter. Since complainant's testimony that a pony and 3 colts in same shipment with 5 racehorses complied with the tariff definition of "lead ponies" is not challenged or refuted, charging of the same rate on those animals as on the racehorses resulted in overcharges.—Newell v. Lux Art Vans Service, Inc., 318 I.C.C. 492 (495-6).

Ratings on driving gear parts applied on past shipments of automobile drive shafts with universal joints attached to the welded yoke at one end and to the slip yoke at the other, both before and after establishment of amended description "axel shafts or drive shafts" subject to lower t.l. and l.t.l. ratings. When latter item was amended the classification board was not informed that it contemplated drive shafts with universal joints and a slip yoke attached, and complainant admits that the completed assembly shipped is a combination of articles.—Ford Motor Co. v. Adley's exp. Co., 322 I.C.C. 156 (158, 159); although complainant contends that, since the drive shaft will not function without the universal joints, it is illogical to conclude that a classification item would be published having no application to preponderance of its shipments, it is not established that the automotive industry as a whole ships completed drive shaft assemblies to the same extent as complainant. Item currently applicable rates drive shafts with universal joints higher than those without, and the industry generally regards them as distinct articles. Since the present ratings are the same as those formerly applied, no unlawfulness is shown.—Id., pp. 159-60.

34. Use to which article is put.—[Vols. 13-19].—Part I, §6(7), n. 51.—While the commission has held that it is not permissible to make different ratings on an article based wholly on different uses to which it may be put, and also that the use to which an article is put is not determinative of the applicable rate thereon, it is equally well settled that the use may be considered in determining the nature of the commodity. [Citing 196 ICC 459.] The nature and character of a shipment when tendered for transportation determines its status for rate purposes and, necessarily, the predominant use or value is the use or value which determine the character of the shipment.—Strickland Transp. Co. v. Ling-Temco-Vought, Inc., 223 F. Supp. 253 (256).

Fact that an article has limited utility is important in determining its nature from a transportation standpoint.—Petition of Rock Island M.T. Co. for Declaratory Order, 315 I.C.C. 482 (483).

35. Whether specific designation supersedes general description.—[Vols. 14, 16, 17].—Part I, §6(7), n. 46.—Where two possible ratings are suggested to be applied on a commodity, the more specific, i.e., the one which more precisely describes and better fits the shipment in question, is the controlling rating. Proper ratings on aluminum commodity shipped is that provided in the classification on "Aircraft or Parts Named: Aircraft skins (outer covering), metal, in boxes or crates: In flat shapes" because it more precisely describes and better fits the shipments than does the rating on "Aluminum: Blanks, stampings, or unfinished shapes, NOI."—Strickland Transp. Co. v. Ling-Temco-Vought, Inc., 223 F. Supp. 253 (254-5, 256); and tariff item which specifically mentions hinges is a more specific description of automobile-hood hinges shipped than general description of iron or steel automobile parts in another item.—Petition of Rock Island M.T. Co. for Declaratory Order, 315 I.C.C. 482 (484).

A specific description in a classification takes precedence over a broad generic description provided that the commodity is actually embraced within the terms of the more specific item.—Ford Motor Co. v. Adley Exp. Co., 322 I.C.C. 156 (159).

See also Roach Appleton Mfg. Co. v. United States, n. 10, above.

40 Departure from tariff rates unlawful.—[Vols. 10-12, 14, 15, 18, 19].—Part I, §6(7), n. 215.—Since route over which defendant's shipments moved was in mountain territory, and the applicable rate was designated a distance commodity rate, item in the tariff providing for addition to mileage or distance rates therein of a 10-cent per-mile charge for operation in mountain territory must apply to the rate item and must be respected; carrier is bound to collect the additional 10 cents, regardless of any negotiations, misunderstandings, misrepresentations, or misquotations by or between the carrier and shipper or their agents. Responsibility for and amount of the charge are fixed by the tariff, not by the parties nor the court; and the statute prohibits carrier from deviating from the published tariff rate.—Miller v. Ideal Cement Co., 214F. Supp. 717 (720-1).

The law peremptorily fixes as charges to be exacted for the carriage of freight those specified in the applicable tariff, no more and no less. Thus, no receiver of freight may free goods of the carrier's lien unless he discharges not what may appear to be, or be asserted to be, but what actually is the amount due thereon, which amount such receiver and the carrier are conclusively presumed to know. When charges on considered shipments of aluminum aircraft skins are calculated under applicable classification item and ratings provided therein, there is a freight charge deficit for which defendant is legally liable to plaintiff; plaintiff is entitled to judgment in amount of that deficit with interest.—Strickland Transp. Co. v. Ling-Temco-Vought, Inc., 223 F. Supp. 253 (255, 256).

The statute imposes on a carrier an absolute duty to collect charges in accordance with published tariffs; and an inadvertent mistake provides no excuse for deviation from such tariffs. However, latter rule is held to be inapplicable in situation where inadvertent omission of note at the end of Sec. III of considered tariff publishing increased rates on household goods for distances up to 500 miles within, from, and to a described eastern territory (which note in former tariff referred to Sec. II therein for rates to be applied for distances of over 500 miles) did not ipso facto change the meaning of the tariff but, at most, created an ambiguity or uncertainty; under such circumstances, traditional rules of construction of written instruments are controlling in determining proper application of the tariff. Thus, intention of the tariff framers and other considerations become relevant.—National Van Lines, Inc. v. United States, 355 F. 2d 326(331-2)*.

The commission, in deciding that a literal interpretation of the new tariff resulted in only one possible construction, and that charges collected during period when the note was inadvertently omitted from Sec. III thereof were in excess of published rates and were not made in conformity with proper tariff interpretation, erroneously interpreted the tariff in question. While any ambiguity in tariffs is generally resolved against the carriers, a strict construction of tariffs against carriers is not justified when such construction ignores a permissible, reasonable one which conforms to intent of the framers, accords with the practical application given the tariff by shippers and carriers, and which would avoid possible violations of law. The district court erred in upholding the commission's decision; reversed.—Id., pp. 328-31, 333.

Though the commission has no authority under Part II to award reparation, a carrier subject to the act is not at liberty to charge or receive greater or less compensation than that specified in its tariffs, unless authorized to do so by competent authority; where rates charged are found inapplicable, it at once becomes the duty of the carrier to refund any overcharges and of the shipper to pay any undercharges, without an order or other action by the commission, and without resort to a court; and §222 provides penalties for failure to observe the provisions of filed tariffs.—Koss v. A. A. Lexington Moving & Storage Co., 315 I.C.C. 355 (355-6).

Just prior to date of considered shipment of household goods, defendant had canceled its participation in tariff shown on bill of lading as authority for rate charged, but participated at time of movement in tariff naming a lower rate for distance between points involved; defendant offered no explanation or authority for departure from latter rate, which is found

applicable.—Id., pp. 357, 358.

Since shipments transported terminal-to-terminal by respondent motor carrier for respondent forwarder constitute "truckload lots" within meaning of the second proviso of §409(a) and are transported for a distance exceeding 450 miles, the motor carrier's charging and the forwarder's paying of contract rates lower than the motor carrier's applicable tariff rates violates §§217(b) and 409(a).—Milne Truck Line, Inc.,—Investigation—Tariff Rates, 325 I.C.C. 128 (135).

See also Campbell "66" Express, Inc. v. United States, Gov't. traffic §66, n. 1.

48. Strict compliance with tariff rules.—[Vols. 10, 11, 14-18].—Rates for exclusive use of a vehicle apply only when provisions of governing tariff rule are complied with. However, tariff rule expressly providing language to be endorsed on bill of lading, in requesting exclusive use of carrier's vehicle, was not intended to exclude all other language adequate to make the same request; it was not intended that form rather than substance would govern. Defendant's certificate on bill of lading that exclusive vehicle service was furnished, which reasonably apprises carrier that shipper is requesting exclusive use of its vehicle, is sufficient compliance with tariff requirement for making exclusive-use rates applicable.—Campbell "66" Express, Inc., v. United States, 302 F. 2d 270 (272).

Charges for extra labor in loading shipment of household goods were inapplicable when applicable rate included loading except under circumstances specified in tariff; driver and his helper could have performed all the loading, facilities for loading are not shown to have been inadequate, and mere fact that loading may be more difficult at one place than another does not warrant extra labor charges; if more than two men are required to load shipment within a desired time, for no reason for which extra charges are specifically authorized in the tariff, cost of the labor is borne by carrier.—Koss v. A. A. Lexington Moving & Storage Co., 315 I.C.C. 355 (357, 358).

Household-goods carrier's practice of applying its published divided-shipment rule only upon request of a shipper is unlawful, since tariffs have the force of law and must be uniformly applied.—John F. Ivory Storage Co., Inc. v. Atlas Van Lines, Inc., 316 I.C.C. 224 (226)*.

Where commodity tariff contains no specific mixing provision for mixed truckloads of meats and other packing house products, specific mixing rule in ratings section of classification governs rather than general mixing rule in exceptions tariff, which is an exception to the general rule in the classification. That special rule, which is itself an exception to the general mixing rule, provides that articles specified thereby (including those involved) shall be charged their respective volume rates, without restriction as to whether they are class or commodity rates, subject to a minimum charge at the volume rate on fresh meat, NOI, for 21,000 pounds. Considered shipment was overcharged to extent that charges assessed exceeded those computed on such minimum basis.—Agar Packing & Provision Corp. v. Blue Arrow Transport, 316 I.C.C. 411 (412, 415-6).

When tariff naming rates per mile per animal on racehorses and lead ponies provided that distances used would be those published in Household Goods Carriers mileage guide, which named a distance of 1,421 miles between origin and destination of considered shipment, computation of charges for a greater distance on a speedometer-mile basis resulted in overcharges.—Newell v. Lux Art Vans Service, Inc., 318 I.C.C. 492 (495).

50. Concessions and rebates.—[Vols. 10, 14, 15].—While proposed rule for settlement of household goods claims, under which carrier, moving goods of shipper's employees at released rates, undertakes to arrange for repair of damaged articles or make settlement with shipper for those lost or damaged beyond repair, subject to reimbursement by shipper for any amount in excess of carrier's liability, may have theoretical possibilities of rebating in authorizing carrier to assume an obligation beyond its bill-of-lading liability, or of discrimination between shippers in that it depends on extension of credit to employers, no real danger of such unlawfulness is apparent. Rule approved, without prejudice to a different conclusion if warranted by results in actual practice.—Claim Settlement on Household Goods—U.S.A., 318 I.C.C. 359 (362).

Defendant's practice of granting free intrastate transportation of cash letters for certain Wisconsin banks coincidental with interstate transportation thereof at published rates violates the rebating provisions of §217(b). Cease-and-desist order entered.—Armored Carrier Corp. v. B.D.C. Corp., 92 M.C.C. 665 (667).

80. Intermediate provisions.—[Vols. 12, 13, 16-19].—Part I §6(7), n. 109 et seq.—Intermediate-points rule in plaintiff's tariff is unambiguous; it can be applied only in absence of specific commodity rates named in that tariff between given origin and destination points. Thus, when tariff named specific commodity rates, minimum 20,000 pounds, on wire from origin to destinations of defendant's shipments (each of which weighed more than 30,000 pounds), and clearly contemplated application of those rates to all shipments in excess of that minimum, lower court erred in applying the intermediate rule; thus, trial court's conclusion that lower 30,000-pound rate published in the tariff from considered origin to a more distant destination applied on the shipments under the intermediate rule was erroneous.—Steffke Freight Co. v. Northwestern Steel and Wire Co., 329 F. 2d 308 (309).

When open-routed tariffs contain an intermediate rule, any of participating carriers' authorized routes may be used to determine the applicable rate, provided they are not unduly circuitous or unnatural. Whether a claimed route is unduly circuitous or unnatural depends on the facts of each case; and while absence of traffic movement over a claimed route is a fact to be considered, it is not conclusive.—Bemis Bro. Bag Co. v. Felten Truck Line, Inc., 316 I.C.C. 417 (419).

Although claimed route from Kansas City to Wichita through Salina, Abilene, and Junction City is 35 percent circuitous and defendants have moved no traffic thereover, it involves no backhaul or unusual operating conditions and is thus not illogical or unnatural. Unrestricted commodity l.t.l. rate to Wichita therefore applied on considered shipments of less than 2,000 pounds to Salina, Abilene, and Junction City under intermediate rule; such application was not barred by existence of volume commodity rates on minima of 20,000 pounds or more to Salina, as the commodity rate referred to in the rule is necessarily one which could apply to the shipments concerned.—Id., pp. 419-20.

Intermediate rule in a tariff establishes the commodity rate published from a named point from an unnamed intermediate point just as positively and legally as if it was specifically named therefrom.—Iron or Steel Articles from Portage, Ind., to Chicago, 316 I.C.C. 255 (256).

175. Undercharges.—[Vols. 13, 14, 17].—Carrier's failure to make additional 10-cent per-mile charge on considered shipments, in accordance with tariff publishing such charge for operation in mountain territory, in connection with distance or mileage rates, resulted in undercharges. Since, admittedly, distance commodity rate was applicable and entire route of movement was in mountain territory, plaintiff was bound to charge and defendant is obligated to pay not only the mileage rate but also the additional 10-cent charge; plaintiff is entitled to recover undercharge for each trip, plus interest at 6 percent from respective dates on which the undercharges arose.—Miller v. Ideal Cement Co., 214 F. Supp. 717 (721).

See also Louisiana & A. Ry. Co. v. Export Drum Co., §8, n. 194.

222. Carrier's duty to collect tariff charges.—[Vols. 14-17].—Plaintiff motor carrier has not only the right but the duty to collect proper charges for transportation services performed. While consignee, who assumed responsibility for payment of charges in issue, is entitled to recover for damage to its goods due to carrier's negligence or misconduct, existence of such damage claim, even though valid, is no defense to plaintiff's claim for transportation charges.—Akers Motor Lines, Inc. v. Lady Cornell Comb Co., 203 F. Supp. 156 (157).

See also Miller v. Ideal Cement Co., n. 40, above.

238. Tariff minimum weights.—[Vols. 17, 18].—See Steffke Freight Co. v. Northwestern Steel and Wire Co., n. 5, above.

Section 217. (c), (d). [*§317(c), (d) U.S.C.*].—[Unchanged. See vol. 10, p. 8227-8.]

Notes of Decisions

§217(d): Volume 10-p. 8228; Volume 11—p. 9562; Volume 12—p. 10466; Volume 15—p. 12248; Volume 16—p. 12913.

§217 (d). 10. Engaging in transportation without filing tariffs.—[Vols. 10-12, 15, 16].—Since it appears that at time considered shipment of racehorses moved over their lines defendants had no rate in effect thereon either jointly or individually, they are admonished that motor common carriers performing transportation without having rates therefor lawfully on file, in violation of §217(d), are amenable to criminal or civil proceedings under §222.—Newel v. Lux Art Vans Service, Inc., 318 I.C.C. 492 (494).

Section 218. [*§318(a) U.S.C.*] **Schedules of contract carriers by motor vehicle—(a) Establishment, filing, and publication of schedules and rules affecting rates; notice of and hearing on proposed changes; undue preferences.** [Unchanged. See vol. 18, p. 14631.]

Notes of Decisions

Volume 10—p. 8230; Volume 11—p. 9564; Volume 12—p. 10466; Volume 13—p. 11115; Volume 14—p. 11639; Volume 15—p. 12248; Volume 16—p. 12914; Volume 17—p. 13621; Volume 18—p. 14633; Volume 19—p. 15904.

2. Construction and interpretation.—[Vols. 17, 18].—Purpose of the statute regulating contract carriers is to prevent destructive competition between contract and common carriers and among the contract carriers themselves; it is not designed to prevent discrimination among shippers, as it is in the case of common carriers. Originally, only minimum rates filed by contract carriers were subject to regulation but, under 1957 amendment to the act, contract carriers are required to file their actual charges as well as minimum rates; as a result thereof, common carriers are given a right of knowledge and surveillance of actual competition from contract carriers. Policies underlying regulation of common and contract carriers are not exactly the same, and that fact must be considered in relation to the basis for recovery of undercharges; however, that policy difference does not justify disregard of the general policy, which pervades regulation of contract as well as common carriers, that the rate filed must be observed. Lower court's holding that contract carrier's collection of alleged undercharges would be contrary to the statute reversed, and case remanded.—Bowser and Campbell v. Knox Glass, Inc., 390 F. 2d 193 (195-7)*.

While application for authority to transport brick (except fire brick) does not contain request for authority to transport sample brick panels to suppliers for matching in color and quality, supporting shippers occasionally require such service and applicant proposes to render it free of charge. Provision of free transportation in that manner, however, would be unlawful under the clear requirement of §218(a) that every contract carrier establish and observe reasonable minimum rates and charges for any service rendered or to be rendered.—James, 96 M.C.C. 272 (273, 275).

25. Schedules; publication; content.—[Vols. 11, 12, 15-19].—Plaintiff contract carrier, in

suit to recover alleged undercharges, was responsible for preparing and filing a correct schedule of charges in accordance with its contract with defendant shipper; and difference in policies underlying regulation of contract and common carriers does not justify disregarding the general policy, which pervades regulation of both, that a rate filed must be observed. Schedule filed by plaintiff was admittedly incomplete because of omission of a stoppage in transit rule, and both shipper and carrier agree that it did not reflect the contract between them; however, the rate filed is a matter of public record of which shipper must take notice at his peril and, as has been held in cases involving common carriers, hardship on shipper resulting from its reliance on the contract is inadequate to alter policy underlying the integrity of plaintiff's filed schedule of charges. The courts cannot in effect validate illegal rates long after the event, especially when carrier's competitors relied on the published charges in the interim. Lower court's decision reversed and case remanded for further proceedings.—Bowser and Campbell v. Knox Glass, Inc., 390 F. 2d 193 (194, 196-7)*.

A carrier may not publish rates on a commodity which it has no authority to transport. Although commodities in issue are chemicals, and respondent may transport them under its authority for "chemicals," proposed rate thereon is unlawful when the commodities are described in its schedules in such a manner as to mislead shipping public as to the extent of its authority. If respondent desires to list supporting shipper's products separately in its chemical list, it should describe them in appropriate terms.—Plastics, Sirup & Washing Compounds, Del. to N.Y. & N.J., 315 I.C.C. 351 (353).

Where mileage blocks in respondent's tariff scales on cement refer to airline rather than highway miles, applicable mileage cannot be determined with any degree of accuracy. Highway distances for rate-making purposes can be affected by many factors, including weight limitations on bridges and highways, overhead clearances, and topography; further, respondent must cross Ohio River to reach considered destinations and the crossings are seldom, if ever, on a direct airline route. Such method of computing distances for determining applicable rates violates §187.5(t) of commission's tariff circular MF No. 4 and §218(a) of the act.—Cement from Kosmosdale, Ky., to Ill., Ind., and Ohio, 318 I.C.C. 497 (498-9).

40. Departure from schedule rates unlawful.—[Vols. 13-15, 16, 17].—Since the statute requires a contract carrier to file with the commission a schedule of its actual charges as well as its minimum rates, and prohibits it from charging or demanding a transportation charge different from that specified in its schedule, plaintiff contract carrier must charge shipper in accordance with its filed schedule of charges. Difference in policies underlying the regulation of contract and common carriers does not justify disregard for the general policy that the rate filed must be observed, a policy which pervades regulation of both forms of carriage and which is enforced by permitting recovery of any undercharges in order to preserve the integrity of published rates. Though the schedule filed was admittedly incomplete because of omission of stoppage-in-transit rule, and plaintiff and defendant shipper agree that it did not reflect the contract between them, rate so filed is a matter of public record of which shipper must take notice at its peril.—Bowser and Campbell v. Knox Glass, Inc., 390 F. 2d 193 (194-6)*.

Accordingly, as has been held in common carrier rate cases, hardship on shipper resulting from its reliance on the contract is inadequate to alter the policy underlying the integrity of plaintiff's filed schedule of charges. Such instances of hardship may not be permitted to destroy the more far-reaching need to maintain respect for lawfully established rates which other shippers and common and contract carriers alike must be able to rely on as realistic facts. The courts cannot in effect validate illegal rates long after the event, especially when in the interim plaintiff's competitors have relied on the published charges. Lower court's judgment, denying plaintiff recovery of alleged undercharges based on its published schedule, reversed; case remanded for further proceedings consistent with the court's opinion.—Id., pp. 196-7.

Regulations of the Commission

30 FR 8335, June 30, 1965, Part 187: Schedules of motor contract carriers; emergency transportation of property, Special Permission No. M-60161, §187.101 revised, effective July 1, 1965.

31 FR 8919, June 28, 1966, Part 187: Freight Rate Tariffs, Schedules, and Classifications, §187.201 Released rates on household goods, amended to read as set forth; and released rates orders nos. MC-2-B, MC-309, MC-330, MC 362, and MC-429, rescinded; effective on date of order.

31 FR 10469, Aug. 4, 1966, Part 187: Freight Rate Tariffs, Schedules, and Classifications §187.201 Released rates on household goods, paragraph (a) (31 FR 8919) amended as set forth, effective Sep. 30, 1966.

31 FR 12719, Sept. 29, 1966, Part 187: Freight Rate Tariffs, Schedules, and Classifications, 187.90 Suspension supplements, paragraphs (a) thru (f) revised, effective on date of order.

NOTE: For recodification, see 49 CFR, Editorial Note, 32 FR 5606, April 5, 1967.

32 FR 8894, June 22, 1967, Part 287 [formerly Part 187]: Freight Rate Tariffs, Schedules, and Classifications, §287.101 Motor contract carriers of property; establishment of actual or minimum rates, etc., covering emergency movements of property, revised, effective on date of order.

Section 218. (b) [§*318(b) U.S.C.*] Complaints and investigations; hearings and orders of commission. [Unchanged. See vol. 11, p. 9565.]

Amendments, see footnotes, pp. 9565-9566.

Historical Note

The commission recommends, in view of the prohibitions in 18 USC §1001, that §218(b) be amended so as to eliminate the mandatory oath provision therein, and that such requirement be made discretionary with the commission.—Annual Report, 1964, p. 72.

Notes of Decisions

Volume 10—p. 8233; Volume 11—p. 9566; Volume 12—p. 10468; Volume 13—p. 11116; Volume 15—p. 12249; Volume 16—p. 12915; Volume 17—p. 13623; Volume 18—p. 14635; Volume 19—p. 15904.

25. What considered in determining reasonableness.—[Vols 10, 13, 15-19].—Respondent's distance scales based on airline mileages on portland cement, minimum 90 barrels, and masonry cement, minimum 122 barrels, or equivalent combinations, from Kosmosdale, Ky., to points in Illinois, Indiana, and Ohio are not compensatory for distances over 100 miles. Revenue on a minimum shipment of portland cement to a point 100 miles from origin, including empty return movement, equals respondent's system average cost, and though heavier loading may increase earnings, compensativeness of rates must be judged by the tariff minima; moreover, computation of charges on airline mileages results in substantial understatements. Other evidence indicates that profit shown by respondent is due to its short-haul traffic which is mostly intrastate. As publication of scales for highway movement on airline mileages also violates §218(a), rates under investigation are ordered canceled.—Cement from Kosmosdale, Ky., to Ill., Ind., and Ohio, 318 I.C.C. 497. (500).

30. Minimum rates and charges.—[Vols. 10-13, 15-19].—Proposed initial rates on salt and products, in bulk and packages, ranging from 54 to 67 cents, minimum 42,000 pounds, from Saltair, Utah, to points in Colorado, Nebraska, and Wyoming are not shown to be unlawful; respondent's cost study of a representative movement, though defective in certain respects, indicates that the truck-mile revenue from the 54-cent rate would cover the total cost of moving the traffic.—Salt from Saltair, Utah, to Colorado, Nebraska & Wyoming, 316 I.C.C. 213 (215, 216).

Section 218. (c) [§*318(c) U.S.C.*] New or reduced charges; hearings and orders of commission; suspension.[Unchanged. See vol. 11, p. 9568.]

Amendments, see footnotes, vol. 10, p. 8236, vol. 11, pp. 9568-9569.

Notes of Decisions

Volume 11—p. 9569; Volume 12—p. 10471; Volume 13—p. 11116; Volume 15—p. 12249; Volume 16—p. 12917; Volume 17—p. 13624; Volume 18—p. 14638; Volume 19—p. 15905.

5. Burden of proof.—[Vols. 12, 13, 16-19].—Contract carriers have no statutory burden under §218 to prove lawfulness of increased rates.—Cement from Hudson, N.Y., to New England and Pa., 319 I.C.C. 235 (238).

6. Initial rates.—[Vols. 18, 19].—Proposed initial distance and point-to-point rates are not shown to be compensatory; protestant's cost data based on public statement No. 4-58 of commission's cost-finding section are more accurate than general averages, without underlying data, supplied by respondent, and show out-of-pocket costs exceeding proposed distance rates by 4 to 33 cents; and respondent's showing of out-of-pocket costs in another proceeding exceeds truck-mile earnings from any of proposed rates. Proposed point-to-point rates are lower than corresponding rates of rail and motor common carriers and are not necessary to meet competition of carrier named; proposed rates would constitute a destructive competitive practice; not approved.—Steel and Metals from or to Points in Conn. and Pa., 315 I.C.C. 308 (309-10).

Proposed rates being initial rates, respondent does not have the burden of proof. As respondent is a small carrier and specializes in handling of two particular groups of commodities, costs indicated by protestant's cost study based on expenses of nine general-commodity common carriers are not necessarily representative of respondent's expenses; protestant's study is unacceptable as indicating costs on considered traffic; proposed rates not shown to be unlawful.—Salt from Saltair, Utah, to Colorado, Nebraska & Wyoming, 316 I.C.C. 213 (214, 216).

Burden of showing unlawfulness of initial rates rests with protestants. Initial rates 350 to 550 cents per net ton on salt, in bulk and in bags, minimum 40,000 pounds, from Omaha to 70 points in Iowa and 6 in Nebraska, and 225 to 900 cents on soybean meal, in bulk and in sacks, from Des Moines, Fort Dodge, and Sioux City, Iowa, to 34 points in Nebraska, though in general considerably lower than corresponding rail rates, are not shown to be unlawful. Cost data submitted by protestants reflect average costs of midwestern contract carriers, not actual costs of respondent's movements; truck-mile earnings fall short of such average truck-mile expense only when computed on round-trip distances with 100-percent empty return, but there is no basis for such assumption when the rates on salt apply in one direction and those on soybean meal in opposite direction. Approved.—Soybean Meal & Salt, Iowa, Nebr., & S. Dak., 318 I.C.C. 94.

Since respondent presently maintains only point-to-point rates on iron and steel articles over irregular routes in considered territory, proposed minimum mileage rates, applicable only in absence of specific point-to-point rates, are initial rates. Proposed scale on 33,000-pound minimum, ranging from 43.5 cents for 141 to 160 miles to 80.5 cents for 476 to 500 miles, patterned after rates maintained by competing iron and steel haulers, is not shown to be unreasonable or otherwise unlawful.—Iron or Steel Articles between Mass. & Middle Atl. States, 322 I.C.C. 133 (134-5, 137)*.

Respondent has satisfied the first test of compensativeness of the proposed rates for service provided with owner-operators when revenues received from actual shipments averaging slightly over 36,000 pounds exceeded corresponding expenses by about 20 percent, and obviously would still exceed respondent's total expenses if computed on the lower minimum proposed. And though existence of representative owner-operator costs is uncertain, since the commission cannot require such

operators to keep uniform accounts, and such costs are but rough approximations, respondent satifies the second test set out in 318 ICC 567 when it has shown that it is able to acquire and retain the services of owner-operators at the agreed division of revenue.—Id., pp. 136-7.

10. Evidence.—[Vols. 11, 12, 15-19].—Proposed rule designating charges and regulations for transportation of pallets or skids used in connection with shipment of corrugated containers is not justified by mere statement that movement under the rule would be so infinitesimal as to have no serious effect on protestant's rates and could result in loss of business to no other carrier. Respondent presented no evidence of distances, earnings, probable expenses, or traffic volume, and did not show rates to be applied on the traffic; it is not clear whether outbound movement of pallets or skids must be related to the inbound movement, nor is there any evidence that proposed movement is within scope of respondent's operating authority; not approved. —Pallets, Points in Ill., Ind., Ky., Mich., and Ohio, 315 I.C.C. 26 (27).

As respondent's cement operations from Lehigh Valley had existed less than a year at time of hearing, in lieu of a cost study it compared them with its affiliate's movements from Hudson Valley area to same destinations, which comparison indicates that costs from both areas are about the same. However, as the affiliate referred to its 1960 annual report in preparing its 5-week study for that year that report may be used to test respondent's rate scale and costs. Restated costs show that respondent's increased rates on cement in bags from Northampton and Nazareth, Pa., to Connecticut and Middle Atlantic States cover total costs by a slight margin, and that its lowest rates on bulk cement also approximate such costs for distances up to about 125 miles. As that distance generally exceeds the average cement haul in that territory, respondent's rates 31 to 355 cents per barrel as a whole cover its full costs and are compensatory. Cement from Hudson, N.Y., to New England and Pa., 319 I.C.C. 235 (244); and comparison with those rates warrants finding that increased cement rates 34 to 204 cents of another contract carrier from Glens Falls, N.Y., to New England and Pennsylvania are likewise compensatory.—Id., p. 249.

Section 219. [§*319 U.S.C.*] Application of section 20 (11) and (12) of this title to common carriers by motor vehicle.—[Unchanged. See vol. 11, p. 9570, vol. 12, p. 10472,]

Amendments, see footnotes, vol. 11, p. 9570.

Notes of Decisions

Volume 10—p. 8237; Volume 11—p. 9570; Volume 13—p. 11117; Volume 14—p. 11640; Volume 15—p. 12250; Volume 16—p. 12917; Volume 17—p. 13624; Volume 18—p. 14640; Volume 19—p. 15907.

15. Bill of lading act; bills, nature and function.—[Vols. 10, 14, 16-19].—Part I, §20(11), notes.—Issuance of one bill of lading covering both interstate and intrastate traffic cannot broaden the commission's jurisdiction: the bill of lading is a receipt for the merchandise and a contract to transport and deliver it; in case of an interstate shipment the contract between shipper and carrier is made up of the bill of lading and the tariffs and other rules and regulations governing interstate commerce, which are to be read into, and become a part of, any contract of shipment authorized by and within scope of the Interstate Commerce Act; but to extent that the bill of lading is a contract for carriage of intrastate commerce it is governed by the laws of the particular State having jurisdiction, and a volume of mixed intrastate and interstate commerce tendered to a motor carrier on one bill of lading does not become wholly interstate in character merely because the intrastate portion is

unloaded under a stop-in-transit rule; the State has exclusive jurisdiction over such intrastate transportation.—Central States Motor Freight Bureau, Inc., Petition, 319 I.C.C. 745 (749, 751)*.

Bills of lading are important instrumentalities of interstate commerce, and freight bills should be similarly regarded; supplying and preparation of such documents are an essential part of the transportation contract, and provision and preparation thereof by shipper constitute the giving of value to the carrier for which shipper may be recompensed either by appropriate reduction in rates, i.e., by provision of a lesser service at a lower charge, or, as proposed, by granting of a just and reasonable allowance. That the initial carrier is responsible for issuing shipping documents does not render the proposal unlawful, since carrier would still bear the ultimate responsibility for so doing.—Combined Bill of Lading-Freight Bill Allowance, 323 I.C.C. 168 (171).

That proposal for provision and preparation by shipper of a 9-part set of documents including a short form bill of lading, a delivery receipt, a consignee memorandum, an original freight bill, and a shipping order increases the minimum number of documents required by the commission's regulations and classification rule 10 does not change their character or significance: they remain instrumentalities of commerce. The obvious advantages accruing to both carriers and shippers from the proposal must be recognized, and, though it may create some problems not presently foreseeable, such possibility does not warrant its condemnation, especially as no problems are shown to have resulted from similar provisions already in effect in middle Atlantic territory.—Id., pp. 169, 171, 173.

See also Thomas Electronics, Inc. v. H. W. Taynton Co., n. 33, below; North American Van Lines, Inc. v. Heller, n. 115, below; and Silver Line, Inc., Investigation and Revocation, case, §204(c), n. 251.

30. Limitation of liability.—[Vols. 10, 11, 13, 14, 16-18].—Inasmuch as §20(11), which specifically applies to motor common carriers, prevents a carrier from limiting its liability except by maintaining rates dependent upon value declared by shipper in writing or agreed on in writing as the released value, paragraph 5 on the back of motor Bill of Lading (which states that carrier excludes liability for goods of extraordinary value) is merely an attempt to limit liability of the carrier in a manner that is prohibited by statute. Thus, unless the carrier either rejects the shipment or completely complies with the statutory requirements, it remains fully liable for the goods carried, regardless of their value.—Thomas Electronics, Inc. v. H. W. Taynton Co., 277 F. Supp. 639 (642-3).

In action for loss of or damage to motor carrier shipment of household goods, resulting from carrier's vehicle catching fire while enroute, carrier was liable for full amount of declared valuation of the entire shipment as shown in the bill of lading. Although the bill of lading contained a formula for determining amount of carrier's liability as to each article in the shipment which limited maximum liability on each article to a proportion of declared value of entire shipment, recovery as to each article whose actual damage was less than the formula maximum liability should not be limited to the actual damage. Shipper declared the value of entire shipment to be $20,000, total value of the articles therein exceeded that amount, all the articles were either destroyed or damaged by the fire, and total amount of damage to all articles exceeded the declared value of the shipment.—Zimmerman v. Allied Van Lines, Inc., 317 F. 2d 72 (73-5).

32. Released rates and ratings, generally.—[Vols. 14, 16-19].—Part I, §20(11), n. 67.Although §20(11), made applicable to motor carriers by §219, provides that carriers shall be liable for full actual loss or damage to property delivered to them, it also provides for limitation of that liability, subject to the commission's authorization, by agreement on a "released" value declared by shipper, to which his recovery for loss or damage is limited. Released-value rates are therefore lower than unreleased rates, and shipper becomes in effect a co-insurer of the shipment.—Strickland Transp. Co. v. United States, 334 F. 2d 172 (175).

In decisions holding that from a transportation standpoint released and unreleased ratings on the same commodity should be considered separate and distinct items, and that

an exceptions rating on shipments made without declaration of released value supersedes only the unreleased classification ratings on the commodity, the commission's action reflects two things, each resting on its administrative judgment in development of a sound transportation policy: first, that a specific commodity shipped with a released valuation is for transportation purposes distinctly different from the same commodity shipped without limitation on value; and second, flowing directly therefrom, that to supersede all classification ratings on the commodity the language of the exception must clearly indicate that it is intended to supersede both the released and the unreleased items. In holding that exceptions ratings on aircraft engines shipped at full, unreleased value did not supersede lower released-value ratings in national motor classification, and that latter provided the applicable charges on considered Government shipments, the trial court applied the correct construction to the tariffs.—Id., pp. 178-9.

Purpose of requirement of the national classification that shipper seeking benefit of released rates shall specify the agreed or declared value of the property on the bill of lading is to inform carrier that the shipment is moving at a lowered valuation; this is important from an operational standpoint and reasonable from standpoint of claims handling. While the Government made no such express declaration respecting considered shipments, there was substantial if not literal compliance with that requirement, since the standard uniform Government bill of lading declares the universal purpose to get the most transportation at the cheapest rate; in absence of affirmative declaration to the contrary, the Government intends thereby to ship at the lowest possible rate, and if that can be accomplished only by a limitation of value, it is the purpose of the Government to declare that released value.—Id., p. 179.

In shipper's action to recover claimed fair market value of household goods destroyed by fire while in transit in motor carrier's van, wherein carrier asserted shipper was limited to recovery of "released value of the property" in accordance with bill of lading and order for services signed by shipper, questions of (1) whether carrier failed to post its tariff for public inspection as required by statute, and (2) whether shipper had not been informed that he could have his goods transported at a higher valuation for an increase in cost, were jury questions.—Chandler v. Aero Mayflower Transit Co., 374 F. 2d 129 (134).

While carrier's statutory liability for loss and damage to property delivered to it may be limited by an agreement upon "released value" of a shipment, such limitation of liability can be effected only in compliance with a commission order authorizing special rates upon shipper's written declaration of value or a released value in writing. There being no challenge to authorization of released rates in issue, the question presented is whether "released value" on plaintiff's shipment was "agreed upon in writing" by shipper as those words are used in the statute. Congress no doubt intended that shipper should agree in the same sense that one agrees or assents to enter into a contractual obligation; thus assent is effective only if given after a fair opportunity to choose between higher or lower liability by paying a correspondingly greater or lesser charge. Contract law should be applied in deciding whether shipper is precluded from attacking validity of agreements shown by bill of lading and order for services signed by him; and questions of fact should be presented to the jury. Remanded to district court for new trial.—Id., pp. 134-7.

Before released rates may be approved, applicants for such relief must show that susceptibility of the traffic to loss or damage is comparatively high, that the wide range in value of the commodity makes amount of any claim difficult to estimate, and that adequate insurance covering is difficult to obtain or unreasonably high in cost. Applicants proposing general rules limiting liability of all class-rate traffic (except ordinary livestock and articles already subject to released rates) to amounts not exceeding maxima specified therein have not sustained that burden either as to the affected traffic as a whole or, individually or by representative evidence, as to any particular commodity or group of commodities to which the rules would apply. Proposed rules are not shown to be just and reasonable and would add considerably to shipper costs,

cause much confusion in compliance, and disrupt established business practices throughout the country; application denied.—Released Rate Rules—National M. Freight Classification, 316 I.C.C. 499 (510, 512-4)*.

The use of released-value rates permits the shipper to have his choice of two rates, the regular rate, holding the carrier to its stated liability in accordance with the terms and conditions of the bill of lading or the lower released value rate with its corresponding reduction of carrier liability; the bills of lading contain a printed notation in accordance with tariff provisions permitting the shipper to specify the declared value of its shipments as condition precedent to the use of the lower released rates; the shipper is charged with such knowledge by virtue of the tariff publication, and carrier's obligation of public notice is fulfilled by publication of such tariff.—Winthrop Laboratories, Div., Sterling Drug v. Dorn's, 325 I.C.C. 654 (656-7).

Liability of Carriers

33. Liability, generally.—[Vols. 17-19].—In its counterclaim for damages to shipment of frozen meat allegedly resulting from carrier's negligence in failing to provide adequate refrigeration, which was asserted in carrier's action to collect freight charges, consignor failed to prove that cause of rejection of the shipment was not present when the frozen meat was delivered to carrier in sealed cartons. Shipper did not meet its burden of proving that the goods were delivered to carrier in good condition; judgment against carrier on the counterclaim reversed.—Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 313 F. 2d 864 (866-7). [Not arising hereunder.]

To establish carrier's liability for loss or damage to goods being transported, it is necessary only for claimant to show the carrier's receipt of the shipment in apparent good order and delivery or release thereof by carrier in damaged condition. This being shown, the prima facie case is established; burden is then on carrier to prove that shipment was not received in good order, that it was delivered by it in good condition, or that the damage was caused by an act of God, the public enemy, inherent nature of the goods, or fault of shipper, and that it was free from negligence.—L. E. Whitlock Truck Service, Inc. v. Regal Drilling Co., 333 F. 2d 488 (491).

Motor carrier was liable for damages to oil well drilling contractor's drilling rig which resulted from carrier's trucks accidentally overturning while moving the derrick (by the "two-truck" method) without disassembling it. Carrier specialized in and was experienced in hauling of oil well equipment; it is undisputed that, in transporting the equipment by "two-truck" method, likelihood of an accident is greater than it would have been had the rig been disassembled and transported in two trucks; and lower court found that, since shipper did not direct the "two-truck" movement as carrier alleged, the accident did not result from hazards created by shipper. And record adequately supports award of special damages, including shipper's loss of income from drilling operations as result of damage to the rig. Carrier knew the importance to shipper of delivery of its only rig on time; thus it knew the circumstances on which the special damages are based.—Id., pp. 491-2.

In carrier's suit to recover freight charges, which the United States defended by asserting setoff and counterclaim for damages to the camera shipped which exceeded plaintiff's charges, decision of the Supreme Court, 377 U.S. 134, that once the shipper establishes a prima facie case, the burden of proof shifts to carrier to show both its freedom from negligence and that the loss was due to one of the excepted causes relieving it from liability, is controlling. Thus, shipper having proved a prima facie case, and the carrier having shown that the damage was the result of shipper's defective packaging, the burden is not then on shipper to prove that, notwithstanding defective packaging, the damage was due to carrier's negligence in handling the shipment.—Super Service Motor Freight Co. v. United States, 350 F. 2d 541 (542-3).

A carrier is liable to lawful holder of the bill of lading for loss or damage to goods shipped occurring while shipment is in transit; and once shipper makes out a prima facie case by establishing delivery to the carrier in good condition and arrival at destination in damaged condition, the burden of disproving negligence is upon carrier. Evidence of record

establishes that plaintiff delivered large manufacturing machine to defendant motor carrier in good condition, that it was damaged while in transit, and that defendant failed to carry its burden of proving freedom from negligence.—Continental Can Co. v. Eazor Exp., Inc., 354 F. 2d 222 (223).

In action to recover damages for destruction by fire of household goods while being transported in interstate carrier's truck, local van and storage company held itself out as an interstate carrier in accepting the interstate shipment and issuing its bill of lading therefor (although it had no tariffs on file with the commission) when it did not disclose its agency relationship with defendant interstate carrier. From moment the cartons were loaded onto company's van they were in interstate commerce; and, while the bill of lading limited liability to 30 cents a pound, a carrier which holds itself out as an interstate carrier without having filed tariffs with the commission may not claim benefit of any contractual provisions limiting its liability to an agreed value.—Hamilton v. Dean Van Lines, Inc., 228 F. Supp. 671 (672-3).

Receiving carrier, having agreed to pick up the goods, open the cartons, repack, weigh, and value each item, cannot now claim that value thereof was not established at time of delivery to it; where defendants' wrongful conduct causes loss of the nature involved, they cannot be heard to complain that the damages were not precisely measured. Furthermore, that the storage company, acting as undisclosed agent of interstate carrier, contracted to obtain insurance in sum of $10,000 on the household goods is shown by credible testimony of two witnesses and by questionable conduct of both defendants in attempting to substitute the carrier's bill of lading (with a $1,000 limit of liability) after the goods were destroyed. Both defendants exercised bad faith throughout the entire transaction, and cannot therefore limit their liability to amount contained in carrier's tariff; any such agreement which limits a carrier's liability must be "fair, open, just and reasonable." [Citing 226 US 491.] Verdict for plaintiff against both defendants.—Id., p. 673.

Interstate common carrier has the burden of full liability for damages to goods received by it unless it shows full compliance with statutory requirements for limiting its liability; and §20(11), made specifically applicable to motor carriers, prevents a carrier from limiting its liability except by maintaining rates dependent on value declared by shipper in writing or agreed on in writing as the released value; thus, paragraph 5 on the back of motor Bill of Lading, which states that carrier excludes liability for goods of extraordinary value, is merely an attempt to limit liability in a manner that is prohibited by statute. Therefore, unless the carrier either rejects the shipment or completely complies with the statutory requirements, it remains fully liable for the goods carried, regardless of their value. And, since shipper has no legal duty to state value of its goods on a bill of lading, its failure to do so will not destroy the protection afforded it by §20(11).—Thomas Electronics, Inc. v. H. W. Taynton Co., 277 F. Supp. 639 (642).

In action to recover for damage to shipment of glass cathode ray tubes, plaintiff shipper established a prima facie case by showing delivery of shipment to defendant carrier in good condition, arrival in damaged condition, and the amount of the damage. Accordingly, since carrier failed to show its full compliance with requirements of the statute for limiting its liability; and did not show either that plaintiff was negligent, that it was free from negligence, or that the damage was due to one of the recognized excepted causes relieving it from liability, plaintiff is entitled to judgment in its favor in the amount of the damages shown.—Id., pp. 641-3.

See also Riss & Co. v. U.S., §20(11), n. 30; and Lux Art Van Service, Inc. v. Pollard, 28 USC §1331, n. 4.

34. Initial carrier.—[Vols. 18, 19].—Part I, §20(11), n. 31.—A warehouseman in the conventional sense does not become an initial carrier vis-a-vis the line-haul carrier he engages when he receives an order to ship goods previously delivered to him and formally undertakes a transportation duty that he cannot lawfully perform himself and must wholly delegate to an authorized carrier.—Flanzbaum v. M & M Transp. Co., 203 F. Supp. 365 (370*.

See also Riss & Co. v. U.S., §20(11), n. 31.

36. Delivering carrier.—See Riss & Co. v.

U.S., §20(11), n. 33.

115. Actions to enforce liability.—[Vols. 14-19].—Part I, §20(11), n. 115.—In action to recover charges for transporting Army officer's house trailer which moved under Government bill of lading, but which carrier could not deliver because of its total loss during transit due to an accident, plaintiff's contention that total measure of its liability is governed by §20(11), notwithstanding provisions of any bill of lading, contract, rule, or tariff, cannot be accepted. Common carrier's liability for value of cargo lost prior to delivery is distinct from shipper's liability for freight charges, latter being controlled by the contractual provisions set forth in the bill of lading. While the parties can, if they desire, provide in their bill of lading contract that full charges will be due despite loss of cargo in transit, standard-form Government bill of lading used in instant case expressly conditions payment of transportation charges on the consignee's receipt of shipment and signing of the Certificate of Delivery on the face of the bill. Summary judgment for defendant.—National Trailer Convoy, Inc. v. United States, 345 F. 2d 573 (574-5, 576).

In shipper's action against motor carrier for damage to large bottle manufacturing machine that fell, while in transit, from carrier's truck as it was ascending a steep hill, evidence supported finding that carrier did not prove its freedom from negligence and that indeed, the accident occurred either because the truck was traveling at an excessive speed after making a sharp turn simultaneously with starting up the hill, or because chain carrier used to secure the machine was defective, or because of a combination of the two. And, in the light of vouchers, ledgers, independent testimony, and the unusual character of the machine and extensive work necessary to repair the damage, amount of the award for damages was not unreasonable.—Continental Can Co. v. Eazor Exp., Inc., 354 F. 2d 222 (223-4).

Appellant motor carrier which had packed and shipped household goods at direction of appellee's wife and which, when informed that appellee (and not his wife) was owner of the goods, allowed shipment to continue moving to billed destination and held it in storage there, was guilty of conversion which gave rise to appellee's right to collect value of the goods at that time. Also, since carrier received notice of appellee's adverse claim after the interstate movement commenced and elected to ignore that claim, it did so at its own peril and is not entitled to storage charges. Presumption that person presenting property for transportation is "rightfully in possession" thereof and is authorized to contract for the transportation does not arise because carrier had knowledge of facts which, if pursued, would have led to actual knowledge that its customer had no authority to order the goods removed in the first instance. Trial court's judgment in favor of appellee, affirmed, as modified.—North American Van Lines, Inc. v. Heller, 371 F. 2d 629 (632-4)*.

Shipper is entitled to recover for any damage to its goods due to carrier's negligence or misconduct, either in an independent action or by way of counterclaim in carrier's action to recover freight charges, but existence of such damage claim, even though valid, is no defense to carrier's claim for transportation charges.—Akers Motor Lines, Inc. v. Lady Cornell Comb Co., 203 F. Supp. 156 (157).

Shipper's suit to recover for loss and damage to interstate shipments of machinery tendered to defendant carrier in good condition, moved under uniform bill of lading, and delivered in damaged condition, is governed by federal law; although, after inspection, carrier specifically authorized and directed plaintiff ro repair the machinery and bill defendant for its expenses, that agreement to provide compensation for damaged goods was routine, and is so closely connected to the bill-of-lading agreement as to constitute at most a clarification or modification thereof. In any event, plaintiff's damage claim can be predicated not on the agreement to repair but on the original damage; and the court, having jurisdiction over the main claim, has jurisdiction over any related claim. Therefore, plaintiff's motion to remand the case to the State court where it was initiated is denied.—Sylgab Steel & Wire Corp. v. Strickland Transp. Co., 270 F. Supp. 264 (266, 270-1).

Regulations of the Commission

29 FR 6324, May 14, 1964, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, §§176.3(c), 176.7 and 176.8, amended, §§176.9 and 176.10, revised, and §176.14 Claims for loss or damage, added, effective July 10, 1964.

29 FR 7390, June 6, 1964, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, §176.1 Definitions, revised, effective July 20, 1964.

29 FR 8481, July 7, 1964, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, effective date of order (29 FR 6324) postponed to Nov. 10, 1964.

29 FR 9711, July 18, 1964, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce§176.1 Definitions, effective date of order (29 FR 7390) postponed from July 20, 1964 to Oct. 1, 1964.

29 FR 9835, July 22, 1964, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, corrections of order (29 FR 6324) in §176.8(c) and §176.12(a) and (b).

29 FR 11921, Aug. 20, 1964, Part 187: Freight Rate Tariffs, Schedules, and Classifications, §187.201 Released rates on household goods, corrected to reflect provisions of Released Rates Order No. MC-2-B.

29 FR 14173, Oct. 15, 1964, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, effective date of order of May 6, 1964 (29 FR 7390) further postponed to Nov. 30, 1964.

29 FR 15289, Nov. 14, 1964, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, §§ 176.3(c), 176.7, 176.8, 176.10, and 176.12 amended, and §176.14 Claims for loss or damage, added, effective Feb. 1, 1965.

29 FR 16125, Dec. 3, 1964, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, effective date of order of May 6, 1964 (29 FR 7390) postponed to Dec. 30, 1964.

29 FR 19107, Dec. 30, 1964, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, effective date of order of May 6, 1964 (29 FR 7390) further postponed to Feb. 1, 1965.

30 FR 3597, Mar. 18, 1965, Part 176: Effective date of order of May 6, 1964 (29 FR 7390) postponed to April 2, 1965.

30 FR 6117, Apr. 30, 1965, Part 176: Effective date of order of May 6, 1964 (29 FR 7390) postponed until further order, effective on date of order.

30 FR 16203, Dec. 29, 1965, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, effective date of regulations prescribed by order of May 6, 1965 (29 FR 7390) having been indefinitely postponed, currently effective regulations are published.

31 FR 8915, June 28, 1966, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, §176.1 Definitions, revised, effective August 1, 1966.

31 FR 8916, June 28, 1966, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, §§176.3(c), 176.7, 176.8 revised; §176.9 (b) and (c) revoked and §176.9 (d) renumbered as paragraph (b); §176.10 (a) and (c) revised, §176.10(d) is renumbered as §176.10(f) and new rules numbered §176.10(d), (e), and (g) are added; §176.12 is amended, and a new rule numbered §176.14 is added, effective Sept. 30, 1966, and will apply only on household goods removed from shipper's premises on and after effective date.

31 FR 10193, July 28, 1966, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, effective date of regulations prescribed by order of June 7, 1966 (31 FR 8916) postponed effective date to Jan. 1, 1967.

31 FR 13446, Oct. 18, 1966, Part 7: List of Forms, Part II, I C Act, Form BOC 101, prescribed as required by §176.10(e), §7.101 BOC 101, Form BOC 101 to report to the Commission all instances in which actual charges exceed written estimates by 10 percent or more, pursuant to §176.10(e), effective Jan. 1, 1967.

31 FR 14879, Nov. 24, 1966, Part 176: Transportation of Household Goods in Interstate or Foreign Commerce, §176.10(f), amended, Estimates of Charges, Reweighting, effective on date of order.

Section 220. [*§320(a) U.S.C.*] Accounts, records and reports.—(a) Reports to commission; copies of contracts; publication of information.—[Unchanged. See vol. 11, p. 9571, vol. 15, p. 12250.]

Amendments, see footnotes, vol. 11, p. 9571, vol. 15, p. 12250; historical notes, vol. 12, p. 10330, vol. 13, p. 11032, vol. 14, p. 11543; vol. 19, p. 15909.

Historical Notes

The Commission recommends that §§220 and 412 be amended to permit the Commission or its duly authorized agents to inspect the books, records, and other documents kept or maintained by agricultural cooperatives and shipper associations.—Annual Report, 1962, p. 201, renewed, Annual Report, 1963, p. 19; Annual Report, 1964, p. 76.

It is recommended that §220(f) be amended so as to prohibit the introduction in evidence in any damage suit of a report submitted to the Commission by its accident investigators, expert opinion testimony by such investigators in damage suits, and to restrict factual testimony by such investigators to cases where factual evidence is not reasonably available from other sources.—Annual Report, 1963, p. 15, Annual Report, 1964, p. 71-2.

Notes of Decisions

Vol. 12—p. 10472; Vol. 14—p. 11641; Vol. 15—p. 12251; Vol. 16—p. 12919; Vol. 17—p. 13626; Vol. 18—p. 14644.

5. In general.—[Vols. 12, 14-18].—The commission has power under §§204(a)(7) and 220(a) to require passenger carriers to report interference with complaince with regulations prohibiting race segregation.—Discrimination—Interstate M. Carriers of passengers, 86 M.C.C. 743 (752)*.

See also Exley Express, Inc. v. United States, §209(a)(1), n. 24.

While there is no statutory support for withholding carriers' individual commodity statistics reports from public inspection, since such reports fall within purview of the public records requirements of §§16(13), 204(d), and 316(d), exercise of the commission's responsibility thereunder must be reconciled with the various provisions of the act prohibiting unauthorized disclosure of shipper information to competitors, particularly §15(11), 222(e), and 317(f). Removal of all commodity statistics reports of individual carriers from public inspection is not a satisfactory solution to the disclosure problem, for even if there were some legal basis for such a complete withdrawal, it would be a retrogressive step, removing a valuable source of freight traffic information for use of carriers and the public. Also, the salutary effect on the reporting carriers of having their reports made available to the public would be lost.—Commodity Statistics Reporting—Extent and Disclosure, 323 I.C.C. 131 (134-5)*.

Additionally, there is no justification for withholding motor carriers' individual statistical reports while similar reports of other modes are made available to the public. Motor carriers with limited operations, serving limited territories, are not required to report commodity statistics unless they have attained class I status, and even class I carriers engaged predominantly in certain specialized services or in transporting certain specific commodities are relieved by regulation from freight commodity statistics reporting. Moreover, the same argument advanced to support exempting small motor carriers may apply also to some class I railroads whose operations are more limited in scope than those of many large motor carriers. In absence of any evidence substantiating a need to differentiate between modes in resolving the disclosure issue, and in interest of fair and impartial regulation as required by the national transportation policy, the issue should not be resolved on a mode basis.—Id., p. 135.

Criteria for implementing an effective solution of the problem include the reporting of meaningful and useful commodity statistics for commission, carrier, and public use, likelihood of inadvertent disclosure, and minimizing of the cost and paperwork burden on carriers and commission alike. The solution most likely to meet those criteria is to allow, in addition to the regular reporting, the separate reporting of commodity classes involving less than three shippers in a supplemental report which will be withheld from public inspection, whereas the carrier's regular commodity statistics report, which may exclude the less-than-three-shippers categories, will be made available to the public. Data from the two report forms may be combined by the commission for published statistics purposes, but access to supplemental reports will be made subject to commission approval. As carrier will be given option of obtaining shipper permission to include less-than-three-shippers' shipments in his regular report form, such reporting requirements should not prove unduly burdensome.—Id., pp. 136, 137.

Since it is clear that commodity statistics reports of individual motor carriers are "reports" as used in §204(d) and therefore, under terms thereof, should be available for public inspection, the provision of 49 CFR §206.7 that "the individual reports filed pursuant to this part will not be open to public inspection" is deleted. Plan outlined will avoid the apparent conflict between §§204(d) and 222(e); however, should there be some question as to the propriety of the data shown on either the regular or the supplemental report form, the commission may require justification from the reporting carrier, and certification of the three-shippers count will be required to assure accurate and proper reporting.—Id., p. 138.

10. Accident register.—Although accident register required to be kept by all for-hire or private carriers operating in interstate commerce is not required to be filed with commission, it is a "report" required by the commission and must be made available for inspec-

tion by it. However, §220(f) provides ample protection against such registers being subject to subpena or used in civil suits arising out of motor carrier accidents.—Qualifications of Employees and Safety of Operation, 91 M.C.C. 141 (147-8)*.

Regulations of the Commission

27 FR 12754, Dec. 27, 1962, Part 205: §205.3a, Class I Motor Carriers of Passengers required to file Annual Report Form D, amended.

28 FR 453, Jan. 17, 1963, Part 205: Reports of Motor Carriers, §205.1 Annual reports of Class I carriers of property, Annual Report Form A (Property), prescribed, effective on date of order.

28 FR 551, Jan. 22, 1963, Part 205: Reports of Motor Carriers, §205.1a, Annual reports of Class II carriers of property, Annual Report Form B (Property), prescribed, effective on date of order.

28 FR 10711, Oct. 4, 1963, Part 206: Freight Commodity Statistics, §206.1 Freight commodity statistics, amended, and §206.8 Standard commodity code, deleted, as to traffic for year beginning Jan. 1, 1964.

28 FR 13747, Dec. 17, 1963, Part 205: Reports of Motor Carriers, amended by adding thereto §205.14 Piggyback traffic statistics—motor. Effective with reports for first quarter of 1964.

29 FR 2559, Feb. 19, 1964, Part 205: Reports of Motor Carriers, §205.4 Annual reports of carriers of passengers other than Class I carriers, Annual Report Form E (passenger) prescribed for use commencing with year ended Dec. 31, 1963.

29 FR 2947, Mar. 4, 1964, Part 205: Reports of Motor Carriers, §205.3 Annual Reports of Class III carriers of property, Annual Report Form C (property), prescribed.

29 FR 12077, Aug. 25, 1964, Part 206: Freight Commodity Statistics, §206.7 Public disclosure—motor carrier reports, amended to read as set forth, effective on date of order.

30 FR 485, Jan. 14, 1965, Part 206: Freight Commodity Statistics, §206.7 modified and amended, effective on date of order.

31 FR 3077, Feb. 24, 1966, Part 205: §205.3a, class I Motor Carriers of Passengers required to file Annual Report Form D, revised to read as set forth, commencing with year ended Dec. 31, 1965.

31 FR 3497, March 8, 1966, Part 205: Reports of Motor Carriers, §205.1 Annual reports of Class I carriers of property, Annual Report, form A (Property), prescribed for use, commencing with reports for the year ended Dec. 31, 1965.

31 FR 4348, Mar. 12, 1966, Part 205: Reports of Motor Carriers, §205.3 Annual reports of class III carriers of property, revised Annual Report Form C (Property), prescribed for use commencing with year ended Dec. 31, 1965.

31 FR 4349, Mar. 12, 1966, Part 205: Reports of Motor Carriers, §205.4 Annual reports of carriers of passengers other than Class I carriers, revised Annual Report Form E (Passenger), prescribed for use commencing with year ended Dec. 31, 1965.

31 FR 9741, July 19, 1966, Part 205: Reports of Motor Carriers, §205.5 Class I Motor Carriers, added, effective on date of order.

NOTE: For Republication and Redesignations of Regulations, see 32 FR 20003, Dec. 20, 1967.

33 FR 538, Jan. 16, 1968, Part 1249 [former Part 305 formerly Part 205]: Reports of Motor Carriers; §1249.2 Annual reports of class II carriers of property, §1249.4 Annual reports of class III carriers of property, and §1249.14 Quarterly reports of class II carriers of property amended, effective Jan. 1, 1968.

33 FR 748, Jan. 20, 1968, Part 1249: Reports of Motor Carriers; §1249.11 Quarterly reports of passenger revenues, expenses, and statistics, §1249.12 Quarterly reports of property revenues, expenses, and statistics, §1249.14 Quarterly reports of Class II carriers of property, effective Dec. 31, 1967.

Section 220. (b) [*§320(b) U.S.C.*] Period covered by report; time of filing; oath.—[Unchanged. See vol. 11, p. 9572.]

Historical Note

The commission recommends, in view of the prohibitions in 18 USC §1001, that §220(b) be amended so as to eliminate the mandatory oath provision therein, and that such requirement be made discretionary with the commission.—Annual Report, 1964, p. 72.

Section 220. (c) [*§320(c) U.S.C.*] Depreciation charges.—[Unchanged. See vol. 11, p. 9572.]

Amendment, see footnote, p. 9572.

Notes of Decisions

Volume 15—p. 12251; Volume 19—p. 15910.

Section 220. (d) [§320(d) U.S.C.] Accounts, records, etc., form; period of preservation; access to by commission or agents.—[Unchanged. See vol. 11, p. 9573, vol. 15, p. 12251.]

Amendments, see footnotes, vol. 11, p. 9573, vol. 15, p. 12251.

Notes of Decisions

Volume 11—p. 9574; Volume 13—p. 11118; Volume 17—p. 13627; Volume 19—p. 15911.

1. Constitutionality.—[Vols. 11, 19].—Records which Congress requires a federally regulated business corporation to keep, and to make available for official inspection in order to provide for effective administration and enforcement, assume the characteristic of quasi-public documents; disclosure of such records may be compelled without violating the Fourth Amendment. Federally regulated motor carriers are subject to the highest degree of accountability to the public, the public being represented by the commission; that accountability naturally allows a motor carrier less protection and privacy than the ordinary citizen enjoys in his private business.—Cooper's Exp., Inc. v. I.C.C., 330 F. 2d 338 (340-1).

30. Accounts, records, etc., inspection; access to.—[Vol. 19].—The statute grants the commission broad power of inspection commensurate with its broad power of regulation of interstate motor carriers; it could not properly perform its duties if the regulated carrier had the right to say just how far examination of carrier records by commission representatives could go. However, the commission itself is limited by the standard of reasonableness; the inspection must be related to the commission's function as regulator of the carrier.—Cooper's Exp., Inc. v. I.C.C., 330 F. 2d 338 (341).

Records demanded of appellant carrier by representatives of the commission were those the commission was authorized to require motor carriers to keep and preserve, regulations requiring keeping thereof were published in the Code of Federal Regulations, and it is not contended that any other matter was requested. Under the circumstances, the commission's proper and reasonable demand to inspect carrier's premises and equipment and to examine and copy those records and documents should not have been refused. Preliminary injunction ordering carrier to submit its records and documents for inspection and copying, and to submit its lands, buildings, and equipment for examination, was properly granted.—Id., pp. 340, 341.

See also Financial Statements Released by Carriers, §20(3), n. 16, 31; §220(a), n. 10.

Uniform Accounting Regulations

50. Investment accounts.—[Vol. 13].—Funds provided through charges to depreciation may properly be used to retire equipment obligations.—Johnson Freight Lines Co., Inc. —Merger, 87 M.C.C. 747 (750, note)*; but use of such funds to repay, in part, a loan to be made for acquisition of intangible property to which a substantial sum has been allocated, and by which those funds would be so depleted as to be insufficient for the purpose for which they should properly be used, should not be approved.—Oregon-Nevada-California Fast Freight—Purchase—Coast-Lee, 90 M.C.C. 5 (9)*.

Proposed merger is a pooling of equity interests of stockholders within §182.01-20 of Uniform System of Accounts, in that all of equity interests in liquidating carrier will continue as such in survivor, and stockholders of neither will obtain 90 percent or more of the voting interest in the combined enterprise; therefore, liquidating carrier's tangible property may not properly be recorded at appraised value, and the appraised value may not be allowed in computing assets properly capitalizable.—Johnson Freight Lines Co., Inc.—Merger, 87 M.C.C. 747 (749)*.

In accounting for liquidation of a predecessor company, the tangible property acquired

was required to be recorded at net book values instead of at appraised values, because at time of consummation of that transaction the accounting regulations did not permit such a writeup; and though subsequent order permitted recording of appraised values on books of the acquiring company in such transactions, no evidence has now been submitted which might warrant an adjustment of depreciation accruals on that property (so as to increase equity of survivor's stockholders and decrease overcapitalization resulting from proposed merger) because of erroneous estimates of service life of such property, as permitted by the accounting rules under some circumstances.—Id., p. 749.

Amended §181.02-20 of Uniform System of Accounts permits writeup of tangible property acquired in a §5 transaction from book value to appraised value, provided appraisals are by independent, qualified appraisers, using proper standards upon adequate evidence, and value entered in survivor's books does not exceed consideration to be paid for such tangibles; but where price for all stock of acquired carrier is a single sum, the tangible properties may not be written up by appraisals to a point where acquired carrier's net worth exceeds the purchase price. A liquidating carrier's net worth as of assumed merger date was $2,066,175, at proposed price of $2,400,000 for its stock the maximum increase for appraisals would be $333,825; however, appraisals indicating a larger value for tangible properties acquired will be given consideration in passing on merger terms.—Continental Tenn. Lines, Inc.—Control—Tennessee Coach, 87 M.C.C. 775 (781).

Though shortened tax-depreciation guideline lives authorized by Internal Revenue Service will result in much larger tax-depreciation deductions in early years of service lives of facilities than book depreciation computed under commission accounting rules, neither that nor investment tax credit permitted by Revenue Act of 1962 warrants changes in present accounting rules or the commission's statement of policy dated February 9, 1959, that actual Federal income taxes payable for each year, based on effective tax regulations for the year, shall be recorded in the tax accounts of carriers' books of account and in financial statements. But present requirement for disclosure in carriers' annual reports of tax reductions for accelerated depreciation will be extended to apply to those attributable to tax-depreciation guideline lives, as well as investment tax credit.—Accounting for Federal Income Taxes, 318 I.C.C. 803 (805, 807-8).

Regulations of the Commission

28 FR 1960, Feb. 28, 1963: Retention periods, records, motor carriers other than class I, 49 CFR 203.1, 203.4; brokers, 49 CFR 203.100; class I motor carriers, 49 CFR 203.307.

29 FR 3088, Mar. 5, 1964: Same retention periods references.

30 FR 3163, Mar. 6, 1965: Same retention periods references, except that Class II motor carriers of property comply with 49 CFR 203.301-203.307.

Regulations of the Commission

29 FR 15867, Nov. 26, 1964, Part 182: Uniform System of Accounts for Class I Common and Contract Motor Carriers of Property, miscellaneous amendments, effective Jan. 1, 1965.

29 FR 16087, Dec. 2, 1964, Part O: The Commission, §0.5 Credentials required by special agents, accountants, and examiners, paragraphs (c), (d), (e), (f), and (g) amended, effective on date of order.

29 FR 19107, Dec. 30, 1964, Part O: Order of Nov. 24, 1964 (29 FR 16087) corrected to substitute "accountants" for "accounts" wherever latter appears therein.

29 FR 19104, Dec. 30, 1964, Parts 182 and 184: Part 182 Uniform System of Accounts for Class I and Class II Common and Contract Motor Carriers of Property, title amended to read as set forth and §§182.8900 - 182.9005, inclusive, added. Part 184 Chart of Accounts for Class II Motor Carriers of Property, cancelled in entirety. Both effective Jan. 1, 1965.

30 FR 5420, Apr. 16, 1965, Part 182: Uniform System of Accounts for Class I and Class II Common and Contract Motor Carriers of Property, regulations in revised and consolidated form (Issue of 1965) republished.

30 FR 11103, Aug. 27, 1965, Part 182: Uniform System of Accounts for Class I and Class II Common and Contract Motor Carriers of Property, miscellaneous amendments for correction of regulations published at 30FR 5420.

31 FR 11181, Aug. 24, 1966, Part 203: Destruction of Records of Motor Carriers and Brokers, §§203.1, 203.8, and 203.20 revised, new §203.10 added, and §203.21 amended, effective sixty (60) days after publication in the Federal Register.

32 FR 3664, Mar. 2, 1967: Retention periods, records, Class I and II motor carriers, 49 CFR 203.8; Class III motor carriers, 49 CFR 203.20; Brokers, 49 CFR 203.20.

30 FR 14984, Dec. 3, 1965, Part 203: Destruction of Records of Motor Carriers and Brokers, §§203.1 through 203.30, regulations revised, effective on date of publication in Federal Register.

31 FR 4067, Mar. 8, 1966: Retention periods, records, class I and II motor Carriers, 49 CFR 203.8; Class iII motor carriers, 49 CFR 203.20; Brokers, 49 CFR 203.20.

31 FR 4302, Mar. 11, 1966, Part 203: Destruction of Records of Motor Carriers and Brokers, §203.8 prescribed periods of retention, inadvertent error in order published at 30 FR 14984 corrected by changing retention period for item 40(a) from 2 to 3 years.

NOTE: For recodification, see 49 CFR, Editorial Note, 32 FR 5606, April 5, 1967.

32FR 13326, Sept. 21, 1967, Part 282 [formerly Part 182]: Uniform System of Accounts for Class I and Class II Common and Contract Motor Carriers of Property, miscellaneous amendments pertaining to treatment of extraordinary and prior period items, effective Jan. 1, 1967.

32 FR 14601, Oct. 20, 1967, Part 281 [formerly Part 181]: Common and Contract Carriers of Passengers — Uniform System of Accounts; Class I Motor Carriers, miscellaneous amendments pertaining to extraordinary and prior period items, effective Jan. 1, 1967.

NOTE: For Republication and Redesignations of Regulations, see 32 FR 20003, Dec. 20, 1967.

33 FR 537, Jan. 16, 1968, Part 1207 [former Part 282 formerly Part 182]: Class I and Class II Common and Contract Motor Carriers of Property, Instruction 1. Classification of carriers, paragraph (a) amended, effective Jan. 1, 1968.

33 FR 537, Jan. 16, 1968, Part 1240: Classes of Carriers, §1240.5 [former §282.1] Classification of motor carriers of property, paragraph (a) amended, effective Jan. 1, 1968.

33 FR 4067, March 1, 1968: Record Retention Guide, XXIV Interstate Commerce Commission [Revised] 1.9 Motor carriers and brokers, 49 CFR Part 1226.

Section 220. (e), (f) [*§320 (e), (f) U.S.C.*]—[Unchanged. See vol. 15, p. 12252; vol. 11, p. 9575.]

Section 221. [*§321 (a) U.S.C.*] **Orders, notices and service of process.—(a) Persons upon whom notice or orders served; manner and time of service.**—[Unchanged. See vol. 10, p. 8241, vol. 11, p. 9475, vol. 15, p. 12252.]

Historical notes, vol. 12, p. 10473, vol. 14, note to § 16(5), p. 11533.

Notes of Decisions

Volume 10—p. 8241; Volume 17—p. 13628; Volume 19—p. 15912.

1. Construction.—[Vols. 10, 19].—Petition for declaratory order to effect that service date of report and recommended order is date on which that document is received physically by parties involved, denied.—M.D. Cressy Co., Inc., 91 M.C.C. 211 (212).

Section 221. (b) [*§321 (b) U.S.C.*] **Effective date and duration of orders of Commission.**—[Unchanged. See vol. 10, p. 8242, vol. 11, 9575.]

Amendment, see footnote, vol. 11, p. 9575.

Notes of Decision

Volume 11—p. 9575; Volume 16—p. 12920; Volume 17—p. 13628; Volume 19—p. 15912.

Section 221. (c) [*§321(c) U.S.C.*] **Designation of agent for service of process.**—[Unchanged. See vol. 17, p. 13628.]

Notes of Decisions

Volume 11—p. 9576; Volume 12—p. 10474; Volume 13—p. 11119; Volume 14—p. 11642; Volume 15—p. 12253; Volume 17—p. 13629; Volume 19—p. 15913.

Regulations of the Commission

30 FR 13061, Oct. 14, 1965, Part 174a: Designation of Process Agents by Motor Carriers and Brokers, Revision of §§ 174a.2, 174a.3, 174a.5, 174a.6, effective Jan. 1, 1966.

30 FR 13784, Oct. 29, 1965, Part 7: Forms for Designation of Agent for Service of Process by Motor Carriers and Brokers, §7.3, effective Jan. 1, 1966.

31 FR 12434, Sep. 20, 1966, Part 174a: Designation of Process Agents by Motor Carriers and Brokers, §174a.2 revised, effective Nov. 1, 1966.

Section 221. (d) [*§321 (d) U.S.C.*] "Motor carriers" as including brokers.—[Unchanged. See vol. 10, p. 8242.]

Section 222. [*§322 (a) U.S.C.*] Unlawful operation—(a) Violation of chapter or rules or orders; penalty when none otherwise provided.—[Unchanged. See vol. 10, p. 8243, vol. 18, p. 14647.]

Historical Note

Historical notes, see vol. 11, p. 9577, vol. 12, p. 10474, vol. 13, p. 11119, vol. 14, p. 11643, See Historical Note to Safety Appliance Acts, 45 USC § 6, infra.

Notes of Decisions

Volume 10—p. 8243; Volume 11—p. 9577; Volume 12—p. 10474; Volume 17—p. 13629; Volume 18—p. 14648; Volume 19—p. 15914.

2. Construction and interpretation.—The elements of "knowingly" and "willfully" as used in §222(a) do not connote conduct done with evil purpose or criminal intent; they connote conduct which is conscious and intentional, deliberate, and voluntary.—United States v. Wormsbacher, 240 F. Supp. 716 (719-20).

10. Violation, indictable Federal offense.—[Vol. 19].—Defendant, though ostensibly an employment service furnishing drivers to shippers, is shown beyond reasonable doubt to have conducted a for-hire operation as a common carrier of motor vehicles in interstate commerce without a certificate from the commission, in violation of §206(a)(1). That such unlawful operations were knowing and willful is proven by testimony and exhibits demonstrating that defendant, through its officers and employees, consciously, deliberately, intentionally, and voluntarily violated the provisions of Part II; it is knowledge of the facts, as opposed to knowledge of the law, that is essential. Defendant found guilty on all counts as charged.—United States v. Aides, Inc., 211 F. Supp. 122 (124, 125).

See also Atwood's Transport Lines case, §208(c), n. 15.

15. Violation of Act, orders or regulations.—Meaning and effect of the phrase "knowingly and willfully" depends on context in which it is used, and in context of §222(a) it must be taken to create a malum prohibitum offense, not one connoting existence of any evil motive or specific criminal intent. It is equally well settled that, while willfulness is a question of fact, direct proof thereof is not essential: it may be inferred from acts, conduct, and circumstances, or a combination thereof. Motor carrier operations must be conducted in good faith, without a shadow of subterfuge or attempted evasion of the letter or obligation of the law. A carrier or shipper is presumed to have a practical knowledge of the law commensurate with his duties, and if the wrong is malum prohibitum it should be known by him, for it is his duty ot know what the law prohibits; other-

wise no criminal statue of nature of §222(a) could be enforced.—United States v. Lowther Trucking Co., 229 F. Supp. 812 (816-7).

Defendant, which lacked authority to transport dehydrated alfalfa meal, violated the act and the commission's leasing regulations when it backhauled that commodity under purported trip-leases of vehicles with drivers to a shipper association. Considering all facts and circumstances, including defendant's 30 years' experience as an authorized carrier; its realization of the nonexempt nature of the commodity by virtue of its possession of the commission's Administrative Ruling No. 107; its awareness that §207.6(a) of the commission's leasing regulations prohibited its leasing of vehicles with drivers to private carriers or shippers; the obviously illegal and spurious nature of the leasing agreements; and its failure to take any steps to determine legality of the arrangements involved, the conclusion is inescapable that the violations found were committed knowingly and willfully. Defendant found guilty as charged.—Id. pp. 814-5, 817.

Arrangement whereby defendant shipper leased vehicles from owner thereof for movement of its shipments fails to meet the tests of private carriage prescribed in 368 US 370, when in actual practice lessor, not shipper, assumed most of the burdens of the transportation business so far as the movements described in the information are concerned; such arrangement therefore constituted a for-hire transportation business by motor vehicle in interstate commerce without appropriate authority from the commission. As there was no substantial change in that arrangement after the commission had advised shipper's president that its position with regard thereto should be given serious consideration to make sure it was consistent with the applicable statutes, the Government has proved beyond a reasonable doubt that shipper-lessee knowingly and willfully aided and abetted defendant lessor in such unauthorized for-hire transportation; defendant shipper found guilty as charged.—United States v. Wormsbacher, 240 F. Supp. 716 (719, 720).

Defendant who transports chickens from its hatchery to both intrastate and interstate destinations is required by law to abide by the commission's regulations pertaining to hours of service of drivers at all times, in order that the safety of operation of its trucks be protected during particular hours or days when drivers thereof, in course of their duties as employees of the hatchery, perform particular acts which affect safety of operation of such trucks. While none of considered drivers went out of the State without having eight or more hours of off-duty time before reporting for work, and those who remained on duty for more than 70 hours in a period of 8 consecutive days drove the trucks only a fraction of their on-duty time, such operation substantially affected motor vehicle safety within commission regulations prohibiting drivers to remain on duty more than 70 hours in any 8 consecutive days.—United States v. Dixie Grain Co., 246 F. Supp. 705 (709, 710-11).

The question to be decided is not whether a substantial part of an employee's duties affects the safety of operation but, rather, whether any of his duties have a substantial effect on motor vehicle safety. Accordingly, on the record as stipulated, duties of each of defendant's employees named in the information substantially affected motor vehicle safety and defendant permitted or required each of them, respectively, to operate motor vehicles in interstate commerce while remaining on duty more than 70 hours in a period of 8 consecutive days in violation of the commission's regulations governing hours of service of drivers. Evidence does not support defendant's contention that it did not willfully and knowingly violate those regulations; nor do charges in four counts amount to double jeopardy when, though two counts concern driving of each of two employees, they pertain to different 8-day periods for each of the drivers; fine imposed.—Id., pp 711-12.

In prosecution charging corporation with engaging in for-hire interstate motor transportation without having obtained operating authority (to which it pleaded guilty) defendant shipper was properly charged with knowingly and willfully aiding and abetting carrier in committing the offense; shipper's motion to dismiss charges against it on ground that, though it knowingly participated in transportation conducted in violation of §203(c), being a member of the protected class for whose

benefit the law was passed, it cannot be charged as an aider or abettor, is denied. A person not within class described in a penal statute may nevertheless be charged provided (1) he was present actually or constructively and aided or abetted another in commission of the crime; (2) or, being absent, he counseled or caused that person to commit the crime; (3) or aided him after he commited the offense. If the crime is a misdemeanor the aider or abettor in any one of those three cases may be a principal and should be charged as such; crime in question being a misdemeanor, defendant is properly charged as a principal with the offense of aiding and abetting in commission of the crime named in the statute. —United States v. J & J Truck Leasing, Inc., 258 F. Supp. 105 (107, 109-10).

In prosecution for knowingly and willfully engaging in the business of a for-hire motor carrier in insterstate commerce without appropriate authority, defendant (owner of a truck-tractor which he leased to shipper under a 1-year written lease providing for rental on basis of 30 cents per mile) could not be considered a "common carrier" within statute proscribing interstate common carrier operation without a certificate where, pursuant to the lease, owner relinquished direction and control of the vehicle to shipper-lessee. Although owner maintained his capital investment in the vehicle, bore the risk of its premature depreciation, and bore risks of increased costs of fuel, repairs and maintenance, and of the vehicle's nonuse, it was operated by employee of, and under control and direction of,the lessee-shipper. Record is not conclusive that defendant-owner, not shipper-lessee, assumed most of the burdens of the transportation business so far as movements described in the information are concerned; judgment of acquittal granted.—United States v. Sternweis, 278 F. Supp. 82 (83-5).

Engaging in the transportation of property in interstate commerce without having obtained a certificate as required by §206(a) is criminal conduct if knowingly and willfully committed. Evidence of record sustains district court's conclusion that appellant knowingly and willfully violated §206(a); judgment of conviction, and order denying a new trial, affirmed.—United States v. Rudolph, 361 F. 2d 832.

Defendant's conviction, in prosecution for knowingly and willfully engaging in contract-carrier operations without a permit in violation of §209(a) and §222(a), is reversed when the trial judge's charge to the jury failed to present a correct view of all the issues (explicated at length in 368 US 370) to be properly considered. Instructions to the jury concerned issues of whether defendant leased motor vehicles to a shipper (for use by shipper to distribute its products) and itself employed drivers of those vehicles, but failed to submit the question of whether defendant-lessor or shipper-lessee bore all or substantially all of the characteristic burdens related to the transportation venture. Several factors, in addition to degree of shipper's control of the transportation, the jury instructions included all relevant factors explained in the cited case, it might have concluded that shipper had not shifted the characteristic transportation burdens to defendant and the latter was not providing contract-carrier services within the meaning of the act.—United States v. Casale Car Leasing, Inc., 385 F. 2d 707 (710-12).

Defendant was entitled, at the very least, to the safeguards spelled out in 368 US 370—a civil case—And certainly not less, since the government chose (perhaps unwisely) to institute the criminal prosecution. Also, in choosing to invoke the awesome power of the criminal law, the government cannot deprive a defendant of the benefit of an accurate statement of the law merely because such statement would make the jury's task less convenient or manageable.—Id., 712.

In prosecution of private motor carrier for allegedly "knowingly and willfully" failing to require its drivers to keep and submit drivers' logs in violation of §222(a), the Government is not required to prove actual criminal intent or deliberate refusal to comply with applicable regulations. Since the offense is a misdemanor and malum prohibitum, proof of specific criminal intent is not required. Uncontroverted evidence shows that defendant's officers knew the logging regulations; and fact that

those officers continued to employ drivers who failed to keep logs, knowing that to do so violated the regulations, supports an inference that defendant's conduct was willful as well. Trial court's judgment of conviction, affirmed.—United States v. John Hendricks, Inc., 388 F. 2d 677 (679).

See also Calore Exp. Co. v. United States, §222(c), n. 5.

60. Parties.—See United States v. Essenfeld, §222(c), n. 15.

Section 222. (b) [*§322(b) U.S.C.*] **Jurisdiction of district courts to restrain violations and enforce orders.**—(1) If any motor carrier or broker operates in violation of any provision of this part (except as to the reasonableness of rates, fares, or charges and the discriminatory character thereof, or any lawful rule, regulation, requirement, or order promulgated by the Commission, or of any term or condition of any certificate or permit, the Commission or its duly authorized agent may apply for the enforcement thereof to the district court of the United States for any district where such motor carrier or broker operates. In any proceeding instituted under the provisions of this subsection, any person, or persons, acting in concert or participating with such carrier or broker in the Commission of such violation may, without regard to his or their residence, be included, in addition to the motor carrier or broker, as a party, or parties to the proceeding. The court shall have jurisdiction to enforce obedience to any such provision of this part, or of such rule, regulation, requirement, order, term, or condition by a writ of injunction or by other process, mandatory or otherwise, restraining such carrier or broker, his or its officers, agents, employees, and representatives, and such other person, or persons, acting in concert or participating with such carrier or broker, from further violation of such provision of this part, or of such rule, regulation, requirement, order, term, or condition and enjoining upon it or them obedience thereto. Process in such proceedings may be served upon such motor carrier, or broker, or upon such person, or persons, acting in concert or participating therewith in the commission of such violation, without regard to the territorial limits of the district or of the State in which the proceeding is instituted.

(2) If any person operates in clear and patent violation of any provisions of section 203(c), 206, 209, or 211 of this part, or any rule, regulation, requirement, or order thereunder, any person injured thereby may apply to the district court of the United States for any district where such person so violating operates, for the enforcement of such section, or of such rule, regulation, requirement, or order. The court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such person, his or its officers, agents, employees, and representatives from further violation of such section or of such rule, regulation, requirement, or order; and enjoining upon it or them obedience thereto. A copy of any application for relief filed pursuant to this paragraph

shall be served upon the Commission and a certificate of such service shall appear in such application. The Commission may appear as of right in any such action. The party who or which prevails in any such action may, in the discretion of the court, recover reasonable attorney's fees to be fixed by the court, in addition to any costs allowable under the Federal Rules of Civil Procedure, and the plaintiff instituting such action shall be required to give security, in such sum as the court deems proper, to protect the interests of the party or parties against whom any temporary restraining order, temporary injunctive, or other process is issued should it later be proven unwarranted by the facts and circumstances.

(3) In any action brought under paragraph (2) of this subsection, the Commission may notify the district court of the United States in which such action is pending that it intends to consider the matter in a proceeding before the Commission. Upon the filing of such a notice the court shall stay further action pending disposition of the proceeding before the Commission. (Aug. 9, 1935, c. 498, §1, 49 Stat. 564; Sept. 6, 1965, Pub. L. 89-170, §4, 79 Stat. 648.)

The commission renews its recommendation that §222(b) be amended to enable the commission in enforcement proceedings to obtain service of process upon motor carriers and to permit the joining of any other necessary party without regard to where the carrier of other party may be served.—Annual Report, 1962, pp. 205-6; renewed, Annual Report, 1963, p. 20; Annual Report, 1964, p. 74-5.

Notes of Decisions

Volume 10—p. 8244; Volume 11—p. 9577; Volume 12—p. 10475; Volume 13—p. 11119; Volume 14—p. 11643; Volume 15—p. 12254; Volume 16—p. 12921; Volume 17—p. 13629; Volume 18—p. 14648; Volume 19—p. 15915.

1. Constitutionality.—On appeal from district court's injunctive order, in action by the commission to perpetually enjoin defendants from engaging in for-hire interstate transportation business by motor vehicle without appropriate authority, cases cited and relied on by defendants do not sustain their contention that §222(b), in permitting the commission or its agents to institute judicial proceedings to enforce the act, violates the constitutional grant of executive power to the President and his agents. The powers of law enforcement are not wholly assigned to the executive department; the function of initiating a judicial proceeding for enforcement of a legislative enactment is not the exercise of a prerogative exclusively reserved to the President, as it is not an action not subject to judicial check; and enforcement of any resulting judgment remains with the judicial or executive departments.—I.C.C. v. Chatsworth Cooperative Marketing Ass'n. 347 F. 2d 821 (822)*.

Moreover, it is recognized (295 US 602) that administrative bodies, such as the commission, created by Congress to carry into effect legislative policies in the statute, act in part quasi-legislatively and in part quasi-judicially; to extent such commission exercises any executive function, as distinguished from executive power in the constitutional sense, it does so in discharge of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government; and the authority of Congress, in creating such agencies, to require them to act independently of executive control cannot well be doubted. Judgment and order of lower court affirmed.—Id., p. 822-3.

2. Construction and interpretation.—[Vol. 19].—The statute being a highly remedial one, it should be liberally interpreted to effect its evident purpose.—I.C.C. v. Dudgeon, 213 F. Supp. 710 (714); I.C.C. v. Interstate Auto Shippers, Inc., 214 F. Supp. 473 (476).

See also Burlington Truck Lines v. U.S., §212 (a), n. 10; McFaddin Express, Inc. v. Adley Corporation, 363 F. 2d 546, 28 USC §1331, n. 4; United States v. City of Jackson, Miss., n. 25, below.

10. Indictment and information in general.—[Vols. 10-16].—It was not necessary that information charging motor carrier with several violations of §206(a) negative exception therein which permits uncertificated operations while carrier litigates asserted "grandfather" rights before the commission. While in a proper case the pendency of such an administrative proceeding is a defense, it is not necessary to anticipate that defense in the formal charge of operating without certificated authority—United States v. W. J. Dillner Transfer Co., 315 F. 2d 107 (109).

11. Interstate operation without certificate or permit.—[Vols. 10-19].—Defendant nonstock corporation whose sole activity is and has been the transportation of property by motor vehicle for compensation, and which performs the major portion of its service for canneries, meat packinghouses, produce dealers, and other persons not engaged in farming operations, is not a cooperative association within exemption of §203(b5) but a for-hire common carrier as defined in §203(a)(14), and its transportation of other than exempt commodities is in violation of §206(a) and is subject to be enjoined by the court when there is not in force with respect to it or any of its officers, directors, or members a certificate, permit, or any other form of authority issued by the commission. Injunction granted against the corporation, but no order restraining individual defendants is considered necessary at this time.—I.C.C. v. Nelson Cooperative Marketing Assn., 209 F. Supp. 697 (699, 700, 701).

Defendants holding no authority from the commission have offered and delivered transportation services at a fixed rate of compensation and throughout their operation have retained the identifying characteristics of a for-hire motor carrier; they have in fact conducted an interstate motor-carrier operation subject to Part II, shallowly cloaked with a subterfuge arrangement purporting to represent private carriage, in violation of §§206(a), 209(a), and 222(b), and unless enjoined and restrained are likely to continue to engage in such practices; injunction granted.—I.C.C. v. Arpel, Inc., 211 F. Supp. 370 (373, 374).

In his business of driveaway transportation of automobiles for individual owners, defendant utilizes (1) a contract with the owner, (2) a driver's application form, and (3) a lease agreement with the driver; however such documents, apparently designed to avoid regulation of the transportation, are of no legal effect where terms thereof are contrary to the facts. The lease agreement, wherein defendant "leases" owner's car to the driver for duration of the trip, is not a bona fide lease; it is a mere subterfuge under which he attempts to screen his unlawful carrier operations.—I.C.C. v. Dudgeon, 213 F. Supp. 710 (712-4).

Moreover, there is privity of contract between owner of each automobile and defendant, although it is made to appear that owner contracts with the driver; owner accepts defendant's terms and conditions, turns the car over to him, and pays his quoted charge; charges for the service are related to distance traveled, thus defendant's claim that rate charged is for screening a driver is discredited. Defendant, who holds no interstate certificate, assumes the right, power and duty to perform service within scope of his holding out, in violation of §206(a); injunction entered.—Id., pp. 714-5; in substantially identical case, preliminary injunction granted against corporate and individual defendants.—I.C.C. v. Interstate Auto Shippers, Inc., 214 F. Supp. 473 (476-7).

In holding out to the public an automobile driveaway service for individual owners, for compensation within meaning of Part II, and in furnishing substantially all the facilities for, and performing substantially all the functions of, such transportation, without having first obtained a certificate from the commission, defendant is unlawfully engaging in transportation as a common carrier in violation of §206(a). As defendant, if not restrained, intends to and will continue to provide such

service in the manner described, without authority from the commission, permanent injunction is issued.—I.C.C. v. Teeter, 228 F. Supp. 479 (481-2).

Although individual's purported lease of his tractors to a meat company for transportation of its products in its trailers provides for lessee's exclusive direction and control of operation of the vehicles, in actual operations he exercises very substantial control over both trucks and drivers and also assumes a substantial and significant share of the burdens of the transportation business. Record as a whole clearly shows that the operations involved are in substance actually those of defendant lessor, within meaning of 368 US 370, and that he occupies the position of a contract carrier in interstate commerce, providing defendant lessee as shipper with a complete transportation service without authority from the commission, in violation of §§206(a) and 209(a). Permanent injunction issued.—I.C.C. v. Moore, 236 F. Supp. 168 (170-2, 173).

Since record clearly shows that defendant cooperative is not a bona fide agricultural cooperative association as defined in the Agricultural Marketing Act, rather that it exists in name only and is a fictitious sham, for-hire transportation performed by it does not fall within partial exemption of §203(b5); and, since the fresh meat transported is not within agricultural commodity exemption of §203(b6), performance of such transportation without appropriate authority violates §§203(c), 206(a), and 209(a). Injunction issued against the cooperative, its two individual and one corporate organizers, and defendant slaughtering plant which (although not eligible for membership) participates in the cooperative and uses the transportation.—I.C.C. v. Iowa Cooperative Assn., 236 F. Supp. 873 (876-9).

Since the Motor Carrier Act is comprehensive enough to bring within its purview all those who, in substance, engage in a business of interstate transportation on public highways for hire and, being remedial in nature, should be liberally construed to effect its evident purpose, defendant nonprofit shippers association cannot claim exemption from economic regulation under any part of the statute by virtue of the exemption provided in §402(c)(1). Legislative history of enactment of Part IV of the Act clearly points out the distinction between freight forwarders and nonprofit associations of shippers, such as defendant. Congress did not intend to exclude shipping associations who assume responsibility for through movement of goods from application of Part II of the Act; a forwarder who is excluded does not engage in motor transportation.—I.C.C. v. International Shippers Ass'n of New Jersey, Inc., 249 F. Supp. 66 (70)*.

Therefore, defendant association which used no certificated carrier, but operated motor vehicles leased for the trip, in transporting goods of its shipper members and was reimbursed by the members for its services, was not within the §402(c) exemption. Neither the association nor its director had obtained appropriate operating authority; both were aware of requirements of the pertinent statutes and operated in violation thereof. Defendants association, its director, and one shipper member enjoined from violating §§203(c), 206, and 209; complaint dismissed as to shipper member that had withdrawn from the association and taken steps to handle its traffic properly.—Id., pp. 68-70.

Since the record is clear that defendant cooperative is not a bona fide agricultural cooperative association as defined in the Agricultural Marketing Act, the for-hire transportation performed by it does not fall within partial exemption of §203(b5); and, since its transportation of processed materials and regulated commodities constitutes common carrier operations within §203(a)(14), performance of such transportation service without appropriate authority violates §203(c) and §206(a). As it appears likely that defendants will continue such practices unless restrained, the cooperative, its two individual organizers, and all persons acting in concert or participation with them, are permanently enjoined and restrained from engaging in for-hire motor common carrier operations unless and until appropriate authority therefor is obtained.—I.C.C. v. All American Association, 281 F. Supp. 18 (22-3).

Defendant, claiming to be an employment agency in bringing together owners of automobiles who want them driven from one place

to another and persons who want to drive them in order to get a cheap trip, was in fact operating as a for-hire common carrier of private automobiles without a certificate, in violation of §§203(c) and 206(a)(1). Nothing in its business advertisements disclose the features now stressed as showing it was a mere intermediary between owner and driver; also it set all terms of the owner-driver relationship; owner and driver did not make their own arrangements as is normally done by an employer and employee. Defendant is not obliged to conduct its business in such a fashion that it must obtain a certificate; however, looking through form to substance, the commission rationally could (and its decisions show that it would) conclude that defendant was operating unlawfully as a common carrier. Lower court's dismissal of the commission's suit for injunction, reversed.—I.C.C. v. AAA Con Drivers Exchange, Inc., 340 F. 2d 820 (821-2, 825-6)*.

Since agricultural cooperative's transportation of non-farm commodities (on return trips after delivering member products to market) is found to be within the "cooperative association" exemption of §203(b5), such transportation was not in violation of the act. Congress intended to exempt from economic regulation by the commission cooperative associations which comply with the Agricultural Marketing Act; and such a cooperative does not lose its status by engaging in activity other than its primary statutory activity, so long as the other activity is incidental to, and necessary to effective performance of, the primary one. The Agricultural Marketing Act was not drawn with the regulation of transportation in mind, and its terms cannot be given one meaning for that purpose and another for the Act's primary purpose of encouraging agricultural cooperatives. Decision of lower court granting injunction reversed.—Northwest Agricultural Coop. Ass'n v. I.C.C., 350 F. 2d 252 (254-5, 257)*.

See also United States v. Casale Car Leasing, Inc., and United States v. Sternweis, §222(a), n. 15.

14. Operation beyond scope of authority granted.—[Vols. 15-19].—In prosecution of carrier charged with operating beyond territorial limits of its certificate, it is no defense that the carrier believes it can show "grandfather" rights broader than its certificate when it has neither sought nor obtained from the commission a broadening of its authority on basis of the alleged "grandfather" rights. Congress provided in §206(a) the narrow permission to continue uncertificated operations while "grandfather" claims were pending before the commission; otherwise, a court must accept carrier's certificate as the source and definition of its authority.—United States v. W. J. Dillner Transfer Co., 315 F. 2d 107 (109. 110).

Motor carrier's certificate authorizing transportation between points in New Jersey and Ohio did not authorize it to carry commodities from two Pennsylvania points to Ohio points, on theory that the two origins are within commercial zones of two New Jersey cities and hence covered by authority to serve those cities. Certificates which grant authority limited to a described territory do not authorize service to any point outside that territory, even though point in question may be within commercial zone of a municipality within the described territory. Operations in issue were not within authority in certificate relied on; conviction affirmed.—Id., p. 109.

In the commission's action seeking to enjoin carrier from transporting fork-lift trucks in interstate commerce, defendant's authority to transport "machinery" and "heavy machinery" (originally issued to its predecessor in 1939) is found to include fork-lift trucks when record in predecessor's application proceeding clearly shows that fork-lifts, and other such vehicles designed for use in warehouses or storage yards, were considered as "machinery" or "heavy machinery" when the certificate was originally issued. While, in the years since then, fork-lift trucks have become more numerous and more widely used, that fact should not deprive defendant of benefit of the uses permitted under the original certificate; to hold otherwise, on instant record, would deprive defendant of a constitutional right guaranteed by the due process clause. Furthermore, though the commission currently distinguishes between fork-lifts and "machinery" or "heavy machinery," that policy was first stated about 16 years after considered certificate was issued.

Complaint dismissed.—I.C.C. v. Mitchell Bros. Truck Lines, 250 F. Supp. 636 (637-9).

25. Injunction.—[Vols. 10-12, 15-19].—In denying the commission's request for preliminary injunction to restrain defendant-appellee from performing cross-haul operations in its radial territory, the district court neither filed findings of fact nor mentioned the crucial findings in its opinion, as required by Federal Rules of Civil Procedure; correctness of its assertion that under the facts and circumstances the commission was not entitled to the order sought depends on findings of fact without which it cannot intelligently be approved or disapproved. Defendant was apprised on two occasions, one 12 years ago, that operations involved were unlawful, and its persistence therein was a conscious rejection of the commission's contentions by one long familiar with requirements for proper conduct of interstate transportation. Judgment of the lower court vacated and case remanded for findings of fact and conclusions of law, with direction to issue a temporary restraining order.—I.C.C. v. Cardinale Trucking Corp., 308 F. 2d 435 (436, 437-8).

Interstate Commerce Act, as amended by the Elkins Act, has behind it the full force of the Commerce Clause giving the statute the broadest possible sweep of Congressional power. The United States has standing, with and without statutory authorization, to bring action against city, city officials, and interstate carriers seeking injunctive relief against racial segregation in passenger terminals in the city. Considering provisions of §§16(12) and 222(b), the Elkins Act, and 28 USC §2322, there is no question as to the Government's and the commission's standing to sue defendant carriers and, by implication, those statutes provide a basis for instant action against noncarrier defendants.—United States v. City of Jackson, Miss., 318 F. 2d 1 (8-10)*.

Statutory power to enforce substantive provisions of the law must carry with it the power to make such enforcement effective; in instant case, enforcement can be made effective only if relief is granted against noncarrier defendants who are causing the carriers to violate the statutes; and, there need be no community of interest between carriers and non-carriers sought to be enjoined. District court's failure to issue injunction against carriers and noncarriers constituted an abuse of judicial discretion; reversed and remanded with instructions that injunction sought be issued.—Id., pp. 10, 17.

Acts of defendant who possessed no interstate motor carrier authority, in providing driveaway service in interstate transportation of automobiles for individual owners, constitute violations of §206(a), and as such, are subject to be enjoined by the court under express provisions of §222(b). Defendant and all parties acting under his direction, or in concert with him, are permanently enjoined from providing such service, directly or indirectly, until appropriate authority therefor is obtained.—I.C.C. v. Dudgeon, 213 F. Supp. 710 (715); in substantially identical case, preliminary injunction granted against corporate and individual defendants.—I.C.C. v. Interstate Auto Shippers, Inc., 214 F. Supp. 473 (477).

Transportation operations conducted under purported vehicle-leasing arrangement are in substance those of defendant lessor who as a contract carrier provides defendant lessee as shipper with a complete transportation service without authority from the commission, in violation of §§206(a) and 209(a), and defendant shipper-lessee has actively aided and abetted defendant lessor in performance of such operations, thus subjecting both to enjoiner under §222(b) and §2 of the Elkins Act. As it appears that both defendants will continue to engage or participate in such unlawful activities unless restrained, both, together with their agents, employees, etc., are permanently enjoined from performing or hiring such transportation unless and until appropriate authority is obtained.—I.C.C. v. Moore, 236 F. Supp. 168 (172, 173).

See also Auto Drive-Away Company of Hialeah, Inc. case, n. 30, below.

27. Violation of orders, regulations, generally.—[Vols. 13, 15, 16, 18, 19].—The Attorney General has standing to bring suits to enjoin enforcement of State passenger segregation statutes, to restrain and remove unconstitutional interference with and burden upon interstate commerce; insofar as the actions involve violations of part II and the commission's regulations thereunder, the commission may itself, or by its designated agent, main-

tain such actions under provisions of §222(b).—United States v. Lassiter, 203 F. Supp. 20 (24).

In action against motor carrier for violation of the commission's safety regulations, proof that vehicle involved is one "used," in ordinary meaning of that word, in transportation of property in interstate commerce is all that is required to bring it within the commission's jurisdiction and to subject its operator to those regulations. When inspection disclosed that braking systems of defendant carrier's tractor-trailer combination were defective and both units were placed out of service, it was immaterial whether freight being transported was moving in interstate or intrastate commerce. Upon instructions from another employee of carrier and prior to any attempt to correct indicated defects, driver of the vehicle drove it back to carrier's terminal for repairs and then completed his trip. Fines imposed on carrier and the two employees involved.—United States v. Pioneer Motor Service, Inc., 204 F. Supp. 611 (612, 613).

30. Evidence.—[Vols. 11-14, 17-19].—At the jury trial, carrier admitted carrying commodities from two Pennsylvania points to Ohio points, although certificate relied on was limited to operations from New Jersey to Ohio points; it also knew that its certificate as interpreted by the commission did not give implied sanction to operations from those nearby Pennsylvania points. The jury was justified in concluding that carrier's conduct was a deliberate refusal to respect the plain limitations of certificate under which it was operating.—United States v. W. J. Dillner Transfer Co., 315 F. 2d 107 (109-10).

Evidence in suit filed by the commission to enjoin corporation, and two officers thereof, from continuing their unlawful interstate automobile driveaway operation without proper authorization, consisting of commission investigator's affidavit and accompanying exhibits, party admissions on file, and other materials, was sufficient to support lower court's summary judgment in favor of the commission. Defendants do not dispute sufficiency of the evidence to prove that their operation requires authority from the commission; and their attack on admissibility of most of the materials on which the lower court based its judgment, made for the first time on appeal therefrom, comes too late.—Auto Drive-Away Company of Hialeah, Inc. v. I.C.C., 360 F. 2d 446 (447-48).

Affidavit submitted in support of the commission's motion for summary judgment is subject to a timely motion to strike, if it does not comply with the Federal Rules of Civil Procedure; but in absence of such motion, formal defects in the affidavit ordinarily are waived. Also, defendants' objection to admission of contents of petitions they filed with the commission, as well as those filed with the court in support of motion for a stay of the court proceedings pending the commission's decision, cannot be justified by any rule of evidence; lower court properly considered those admissions in making its findings. Whether or not the stay granted for appeal from the summary judgment should remain in effect until the commission rules on appellants' pending application for appropriate authority is left to the district court's discretion; judgment affirmed.—Id., pp. 448-9.

Section 222. (c) [*§322(c) U.S.C.*] **Participation in unjust discrimination; evasion of regulations; penalty.**—[Unchanged. See vol. 10, p. 8247, vol. 18, p. 14651.]

Notes of Decisions

Volume 10—p. 8247; Volume 11—p. 9581; Volume 13—p. 11121; Volume 14—p. 11644; Volume 15—p. 12256; Volume 17—p. 13631; Volume 19—p. 15919.

5. Defeating or evading regulation.—[Vols. 15, 19].—Motor carrier, convicted on information charging that it and another carrier had entered into an arrangement whereby the

other purported to carry, but defendant actually carried and was paid for carrying freight in an area in which only the other carrier had operating authority, was properly penalized under portion of §222(c) which penalizes all violations in connection with which defendant has been guilty of fraud. Though the information did not refer to the substantive regulation violated, it did refer in parentheses to §222(c), a penalty section; and, viewing the three portions of §222(c) as a whole, it is not unreasonable to penalize the making of false or fictitious documents in connection with a violation as an aggravation of the violation itself. Defendant's argument that §222(c) is inapplicable and that it should have been penalized under §222(a), which prescribes the general penalty for a willful violation for which no penalty is otherwise provided, does not overcome the countervailing arguments.—Calore Exp. Co. v. United States, 351 F. 2d 596 (597-8).

It may be that an information alleging violation of §223 could support a criminal prosecution if it further charged that the carrier's extension of credit was designed to accomplish discrimination among shippers (noting that "liability" as used in §223 obviously refers only to civil liability); however, no discrimination is alleged in information charging defendant carrier with having failed to collect freight charges within seven days after delivery of the freight, in violation of §223 and the commission's regulations. Moreover, fact that carrier billed shippers in due time tends to negate any inference of discrimination. Therefore, as mere failure to receive payment from shipper within seven days after delivery of freight does not expose the carrier to criminal liability, defendant's motion to dismiss the information is well taken; granted.—United States v. General Expressways, Inc., 270 F. Supp. 115 (117).

To constitute a violation of §222(c) by a shipper who knowingly patronizes an uncertificated carrier, he must either (a) receive some character of rebate or concession, or (b) be guilty of some fraudulent conduct in an attempt to evade the regulations. Read together with §203(c), which condemns only the conduct of a carrier, as they must be as part of the same chapter of the act, those sections indicate congressional intent only to condemn the act of a shipper where elements of §222(c) are present. In absence of either rebate or fraud on part of defendant shipper, it may not be charged, under 18 USC §2, as an aider or abbettor of carrier who plead guilty to operating without authority. Had Congress intended to punish the shipper for participation in same conduct as the carrier, it seems that §203(c) would have so provided. This does not mean that a shipper may not conspire with carrier to violate §203(c), or may not be guilty as an aider or abbettor; but only that knowing shipment of goods, and payment of proper tariff charges, does not make the shipper an aider or abbettor.—United States v. Williamson, 235 F. Supp. 836 (837-9).

15. Concessions and rebates.—[Vols. 10, 11, 13, 14, 17].—Defendant's contention that §222(c) displaced provisions of the Elkins Act relating to rebates, concessions, and discriminations, is not supported by facts appearing in the information charging it with receiving rebates from railroad for cartage of shipments from Jersey City, N.J., to railroad's station in New York City, a service which it did not perform. The Elkins Act was adopted as a supplement to Part I of the act, which regulates interstate carriage by rail or jointly by rail and motor; however, §202(c) expressly makes provisions of the Motor Carrier Act, including §222, inapplicable to transportation by motor vehicle for a railroad subject to Part I. Accordingly, §222(c) does not apply to defendant's transportation of considered rail shipments; and, since defendant transported the shipments in behalf of railroad that is subject to the Elkins Act, defendant is subject to proscriptions and penalties provided by that statute. Motion to dismiss is denied.—United States v. Pep Trucking Co., 261 F. Supp. 480 (483-4).

Individual defendant's motion to dismiss, as to him, each count of information alleging that he and motor carrier corporation unlawfully gave a rebate by charging less than published rates and extended credit for more than 7 days after delivery of freight, because it is not alleged that he is, nor is he, a "common carrier by motor vehicle," denied. It is doubtful whether defendant's status must be alleged in any asserted violation of §222(c);

however, the Government's bill of particulars states that he is alleged to have acted as an officer of the corporation. In any event, each count of the information cites the general "aiding and abetting" provision, which is sufficient to notify defendant of grounds of his culpability. Moreover, 6 of the counts allege violation of §222(a) which refers to any "person" and §203(a)(1) defines that term as including "any individual"; therefore, those counts clearly state sufficient facts to constitute an offense against the United States.—United States v. Essenfeld, 267 F. Supp. 637 (638).

Fact that protestant carrier has contracted with a shipper to operate one of latter's cement storage and distribution plants on a cost-plus basis, and maintains certain supervisory employees who work at that and other plants, whose salaries are not billed to shipper but carried as part of carrier's general overhead, is not shown to constitute a concession to the shipper in violation of §222(c); nor is proceeding on extension application of another carrier the proper forum for final determination of that issue.—Bonded Freightways, Inc., Extension, 92 M.C.C. 68 (70-1).

Although defendant's granting of free intrastate transportation of cash letters for certain Wisconsin banks in connection with their interstate shipments for which a charge is made, while withholding such free service from other interstate shippers, violates provisions of §222(c), complainant may not in a complaint proceeding invoke the penalties provided therein.—Armored Carrier Corp. v. B.D.C. Corp., 92 M.C.C. 665 (668).

Section 222. (d), (e) [*§322(d), (e) U.S.C.*]—[Unchanged. See vol. 11, p. 9582; vol. 10, p. 8248.]

Notes of Decisions

§222(e): Volume 10—p. 8248; Volume 17—p. 13632.

§222(e). 3. Disclosure of information without shipper's consent.—[Vol. 17].—Since commodity statistics reports of individual carriers do not show names of shippers or their number, or origins and destinations of shipments, for harmful disclosure to result other information concerning carrier operations and carrier-shipper relations must be known or gathered and used together with the commodity traffic data from the individual report form. Nevertheless, so long as possibility for harmful disclosure exists, such possibilities must be recognized and measures taken to prevent unnecessary disclosure of shipper affairs to competitors, as intended by Congress. The fact that the disclosure provisions of §§15(11), 222(e), and 317(f) apply to carriers and their employees and agents, rather than to the commission or its staff, does not relieve the commission of its responsibility to carry out the intent of Congress to protect shippers from harmful disclosure. The commission must therefore retain administrative discretion to withhold commodity statistics reports from public inspection upon determination that harmful disclosure exists.—Commodity Statistics Reporting—Extend and Disclosure, 323 I.C.C. 131 (135-6)*.

Since such reports fall within purview of the public records requirements of §§16(13), 204(d), and 316(d), the commission's responsibility thereunder must be reconciled with the various statutory provisions prohibiting unauthorized disclosure of shipper information to competitors. The most effective solution is to allow, in addition to the regular reporting, separate reporting of commodity classes involving less than three shippers in a supplemental report which will be withheld from public inspection; but the individual carrier's regular commodity statistics report, which may exclude the less-than-three-shippers categories, will be made available to the public; this plan will avoid the apparent conflict between §§204(d) and 222(e). Therefore,

the provision of 49 CFR §206.7 that "the individual reports filed pursuant to this part will not be open to public inspection" is deleted. —Id., pp. 134, 137, 138.

Section 222. (f), (g), [*§322(f), (g), U.S.C.*] —[Unchanged. See vol. 10, p. 8249, vol. 11, p. 9583; vol. 15, p. 12256.]

Notes of Decisions

§222(g): Volume 16—p. 12924; Volume 18—p. 14651.

§222(g). 25. Falsification of reports, records, drivers' logs.—[Vols. 16, 18].—It is settled beyond a doubt that a corporation may be held criminally liable; that knowledge of employees and agents may be attributed to the corporation; and that their acts may amount to willfulness on part of the corporation. Evidence of filing of false logs by appellant's drivers, consisting of comparison thereof with Colorado port of entry receipts, was properly admitted; although records compared covered trips to Colorado only, such evidence was relevant and material to charges against appellant for falsifications in connection with trips to Colorado, and went to question of willfulness; it also served to negate evidentiary defense that the violations charged resulted from mere negligent or accidental failure to require proper logs, which would not amount to a crime under the regulation cited. Evidence adduced was sufficient to support a finding by the jury of knowing and willful violations by appellant of the commission's regulations pertaining to drivers' logs.—Steere Tank Lines, Inc. v. United States, 330 F. 2d 719 (721-722).

While the statute involved is of the malum prohibitum class, proof of both knowledge and willfulness is required. After properly charging the jury as to the meaning of "knowingly" and "willfully," and stating that it was unnecessary to show an evil or criminal intent, the lower court went into the subject of a corporation acting through agents and employees, and how knowledge was attributed to the corporation, including that gained in course of their work by subordinate employees such as truck drivers. While the charge as given was technically a correct statement of law, it nevertheless may have engendered confusion, ambiguity, and overemphasis, in light of evidence that each of the truck drivers concerned acted for his own benefit; such charge was therefore erroneous because of failure to go further and charge that knowledge sufficient to serve as basis for a finding of a knowing and willful violation would depend on knowledge by agents and employees of the corporation other than the drivers doing the falsifying.—Id., p. 723.

However, an appellate court must determine what the error meant to the jury in relation to all else that happened: an error which does not affect the substantial rights of a party shall be disregarded. Record as a whole shows that the manager of the terminal out of which the violations occurred was appellant's agent and knew of the violations; that, while the drivers falsified the records to make extra money, shortage of sufficient equipment and drivers for the rush of business created a situation inviting falsification, and the "word" to at least one driver was that his job depended on falsifying his log; and that appellant had been repeatedly warned of falsified logs, and had records in its possession, though in separate offices, which would easily have disclosed the falsifications. Thus it affirmatively appears that the error in the charge had only slight, if any, effect on the jury and was harmless. Judgment of the lower court affirmed and rehearing denied.—Id., p. 724.

See also United States v. Handfinger, §204(a)(1), n. 1.

Section 222. (h) [§*322(h) U.S.C.*]—Civil action for fines; amount; service of process; payment of costs and expenses.—[Unchanged, except that by the act of Sept. 6, 1965, Pub. L. 89-170, §3, 79 Stat. 649, the words "shall forfeit to the United States the sum of $100 for each such offense, and, in case of a continuing violation, not to exceed $50 for each additional day during which such failure or refusal shall continue" were stricken from the first sentence and, in lieu thereof, the language set forth below was inserted. See vol. 15, p. 12256.]

* * * or who shall fail or refuse to comply with the provisions of section 203(c) or section 206(a)(1) or section 209(a)(1) shall forfeit to the United States not to exceed $500 for each such offense, and, in case of a continuing violation not to exceed $250 for each additional day during which such failure or refusal shall continue.

Historical Note

The commission recommends that §222(h) be amended so as to (1) extend civil forfeiture provisions therein to unlawful operations and safety violations by motor carriers, (2) permit the commission to institute forfeiture actions directly in the courts, and (3) increase substantially amount of the forfeitures prescribed.—Annual Report, 1962, pp. 206-7; renewed, Annual Report, 1963, p. 20; Annual Report, 1964, p. 75-6.

Regulations of the Commission

32 FR 10794, July 22, 1967, Part 107a: Administrative Collection of Enforcement Claims, new Part 107a, adopting regulations published in 4 CFR Parts 101 through 105, added, effective Aug. 1, 1967.

Section 223 [§*323 U.S.C.*] Collection of rates and charges; extension of credit; liability of agent of beneficial owner.—[Unchanged. See Vol. 10, p. 8250.]

Notes of Decisions

Volume 10—p. 8251; Volume 11—p. 9584; Volume 12—p. 10476; Volume 14—p. 11645; Volume 15—p. 12257; Volume 16—p. 12924; Volume 17—p. 13632.

1. Construction and interpretation.—[Vols. 10, 17].—There can be no doubt that the purpose of the credit provisions in the statute is to prevent discrimination in credit treatment accorded shippers by motor carriers. Thus, in light of the specific statute punishing those carriers who have knowingly engaged in discrimination, purpose of the statute relating to extension of credit to shippers can be effectuated by a prosecution, under §222(c), for knowing discrimination.—United States v. General Expressways, Inc., 270 F. Supp. 115 (117).

See (also) Akers Motor Lines, Inc. v. Lady Cornell Comb Co., §217(b), n. 222.

2. Unfair practice; discrimination effected by extension of credit.—[Vols. 10, 11].—While an information based on a violation of §223 might support a criminal prosecution under §222(c) if it further charged that the extension of credit was intended to accomplish discrimination among shippers, no discrimination is alleged in eight-count information charging motor carrier with having failed to collect freight charges within seven days after delivery of the freight, in violation of the statute and the commission's credit regulations. Indeed, uncontroverted fact that defendant billed the shippers in due time tends to negate any inference of discrimination. The mere failure to receive payment from a shipper within seven days after delivery of freight does not expose the carrier to criminal liability (noting that "liability" as used in §223 ob-

viously refers only to civil liability). Therefore, defendant's motion to dismiss the information, being well taken, is granted.—United States v. General Expressways, Inc., 270 F. Supp. 115 (116-7).

As to alleged violation regarding extension of credit to shippers, record is clear that the commission's regulations have not been observed by respondent carrier; carrier concedes it extended credit beyond period allowed by the regulations. Although that entire area is being reassessed in Ex Parte No. 73 and Ex Parte No. MC-1, past and continuing violations of the regulations cannot be condoned; cease and desist order entered.—Silver Line, Inc., Investigation and Revocation, 96 M.C.C. 173 (174, 176, 177).

5. Practices, in general.—[Vols. 11, 12].—Under proposed rule for time payment of charges for transportation of household goods, shipper applies for credit before movement and carrier transmits the application to a financial institution which agrees to purchase shipper's note upon presentation by carrier, without recourse to carrier; before delivery shipper makes a downpayment of at least 10 percent of the total charges and executes a promissory note to carrier for the balance, and carrier submits the note to the financial institution, which then pays the full amount of the remaining transportation charges. The commission's credit regulations provide that a carrier may, upon taking precautions deemed sufficient, extend credit for 7 days from date of delivery or presentation of the bill, and proposed rule establishes a procedure whereby carrier assures itself of payment of its charges within the period permitted; it extends no further credit, the continuing credit relation being between shipper and the financial institution. Proposed rule thus conforms to the statute and the credit regulations; approved.—Time Payment Plan for Transporting Household Goods, 323 I.C.C. 677 (678-9).

However, proposed rule for determining amount of shipper's note and the required monthly payments deals with matters beyond the commission's jurisdiction. The note reflects the balance owing on the transportation charges, plus cost of the credit, which is given by the financial institution that passes on acceptability of the note and agrees beforehand to purchase it without recourse to the carrier. The additional charges for credit recompense the financial institution for a service rendered by it, not a service of the carrier; they are not charges contemplated by §217, do not refer to a service within scope of the act, and are not in fact charges of a carrier subject to the act. Cancellation required.—Id., pp. 679-80.

Regulations of the Commission

31 FR 6964, May 12, 1966, Part 188: Extension of Credit to Shippers, §188.1 Carrier may extend credit to shippers, revised as set forth, effective July 21, 1966.

31 FR 10076, July 26, 1966, Part 188: Extension of Credit to Shippers, effective date (31 FR 6964) modified to August 29, 1966.

NOTE: For recodification, see 49 CFR, Editorial Note, 32 FR 5606, April 5, 1967.

32 FR 12402, Aug. 25, 1967, Part 288 [formerly Part 188]: Extension of Credit to Shippers, §288.3 Period of credit following delivery of freight, revised, effective Sept. 25, 1967.

Section 224. [§*324 U.S.C.*] Identification plates for interstate motor carriers.—[Unchanged. See vol. 10, p. 8253.]

Amendments, see footnotes, vol. 10, p. 8253; historical notes, vol. 10, p. 8253, vol. 11, p. 9584, vol. 12, p. 10477, vol. 13, p. 11122, vol. 14, p. 11645.

Notes of Decisions

Volume 16—p. 12925.

Section 225. [§*324a U.S.C.*] Allowances to shippers for transportation services.—[Unchanged. See vol. 11, p. 9585.]

Amendments, see footnotes, vol. 11, p. 9585.

Notes of Decisions

Volume 15—p. 12257; Volume 16—p. 12925; Volume 17—p. 13633; Volume 18—p. 14652; Volume 19—p. 15920.

20. Instrumentality or service furnished by shipper.—Proposal that, for an appropriate allowance, shippers may provide a 9-part set of documents including a short form bill of lading, a delivery receipt, a consignee memorandum, an original freight bill, and a shipping order, on shipments moving between trunkline territory and central, northwestern, southwestern, or w.t.l. territory, pertains to matters for which an allowance may properly be paid, since bills of lading and freight bills are instrumentalities of commerce and their supply and preparation are an essential part of the transportation contract. Shipper's performance of those functions constitutes the giving of value to the carrier for which shipper may be recompensed, and fact that it is initial carrier's responsibility to issue shipping documents does not render the proposal unlawful, since it is in recognition of that duty that allowance is to be paid.—Combined Bill of Lading-Freight Bill Allowance, 323 I.C.C. 168 (171).

Proposed allowance, which is open to all shippers on an equal basis, does not constitute a discriminatory rebate, and the record does not establish that it is unnecessary or will create complications on joint-line traffic or difficulty in reconciliation with present systems designed for data-processing machinery. That some shippers now prepare their own bills of lading should not preclude publication of proposed allowance, nor should it be condemned because shippers will themselves realize some benefits from it. Many obvious advantages will accrue to carriers under the proposal, and the commission would be remiss in its duty if it failed to recognize that fact; conversely, possibility that the proposal may create some problems not presently foreseeable does not warrant its condemnation. Proposed allowance is therefore lawful.—Id., p. 173.

25. Compensation contemplated.—[Vols. 16, 18, 19].—Schedules naming proposed plan V TOFC rates provide that shipper and consignee may elect to pick up and deliver a shipment, in lieu of the motor respondent, and receive an allowance of 7 cents per 100 pounds for each service. Under §225 a shipper allowance must be no more than is just and reasonable, and the criterion is the reasonable cost to the shipper; as there is no evidence on that issue, the proposed allowances are not shown to be just and reasonable. Proposed rates disapproved on other grounds.—Rubber Articles, Philadelphia to Ill., Ky., Mich., & Mo., 319 I.C.C. 632 (634).

In considering the reasonableness of proposed allowances, the commission has adhered to the principle that the amount paid (1) should be no more than is just and reasonable for the service or instrumentality furnished, and (2) should not exceed the reasonable cost to the owner of the goods of performing the service or furnishing the instrumentality used; whichever of these sums is the lower marks the maximum the carrier may pay.—Combined Bill of Lading-Freight Bill Allowance, 323 I.C.C. 168 (172).

In determining reasonableness of proposed allowance of 4 cents a set for a 9-part combined bill of lading-freight bill to be supplied and prepared by consignor, the standard to be considered is the cost of a 9-part bill, i.e., the service or instrumentality furnished, not the price of the 2-part bill required by the commission's regulations and classification rule 10; and fact that shipper would retain two parts of the document does not preclude it from receiving an allowance for supplying those parts, since carrier is required to issue the bill of lading and freight bill to the shipper. Level of proposed allowance does not exceed maximum reasonableness, considered in relation to carrier's costs in issuing the documents; irrespective of actual price paid for the set, which depends on the number purchased, carrier's costs, including preparation of the documents, exceed the allowance proposed.—Id., p. 172.

Proposed allowance is also reasonable from standpoint of shippers' costs in purchasing the documents. Since the minimum price of

0.9 cents for a 9-part bill is based on purchase of 4.5 million bills, use of that figure would understate costs to intervener tendering some 250,000 motor carrier shipments a year, and would ignore the obvious fact that, since respondents hold out to serve all shippers, many would doubtless purchase the documents in lots of 5,000 to 100,000, for which the average cost is 7 cents a set, compared with an average cost of 3 cents a set for like quantities of the 2-part bill. Reasonableness of proposed allowance is supported by intervener's evidence, which appears reasonably representative of shipper costs. Approved.—Id., pp. 169, 172.

49. Privately-owned (shipper-lessor) trucks.—[Vols. 15, 18].—That proportional all-commodity rates for movement of shippers' trailers to and from rail terminals, in conjunction with rail plan III TOFC service, produce charges differentially lower than those for similar shipments in normal joint-line motor service does not constitute an allowance for services and facilities furnished by shipper, which violates §225 because not specifically published as such; as the property transported under those rates is the trailer itself, loaded or empty, the trailer is not an instrumentality which carrier is obligated to furnish and for which an allowance must be published.—Proportional Rates between Harrisbury & Points in Pa., 315 I.C.C. 499 (502); Freight, All Kinds, between Harrisburg and Pa. Points, 316 I.C.C. 41 (44).

65. Publication of allowances required.—Vol. 16].—Under proposed per-trailer charges for terminal-to-terminal service, on shipments in carrier-owned trailers, owners of the property would render a loading and unloading service for which they are entitled to publication of a reasonable allowance under §225; such an allowance in excess of shipper's cost would be unjust and unreasonable. —Automobile Parts and Other Articles, Central Territory, 316 I.C.C. 143 (145).

Section 226. [§*325 U.S.C.*] **Investigation of motor vehicle sizes and weights and qualifications and hours of service of employees.**—[Unchanged. See vol. 11, p. 9585.]

Amendment, see footnote, p. 9585; historical notes, p. 9586, vol. 12, p. 10477.

Notes of Decisions

Volume 10—p. 8254; Volume 11—p. 9586; Volume 14—p. 11646; Volume 17—p. 13633; Volume 18—p. 14653.

Cross Reference

By provision of Executive Order 11340, dated March 30, 1967 (32 FR 5453, April 1, 1967), the date on which the Department of Transportation takes effect is April 1, 1967.

Sections 227, 228. [§§326, 327 *U.S.C.*]—[Unchanged. See vol. 11, p. 9586.]

PART III

INTERSTATE COMMERCE ACT; WATER CARRIERS

Chapter 12, Title 49, U.S. Code

Section 301. [§*901 U.S.C.*] **Short title.**—[Unchanged. See vol. 11, p. 9587.]

Section 302. (a), (b), (c), (d) [§*902 U.S.C.*] **Definitions; "water carrier," "common carrier by water."**—[Unchanged. See vol. 11, p. 9588.]

Notes of Decisions

§302(c): Volume 12—p. 10478; Volume 14—p. 11646; Volume 15—p. 12259; Volume 16—p. 12926; Volume 18—p. 14654.

§302(d): Volume 11—p. 9588; Volume 12—p. 10479; Volume 13—p. 11123; Volume 14—p. 11646; Volume 15—p. 12259; Volume 16—p. 12926; Volume 17—p. 13633; Volume 18—p. 14654.

§302(d). 1. Common carrier defined.—[Vols. 11, 15, 16, 18].—Contractual arrangements: [Vols. 12-14, 18].—Transferee authorized to operate as a carrier only by towing vessels in performance of general towage is the towing carrier when the towing is performed by others under contractual arrangements. The contract for towage of shippers' barges is evidenced by transferee's bill of lading, and the towage performed by others under contract with it is incidental to such transportation for the shipper, within exemption of §303(f)(2). And in absence of any pertinent regulations of the commission, transferee may lawfully hire towage under any contractual arrangements not in conflict with other maritime law, regulations, or custom.—Pittsburgh Towing Co.—Certificate Transfer—Zubik, 317 I.C.C. 661 (668, 670)*.

Ownership of vessel or facilities:—[Vol. 12].—Though transferee of authority for towage operations owns no towboats, and towage of shippers' barges is either performed by it with chartered towing vessels or by others under contract with it, there is no requirement in Part III that a water carrier must own or actually operate vessels; the statutory requirement is use of the vessel irrespective of ownership.—Pittsburgh Towing Co.—Certificate Transfer—Zubik. 317 I.C.C. 661 (668)*.

Towage: [Vols. 12, 13].—As a person engaged solely in towage, transferee is a "carrier" for regulatory purposes under Part III; but to fulfill its obligations to its shippers does not require the degree of control over the towing vessel that would be required of a freighting carrier over a cargo-carrying vessel.—Pittsburgh Towing Co.—Certificate Transfer—Zubik, 317 I.C.C. 661 (669)*.

Section 302. (e) [*§902(e) U.S.C.*] "Contract carrier by water."—[Unchanged. See vol. 11, p. 9589.]

Notes of Decisions

Volume 11—p. 9590; Volume 12—p. 10482; Volume 13—p. 11124; Volume 14—p. 11647; Volume 15—p. 12259; Volume 16—p. 12926; Volume 17—p. 13634; Volume 19—p. 15921.

1. Constitutionality.—Provisions of §302(e) which embrace the kind of vessel-furnishing business operated by appellant within statutory term "contract carrier by water," and consequently require one engaged in such business to obtain a permit authorizing such operations, do not offend the Due Process Clause of the Fifth Amendment. Due process requirements are satisfied if the law passed under authority of the Commerce Clause has a reasonable relation to a legitimate legislative purpose and is not arbitrary, capricious, or discriminatory.—Boylan v. United States, 310 F. 2d 493 (496, 498).

Due process does not require Congress to surrender foresight based on its judgment as to reasonable possibilities, or demand that the legislative hand be stayed until an anticipated evil has become a reality or demonstrably inevitable. It is a proper legislative purpose to deal with conditions inimicable to the public interest which, in the judgment of Congress, "might well" come about unless something is done about it. Thus, control of competitive pressure exerted by vessel-furnishers upon regulated water carriers was a proper legislative purpose and the statutory means of doing so—requiring permit authority—has a reason-

able relation to that purpose.—Id., p. 499.

While a long line of cases have held that a lessor of transportation equipment is not a "carrier," persons who furnish vessels to shippers are carriers by statutory definition. It is not significant that Congress chose to so categorize lessors of vessels; it could have termed them "vessel furnishers" and subjected them to the same regulation as contract carriers by water. Where legislative judgment as to reasonableness is questioned, judicial inquiry is restricted to issue whether any state of facts, known or reasonably assumable, affords support therefor; the statute must be deemed to have a reasonable basis in fact unless the contrary is apparent from its face or from facts which may be judicially noted.—Id., p. 500.

Although private lessors of vessels are subject to economic regulation, whereas private lessors of rail and motor transportation equipment are not, and interstate water carriers are in active competition with interstate rail and motor carriers, the Fifth Amendment contains no equal protection clause. At best, appellant calls attention to a lack of uniformity in the way Congress has exercised its power under the Commerce Clause; he has failed to show that lack of uniformity in existing laws is inappropriate to any proper legislative purpose. A legislative body may hit at an abuse which it has found, even though it has failed to strike at another; due process is not violated by §302(e), as applied under facts of record.—Id., pp. 500-1.

5. Contract carrier defined.—[Vols. 11-17, 19].—When appellant, under individual contracts or agreements, furnished his tug for compensation to a construction firm so latter could transport its own property (construction equipment loaded on its barge) in interstate commerce, he was engaging in the business of a "contract carrier by water," as defined in §302(e); such operations are subject to the permit requirements of the act. While it has been held, in a long line of cases, that a lessor of transportation equipment is not a "carrier," a lessor of vessels is a carrier by statutory definition.—Boylan v. United States, 310 F. 2d 493 (495-6, 500).

10. Exemption orders.—Application for order exempting proposed operation as furnisher of vessels to persons engaged in marine construction for use in transporting their own property, denied when service applicant would provide would be substantially competitive with service of existing authorized carriers who offer to transport contractors' equipment and supplies. Moreover, even if the situation were otherwise it is doubtful whether exemption should be granted in view of applicant's apparent lack of concern for the matter of regulation, as evidenced by its past arrangement of unauthorized transportation subject to the act.—Jack Neilson, Inc., Exemption, 321 I.C.C. 664 (677).

Respondent Atlas, holding exemption order as furnisher of a special barge to noncarriers for transportation of their own contractors' machinery and equipment on Mississippi River and tributaries between Vicksburg, Miss., and New Orleans, exceeded scope of that exemption when it leased its barge to respondent Neilson, which contracted with one shipper for movement of latter's property from Gale, Ill., on the upper Mississippi, to Fort Gaines, Ga., on the Chattahoochie, then with another shipper for movement from Coffeeville, Ala., to Port Lavaca, Tex. As a vessel furnisher, Atlas had obligation to ensure that its vessel was used in compliance with terms of its exemption, and its reliance on Neilson's status as an unregulated carrier of exempt commodities did not relieve it of that obligation. By leasing its barge without restriction on its use Atlas engaged in the business of a contract carrier without a permit, in violation of §309(f); cease-and-desist order entered.—Id., pp. 668, 676, 678.

Section 302. (f), (g), (h) [*§902 (f), (g), (h) U.S.E.*]—[Unchanged. See vol. 11, p. 9592.]

Notes of Decisions

§302(g): Volume 13—p. 11125; §302(h): Volume 11—p. 9592; Volume 12—p. 10483; Volume 15—p. 12261; Volume 18—p. 14655.

Section 302. (i) [§*902(i) U.S.C.*]—"Interstate or foreign transportation"—[Unchanged. See vol. 11, p. 9592.]

Historical notes, see vol. 14, p. 11649.

Notes of Decisions

Volume 11—p. 9593; Volume 12—p. 10484; Volume 13—p. 11126; Volume 14—p. 11649; Volume 15—p. 12261; Volume 16—p. 12927; Volume 17—p. 13635; Volume 18—p. 14655; Volume 19—p. 15922.

10. Transportation to or from a foreign country.—[Vols. 12, 14, 15, 17-19].—Canadian water carrier's transportation of passengers and property from Canadian Pacific ports to ports in Alaska is clearly not within meaning of "interstate or foreign commerce" as defined in §302(i)(1); and transportation of passengers and their property who will stay with the ship from the Canadian port of embarkation until its return thereto, with "shore-leave" stops at Alaska ports for sightseeing and other pleasure purposes, is not within definition of that term in §302(i)(3B), since, when passengers are given "shore leave" at one Alaskan place and thence transported to another and again given "shore leave," there is no element of transshipment. "Grandfather" application dismissed.—Canadian Natl. Steamship, 322 I.C.C. 436 (438).

Section 302 (j)—(m) [§*902 U.S.C.*] Definitions.—[Unchanged. See vol. 11, p. 9593, 9594.]

Section 303. (a) [§*903(a) U.S.C.*] Application of provisions; exemptions.—[Unchanged. See vol. 11, p. 9594.]

Section 303. (b) [§*903(b) U.S.C.*] Bulk cargo carriers; commodities.—[Unchanged. See vol. 11, p. 9594.]

Historical note, vol. 14, p. 11649; vol. 19, p. 15923.

Historical Note

The commission renews its recommendation that §303(b) relating to the water carrier bulk commodity exemption be repealed, but with provisions preserving rights of those carriers presently engaged in such operations under the exemption.—Annual Report, 1962, p. 208; Annual Report, 1963, p. 21.

Notes of Decisions

Volume 11—p. 9594; Volume 12—p. 10486; Volume 13—p. 11127; Volume 14—p. 11650; Volume 15—p. 12262; Volume 16—p. 12928; Volume 17—p. 13635; Volume 18—p. 14656; Volume 19—p. 15923.

1. In general.—[Vols. 11-19].—Where carrier A enters into affreightment contract with bulk shipper for through shipment of bulk grain to be transported as a §303(b) exempt tow and tows the barge to an intermediate point where it engages carrier B—authorized

to provide towage—to tow it to destination, and carrier B moves the barge in a mixed tow intermingled with barges of non-bulk commodities, inclusion of non-bulk during any portion of the through trip destroys the §303(b) exemption otherwise applicable to carrier A and subjects its affreightment contract to regulation for the entire trip. Bulk-cargo exemption applies only if bulk and non-bulk commodities are not moved in same tow at any time during entire trip for which exemption is claimed; the price for bulk exemption is no mixing. As carrier A is responsible for entire through trip under its affreightment contract, it cannot claim benefits of the exemption unless conditions of §303(b) are strictly observed throughout the trip; if it engages other carriers for towage, it must see to it that tower complies with those conditions. The commission's ruling, that carrier A is not exempt, sustained.—Gulf Canal Lines, Inc. v. United States, 258 F. Supp. 864 (866-8, 872-3)*.

Discrimination against exempt bargelines in ex-barge rates of rail carriers, see American Barge Line Co. case, §3(4), n. 43.

Section 303. (c) [*§903(c) U.S.C.*]—[Unchanged. See vol. 11, p. 9595.]

Section 303. (d) [*§903(d) U.S.C.*] **Liquid cargoes in bulk in tank vessels, exempt.**—[Unchanged. See vol. 11, p. 9595.]

Notes of Decisions

Volume 11—p. 9596; Volume 12—p. 10487; Volume 13—p. 11127; Volume 14—p. 11650; Volume 19—p. 15924.

Section 303. (e) [*§903(e) U.S.C.*] **Passenger transportation via foreign ports; Noncompetitive contract carriers.**—[Unchanged. See vol. 19, p. 15924.]

See vol. 19, p. 15924.]

Notes of Decisions

Volume 11—p. 9597; Volume 12—p. 10488; Volume 13—p. 11128; Volume 14—p. 11651; Volume 15—p. 12262; Volume 17—p. 13637; Volume 18—p. 14656; Volume 19—p. 15925.

Section 303. (f) [*§903(f) U.S.C.*] **Incidental water transportation, terminal services, subject to Part I or Part II, exempt.**—[Unchanged. See vol. 11, p. 9599.]

Amendments, see footnotes, p. 9599.

Notes of Decisions

Volume 11—p. 9600; Volume 12—p. 10489; Volume 13—p. 11128; Volume 14—p. 11651; Volume 17—p. 13637; Volume 18—p. 14657.

10. Service incidental to transportation by other carriers.—[Vols. 11-14, 17, 18].—In transferee's arrangements with towing contractors, it is immaterial that it is authorized to operate as a carrier only by towing vessels in performance of general towage. As the contract for towage of shipper's barges is evidenced by its bill of lading, transferee as the bill-of-lading carrier is the towing carrier, and actual performance by others under contractual arrangements with it is "incidental" to its transportation for the shipper, within exemption of §303(f)(2).—Pittsburgh Towing Co.—Certificate Transfer—Zubik, 317 I.C.C. 661 (668)*.

Where one water carrier is employed by

another to tow vessels between specified ports, such incidental towage is transportation by the latter under 303(f)(2).—Hambrick v. American Commercial Barge Line Co., 318 I.C.C. 527 (548).

Section 303. (g) [§*903(g) U.S.C.*] Intraharbor, contiguous harbors; small craft.—[Unchanged. See vol. 11, p. 9600.]

Notes of Decisions

Volume 11—p. 9601; Volume 12—p. 10491; Volume 13—p. 11129; Volume 14—p. 11651; Volume 15—p. 12263; Volume 16—p. 12928; Volume 17—p. 13637; Volume 18—p. 14657.

Section 303. (h) [§*903(h) U.S.C.*] Property transported that of the carrier; certificate of exemption; revocation.[Unchanged. See vol. 11, p. 9602.]

Notes of Decisions

Volume 11—p. 9602; Volume 12—p. 10493; Volume 13—p. 11130; Volume 17—p. 13638; Volume 19—p. 15925.

Section 303. (i), (j), (k), (l) [§*903(i)—(l) U.S.C.*]—[Unchanged. See vol. 11, p. 9603.]

Notes of Decisions

§303(j): Volume 12—p. 10493; Volume 14—p. 11652.

Section 304. (a)—(d) [§*904(a)—(d) U.S.C.*]—[Unchanged. See vol. 11, p. 9604.]

Historical Note

The commission recommends, in view of prohibitions in 18 USC §1001, that the IC Act and various related acts be amended to eliminate the mandatory requirement that certain reports, applications, and complaints be filed with the commission under oath, and that such oath provisions be made discretionary with the commission.—Annual Report, 1962, p. 209; renewed, Annual Report, 1963, p. 21.

Notes of Decisions

§304(c): Volume 11—p. 9604; Volume 12—p. 10493; Volume 13—p. 11130, Volume 14—p. 11652; Volume 15—p. 12264; Volume 16—p. 12928.

§304(c). 5. Classification of groups of carriers.—[Vols. 12-16].—Though transferee of general-towage authority owns no towboats, and towage of shippers' barges is either performed by it with chartered towing vesels or by others under contractual arrangements, Part III does not require a water carrier to own or actually operate vessels; the statutory requirement is use of the vessel. Since transferee's contract to tow a shipper's barge is evidenced by its bill of lading, it is the towing carrier, and towage performed for it by others under contract is incidental to its transportation for the shipper, within exemption of §303(f)(2). Its obligations to its shippers as a tower do not require the degree of control over the towing vessel that would be required of a freighting carrier over a cargo vessel, and its method of operation exclusively or largely with outside towage is not shown to violate any provision of Part III or regulations thereunder.—Pittsburgh Towing Co.—Certificate Transfer—Zubik, 317 I.C.C. 661 (668, 669, 670)*.

Regulations of the Commission

29 FR 4914, April 8, 1964, Part 500: New Subchapter E—Intermodal Transportation, Part 500 Practices of For-Hire Carriers of Property Participating in Trailer-on-Flatcar Service, §§500.1 - 500.8, added, effective July 6, 1964.

29 FR 8421, July 3, 1964, Part 500: Practices of For-Hire Carriers Participating in Trailer-on-Flatcar Service, effective date of order (29 FR 4914) postponed pending further order.

29 FR 11126, July 31, 1964, Part 51: New Part 51—General Requirements, added under the heading Parts 51-59, Consolidation, Finance, and Reorganization, effective Oct. 1, 1964.

29 FR 11273, Aug. 5, 1964, Part 500: Practices of For-Hire Carriers Participating in Trailer-on-Flatcar Service, effective date of order (29 FR 4914) fixed as Sept. 11, 1964.

29 FR 12508, Sept. 2, 1964, Part 500: Effective date of order (29 FR 4914) as amended (29 FR 11273) postponed until further order.

31 FR 8573, June 21, 1966, Part 6, Fees for Service Performed in Connection with Licensing and Related Activities, amended, effective July 22, 1966.

NOTE: For recodification, see 49 CFR, Editorial Note, 32 FR 5606, April 5, 1967.

32 FR 12689, Sept. 1, 1967, Part 600 [formerly Part 500]: Practices of For-Hire Carriers of Property Participating in Trailer-on-Flatcar Service, effective date, except as to §§600.7 and 600.8, is Aug. 18, 1967; §600.7 shall become effective Nov. 16, 1967, and §600.8 shall become effective Feb. 18, 1968.

32 FR 13414, Sept. 23, 1967, Part 106 [formerly Part 6]: Fees, §106.2 Filing fees, amended, effective Oct. 20, 1967.

Section 304. (e)[*§904(e) U.S.C.*] Investigation of complaints; orders.—[Unchanged. See vol. 11, p. 9605.]

Notes of Decisions

Volume 16—p. 12929; Volume 17—p. 13638.

25. Transportation without requisite authority.—Although respondent Neilson contends that it acted as a broker in arranging for transportation of contractors' equipment for two shippers, Part III contains no provisions relating to functions or regulation of brokers of water transportation. Under tests of use of transportation facilities discussed in 250 ICC 639, it appears that Neilson was merely a broker or agent as to that part of the transportation performed for one shipper from Gale, Ill., to New Orleans, since towers who performed the service retained control and use of their towing vessels and the barge obtained by Neilson for shipper's use; but as to remainder of that movement, from New Orleans to Fort Gaines, Ga., and as to the subsequent transportation for the other shipper from Coffeeville, Ala., to Port Lavaca, Tex., Neilson had the right to exclusive use and control of the towing vessel and the barge and was responsible as a carrier within meaning of Part III for the operations conducted thereby.—Jack Neilson, Inc., Exemption, 321 I.C.C. 664 (675, 676).

Regardless of whether Neilson functioned as a carrier or as a broker with respect to all or part of the considered transportation, it acted unlawfully in either capacity, since the transportation was not exempt, and, in engaging unauthorized carriers to perform services which could not lawfully be performed without authority, Neilson, which has no authority, was responsible as an accessory to the unlawful operations. Neilson apparently gave no thought to the matter of authority and made no inquiry in that respect of the towers it engaged. Considering the warning previously given it by a commission representative concerning its unlawful operations, and its more recent use of vessels of others to perform an unauthorized operation itself as a carrier, and in arranging for unlawful operations by the other carrier respondents, Neilson is chargeable with deliberate disregard for the provisions of the act. Cease-and-desist order entered.—Id., pp. 676-7.

None of respondent towing companies—the one engaged by Nielson to tow the barge from Gale to New Orleans, the one which under contract with that carrier towed it from Gale to Vicksburg where it was turned over to the other, and the one engaged to perform the remainder of the towage movements

considered—held any authority to perform the service involved, but either relied on Neilson for the requisite authority or were simply unconcerned with whether authority was required. However, only the first two retained control of their vessels and crews during the portion of the trip performed by each and were responsible as principals for the unauthorized transportation; cease-and-desist order entered against those two.—Id., pp. 670, 676, 678; and as there is no evidence that either shipper knowingly or willfully violated the law, investigation is discontinued as to them, but both are admonished to exercise care in future to employ only carriers holding appropriate authority from the commission.—Id., p. 677.

Modified Procedure

215. In general.—[Vol. 16].—Respondent's motion to strike references in protestants' exceptions to comparison of the parties' rates on ground that it was not permitted to testify concerning rate comparisons at oral hearing, overruled. Comparison of the rates was introduced by protestants in their statement of facts and argument, and respondent did not request cross-examination on the matter; respondent was afforded ample opportunity to present evidence thereon in its statements under modified procedure.—Towing Rates, Pittsburgh Towing Co., 321 I.C.C. 366 (367).

Section 305. (a) [*§905(a) U.S.C.*] Reasonable rates, fares, charges; classifications, regulations, practices.—[Unchanged. See vol. 11, p. 9605.]

Notes of Decisions

Volume 11—p. 9606; Volume 12—p. 10494; Volume 13—p. 11131; Volume 14—p. 11653; Volume 15—p. 12264; Volume 16—p. 12929; Volume 17—p. 13639; Volume 18—p. 14658; Volume 19—p. 15926.

25. Competition considered.—[Vols. 14-19].—Disabilities of Seatrain's rail-water-rail service are not shown to require rates differentially under respondent Sea-Land's in order to share in considered rubber traffic; each service has its own disabilities, which to considerable extent offset each other; moreover, interested shippers testified that Sea-Land's service offers no particular advantage and would not be used at rates higher than Seatrain's. Thus no justification appears for interfering with Sea-Land's effort to meet existing competition; its proposal is to meet, not to go below, Seatrain's rate level; both carriers participated in the traffic at equal rates in the past, and there is no reason to assume they would do otherwise under rate equality proposed; Sea-Land's proposed single-factor rate is shown to be compensatory; approved.—Synthetic Rubber, Baytown and Houston, Tex., to Conn;, 315 I.C.C. 649 (653, 654).

Under former parity of rates on drugs and related articles, both Sea-Land and Seatrain were able to compete effectively for the traffic, but Sea-Land's competitive position was impaired after Seatrain established incentive rates for its rail-water-rail service. As that and Sea-Land's motor-water-motor service appear to be of equal value to volume shippers, who testified that they would not use Sea-Land's service at rates higher than Seatrain's, Sea-land's reduced incentive rates, the same as Seatrain's, on weight of shipments in excess of 40,000 pounds, are competitively necessary and, being fully compensatory, are approved.—Drugs and Related Articles from N.J. and N.Y. to Tex., 318 I.C.C. 67 (76, 77).

28. Reasonableness, relatively.—[Vol. 18].—Although Seatrain seeks a favorable rate differential under Sea-Land's rate on carbon blacks because it is the low-cost carrier, that factor is not controlling when Sea-Land's rate generally meets or exceeds its fully distributed costs and, as it is the same as Seatrain's between points where there is an appreciable movement of that traffic, it does

not appear that Seatrain cannot compete effectively for the traffic. There is little difference in the two services: Seatrain's main operational disadvantage stems from its use of boxcars compared with Sea-Land's use of truck-body containers, and does not justify prescription of a rate differential. Sea-Land's rate found lawful.—Carbon Black from Tex. and La. to N.J. and Pa., 318 I.C.C. 339 (344).

Relative advantages and disadvantages of Seatrain Lines' rail-and-water (boxcar) and Sea-Land Service's motor-and-water (container) services are not such as to warrant differentials in rates on same traffic between same points.—Plastics, Texas to New Jersey, New York, & Pennsylvania, 321 I.C.C. 115 (117).

Evidence; Presumptions; Admissions as to Reasonableness

70. Comparisons of rates, generally.—[Vols. 11, 12, 14, 15, 18].—Comparisons of assailed rates from Pittsburgh district to Tennessee River ports with rates on similar traffic to points on Ohio and lower Mississippi Rivers have little value; size of locks on the Tennessee as compared with the Ohio, also differences in volume and balance of traffic on the three rivers, are operational factors which cannot be ignored; moreover, whereas the Tennessee is a slack-water river, barge tows can be moved down the lower Mississippi with the current and without delay due to locks, at less cost per mile to the carrier than on the other two waterways. Thus, in absence of cost data, rates to the compared Ohio and lower Mississippi points do not represent the maximum level of reasonableness to the Tennessee River ports, and in light of such differences in operating conditions the rate advantage of the lower Mississippi River ports cannot be found undue or unreasonable.—Hambrick v. American Commercial Barge Line Co., 318 I.C.C. 527 (538).

Cost of Service

101. Terminal services.—[Vol. 15].—Charge for local cartage is a direct expense incurred by respondent, not related to through motor-water rate, and therefore not a division of revenues.—Razors and Related Articles, Boston, Mass., to Houston, 318 I.C.C. 97 (99); but instead of using average interline expense for all trailers interchanged at New York, the portion of interline expense which is variable with time the equipment is in possession of connecting carriers should have been developed to reflect any differences in that time attributable to different destinations or lengths of haul.—Id., p. 100.

102. Operating costs.—[Vols. 14-17, 19].—Reduced motor-water-motor rates on weight of shipments of drugs and related articles in excess of 40,000 pounds, from Jersey City-Newark and New York City areas to Texas, are compensatory when to Houston they approximate 152 and 150 percent, and to Dallas 106 and 108 pereent, of fully distributed costs. While such costs were developed on basis of an entire excess weight shipment, such relation of rate to cost was based only on the incentive rate, and a true measure of compensativeness—comparison of costs with weighted average rate for the shipment—would afford even stronger support for compensativeness of considered rates.—Drugs and Related Articles from N.J. and N.Y. to Tex., 318 I.C.C. 67 (76).

Sea-Land's use of territorial average costs of connecting motor-carriers in its cost data appears appropriate because of the number of origins involved and the number of different motor carriers participating in considered joint rate.—Carbon Black from Tex. and La. to N.J. and Pa., 318 I.C.C. 339 (343).

Although respondent's initial intercoastal operations were necessarily of a break-bulk, stopgap nature pending completion of its trailership facilities, its cost study reflecting those operations has material bearing to show compensativeness of considered intercoastal any-quantity class and commodity rates under present more economical trailership operation. Coupled with fact that most of the rates under investigation, particularly on shipments of 2,500 pounds and over, represent increases over prior rates, that study indicates that the considered rates are even more remunerative for trailership service and are reasonably compensatory.—Intercoastal Any-Quantity Class and Commodity Rates, 319 I.C.C. 357 (360, 361).

Seatrain's reduced rates on plastics from Texas to New York and New Jersey points substantially exceed fully distributed costs computed on joint costs of the rail and water carriers; as a majority of the rates are covered by agreements between the parties, that method of costing fully supports finding that those rates are compensatory; and as Seatrain is shown to have a very substantial cushion of profit, and its port-to-port rate is not shown to exceed its costs, both the nonconcurring (combination) rates and the port-to-port rate are also compensatory. Sea-Land's motor-water-motor rates in same amounts as the Seatrain rates are likewise compensatory when they exceed its out-of-pocket costs. Both sets of rates approved.—Plastics, Texas to New Jersey, New York, & Pennsylvania, 321 I.C.C. 115 (118).

Although protestant criticizes Sea-Land's failure to recognize a directional empty movement in its operations, since number of loaded trailers moving northbound from Jacksonville to the port of Newark is greater than the southbound loaded movement, Sea-Land's equal apportionment to its loaded movement of cost of moving empty trailers satisfies the cost principle that vessel costs at sea are by nature joint for the round trip.—Frozen Juice and Fruit from Florida to the North, 319 I.C.C. 577 (589); and though protestant contends that the higher-than-average ownership cost of refrigerated trailers used for considered citrus traffic should, for the southbound movement, be a charge against the northbound traffic, such higher ownership and depreciation costs are joint to all traffic handled in the containers, regardless of direction, and there is no cost-of-service basis for distributing that cost other than equally over the total loaded movements in both directions.—Id., p. 590.

Although no underlying data were presented to show accuracy of amount of $19,286 which protestants claim should be included in respondent's costs of operation with "outside" towage by independent contractors, and their unsupported statement that charges for such towage were currently depressed owing to temporary oversupply of towing service is entitled to little weight, even including that amount and an allowance for profit based on an operating ratio of 95 percent respondent's increased rates for towage of shippers' barges would still generally exceed its costs in connection with outside towage. On that basis, ton-mile expense including allowance for empty return would be 3.142 mills per ton-mile, and the rates for representative movements would exceed fully distributed costs in all but one instance by 2 to 51 cents. Thus the proposed rates are generally compensatory for application exclusively in connection with outside towage.—Towing Rates, Pittsburgh Towing Co., 321 I.C.C. 366 (370).

111. Wages; prices; taxes.—[Vols. 14, 16, 18].—By act of June 28, 1962, §5, provisions of statute imposing 10-percent tax on amounts paid for transportation of persons, 26 USC §4261, were amended so as to apply to such transportation beginning before Nov. 16, 1962. Public Law 87-508, 87th Congress, H. R. 11879.

Rates, by Commodities

125. Commodities; characteristics; rates prescribed or approved.—[Vols. 11-19].—Part I, §1(5), n. 350; Part II, §216(b), n. 125. ***Carbon black:*** Sea-Land's rate, $1.56, minimum 65,000 pounds, by motor-water-motor, on carbon black, in packages or bags, from points in Louisiana and Texas to New Jersey and Pennsylvania points, from Sherlington, La., to the same destinations, and from 4 other Louisiana points to Trenton, N.J., found lawful.—Carbon Black from Tex. and La. to N.J. and Pa., 318 I.C.C. 339.

Coal: [Vols. 11, 17, 18].—Initial joint rail-water rates on coal from Illinois-Indiana mine groups to upper lake ports for transshipment beyond the docks by rail, barge, or truck, ranging from $2.67 to $3.17 per net ton, found not shown to be unjust, unreasonable, or otherwise unlawful.—Chicago, B. & Q. R. Co. v. Chicago & E.I. R. Co., 322 I.C.C. 138*.

Drugs, medicines, toilet preparations: Reduced single-factor motor-water-motor commodity rates on certain acids, chemicals, drugs, medicines, and toilet preparations, 118 cents from Jersey City and Port Newark, N.J., terminals and 138 cents from New York

City and New Brunswick and Wharton, N.J., rate groups to Dallas and Fort Worth, Tex., and 136 and 156 cents, respectively, to Houston, Tex., to apply on weight of shipments in excess of 40,000 pounds, approved as compensatory and no lower than necessary to meet rail-water-rail competition.—Drugs and Related Articles from N.J. and N.Y. to Tex., 318 I.C.C. 67.

Fruits: [Vol. 11].—Increased Sea-Land rate 140.5 cents, minimum 70,000 pounds, on citrus fruits and frozen juices and concentrates from Florida to New York City and points grouped therewith, and $1.40 rate, minimum 31,000 pounds, from Jacksonville, approved as just and reasonable.—Frozen Juice and Fruit from Florida to the North, 319 I.C.C. 577.

Grain, grain products: [Vol. 19].—Joint rail-water rates 28 to 36 cents per 100 pounds on corn and wheat in bulk, based on a fixed quantity booked in advance for water movement, from St. Louis and Illinois and Indiana points on Chicago & E.I.R. to Buffalo, approved as just, reasonable, and otherwise lawful.—Rail-Water, Grain in Bulk, from Mo., Ill., & Ind. to Buffalo, 319 I.C.C. 123*.

Lumber: [Vol. 11].—Common and contract carrier rates on surfaced lumber from certain Oregon and Washington ports, $12 per 1,000 board feet to Los Angeles and $12.50 to San Diego, and $12, $13.25, and $13.75 from Seattle to San Francisco, Monterey, and San Diego, respectively, with rates $2 higher on rough lumber, appear compensatory and otherwise lawful if made subject to agreed conditions fixing a minimum tender of 500,000 board feet, providing for loading charges when vessel is shifted to a second dock at shipper's request to complete loading, and requiring delivery to vessel in sufficient volume for expeditious loading.—Rough and Surfaced Lumber from Oregon to California, 318 I.C.C. 363.

Plastics, products: Reduced water, rail-water, rail-water-rail, motor-water, and motor-water-motor rates on synthetic plastics from Texas origins to New York City rate group, 106 and 101 cents, respectively, on minima 70,000 and 80,000 pounds from Houston and Texas City, and 116 and 111 cents from Freeport, North Seadrift, and Orange, approved as reasonable and not shown to be unlawful.—Plastics, Texas to New Jersey, New York, and Pennsylvania, 321 I.C.C. 115.

Miscellaneous: [Vol. 11].—Truck-water-truck rates of $1.53, minimum 50,000 pounds, and $1.03 on excess in single shipment using not more than 2 vehicles, on various articles, including electric wire and cable, New York City and New Brunswick, N.J. to Houston, Tex., found just and reasonable; will not constitute a destructive competitive practice.—Electric Wire, Cable, from New Yqrk and New Brunswick, 316 I.C.C. 75 (79).

Motor-water incentive rate, 217 cents, on weight in excess of 40,000 pounds on razor blades and related articles from Boston, Mass., to Houston, Tex., approved as compensatory.—Razors and Related Articles, Boston, Mass., to Houston, 318 I.C.C. 97.

Sea-Land Service's local port-to-port and joint single-factor motor-water, water-motor, and motor-water-motor any-quantity class and commodity rates on general freight moving intercoastal between Pacific coast States and New England and middle Atlantic States, made in relation to rates of overland forwarders on same general pattern as rates for Sea-Land's Atlantic coastwise and gulf services, found reasonably compensatory and otherwise lawful; §4 relief granted for the joint commodity rates.—Intercoastal Any-Quantity Class and Commodity Rates, 319 I.C.C. 357.

Rubber: [Vol. 11].—Single-factor motor-water-motor rate 126 cents, minimum 108,000 pounds, on synthetic rubber from Baytown and Houston, Tex., to Bridgeport, East Norwalk, Fairfield, New Haven, Norwalk, Stratford, and West Haven, Conn., found just and reasonable.—Synthetic Rubber, Baytown and Houston, Tex., to Conn., 315 I.C.C. 649.

Sugar: [Vol. 18].—Reduced rates on sugar, minimum 600 tons, from gulf ports to Ohio River crossings, of which rate from New Orleans to Cincinnati, $5.70 per ton or 28.5 cents per 100 pounds, not including transfer from barges to rail cars or trucks, is representative, approved as fully compensatory and otherwise lawful.—Sugar, South to Indiana, Ohio River, Intermediate Points, 319 I.C.C. 782*.

Rates for Special Classes of Service; Practices

420. Towage.—Mileage rates proposed for towage of shippers' barges are not shown to be compensatory; protestants' cost data indicate that they would not meet costs of service, and cancellation of provision requiring shippers to insure cargo and barge could be expected to increase carrier's costs; evidence is inadequate for determining a proper relation between rates for affreightment and for towing services, or a minimum level of rates for respondent on Ohio River; not approved. —Towing Rates between Points on the Ohio River, 315 I.C.C. 583 (584, 586, 587).

Increased bargeload towing rates $1.05 to $2.95 per ton on all commodities, minimum 500 tons, in shipper-owned barges, between points on Ohio River and tributaries, ranging from 59 to 85 percent of protestants' towing rates, are noncompensatory for towage with chartered towboats when costs of chartering a towboat exceed such rates except for the two shortest hauls, but are generally compensatory and on high enough level to enable respondent to conduct a profitable operation when used exclusively in connection with outside towage (performed by others under contractual arrangements), since costs for such movements are in all instances below the proposed rates for representative movements; approved for application exclusively in connection with outside towage. However, as lawfulness of respondent's operating practices is under consideration in another proceeding, it is to be understood that an adverse finding therein would necessarily affect the instant findings.—Towing Rates, Pittsburgh Towing Co., 321 I.C.C. 366.

Rules, Regulations, Practices

460. Demurrage.—[Vols. 15, 18].—See Rail-Water, Grain in Bulk case, §15(7), n. 77a.

529. Tender; loading.— Conditions agreed on by respondents to govern application of rates on lumber and products from Oregon and Washington to California ports, (1) fixing a minimum tender of 500,000 board-feet, to be discharged at not more than two docks at one destination port; (2) providing a charge, when after loading of such minimum at one dock vessel is shifted to a second at same port at shipper's request for loading of a lesser amount, of 50 cents per 1,000 feet on portion so loaded, subject to a minimum charge of $125; and (3) requiring delivery to vessel in sufficient volume for loading at a rate of not less than 100,000 board-feet per hour per gear, constitute an informed judgment of what is operationally desirable and practical for handling the traffic, and would aid materially in developing the stable and economical service to which the public is entitled. Respondents will be expected to incorporate the text of those conditions in revised schedules. —Rough and Surfaced Lumber from Oregon to California, 318 I.C.C. 363 (367-8).

See also Rail-Water, Grain in Bulk case, §15(7), n. 77a.

Section 305. (b) [*§905(b) U.S.C.*] Duty to establish through routes, joint rates; divisions.—[Unchanged except that the new sentence, below, was inserted between the second and third sentences thereof by §2 of act of Aug. 24, 1962, Pub. Law 87-595, 76 Stat. 938. See vol. 11, p. 9612.]

Common carriers by water subject to this part may also establish reasonable through routes and joint rates, charges, and classifications with common carriers by water subject to the Shipping Act, 1916, as amended, or the Intercoastal Shipping Act, 1933, as amended (including persons who hold themselves out to transport goods but who do not own or operate vessels) engaged in the transportation of property in interstate or foreign commerce between Alaska or Hawaii on the one hand, and, on the other, the other

States of the Union, and such through routes and joint rates, and all classifications, regulations, and practices established in connection therewith shall be subject to the provisions of this part.

Notes of Decisions

Volume 11—p. 9612; Volume 12—p. 10495; Volume 13—p. 11131; Volume 15—p. 12267; Volume 16—p. 12931.

2. Construction and interpretation.—[Vols. 11, 12, 16].—Since defendant bargeline affords single-line service on considered traffic from Pittsburgh district to Tennessee River ports and no public need is indicated for through routes and joint rates with another bargeline beyond Paducah, there is no violation of §305(b) in failure to establish such rates.—Hambrick v. American Commercial Barge Line Co., 318 I.C.C. 527 (538-9).

Section 305. (c) [§*905(c) U.S.C.*] Undue preferences or prejudices prohibited.—[Unchanged. See vol. 11, p. 9612.]

Notes of Decisions

Volume 12—p. 10495; Volume 14—p. 11655; Volume 15—p. 12267; Volume 16—p. 12932; Volume 18—p. 14660; Volume 19—p. 15928.

20. Localities.—[Vol. 19].—Although lower Mississippi River ports are shown to be in an advantageous position ratewise, compared with Tennessee River ports, in barge movement of iron and steel articles from Pittsburgh district, complainant has not met its burden of showing such advantage to be undue or unreasonable in light of differences in operating conditions on those waterways, particularly heavier volume of traffic on the lower Mississippi and fact that barge traffic can move downstream with the current and without delay due to locks, at less cost per mile to the carrier than to the Tennessee River ports. Thus there is no sound basis for a preference and prejudice finding.—Hambrick v. American Commercial Barge Line Co., 318 I.C.C. 527 (538, 539).

25. Shippers.—[Vols. 15, 16, 18].—Although forwarders are not specifically included in §305(c), Congress clearly intended a forwarder to stand in a shipper relation to any underlying carrier subject to Part I, II, or III. Complainant forwarder's objection to examiner's ruling that he could not raise issue of undue preference or prejudice in assailed barge rates under that section, and that intervener's attempts to show violation thereof unduly extended issues in complaint proceeding, contrary to Rule 72 of Rules of Practice, sustained.—Hambrick v. American Commercial Barge Line Co., 318 I.C.C. 527 (529).

Section 305. (d) [§*905(d) U.S.C.*] Interchange of traffic.[Unchanged. See vol. 11, p. 9613.]

Notes of Decisions

Volume 13—p. 11132; Volume 14—p. 11656; Volume 15—p. 12268; Volume 17—p. 13640.

Section 306. (a) [§*906(a) U.S.C.*] Schedule of rates, fares, and charges; filing and posting; content.—[Unchanged. See vol. 11, p. 9613.]

Notes of Decisions

Volume 11—p. 9614; Volume 12—p. 10496; Volume 14—p. 11656; Volume 15—p. 12268; Volume 16—p. 12932; Volume 18—p. 14661; Volume 19—p. 15929.

136. Plain and definite statement required.—[Vols. 16, 19].—Part I, §6(1), n. 136; Part II, §217(a), n. 10.—Although freight bills covering two bargeload movements for one shipper were introduced to show that defendant bargeline's multiple bill-of-lading provisions permit individual shippers to perform forwarder services in violation of §411(b), those movements appear to have been multiple shipments by one consignor to more than one consignee, as contemplated by §402(c)(1). However, as defendant's tariff provisions concerning issuance and use of multiple bills of lading are not clear, it will be expected to revise them to prevent misinterpretation.—Hambrick v. American Commercial Barge Line Co., 318 I.C.C. 527 (537).

Section 306. (b) [§*906(b) U.S.C.*] Form and manner of publishing, filing, posting schedules; unlawful use.—[Unchanged. See vol. 11, p. 9614.]

Section 306. (c) [§*906(c) U.S.C.*] Deviation from tariff rates forbidden.—[Unchanged. See vol. 11, p. 9615.]

Notes of Decision

Volume 11—p. 9615; Volume 12—p. 10497; Volume 15—p. 12269; Volume 16—p. 12933; Volume 17—p. 13642; Volume 18—p. 14663; Volume 19—p. 15929.

Section 306. (d) [§*906(d) U.S.C.*] Transportation without published schedules forbidden; change in rates.—[Unchanged. See vol. 11, p. 9615.]

Notes of Decisions

Volume 12—p. 10498.

Section 306. (e) [§*906(e) U.S.C.*] Establishment, filing and publication of schedules and rules affecting rates; notice of changes; deviation from rates forbidden.—[Unchanged. See vol. 11, p. 9616.]

Notes of Decisions

Volume 16—p. 12934; Volume 17—p. 13641.

25. Schedules; publication; content.—[Vol. 16].—Although defendants have not been shown to be conducting motor pickup and delivery service beyond maximum permissible limits of their terminal areas, their tariffs as filed do not adequately describe operations

offered or scope of their terminal areas; present tariffs ordered canceled without prejudice to filing of new tariffs in line with the findings.—Sause Bros. Ocean Towing Co. v. W.R. Chamberlin & Co., 91 M.C.C. 199 (204).

Section 307. (a)-(c) [§*907 U.S.C.*]—[Unchanged. See vol. 11, pp. 9617-8.]

Historical Note

The commission recommends, in view of the prohibitions in 18 USC §1001, that §307(a) be amended so as to eliminate the mandatory oath provision therein, and that such requirement be made discretionary with the commission.—Annual Report, 1964, p. 72.

§307(b). 5. Parties.—Bargeline which did not participate in assailed rates but was employed by another to tow vessels between specified ports was properly dismissed as defendant; such incidental towage is transportation by the employing carrier under §303(f)(2).—Hambrick v. American Commercial Barge Line Co., 318 I.C.C. 527 (528).

Section 307. (d) [§*907(d) U.S.C.*] Establishment of through routes, joint classification, joint rates, fares, etc; differentials.—[Unchanged. See vol. 11, p. 9618.]

Notes of Decisions

Volume 12—p. 10498; Volume 14—p. 11657; Volume 15—p. 12269; Volume 16—p. 12934; Volume 17—p. 13642; Volume 19—p. 15930.

Historical Note

The commission recommends the parts I, II, and III be amended to authorize the commission, after investigation and hearing, when necessary and desirable in the public interest, to require establishment of through routes and joint rates between motor common carriers of property and between those carriers and carriers by rail, express, and water.—Annual Report, 1962, p. 201; renewed, Annual Report, 1963, p. 19, Annual Report, 1964, p. 69.

100. Joint rates, fares, and charges.—[Vols. 15-17, 19].—See Candy and Confectionery from N.J., N.Y., & Pa. to Tex., §15a(3), n. 2; and Rail-Water, Grain in Bulk case, §15a(3), n. 2; §307(g), n. 10.

150. Differentials.—[Vols. 15-17, 19].—Seatrains' contention that it must have differentially lower rates than Sea-Land to offset various disabilities claimed to make rail-water-rail service less attractive than motor-water-motor is not substantiated; interested shippers testified that they consider those services similar, and that Sea-Land could not share in the traffic involved except on rate parity with Seatrain. Determination of the low-cost carrier is not important in passing on reasonableness of Sea-Land's reduced incentive rates on drugs and related articles when they exceed its fully distributed costs and do not go below level of Seatrain's incentive rates or fully distributed costs; in those circumstances, requirement of a differential is not warranted.—Drugs and Related Articles from N.J. and N.Y. to Tex., 318 I.C.C. 67 (76-7).

Section 307. (e) [§*907(e) U.S.C.*] Commission to establish just divisions of joint rates, fares, or charges; adjustments.—[Unchanged. See vol. 11, p. 9619.]

Notes of Decisions

Volume 12—p. 10499.

Section 307. (f) [§*907(f) U.S.C.*] Transportation needs and fair return considered in determining rates, etc.—[Unchanged. See vol. 11, p. 9620.]

Historical notes, see vol. 11, p. 9620, vol. 12, p. 10499.

Notes of Decisions

Volume 11—p. 9620; Volume 13—p. 11133; Volume 14—p. 11658; Volume 15—p. 12271; Volume 16—p. 12937; Volume 17—p. 13643.

Section 307. (g) [§*907(g) U.S.C.*] New rates; determination of lawfulness by commission.—[Unchanged. See vol. 11, p. 9621.]

Notes of Decisions

Volume 11—p. 9622; Volume 12—p. 10499; Volume 16—p. 12937; Volume 19—p. 15932.

10. Burden of proof.—[Vols. 11, 17, 19].—Part I, §15(7), n. 35; Part II, §216(g), n. 5—Investigation having been instituted before effective date of proposed rates, burden is on proponent to show that they are just and reasonable, notwithstanding discontinuance of suspension. That burden is not met when the only evidence bearing on their compensativeness indicates that they would not meet operating costs of the service. Respondent's request for further hearing to submit additional evidence is denied when petition fails to establish that such evidence would reveal any material change in or addition to facts already of record.—Towing Rates between Points on the Ohio River, 315 I.C.C. 583 (584, 586, 587).

To come under the protection of the act against unfair or destructive competition, a motor carrier or forwarder protesting proposed water-carrier rates must first establish that it possesses a cost advantage, or must bear the consequences of its failure to do so.—Intercoastal Any-Quantity Class and Commodity Rates, 319 I.C.C. 357 (361).

Joint rates published by water carrier for rail-water movement of bulk grain are initial rates as to which protestants have the burden of proof. There have been no through combination rates subject to the act on considered movements, since water respondent's port-to-port rates applicable on packaged grain require issuance of a separate bill of lading, and its past transportation of bulk grain has been under §303 exemption. Rail respondent's concurrence in its tariff did not bring the joint rates within purview of §15(7) so as to impose a burden of proof on the water carrier, since exemption initially lost thereby renders the publication "initial," though water carrier's status is "changed," now being subject to regulation. Otherwise, a new or exempt water carrier could never file in the first instance joint rates with rail connections without subjecting itself to limitations not of its own making, but imposed on it solely because of the form of publication and fact that the railroad is already subject to rate regulation; this would be a subversion of substance to form of publication.—Rail-Water, Grain in Bulk, Mo., Ill., and Ind. to Buffalo, 321 I.C.C. 564 (565-6)*.

It is significant that, while both §15(7) and §307(g) provide expressly for suspension and/or investigation of "a new rate," which encompasses both changed and initial, each places the burden of proof on the proponent

only of a "changed" rate. Distinction between meaning of the two terms is readily apparent from the exception from provisions of §307(g) of any "initial" schedule filed before a specified date, and further support for this distinction is found in similar provisions of §§216(g), 218(c), 307(i), and 406(e). Thus, within the entire statutory framework there is consistently recognized an express difference between an "initial" and a "changed" rate, and express identification of the parties on whom the burden of proof falls. This view is consistent also with provisions of §7(c) of Administrative Procedure Act, whereby the proponents of an order, such as protestants of an "initial" rate proposal, have the burden of proof.—Id., pp. 566-7. [But see dissent.]

See also Terminal Charge on Order Bills of Lading Shipments, §216(g), n. 5.

15. Orders as to suspended rates.—[Vol. 19].—Since §307(g) authorizes the commission to investigate new rates or regulations, with or without suspension, it has no burden under §7(c) of Administrative Procedure Act to show lawfulness of order discontinuing suspension and continuing investigation of proposed rates.—Towing Rates between Points on the Ohio River, 315 I.C.C. 583 (586).

27. Particular issues; reasonableness.—[Vol. 16].—Proposed rates in connection with truck-water-truck services provide for utilization of two containers per shipment; however, rates subject to a minimum weight in excess of the physical or legal carrying capacity of the motor vehicles are not unlawful per se, and are not contrary to law merely because they are on the same basis as rail incentive rates.—Electric Wire, Cable, from New York and New Brunswick, 316 I.C.C. 75 (77).

In determining compensativeness of proposed incentive rate on weight of shipments in excess of 40,000 pounds, protestant's comparison of respondent's costs for average excess weight of 15,000 pounds with rate applicable to that excess lacks probative value because (1) the incentive rate is inoperative until the 40,000-pound minimum has been exceeded and thus cannot stand alone, and (2) assuming 55,000 pounds to move without additional loading of the containers with other freight, costs should be computed on equal division of weight between the two containers, on which basis protestant's cost estimate is well below the normal rate and the incentive rate. Proper comparison is between aggregate revenue from a shipment with aggregate cost of that shipment; on that basis revenue from a 55,000-pound shipment would exceed fully distributed cost by almost 50 percent; approved.—Razors and Related Articles, Boston, Mass., to Houston, 318 I.C.C. 97 (100-1).

Sea-Land's proposed rates on citrus fruits and juices from Florida to New York metropolitan group are just and reasonable when they are fully compensatory and protesting motor carriers have not shown that they have an inherent cost advantage in competing with Sea-Land.—Frozen Juice and fruit from Florida to the North, 319 I.C.C. 577 (597).

See also Rough and Surfaced Lumber case, §307(h), n. 25.

Section 307. (h), (i) [*§907 (h), (i) U.S.C.*] —[Unchanged. See vol. 11, pp. 9622, 9623.]

Historical Note

The commission recommends, in view of the prohibitions in 28 USC §1001, that §307(h) be amended so as to eliminate the mandatory oath provision therein, and that such requirement be made discretionary with the commission.—Annual Report, 1964, p. 72.

Notes of Decisions

§307(h): Volume 16—p. 12938; §307(i): Volume 11—p. 9624.

§307(h). 25. [Vol. 16].—What considered in determining reasonableness.—[Vol. 16].—Since in the water carrier lumber trade on Pacific coast there are none of the traditional distinctions between contract and common carriers, rules and regulations gov-

erning the service should apply equally to all. Conditions agreed on by respondents to govern application of rates on lumber and products from Oregon and Washington to California ports, (1) fixing a minimum tender of 500,000 board-feet, to be discharged at not more than two docks at one destination port; (2) providing a charge, when after loading of such minimum at one dock vessel is shifted to a second at same port at shipper's request for loading of a lesser amount, of 50 cents per 1,000 feet on portion so loaded, subject to a minimum charge of $125; and (3) requiring delivery to vessel in sufficient volume for loading at a rate of not less than 1,000 board-feet per hour per gear, constitute an informed judgment of what is operationally desirable and practical for handling such traffic.—Rough and Surfaced Lumber from Oregon to California, 318 I.C.C. 363 (365, 367-8).

However, since one respondent is the only carrier serving certain small Oregon ports, and, though a minimum exceeding 150,000 board-feet would work hardship to small mills shipping through those ports, it would be uneconomical to enter them for less than 500,000 board-feet, the minimum tender rule in that carrier's schedule should be modified by a pooling or consolidation rule which would permit two or more shippers at those ports to combine in offering the requisite minimum quantity at one time and place. Subject to publication in revised schedules of the agreed conditions as thus modified, respondent's rates of $12 per 1,000 board-feet to Los Angeles and $12.50 to San Diego appear compensatory and otherwise lawful.—Id., p. 368.

§307(i) 7. Reduced rates; charges.—Proposed reduced rates on lumber from Washington and Oregon points, $12 per 1,000 board feet to Los Angeles and $12.50 tq San Diego, appear compensatory and otherwise lawful if made subject to agreed conditions fixing a minimum tender of 500,000 board-feet, providing for loading charges when vessel is shifted to a second dock at shipper's request to complete loading, and requiring delivery to vessel in sufficient volume for expeditious loading.—Rough and Surfaced Lumber from Oregon to California, 318 I.C.C. 363 (367-8).

Section 308. (a) [§*908(a) U.S.C.*] Reparation awards; limitation of actions; "carrier".—[Unchanged. See vol. 15, p. 12272.]

Amendment, see footnote, vol. 15, p. 12272; historical notes, see vol. 14, p. 11568.

Notes of Decisions

Volume 13—p. 11133; Volume 14—p. 11658; Volume 15—p. 12272.

Section 308. (b)-(e) [§*908 U.S.C.*] Liability in damages; Remedies; election; Orders by commission for payment; Courts to enforce orders; costs; attorney's fee.—[Unchanged. See vol. 11, pp. 9624-5.]

Notes of Decisions

§308(d); Volume 11—p. 9625; Volume 12—p. 10500.

Section 308. (f) [§*908(f) U.S.C.*] Limitation of actions.—[Unchanged. See vol. 18, p. 14664.]

Notes of Decisions

Volume 17—p. 13644.

Section 308. (g) [§*908(g) U.S.C.*] Joinder of parties; process; judgment.—[Unchanged. See vol. 11, p. 9626.]

Section 309. (a) [§*909(a) U.S.C.*] Certificates of public convenience and necessity; water carriers in bona fide operation on January 1, 1940.—[Unchanged. See vol. 11, p. 9627, vol. 19, p. 15933.]

Notes of Decisions

Volume 11—p. 9628; Volume 12—p. 10500; Volume 13—p. 11134; Volume 14—p. 11659; Volume 15—p. 12274.

1. Construction and interpretation.—[Vols. 11-14].—Section 27(b) of Alaska Statehood Act specifically provides that nothing therein or in any other act shall be construed as depriving Federal Maritime Commission of its preexisting exclusive jurisdiction over common carriage by water between Alaska and other U.S. ports, or as conferring such jurisdiction on Interstate Commerce Commission, and the subsequent amendments of §309 conferred "grandfather" rights on water common or contract carriers engaged on the critical date in interstate or foreign commerce between points in Alaska "over any inland waterway, other than the high seas." As all applicant's operations between Washington and Alaska ports are performed with ocean-going vessels which because of their draft cannot directly tie up or anchor in many of the Alaska ports served, necessitating transfer of cargo to and from shallower draft vessels at a convenient and safe anchorage, and in other instances its vessels proceed directly to the dock or anchorage at a river port without stopping at other points on the river, its operations are conducted on the high seas, with traversal of navigable inland waterways only as an incident thereto.—Alaska Steamship Co., 325 I.C.C. 196 (198-9).

And lighterage operations of applicant's Lomen Division are performed, not between points on inland waterways, but between shipside and shore installations. Its barge operations between Alaska points are also performed by use of the high seas, and no service is shown to be provided in transportation of shipments from and to points wholly on any inland waterway without traversing in part the high seas. Therefore, neither applicant's common carrier operations nor the common and contract carrier operations of its Lomen Division are shown to have been conducted between Alaska points over inland waterways within meaning of the amendments to §309. Applications dismissed.—Id., p. 199.

Under §309(a) and (f), as amended by Pub. Law 86-615, July 12, 1960, the commission's jurisdiction over water carrier "grandfather" operations between points in Alaska attaches only if they are conducted over inland waterways, rather than the high seas. Thus, issue presented in Alaska "grandfather" application proceeding is the effect on the jurisdictional question of the order of Jan. 19, 1952 (33 CFR 82.275), issued by the Commandant of the Coast Guard, of which official notice is taken, wherein he designated as "inland" all the waters plied by applicant. The Act of Feb. 19, 1895 provided for special rules for navigating certain United States harbors, rivers, and inland waters; inland navigation rules and

pilot rules apply in accordance with lines dividing the high seas from inland waters which are established by the Commandant of the Coast Guard; and 33 CFR 82.2 provides a general rule for distinguishing inland waters from the high seas for the purposes of applying inland or international rules of navigation.—Erickson and Wolf Alaska "Grandfather" Application, 325 I.C.C. 276 (277).

Moreover, the court said in 173 Fed. 426, in commenting on the line prescribed pursuant to the 1895 statute, that purpose of the legislation was for delimiting United States inland waters in order to inform navigators where inland navigation rules, as distinguished from the international rules, become applicable; and that it did not purport to change boundaries of a particular federal district, nor enlarge the jurisdiction of any particular federal court. Accordingly, it is clear that the navigational boundary line established by the Commandant of the Coast Guard with respect to the waters involved in applicant's "grandfather" proceeding would not fix, change, or limit statutory jurisdiction of Federal regulatory agencies. And there is no doubt that, in the Alaska Statehood Act, Congress intended to withhold from the commission jurisdiction over transportation by water which had previously been conferred on the Federal Maritime Board (now the Federal Maritime Commission).—Id., p. 278.

Therefore, since the examiner properly weighed the criteria which should determine regulatory jurisdiction over considered transportation, his conclusions that waters plied by applicants in conducting their operations are "inland waterways, other than the high seas," within meaning of the Alaska "grandfather" amendments to §309(a) and §309(f), and that the service involved is not subject to the certificate or permit requirements of part III of the act, are affirmed. As the commission is without jurisdiction over water carrier operations involved, the application is dismissed.—Id., pp. 278, 280-3.

50. Bona fide operation.—[Vols. 11-15].—Since operation by corporate applicant's predecessor-in-interest as a water common carrier of property between ports of call in southeastern Alaska, as described in the application, was not conducted over "any inland waterway, other than the high seas," within the meaning of the so-called Alaska "grandfather" amendment to §309(a), the service involved is not subject to certificate requirements of the statute. Although the Commandant of the Coast Guard has classified as "inland" the waters plied by applicant, all waters involved are tidal waters and a substantial portion are classed as coastal waters by the U.S. Customs Service. While applicant's operations are wholly between coastal ports in Alaska, it was recognized in 173 Fed. 426 that, notwithstanding fact that a port may be within territorial waters of a State, it may still be on the high seas. The commission is without jurisdiction over the operations involved; application dismissed.—Erickson and Wolf Alaska "Grandfather" Application, 325 I.C.C. 276 (278, 280-3).

Section 309. (b) [*§909(b) U.S.C.*] Application for certificate; form and contents.—[Unchanged. See vol. 11, p. 9631.]

Historical Note

The commission recommends, in view of the prohibition in 28 USC §1001, that §309(b) be amended so as to eliminate the mandatory oath provision therein, and that such requirement be made discretionary with the commission.—Annual Report, 1964, p. 72.

Notes of Decisions

Volume 11—p. 9631; Volume 12—p. 10505; Volume 13—p. 11137; Volume 14—p. 11660; Volume 15—p. 12274; Volume 16—p. 12938; Volume 17—p. 13645; Volume 18—p. 14666; Volume 19—p. 15934.

15. Filing application; scope of issues; parties.—[Vols. 11-13, 16-19].—Inasmuch as portions of Arkansas and Verdigris Rivers over which applicant proposes to conduct barge operations are not now navigable and will not be so until completion of approved waterway projects in 1970 at the earliest, application is dismissed as premature, without prejudice to filing of another application at a more appropriate time. As in other consolidated applications, voluntary withdrawal was sought without success, and issues at hearing were necessarily limited to fitness and ability of each applicant to conduct operations in the reasonably foreseeable future. Handling of those matters has consumed time, effort, and expense that should have been directed to more useful purposes; applicants are therefore admonished to withhold filing of applications in future until it can be established with certainty that the operations can be commenced within a reasonable period, otherwise summary dismissal of such applications will be considered.—A & O Barge Line, Inc., 321 I.C.C. 343 (345).

Section 309. (c) [*§909(c) U.S.C.*] Issuance of certificate to qualified applicants.—[Unchanged. See vol. 11, p. 9632.]

Historical Note

The commission recommends that part III of the act be amended so as to provide for revocation of water carrier certificates or permits for nonuse.—Annual Report, 1964, p. 62.

Notes of Decisions

Volume 11—p. 9632; Volume 12—p. 10506; Volume 13—p. 11137; Volume 14—p. 11661; Volume 15—p. 12275; Volume 16—p. 12939; Volume 17—p. 13645; Volume 18—p. 14666; Volume 19—p. 15934.

5. Competition.—[Vols. 12-19].—Carriers already in the field are entitled to transport all the traffic they can handle adequately, efficiently, and economically, without competition of a new service; applicant has failed to establish by convincing evidence that existing water carriers cannot or will not meet supporting shippers' reasonable transportation needs between points involved; extension authority denied.—Moran Towing & Transp. Co., Inc., Extension, 315 I.C.C. 591 (596)*.

25. Necessity, demand for service, in general.—[Vols. 11-19].—Decision in the Schaeffer case, 355 US 83, did not make consideration of comparative rates mandatory in application proceedings. While the Supreme Court noted therein that lower rates may be a factor for consideration as an inherent advantage, it also indicated that, where such advantages exist, the commission must consider whether on the balance public interest would be better served by additional competitive service. Evidence of shippers and other water carriers supported the commission's conclusion that present or future public convenience and necessity would be served by grant of certificate permitting extension of applicant's water-carrier service from Atlantic ports to Tampa, Fla., thereby improving service to shippers whose commodities are inherently suited for barge movement; sustained.—Atlantic Coast Line R. Co. v. United States, 202 F. Supp. 456 (459-61)*.

While it might be arguable that the type of single-line through service plaintiff seeks to provide would be an improved and better service, for which there is present or future need, the commission's conclusion that evidence failed to establish need for proposed operations is also clearly rational. Much of the evidence pertained to conjectural future use of such service, if offered, and there is in fact no showing that present interline service is inadequate; sustained.—A.L. Mechling Barge Lines, Inc. v. United States, 218 F. Supp. 837 (839)*.

Need for applicant's proposed freighting service from New York and New England

ports to ports on Great Lakes is not established when opposing water carriers have shown that they can provide transportation without transfer of lading, and none of supporting shippers has investigated or used the freighting service of such carriers. One shipper's support apparently arises from satisfactory nature of applicant's towing service, rather than any need for additional freighting service; other shippers' evidence is vague and there is no certainty they would use the service if authorized; denied.—Moran Towing & Transp. Co., Inc., Extension—Great Lakes, 315 I.C.C. 591 (595)*.

26. Fitness; financial ability.—[Vols. 11-19].—Applicant has not shown that it can and will conduct proposed operations along Arkansas and Verdigris Rivers prior to completion of waterway project approved by Congress. Its proposal to operate shallow-draft towboats and barges on now open portions of Arkansas River and to portage towboats and cargoes around damsites under construction by piggyback truck service is indefinite and hazy; it is not shown to have now available any vessels of type to be used, or to have tested feasibility of transporting commercial cargoes on present waters of Arkansas River; nor has it presented any details of its plan for portaging around construction sites or shown feasibility of such combined operations. Application dismissed as premature.—A & O Barge Line, Inc., 321 I.C.C. 343 (344-5).

Section 309. (d) [§*909 (d) U.S.C.*] Specifications of routes, ports; extension of routes; restriction on additions to equipment.—[Unchanged. See vol. 11, p. 9633.]

Notes of Decisions

Volume 12—p. 10510; Volume 13—p. 11139; Volume 14—p. 11663; Volume 15—p. 12276; Volume 16—p. 12942; Volume 17—p. 13650; Volume 18—p. 14670; Volume 19—p. 15937.

20. Extension over unfinished portions of waterways.—[Vols. 12-19].— Although Congress never authorized any specific project to extend navigation on Licking River, maintenance of the navigable portions thereof was specifically authorized, and construction of Markland locks and dam on Ohio River resulted in the Markland Pool, of which the Licking forms a part above the dam, water levels of the Locking being controlled by level of that pool; as a direct result, the normal pool level of the Licking was increased and the limit of practicable navigation on that river extended from 3 to 18.3 miles. As applicants' operation son the Licking were connected with their operations on the Ohio, and service on the navigable portion of the Licking is a normal extension of their past service along that river, they are entitled to operate over the new segment under the proviso of §309(d).—Ohio River Co. Extension, 322 I.C.C. 731 (732-3).

Section 309. (e) [§*909(e) U.S.C.*] Certificate not to confer proprietary or exclusive rights in waterways.—[Unchanged. See vol. 11, p. 9634.]

Section 309. (f) [§*909(f) U.S.C.*] Permit essential to operation; carriers in bona fide operation on January 1, 1940.—[Unchanged. See vol. 19, p. 15938.]

Notes of Decision

Volume 11—p. 9635; Volume 12—p. 10511; Volume 13—p. 11140; Volume 14—p. 11664; Volume 15—p. 12277.

2. Construction and interpretation.—[Vols. 12-15].—Insofar as immediate effect of requirement that persons who furnish vessels to a shipper for compensation, for shipper's use in transporting its own property in interstate commerce to obtain a permit may be advantageous to established common and contract water carriers, and the same is warranted as a means of attaining objective of the national transportation policy.—Boylan v. United States, 310 F. 2d 493 (499).

See also Erickson and Wolf Alaska "Grandfather" Application, §309(a), n. 1.

Section 309. (g) [§*909(g) U.S.C.*] Application for permit; form and contents; issuance of permit; terms and conditions.—[Unchanged. See vol. 11, p. 9636.]

Notes of Decisions

Volume 11—p. 9636; Volume 12—p. 10512; Volume 13—p. 11141; Volume 14—p. 11666; Volume 15—p. 12278; Volume 16—p. 12942; Volume 17—p. 13651; Volume 18—p. 14670.; Volume 19—p. 15939.

Historical Note

The commission recommends, in view of the prohibitions in 28 USC §1001, that §309(g) be amended so as to eliminate the mandatory oath provision therein, and that such requirement be made discretionary with the commission.—Annual Report, 1964, p. 72.

18. Conditions imposed; scope stated in permit.—[Vol. 16].—Though defendants' authority for freighting service, in which carrier furnishes both cargo space and motive power, does not authorize towage operations, in which carrier provides only the motive power, its publication of allowances for use of shippers' barges does not alone constitute prima facie evidence of an offering to engage in unauthorized towage operations, and evidence does not establish that it performed an unauthorized towage service when, before publication of the allowances, it leased contracting shipper's barge on occasions when it had no suitable equipment of its own. Moreover, defendant's allowances are fixed amounts unrelated to size of shipment and do not appear designed to meet level of competitive towage rates. No violation of its permit or of §309(f) is shown; 278 ICC 417 and 285 ICC 75, distinguished.—Coyle Lines, Inc. v. Warrior & Gulf Nav. Co., 318 I.C.C. 583 (586-7).

25. Necessity, demand for service, in general.—[vols. 11-19].—Under the contract-carrier provisions of Part III, applications have generally been denied upon showing that existing carriers could provide the type of service required by shipper; however, extension authority has been granted shipper-owned carriers which gear their services to their parent companies in interest of efficiency and economy, and authority has also been granted where it has been shown that applicant would provide low-cost transportation, that its equipment is especially adapted to shipper's needs, and that protestants have not furnished reasonably adequate service.—Warrior & Gulf Nav. Co. Extension, 322 I.C.C. 261 (264-5).

34. Extension of operations.—[Vols. 14-17].—Extension authority granted applicant for points along Atlantic coast between Fort Pierce and Cape Kennedy, Fla., to permit extension of an efficient and economical service geared to needs of its parent shipper for transportation of iron and steel articles from Port Birmingham, Ala., and Orange, Tex., to additional consuming points. It is advantageous to shipper to deal with applicant as its alter ego rather than with two or more carriers for movement of its products from the mills to consuming points, and though protestants can provide a joint-line service in some respects similar to that of applicant, they have not shown that it would be as economical or so

geared to shipper's production schedules as fully to meet its overall needs. As protestants are now shown to have handled any of traffic involved, grant will not materially affect them.—Warrior & Gulf Nav. Co. Extension, 322 I.C.C. 261 (265).

Section 310. [§*910 U.S.C.*] **Dual operations under certificates and permits.**—[Unchanged. See vol. 11, p. 9638.]

Amendment, see footnote, vol. 11, p. 9638.

Notes of Decisions

Volume 11—p. 9638; Volume 12—p. 10512; Volume 13—p. 11142; Volume 14—p. 11666; Volume 18—p. 14671.

1. In general.—[vols. 11-14, 18].—Contract carriage by applicant of iron and steel articles for its parent shipper from Port Birmingham, Ala., and Orange, Tex., to points along Atlantic coast between Fort Pierce, Fla., and Cape Kennedy will not be competitive with its certificated operations. However, though resulting dual operations are approved, right is expressly reserved to reconsider that issue at any future date should the situation change so as to bring about an improper competitive situation, discrimination, or preference.—Warrior & Gulf Nav. Co. Extension, 322 I.C.C. 261 (265-6).

Section 311. (a), (b) [§*911 U.S.C.*] **Temporary operations.**—[Unchanged. See vol. 11, p. 9638, vol. 15, p. 12279, vol. 16, pp. 12943—4.]

Notes of Decisions

Volume 12—p. 10513; Volume 13—p. 11142; Volume 14—p. 11667; Volume 15—p. 12280; Volume 16—p. 12944; Volume 18—p. 14671.

Section 312. [§*912 U.S.C.*] **Transfer of certificates and permits.**[Unchanged. See vol. 11, p. 9639.]

Historical Notes, see vol. 15, p. 12280, vol. 16, p. 12945, vol. 17, p. 13652, vol. 19, p. 15940.

Notes of Decisions

Volume 13—p. 11143; Volume 14—p. 11667; Volume 16—p. 12945; Volume 17—p. 13632; Volume 18—p. 14671; Volume 19—p. 15940.

5. Transfers, in general.—[Vols. 14, 16-18].—In action to set aside and annul the commission's approval of application for transfer of considered water carrier certificate, the court cannot accept the commission's refusal to heed its own regulations governing transfer of such certificates and the clear evidence before it of applicants' attempt to deceive the commission for purpose of changing the ownership, not just the form of ownership, of the certificate and effectively circumventing the commission's transfer rules. Legislative regulations, created by a Federal agency pursuant to congressional authority, have the force of law, and the agency promulgating a rule is as bound by its terms as is the general public; therefore, the commission itself being bound by its rules and regulations, any action taken by it is invalid unless the rules pertaining to the action are followed.—Mississippi Valley

Barge Line Co. v. United States, 252 F. Supp. 162 (165-6)*.

The transfer regulations require that copy of all contracts or other written documents pertaining to proposed transfer be filed with the application; that, if operations are not being conducted at the time, it must be shown that suspension of operations was due to circumstances over which holder of the authority had no control, and that operations under certificate sought to be transferred would be consistent with public interest; and that applicant submit information to show that proposed transferee is fit, willing, and able properly to perform the services authorized. However, option agreements entered into by transferor and corporate transferee's sole stockholder, which show that actual purpose of the transfer was to change ownership of the certificate (not merely to change the form of ownership), were not filed with the application; there was no showing that transferor's suspension of operations was caused by circumstances beyond his control; and there was no information in the application showing that transferee was in any way financially fit to carry on operations authorized by the certificate.—Id., pp. 165, 166.

In addition, transferor's statement in his notice to competitors, that he was owner of transferee corporation, is completely refuted by the record. The commission allowed a concealment and violation of its rules in the transfer application and, after subsequent hearings resulted in an examiner's recommendation that the transfer be denied, it refused to accept the examiner's findings. The commission cannot ignore its own rules under the facts before it; therefore, in view of the regulations and the record, the commission's orders approving transfer of the certificate are set aside and annulled.—Id., pp. 164, 165.

10. Transactions under §5.—[Vols. 13, 14, 19].—Since approval under §5(2) for merger of a regulated water carrier into parent lumber company would encompass transfer of former's certificate, that part of application seeking authority under 312 is dismissed.—Weyerhaeuser Co. Merger, 312 I.C.C. 778 (781)*.

Regulations of the Commission

28 FR 12336, Nov. 22, 1963, Part 306: Transfers of Certificates and Permits, 306.4 Required exhibits, amended by deleting therefrom paragraph (f); and §306.6 Procedure, paragraphs (b) and (c) amended to read as set forth, effective Jan. 1, 1964.

Section 312a. [*§912a U.S.C.*] **Revocation of certificates and permits.**—(1) Certificates and permits shall be effective from the date specified therein, and shall remain in effect until suspended or revoked as provided in this section.

(2) Any certificate or permit issued under this part may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may, upon complaint, or on the Commission's own initiative, after reasonable notice and opportunity for hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with the provisions of section 305(a) with respect to performing, providing, and furnishing transportation upon reasonable request therefor: *Provided, however,* That no such certificate or permit shall be suspended, changed, or revoked under this paragraph (except upon application of the holder) unless the holder thereof, fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 304(e) of this title, commanding obedience to the provisions of section 305(a) with respect to per-

forming, providing, and furnishing transportation upon reasonable request therefor. (Sept. 6, 1965, Pub. L. 89-170, §8(a), 79 Stat. 652.)

Section 13. (a) [§*913(a) U.S.C.*] Accounts, records and reports.— [Unchanged. See vol. 11, p. 9639, vol. 15, p. 12280.]

Amendments, see footnotes, vol. 15, p. 12281; historical notes, see vol. 12, p. 10330, vol. 13, p. 11032, vol. 14, note to § 20(1), p. 11543; vol. 19, p. 15940.

Historical Note

The commission recommends, in view of the prohibitions in 18 USC §1001, that §313(a) be amended so as to eliminate the mandatory oath provision therein, and that such requirement be made discretionary with the commission.—Annual Report, 1964, p. 72.

Regulations of the Commission

28 FR 695, Jan. 26, 1963, Part 301: Reports, §301.20, Annual Report Form M prescribed for use by maritime carriers beginning with year ended Dec. 31, 1962.

28 FR 1255, Feb. 8, 1963, Part 301: Reports, §301.10, Annual Report Form K-A (Class A and Class B Water Carriers) prescribed for use by water carriers operating on inland and coastal waterways beginning with year ended Dec. 31, 1962.

28 FR 4562, May 7, 1963, Part 120: Annual, Special or Periodical Reports, §120.52, Quarterly Report Form QWS (Quarterly Report of Revenue Traffic) prescribed for all water carriers, excluding Class C, with respect to reports for quarter ending Sept. 30, 1963, and subsequent quarters.

28 FR 13747, Dec. 17, 1963, Part 301: Reports, amended by adding thereto §301.40 Piggyback traffic statistics—water. Effective with reports for first quarter of 1964.

29 FR 1469, Jan. 29, 1964, Part 301: Reports, §301.10 Annual reports of Class A and B water carriers on inland and coastal waterways, Annual Report From K - A prescribed for use commencing with year ended Dec. 31, 1963.

29 FR 12077, Aug. 25, 1964, Part 123: Freight Commodity Statistics, §123.28 Public inspection—water carrier reports, added, effective on date of order.

30 FR 951, Jan. 29, 1965, Part 301: Reports, 301.20 Form prescribed for maritime carriers, Annual Report Form M (Maritime Carriers) prescribed for use commencing with year ended Dec. 31, 1964.

30 FR 997, Jan. 30, 1965, Part 301: Reports, §301.10 Annual reports for Class A and Class B water carriers on inland and coastal waterways, Inland and Coastal Waterways Annual Report Form K-A (Class A and Class B water Carriers) prescribed for use commencing with year ended Dec. 31, 1964.

Section 313. (b) [§*913(b) U.S.C.*] Copies of contracts, agreements, to be filed.—[Unchanged. See vol. 11, p. 9640.]

Notes of Decisions

Volume 16—p. 12945.

Section 313. (c) [§*913(c) U.S.C.*] Uniform system of accounts.— [Unchanged. See vol. 11, p. 9640.]

5. In general.—Though shortened tax-depreciation lives authorized by Internal Revenue Service will result in much larger tax-depreciation deductions in early years of service lives of facilities than book depreciation computed under commission accounting rules, neither that nor investment tax credit permitted by Revenue Act of 1962 warrants changes in present accounting rules or the commission's statement of policy dated February 9, 1959, that actual Federal income taxes payable for each year, based on effective tax regulations for the year, shall be recorded in the tax accounts of carriers' books of account and in financial statements. But present requirement for disclosure in carriers' annual

reports of tax reductions for accelerated depreciation will be extended to apply to those attributable to tax-depreciation guideline lives, as well as investment tax credit.—Accounting for Federal Income Taxes, 318 I.C.C. 803 (805, 807-8).

See also Financial Statements Released by Carriers, §20(3), n. 16, 31.

Regulations of the Commission

NOTE: For recodification, see 49 CFR, Editorial Note, 32 FR 5606, April 5, 1967.

32 FR 14661, Oct. 21, 1967, Part 423 [formerly Part 323]: Uniform System of Accounts for Maritime Carriers, miscellaneous amendments pertaining to accounting treatment of extraordinary and prior period items, effective Jan. 1, 1967.

32 FR 15025, Oct. 31, 1967, Part 424 [formerly Part 324]: Uniform System of Accounts for Carriers by Inland and Coastal Waterways, miscellaneous amendments pertaining to extraordinary and prior period items, effective Jan. 1, 1967.

Section 313. (d), (e) [§*913 (d), (e) U.S.C.*] Depreciation charges; forms of accounts, records, memoranda.—[Unchanged. See vol. 11, p. 9641.]

Section 313. (f), (g) [§*913 (f), (g) U.S.C.*] Access to records, etc.; destruction of records.—[Unchanged. See vol. 11, p. 9641, vol. 15, p. 12281.]

Amendment, see footnote, vol. 15, p. 12281.

Regulations of the Commission

28 FR 1960, Feb. 28, 1963: Retention periods, records, water carriers, 49 CFR 325.7.

29 FR 3088, Mar. 5, 1964: Same retention periods reference.

30 FR 3163, Mar. 6, 1965: Same retention periods reference.

30 FR 12252, Sept. 24, 1065, Part 325: Destruction of Records, §325.7, item 14, amended in order to implement recent amendment of the competitive-bidding regulations, effective on publication in the Federal Register.

31 FR 4067: Mar. 8, 1966: Retention periods, records, water carriers, 49 CFR 325.7

32 FR 3664, Mar. 2, 1967: Retention periods, records, water carriers, 49 CFR 325.7.

33 FR 4067, March 1, 1968: Record Retention Guide, XXIV Interstate Commerce Commission, [Revised] 1.10 Water carriers, 49 CFR Part 1227.

29 FR 16087, Dec. 2, 1964, Part O: The Commission, §0.5 Credentials required by special agents, accountants, and examiners, paragraphs (c), (d), (e), (f), and (g) amended, effective on date of order.

29 FR 19107, Dec. 30, 1964, Part O: Order of Nov. 24, 1964 (29 FR 16087) corrected to substitute "accountants" for "accounts" wherever latter appears therein.

Section 313. (h) [§*913(h) U.S.C.*] Definitions.—[Unchanged. See vol. 15, p. 12282.]

Amendments, see footnotes, vol. 15, p. 12282.

Section 314. [§*914 U.S.C.*] Allowances to shippers for transportation services.—[Unchanged. See vol. 11, p. 9643.]

Notes of Decisions

Volume 12—p. 10517; Volume 15—p. 12282; Volume 16—p. 12946; Volume 18—p. 14673.

15. Carrier's right and duty to furnish instrumentality and service.—[Vols. 15, 18].—A carrier authorized to engage in freighting service (which does not include towage operations) is not prohibited from using shippers' barges as part of its equipment, provided arrangements for such use are reasonable and otherwise lawful. The test is whether shippers' barges would be used as part of defendant's equipment or received as part of con-

signment to be towed. Defendant's publication and maintenance of allowances for use of shippers' barges does not alone constitute an offering to engage in unauthorized towage operations, and evidence does not establish that it has in fact done so in leasing shipper's barge when it had no suitable equipment of its own.—Coyle Lines, Inc., v. Warrior & Gulf Nav. Co., 318 I.C.C. 583 (585, 587).

50. Publication of allowances required.—[Vols. 12, 15, 16, 18].—Where contract carrier leases shipper's barge for performance of authorized freighting service, existence of an executed charter party would not relieve it from requirement of §314 to publish its allowances as a part of its schedule.—Coyle Lines, Inc., v. Warrior & Gulf Nav. Co., 318 I.C.C. 583 (588).

Section 315. (a), (b) *[§915 (a), (b) U.S.C.2*—[Unchanged. See vol. 11, pp. 9643, 9644.]

Section 315. (c) [*§915(c) U.S.C.]* **Suspension and modification of orders.**—[Unchanged. See vol. 11, p. 9644.]

Historical note, vol. 14, p. 11668.

Notes of Decisions

Volume 13—p. 11144; Volume 14—p. 11668; Volume 16—p. 12946; Volume 17—p. 13653; Volume 19—p. 15941.

20. Certificates; permits.—[Vols. 13, 14, 16, 17, 19].—The commission's power under §315(c) to suspend, modify, or set aside its orders under Part III is circumscribed by prevailing standards of fair procedure. Where an unopposed application for transfer of a water-carrier certificate has been granted and the transaction consummated, clear and convincing evidence that approval was induced by willfully misleading evidence in regard to some vital matter is required before the order may be set aside. Moreover, if the order approving the transfer was properly entered and the conditions for issuance of the certificate in transferee's name fully complied with, the certificate became vested in transferee, and the commission has no power to revoke any water carrier certificate. Even if transferee's subsequent operations were found in an appropriate proceeding to be unlawful, only an order to compel compliance would be issued.—Pittsburgh Towing Co.—Certificate Transfer—Zubik, 317 I.C.C. 661 (666, 668)*.

Section 315. (d) [*§915(d) U.S.C.*] **Time when orders take effect; continuance in effect.** [Unchanged. See vol. 11, p. 9644.]

Notes of Decisions

Volume 13—p. 11145; Volume 16—p. 12946.

Section 315. (e) [*§915(e) U.S.C.*] **Compliance with orders.**—[Unchanged. See vol. 11, p. 9644.]

Section 316. (a)-(d). [*§916(a)-(d) U.S.C.*]—[Unchanged. See vol. 11, pp. 9645, 9646.]

Notes of Decisions

§316(c) Volume 16—p. 12947.

Section 317. (a)-(f) *[§917(a)-(f) U.S.C.]* **Unlawful acts and penalties; Rebates, concessions; false billing; false reports; disclosure of information.**—[Unchanged. See vol. 11, pp. 9647—9649.]

Historical note, see vol. 12, p. 10474.

Notes of Decisions

§317(f): Volume 12—p. 10515.

§317(f). 5. Disclosure of information to shipper's competitor.—[Vol. 12].—See Commodity Statistics Reporting—Extent and Disclosure, §222(e), n. 3.

Sections 318, 319. *[§§918, 919 U.S.C.]*—[Unchanged. See vol. 11, pp. 9650, 9652.]

Section 320. *[§920 U.S.C.]* **Repeals.**—[Unchanged. See vol. 11, p. 9652.]

Notes of Decisions

Volume 12—p. 10516; Volume 14—p. 11669; Volume 19—p. 15942.

2. Construction and interpretation.—[Vols. 12, 14, 19].—The commission has not promulgated any rules or regulations applying to the hiring of towage by water carriers; therefore, under §320(d), a carrier holding towage authority may lawfully hire towage under any contractual arrangements not in conflict with other maritime law, regulations, or custom.—Pittsburgh Towing Co.—Certificate Transfer—Zubik, 317 I.C.C. 661 (670)*.

Sections 321, 322. *[§§921, 922 U.S.C.]*—[Unchanged. See vol. 11, pp. 9653, 9654.]

Section 323. *[§922a U.S.C.]* **Recording of evidences of equipment indebtedness.**—Any mortgage (except mortgages under the Ship Mortgage Act, 1920, as amended), lease, equipment trust agreement, conditional sale agreement, or other instrument evidencing the mortgage, lease, conditional sale, or bailment of one or more vessels, used or intended for use by a carrier subject to this part in interstate commerce or any assignment of rights or interest under any such instrument, or any supplement or amendment to any such instrument or assignment (including any release, discharge, or satisfaction thereof, in whole or in part), may be filed with the Commission, provided such instrument, assignment, supplement, or amendment is in writing, executed by the parties thereto, and acknowledged or verified in accordance with such requirements as the Commission shall prescribe; and any such instrument or other document, when so filed with the Commission, shall constitute notice

to and shall be valid and enforceable against all persons including, without limitation, any purchaser from, or mortgagee, creditor, receiver, or trustee in bankruptcy of, the mortgagor, buyer, lessee, or bailee of the vessel covered thereby, from and after the time such instrument or other document is so filed with the Commission; and such instrument or other document need not be otherwise filed, deposited, registered, or recorded under the provisions of any other law of the United States of America, or of any State (or political subdivision thereof), territory, district, or possession thereof, respecting the filing, deposit, registration, or recordation of such instruments or documents: *Provided, however,* That nothing contained in this section shall, in any way, be construed to alter or amend the Ship Mortgage Act, 1920, as amended. The Commission shall establish and maintain a system for the recordation of each such instrument or document, filed pursuant to the provisions of this section, and shall cause to be marked or stamped thereon, a consecutive number, as well as the date and hour or such recordation, and shall maintain, open to public inspection, an index of all such instruments or documents, including any assignment, amendment, release, discharge, or satisfaction thereof, and shall record in such index the names and addresses of the principal debtors, trustees, guarantors and other parties thereto, as well as such other facts as may be necessary to facilitate the determination of the rights of the parties to such transactions. (Oct. 17, 1968, Pub. L. 90-586, §1(2), 82 Stat. 1149.)

Section 324 [1] *[§923 U.S.C.]* **Separability of provisions.**—[Unchanged. See vol. 11, p. 9656.]

[1]Section 323 was renumbered section 324 by Pub. L. 90-586, §1(1), Oct. 17, 1968, 82 Stat. 1149.

PART IV

INTERSTATE COMMERCE ACT, FREIGHT FORWARDERS

Chapter 13, Title 49, U.S. Code

Section 401. *[§1001 U.S.C.]* **Short title.**—[Unchanged. See vol. 11, p. 9656.]

Section 402. (a) (1)-(4) *[§1002(a) (1)-(4) U.S.C.]* **Definitions and exemptions.**—[Unchanged. See vol. 11, p. 9656.]

Section 402. (a) (5) *[§1002(a) (5) U.S.C.]* **Freight forwarder defined.**—[Unchanged. See vol. 15, p. 12284.]

Notes of Decisions

Volume 12—p. 10516; Vol. 13—p. 11147; Volume 14—p. 11670; Volume 15—p. 12285; Volume 16—p. 12947; Volume 17—p. 13654; Volume 18—p. 14674; Volume 19—p. 15943.

1. Freight forwarder defined.—[Vols. 12-19].—Freight forwarders and motor carriers are not the same: under definition of a forwarder in §402(a)(5) as a person which "otherwise than as a carrier" subject to Part II holds out to the public and utilizes services of carriers subject to Parts I, II, or III, a freight forwarder is one who hires independent common or contract carriers.—Shippers Cooperative, Inc. v. I.C.C., 308 F. 2d 888 (891)*.

While freight forwarders are authorized to, and ordinarily do, assemble, consolidate, break-bulk, and distribute the consignor's freight, challenged volume commodity rate tariff is not unlawful because under its terms forwarders need not actually perform all those functions; tariff contemplates certain variations from ordinary procedures, and offers shipper reduced charges contingent upon degree of variation. Forwarders proffer all the services they are authorized to perform but that is the extent of their obligation. If some consignors or consignees wish to have less than the proffered service, no statute and no public policy prevent such arrangements being authorized by the commission.—National Motor Freight Ass'n., Inc. v. United States, 205 F. Supp. 592 (595-7)*.

In enacting Part IV, Congress recognized that services of freight forwarders are definitely in public interest, and safeguarded their place in the overall scheme of regulated transportation insofar as lay within its power. Unlike Parts II and III, Part IV does not distinguish between common and contract carriers: all forwarders subjected to economic regulation are uniformly described as persons which hold out to the general public as common carriers to provide transportation of property for compensation, and legislative history of Part IV establishes that Congress did not intend to exclude from licensing provisions thereof those persons which, like motor contract carriers, restrict their for-hire services to a limited number of shippers.—Atlanta Shippers Assn., Inc.—Investigation, 316 I.C.C. 259 (273, 275)*.

A group or association of shippers may not lawfully handle nonmembers' shipments which have no connection with or fundamental relation to the business of its shipper-members; whenever the freight consolidating and distributing services performed by such a group or association on nonmembers' shipments are supplied with a purpose to profit from the effort itself, as distinguished from a purpose merely to obtain for its members the benefits of c.l., t.l., or other volume rates, the operation is in substance a common-carrier freight forwarding service for compensation.—Id., p. 278.

And if any person or persons other than the shipper-members of a group or association actually control, or even possess the right or privilege to control, the freight consolidation and distribution services, it is they and not the shippers who through the purported association perform such activities; the operation thus conducted in name of the shippers (or group or association) is in substance a common-carrier forwarding service for which authority is required. In such circumstances the controlling persons will be regarded as having assumed the necessary responsibility for the transportation from point of receipt to destination within meaning of the forwarder definition; and the same conclusion obtains where persons other than shipper-members of the association bear the essential risks and burdens of the consolidating and distributing operations.—Id., p. 279.

Whether particular activities constitute a for-hire freight forwarding service or are bona fide consolidating and distributing operations by a nonprofit group or association of shippers can be resolved only after consideration of all facts and circumstances in each case. Surface appearances and similarities are neither conclusive nor significant; all essential elements must be considered together in light of the broad remedial purposes of the statute

in relation to the governing criteria embraced in its multiple provisions.—Id., p. 283.

Facts and circumstances surrounding organization and continuing operation of respondent ASA as a purported shippers' association establish that it was designed to benefit respondent Kilgore and his family; Kilgore dominated its organization and at the outset caused it to adopt a corporate charter and bylaws which preclude its apparent shipper-members from exercising any control over its policies and functions, and he continues to control and manage its activities through a sympathetic board of governors appointed without approval of the "shipper-members"; he financed its operations initially, solicited traffic and members, created a rate structure which would aid in such solicitation, and established a pattern of operations which has never changed except on his "recommendation"; and the "shipper-members" assume none of the risks and burdens normally assumed by shippers acting together to obtain cheaper transportation. ASA's activities constitute in substance a for-hire forwarding operation subject to the act.—Id., pp. 281-2.

Respondents ASA, the two Kilgores, ABW (which they control), Paramount, and Consolidated—the last three of which perform the physical operations at Atlanta, New York-Philadelphia, and Chicago—by knowingly participating in the overall scheme revealed are jointly providing a complete freight-forwarding service for compensation. Although their activities are conducted under color of §402(c)(1), operations of bona fide shippers' associations, which by nature are initiated by the shippers themselves, require no such complicated schemes as are disclosed. Record establishes beyond dispute that respondents, acting in concert under a coordinated plan, the plain purpose of which is to evade requirements of the act, hold out to the general public a common-carrier forwarder service without authority from the commission, in violation of §410(a).—Id., pp. 267, 282, 283.

Respondents Paramount and Consolidated participated in the arrangements, not as agents for ASA's shipper-members, but as agents for Kilgore (who clearly acted as an independent entrepreneur), and thus undertook to perform services which he as their principal could not lawfully perform. Relations between the several respondents resulted in a kind of partnership or common interest in which each member is the agent of all, so that the act of one in furtherance of the common object is the act of all. Respondents thus constitute in effect a single person within meaning of Part IV, and all are as responsible for violating its provisions as if each had conducted the entire operation individually; cease-and-desist orders entered against all six respondents.—Id., pp. 282-3, 289.

Though it is argued that Kilgore at all times acted as employee of ASA under delegation of authority by its membership and board of governors, evidence is clear and convincing that he was an independent actor, having full control over the questioned operations and responsibility for providing the consolidation and distribution services received by shipper-members, and his financing of the original operations is plainly inconsistent with any employee or agent status. Subsequent organizational changes whereby Kilgore relinquished his various titles and installed his son as manager of ASA were mere changes in form which would not warrant a different conclusion, since members continue to look to him for continuing functioning of "their" association; and he has profited not only in salaries for himself and his immediate family, but also through his proprietary interest in ASA's distribution agent. Finding that operations performed in name of ASA are in substance an unauthorized freight-forwarder service, affirmed.—Id., 322 I.C.C. 273 (291-2)*.

Absence of a formal agency relation between respondents respectively performing consolidation and distribution service on pool-barge shipments does not require independent consideration of their operations; §402(a)(5) neither explicitly nor by implication requires existence of such a relation between participants in a through transportation service, but by defining a forwarder as one who holds out "to transport or provide transportation" recognizes that forwarders often accomplish their complete-service undertaking

by means of informal arrangements with other participants.—Southern Bonded Warehouse Co.—Investigation, 318 I.C.C. 345 (355).

Respondents have participated jointly in a common plan or enterprise to effect for-hire transportation, in which under doctrine of 245 US 229 each is the agent of all, thus constituting a single person within meaning of §402(a)(5). Nor are form and manner of issuing bills of lading or assessing terminal charges of controlling significance in determination of forwarder status; any other conclusion would be inconsistent with purposes of Congress in subjecting the forwarder industry to economic regulation.—Id., pp. 355, 356.

Applying criteria of a bona fide shippers' association announced in 316 ICC 259 to facts in instant investigation, the freight consolidating, shipping, and distributing operations performed in name of respondent FSA constitute in substance and reality a complete freight forwarder service provided jointly by the several respondents for compensation and without authority from the commission; evidence clearly shows that FSA's apparent shipper-members, in obtaining from respondents the same physical transportation service (albeit at lower cost) as they would receive from a regulated forwarder, do not control, direct, or dominate the activities in question or bear the essential risks and burdens of conducting such operations. Cease-and-desist order entered against all respondents, and companies named, which though not named as respondents are shown to have participated in conduct of the operations involved, are admonished to discontinue their participation.—Federal Shippers Assn., Inc.—Investigation, 316 I.C.C. 523 (526-7)*.

The essential functions of a freight forwarder are to assemble, consolidate, break bulk, and distribute the consignor's freight; in addition, it assumes responsibility for transportation of the property from point of origin to point of destination. It is not shown that operations of defendant holding out a consolidation service permitting use of plan III TOFC service include all the essential functions of a forwarder or that it assumes responsibility for the through transportation. It accepts only one loaded trailer at a time from a shipper, which it "mates" or "marries" with another shipper's trailer moving to same destination, and disclaims any responsibility for a shipment it is to "marry" until it executes a rail bill of lading for the TOFC movement; that disclaimer is affirmed by testimony of a motor carrier representative that such carrier assumes all responsibility for the inbound movement to the railroad ramp and is paid direct by shipper for such movement. Thus, it cannot be said that defendant's operations are not confined to the terminal area where the trailers are "mated."—Natl. Motor Freight Traffic Assn. v. Delaware Valley, 323 I.C.C. 560 (562, 571-2)*.

Concerning break-bulk and distribution, there is no showing that defendant's business and that of the distributor which delivers shipments to consignees are not wholly separate or that each of their services and responsibilities are not confined to their respective terminal areas; if anything, the facts tend to show that defendant has no connection with or control over the distributor. Further, the record is devoid of any evidence that shippers using defendant's service look to it for overall responsibility for their traffic; to the contrary, in case of damage claims by shippers, defendant merely furnishes them the original bill of lading, with instructions to resolve the matter with the carriers involved. Notwithstanding any implication in the factual situation that defendant is performing a forwarder service, complainants have not adduced sufficient evidence to permit an affirmative finding that defendant's business is that of a forwarder within §402(a)(5); and it follows that the railroad providing the TOFC service and its subsidiary which furnishes trailers to defendant cannot be found to be aiding or abetting it in any violation of Part IV.—Id., pp. 572-3.

Among the requisites of a freight forwarder as defined in §402(a)(5) are (1) that the forwarder service begin at point of receipt of shipment and continue to point of ultimate destination, and (2) that it receive compensation for the total service performed; and §413 provides that the forwarder shall be deemed both the receiving and delivering transportation company for purposes of §20(11). Receipt of shipments from, or delivery to, a connecting carrier under circumstances ap-

proximating or amounting to mere interchange between carriers is not the receiving or delivery of freight contemplated by those sections of the act.—Alaska Freight Lines, Inc., v. Puget Sound Tug & Barge, 94 M.C.C. 376 (379).

Though defendant water carrier consolidates shipments at its dockside terminal and issues through bills of lading between Seattle and interior Alaska points, shipments originating at or destined to points beyond Seattle or Seward are received from or delivered to land carriers at those ports; there is no privity of contract between defendant and the actual shipper or consignee whereby defendant assumes full responsibility for safe transportation of shipments from point of receipt from shipper to ultimate destination; and it does not receive as compensation the total charges for the through movement. Where several carriers thus participate in the transportation there is a joint undertaking; defendant's responsibility begins and ends at Seattle or Seward, and its participation is merely that of a connecting common carrier. And on shipments originating at Seattle and destined to Seward its service is only that of the actual transporting water carrier. Its services are therefore not those of a forwarder subject to Part IV.—Id., pp. 377-8, 379-80.

A shipper association that is not controlled by its members may fall within the definition of a freight forwarder even though the services rendered are performed exclusively for its members and do not profit the organization per se. Mere reimbursement for expenses of operation of such an association has been held to constitute "compensation" or "compensation" may involve profit, through various means, to nonshippers in control of an association. Likewise, the holding out of service to a limited number or class of shippers, as distinct from all of the general public, maybe a holding out within §402(a)(5) if the association is not otherwise bona fide.—Natl. Motor Frt. Traf. Assn., Inc., v. Internatl. Shippers, 94 M.C.C. 440 (444).

When members of a purported shipper association, while enjoying benefits of a complete transportation service at volume rates, do not control the association but instead allow a purported agent or employee to control it, they have invested the latter with the basic characteristics of an independent entrepreneur, and as such the operations of the purported agent or employee, if otherwise within the definition of a freight forwarder, are subject to the licensing requirements of Part IV.—Natl. Motor Frt. Traf. Assn., Inc. v. Mfrs. Shipping Assn., 322 I.C.C. 205 (215).

Lack of knowledge of important matters pertaining to organization and activities of defendant MSA on part of shipper representatives, officers, and board members supports the reasonable inference that the board is merely a rubber stamp for recommendations of defendant Tiefenthal, MSA's vice-president in charge of operations, and that he actually controls the organization. It is apparent that Tiefenthal is in reality an unauthorized forwarder acting in MSA's name; it is he who profits from the involved operations, not only from his "compensation," but also from rental of equipment to MSA by a corporation which he controls through stock ownership, and from fact that latter can "marry" its relatively insignificant amount of freight to that of MSA; and MSA's services are held out to the public by solicitations and through telephone-book listings. Cease-and-desist order entered.—Natl. Motor Frt. Traf. Assn., Inc. v. Mfrs. Shipping Assn., 322 I.C.C. 205 (216).

Defendant Lincoln not only manages defendants PBS and CSA, but shipper-members of both associations clearly have delegated or abandoned to him whatever power of control they ever had, and have invested him for all practical purposes with the characteristics of an independent entrepreneur, providing services physically identical to those of regulated forwarders. His compensation for conducting forwarding operations in their name includes not only his income from CSA and PBS, but, since success of their operations and those of another "nonprofit" corporation of which he is executive secretary depends materially on continued operation of each, also includes his income from latter corporation to a material degree. His unauthorized forwarder services are held out to members and prospective members whose traffic will benefit his operations, and mere fact that they are not held out to all of the general public does not preclude a

finding of a holding out within meaning of §402(a)(5). Cease-and-desist order entered.—Natl. Motor Frt. Traf. Assn., Inc. v. Piggy Back Shippers, 322 I.C.C. 190 (201, 202-3).

In enacting §402(c) as an exception to or clarification of §402(a)(5) and (7), Congress recognized that while most shippers may prefer to have their shipments consolidated, forwarded, and distributed by others on a for-hire basis, and to pay for such service by sharing with them the savings from volume shipment, others desire to participate in mutual nonprofit pool-car or pool-truck activities and secure for themselves the benefits of volume rates. Those statutory provisions constitute a functional delineation between transportation "services" intended to be regulated and "operations" not to be regulated, and in clear language forbid the purchase and sale of all unlicensed freight forwarding service regardless of methods or procedures employed. Determination of whether any particular transportation function is a forwarding service subject to the act entails careful and complete analysis of all facts and circumstances surrounding its performance, and compliance with the regulatory requirements cannot be evaded by subtle arrangements or shades of form if the substance and basic nature of the operation brings it within purview of the law.—Atlanta Shippers Assn., Inc.— Investigation, 322 I.C.C. 273 (277-8)*.

See also Dal-Worth Shippers Ass'n., Inc. case, §402(c), n. 15.

Air freight forwarders follow the general pattern set by surface forwarders subject to part IV in that they assemble shipments for expedited movement, consolidate them, perform distribution service, and assume responsibility for the transportation from point of receipt to point of delivery; the only difference is that the air forwarder uses a direct air carrier and the surface forwarder uses only surface forms of transportation.—Special Delivery, Inc., Extension, 88 M.C.C. 275 (277); Nickerson, 88 M.C.C. 186 (187); and such forwarders are defined and classified by Civil Aeronautics Board as indirect air carriers. [9 CAB 473; 14 CFR 296.2(a).]—Panther Cartage Co. Extension, 88 M.C.C. 37 (40).

Since the forwarder definition in §402(a)(5) includes one who utilizes for any part of the transportation the services of a carrier subject to Part II, it follows that air freight forwarders which use the services of a motor carrier for transportation requiring operating authority from the Commission are subject to provisions of Part IV.—Nickerson, 88 M.C.C. 186 (187); Special Delivery, Inc., Extension, 88 M.C.C. 275 (277).

Air forwarder service on traffic moving to and from points beyond the published terminal areas of air carriers, where shipper is normally charged the forwarder's rates between air terminals and the motor carrier's published charges to or from the air terminal city, is similar to that furnished by direct air carriers through connection with motor carriers; shipping documentation clearly apprises shipper that a connecting service is being performed and that the air forwarder has no carrier responsibility for the shipment while it is under the motor carrier's control. Such operations do not constitute surface freight forwarding under part IV of the act. Air freight forwarders' assumption of carrier responsibility for shipments the motor transportation of which does not fall within the §203(b7a) exemption, however, would result in institution of surface forwarding operations in violation of the licensing provisions of part IV.—Motor Transp. of Property Incidental to Air, 95 M.C.C. 71 (88-90)*.

Section 402. (a)(6)-(8) [*§ 1002(a) (1)-(8) U.S.C.*]—[Unchanged. See vol. 11, p. 9657.]

Notes of Decisions

Volume 12—p. 10517; Volume 13—p. 11148; Volume 14—p. 11671.

SERVICE

§402(a)(7). 1. Construction and interpretation.—Since §402(a)(7) excepts from service subject to Part IV only that part in which motor transportation within exemption of §203(b7a) is utilized, an air-freight forwarder utilizing motor carriers for service not within exemption, and which therefore requires authority from the commission, is itself subject to provisions of Part IV.—Panther Cartage Co. Extension, 88 M.C.C. 37 (40,42). Therefore air forwarders desiring to use motor carriers' service between airports and points beyond terminal areas of underlying air carriers (which is not within exemption of §203(b7a)) must obtain permits as surface forwarders from the commission.—Air Cargo Terminals, Inc., Extension, 88 M.C.C. 468 (470); Nickerson, 88 M.C.C. 186 (188).

See also Motor Transp. of Property Incidental to Air, §402(a)(5), n. 1.

A customs brokerage service is not related to, and therefore not a part of, that service which the act contemplates will be rendered by a freight forwarder.—Frank P. Dow Co., Inc., Extension, 322 I.C.C. 103 (115).

"Service subject to this part," as used in the permit requirement of §410(a), is defined in §402(a)(7) to cover everything the freight forwarder does, in connection with forwarding by surface facilities, in the course of his undertaking to the shipper whom he serves.—Atlanta Shippers Assn., Inc.—Investigation, 322 I.C.C. 273 (275)*.

Section 402. (b) [§ *1002(b) U.S.C.*] Exemptions.—[Unchanged. See vol. 11, p. 9658.]

Historical notes, see vol. 15, p. 12286, vol. 16, p. 12948, vol. 17, p. 13655.

Notes of Decisions

Volume 18—p. 14675; Volume 19—p. 15944.

30. Household goods.—[Vols. 12, 14, 18, 19].—See Routed Thru-Pac, Inc. v. United States, 28 USC §2325, n. 27.

Section 402. (c) [§ *1002(c) U.S.C.*] Exemptions.—[Unchanged. See vol. 11, p. 9658.]

Historical notes, vol. 16, p. 12948; vol. 17, p. 13655; vol. 18 p. 14676; vol. 19, p. 15945.

Historical Note

The commission recommends that §§203(b5) and 402(c) be amended to provide that agricultural cooperatives and shipper associations, respectively, shall be entitled to exempt status thereunder only upon application and proof of eligibility.—Annual report, 1962, p. 201; renewed, Annual Report, 1963, p. 19; Annual Report, 1964, p. 76.

The commission recommends that §402(c) be amended to require groups or associations of shippers to satisfy the commission that they are bona fide shipper associations before they begin opeations.—Annual Report, 1965, p. 77.

Notes of Decisions

Volume 12—p. 10518; Volume 13—p. 11148; Volume 14—p. 11672; Volume 15—p. 12286; Volume 17—p. 13655; Volume 18—p. 14676.

2. Construction and interpretation.—[Vol. 15].—Exemption of §402(c) is specifically restricted to associations of freight forwarders and does not extend to an association of carriers; and a freight forwarder is by definition one who hires independent carriers; thus, that

exemption does not apply to operations of a nonprofit corporation which performs an over-the-road transportation service for its members.—Shippers Cooperative, Inc. v. I.C.C., 308 F. 2d 888 (891)*.

Legislative history of the statute, as well as its language, clearly would justify the commission's treatment of §402(c) as a "clarifying provision" rather than as a true exemption from §402(a)(5).—National Motor Freight Traffic Ass'n v. United States, 242 F. Supp. 601 (605)*.

Though forwarders and shippers are to an extent engaged in similar activities, they are separated by sharply defined differences in operation, which Congress clearly recognized and provided for in the Freight Forwarders Act; §402(c) clearly evinces a strong Congressional policy that the regulation envisioned by the act not encroach on or restrict the right of shippers to join together to gain for themselves the savings of volume rates. However, shipper associations, unlike forwarders, do not hold out to the general public but perform services only for their dues-paying members, and do not assume common-carrier responsibility for the shipment from point of assembly to point of destination; and, since a true shipper association is a nonprofit cooperative association, the members bear the burdens as well as share the benefits of its operation, bearing expenses of the consolidation and distribution operation as well as sharing in any surplus monies that remain in the association's treasury at the end of the year.—Freight Consolidators Cooperative, Inc. v. United States, 230 F. Supp. 692 (696)*.

In view of the strictures imposed on freight forwarders as distinguished from shipper associations, it is perfectly clear that great competitive advantages would accrue to an organization if it could free itself of the burdens of compliance with the applicable regulations, by the self-styled title of shippers association or otherwise, for purpose of engaging in the business of freight forwarding. To tolerate such a situation would be repugnant to the Congressional intent and would create a fertile field for unscrupulous entrepreneurs. One who does all the things a forwarder does is subject to regulation, no matter what he may call himself; the Interstate Commerce Act, including the forwarder provisions, is remedial in nature, and exceptions to its regulatory plan are to be strictly construed; one claiming benefit of an exception to such a statute has the burden of proving that he comes within such exception.—Id., pp. 697, 698-9.

While §402(c) exempts nonprofit shippers' associations from economic regulation, it does not give such an association carte blanche authority to operate without the properly prescribed commission procedure. A nonprofit association of freight forwarders would be exempt, but an association of carriers would not; and a freight forwarder is defined as one who hires an independent carrier. Thus, the §402(c) exemption does not apply to defendant association which operated its own vehicles, leased for the trip, to transport its members' goods.—I.C.C. v. International Shippers Ass'n of New Jersey, Inc., 249 F. Supp. 66 (68, 69-70)*.

On further consideration, practice whereby traffic of respondent shippers' association is coloaded with that of another such bona fide association, for interstate TOFC movement, is found to be a lawful service within §402(c); however, it does not necessarily follow that all operations of such an association are exempt from regulation merely because a bona fide shippers' association is involved. Respondent occasionally coloads its interstate traffic with that of two other associations whose activities are not shown to be other than those of a bona fide shippers' association and, in view of Columbia Shippers decision, 105 MCC 846, record is persuasive that such banding together on a non-profit basis in order to secure benefits of rail volume rates is a permissible function consistent with objectives of the statute.—Piggy-Back Shippers Assn. of Florida—Investigation, 332 I.C.C. 349 (350-1)*.

Congress, recognizing that the freight forwarder definition in §402(a)(5) does not embrace the normal or usual activities of warehousemen and nonprofit shippers' associations, enacted §402(c), not as a true exemption, but as a clarifying provision to assure that §402(a)(5) would not be construed as applying to such persons. Net effect of those sections taken together is to denote the type of transportation agency to be regulated,

while cautioning the commission that certain activities of nonprofit associations or other shippers' agents, "as those persons normally operate," are not to be confused with or regarded as forwarder operations subject to Part IV, since such persons do not do all the things required by the definition of a forwarder.—Atlanta Shippers Assn., Inc.—Investigation, 316 I.C.C. 259 (273-4)*.

In effect, those sections preclude a shipper from purchasing a complete freight forwarding service from persons not licensed by the commission, while allowing him to combine his goods with those of other shippers on a nonprofit basis to obtain the savings resulting from their collective ability to utilize the c.l., t.l., or other volume rates of regulated rail, motor, or water carriers; such construction accords with the basic purposes of Congress in subjecting the forwarder industry to economic regulation.—Id., pp. 274-5.

The forwarder act safeguards the right of all shippers to combine their goods on a nonprofit basis to obtain volume transportation savings, whether the physical consolidation or distribution is performed by them, their group or association, or their terminal agent; however, the statute precludes a shipper from purchasing "for compensation" a complete transportation service in which details and responsibilities of freight assembly, etc., are assumed by unlicensed persons. Thus Part IV brings within its proscriptions all persons who in substance engage in providing and assuming full responsibility for through transportation of shipments of others on a for-hire basis, regardless of the form they adopt.—Southern Bonded Warehouse Co.—Investigation, 318 I.C.C. 345 (353).

Multiple shipments by one consignor to more than one consignee are within contemplation of §402(c)(1).—Hambrick v. American Commercial Barge Line Co., 318 I.C.C. 527 (537).

The mere fact of incorporation cannot significantly alter the regulatory status of otherwise lawful freight consolidating and distributing activities of a nonprofit group or association of shippers. By whatever name described, §402(c) evinces a strong congressional policy that regulation under Part IV not encroach on or restrict the right shippers always had to join together to gain for themselves the savings of volume rates. Congress' primary concern was with the method of operation adopted by shippers, not their form of organization; existence of both incorporated and unincorporated shipper associations prior to passage of the Forwarder Act, together with absence of any clear congressional expression on the subject, indicates that Congress, which was surely aware of State laws authorizing nonprofit corporations, considered the difference between the two forms insignificant. In absence of a clear mandate to the contrary, the phrase "group or association of shippers" in §402(c) must be given an uncomplicated nontechnical meaning which would not exclude corporations.—Atlanta Shippers Assn., Inc.—Investigation, 322 I.C.C. 273 (286-7)*.

Nor is there anything in the makeup or functioning of an incorporated shipper association that automatically brings its operations within licensing provisions of Part IV. The view that incorporation insulates shipper-members from burdens normally inherent in transportation activities and thus constitutes them "purchasers" of a complete forwarding service disregards the basic nature of relationship between the shippers and their group, which exists whether or not it is incorporated. Shipper-members are never fully divorced from their fundamental responsibilities as organizers and controllers of the association and as shippers of freight transported in its service. They are necessarily responsible as beneficial owners of the goods, and to that extent there can be no effective insulation between them and third persons. Consequently, when shippers acting together organize, operate, and control their own corporation to perform consolidation and distribution of their own freight, and bear the risks and burdens entailed, including risk of loss or of obtaining no savings, there is no holding out to the public to provide transportation for compensation within the forwarder definition.—Id., pp. 287-8. [But see dissent.]

While a contrary conclusion would avoid necessity of case-by-case determination of lawfulness of certain operations, it would be an impermissible incursion into the legislative field in light of history, purposes, and past

application of Part IV. However, this does not mean that circumstances surrounding an incorporation may not be weighed in ascertaining the basic nature and true status of purported shipper-association operations. The commission will go behind the corporate form to establish the essential facts, which must be weighed and considered with all others attendant to a given operation, to arrive at a correct assessment of the total situation. And where it appears that the corporate form has been purposely chosen as a subterfuge to escape regulation, appropriate weight will be given that fact in finding the operations in question to be such as require authority.—Id., pp. 288-9.

The statute does not require that members of a bona fide shippers association bear a joint and several liability. Congress apparently accorded no importance in the statutory scheme of regulation to presence or absence of such "partnership" liability. The major financial risk entailed in conduct of association operations, other than those readily insurable, is risk that savings resulting from the association's use of volume rates will be eaten up or more than offset by its operating expenses. So long as this essential transportation burden is in fact ultimately borne by the members, rather than by someone else who exercises effective surveillance over the physical consolidation and distribution operations, there is compliance with the statutory scheme.—Id., p. 285.

15. Associations of shippers.—[Vols. 12-15, 17].—Plaintiff nonprofit shippers' association does not hold itself out to the public as a common carrier for compensation, assumes no responsibility for through movement of freight, and differs from a freight forwarder as defined in §402(a)(5) in other respects; however, it does provide for assembling and consolidating of property, uses services of rail or motor carriers for transportation of consolidated shipments, and also, if a member desires, provides for distribution of shipments at destination. The profit motive is not a necessary element of engaging in for-hire transportation business within §4272 of the Internal Revenue Code; construction placed on various statutes regulating interstate commerce are not determinative of tax statutes involved. Since plaintiff furnishes substantially all the facilities and performs substantially all the functions of a freight forwarder, it is liable for payment of transportation excise taxes; action for refund of transportation taxes dismissed.—Dal-Worth Shippers Ass'n., Inc. v. United States, 211 F. Supp. 590 (593-4).

Though plaintiffs would have the court believe that they are a bona fide shippers association simply because they say they are, the record details their method of operations and amply supports the commission's finding that they are engaged in an unauthorized forwarder business. Their modus operandi starkly shows the total absence of good faith participation by members in the conduct and affairs of plaintiff FCC and leaves no doubt that the raison d'etre underlying their organization was to operate unlawfully as freight forwarders. Service received by individual shipper members was identical to that provided by a regulated forwarder; shipments moved on standard common-carrier bills of lading prepared and signed by one of FCC's principals, and it thus assumed responsibility for the through shipments in same manner as a regulated forwarder. The commission's cease-and-desist order sustained.—Freight Consolidators Cooperative, Inc. v. United States, 230 F. Supp. 692 (697)*.

The essential predicate of any bona fide shippers' association is that, at all times and with respect to each l.c.l. or l.t.l. shipment moving in its service, it must act as agent for its lawful shipper-members in reducing their transportation costs through savings effected in cooperation with other members who likewise employ it as transportation agent; the avowed purpose and practical result of its combining freight of its members must not be to obtain any benefit for the shipper other than the savings so achieved. Consequently, to avoid being characterized as a for-hire forwarder, a group or association of shippers may not lawfully handle nonmembers' shipments which have no connection with or fundamental relation to the business of its shipper-members.—Atlanta Shippers Assn., Inc.—Investigation, 316 I.C.C. 259 (277-8)*.

In addition, operations of a bona fide shippers' association must be conducted at all

times as agent for its shipper-members who as its principals possess the exclusive right and ability to control, direct, and dominate its operations; in such circumstances the association merely does for its members, as their agent, what they could legally do for themselves under §402(c).—Id., pp. 278-9. [But see dissent.]

General considerations must be given practical application; unregulated competition in any regulated industry must be confined within practicable limits determined by substance rather than any label; the definition of a shippers' association must be interpreted in a manner transcending the merely formal, and the economic reality behind the arrangements, not their form, is determinative. For example, the handling by an otherwise lawful association, as agent for its members, of shipments moving on a delivered-price basis to consignee-members merely results in reduction of the transportation costs ultimately paid by the members and is within protection of §402(c)(1). [338 US 689.]—Id., pp. 277, 279-80.

Facts and circumstances surrounding organization and continuing operation of respondent ASA are convincing that its apparent shipper-members neither control its activities nor assume risks and burdens of its operations, but are primarily interested in obtaining cheaper transportation for their goods, and to that end look solely to respondent Kilgore, who organized the "association," as the one primarily responsible. At the outset, Kilgore caused ASA to adopt a corporate charter and bylaws which effectually preclude the "shipper-members" from exercising any more control over or participation in its policies and functions than they could in dealing with a recognized for-hire forwarder; though they may use its services, none has ever had right or ability to direct manner in which it would operate or to require it to supply a different service better suited to his needs, and its physical operations have always been left to Kilgore's sole discretion. Thus, ASA's operations are not those of a bona fide group or association of shippers within exclusion of §402(c)(1).—Id., pp. 266, 280-1.

Freight consolidating and distributing activities of respondent FSA are not those of a bona fide group or association of shippers within meaning of §402(c)(1) when its apparent shipper-members are able to exercise no more control over such operations than over those of any regulated forwarder; there has never been a meeting of FSA's members, none of its financial dealings have been disclosed to them or to its board of directors, nor does it appear that members have ever had opportunity to vote on any matter. The shipper-members are primarily interested in obtaining cheaper transportation for their goods, and to that end vested complete control over and responsibility for the operations conducted in name of their "association" in respondent Silverman, who organized the corporation and as president has operated it as his own, soliciting traffic and members, formulating all corporate policies, and establishing a pattern of operations that he alone could alter. Such operations constitute in substance a for-hire forwarder service subject to Part IV.—Federal Shippers Assn., Inc.—Investigation, 316 I.C.C. 523 (527)*.

A shippers' association of type recognized by §402(c)(1) as beyond scope of regulatory provisions of Part IV must possess as an essential attribute the quality of subordination; in all its operations it must act solely at the request, under the direction, and for the account and benefit of its members; the members must always act as principal and the association as their agent. Conversely, where the members, though enjoying benefits of a complete transportation service at volume rates, have not retained effective control over movement of their freight but have delegated all responsibility therefor to a purported agent or employee, they have invested the latter with the basic characteristics of an independent entrepreneur, and as such the operations of the purported agent or employee, if otherwise within the definition of a freight forwarder, are subject to the licensing requirements of Part IV.—American Freight Forwarding Corp. v. Konlon and Walder, 318 I.C.C. 507 (518)*.

And that a shippers' association operates on a nonprofit basis and for benefit of members only has little or no significance when it is shown that in all its operations the association is not directed, dominated, and con-

trolled by its members, but on the contrary is a mere pawn manipulated at the will of persons other than bona fide shipper members and used by them solely to impart a semblance of lawfulness to services which in all material respects are those of a for-profit forwarder within meaning of §402(a)(5).—Id., p. 518.

The physical service rendered individual shipper members of respondent FCC, through activities of respondents purportedly acting as its agents for consolidation, forwarding, and distribution of their shipments, is identical to that ordinarily provided by a regulated forwarder. It is equally clear that the shipper members have never exercised any greater control or influence over FCC and the operations assertedly performed in its name than if they had employed a regulated common carrier, and that they regarded their membership in FCC, not in terms of responsibilities assumed, but rather as a mere formality which qualified them to receive the benefit, at an agreed rate, of a preexisting and self-operating transportation service.—Id., pp. 518-9.

History of considered operations discloses that from their inception they were completely dominated and controlled, without interference from shipper members, by nonshipper individuals primarily interested in profiting from transportation as such, who derived substantial profit either directly in form of salaries and expenses or indirectly through their proprietary interest in the consolidation and distribution agents selected by them. Since the service resulting from collective activities of the various individuals and companies named has been available to any interested shipper through expedient of an obligation-free "membership," their combined operations in concert with FCC constitute a single jointly-conducted common-carrier forwarder service, for the unauthorized performance of which each participant is individually responsible. Cease-and-desist order entered against participants named as respondents, and those not so named admonished to discontinue their participation.—Id., pp. 509-13, 519-20.

While record does not support detailed analysis of respondents' practices, it is apparent that corporate respondent, though it has a "membership" list of a limited number of shippers, is not a shippers' association within exemption of §402(c), but a business device whereby one of two individual respondents has performed operations which he could not lawfully perform in his own name; he and the other individual received profits from the operation in form of payments for procuring equipment leases required for shipments transported, which funds constitute the entire amount received by the corporation in excess of its operating expenses, and only their distribution to those two individuals clothes it in guise of a nonprofit organization.—Western Shippers Assn., Inc.—Investigation, 88 M.C.C. 575 (576, 577).

To qualify for the exclusion of §402(c), a group or association of shippers must limit its consolidating and distributing services to its members, those services must be for the purpose of reserving to the members the benefit of volume rates and must be performed on a nonprofit basis. Additionally, a bona fide shippers' association must be controlled by its members, otherwise it may be found to fall within the forwarder definition in §402(a)(5), since the provisions of §402(c) do not preclude the commission from determining what is an "association of shippers." There is no convincing evidence that defendant association does not meet these tests, and the mere fact of incorporation does not affect its status. However, the exclusion of §402(c) does not authorize it to perform any motor carriage subject to the act.—Natl. Motor Frt. Traf. Assn., Inc., v. Internatl. Shippers, 94 M.C.C. 440 (443-6, 447).

Most shippers' associations perform or arrange for performance of same services provided by freight forwarders as set forth in parts (A), (B), and (C) of the definition in §402(a)(5); the other essential parts of that definition, which primarily and usually distinguish freight forwarders from bona fide shippers' associations, are that the services so enumerated be held out to the general public and be performed for compensation. Neither defendant CSA nor defendant PBS, both organized as nonprofit corporations under California law, is a bona fide shippers' association, although neither is operated so as to

profit the association itself and neither holds out to or will serve all of the general public, service being provided to those whose traffic will "fit in with" or complement existing members' traffic because of its type, volume, and frequency of movement. Holding out of service to a limited number or class of shippers, as distinct from all of the general public, does not preclude a finding that there is a holding out within meaning of §402(a)(5), if the association is not otherwise bona fide.—Natl. Motor Frt. Traf. Assn., Inc. v. Piggy Back Shippers, 322 I.C.C. 190 (200-1).

Control by members of an association which would otherwise be within definition of a forwarder is essential for it to qualify as an association of type recognized by §402(c)(1) as beyond scope of the regulatory provisions of Part IV. In receiving the same physical services as those provided by regulated forwarders, shipper-members of CSA and PBS exercise no greater control over their respective associations, and have little more interest in or dominion over their operations, than any shipper in any for-hire service, namely, the service received and the rates paid; formalities such as payment of entrance fees and meetings merely lend a semblance of validity to the associations so that they can continue to render satisfactory service at lower rates. Principal function and seemingly greatest exercise of control or power of board members of both is to vote on admission of members, and even this becomes little more than a formality in face of screening of prospective members, and presentation of traffic information on which the boards are to vote, by defendant Lincoln, the manager of both.—Id., pp. 200, 201-2.

Examples cited of independent membership action do not overcome the overwhelming impression given by shipper testimony of lack of knowledge about the basic structure and operations of CSA and PBS. Those witnesses, including presidents of both, though officers and members of the boards of directors, do not know enough about their respective organizations to indicate that they do or could control them, and the general membership would certainly know even less. If shipper-members of either association ever controlled or had the right to control it, they clearly have delegated or abandoned that power to Lincoln, and have invested him for all practical purposes with the basic characteristics of an independent entrepreneur, whose operations are those of an unauthorized freight forwarder. Cease-and-desist order entered against all defendants still performing or participating in the involved operations.—Id., pp. 202, 203.

Whenever an apparent shipper's group or association ostensibly consolidates and distributes freight, lawfulness of its operations may be determined by either of the following standards: (1) whether the group or association itself is in substance engaged in the business of serving the public as a forwarder of property for compensation, and thus is a seller of forwarder service; or (2) whether the group or association (or its shipper-members through their organization) is purchasing for compensation a complete transportation service in which the essential risks and burdens of freight assembly, consolidation, forwarding, break-bulk, and distribution are assumed for it or its members by a person not licensed by the commission.—Atlanta Shippers Assn., Inc.—Investigation, 322 I.C.C. 273 (279)*.

An otherwise legitimate shippers' association may overstep the statutory limits by functioning unlawfully as a provider of forwarder service for profit, when its activities are not confined to the normal operations of a nonprofit association or group in consolidating or distributing freight for its members, but instead reflect all essential attributes of a forwarder service as defined in the act. Conversely, where its operations are those normal to a nonprofit shipper association and do not include all things required by the forwarder definition, they necessarily will not conform to the statutory definition of "service subject to this part" and plainly are not subject to the commission's jurisdiction. Since the shipper obtains from the nonprofit group or association the same physical service it would receive from any recognized forwarder, the functional distinction between regulated and nonregulated consolidating and distributing operations is that the regulated forwarder by statute holds itself out to the general public,

for compensation, to deliver safely at destination the shipments entrusted to its care.—Id., pp. 279-80.

A shippers' organization may not justify service to any nonmember simply on ground that the profits it thus receives ultimately or indirectly benefit its members by helping defray costs of handling their own shipments. Such a group must affirmatively stand aloof from the lure of a public calling, and may not lawfully handle shipments unconnected with and fundamentally unrelated to a non-transportation activity of a shipper member; when it handles shipments of that character for a nonmember the service is clearly supplied for the purpose of profiting from transportation as such, rather than to obtain for its members the savings of volume rates, and the operation is in substance a common-carrier forwarding service for compensation. To hold otherwise would allow shippers' groups or associations to engage indiscriminately and without limitation in the for-hire forwarding business and would be inconsistent with the clear legislative mandate outlawing the purchase and sale of unlicensed forwarding services generally.—Id., p. 282.

Nor may a shippers' organization operate as a device whereby unlicensed forwarders serve its shipper members in contravention of the act. The basic test is whether the consolidating and distributing operations are such that any person or persons other than the association (a) have any right or ability to control, direct, or dominate such operations, or (b) bear the essential risks and burdens, financial and otherwise, of conducting them. Both aspects of that question must be answered in the negative for the operations to be those of a bona fide group of shippers acting together on a nonprofit basis to achieve the permissible purposes specified in the act; an affirmative answer to either part compels conclusion that the purported members are in fact purchasing transportation from a person or persons engaged in unlawful forwarding service. Where the association members have not retained effective control over movement of their freight but have delegated all responsibility to a purported agent or employee, the latter acts as an independent entrepreneur which if otherwise within the forwarder definition is subject to the licensing requirements of Part IV.—Id., pp. 283-4.

Control of an association by its shipper members is essential for it to be considered an association of type recognized by §402(c)(1) as beyond scope of regulatory provisions of Part IV. Defendant MSA is not a bona fide shippers' association when evidence as a whole, particularly testimony of two representatives of shipper members, precludes finding that it is controlled by either its members or its board of directors. Though both those witnesses have served on the board and collectively have held offices of president, secretary, and treasurer, their testimony is replete with vagueness on vital matters concerning MSA's operations and internal structure, and it is a reasonable inference from such lack of knowledge on part of board members and others that, while control ostensibly lies in the board, it is but a rubber stamp for recommendations of defendant Tiefenthal, MSA's vice president in charge of operations, and that it is he who actually controls the organization and is in reality a forwarder acting in its name. Cease-and-desist order entered against MSA and three individual defendants who have actively participated in considered operations.—Natl. Motor Frt. Traf. Assn., Inc. v. Mfrs. Shipping Assn., 322 I.C.C. 205 (213, 215, 216).

Present operations of respondent association are those of a bona fide shipper association entitled to benefit of the exclusion provision of §402(c), when its board of directors has assumed strict control of its operations, no freight other than that of shipper members is handled, and no profit or compensation over and above the actual transportation and operating costs incurred is realized; shipper members thus bear the essential risks and burdens of conducting the considered operations.—Piggy-Back Shippers Assn. of Florida—Investigation, 323 I.C.C. 672 (675)*.

However, record discloses that respondent association occasionally coloads its interstate traffic with that of two other shippers' associations for plan III TOFC movement and, thereby, obtains the benefit of rail volume rates and charges. Accordingly, although apparently it has confined such activities to coloading its traffic only with that of other

bona fide shippers' associations, respondent is cautioned to conduct operations in strict conformance with guidelines of the Columbia Shippers case, 105 MCC 846. If respondent's traffic were to be combined with that of non-members, for-profit, shippers, it would not be within the §402(c) exemption since, under the cited decision, the freight forwarder type of activities of a shippers' association must be limited to those conducted solely for members of a bona fide shipper association or in conjunction with other such non-profit associations.—Id., 332 I.C.C. 349 (350-1)*.

While a single entity clearly cannot be both a forwarder subject to regulation and an exempt shipper association, the fact that their physical operations closely parallel each other, since they are predicated on the expedition and economy available through tendering of volume shipments to underlying carriers rather than numerous smaller ones, is not determinative of their true status, especially as the forwarder takes a portion of the savings realized as its profit, while the association does not. And since the act specifically recognizes shippers' right to join together to secure the benefit of volume rates, and it would ignore simple economic truths not to recognize that business cooperatives are generally motivated by members' desire to secure an economic advantage they could not obtain individually, motivating factors such as level of transportation charges which may cause a shipper to join or use services of an association have little significance in determining legality of the operation involved. Nor does an association's assumption of corporate status alter the regulatory status it may enjoy.—National Motor Freight v. New Hampshire Shippers Co-op., 323 I.C.C. 658 (664-5).

While the standard stated in 322 ICC 273, i.e., whether any person other than shipper members has any right or ability to control, direct, or dominate the operations, or bears the essential risks and burdens of conducting them, delineates the type of investigation to be pursued in determining status of a purported shipper association, it is basically an abstraction that can be applied only after all facts and circumstances pertinent to the operations under scrutiny are carefully and completely analyzed, both as individual elements and as components in the total functioning of the organization. For to place unwarranted reliance on a few actions or failures to act would tend to circumvent consideration of the totality of the operation and inevitably lead to a somewhat algebraic solution not in accord with the mandate of the act. All the evidence relating to the conduct of defendant's operations must therefore be weighed and balanced most delicately in relation to the applicable criteria to determine whether they are actually conducted in a bona fide manner.—Id., pp. 665-6.

Analysis of all the evidence is convincing that defendant is a bona fide shippers' association, entitled to continue its present operations without authority from the commission. All service rendered is limited to members, and even subsid¹aries of members must themselves be members before they may use it. A principal purpose of the association is to furnish members an integrated service without necessity of their making individual arrangements with carriers and other agents for handling of shipments at intermediate points and destination, thus members need have no more than general knowledge of manner in which their shipments are handled. Members bear a continuing relation to the association and assume responsibility for and control of it through election and participation of members on the board of directors, which meets regularly and frequently to consider not only general policies but also matters of more routine nature; and all commitments necessary to conduct of operations are made in the association's name and by its employees, the more important being made only after action by the board.—Id., pp. 666-7.

While the board has frequently obtained cogent facts from, and followed the advice of, the general manager whom it employed and entrusted with responsibility for day-to-day operations, this might be expected of any organization that hires a supervisor, and the board has not always accepted his recommendations, depending on members to furnish the pertinent facts. And though neither the board nor the members formulated specific charges for various classes of freight moving to diverse points, the general manager being instrumental in their initial determination, the board

has considered the level of charges on numerous occasions, particularly in relation to broader problems affecting the association's operations, such as rise in costs due to increases in rates of underlying carriers and necessity to pay legal costs arising from the instant proceeding.—Id., pp. 667-8.

Though the general manager's salary is based on a sliding scale related to gross freight billings, the amount of work involved is likewise determined and the resulting salary, which represents his entire remuneration, does not appear unreasonable. He has neither assumed responsibility for defendant's current deficit nor stands to gain if its revenues should exceed costs of operation, since any excess belongs to the association and its members, and in his relation to it he is clearly subject to the board. His authority to sign checks was specifically granted by the board when election of a nonresident treasurer made it necessary, and his authority to pledge the association's assets was intended to allow it to obtain operating funds from its creditor bank by using its bills of lading as collateral; moreover, the treasurer, a shipper-member, submits regular independent financial reports to the board. The members and their elected board alone ultimately assume the essential risks and burdens of the enterprise as well as control, direct, and dominate its operations, and it is therefore exempt from regulation by virtue of §402(c).—Id., pp. 667, 668.

See also I.C.C. v. International Shippers Ass'n of New Jersey, Inc., §222(b), n. 11.

16. Operations confined to terminal areas.—[Vols. 12-15, 18].—If business of respondents engaged in consolidating and distributing pool-barge shipments were wholly separable and services of each confined to its respective terminal area, they would not be subject to Part IV; however, although their operations are ostensibly those of shippers' agents or terminal operators, evidence is convincing that this is a mere device or subterfuge under which they jointly provide or hold out a complete freight forwarding service without appropriate authority. Cease-and-desist order entered.—Southern Bonded Warehouse Co.—Investigation, 318 I.C.C. 345 (354).

See also Natl. Motor Freight Traffic Assn. v. Delaware Valley, §402(a)(5), n. 1.

18. Operations as shipper's agent.—[Vols. 13, 15].—While a group or association of shippers can lawfully employ other persons to manage their daily shipping operations, such persons may not act independently or otherwise than as bona fide employees of the shipper-members; to sanction any delegation of power or authority to another person by a shipper, or group or association, the purpose of which is to have the purported agent assume all the shipper's or association's functions and risks in the operation concerned, would enable a shipper or association to confer upon another person a license to operate as a for-hire forwarder; such arrangements are merely a device to circumvent provisions of Part IV and will not be allowed.—Atlanta Shippers Assn., Inc.—Investigation, 316 I.C.C. 259 (280)*.

Although the usual function of a freight consolidator is to act as consignee's agent in collecting shipments from various shippers and in forwarding a single consolidated shipment to his principal, this is not his only proper and lawful function. Nothing in the act remotely implies that a freight consolidator may not act as agent of multiple consignors for purpose of obtaining for his principals the lower transportation charges which railroads, motor carriers, or forwarders may extend when a shipment is large enough to satisfy a stipulated minimum weight.—Aggregate Rates on Wearing Apparel—Ry. Exp. Agency, 318 I.C.C. 737 (740)*.

However, that does not necessarily apply where Railway Exp. Agency suggests in its advertising that shippers may obtain benefit of reduced charges under a consolidation rule by employing a freight consolidator which is its own wholly owned subsidiary; operations of REA and its subsidiary may not be treated as a single commercial enterprise unless the separate entities were devised to avoid some clear legislative purpose of the act. Since the record fails to show whether or to what extent REA's competitors are adversely affected by its use of the subsidiary as a consolidator or the extent, if any, to which economies claimed to result to it from aggregation of

shipments are nullified by costs of the subsidiary, judgment on the matter is reserved pending development of necessary facts in instant or some other proceeding.—Id., pp. 740-1.

Section 403. (a), (b) [§ *1003(a), (b) U.S.C.*]—[Unchanged. See vol. 11, pp. 9658, 9659.]

Historical Note

The commission recommends, in view of prohibitions in 18 USC §1001, that the IC Act and various related acts be amended to eliminate the mandatory requirement that certain reports, applications, and complaints be filed with the commission under oath, and that such oath provisions be made discretionary with the commission.—Annual Report, 1962, p. 209; renewed, Annual Report, 1963, p. 21.

Regulations of the Commission

29 FR 4914, April 8, 1964, Part 500: New Subchapter E—Intermodal Transportation, Part 500 Practices of For-Hire Carriers of Property Participating in Trailer-on-Flatcar Service, §§500.1 - 500.8, added, effective July 6, 1964.

29 FR 6283, May 13, 1964, Part 404: Exemptions, §404.1 Use by air freight forwarders of regulated motor common carrier service, added, effective June 24, 1964.

29 FR 8421, July 3, 1964, Part 500: Practices of For-Hire Carriers Participating in Trailer-on-Flatcar Service, effective date of order (29 FR 4914) postponed pending further order.

29 FR 11126, July 31, 1964, Part 51: New Part 51—General Requirements, added under the heading Parts 51-59, Consolidation, Finance, and Reorganization, effective Oct. 1, 1964.

29 FR 11273, Aug. 5, 1964, Part 500: Practices of For-Hire Carriers Participating in Trailer-on-Flatcar Service, effective date of order (29 FR 4914) fixed as Sept. 11, 1964.

29 FR 12508, Sept. 2, 1964, Part 500: Effective date of order (29 FR 4914) as amended (29 FR 11273) postponed until further order.

31 FR 8573, June 21 1966, Part 6. Fee for Service Performed in Connection with Licensing and Related Activities, amended, effective July 22, 1966.

NOTE: For recodification, see 49 CFR, Editorial Note, 32 FR 5606, April 5, 1967.

32 FR 12689, Sep. 1, 1967, Part 600 [formerly Part 500]: Practices of For-Hire Carriers of Property Participating in Trailer-on Flatcar Service, effective date, except as to §§600.7 and 600.8, is Aug. 18, 1967; §600.7 shall become effective Nov. 16, 1967, and §600.8 shall become effective Feb. 18, 1968.

32 FR 13414, Sept. 23, 1967, Part 106 [formerly Part 6]: Fees, §106.2 Filing fees, amended, effective Oct. 20, 1967.

32 FR 14557, Oct. 19, 1967, Part 505 [formerly Part 405]: Surety Bonds and Policies of Insurance, §505.6 Insurance and surety companies.—(b) Financial resources, amended, effective Dec. 31, 1967.

Section 403. (c), (d) [§ *1002(c), (d) U.S.C.*] Security for protection of public.[Unchanged. See vol. 11, p. 9659.]

Notes of Decisions

Volume 12—p. 10518; Volume 13—p. 11149; Volume 15—p. 12287; Volume 16—p. 12948.

Regulations of the Commission

27 FR 6674, July 13, 1962, Part 405: Surety Bonds and Policies of Insurance, §405.6 Insurance and surety companies—(a) State authority and designation of agent, revised, effective July 15, 1962.

Section 403. (e) [§ *1003(e) U.S.C.*] [Unchanged. See vol. 11, pp. 9659.]

Section 403. (f) [§ *1003(f) U.S.C.*] Investigation; hearing; enforcement.—[Unchanged. See vol. 11, pp 9660.]

5. Scope of issues.—Since the issue of whether an exempt shippers' association may engage in practice of "co-loading" its trailers with those of other shipper associations (in order to secure benefits of rail volume TOFC rates) was raised at start of the commission's

investigation proceedings, and the question certainly was important to plaintiffs (interveners therein) the commission was required to rule thereon; therefore, no justification therefor being shown, the commission's failure to rule on legality of respondent association's coloading practices was error. While plaintiffs ask the reviewing court to decide the coloading issue, questions of whether specific conduct is illegal and what remedy is appropriate are peculiarly suited for the commission's judgment; accordingly, question of legality of coloading by exempt shippers' associations is remanded to the commission for its initial determination. Affirmed in part.—Freight Forwarders Institute v. United States, 263 F. Supp. 460 (466-9)*.

Although issue of whether a corporation may qualify as a bona fide shippers' association under §402(c)(1) was decided in the negative in 316 ICC 259, that decision is now before the entire commission for reconsideration; therefore, since propriety of respondents' operations can readily be determined on another and more fundamental basis, judgment on the interpretation issue is reserved for the prior case, and for purpose of instant proceeding it is assumed that the corporate respondent's status does not automatically disqualify it as a shippers' association.—American Freight Forwarding Corp. v. Konlon and Walder, 318 I.C.C. 507 (517)*.

10. Parties and notice.—Rights of certain respondents to be represented by counsel and cross-examine witnesses throughout all stages of investigation proceeding were not prejudiced by their inclusion as parties after taking of over 900 pages of transcript. Administrative investigations into lawfulness of operations are necessarily somewhat exploratory in initial stages; the vital and material connection between those respondents and ones initially named was elicited from subpenaed witnesses during first 5 days of hearings, whereupon the additional respondents were promptly made parties and were afforded, but declined to exercise, opportunity to recall and cross-examine witnesses who had previously testified. Extent of their involvement in operations of initial respondents was a matter peculiarly within their knowledge from inception of the investigation, and if their failure promptly to disclose their true interest led them to do less in early stage of the proceeding than they might have done, the choice was theirs.—American Freight Forwarding Corp. v. Konlon and Walder, 318 I.C.C. 507 (514)*.

15. Hearing.—Granting of a continuance before an administrative agency rests in the examiner's sound discretion, and reviewing courts will not interfere with its exercise except on a clear showing of abuse. Hearing examiner did not abuse his discretion in failing to adjourn hearing indefinitely; on last days of hearings, after conclusion of testimony of interveners and the commission's Bureau, counsel for plaintiffs (respondents in investigation) orally requested adjournment so that they might prepare a rebuttal case, but failed to identify their alleged witnesses, or state when or where they would be available, or what relevant testimony they would give. There was no request for subpenas of those witnesses as authorized by Rule 56 of the commission's Rules of Practice, nor any showing that depositions of material witnesses could not be taken as authorized by Rule 57, and plaintiffs rejected examiner's offer to grant a short postponement, while failing to demonstrate good and sufficient cause for a longer postponement.—Freight Consolidators Cooperative, Inc. v. United States, 230 F. Supp. 692 (700)*.

Opportunity to be represented and to present and cross-examine witnesses is all that the law requires as the elements of a full hearing.—American Freight Forwarding Corp. v. Konlon and Walder, 318 I.C.C. 507 (514)*.

Full and careful consideration of record in investigation of operations of Carload Shippers Assn. compels conclusion that conduct of the hearing was not all that is required under the law; examiner's overly active participation in interrogation of witnesses has so beclouded the evidence that a finding of unlawfulness would be inappropriate. However, though investigation is discontinued, respondents are admonished to conduct their operations in accordance with the standards discussed.—Atlanta Shippers Assn., Inc.—Investigation, 322 I.C.C. 273 (289)*.

See also National Motor Freight Traffic Ass'n v. United States, APA, 5 USC, Burden of Proof.

20. Evidence.—Intervener's petition filed subsequent to oral argument, requesting that a document entitled "Code of Operations for Bona Fide Shippers' Association" be incorporated in the record, denied. While standards outlined therein represent petitioner's conception of organizational and operational requirements of the §402(c) exclusion, and the document is not objectionable as argument on the questions presented for determination in investigation,, reception of those contentions at such late date would in fairness require that the other parties of record be allowed additional time to file rebuttal statements, thereby further delaying an ultimate decision; the circumstances are thus within contemplation of Rule 1.86 of Rules of Practice.—Atlanta Shippers Assn., Inc.—Investigation, 316 I.C.C. 259 (272)*.

Intervening forwarders were properly allowed to participate in direct examination of witnesses called by Bureau of Inquiry and Compliance. Under Rule 74 of Rules of Practice interveners may examine witnesses immediately following their examination by parties in whose behalf intervention was made; to restrict such examination to cross-questioning on matters raised by the Bureau would not only place interveners in anomalous position of having to cross-examine witnesses presented by the party in whose behalf they intervened, but would also hamper just, speedy, and inexpensive determination of substantive issues involved in investigation. Interveners' direct examination of those witnesses is not claimed to have exceeded scope of the investigation or improperly broadened the issues, and respondents were not prejudiced thereby in any manner.—Federal Shippers Assn., Inc.—Investigation, 316 I.C.C. 523 (525)*.

Examiner properly refused to strike testimony of interveners' witnesses on ground that it constituted improper rebuttal evidence; though those witnesses plainly were presented to rebut individual respondent's statements concerning extent of solicitation performed by purported shippers' association, adequate groundwork for presentation of their testimony was laid during interveners' cross-examination of one of respondents' witnesses; respondents do not challenge materiality or veracity of such testimony and were not prejudiced by its admission.—Id., p. 526.

Transcript of record in 285 ICC 724, wherein certain respondents in instant investigation are shown to have participated in operations claimed to be those of a regulated forwarder, was properly admitted. Although weight of that evidence is attenuated by fact that only one bargeload was involved, it is relevant and material to a proper understanding of respondents' overall activities because of similarity of surrounding facts and circumstances to the operations under investigation.—Southern Bonded Warehouse Co.—Investigation, 318 I.C.C. 345 (351-2).

Admission in investigation proceeding of exhibit consisting of 988 pages of transcript in an earlier proceeding, wherein certain past activities of an individual respondent are described, did not deprive other respondents not parties to the earlier case of their right of cross-examination. That evidence relates only to that individual and not to any of the other respondents, except as they may be controlled by him; requirements of administrative due process are met when he, represented by his counsel, was present at the earlier proceeding and was afforded ample opportunity to participate therein. However, since matters contained in the exhibit are too inconclusive to show a past pattern of unauthorized operations by that respondent, objection is sustained and the exhibit stricken.—American Freight Forwarding Corp. v. Konlon and Walder, 318 I.C.C. 507 (515)*.

In concluding that that respondent, who controls a licensed forwarder respondent was the prime mover behind certain operations found to be unlawful, the commission takes official notice of decision in 285 ICC 276 (affirmed 125 F. Supp. 926, 348 US 967), wherein the forwarder, under his control, was found to have aided and abetted the creation and conduct of other unlawful forwarder operations.—Id., p. 520, Note 20.

Burden is on complainants to establish by competent evidence the material allegations of the complaint. Cases cited by complainants

in support of their argument that defendants have both the burden of adducing evidence and the burden of persuasion that alleged forwarder operations come within §402(c)(2) were not adversary in nature, in that the United States, an agency thereof, or a commonwealth was a party to the proceeding; complainants in an adversary complaint case do not wear the same shoes as would the commission in an administrative investigation proceeding brought on its own motion as a regulatory agency charged with the duty of requiring compliance with existing statutes. And to shift the burden of persuasion, rather than the mere burden of going forward with the evidence, to defendants in complaint proceedings such as the instant one is not warranted.—Natl. Motor Freight Traffic Assn. v. Delaware Valley, 323 I.C.C. 560 (570)*.

Break-bulk and distribution of traffic moving in plan III TOFC service are not shown to be services and responsibilities of defendant consolidator; there is no showing that latter's business and that of the distributor are not wholly separable or that each of their services and responsibilities are not confined to their respective terminal areas. Without testimony of a witness for a distributor of involved traffic, the record must speak for itself; complainant's mere inferences and assumptions that there is some agency relation or other arrangement between defendant and the distributors, without definite proof thereof, falls far short of affirmatively establishing that such agency or arrangement exists; if anything, the facts tend to refute such presumptions and dictate that defendant has no connection with or control over the distributor.—Id., p. 572.

30. Orders of Commission.—There is no merit to contention that scope of challenged cease-and-desist order is too broad, vague, and general. Order under attack provides fair notice of what it seeks to prohibit when read in conjunction with the opinion. The entire record, complaint, investigation, and opinion are to be considered as indices of what conduct is sought to be proscribed. The order sustained.—Freight Consolidators Cooperative Inc. v. United States, 230 F. Supp. 692 (700)*.

Respondent which loads pool barges at Monaca, Pa., and respondents which perform unloading and distribution of such shipments at Houston, Tex., have participated jointly in a common plan to provide for-hire transportation and under doctrine of 245 US 229 constitute a single person within meaning of §402(a)(5); thus, in conducting unauthorized forwarder operation, all are as responsible for violating the act as if each had conducted the entire operation separately and individually. Cease-and-desist order entered against all three respondents.—Southern Bonded Warehouse Co.—Investigation, 318 I.C.C. 345 (355-6).

Respondent Brown's disclaimer of any control over or influence on other respondents found to be conducting an unauthorized forwarder operation is belied by the facts of record. Brown controls ABC, a licensed forwarder which controls the company that acquired control of the distribution agents involved, and under Brown's orders two former employees of ABC assumed complete control of the involved operations and at all times considered themselves primarily responsible to him. These circumstances, together with ABC's past participation, under Brown's control, in similar unlawful forwarder operations, impel conclusion that Brown, a man of diverse transportation experience, not only held power to control but was the prime mover behind the operations concerned. Cease-and-desist order should therefore be directed against Brown and ABC as well as the other respondents.—American Freight Forwarding Corp. v. Konlon and Walder, 318 I.C.C. 507 (520)*.

Respondents in each of two investigation proceedings are aware of the part they play in the overall plan of operation found to be unlawful. By participating therein they are providing (selling) to shippers, jointly and in concert, a complete forwarder service for compensation without authority from the commission; each participant is therefore individually responsible for the unauthorized performance of such service, and plea of certain terminal-agent respondents that a cease-and-desist order be not directed against their activities in the overall scheme must be rejected. Those respondents acted in effect as agents of an unlicensed and hence illegal forwarder, and as

such undertook to perform services which their principals could not perform. Cease-and-desist order entered against all respondents in each proceeding.—Atlanta Shippers Assn., Inc.—Investigation, 322 I.C.C. 273 (293-4)*.

Although individual who initially organized and controlled respondent association for his own benefit has severed any connection with it and it now functions as a bona fide shipper association, entry of a cease-and-desist order against him is amply supported by the evidence.—Piggy-Back Shippers Assn. of Florida—Investigation, 323 I.C.C. 672 (674-5)*.

Section 404. (a) [§ *1004(a) U.S.C.*] Rates, charges, and practices. Duty to establish reasonable rates, etc.; service; classifications, regulations and practices.—[Unchanged. See vol. 11, p. 9660.]

Historical note, vol. 14, p. 11673.

Notes of Decisions

Vol. 12—p. 10519; Volume 13—p. 11151; Volume 15—p. 12288; Volume 16—p. 12949; Volume 17—p. 13656; Volume 18—p. 14676; Volume 19—p. 15945.

Tests of Reasonableness

23. In general.—[Vols. 18, 19].—Though forwarders generally have the same class-rate structure, no unreasonableness is shown in maintenance by three commonly controlled defendants of different rate levels, subject to different rules and practices, on same commodities between same points in various instances. Defendant publishing the lowest rates does so to meet unregulated competition, chiefly of pool-car shippers, or competition of motor carriers and other forwarders; such reductions were based on cost analyses and were subject to protest; moreover, that forwarder's recent operations have yielded a substantial profit.—Clipper Carloading Co., Inc., v. ABC Freight Forwarding, 318 I.C.C. 157 (161).

104. Ascertaining cost.—[Vol. 19].—Although recognized as carriers under the act, forwarders are required to use common carriers for their underlying transportation needs; therefore their costs are the transportation charges of the underlying mode plus their overhead expenses.—Intercoastal Any-Quantity Class and Commodity Rates, 319 I.C.C. 357 (360).

Classifications, Class Rates

130. Class rates, ratings, exceptions.—[Vols. 18, 19].—Respondent's proposed reduced l.c.l. and any-quantity class rates between 6 southern and 10 northern States, on same level as rates of competing motor carriers, are compensatory and no lower than necessary to enable respondent to compete effectively for the traffic; approved.—Forwarder L.C.L. Class Rates between South and Ill., Ind., 316 I.C.C. 651 (653-4).

Section 404. (b) [§ *1004(b) U.S.C.*] Undue preferences or prejudices prohibited.—[Unchanged. See vol. 11, p. 9660.]

Notes of Decisions

Volume 12—p. 10521; Volume 13—p. 11151; Volume 15—p. 12289; Volume 16—p. 12950; Volume 17—p. 13657; Volume 18—p. 14680; Volume 19—p. 15951.

50. Persons shipping, receiving freight.—[Vols. 12, 13, 15, 18, 19].—Rates or tariff rules which favor shippers who tender relatively large shipments in the aggregate and thus promote economical transportation are not inherently unduly prejudicial to small shippers.—Multiple Shipments, California to Oregon & Washington, 315 I.C.C. 247 (248).

Defendants, three commonly controlled forwarders, are not shown to be engaging in discriminatory tactics to detriment of the shipping public, merely because they maintain different rate levels in various instances for movement of same commodities between same points, in connection with different rules and practices; complainant forwarder failed to produce a single shipper in support of its allegation of unjust discrimination.—Clipper Carloading Co., Inc. v. ABC Freight Forwarding, 318 I.C.C. 157 (161-2).

Although proposed reduced rates on all commodities in straight or mixed shipments in "Speed Van Service," applicable only when shipper requests such service and speed van containers are available, are subject to a maximum weight per container, respondent would accept heavier shipments and charge its present l.c.l. rates on the excess weight; also, even if Speed Van Service were requested, the present higher rates would apply if speed van containers were not available. Since it is within respondent's control or discretion to make the containers available for their application, the proposed rates are unjustly discriminatory, permitting application of different charges on identical shipments, depending on manner in which respondent loaded the shipment, amount of any excess weight, and the commodity or commodities involved. Service provided under the proposed rates is admittedly similar to that under respondent's present rates; such difference in treatment cannot be justified by availability of the proposed rates to all shippers upon proper notice to respondent.—"Speed Van Service" between Md., N.J., N.Y., Pa. & Ill., 321 I.C.C. 452 (454-5, 456).

The proposed rates not only unjustly discriminate between different shippers, but same shipper could be subjected to different rates on like shipments, depending on availability of the necessary containers at time Speed Van Service was requested. Such discrimination is patent in, and encouraged by, the proposed schedules, and in such circumstances the commission need not abdicate its duty to protect the general public despite absence of shipper complaint. Examples of discrimination set forth in recommended report are more than potential; they are the inherent result of the schedules. Such unlawfulness cannot be removed by providing for alternation of the proposed with the present rates; a shipper requesting Speed Van Service on shipments exceeding the stated maximum weights would still be unable to determine the applicable rate until after respondent had loaded the shipment. Though respondent is willing to modify the tariff so as to accord shipper the benefit of the lower of the conflicting charges, it does not clearly or specifically show how or to what extent the unlawfulness would be removed. Not approved.—Id., pp. 456-7.

However, the proposed rates cannot be found unduly preferential or prejudicial when there is no indication how and to what extent specific shippers are injured, nor any basis for a presumption in that regard.—Id., p. 456.

100. Rates and charges.—[Vols. 13, 16-19].—That 6-percent increase proposed in transcontinental rates and charges excludes some areas and some traffic is not unduly discriminatory; lawfulness of particular rates is not in issue, and approval is restricted to lawfulness of the proposed increase as applied to the basic rates.—General Increases—Transcontinental, 319 I.C.C. 792 (804).

Section 404. (c) [*§ 1004(c) U.S.C.*] Preference or advantage by common carrier.—[Unchanged. See vol. 11, p. 9661.]

Notes of Decisions

Volume 17—p. 13657.

Section 404. (d) [§ *1004(d) U.S.C.*] Agreements for joint loading of traffic.—[Unchanged. See vol. 11, p. 9661.]

Notes of Decisions

Volume 13—p. 11152; Volume 14—p. 11673.

Section 405. (a) [§ *1005(a) U.S.C.*] Tariffs of freight forwarders; filing, posting.—[Unchanged. See vol. 11, p. 9661.]

Notes of Decisions

Volume 13—p. 11153; Volume 14—p. 11673; Volume 15—p. 12289; Volume 16—p. 12951; Volume 18—p. 14681; Volume 19—p. 15952.

10. Duplicating or conflicting rates.—Although proposed reduced rates on all commodities in straight or mixed shipments in "Speed Van Service," applicable only when shipper requests such service and speed van containers are available, are subject to a maximum weight per container, respondent would accept heavier shipments and charge its present l.c.l. rates on the excess weight; also, even if Speed Van Service were requested, higher present rates would apply if speed van containers were not available. As proposed rates are published in a separate tariff and are not referred to in tariff containing the present rates, there is a hidden conflict between the various rates, in violation of the commission's tariff regulations. Such unlawfulness cannot be removed by providing for alternation of the proposed and present rates, since a shipper requesting Speed Van Service would not know the applicable rate until after respondent had loaded the shipment. Shipper is entitled to know with certainty what rates he must pay; proposed schedules ordered canceled.—"Speed Van Service" between Md., N.J., N.Y., Pa. & Ill., 321 I.C.C. 452 (454-5, 456).

Section 405. (b) [§ *1005(b) U.S.C.*] Form of tariffs prescribed by commission; rejection of tariffs.—[Unchanged. See vol. 11, p. 9662.]

Section 405 (c) [§ *1005(c) U.S.C.*] Deviation from rates and regulations enumerated in tariff forbidden; rebates; privileges.—[Unchanged. See vol. 11, p. 9662.]

Notes of Decisions

Volume 13—p. 11153; Volume 14—p. 11674; Volume 15—p. 12290; Volume 16—p. 12951; Volume 17—p. 13658; Volume 18—p. 14682.

Section 405. (d), (e) [§ *1005 U.S.C.*]—[Unchanged. See vol. 11, p. 9662.]

Notes of Decisions

§405(d): Volume 18—p. 14682; §405(e): Volume 13—p. 11154.

Section 406. [*§ 1006(a) U.S.C.*] **Complaints to and investigations by commission. (a) Complaint to commission of violation of law by freight forwarder; investigation.**—[Unchanged. See vol. 11, p. 9663.]

Notes of Decisions

Volume 14—p. 11674; See also §406a, n. 20, v. 15, 16; Volume 18—p. 14683; Volume 19—p. 15953.

Section 406. (b) [*§ 1006(b) U.S.C.*] **Commission empowered to determine and prescribe rates, classifications, etc.**—[Unchanged. See vol. 11, p. 9664.]

Notes of Decisions

Volume 15—p. 12291; Volume 18—p. 14683; Volume 19—p. 15953.

Section 406. (c) [*§ 1006(c) U.S.C.*] **Good will, earning power or permit inadmissible in proceedings to determine rates.**—[Unchanged. See vol. 11, p. 9664.]

Section 406 (d) [*§ 1006(d) U.S.C.*] **Need of freight-forwarder service and fair return considered in determining rates, etc.**—[Unchanged. See vol. 11, p. 9664.]

Historical Notes

See vol. 12, p. 10522, vol. 13, p. 11154.

Notes of Decisions

Volume 12—p. 10522; Volume 13—p. 11154; Volume 14—p. 11675; Volume 15—p. 12291; Volume 16—p. 12952; Volume 17—p. 13659; Volume 18—p. 14683; Volume 19—p. 15954.

Section 406. (e) [*§ 1006(e) U.S.C.*] **New rates; determination of fairness by commission; suspension.**—[Unchanged. See vol. 11, p. 9665.]

Notes of Decisions

Volume 12—p. 10522; Volume 16—p. 12953; Volume 17—p. 13659; Volume 18—p. 14684; Volume 19—p. 15954.

15. Order as to suspended rates.—[Vol. 19].—Although certain of proposed rates represent slight increases, they are integral parts of proposed adjustment resulting generally in

reductions and must be so viewed; as the reduced rates are not shown to be compensatory, all proposed rates are required to be canceled.—Forwarder Commodity Rates between N.J. and Midwest, 315 I.C.C. 554 (554, 556).

20. Evidence.—[Vol. 19].—Respondent's objection to statement of an employee of motor tariff bureau, who supervises publication or printing of tariffs, on ground that he is not shown to appear on behalf of carriers or shippers and has no interest in the proceeding, overruled; the bureau publishes tariffs on behalf of its members and has an interest in the proceeding, and qualifications of its employee to testify as to rate and tariff matters are not questioned.—Freight, All Kinds, Import—Pacific Coast to Chicago, 315 I.C.C. 491 (492).

25. Burden of prrof.—[Vols. 12, 16-19].—That proposed rate was not protested does not relieve respondent of the burden imposed on it by §406(e) to show that the proposed change is just and reasonable.—Various Commodities, New York to New Jersey & New York, 316 I.C.C. 135 (136).

While respondent is entitled to meet existing competition at just and reasonable rates, it has burden of showing that proposed rates are just and reasonable; mere reference to rail rates and alleged competition is insufficient to establish their lawfulness.—Forwarder Commodity Rates between N.J. and Midwest, 316 I.C.C. 554 (555).

Although respondents represent that since 1948 they have elected to forego authorized general increases on transcontinental traffic aggregating approximately 8 percent and are entitled now to add at least 6 percent of those unclaimed increases, their failure to apply previous increases does not relieve them of the statutory burden under §406(e) to justify the general 6-percent increase now proposed.—General Increases—Transcontinental, 319 I.C.C. 792 (800).

See also Terminal Charge on Order Bills of Lading Shipments, §216(g), n. 5.

26. Reasonableness of regulations and practices.—Proposed multiple-shipment rule, minimum 5,000 pounds, designed to induce shippers to consolidate for a single pickup relatively small shipments otherwise requiring more than one pickup, is objectionable in that it does not specifically require that the aggregated shipment be received from one shipper, and that it be prepaid; requirement that charges be prepaid is necessary because their application depends on volume and other incidents of tender by shipper; disapproved, without prejudice to establishment of a rule conforming to views expressed.—Multiple Shipments, California to Oregon & Washington, 315 I.C.C. 247 (248).

65. Reasonableness of proposed rates.—[Vols. 17-19].—Proposed charges for segregation for split delivery at Pacific coast destinations of components of single shipments of at least 20,000 pounds, $2 for shipments rated up to $10 and $4 for higher-rated shipments, in connection with rate reduction averaging 32 cents, appear adequate to cover cost of additional service performed and are just and reasonable as inducement to shippers to consolidate 20,000-pound lots. Proposed charges would not give respondent an unfair advantage over other forwarders or motor carriers when any disproportion compared with latter's split delivery charge of $16.39 is more than offset by greater differences between their volume and any-quantity or small-quantity transcontinental rates.—Split Delivery—East to Pac. Coast & Mountain States, 315 I.C.C. 253 (255).

Proposed reduced import commodity rates from Pacific coast ports to Chicago are not shown to be compensatory for contemplated use of rail plan IV TOFC service; while respondent states that import forwarder traffic loads heavier than domestic, there is no sure indication that a volume sufficient to load 60,000 pounds on two trailers on a flatcar would be available for movement with reasonable dispatch; and that the predominant westbound forwarder movement is about twice that eastbound is an important factor in considering whether respondent could reasonably be expected to obtain enough traffic to permit use of the plan IV rates.—Freight, All Kinds, Import—Pacific Coast to Chicago, 315 I.C.C. 491 (493).

Nor is it shown that the proposed rates would not constitute a destructive competitive practice; respondent now handles traffic under joint-loading contract with other for-

warders, who would reduce their rates to retain it; and evidence does not support respondent's claim that consolidators, rather than regulated carriers, are handling traffic it formerly enjoyed, or that volume diverted from consolidators could be expected to provide loads of at least 60,000 pounds, particularly if regulated carriers publish the same reduced rates and the forwarders continue joint loading—both reasonably to be anticipated. Not approved.—Id., p. 493-4.

That proposed reduced rates or charges are above or on same level as certain competitive rates does not of itself establish their reasonableness; and beyond unsupported statement that some of considered traffic has been diverted to a forwarder using a rail-water-rail route, respondent offered no evidence of existing competition; moreover, it has not met the minimum requirement of proving the proposed rates to be compensatory; not approved.—Boots or Shoes from Massachusetts to Texas, 315 I.C.C. 264 (265).

Proposed l.t.l. commodity rates are not shown to be just and reasonable when respondent submitted no evidence of earnings or cost data to show their compensativeness and there is nothing to indicate that compared rates cited are acceptable as a proper standard to gage reasonableness of the rates proposed. Moreover, l.t.l. commodity rates require special justification which is not presented. Not approved.—Various Commodities, New York to New Jersey & New York, 316 I.C.C. 135 (138).

Respondent's unsupported assertion that proposed volume rates on various commodities between certain New Jersey points and points in 7 midwestern States, generally lower than present rates of respondent and protestant motor carrier association, are as profitable, on a cost basis, as from or to any other New Jersey points where they now apply, does not meet the minimum requirement of proving that they are compensatory; not approved.—Forwarder Commodity Rates between N.J. and Midwest, 316 I.C.C. 554 (555-6).

Although respondent's cost data do not reflect its present expenses because of its limited experience with traffic concerned at time its costs were computed, rates of competing motor carriers on same level as respondent's proposed reduced l.c.l. and any-quantity class rates between 6 southern and 10 northern States are the best available evidence of reasonableness of the proposed rates and are convincing that they are compensatory. Proposed rates are no lower than necessary to permit respondent to compete effectively for the traffic; approved.—Forwarder L.C.L. Class Rates between South and Ill., Ind., 316 I.C.C. 651 (653-4).

Proposed 6-percent increase in rates and charges on all transcontinental traffic weighing less than 10,000 pounds and moving to and from Pacific coast, except between certain points and areas specified (which exceptions are necessitated by similar exceptions in like increases proposed by motor carriers which are respondents' principal competitors), approved as necessary to provide revenues needed to meet increased operating expenses. Evidence is convincing that the transcontinental rates as thus increased do not exceed reasonable Maxima.—General Increased—Transcontinental, 319 I.C.C. 792 (799-800, 803).

Proposed rates on all commodities in straight or mixed shipments in "Speed Van Service," subject to a maximum weight per container and applicable only when shipper requests such service and speed van containers are available, are admittedly below many of respondent's present c.l. or volume rates; contention that negligible damage claims justify such reductions is without substance, as the speed van containers are also used in connection with respondent's present rates, and a shipper using speed van service does not have exclusive use of the container; not approved.—"Speed Van Service" between Md., N.J., N.Y., Pa. & Ill., 321 I.C.C. 452 (457).

Proposed l.c.l. commodity rates on straight or mixed shipments of commodities rated class 110 or higher in uniform classification, in steel containers of not over 350 cubic feet capacity, furnished by shipper, gross minimum weight 3,000 pounds, $4.28 from Baltimore and $4.91 from New York to Atlanta, are reasonably compensatory and justified to facilitate handling of import traffic while reducing loss and damage claims to a minimum.

Though the proposed rates are the same as respondent's class 100 rates, the containers, which must be returned to shipper, weigh 1,420 pounds, resulting in the charge on the 1,580 pounds minimum weight of lading approximating the class 200 level; and while respondent will return the empty containers at the class 150 rates to the ports, it will augment that revenue by shipping northbound traffic in them. Approved.—Merchandise from Baltimore and New York to Atlanta, 322 I.C.C. 245 (246, 248)*.

66. Cost of service.—[Vol. 19].—Although respondent's study of cost of transporting containerized merchandise shipments omitted such items as general office and tarffic department salaries, operating rents, office supplies, maintenance, and payroll taxes, it is neither feasible nor necessary to require allocation of overhead costs to any single l.c.l. forwarder shipment. As a practical matter, nearly all forwarder costs are variable because based almost exclusively on purchased transportation. Respondent has shown its out-of-pocket costs for the 3,000-pound l.c.l. shipment, and any remaining unallocated costs are more than covered by the revenue in excess of those costs; moreover, additional revenue would be derived from other shipments consolidated with one subject to the proposed rates, thus the total revenue for a c.l. shipment would substantially exceed the total line-haul cost by rail. Considering the very substantial excess of the rate over the costs shown, proposed rates are compensatory.—Merchandise from Baltimore and New York to Atlanta, 322 I.C.C. 245 (247)*.

Protestants' contention that respondent's cost data are unrealistic because they do not include any overhead costs such as expenses for employees, operating rents, etc., and that addition of amount for such expenses, based on respondent's quarterly report, produces total costs higher in many instances than proposed rates, is not rebutted; proposed rates thus are not shown to be compensatory.—Boots or Shoes from Massachusetts to Texas, 315 I.C.C. 264 (266).

Section 406. (f) [§ *1006(f) U.S.C.*] Investigation involving State regulations; conference of State and interstate commissions; prescription of rates, regulations.—[Unchanged. See vol. 11, p. 9665.]

Section 406a. [§ *1006a U.S.C.*] Actions for recovery of charges; limitation of actions; definition; effective date.—[Unchanged, except that the act of Sept. 6, 1965, Pub. L. 89-170, §7, 79 Stat. 651, amended paragraph (2) to read as set forth below; also renumbered paragraphs (5), (6), and (7) as paragraphs (6), (7), and (8), respectively, and inserted new paragraph (5), below. See vol. 18, p. 14687.]

(2) For recovery of reparations, action at law shall be begun against freight forwarders subject to this part within two years from the time the cause of action accrues, and not after, and for recovery of overcharges, action at law shall be begun against freight forwarders subject to this part within three years from the time the cause of action accrues, and not after, subject to paragraph (3) of this section, except that if claim for the overcharge has been presented in writing to the freight forwarder within the three-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the freight forwarder to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

The term "reparations" as used in this section means damages resulting from charges for transportation services to the extent that the Commission, upon complaint made as provided in section 406 of this part, finds them to have been unjust and unreasonable, or unjustly discriminatory or unduly preferential or unduly prejudicial.

Notes of Decisions

Volume 14—p. 11674; Volume 15—p. 12292; Volume 16—p. 12953; Volume 17—p. 13660; Volume 18—p. 14688

20. Complaints seeking reparation.—[Vols. 15-18].—In 1965 amendment to §406a, Congress did not in express terms provide more than a judicial avenue to reparations; therefore, the commission's decision to anticipate voluntary settlements before resort to the courts (by establishing informal procedure for settlement of uncontested reparations claims against forwarders), and to make a rate determination for the convenience and protection of the parties, was not a necessary consequence of the statutory change. Whether the commission should have so decided and, if so, what the precise form and scope of the procedure should be were questions suitable for exploration in formal rule-making. The commission having failed to comply with rule-making requirements of §4 of the APA, its action establishing considered procedure is invalid.—National Motor Freight Traffic Ass'n v. United States, 268 F. Supp. 90 (93, 95-7)*.

Regulations of the Commission

30 FR 16050, Dec. 23, 1965: In view of enactment of Public Law 89-170, Sept. 6, 1965, the Commission has approved a method by which freight forwarders may be authorized informally to pay reparations to shippers in uncontested cases where the carrier is agreeable to making adjustments.

Section 407. [*§1007 U.S.C.*] **Motor carrier rates applicable to small parcel forwarding.**—[Unchanged. See vol. 11, p. 9666.]

Section 408. [§1008 U.S.C.] Authority for assembling and distribution rates.—[Unchanged. See vol. 11, p. 9667.]

Notes of Decisions

Volume 12—p. 10523; Volume 13—p. 11155; Volume 14—p. 11675; Volume 15—p. 12293; Volume 17—p. 13660; Volume 18—p. 14688; Volume 19—p. 15958.

2. Construction and interpretation.—[Vols. 12-15].—Under the permissive provisions of §408, assembling or distribution rates lower than normal rates may not be established for exclusive benefit of forwarders, but must be made available to others using common carrier services under like conditions. [272 ICC 413.]—Assembling and Distribution Rates Between Points in N.Y., 316 I.C.C. 606 (607-8).

5. Assembling and distribution rates.—[Vols. 13-15, 17-19].—A motor common carrier may establish distribution rates different from its normal rates if such difference is justified by a difference in the respective services; proposed distribution rates for freight consolidators not approved where respondent failed to show any difference in the services or that the proposed rates would be compensatory.—Distribution Rates—Pitts-

burg to Ind., Ky., Mich., and Ohio, 316 I.C.C. 381 (382).

Although assembling and distribution rates less than 85 percent of corresponding class rates have not generally been approved, and proposed assembling rates on textiles from mills throughout the Carolinas to Charlotte and Greensboro, N.C., are less than 80 percent of l.t.l. class rates presently moving the traffic, they are shown to be no lower than necessary to prevent diversion to private carriage or other modes of transportation; and comparisons with other motor-carrier rates in that area, together with indicated savings in collecting charges and making deliveries, are convincing that the proposed rates, though possibly depressed, are compensatory; approved.—Assembling Rates at Charlotte and Greensboro, N.C., 318 I.C.C. 429 (431, 436-7, 439).

Proposed l.t.l. assembling and distribution commodity rates, restricted to forwarder traffic and lower than like rates maintained by same respondent without such restriction, may not be approved; moreover, proposed rates are not shown to be compensatory, as required under §216(g), or to be justified by difference in conditions under which the respective services are employed, as required under §408.—Assembling and Distribution Rates between Points in N.Y., 316 I.C.C. 606 (608).

Proposed l.t.l. assembling and distribution class rates between Springfield, Mass., and some 19 points in Connecticut and 61 in Massachusetts are not justified by general statements concerning attractiveness of the traffic and reference to competitive rates which apply only between Connecticut points; many of proposed rates are far below level 85 percent of normal class rates previously approved for rates under §408, and no cost data to show their compensativeness are presented. Not approved.—Assembling and Distribution Rates between New England Points, 318 I.C.C. 57 (58).

Assembly and distribution rates published for New York and Philadelphia areas in "A & D" tariffs apply to service beyond commercial zones for forwarders and consolidators, whose traffic is varied, frequently light and bulky, and entails more paperwork than assembly and distribution under "S" tariffs, generally within the commercial zone, of small shipments having a prior or subsequent line haul by the same carrier as part of a pool truckload, which usually consists of articles of the same class. Moreover, traffic moving beyond the commercial zones under "A & D" tariffs may not be handled by exempt carriers, whereas service performed within the zones by regulated carriers under the "S" tariffs is in direct competition with unregulated local cartage operators whose rates are not published or subject to any statutory criterion. These substantial differences in nature of the traffic and services involved justify maintenance of a higher level of rates in the "A & D" than in the "S" tariffs.—Distribution Rates in Eastern Central Terr. Cities, 319 I.C.C. 410 (413-4).

Section 409. [§1009 U.S.C.] Utilization by freight forwarders of services of common carriers by motor vehicle.—[Unchanged. See vol. 15, p. 12294.]

Amendments, see footnotes, vol. 13, p. 11158 (former §409); see also vol. 15, p. 12294, Historical note, vol. 17, p. 13661; vol. 18, p. 14689.

Notes of Decisions

Volume 12—p. 10524; Volume 13—p. 11158; Volume 14—p. 11676; Volume 15—p. 12295; Volume 17—p. 13661; Volume 18—p. 14689; Volume 19—p. 15959.

2. Construction and interpretation.—[Vols. 12-15, 17-19].—In holding in 272 ICC 413 that, since most forwarder traffic moving terminal-to-terminal by motor carriers moves in trucks sealed by the forwarders, all such traffic should be treated as "truckload" for purposes of §409(a), the commission clearly considered factors other than published rates in determining what constitutes a truckload; and, except for the 450-mile exemption, there is no indication that Congress, in the 1950 amendment which added the second proviso

of §409(a), adopted a different view. And though historically a t.l. shipment is one that substantially fills the vehicle's carrying capacity, "truckload" does not lend itself to an exact definition applicable in all instances; circumstances surrounding the movement must be considered, and that weight alone is not conclusive in defining a truckload was recognized in 321 ICC 732 and 323 ICC 543.—Milne Truck Line, Inc.—Investigation—Tariff Rates, 325 I.C.C. 128 (133).

That consideration of factors other than weight and published rates in determining what constitutes a truckload lot will render enforcement of §409(a) more difficult is not controlling. Volume and t.l. rates and minimum weights are published at various levels, and, while such factors in the tariff should be considered, to adopt a definition of "truckload lots" as a shipment of freight thus rated or ratable would ignore the fact that in many instances a shipment ratable at a particular volume or t.l. rate would not constitute a truckload; recognition of that fact is necessary to give practical effect to the provisions of §409(a).—Id., p. 134.

Forwarder respondent's contention that a fair method of defining a truckload lot is to relate it to the capacity of the vehicle used, measured by either maximum weight or volume, without reference to minima published in connection with t.l. or volume rates, is not supported by decisions cited, which show that the commission has never restricted its consideration solely to those matters, but has given primary consideration to the actual service to be rendered. Moreover, respondent's interpretation of "vehicle" to mean the tractor or unit of motive power pulling the load, rather than the trailer containing the freight, is erroneous in context of the matters at issue. "Vehicle" as used in that context clearly implies a single unit or trailer on or in which the freight is actually loaded; the tractor has no freight carrying capacity.—Id., pp. 134-5.

The best test for determining what constitutes a truckload lot within meaning of §409(a) is one which carefully weighs all pertinent factors, including the actual practice of the motor carrier who provides the forwarder with service. Evidence indicates that representative shipments handled by respondents moved on one bill of lading from one consignor at one origin to one consignee at one destination; each of such shipments, which averaged about 20,500 pounds, moved in one 24-foot trailer; and although additional freight could possibly have been loaded onto the trailer, normally the seals placed on the trailers in respondent forwarder's dock were not broken prior to delivery at destination terminal, thus indicating that the forwarder had exclusive use of the trailer. Weighing such factors in ligh of past precedents and dealing in totalities, conclusion is warranted that the involved shipments constitute truckload lots.—Id., p. 135.

5. Agreements.—[Vols. 15, 17-19].—Since shipments transported terminal-to-terminal by respondent motor carrier for respondent forwarder are found to be "truckload lots" within meaning of the second proviso of §409(a) and were and are transported for a distance exceeding 450 miles, the motor carrier's charging and the forwarder's paying of contract rates lower than the motor carrier's applicable tariff rates was and is in violation of §§217(b) and 409(a). Cease-and-desist order entered.—Milne Truck Line, Inc.—Investigation—Tariff Rates, 325 I.C.C. 128 (135).

Section 410. (a) [*§ 1010(a) U.S.C.*] Permit essential to operation; carriers in operation on effective date of section; service to, from, and within Alaska; Hawaii; "grandfather" provisions.—[Unchanged. See vol. 11, p. 9669; Vol. 19, p. 15959].

Historical notes, vol. 16. p. 12954, vol. 17, p. 13661, vol. 18, p. 14690.

2. Construction and interpretation.—Unauthorized for-hire forwarder operation by purported shipper association, see Atlanta Shippers Assn. case, §402(a)(5), n. 1.

See §402(a)(7), n. 1.

10. Cessation of unlawful operation.—Where individual shippers' commodities are loaded into pool barges by one respondent at Monaca, Pa., for movement by regulated water carriers to Houston, Tex., where break-bulk and distribution operations are performed by two others pursuant to a common plan or enterprise, respondents jointly and in concert are engaged in service as a for-hire freight forwarder in violation of §410(a); cease-and-desist order entered.—Southern Bonded Warehouse Co.—Investigation, 318 I.C.C. 345 (346, 355, 356).

Section 410. (b) [§ *1010(b) U.S.C.*] Application for permit; form and content.

[Unchanged. See vol. 11, p. 9669.]

Historical Note

The commission recommends that mandatory oath requirement be eliminated; that oath provision be made discretionary with the commission.—Annual Report, 1960, p. 191; Annual Report, 1961, p. 192; Annual Report, 1964, p. 72.

Notes of Decisions

Volume 12—p. 10525; Volume 13—p. 11158; Volume 14—p. 11676; Volume 15—p. 12296; Volume 16—p. 12954; Volume 17—p. 13661; Volume 18—p. 14690; Volume 19—p. 15961.

18. Burden of proof.—[Vols. 13, 15, 16, 18, 19].—In showing that proposed forwarder service will be consistent with public interest and the national transportation policy, applicants must establish that existing service is inadequate to meet the reasonable needs of the public, in same manner as those seeking certificated authority under Part II. This requirement was effectively imposed by the 1957 amendment of §410(d), and a finding of inadequacy in service of opposing forwarders is penultimate to a finding of need for a new similar service.—Norman G. Jensen, Inc., 318 I.C.C. 719 (724).

In the 1957 amendment of §410(d), Congress did not change a forwarder applicant's basic burden of establishing that its proposed operation will be consistent with public interest and the national transportation policy, but merely removed the bar, except in case of applicants controlled by or affiliated with a carrier subject to Part I, to the commission's denial of an application solely on ground of adequacy of existing forwarder service.—Frank P. Dow Co., Inc., Extension, 322 I.C.C. 102 (112-3).

22. Evidence.—[Vols. 14, 15, 17, 18, 19].—Since intervener's claim of right to serve Longview, Wash., under its authority to serve Portland, Oreg., has not been determined; its authority is limited to foreign freight; at time of hearing it had handled only two small shipments in its recently instituted service from Longview; and a number of protestants can provide the complete service for which authority is sought, its opposition to application need not be considered.—Norman G. Jensen, Inc., 318 I.C.C. 719 (721, 724).

Verified statements of 38 shippers in support of applicant's request for further hearing, which were appended to its exceptions, cannot properly be considered as evidence; motion to strike granted.—Frank P. Dow Co., Inc., Extension, 322 I.C.C. 103 (108).

Evidence relating to applicant's operations between 1916 and 1933 was properly excluded; regardless of their nature and extent, those operations are too remote in time to justify modification of authority granted applicant in 1948.—Id., p. 109.

25. Hearing, generally.—Applicant's request in its exceptions for further hearing, and supporting verified statements of 38 shippers, do not comply with rule 1.101(b) of Rules of Practice; no satisfactory reason is given why the evidence sought to be adduced at a further hearing was not presented at initial hearing, and matter contained in the appended shipper statements is convincing that such evidence would be merely cumulative of that already of record.—Frank P. Dow Co., Inc., Extension, 322 I.C.C. 103 (108).

Section 410. (c) [§ *1010(c) U.S.C.*] Issuance of permit; carriers excluded; applicant controlled by or with common carrier.—[Unchanged. See vol. 11, p. 9669.]

Notes of Decisions

Volume 12—p. 10525; Volume 13—p. 11159; Volume 14—p. 11677; Volume 15—p. 12296; Volume 16—p. 12954; Volume 17—p. 13662; Volume 18—p. 14691; Volume 19—p. 15962.

2. Construction and interpretation.—[Vols. 12-19].—The basic statutory standards to be applied in determining whether an application for forwarder permit should be granted or denied are contained in §410(c) and (d). Though §410(d) formerly prescribed a rule to be followed in all forwarder proceedings, which assured that permit would not be refused solely on ground of adequacy of existing forwarder service, amendment thereof in 1957 limited applicability of that rule to proceedings involving applicants controlled by or affiliated with a carrier subject to Part I, but did not change the §410(c) standard of consistency with public interest and the national transportation policy. Obviously, to grant forwarder authority in face of adequate existing service would frustrate Congress' intent in amending §410(d) so as to avoid wasteful duplication of existing facilities; however, though an application may now be denied solely because existing service is adequate, it need not be denied where there is proof of a public interest factor of equal or dominant importance. Nonetheless, adequacy of existing service is a vital factor and most frequently of controlling importance.—Frank P. Dow Co., Inc., Extension, 322 I.C.C. 103 (110, 111-3).

And because §§209(b) and 410(c) require application of the same statutory standard of consistency with public interest and the national policy in evaluating contract-carrier and freight-forwarder applications, it does not follow that forwarder applications should be considered in terms of criteria announced in the 1957 amendment of §209(b). That Congress considered the amendment of §§209(b) and 410(d) at the same time does not mean that it intended to include the §209(b) criteria in Part IV; had it so intended, it could have specifically referred to or incorporated those five criteria in Part IV, but it did not. On the contrary, the congressional committee reports state that the amendment of §410(d) would bring the requirements for obtaining forwarder authority more nearly in line with those for obtaining rights to engage in other types of common-carrier service; this hardly evinces intention to bring the requirements for forwarder authority in line with those for contract-carrier authority.—Id., pp. 113-4.

7. Competition.—[Vols. 13-19].—Mere availability of other types of common carriage should not bar institution of forwarder service of a character not presently offered.—Corpus Christi Distributing Service, Inc., Extension, 316 I.C.C. 542 (545).

Amendment of §410(d) in 1957 for specific purpose of eliminating needless and uneconomic duplication of existing forwarder services had effect of imposing requirement that an applicant seeking authority for a new similar service must prove inadequacy of service provided by opposing forwarders. Five forwarder protestants are authorized to serve Longview, Wash., all offer service from that port in connection with their nearby terminals at Portland, Oreg., and, since no inadequacy in their service is shown, they are entitled to continue their operations without any diversion by applicant. Denied.—Norman G. Jensen, Inc., 318 I.C.C. 719 (723, 724, 725).

It is manifest from the legislative committee reports that Congress intended by the 1957 amendment of §410(d) to remove the bar to the commission's giving full consideration and weight to existing forwarder service (except in case of applicants controlled by or affiliated with a carrier subject to Part I) in evaluating merits of applications seeking to establish a new competitive forwarder service; and the commission has since felt it incumbent to make subsidiary findings as to

whether existing service is adequate to meet the evident needs of the supporting shippers.—Frank P. Dow Co., Inc., Extension, 322 I.C.C. 103 (112, 113).

Protestants can provide more frequent service on import traffic from Longview, Wash., and Stockton and San Diego, Calif., to destinations east of Rocky Mountains than applicant whose authority is restricted to that traffic, because of their ability to combine such shipments in consolidated loads with their large volume of domestic traffic, and they have surplus equipment and capacity for forwarding eastbound traffic in TOFC service. Applicant's use of motor carrier service for line-haul movement of some traffic does not constitute a significant advantage because its use thereof is limited by terms of §409. While protestants' service is largely untried by supporting shippers, it appears adequate to handle all import traffic that might be tendered them at those three ports. Grant of authority sought would therefore be inimical to public interest and the national transportation policy, particularly the directive to foster sound economic conditions in transportation and among the several carriers.—Id., p. 116.

25. Necessity, demand for service.—[Vols. 12-19].—There is substantial public need for proposed forwarder service between points in 11 northern or central States and points in Louisiana and Texas, utilizing barge service between consolidation and distribution points, when numerous shippers desire to obtain the rate advantages of barge service and are not interested in expeditious movement, but do not ship individually in sufficient quantities to meet bargeload minima, and the only forwarders holding authority for part of the service proposed have not provided such service for some years; however, no support is shown for service at New York points except in extreme western portion of the State, and authority granted is limited accordingly.—Corpus Christi Distributing Service, Inc., Extension, 316 I.C.C. 542 (545).

Applicant has failed to meet its burden of showing inadequacy of existing forwarder services from Longview, Wash. Protestants authorized to serve Longview as well as Seattle and Portland, Oreg., are furnishing adequate service and can facilitate dispatch of all shipments by combining those from Longview with those from the other ports; nor is any need shown for establishment of terminal facilities at Longview in view of proximity of protestants' terminals at Portland. While overall traffic through the port of Longview has increased in recent years, no reasonable certainty of prospective need for proposed forwarder service is shown, and if volume of traffic warranted it in future at least one existing forwarder would consolidate and make shipments directly from there. Denied.—Norman G. Jensen, Inc., 318 I.C.C. 719 (724-5).

Though applicant, an import forwarder holding authority from the Treasury Department as a customs broker, contends that it can provide a complete service meeting a public need which protestants who lack that authority cannot supply, its service as a customs broker cannot be considered a part of the service it proposes to provide. Its customs brokerage service is performed under regulations of the Customs Bureau, and its duties and obligations as a customs broker in no way relate to the provision of or arranging for surface transportation subject to the commission's jurisdiction. In proceeding on application for extension authority from three additional Pacific coast ports, the commission's concern is with the forwarder service proposed, not with some extraneous service such as customs brokerage, which is not a part of forwarder service as defined in §402.—Frank P. Dow Co., Inc., Extension, 322 I.C.C. 103 (114-5).

Even though supporting shippers' traffic now moves to an undisclosed extent through the three ports sought instead of those which applicant is already authorized to serve, the commission has found that a carrier's mere desire to follow traffic it has previously handled is not enough alone to warrant grant of authority, and that it would be contrary to law and sound reasoning to authorize an applicant to follow certain traffic where adequate existing service is available at the relocated origin. Those principles are equally applicable to forwarders; in amending §410(d) Congress intended the commission to afford greater protection to existing forwarders which can adequately provide the service needed by

shippers, and to allow applicant to follow its shippers' traffic to the three ports involved, in face of adequacy of available service, would frustrate Congress' intent in amending §410(d).—Id., p. 117.

Despite applicant's contention that it would provide a specialized service, no essential difference is discernible in forwarding of domestic traffic and import traffic that has been cleared through customs. Protestants serving the involved ports handle import shipments in same manner as domestic and, because they forward both types together in consolidated loads, can offer more frequent service; supporting shippers who have used their service have found it satisfactory. As protestants' service thus appears adequate to handle all import traffic that may be tendered them at the three ports, grant of application would authorize an unneeded duplicative service, and it must be denied as contrary and inimical to the public interest and the national transportation policy.—Id., p. 116.

26. Fitness, generally.—[Vols. 12-19].—Since prohibition of §411(b) is designed to prevent abuses arising from shipper control of forwarders, an application falling within purview thereof must be subjected to searching scrutiny and denied unless circumstances render applicant's practice of such abuses unlikely. Proposed operation as a forwarder of new furniture would not be consistent with public interest when applicant would be subject to potential control by a furniture company which could exercise control over movement of traffic to its competitors. Denied.—Furniture Forwarders, Inc., 316 I.C.C. 615 (618, 619).

Although applicant has not provided any service under its existing permit for operation between 15 States and southern Texas for about 19 years, it believes that proposed operation between points in 11 States and points in Texas and Louisiana, utilizing barge service between consolidation and distribution points, would be more economically feasible, and is willing to surrender its existing rights; applicant has shown ability to obtain substantial financial backing and its president, who is president of two other forwarding companies, proposes to use latter's facilities and personnel to aid in rendition of the proposed service. In the circumstances, applicant may be found fit to perform the proposed service, but grant of authority sought is conditioned on its request in writing for concurrent cancellation of its outstanding permit.—Corpus Christi Distributing Service, Inc., Extension, 316 I.C.C. 542 (546).

Section 410. (d) [§ *1010(d) U.S.C.*] Competition.—[Unchanged. See vol. 18, p. 14693.]

Section 410 (e) [§ *1010(e) U.S.C.*] Terms and conditions; territories; restrictions.—[Unchanged. See vol. 11, p. 9670.]

Notes of Decisions

Volume 12—p. 10527; Volume 13—p. 11160; Volume 14—p. 11679; Volume 15—p. 12298; Volume 16—p. 12955; Volume 17—p. 13664; Volume 19—p. 15963.

25. Territory to be served.—[Vols. 12-15, 19].—Although territorial scope of applicant's original application for authority to render forwarder service from all Pacific coast ports was unopposed, authority was granted only from the ports of Vancouver, B.C., and Seattle, Portland, San Francisco, and Los Angeles, those being the only Pacific coast ports handling any significant volume of import traffic at that time. The commission could have granted authority as sought, but did not, and it is not suggested that its failure to authorize all Pacific coast ports resulted from clerical error or inadvertence; terms of applicant's existing permit conform precisely with findings on its original application, and its argument that it is already authorized to perform proposed service from the ports of

Longview, Wash., and Stockton and San Diego, Calif., is without merit.—Frank P. Dow Co., Inc., Extension, 322 I.C.C. 103 (109).

A forwarder is authorized to serve only those points specifically designated in its permit and points within commercial zones of the points so designated. There is therefore no merit to contention that applicant (which also operates as a customs broker at all ports it is authorized or seeks to serve) is entitled to serve all points in the U.S. Customs District for San Francisco, which includes Stockton, and all points in the Customs District for Oregon, which includes Portland and Longview.—Id., p. 110.

Section 410. (f) [§ *1010(f) U.S.C.*] Suspension, change, revocation, or permits.—[Unchanged. See vol. 11, p. 9670.]

Notes of Decisions

Volume 13—p. 11161; Volume 15—p. 12298; Volume 17—p. 13665; Volume 18—p. 14693.

10. Amendment of permit.—[Vol. 13].—To modify terms of an existing permit merely because territorial scope of original application was unopposed and a more extensive grant might have been made 15 years earlier would tend to cast doubt on all outstanding certificates, permits, and licenses.—Frank P. Dow Co., Inc., Extension, 322 I.C.C. 103 (109).

Section 410. (g) [§ *1010(g) U.S.C.*] Transfer of permit or operating rights; employees' interest protected.—[Unchanged. See vol. 11, p. 9671.]

Historical Note

The commission recommends that provisions of part IV relating to ownership, control, and operation of freight forwarders in common with carriers of other modes be revised and clarified, and, to this end, that future transactions involving such relationships be made subject to the provisions of §5.—Annual Report, 1962, p. 208; renewed, Annual Report, 1963, p. 21.

Notes of Decisions

Volume 14—p. 11679; Volume 15—p. 12298; Volume 16—p. 12956; Volume 17—p. 13665.

Regulations of the Commission

28 FR 12367, Nov. 22, 1963, Part 415: Transfers of Operating Rights, §415.5 Procedure, amended by relettering paragraph (e) as paragraph (f) and inserting a new paragraph (e) to read as set forth, effective Jan. 1, 1964.

Section 410. (h), (i) [§1010(h), (i) U.S.C.]—[Unchanged. See vol. 11, pp. 9671, 9672.]

Notes of Decisions

§410(i): Volume 14—p. 11680.

Section 411. [§ *1011 U.S.C.*] Acquisition of control; injunction; supplemental orders.—[Unchanged. See vol. 11, p. 9672.]

Historical notes, see vol. 12, p. 10527, vol. 13, p. 11161, vol. 14, p. 11680, vol. 15, p. 12299, vol. 16, p. 12956, vol. 17, p. 13666.

Historical Note

The commission recommends that provisions of part IV relating to ownership, control, and operation of freight forwarders in common with carriers of other modes be revised and clarified, and, to this end, that future transactions involving such relationships be made subject to the provisions of §5.—Annual Report, 1961, p. 187; renewed, Annual Report, 1962, p. 208; Annual Report, 1963, p. 21.

Notes of Decisions

Volume 12—p. 10528; Volume 13—p. 11161; Volume 14—p. 11680; Volume 15—p. 12299; Volume 16—p. 12956; Volume 17—p. 13666; Volume 18—p. 14694; Volume 19—p. 15965.

2. Construction and interpretation.—[Vols. 12-19].—Since purpose of the prohibition stated in §411(b) is to guard against abuses which may arise from shipper control of forwarders, an application falling within purview thereof must be denied unless attendant circumstances render applicant's practice of such abuses unlikely. Section 402(a)(8) provides that "control" includes actual as well as legal control and also power to exercise control; and since Congress in enacting Part IV used "Control" in same sense as in Part I, the commission is not limited to forwarder cases in resolving the question of control. See discussion of "control" in 38 MCC 95, and of effect of family relationship in 55 MCC 696 and 60 MCC 404.—Furniture Forwarders, Inc., 316 I.C.C. 615 (618).

Applicant's president and principal stockholder (the others being his wife and son) is employed, and will continue to be employed, as purchasing agent and supervisor of trucking operations for furniture company whose chairman of the board and president are his brother and nephew, respectively; thus, applicant's president is in a position to influence policies of the furniture company although he is not a director or officer thereof; conversely, the furniture company is in position to influence him and through him to control applicant's proposed operations as a forwarder of new furniture—a situation proscribed by §411(b); that the furniture company does not intend to use applicant's service does not negate its power to exercise control. Application denied.—Id., pp. 618-19.

Section 412. [§ *1012 U.S.C.*] Accounts, records and reports.—[Unchanged. See vol. 11, p. 9674, vol. 15, p. 12300.]

Amendments, see footnotes, vol. 15, p. 12300; historical notes, see vol. 12, p. 10330, vol. 13, p. 11032, vol. 14, 11543.

Historical Notes

The commission recommends that §412 be amended to permit the commission or its duly authorized agents to inspect the books, records, and other documents kept or maintained by agricultural cooperatives and shipper associations. —Annual Report, 1961, p. 184; renewed, Annual Report, 1962, p. 201; Annual Report, 1963, p. 19; Annual Report, 1964, p. 76.

The commission recommends, in view of the prohibitions in 28 USC §1001, that §412(b) be amended so as to eliminate the mandatory oath provision therein, and that such requirement be made discretionary with the commission.—Annual Report, 1960, p. 191; renewed, Annual Report, 1961, p. 192; Annual Report, 1964, p. 72.

Notes of Decisions

Volume 17—p. 13666.

10. Controlling person subject to reports, accounting, provisions.—[Vol. 17].—Part I, §5 (3), n. 10.—See Financial Statements Released by Carriers, §20(3), n. 16, 31.

Regulations of the Commission

28 FR 1960, Feb. 28, 1963: Retention periods, records, freight forwarders, 49 CFR 450.11.

28 FR 13747, Dec. 17, 1963, Part 446: Periodical and Special Reports, amended by adding thereto §446.2 Piggyback traffic statistics—freight forwarders. Effective with reports for first quarter of 1964.

29 FR 1470, Jan. 29, 1964, Part 445: Annual Reports, §445.1 Annual reports of Class A Freight Forwarders, Annual Report Form F-a prescribed for use commencing with year ended Dec. 31, 1963.

29 FR 16087, Dec. 2, 1964, Part O: The Commission, §0.5 Credentials required by special agents, accountants, and examiners, paragraphs (c), (d), (e), (f), and (g) amended, effective on date of order.

29 FR 19107, Dec. 30, 1964, Part 0: Order of Nov. 24, 1964 (29 FR 16087) corrected to substitute "accountants" for "accounts" wherever latter appears therein.

29 FR 3088, Mar. 5, 1964: Retention periods, records, freight forwarders, 49 CFR 450.11.

30 FR 3163, Mar. 6, 1965: Same retention periods reference.

30 FR 9585, July 31, 1965, Part 450: Preservation of Records of Freight Forwarders, title of part changed to read as set forth and regulations modified in order to (1) update the rules and (2) standardize the instructions and retention requirements with similar requirements to be prescribed by the Civil Aeronautics Board, effective Sept. 1, 1965.

31 FR 4067, Mar. 8, 1966: Retention periods, records, freight forwarders, 49 CFR 450.8.

32 FR 3664, Mar. 2, 1967: Retention periods, records, freight forwarders, 49 CFR 450.8.

NOTE: For recodification, see 49 CFR, Editorial Note, 32 FR 5606, April 5, 1967.

32 FR 16428, Nov. 30, 1967, Part 540 [formerly Part 440]: Uniform System of Accounts for Freight Forwarders, miscellaneous amendments pertaining to extraordinary and prior period items, effective Jan. 1, 1967.

33 FR 4067, March 1, 1968: Record Retention Guide, XXIV Interstate Commerce Commission [Revised] 1.11 Freight forwarders, 49 CFR Part 1228.

Section 413 [§ *1013 U.S.C.*]. Receipts or bills of lading; delivery; application of §20(11), (12).—[Unchanged. See vol. 11, p. 9676.]

Notes of Decisions

Volume 12—p. 10528; Volume 13—p. 11162; Volume 14—p. 11681; Volume 15—p. 12301; Vol. 16—p. 12957; Volume 18—p. 14694.

10. Issuance of bills of lading.—[Vols. 13, 14, 16, 18.]—Under through bills of lading issued by plaintiff forwarder to shippers of l.c.l. shipments lost in transit while on defendant's St. Louis freight platform awaiting plaintiff's loading instructions or availability of outbound car or truck, plaintiff was a common carrier; so far as the customer-shipper was concerned, interstate carriage was still in effect when the loss occurred and plaintiff was liable to its shippers therefor.—Republic Carloading & Distrib. Co. v. Missouri Pac. R. Co., 302 F. 2d 381 (385, 389)*.

But in movement of the consolidated carload or truckload to St. Louis under bill of lading issued by the line-haul rail or motor carrier, naming plaintiff as consignor-consignee, or in similar outbound movement under new bill of lading, plaintiff was a shipper-consignee in relation to the underlying carrier; latter's obligation ended with placement of the inbound car at the platform or the truck at the depot, and subsequent unloading by defendant was performed at plaintiff's request as consignee and was not part of the common carriage; thus, when the loss occurred the interstate movement had either ceased or had not yet begun, and defendant, which did not participate therein, was not liable to plaintiff for the loss.—Id., pp. 385-6, 389.

32. Released rates and ratings generally.—Section 20(11), which is made applicable to forwarders by §413, merely restates the common law rule that a common carrier is ordinarily an insurer against loss, damage, or injury to property committed to it for transportation; but though it also declares any limitation of liability to be null and void, it authorizes the commission to modify that general rule upon a proper showing of justification for relief therefrom. Since this discretionary power involves an exception to the general rule, it has been used sparingly, and an applicant for released-rates authority is required to show that (1) the wide range in value of the commodity makes it difficult to estimate amount of any claim that may arise, (2) susceptibility of the traffic to loss and damage is comparatively high, (3) there is a high ratio of claims to freight charges, and (4) claims for loss and damage are numerous and frequent.—Wearing Apparel, Accessories, Piece Goods—Shulman, Inc., 321 I.C.C. 1 (4-5).

Applicant, a forwarder of wearing apparel, accessories, and piece goods, has shown that

packages handled contain commodities with a range of values from $5 to $30,000; that, despite modern security precautions, theft and pilferage continue to be high and seemingly cannot be eliminated; and that frequency of claims causes it great difficulty in obtaining cargo insurance. Outstanding order granting it relief for released-value rates should not be rescinded merely because of its failure to adduce specific evidence concerning ratio of claims to freight charges, since it has introduced an added consideration: competitive necessity. Without released rates, applicant would be required to ascertain the actual value of each shipment, even though its competitors would not, and resultant slowing down of its operations would prevent continuance of its competitive overnight service; moreover, if shippers were required to declare actual value, its exposure to claims would be increased. The released rates order previously issued is thus shown to be lawful.—Id., pp. 5-6.

Although the outstanding order, after authorizing applicant to maintain released rates on "wearing apparel, accessories, and piece goods," also states that it does not authorize such rates "on any description of traffic * * * other than as herein specifically indicated," that negative statement is explanatory, not descriptive, and examiner's conclusion that dresses, shoes, fur coats, and costume jewelry are not "specifically indicated" and therefore excluded would virtually nullify the order. The ordinary rule in interpreting orders is that a presumption exists in favor of a meaningful interpretation; broad generic descriptions, such as "wearing apparel," have long been used in the trade and by the commission for convenience; obviously, that description is inclusive, not exclusive. Since wearing apparel was specifically indicated in the order, it follows that all commodities embraced within that generic description are also indicated as specifically as though expressly designated; hence, dresses, shoes, and fur coats are included in the description "wearing apparel."—Id., p. 3.

115. Actions to enforce liability; in general.—[Vols. 14, 15].— Suit to recover from underlying connecting carrier, see First Flight Co. case, §20(12), n. 1.

Section 414. [§ *1014 U.S.C.*]. **Collection of rates and charges.**—[Unchanged. See vol. 11, p. 9677.]

Notes of Decisions

Volume 12—p. 10528; Volume 13—p. 11163.

Section 415. [§ *1015 U.S.C.*] **Allowances to shippers for transportation service.**—[Unchanged. See vol. 11, p. 9677.]

Notes of Decisions

Volume 12—p. 10529; Volume 15—p. 12302; Volume 19—p. 15966.

50. Pickup and delivery.—[Vols. 12, 14, 19].—Prohibition in §415 of payment by forwarders of allowances that are "more than just and reasonable" requires some indication that a proposed allowance does not exceed average shipper's cost of performing the service. Respondent's claim that its cost of performing pickup service at Baltimore ranges from 55 to 60 cents per 100 pounds is not supported by any cost data, and no evidence of costs of shippers or of cartage companies performing the service for them was presented. In absence of such a showing, proposed allowances in form of a general reduction of 35 cents in rates of one respondent, and of 20 and 30 cents in rates of another, on shipments de-

livered by shippers to their receiving stations may not be approved.—Freight Forwarder Allowances at Baltimore, Md., 315 I.C.C. 719 (721).

Section 416. (a)—(d) [*§ 1016(a)—(d) U.S.C.*]—[Unchanged. See vol. 11, pp. 9677, 9678.]

Section 417. (a) [*§ 1017 (a) U.S.C.*] **Enforcement and procedure. Sections 12 and 17 of Part I, Compulsory Testimony and Immunity of Witnesses Acts, applicable.**—[Unchanged. See vol. 11, p. 9679.]

Section 417. (b) [*§ 1017(b) U.S.C.*] **Proceedings to enforce orders.—**

By act of Sept. 6, 1965, Pub. L. 89-170, §5, 79 Stat. 650, paragraph (b) was amended by inserting "(1)" after "(b)" and by adding the following:

(2) If any person operates in clear and patent violation of section 410 of this part, or any rule, regulation, requirement, or order thereunder, any person injured thereby may apply to the district court of the United States for any district where such person so violating operates, for the enforcement of such section, or of such rule, regulation, requirement, or order. The court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such person, his or its officers, agents, employees, and representatives from further violation of such section or of such rule, regulation, requirement, or order; and enjoining upon it or them obedience thereto. A copy of any application for relief filed pursuant to this paragraph shall be served upon the Commission and a certificate of such service shall appear in such application. The Commission may appear as of right in any such action. The party who or which prevails in any such action may, in the discretion of the court, recover reasonable attorney's fees to be fixed by the court, in addition to any costs allowable under the Federal Rules of Civil Procedure, and the plaintiff instituting such action shall be required to give security, in such sum as the court deems proper, to protect the interests of the party or parties against whom any temporary restraining order, temporary injunctive or other process is issued should it later be proven unwarranted by the facts and circumstances.

(3) In any action brought under paragraph (2) of this subsection, the Commission may notify the district court of the United States in which such action is pending that it intends to consider the matter in a proceeding before the Commission. Upon the filing of such a notice the court shall stay further action pending disposition of the proceeding before the Commission.

Notes of Decisions

Volume 15—p. 12302; Volume 16—p. 12957.

Section 417. (c), (d) [*§ 1017(c), (d) U.S.C.*]—[Unchanged. See vol. 11, p. 9679, 9680.]

Section 418. [*§ 1018 U.S.C.*] **Carriers, instrumentalities, to be utilized.**—[Unchanged. See vol. 11, p. 9680, vol. 19, p. 15967].

Notes of Decisions

Volume 13—p. 11163; Volume 14—p. 11682; Volume 18—p. 14695.; Volume 19—p. 15967.

2. Construction and interpretation.—[Vols. 13, 14, 18, 19].—There is no distinction in law between the well-known and recognized policy permitting ownership of transportation facilities such as various types of cars by shippers or other private owners for transportation in line haul by rail carriers, and TOFC plan IV under which forwarders supply the flatcar either by lease from private owners or from the carrier itself, if the rates and tariffs covering such service are properly published and available to all shippers. However, the language of §418 is far from plain when applied to such a situation, and the court may seek light from its legislative history; evidence in that respect clearly demonstrates the legislative intent to prevent use of contract carriers by forwarders, and not to prevent forwarders from using their own instrumentalities and containers. The commission in its expertise correctly held that plans III and IV, and the rates and charges thereunder, are not violative of §418 when used by freight forwarders.—Cooper-Jarrett, Inc. v. United States, 226 F. Supp. 318 (326-7)*.

Section 419. [*§ 1019 U.S.C.*] **Liability for past acts and omissions.**—[Unchanged. See vol. 11, p. 9681.]

Notes of Decisions

Volume 12—p. 10529; Volume 13—p. 11164; Volume 17—p. 13667.

Section 420. [*§ 1020 U.S.C.*] **Special powers during time of war or other emergency.**—[Unchanged. See vol. 11, p. 9681.]

Historical note, vol. 16, p. 12615.

Sections 421, 422. [*§§ 1021, 1022 U.S.C.*]—[Unchanged. See vol. 11, pp. 9681-9684.]

Notes of Decisions

§421(g): Volume 18—p. 14695.

PART V

INTERSTATE COMMERCE ACT; LOAN GUARANTIES

Chapter 19, Title 49, U.S. Code

Section 501. [§ *1231 U.S.C.*] **Purpose.**—[Unchanged. See vol. 18, p. 14696.]

Historical Note

Although the loan guaranty program terminated on June 30, 1963, the commission continued to discharge responsibilities in connection with applications pending on that date and guaranties made prior thereto. All applications pending at the termination of the program have been disposed of; and final disbursements have been made in all guaranteed loans.—Annual Report, 1965, pp. 51, 53.

Notes of decisions

Volume 19—p. 15968.

2. Construction and interpreration.—[Vol. 19].—Inasmuch as the specific definition of a common carrier by railroad in §1(3)(a) includes as a carrier a trustee of a railroad, application under Part V by trustees of railroad in reorganization under the Bankruptcy Act qualifies under the statute as an application designed to aid a common carrier by railroad.—New York, N.H.& H.R. Co. Trustees' Loan Guaranty, 312 I.C.C. 749 (754).

Since Part V is a remedial statute, a liberal construction thereof is required. Though the trustees constitute an entity separate and apart from the debtor, upon assuming office they succeeded to all its rights, properties, and assets under §77(c)(2) of the Bankruptcy Act, thus are substituted for debtor by operation of law; it would therefore be unreasonable so to construe Part V that they would be placed in a less advantageous position than debtor to obtain aid consistent with the general purposes and objectives of Part V and §77 of the Bankruptcy Act; considering also the continuity of interest between debtor and the trustees, Part V authorizes the guaranty of a loan to them for purpose of reimbursing the estate they administer for capital expenditures made by the debtor from its own funds prior to inception of the reorganization proceeding.—Id., p. 755.

Objection by a holder of debtor's bonds that the loan for which guaranty is sought would not be in best interest of bondholders is more properly for consideration by the court in the reorganization proceeding.—Id., p. 750, note.

Section 502. [§ *1232 U.S.C.*] **Definitions.**—[Unchanged. See vol. 18, p. 14696.]

Section 503. [§ *1233 U.S.C.*] **Loan guaranties.**—[Unchanged. See vol. 18, p. 14696.]

Section 504. [§ *1234 U.S.C.*] **Limitations.**—[Unchanged. See vol. 18, p. 14679.]

Notes of Decisions

Volume 18—p. 14698; Volume 19—p. 15970.

5. Findings required; carrier's need for guaranty.—[Vol. 19].—Copies of letters received from three prominent New York banking institutions evidence inability of debtor railroad's trustees to obtain proposed $7,500,000 loan without a guaranty under Part V. Under present circumstances, failure to afford the trustees the time they seek through the proposed loan for determining, through surveys and studies being conducted, whether debtor's operations can be restored to profitable basis will result not only in complete and almost immediate cessation of the railroad operations, but will nullify all action taken to date by the trustees; from standpoint of the overall public interest, including the national defense, such result would be catastrophic. Grant of the guaranty sought is therefore justified.—New York, N.H. & H. R. Co. Trustees' Loan Guaranty, 312 I.C.C. 749 (756, 758, 759).

However, the proposed loan will enable the trustees to operate the railroad only for a few more months, when an additional $7,500,000 will be needed. As a prerequisite to favorable consideration of any further requests under Part V, the trustees will be required to furnish concrete evidence of steps taken and proposed to eliminate the continuing substantial out-of-pocket losses, also specific and detailed information as to definite commitments by States and localities, employees and labor unions, and other affected parties, to assume their respective share of the burden of maintaining such of the railroad operations as are essential in the public interest.—Id., pp. 759-60.

6. Interest rates.—[Vol. 19].—Interest rate of 4-3/4 percent per annum on proposed loan was negotiated by debtor's trustees after prolonged and unsuccessful attempts to secure loans at the current prime rate of 4-1/2 percent; proposed rate is less than that involved in trustees' prior application; is not unreasonable.—New York, N.H. & H.R. Co. Trustees' Loan Guaranty, 312 I.C.C. 749 (756).

8. Carrier's ability to repay; earning power; collateral security.—[Vol. 19].—***Collateral security:*** Proposed loan of $7,500,000 to debtor railroad's trustees would be secured by trustees' certificates which would have first lien on all debtor's properties other than such right, title, and interest as the trustees have or may acquire in capital stock of the railroad's subsidiary bus company now held by the Secretary of the Treasury as part of collateral securing flood loans to the railroad. As debtor's total assets as of September 30, 1961, aggregated $431,077,981, it is reasonable to conclude that, should resort thereto be necessary, the liquidating value of the estate would more than adequately secure the proposed loan; affirmative finding under §504(a)(4) is therefore warranted.—New York, N.H. & H.R. Co. Trustees' Loan Guaranty, 312 I.C.C. 749 (757-8).

Earning power: Not even the most favorable analysis of the trustees' pro forma estimates of prospective earning power of debtor's estate could be considered encouraging; such estimates compel conclusion that to date the trustees have been unsuccessful in arresting debtor's out-of-pocket losses to any material degree, and that no such abatement is envisioned within the next year; thus the estate's prospective earning power does not of itself furnish assurance of the trustees' ability to repay the proposed loan within the time fixed, or afford reasonable protection to interests of the United States. Nevertheless, the requisite finding under §504(a)(4) may be made if the trustees' prospective earning power, together with the character and value of the security pledged for the proposed loan, meets the statutory requirements.—New York, N.H. & H.R. Co. Trustees' Loan Guaranty, 312 I.C.C. 749 (757).

Section 505. [§ *1235 U.S.C.*] **Modifications.**—[Unchanged. See vol. 18, p. 14697.]

Section 506. [*§1236 U.S.C.*] **Payment of guaranties; action to recover payments made.**—[Unchanged. See vol. 18, p. 14697.]

Section 507. [*§1237 U.S.C.*] **Guaranty fees.**—[Unchanged. See vol. 18, p. 14697.]

Notes of Decisions

Volume 19—p. 15976.

Section 508. [*§1238 U.S.C.*] **Assistance of Departments or other agencies.**—[Unchanged. See vol. 18, p. 14698.]

Section 509. [*§1239 U.S.C.*] **Administrative expenses.**—[Unchanged. See vol. 18, p. 14698.]

Section 510. [*§1240 U.S.C.*] **Termination of authority.**—[Unchanged. See vol. 19, p. 15977.]

SUPPLEMENTAL LEGISLATION

Chapter 2.—ELKINS ACT

Section 41.(1)-(3). Liability, offenses, penalties, jurisdiction; Acts of agents, departures from published rates; receiving rebates.—[Unchanged. See vol. 4, pp. 2748, 2788, 2791.]

Historical note, see vol. 4, p. 2749, vol. 18, p. 14699.

Notes of Decisions

Volume 4—pp. 2751-2788; Volume 7—p. 5891; Volume 10—p. 8257; Volume 11—p. 9686; Volume 12—p. 10530; Volume 13—p. 11164; Volume 14—p. 11683; Volume 15—p. 12303; Volume 16—p. 12958; Volume 17—p. 13668; Volume 18—p. 14699; Volume 19—p. 15977

Constitutionality and Interpretation

11. Construction of language employed.—[vols. 4, 7, 10, 19].—

By its terms, the Elkins Act (adopted as a supplement to the then existing Interstate Commerce Act which regulated only interstate carriage by rail or jointly by rail and motor) applied to acts done by any common carrier subject to that act and its amendments; and amendment thereof by the Hepburn Act did not effect a change in the language delineating its coverage. Thus, since the statute applies to the railroad named in information charging defendant motor carrier with receiving rebates from the railroad for cartage service which it did not perform, in violation of §41(1), defendant is subject to proscriptions and penalties provided by the Elkins Act upon which the counts of the information are properly based. Motion to dismiss, on grounds that defendant is not a person or corporation intended to be covered by prohibitions of the Elkins Act, denied.—

United States v. Pep Trucking Co., 261 F. Supp. 480 (482, 483-4).

While ownership or maintenance of tracks inside a plant by a carrier, for use or benefit of the industry, violates the Elkins Act, when such tracks are not in fact plant facilities, though used incidentally for temporary placement of industry cars to facilitate interchange of cars in line-haul service, no violation occurs.—A. O. Smith Corp. Terminal Allowance, 319 I.C.C. 99 (101)*.

12. Purpose.—[Vols. 4, 10, 11, 19].—Shipper-appellant's practice of shipping locally produced propane gas at published transit rate instead of applicable higher local rate, through device of claiming a transit privilege to which it was not entitled, comes well within intendment of the Elkins Act, which is to eliminate rebates, concessions or discriminations from interstate transportation and, thus, to place all shippers and localities on an equal basis. Considering appellant's unfair economic advantage from such practice, the evil of discrimination against local shippers is readily apparent; furthermore, stipulation that appellant charged its customer with the local freight rate, and would have lost money on the propane business had it not been for the profit it made on the freight rates, cannot be dismissed as insignificant. Trial court's judgment finding appellant guilty of violating the statute, and imposing a fine on each of 26 counts, affirmed.—Union Petroleum Corp. v. United States, 376 F. 2d 569 (571-3)*.

Failure to File or Publish Rates

30. Willful failure to file and publish rates a misdemeanor.—[vol. 4].—See Natl. Motor Freight Traffic Assn. v. Delaware Valley, §6(1), n. 55.

Rebates, Concessions, and Discriminations

42. Solicitation an offense.—[vol. 4].—The Elkins Act outlaws solicitations of rebates by any person whatever, no matter for whose benefit the rebate is sought. Sanctions of the act are not restricted to carriers or shippers; any person as used in §1 thereof means "any person." Congress wanted interstate carrier rates to be published and honored, it wanted rebates stopped, and it used fitting language to accomplish that end. An indictment under §1 of the Elkins Act states an offense when it charges that a person has solicitated a rebate from a common carrier respecting interstate transportation of a shipper's property, even though it is not alleged that the rebate was for the benefit of the shipper.—United States v. Braverman, 373 U.S. 405 (406-9).

Acts alleged to amount to illegal "solicitation" of extension of credit beyond the 120-hour period authorized in the commission's credit regulations, which occurred both before and after movement of shipments involved, must be compared with the railroad's normal policy toward, and usual treatment of, other shippers. While a request before shipment for more than 120 hours in which to pay for a given shipment would be a solicitation of a concession or discrimination with respect to that shipment, transactions pointed to as such a "solicitation" did not in fact request longer credit for shipments charged in the information. And, while evidence shows instances of discussion and efforts between the railroad and shippers' association (after shipment) aimed at resolving default and securing payment of delinquent bills, it is not shown that the railroad would not have done the same to settle like problems of other shippers in similar circumstances; charge of unlawful solicitation of concession or discrimination is not supported.—Continental Shippers' Ass'n. v. United States, 328 F. 2d 966 (969-71).

47. Rebates; defined.—[vols. 4, 10, 15, 17, 19].—If a carrier wishes to initiate a lesser service for a lower price, it may do so: nothing in TOFC plans III and IV even suggests any rebate, concession, or discrimination; the types of service offered are available to all who wish to use them, and the rates are published for the type selected by the shipper; rates and charges under those plans thus do not violate the Elkins Act or §§2, 3, or 6 of Interstate Commerce Act. Whether railroads have indulged in unlawful practices under those plans has no bearing on lawfulness of the plans themselves; however, practices which they are shown to be engaging in—leasing of trailers and flatcars—are not violative of those sections on their face, and since there is nothing to prove that these leasing arrangements were used unlawfully, the

commission's decision that they are not shown to be unlawful must be upheld.—Cooper-Jarrett, Inc. v. United States, 226 F. Supp. 318 (323, 324-5)*.

Railroad was forced to transport shipments in interstate commerce at a rate less than that named in its published and filed tariffs when defendant trucking company demanded and received from the railroad 10-1/4 cents per hundred pounds for cartage service it did not perform, thus limiting the railroad to receipt of only 24-1/4 cents of the filed rail tariff rate of 34-1/2 cents. This amounted to a proscribed rebate received by defendant from the railroad, and a violation of the Elkins Act.—United States v. Pep Trucking Co., 261 F. Supp. 480 (482-3).

Provision in tariff naming TOFC rates under which shippers move railroads' trailers to and from ramp sites, that, if prior arrangements are made with the carriers, shippers or their agents may transport the trailers to points beyond tariff terminal areas, is a possible source of illegal rebating under Elkins Act, since it holds out to provide something of value to shippers but neither the charge therefor nor its compensativeness is shown, and is also potentially discriminatory when granting of the privilege would be discretionary with the carriers; cancellation required.—Iron and Steel Articles between Atlanta and St. Louis, 318 I.C.C. 80 (83).

Assailed unit train rates on steam coal, based on annual volume minima, do not result in a rebate through provision of free transportation for quantities of coal exceeding that fuel's 1962 share of the destination market. Unit train tariff provides that freight charges will be assessed initially at the rate for the highest annual volume, to be later adjusted on an alternating rate basis if that volume is not met; and once the volume shipped exceeds each of the annual minima, the rate for all coal previously shipped drops to the figure for that minimum. This does not amount to a rebate, since any settling payments will be made to, not by, the carrier. Also, if the 10,000-ton minimum per shipment is not met, defendant's rate for conventional service, rather than the unit train rate, becomes applicable.—Natural Gas Pipeline Co. of America v. N.Y.C. R. Co., 323 I.C.C. 75 (84).

71. Discrimination; defined.—[vol. 4].—The prohibition of a "concession or discrimination" implies a comparison with, a measurement by, and a departure from, a determined standard; also a two party transaction must exist before the statute is violated. It is not enough that shipper know that he is in a different position than other shippers; the railroad must have put him in, or he must have asked that the railroad put him in, that position. The prohibited acts, concession or discrimination, require that a conceding or discriminating party exist; however, cooperation between shipper and carrier is not required before the statute can be violated.—Continental Shippers' Ass'n v. United States, 328 F. 2d 966 (968).

Departure from Schedules; Devices

89. As to the shipper.—[vols. 4, 7].—In placing a density classification on export cotton, which under governing marine tariff made lower of two rates applicable, shipper demanded a rebate on basis of a claim that it knew or should have known to be false; such action is similar in nature to "false billing" and "false classification" and, under well known principles of statutory interpretation, come within "any other unjust or unfair device or means." Moreover, shipper acquiesced in—if, indeed, it did not prompt—carrier's actions that the [Maritime] commission found to constitute false billing. Effect of entire transaction was that shipper obtained transportation by water at less than otherwise applicable rates in such a way that its competitors were unaware of what had transpired.—Hohenberg Bros. Co. v. Federal Maritime Commission, 316 F. 2d 381 (383, 385). [Not arising hereunder]

On appeal from trial court's judgment finding shipper guilty of knowingly soliciting and accepting concessions from railroads through device of claiming a transit privilege to which it was not entitled, in violation of §1 of the Elkins Act, appellant's claimed misinterpretation of the transit tariff is not a valid defense to prosecution; while the statute was amended to insert word "knowingly," this does not alter fundamental principle that mistaken understanding of the law does not constitute a

defense. Moreover, "knowingly" imports mere perception of facts necessary to bring a questioned activity within statutory prohibitions; it does not require that there be knowledge or awareness that the activity is in fact prohibited. Appellant had full knowledge of tariffs in issue as well as all facts that would make the transit privilege inapplicable and discriminatory, but it nevertheless operated upon supposition of its legal right to do so. As the Supreme Court stated in 209 US 56, this was all the knowledge or guilty intent required by the statute; affirmed.—Union Petroleum Corp. v. United States, 376 F. 2d 569 (570-1, 573)*.

100.—Extension of credit.—[vols. 4, 13].—In criminal prosecution for violation of the Elkins Act, allegedly committed when shippers' association failed to pay its freight charges within time allowed by the commission's credit regulations, mere fact that the association failed to pay its freight bills within time allowed (and thus took advantages which it knew other shippers did not receive) does not show acceptance or receipt of a concession or discrimination. The statute does not make the mere failure to pay bills in violation of the credit regulations a crime, without more; nor does it make criminal a dialogue between creditor and debtor aimed at resolving existing default and securing payment of delinquent bills, without more.—Continental Shippers' Ass'n v. United States, 328 F. 2d 966 (967, 969, 970).

The railroad was not acting discriminatorily, or giving a concession, when it allowed the association to ship freight and extended to it the allowable credit; it was only giving what lawfully could be and was given to any shipper. Any advantage the association gained was entirely by its own action in failing to pay its freight bills after the freight was received, not through a discrimination or concession either knowingly or innocently granted by the railroad, and thus such advantage did not violate the statute. Moreover, while a long-standing record of unobjected-to late payments might show a course of action amounting to giving and receiving discriminatory credit, the railroad continually objected to the late payments and even suspended association's credit privileges for a period. After reinstatement of its credit, there was no regular pattern of late payments by the association; thus there is no support for the theory that the railroad gave it a concession or discrimination.—Id., p. 969.

102.—Lease to shipper at inadequate rental.—[Vols. 4, 7, 10, 11, 13, 15, 16, 19].—Schedule of minimum sale price and minimum monthly rental of each building at railroad's food terminal which tenants or buyers must pay, and which the railroad must collect in compliance with the commission's order in 308 ICC 609, set forth. As to the two of those buildings considered separately, in view of circumstances surrounding the transition of going concern businesses of previous tenants, early completion costs and latent defect costs were necessarily includible in current tenant's rate base, even though it derived no direct benefit therefrom.—Birmingham Food Terminal, Inc. v. Southern Ry. Co., 205 F. Supp. 640 (644, 645-6)*.

Penalties and Prosecutions

112. Application of penalties and provisions; to both carrier and shipper.—[Vols. 4, 7, 10, 13, 16].—Although defendant's granting of free intrastate transportation of cash letters for certain Wisconsin banks in connection with their interstate shipments for which a charge is made, while withholding such free service from other interstate shippers, violates provisions of the Elkins Act, complainant may not in a complaint proceeding invoke the penalties provided therein.—Armored Carrier Corp. v. B.D.C. Corp., 92 M.C.C. 665 (668).

See also Meinerz Creamery Co. case, EA §42, n. 1.

140. Sufficiency of indictment.—[vols. 4, 7, 10].—Test of the sufficiency of an indictment is whether the accusation contains elements of the offense intended to be charged, and sufficiently apprises defendant of what he must be prepared to meet, and whether the record accurately shows to what extent defendant may plead former acquittal or conviction in future proceedings relating to the same alleged offense. Information charging defend-

ant with violations of §41(1) of the Elkins Act, in that it knowingly, by means of a device, accepted rebates from Pennsylvania R. Co., meets the test of sufficiency; motion to dismiss, on grounds of insufficiency of the information, denied.—United States v. Pep Trucking Co., 261 F. Supp. 480 (482, 484).

See also United States v. Braverman, n. 42, above.

147. Burden of proof.—[Vols. 4, 10].—In order for association's conviction of violation of the Elkins Act, allegedly committed when it failed to pay accumulated freight charges within railroad's credit period, to be upheld, the record must show that the association knowingly solicited, accepted, or received a rebate, concession, or discrimination whereby any advantage was given or discrimination was practiced. The evidence established only that, because of pressing financial problems, the association failed to pay its obligations; it informed the railroad of its problems and suggested steps to resolve the debt; the railroad, after consideration, disclosed steps which it intended to collect the debt. The record as a whole is convincing that the association did not solicit, accept, or receive a concession or discrimination; hence there was a failure of evidence to support the charge; reversed.—Continental Shippers' Ass'n v. United States, 328 F. 2d 966 (968, 971).

Regulations of the Commission

32 FR 10794, July 22, 1967, Part 107a: Administrative Collection of Enforcement Claims, new Part 107a, adopting regulations published in 4 CFR Parts 101 through 105, added, effective Aug. 1, 1967.

Section 42. [§42 *U.S.C.*] Parties included in proceedings to enforce law.—[Unchanged. See vol. 4, p. 2792.]

Historical note, see vol. 4, p. 2792.

Notes of Decisions

Volume 4—p. 2792; Volume 7—p. 5896; Volume 11—p. 9688; Volume 14—p. 11683. Volume 19—p. 15979.

Parties Included in Proceedings to Enforce Law.

1. Parties interested in the traffic.—[Vols. 4, 7, 11, 14, 19].—Defendant district attorneys and judges of Louisiana were properly joined as parties defendant in actions to enjoin enforcement of State segregation statutes on Federal constitutional grounds.—United States v. Lassiter, 203 F. Supp. 20 (24).

While neither the pertinent provisions of the Elkins Act, the Interstate Commerce Act, nor the commission's order in 308 ICC 609, would apply to tenants at railroad's food terminal who were not shippers or receivers of freight or interested in or affected by rates on shipments moving through that terminal, the court, declining to apply the doctrine of "de minimis," found that tenants and realty companies named, all of whom occupied premises at the terminal on effective date of the commission's order, were shippers or receivers of freight within those statutes.—Birmingham Food Terminal, Inc. v. Southern Ry. Co., 205 F. Supp. 640 (643-4, 645-6)*.

Individual defendant who under purported vehicle-leasing arrangement has in substance actually been performing a complete transportation service as a contract carrier for defendant lessee as shipper, without authority from the commission in violation of §206(a) and 209(a) of Interstate Commerce Act, and defendant shipper-lessee who has actively aided and abetted the performance of such unauthorized operations, are subject to enjoiner under §2 of the Elkins Act. As it appears that both defendants will continue to engage in such unlawful activities unless restrained, defendant lessor, his agents, employees, etc., are enjoined from performing

such transportation, and defendant shipper, its agents, employees, etc., are enjoined from employing such services, unless and until defendant lessor obtains appropriate authority from the commission.—I.C.C. v. Moore, 236 F. Supp. 168 (172, 173).

In action by the Government seeking injunctive relief against racial segregation in rail and bus terminals which resulted from maintenance, by the city and its officials, of signs on sidewalks adjacent to terminals used by interstate carriers designating terminal waiting rooms as "white" and "colored" respectively, defendant carriers are proper parties since, although not responsible for the signs, they use those terminal facilities. Also, defendants city and city officials are "interested" and "affected" parties within this section, and under §43 they are "parties interested in the traffic," who should be required to discontinue their practices leading to discrimination. Reversed and remanded with instructions that injunction sought against both carrier and noncarrier defendants be issued.—United States v. City of Jackson, Miss., 318 F. 2d 1 (9-10, 17)*.

Provisions of §2 of Elkins Act authorizing joinder as parties, in addition to the carrier, of all persons interested in or affected by the rate considered concern enforcement proceedings instituted by the commission or other proper authorities, not by private parties. That section does not authorize joinder as defendants in a complaint proceeding under §13 of Interstate Commerce Act of noncarrier shippers or consignees charged assailed rates; a §13 proceeding is not an enforcement proceeding, and no violation of Elkins Act was alleged against defendant carriers.—Empire Petroleum Co. v. Chicago, B. & Q. R. Co., 315 I.C.C. 291 (292, 293).

Respondent sugar refineries and brokers have participated in and "are interested in or affected by" respondent dairy company's unlawful for-hire backhauling of sugar, within §2 of the Elkins Act, because their dealings with it have contributed to the success of those operations, and they have benefited therefrom in that their transactions with the dairy company have resulted in furthering sales by the brokers on behalf of their principals, with brokerage fees going to the brokers; and it is unnecessary to find that they knew or should have known that the dairy company's activities were in violation of Interstate Commerce Act before they may be ordered to cease and desist from dealing with it, since their own dealings constitute participation in violation of the licensing requirements of that act, which may be enjoined under the Elkins Act.—Meinerz Creamery Co.—Investigation of Operations, 88 M.C.C. 77 (85-6).

Respondent brokerage company is interested in or affected by the principal respondents' unlawful interstate transportation of sugar, within meaning of §2 of Elkins Act, when it has had full knowledge of every significant phase of their operations, has profited in utilizing their services, receiving its commission from the refinery whether or not it assists them in reselling sugar, and knows that their sugar operations constitute for-hire transportation service.—Stewart—Investigation of Operations, 89 M.C.C. 281 (289).

In purported lease of equipment without drivers, in which vehicles involved were actually subject to use, often with drivers on shipper-lessee's payroll, for movements on behalf of other shippers, shipper-lessee benefited by its participation as shipper in lessor's operations and must fairly be found to be interested in or affected by the considered practices within §2 of Elkins Act.—G & W Transfer Co., Inc.—Investigation of Operations, 89 M.C.C. 251 (254)*.

Shipper benefited and is benefiting by its participation as such in unlawful for-hire transportation performed under purported truck-leasing arrangement, and thus can be said to be interested in the practices condemned, within meaning of §2 of Elkins Act.—Schultz Transit, Inc., Investigation of Operations, 89 M.C.C. 305 (310)*.

Respondent sugar refiners and their agent brokers are "interested in or affected by" principal respondent's unlawful transportation activities; their dealings with it have contributed to success of its buy-and-sell operations and they have benefited therefrom, the refiners in avoiding absorption of a part of freight cost for lawful for-hire carriage and in

reaching a market where they would otherwise be at a competitive disadvantage geographically, and the brokers in receiving commissions on sugar which otherwise might not be sold in their respective marketing areas.—Morgan Packing Co., Inc.—Investigation of Operations, 92 M.C.C. 48 (60. 61).

Respondent sugar refiners and their exclusive broker are interested in and affected by respondent dairy company's unlawful sugar-transporting activities within meaning of §2 of Elkins Act; their dealings with it have contributed to success of those operations and they themselves have benefited therefrom; and since those dealings constitute participation in a violation of the licensing provisions of the Interstate Commerce Act, which participation may be enjoined under the Elkins Act, it is unnecessary to find that they knew or should have known that the dairy company's sugar activities have been unlawful.—Clearfield Cheese Co., Inc.—Investigation, 92 M.C.C. 504 (509)*.

In investigation to determine whether freight forwarder holding C. A. B. authority and motor carrier respondent are jointly and severally engaged in interstate carriage of property beyond scope of motor carrier's certificates, record is convincing that air forwarder knew, or had reason to know from nature of the arrangements in which it participated, that activities of the motor carrier constituted a for-hire transportation service requiring interstate motor carrier authority. It is evident, also, that air forwarder respondent benefited by its participation to some extent, and that it is interested in or affected by the practices under investigation within meaning of the statute. Consequently, cease and desist order is entered against both the air forwarder and the motor carrier respondents.—Film Transit, Inc., and Air Dispatch, Inc.—Investigation, 98 M. C. C. 145 (152).

See also I.C.C. v. Iowa Cooperative Assn., §222(b), n. 11.

Section 43. [§*43 U.S.C.*] **Proceedings in equity to enforce tariffs, etc.; district attorneys; damages; witnesses; precedence.**—[Unchanged. See vol. 4, p. 2793.]

Historical note, see vol. 4, p. 2794.

Notes of Decisions

Volume 4—p. 2795; Volume 19—p. 15980.

1. Injunction against departure in rates or discrimination.—[Vols. 4, 19].—Under this statute, both the rail and bus aspects of actions to restrain enforcement of State statutes requiring separation of passengers according to race in terminals, on Federal constitutional grounds, may be maintained by the commission or the Attorney General.—United States v. Lassiter, 203 F. Supp. 20 (24).

The Attorney General has standing to bring suit in the name of the United States to restrain and remove an unconstitutional interference with, and burden upon, interstate commerce. And the statute authorizes a U.S. Attorney, whenever so directed by the Attorney General, to institute a proceeding for equitable relief against discriminations forbidden by statutes relating to interstate commerce.—United States v. City of Shreveport, La., 210 F. Supp. 708 (710).

See also Meinerz Creamery Co. case, EA, §42, n. 1.

See also United States v. City of Jackson, Miss., §42, n. 1.

EXPEDITING ACT

Section 44, 45.[Unchanged. See vol. 11, p. 9688, vol. 13, p. 11165; vol. 15, p. 12304.]

Notes of Decisions

§44: Volume 4—p. 2802; §45: Volume 4—p. 2804; §45: Volume 19—p. 15980.

§45: 1. Right of direct appeal to Supreme Court.—[Vols. 4,19].—See I.C.C. v. AAA Con Drivers Exchange, Inc., case, 28 U.S.C. §§1291, 1292, n. 1.

COMPULSORY TESTIMONY—IMMUNITY OF WITNESSES

Section 46-48. Self-criminating testimony; perjury; refusal to testify.—[Unchanged. See vol. 4, p. 2806.]

Historical note, see vol. 4, p. 2806.

Notes of Decisions

§46: Volume 4—p. 2807; Volume 10—p. 8263; Volume 12—p. 10531; Volume 14—p. 11684; Volume 15—p. 12305; Volume 18—p. 14700.

§47: Volume 4—p. 2816; Volume 12—p. 10532.

§48: Volume 4—p. 2820; Volume 13—p. 11166; Volume 14—11685.

§47: 3. Interpretation.—[Vols. 4, 12].—Appellee was not immune from indictment and prosecution for violation of the Sherman Act and the Conspiracy Act because of the fact that he had previously appeared and testified before a subcommittee of Congress concerning matters covered by the indictment. Immunity provision of the Act of Feb. 25, 1903, applies only to persons testifying in judicial proceedings, not to those testifying before Congressional committees, and the 1906 amendment thereof simply limited immunity to persons testifying under oath and in response to subpena; it is limited to judicial proceedings which are brought under specific acts, such as the Sherman Act or the Commerce Act. Congressional investigations, although they may relate to specific existing acts, are not generally so restricted in purpose and scope as to be spoken of as being brought "under" those acts. Lower court's dismissal of the indictment, on ground that appellee's testimony before the subcommittee had immunized him from indictment, reversed and case remanded.—United States v. Weldon, 377 U.S. 95 (96-8, 104-7)*.

See also Farmers Feed & Supply Co. case, §204(c), n. 251.

MANN-ELKINS ACT

Section 50. Agent in Washington for service; service in default of designation.[Unchanged. See vol. 4, p. 2828.]

Historical note, see vol. 4, p. 2828.

Notes of Decisions

Volume 7—p. 5899; Volume 11—p. 9689; Volume 12—p. 10532; Volume 13—p. 11166; Volume 14—p. 11685; Volume 15—p. 12305; Volume 16—p. 12958; Volume 17—p. 13669; Volume 18—p. 14700.

1. In general.[Vols. 7, 11-18].—Although third-party plaintiff, a Tennessee corporation, is a wholly owned subsidiary of a wholly owned subsidiary of defendant, a Missouri corporation, in absence of a showing that the books and records of the parent and subsidiary corporations are mingled, and that the parent exercises such control over the subsidiary that the latter should be deemed the agent of the former, the mere relationship of parent and subsidiary does not warrant conclusion that the parent is doing business wherever the subsidiary is doing business.—First Flight Co. v. National Carloading Corp., 209 F. Supp. 730 (733, note 3).

Extent of personal jurisdiction of the federal courts and sufficiency of service of process under Rule 4(d)(3) of Federal Rules of Civil Procedure is a matter governed solely by federal rather than state law. Although third-party defendant neither owns nor operates any line in Tennessee and maintains in that State only a solicitation office staffed by a "District Agent" and a clerk, neither of whom has been designated an agent to receive process, such district agent would be regarded as a "managing or general agent" within meaning of Rule 4(d)(3) authorizing a wholly federal method of service; the court has personal jurisdiction over defendant under federal law, and service of third-party process upon the district agent was service upon an acknowledged agent of defendant within the territorial limits of the court's process; motion to quash overruled.—Id., pp. 733, 735-6, 740.

The district court has no jurisdiction to entertain a third-party complaint against a railroad which owns no track and performs no transportation service within the judicial district, but merely maintains an office for solicitation of business. Mere solicitation does not constitute "doing business": the criterion is whether the local solicitors have authority to bind the foreign corporation by which they are employed; none of defendant's employees in its Philadelphia office had such authority; motion to quash service of process, granted.—Vereen v. Chicago, N., St. P. & P. R. Co., 209 F. Supp. 919 (920-1); Greenwalt v. Reading Co., 209 F. Supp. 954 (955). [Not arising hereunder.]

In the matter of service of process, a district court must not be walled in by limitations of state law that are more restrictive than federal law. Where service of process is validly predicated under Rule 4(d)(3) of Federal Rules of Civil Procedure, it must not be defeated by showing that the alternative provisions of Rule 4(d)(7), allowing process to be served in accordance with state law, indicate defective service; where there is no need to use state law for service, it may not be used to test sufficiency of service. Since subsection (d)(3) permits service on an agent authorized by law to receive process, federal law is used to determine whether the agent served comes within meaning of the rule; and state law, not being invoked under subsection (d)(7), cannot define the agency question under subsection (d)(3). Except where, unless service is properly had under state procedure, no federal means of service is available, subsections (d)(3) and (7) stand on independent footing; once it is established that a defendant may be served, either is available to plaintiff as his direction for the service of process.—Hornstein v. Atchison, T. & S.F. Ry. Co., 229 F. Supp. 1009 (1012). [Not arising hereunder.]

Purpose of the summons is to give efficient notice, and service of process on an agent whose activities establish defendant's "presence" in the State cannot be deemed insufficient notice; as a matter of law, the highest ranking agent within the State who is the means whereby a foreign corporation is subject to process is a proper person under Rule 4(d)(3) to receive the summons on behalf of his principal. Service of process on agent in charge of defendant railroad's solicitation office in Wisconsin, maintenance of which

establishes its amenability to the district court's jurisdiction, provided adequate notice. It would be reasonable to expect that such an agent, especially one under direction of out-of-State superior officers, would turn over the process received by him to his superiors, as defendant's agent in fact did. Finding of "in personam" jurisdiction over defendant because it is doing business in the State and because service on its solicitation agent was proper is compatible with fair play and substantial justice.—Id., p. 1013.

PANAMA CANAL ACT

Section 51. Proceedings relating to rail and water routes; orders.—[Unchanged. See vol. 11, p. 9690.]

Amendments, see footnotes, vol. 11, p. 9690.

SUNDRY CIVIL APPROPRIATIONS ACT; CINCINNATI SOUTHERN RY. TRUSTEES ACT

Sections 52, 53.[Unchanged. See vol. 4, p. 2830, 2831.]

D.C. TRANSIT SYSTEM, INC.

Section 1. (a).—[Unchanged. See vol. 17, p. 13669.]

HOCH-SMITH RESOLUTION

Section 55. Policy in making rate adjustments; investigation of rates authorized.—[Unchanged. See vol. 4, p. 2833.]

Historical notes, see vol. 4, p. 2834, vol. 10, p. 8267.

Notes of Decisions

Volume 4—p. 2835; Volume 7—p. 5901; Volume 10—p. 8267; Volume 11—p. 9690; Volume 13—p. 11167; Volume 15—p. 12306; Volume 16—p. 12959; Volume 17—p. 13669; Volume 18—p. 14701; Volume 19—p. 15982.

Ratemaking Policy

20. Consideration of industrial conditions.—[Vols. 4, 7, 10].—Hoch-Smith Resolution, and analysis thereof in 281 US 658, give convincing proof that congressional policy requires just and reasonable classifications for all ratemaking purposes, not just class rates; and in commenting on requirement for consideration of (a) the general and comparative levels in market value "of the various classes and kinds of commodities" over a reasonable period of years, (b) natural and proper development of the country as a whole, and (c) maintenance of an adequate system of transportation, the Supreme Court emphasized that those matters were all regarded as factors to be considered under existing laws. The basic statutory standards of lawfulness are substantially the same today as when that resolution was enacted.—All Commodities, New England to Chicago and St. Louis, 315 I.C.C. 419 (424)*.

RATES ON GOVERNMENT TRAFFIC

GOVERNMENT TO PAY FULL RATES

Section 65. [§321 as enacted] Government traffic; rates,—[Unchanged. See vol. 13, p. 11167, vol. 11, par. (b), p. 9691.]

Amendments, see footnotes, vol. 13, p. 11168; historical notes, vol. 11, p. 9691, vol. 12, p. 10533.

Notes of Decisions

Volume 11—p. 9692; Volume 12—p. 10533; Volume 13—p. 11168; Volume 14—p. 11686; Volume 15—p. 12307; Volume 16—p. 12960; Volume 18—p. 14701; Volume 19—p. 15983.

10. Pleadings and procedure, generally.—[Vols. 13-15].—When they filed a stipulation of facts, affidavits supporting their contentions, and documents relating thereto, both parties intended the stipulation to mean that all possible evidence in carrier's suit to recover amount of claimed overpayment on government shipments had been put into the record, i.e., that neither party had any more evidence regarding the issues. In addition, by their cross motions for summary judgment, both parties admit that there was no question of fact remaining which necessitated further proceedings.—Garrett Freightlines, Inc. v. United States, 236 F. Supp. 594 (595).

In government's suit to recover from carrier alleged overpayments for transportation charges, judgment and order of Sept. 12, 1955, referring to the commission question of "what were the reasonable rates for shipments involved," and retaining jurisdiction pending that determination, was an adjudication of the whole case (including all possible theories of recovery) to which the United States took no exception. However, the commission did not rule on the matter because of lack of jurisdiction. It is now too late (9 years after trial) for plaintiff to urge that defendant is liable for overcharges because his representation on bills, that charged rates were lowest available for movement of similar traffic, was incorrect; in view of its long acquiescence therein, the 1955 judgment is interpreted to embrace a finding, and the court finds, that plaintiff failed to sustain its burden of proof on the misrepresentation theory. While that theory was not urged at first trial, it could just as well have been; and, ordinarily, a second trial will not be accorded on basis of a new theory. Complaint dismissed.—United States v. Garner, 236 F. Supp. 632 (634-6).

Motor carrier found not entitled to recover transportation charges on Army officer's house trailer which moved under Government bill of lading, but which it could not deliver because of accident in transit which resulted in total loss of the trailer, when the bill of lading expressly conditioned payment of charges on consignee's receipt of the shipment and his signing the Certificate of Delivery on face of the bill. Under decision in 338 US 421, the evidence on which carrier may rely for payment is the "accomplished" bill of lading, accompanied by the Certificate of Delivery signed on "receipt of the shipment"; without receipt of the goods, the bill was not, and could not have been, filled in under strict terms thereof so as to be "properly accomplished" for purposes of payment to carrier.—National Trailer Convoy, Inc. v. United States, 345 F. 2d 573 (574, 575-6).

Section 65a. [*§3 as enacted.*] **Readjustment of rates, fares, and charges to shippers.**—[Unchanged. See vol. 13, p. 11168, vol. 11, p. 9692.]

Amendments, see footnotes, vol. 13, p. 11168.

Notes of Decisions

Volume 14—p. 11688.

Section 66. [§322 as enacted]. Government traffic; payment for transportation; deduction of overpayments. —[Unchanged. See vol. 18, p. 14702.]

Cross Reference

See United States v. Yale Transport Corp., 184 F. Supp. 42, in §204a, n. 10, 95.

Notes of Decisions

Volume 18—p. 14703; Volume 19—p. 15984.

1. In general.—[Vols. 18,19].—Though neither Government bill of lading nor plaintiff motor carrier's freight bill indicated that plaintiff was either initial or delivering carrier of shipment intended for movement in piggyback service under its contract with railroads, the Government withheld earned revenues from plaintiff on account of claim for loss of the shipment on line of connecting railroad, and, the railroad being willing to settle with plaintff within limit of their indemnity agreement, plaintiff effected settlement not knowing that the Government's claim was over twice the amount thereof. Since plaintiff was not liable to the Government for destruction of the cargo, it was unjustly enriched by the amount so received, and the government is entitled to credit therefor in law and equity, under principles of subrogation and unjust enrichment, and is entitled to recover the balance remaining after crediting the shipping charges owed by it to plaintiff.—Riss & Co. v. United States, 213 F. Supp. 791 (796-7, 799).

To justify deductions made from charges paid by the government on certain shipments, under claim of the presumption of unreasonableness created by Rule 66(a) of Tariff Circular 20, the government, as the person claiming benefit of the presumption, had the burden of proving by substantial evidence (1) that cars of particular size were ordered from plaintiff carriers, (2) that carriers were given sufficient time to furnish the cars ordered but furnished larger cars for their own convenience, and (3) that shipments on which setoff is claimed would have fitted in cars of size ordered. Since there was a lack of substantial factual evidence on which the commission could find the three basic facts, or any one of them, which would render Rule 66(a) applicable, the commission's finding that that rule rendered the considered charges unreasonable and that plaintiffs had not overcome that presumption was erroneous. The commission's order set aside and the case remanded for further proceedings consonant with the court's opinion.—Baltimore & O. R. Co. v. United States, 217 F. Supp. 918 (922-6)*.

In reliance on two commission decisions in complaints by other parties that rates charged on shipments of knocked-down motor-vehicle chassis were excessive, the General Accounting Office deducted amounts in excess of the rates found reasonable from freight bills due the railroad on other Government shipments; but upon referral of the matter to the commission in the railroad's suit to recover those deductions the commission reversed its prior decisions and found the rates charged not unreasonable. In such complicated matters as rate fixing, strong reliance must be placed on the expertise of the regulating agency; as the commission's findings upon reconsideration are based on substantial evidence and there is no basis for finding the rates approved by it unreasonable, the commission's order ratifying the rates charged is sustained.—United States v. I.C.C., 221 F. Supp. 584 (586, 587, 588)*.

In carrier's suit to recover amount of claimed overpayment, deducted following post-audit from other amounts due plaintiff,

on government shipments of engines, evidence shows that "exclusive use" was requested by shipper when each bill of lading contained a notation that exclusive use of vehicles was authorized to meet a deadline date at destination. While trailers were not loaded to full visual or weight capacity, the floor area of each was completely used, shipper marked "no stowage on top" on each engine, lading remained in original trailers (and no additional freight was added) during entire movement, and the shipments were given expedited service by use of a two-man sleeper cab operation. Defendant's contention that "exclusive use" service does not differ materially from t.l. service is without merit, and its contention that "exclusive use" tariff does not apply in preference to t.l. tariff when vehicles are loaded to capacity is incorrect as a matter of law. Rates based on "exclusive use" were properly charged; plaintiff entitled to recover amount of improper deductions.—Garrett Freightlines, Inc. v. United States, 236 F. Supp. 594 (595-8).

When exclusive use of carrier's vehicles was requested, and received, by the Government on all four shipments in issue, higher tariff rates for exclusive use were applicable. Although three of the shipments each loaded vehicle used to capacity, and no benefit was received from exclusive-use rates, defendant was not entitled to lower t.l. rates; tariff publishing rates applicable when exclusive use is requested makes no exception in case of a vehicle loaded to capacity. While fourth shipment did not load the vehicle to capacity, and notation that exclusive use was requested was not on bill of lading, defendant's certificate on bill of lading that exclusive vehicle use was furnished was tantamount to a request therefor. Plaintiff is entitled to recover amount of transportation charges claimed as overpayment, upon post audit, and deducted from amounts due it for other transportation.—Campbell "66" Express, Inc. v. United States, 302 F. 2d 270 (270-2).

Railroad found entitled to recover amount of overcharges claimed by the Government, which was deducted after post-audit from amounts admittedly due plaintiff for other services, on shipments of army tractor tanks with guns. Although under §22 quotation in effect when shipments moved class or column 35 rates published in tariffs on file with the commission applied on such commodities, and Note 2 thereof provided that where such rate was not published 35 percent of first class would apply, defendant was not entitled to make the deduction in issue in reliance on that quotation and Pacific South-Coast Freight Bureau Tariff No. 234-C; at time of considered movement all class rates in that tariff had been cancelled except classes 1 through A, but tariff supplement cancelling them referred to another tariff for rates to apply in lieu of those cancelled and that tariff provided a class or column 35 rate for tractor tanks; therefore, such rate being published in an available tariff, Note 2 precludes defendant from applying 35 percent of the first class rate as it did. Rate charged by plaintiff was the applicable rate.—Great Northern Ry. Co. v. United States, 352 F. 2d 375 (376-7).

Although plaintiff carrier could not actually move government shipments of jet fuel in tank trucks over 293-mile short-line route which involved some ferry movement, because of Coast Guard regulations prohibiting transportation on ferries of tank trucks loaded with flammable mixtures, that route, rather than 340-mile shortest all-highway route, was properly used as mileage basis for determining transportation charges on those shipments. Governing tariff provided for application of mileage rate to the short-line route where carrier deviates therefrom to avoid violation of federal regulations; and provisions of mileage guide referred to in the tariff indicate that shortest route is to be used for rate-making purposes, regardless of whether it is the actual route chosen by carrier. Plaintiff is not entitled to recover refunds made under protest to defendant because of claimed overpayments determined after post audit of its transportation bills.—M. I. O'Boyle & Son, Inc. v. United States, 303 F. 2d 446 (447-8).

In determining that domestic-rate charges applicable on war-blocked export shipments of Government freight were unjust and unreasonable, the commission properly weighed all pertinent factors, and though it did not expressly find that the lower export rate was

reasonable, what it did was to provide for just and reasonable charges on the shipments concerned. Issue of reasonableness of the rates is not open to the court in carrier's action to recover deductions by the Government in amount of difference between the export and domestic rates; case remanded to the lower court with direction to dismiss the petition for injunction for want of equity.—Pennsylvania R. Co. v. United States, 315 F. 2d 460 (465)*.

Section 66 was enacted to aid the railroads to secure prompt payment of their charges, and the right reserved to the Government to audit and deduct overpayments is for protection of the Government, not the carriers. Requirement of mutual dealings essential to plaintiff's theory of an open, running account, against which the statute of limitations would not begin to run until audit was made, is not met where all services were rendered by plaintiff and the Government's only obligation was to pay for those services, subject to its right to assure by audit the accuracy of the charges; that requirement is not satisfied by the mere fact that the parties have cross-demands against each other. Moreover, plaintiff's claims for additional charges do not constitute a running account when it billed the Government after each shipment and expected and received payment on that basis. As plaintiff did not discover its billing errors until 6 years after the services were performed, its claims for additional charges are barred.—Baggett Transp. Co. v. United States, 319 F. 2d 864 (870-1).

However, plaintiff's claim for refund of amounts deducted in post-audit for weight of dunnage included in shipments is not barred, since that cause of action arose when the deductions were made. Plaintiff is entitled to refund of amounts deducted for dunnage under §22 quotations which did not mention dunnage, including deductions from charges at rates named therein which applied under alternative provision in another quotation which excluded dunnage from computation of charges. But plaintiff is not entitled to refund where deductions were made under quotations which provided for exclusion of dunnage by reference to motor classification rule.—Id., pp. 871-2.

Motor carrier that had filed rates with the United States as a party to a §22 quotation must be considered to be within meaning of "common carrier subject to the Interstate Commerce Act" in this section; therefore, the government could bring action under §66 for restitution of alleged overpayments on shipments which moved between points within a State. Having voluntarily become bound as an interstate carrier, appellee cannot now claim he is not so bound; he has waived any claim of exclusion under §66. Furthermore, while carrier is defending against the government action, instead of suing to recover an amount deducted after post audit, this difference is not sufficient to shift the burden of proof; carrier is entitled to recover only if it satisfies its burden of proving that its charges were computed at lawful and authorized rates. [Citing 355 US 253.]—United States v. Francis, 320 F. 2d 191 (195).

Legislative history of §66, as discussed in 355 US 253, and the Court's action in that case and 352 US 59, are convincing that deductions or setoffs of overcharges for pre-1958 shipments are never time-barred. It was the congressional purpose in enacting §66 to afford immediate payment to carriers, but to provide full protection to the Government by post-audit procedures, and Congress then put no time limit on the §66 right to deduct the amount of any overpayment from any amount subsequently found to be due the carrier; experience apparently demonstrated that this was unwise, and Congress thought it wise to change that policy. Legislative history of the 1958 changes reflects (1) congressional awareness of the pre-1958 law, that the Government's right to deduct for overpayment is not limited as to time, and (2) the legislative judgment then reached, that a reasonable time limitation (3 years) should be established for such deductions; but that amendment does not affect claims for overcharges collected prior to its effective date.—Strickland Transp. Co. v. United States, 334 F. 2d 172 (179-80). [See also same case, §217(b), n. 17.]

Carriers found entitled to recover amounts of claimed overcharges on Government shipments which defendant collected after audit of plaintiffs' bills for freight charges on shipments of household goods for the military. Plaintiffs' previously filed individual §22 rate

tenders on household goods were effectively cancelled by supplements to bureau tenders filed by their respective rate publishing bureaus, which supplements published uniform §22 rate tenders for account of all member carriers and specifically cancelled and superseded all individual tenders previously filed by the carriers; and, after the Department of Defense agreed to such cancellation of the individual tenders and approved the supplements, the new common rates became effective. Therefore, rates in the two bureau supplements applied on shipments in controversy; and the Government was not overcharged, as claimed, to extent that applicable charges exceeded charges computed on basis of plaintiffs' individual tenders filed prior to effective date of those supplements.—United Van Lines, Inc. v. United States, 353 F. 2d 741 (745-4, 746).

Amendment to the statute, providing that settlement of claims for transportation charges on Government shipments shall be barred unless claim is received by General Accounting Office within 3 years after accrual thereof, was intended only to bar administrative settlement of claims presented 3 years after accrual. The proviso does not affect or extend running of the 6-year period provided in 28 USC §2501 which governs filing of suits in the Court of Claims by carriers against the Government to recover transportation charges; and presentment of claim to and decision by General Accounting Office, not being prerequisite to such a suit, does not toll running of that statute. Thus, GAO's refusal of foreign air carrier's claim for freight charges on considered shipments, because bills were not presented to it within 3 years after last one was delivered, is not an adjudication which bars plaintiff's Court of Claims suit to recover those charges filed less than 6 years, but more than 3 years, after delivery. Judgment for plaintiff.—Iran National Airlines Corp. v. United States, 360 F. 2d 640 (641-3).

See also Dean Van Lines, Inc. v. United States, §22(1), n. 5. Great Northern Ry. Co. v. United States, §22(1), n. 5.

Chapter 5—INLAND WATERWAYS TRANSPORTATION

Section 141-3, 151-2, 153, 154-7.—[Unchanged, except §141, 151-157.—Repealed. Pub. Law 88-67, July 19, 1963, 77 Stat. 81. See vol. 4, pp. 2948-2961; vol. 7, p. 5947; vol. 10, p. 8278; vol. 11, p. 9695; vol. 19, p. 15985.]

Historical Notes, see vol. 13, p. 11170, vol. 16, p. 12961, vol. 17, p. 13671.

Notes of Decisions

§153: Volume 4—p. 2957; Volume 7—p. 5948; Volume 10—p. 8279.

Section 500. [§142 U.S.C.] Development of water transportation; duties of Secretary of Commerce.—[Unchanged. See vol. 4, p. 2936, vol. 14, p. 11689.]

For review of history, see 88 F. Supp. 982.

Notes of Decisions

Volume 4—p. 2937; Volume 7—p. 5933; Volume 10—p. 8276; Volume 11—p. 9695; Volume 12—p. 10535; Volume 13—p. 11171; Volume 17—p. 13671.

Chapter 9.—[1]FEDERAL AVIATION ACT OF 1958

Section 1003 (a)-(e) [§643 U.S.C.] Joint Boards; through service; jurisdiction.—[Unchanged. See vol. 10, p. 8285, vol. 14, p. 11689.]

Historical note, vol. 10, p. 8286.

Chapter I, Title I.—RULES OF CONSTRUCTION

Section 1-5.—[Unchanged. See vol. 15, p. 12309, vol. 16, p. 12961.]

ADMINISTRATIVE PROCEDURE ACT

[5 USC §§551-559 and §§701-706]

CHAPTER 5—ADMINISTRATIVE PROCEDURE

SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

[The provisions of this subchapter and chapter 7 of this title were originally enacted by act June 11, 1946, ch. 324, 60 Stat. 237, popularly known as the "Administrative Procedure Act". That Act was repealed as part of the general revision of this title by P.L. 89-544 of Sept. 6, 1966 and its provisions incorporated into this subchapter and chapter 7 hereof.] [See vol. 13, p. 11171.]

SEC. 551. DEFINITIONS

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891–1902, and former section 1641 (b) (2), of title 50, appendix;

(2) "person" includes an individual partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a

party, in an agency proceeding, and a person or agency admitted by an agency as a party or for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section; and

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof,

or failure to act.

SEC. 552 PUBLIC INFORMATION; AGENCY RULES, OPINIONS, ORDERS, RECORDS, AND PROCEEDINGS

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justifi-

cation for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceedings.

(b) This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which

would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

SEC. 553. RULE MAKING

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statue, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportu-

nity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

SEC. 554. ADJUDICATIONS

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceedings, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a con-

troversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for any agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

SEC. 555. ANCILLARY MATTERS

(a) This section applies, according to the provisions thereof, except as otherwise provided by this subchapter.

(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the

right to appear for or represent others before an agency or in an agency proceeding.

(c) Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law. A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(d) Agency subpenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpena or similar process or demand to the extent that it is found to be in accordance with law, In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

SEC. 556. HEARINGS; PRESIDING EMPLOYEES; POWERS AND DUTIES; BURDEN OF PROOF; EVIDENCE; RECORD BASIS OF DECISION

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of

personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

SEC. 557. INITIAL DECISIONS; CONCLUSIVENESS; REVIEW BY AGENCY; SUBMISSIONS BY PARTIES; CONTENTS OF DECISIONS; RECORD

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554 (d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision.When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions of the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

SEC. 558 IMPOSITION OF SANCTIONS; DETERMINATION OF APPLICATIONS FOR LICENSES; SUSPENSION, REVOCATION, AND EXPIRATION OF LICENSES

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

SEC. 559. EFFECT ON OTHER LAWS: EFFECT OF SUBSEQUENT STATUTE

This subchapter, chapter 7, and sections 1305, 3105,3344, 4301 (2) (E), 5362, and 7521, and the provisions of section 5335 (a) (B) of this title that relate to hearing examiners, do not limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons. Each agency is granted the authority necessary to comply with the requirements of this subchapter through the issuance of rules or otherwise. Subsequent statute may not be held to supersede or modify this subchapter, chapter 7, sections 1305, 3105, 3344, 4301 (2) (E), 5362, or 7521, or the provisions of section 5335 (a) (B) of this title that relate to hearing examiners, except to the extent that it does so expressly.

CHAPTER 7 — JUDICIAL REVIEW

SEC. 701. APPLICATION; DEFINITIONS

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judical review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891—1902, and former section 1641 (b) (2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

SEC. 702. RIGHT OF REVIEW

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

SEC. 703. FORM AND VENUE OF PROCEEDING

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review in civil or criminal proceedings for judicial enforcement.

SEC. 704. ACTIONS REVIEWABLE

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

SEC. 705. RELIEF PENDING REVIEW

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

SEC. 706. SCOPE OF REVIEW

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole

record or those parts of it cited by a party and due account shall be taken of the rule of prejudicial error.

Historical Note

The Administrative Conference of the United States was established as a permanent Conference, in order to provide for continuous improvement of the administrative procedure of Federal agencies, by the Act of Aug. 30, 1964, Public Law 88-499, 78 Stat. 615. [See also vol. 14, p. 11690, vol. 16, p. 12961.]

Notes of Decisions

Volume 14—p. 11691; Volume 15—p. 12310; Volume 16—p. 12962; Volume 17—p. 13672; Volume 18—p. 14706; Volume 19—p. 15986.

Burden of Proof

Plaintiff's contention, in action to set aside the commission's order authorizing total abandonment of a railroad without imposition of protective labor conditions, that the commission failed to set out sufficient facts to support its refusal to impose protective conditions and failed to set out facts on which its conclusions were based, is in essence an attempt to place the burden of proof upon the commission. No authority has been cited which holds that conditions must be imposed absent a reason for refusing them; and contention that the burden was on the commission to show why they should not be imposed appears to be contrary to provision of §7(c) of APA that "Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof."—Brotherhood of Locomotive Engineers v. United States, 217 F. Supp. 98 (103)*.

Burden of proof is on proponent of a rule or order; and it is the general rule that "the burden of proof lies upon him who affirms, not on him who denies." [175 F. 2d 808.] There can be no doubt that plaintiffs seeking to set aside the commission's order, which dismissed their complaint alleging that defendants therein were engaging in unlawful freight forwarder operations, were the "affirming party" before the commission and defendant was the party who denied. The commission's findings that burden was on plaintiffs to establish material allegations of their complaint, and that they failed to present sufficient evidence to sustain that burden, sustained.—National Motor Freight Traffic Ass'n v. United States, 242 F. Supp. 601 (605-6)*.

In suit to set aside Interstate Commerce Commission order requiring cancellation of proposed increased l.t.l. classification rating on certain stuffed toys, the commission's manner of appraising evidence before it (on which it concluded that carriers had failed to sustain their statutory burden of proof) did not contravene requirements of the APA. Commission consideration of the entire record is shown by its sharpening of the issues and analysis of all the evidence; moreover, the APA places burden of proof on the proponent of a rule or order, thus anticipating a decision based on a paucity of proof. As the trier of fact, the commission had the duty to assay the proof; and the court cannot say that its conclusion, that proponent carriers had not proved their case, is without rational basis.—Overnite Transportation Co. v. United States, 266 F. Supp. 88 (90-91)*.

Since a rate effective prior to institution of investigation thereof by the commission is not a "changed" rate, there is no statutory burden of proof on its proponents under §15(7) or §216(g) of Interstate Commerce Act; the statutory burden of proof in such cases is imposed on opponents of the rate by §7(c) of APA, which provides that the proponent of a rule or order shall have the burden of proof. However, question of where the burden of proof lies is of more theoretical than practical importance; regardless of where the burden lies, a carrier is expected to aid in disposition of proceedings to which it is a party by making available all pertinent facts within its knowledge.—Terminal Charge on Order Bills of Lading Shipments, 315 I.C.C. 327 (329, 330)*.

In most commission proceedings the burden of proof is primarily a rule of evidence to ensure orderly procedure; its principal effect is to require the party asserting the affirmative of an issue to go forward in the proof; parties who are proponents of a different result must then sustain their burden of going forward. But burden of proof becomes the master rather than the servant of administrative process when viewed solely in quantitative terms; while proof by a clear preponderance of the evidence may be an appropriate requirement in civil actions involving only private rights, that is not the sense in which Congress used "burden of proof" in ICA and APA; the public interest necessarily involved in the commission's quasi-legislative function of rate-making cannot be determined merely on basis of who proved what by a clear preponderance of the evidence.—Id., pp. 329-30.

In proceedings involving initial rates, protestants who have requested the commission to suspend and investigate the rate schedules involved and ultimately to issue an order canceling them are proponents of an order within purview of §7(c) of APA, thus have the burden of proof. When §7(c) is read in context of a carrier's statutory right to initiate rates, generally without any obligation to justify them, it may not be applied to impose on the proponent of initial rates the burden of sustaining their lawfulness in absence of a prima facie showing that they are unlawful. Respondent is the proponent of a rate rather than an order, in the practical sense that his rate will stand unless the order sought by protestants is issued.—Animal Feed, Miss. and Tenn. to Midwest and Southwest, 319 I.C.C. 257 (259)*.

Where protestants' comparison of proposed initial rates of a class III limited-commodity carrier with average costs of class I and II general-commodity carriers does not establish a prima facie showing that the rates are noncompensatory and therefore unreasonable, and respondent's cost evidence lacks probative value because of defects noted, the showing is insufficient to sustain an order canceling the rates within requirement of §7(c) that such an order be supported by and in accordance with reliable, probative, and substantial evidence.—Id., p. 260. [See also concurrences.]

See also New York, N.H. & H. R. Co. Discontinuance, §13a n. 15.

Declaratory Orders

Interstate Commerce Commission's discretionary refusal of declaratory relief does not require plaintiff to do or refrain from doing anything, fix any liability or responsibility, civil or criminal, upon plaintiff, or finally determine its rights or obligations; therefore, the commission's denial of plaintiff's attempts to secure a declaratory order does not entitle plaintiff to a judicial review.—W. J. Dillner Transfer Co. v. McAndrew, 226 F. Supp. 860 (864)*.

Where the only controverted issue respecting proposed amended tariff provisions is interpretation of respondents' present tariff provisions and their applicability on past shipments, the commission has authority under §5(d) of APA to remove the uncertainty and terminate the controversy.—Nonapplication of Coarse or Feeding Grain Rates, 316 I.C.C. 547 (548).

Where petitioner requested determination pursuant to §5(d) of applicability of transit privilege under certain tariff provisions, reasonableness of neither transit regulations nor charges sought to be collected is put in issue and may not be considered.—Petition of Southern Pacific Co. for Declaratory Order, 316 I.C.C. 661 (665).

Petition requesting issuance of a declaratory order to establish that petitioner's transportation of automobile utility trailers in its own vehicles, for redistribution purposes between trailer rental stations maintained by its members at points throughout the United States, constitutes private carriage is denied. Since the evidence is insufficient for a determination of whether petitioner has engaged in private carriage, a declaratory order would serve no useful purpose.—National Trailer Rental Assn., 94 M.C.C. 526 (531).

A declaratory order will not lie under §5(d) of APA in those instances where there is no statutory requirement for a hearing. Certificates which are subject of petition for declaratory order were issued under §207(a) and, though tenor of §204(c) and §205 is that hear-

ings will be held to make statutory findings required by §207(a), there is no positive mandate that one be held; therefore a declaratory order will not lie with respect to those certificates, even though, as a matter of due process, a hearing might have had to be held. Nevertheless, as the commission's authority to entertain and decide petitions for interpretation of operating rights issued by it is not limited to proceedings covered by APA, instant petition will be so considered.—Renner Motor Lines, Inc., 94 M.C.C. 605 (611).

Petition filed under §5(d) of the APA to clarify and remove any uncertainty with regard to involved permit was proper. The commission's power to issue declaratory orders in proceedings of this nature is well established; moreover, independent of the power conferred by the section, the commission is authorized to entertain petitions seeking an interpretation of certificates or permits. [See 51 MCC 175].—Carolina-Virginia Courier, Inc., Extension, 95 M.C.C. 612 (613).

See also Southern Motor Carriers—Agreement, 323 ICC 396.

Applicability of special §22 rates on shipments moving on commercial bills of lading, see Interpretation of Govt. Rate Tariff—Eastern Central, §22(1), n. 5.

Reviewability of declaratory order, see National Van Lines case, under Judicial Review, below.

Examiners: ICA and APA

Social Security Administration had the right to prescribe regulations concerning employee indebtedness, and the duty to carry them out by preferring charges of delinquency; and Civil Service Commission had the responsibility to determine from the evidence the correctness of the charges. That commission's finding that plaintiff hearing examiner was financially irresponsible in failing to meet his personal monetary obligations and thus brought discredit on the agency are supported by substantial evidence, and plaintiff was not denied due process in that the creditors did not testify in person, so that they could be cross-examined; plaintiff does not question truth of contents of creditors' letters to the agency and admits the debts they describe. Civil Service Commission drew a justifiable inference from the established facts, and specific proof that plaintiff's continuing employment caused the agency to be held in lower esteem was not required; the commission's order recommending his removal from his position, sustained.—McEachern v. Macy, 233 F. Supp. 516*.

Hearing examiner of the Social Security Commission, duly appointed under §11 of APA, was entitled to review by the district court of decision and order of the Civil Service Commission that he be removed from that position because of unjustified neglect of his financial obligations. Exception of examiners appointed pursuant to §11 from the exemption of selection or tenure of an officer or employee in §5, pertaining to agency adjudication, restores reviewability of "the selection and tenure" of such examiner. Since review of the Civil Service Commission's order may be obtained by the aggrieved person in the form of a complaint filed in the district court, lower court's dismissal of plaintiff's suit for want of jurisdiction was in error. Remanded, with directions to drop the United States as party defendant, to allow complainant to amend so as to implead proper defendants, and thereafter grant a hearing on the complaint.—McEachern v. United States, 321 F. 2d 31 (32-3)*.

Position of hearings examiners is not a constitutionally protected position, but is a creature of congressional enactment; plaintiff has no vested right to such a position and can be, in accordance with provisions of APA, discharged for cause. The court cannot say that willful refusal or negligent failure to pay lawful debts without sufficient cause or reason does not constitute good cause for dismissal. Social Security Administration regulation providing for dismissal of an employee for those reasons is manifestly within the statutory authorization.—McEachern v. United States, 212 F. Supp. 706 (710-11, 712)*.

An examiner is not required to compel production of every item of evidence which a party desires; he may, in his discretion, deny request for production which is merely cumulative or immaterial to issues presented. Examiner's exclusion as irrelevant, and refusal to compel production of certain evidence

did not deny plaintiffs due process or constitute prejudicial error under the statute; plaintiffs received a full, fair, and impartial hearing.—Fried v. United States, 212 F. Supp. 886 (894-6)*.

The matter of continuances rests in the sound discretion of the administrative agency's hearing examiner, and the reviewing courts will not interfere except upon a clear showing of abuse. Language in §5(a) of the statute relative to fixing time and place for hearings with due regard for convenience and necessity of the parties or their representatives means that convenience of all persons concerned—applicant, the agency, and opposing shippers—must be accorded due recognition in scheduling an application proceeding for hearing. Due regard for convenience and necessity of the parties cannot be divorced from convenience of the agency. Oral request at the hearing for indefinite postponement thereof, predicated only on statement that it was "inconvenient" for applicant to go forward with hearing at that time, was insufficient to compel the examiner to grant a postponement: denial of the request sustained.—Burnham Trucking Co. v. United States, 216 F. Supp. 561 (563-4)*.

The most cursory examination of examiner's report in consolidated application proceedings reveals the exact basis and reasons for the examiner's recommendations; the report amply reviews the evidence, sets forth detailed findings of fact, and in all other respects complies with requirements of APA. In setting forth findings which apprise the court of the essential basis of the commission's decision, the examiner complied with his duty under §8(b) of APA to include a statement in his report, and it was therefore permissible for the commission to affirm and adopt the examiner's report as it did.—North American Van Lines, Inc. v. United States, 217 F. Supp. 837 (842)*.

The Commission is not bound to accept its examiner's findings; it is required to make its own findings based on the evidence.—Vincent Montone Transp., Inc. v. United States, 231 F. Supp. 484 (487)*; Mitchell Bros. Truck Lines v. United States, 225 F. Supp. 755 (758)*; Eagle Motor Lines, Inc. v. United States, 236 F. Supp. 502 (504)*; Eazor Exp., Inc. v. United States, 218 F. Supp. 393 (395)*.

The commission's conclusions are not vulnerable merely because they overruled those of the examiner: the commission, not the examiner, exercises the determinative judgment and discretion. The commission's denial, contrary to the examiner's recommendation. of the extension certificate sought by plaintiff was pursuant to statutory authority and was supported by adequate findings based on substantial evidence; sustained.—Wycoff Co., Inc. v. United States, 240 F. Supp. 304 (312)*.

Interstate Commerce Commission is not bound by factual determinations of its examiners and has all the powers which it would have in making the initial decision; thus, in determining whether plaintiff's certificate authorized transportation of certain commodities, the commission is not bound by prior administrative rulings in other motor carrier application cases which were determined by examiners.—Whitehouse Trucking, Inc. v. United States, 261 F. Supp. 9 (11)*.

There was no error in examiner's failure in his report on further hearing to make certain findings requested by applicant; §8(b) of APA does not require a detailed finding on every subsidiary evidentiary fact or conclusion submitted by a party as proposed findings; requested findings were disposed of in examiner's report or are immaterial to proper disposition of the issues.—Davidson Transfer & Storage Co. Extension, 88 M.C.C. 715 (716)*.

Examiner's finding that applicant's evidence of traffic volume allegedly transported through gateway sought to be eliminated could not be credited in absence of documentary corroboration was not a novel or unwarranted evidentiary approach. Question whether applicant actually operated through its authorized gateways was raised by opposing carriers and thus was specifically in issue; examiner, who heard the testimony and was in position to observe witnesses' demeanor, was unwilling to find that applicant actually did observe its gateways without additional evidence; as such evidence was not proffered, examiner's factual conclusion will not be dis-

turbed.—Mason & Dixon Tank Lines Extension, 91 M.C.C. 7 (14).

There was no error in examiner's allowing witnesses for protestants who were not represented by practitioners to testify orally in narrative form. The commission's Rules of Practice—which should be construed liberally to secure just, speedy, and inexpensive determination of the issues—provide adequate safeguards effectively to protect interests of all parties. Rule 1.70 specifically authorizes the hearing officer to regulate the procedure before him, and he has ample discretion to exclude objectionable testimony or to require a person appearing both as representative of a party and as a witness to prepare his testimony in written form in advance of his oral testimony. Moreover, §10(e) of APA requires that decision be based on substantial evidence, and the examiner and the commission limit their consideration to the type of evidence.—Blythe Extension, 91 M.C.C. 827 (831-2).

Statement of complainant's practitioner, in connection with his allegation that hearing examiner improperly, in absence of opposing counsel, discussed with counsel for defendants a proposal to adjourn the hearing, that the examiner submitted the same proposal to him off the record, noted; also noted, in connection with his allegation that after adjournment the examiner traveled by automobile to another city as guest of defendants' counsel, that he stresses adverse highway conditions on the date in question, making difficult identification of persons in a passing car; those facts were fully considered in commission's special report, 311 ICC 71; conclusions therein absolving the hearing examiner of committing the alleged improprieties and unethical conduct, affirmed.—In Re Willette and Partridge, 315 I.C.C. 359 (363).

There was no violation of §7(a) of APA in the commission's relieving one examiner, at his request, of his assignment as hearing examiner in consolidated complaint and investigation proceedings and assigning the proceedings to a different examiner. As §7(a) provides only for voluntary withdrawal of a presiding officer if he deems himself disqualified, or for disposition by the agency of an allegation of bias or disqualification made by one of the parties, and there is no question raised of bias or disqualification of the examiner concerned, §7(a) is inapplicable. Moreover, §7(a) does not prevent an agency from relieving a hearing examiner of an assignment upon his request, for such reasons as the agency considers adequate; the commission's action was simply one of internal procedure and management, consistent with its inherent powers and duties.—Chicago, B. & Q. R. Co. v. New York, S. & W. R. Co., 318 I.C.C. 180 (182)*.

In administration of proceedings involving hearings, it often becomes necessary, due to unforeseen exigencies, to relieve an examiner of an assignment made in preparation of an itinerary; an examiner may also be relieved of an assignment by mutual agreement with the commission; these views reflect the necessities of proper, efficient, and economical administration of the commission's functions and the relationship of the examiner as an employee of the commission. Since examiner concerned had not presided at taking of any oral evidence, but only at prehearing conferences which dealt solely with procedural matters, he had not presided "at the reception of evidence" in the proceedings within §8 of APA, and thus was not required to make the recommended or initial decision contemplated by §5(c).—Id., p. 183.

The examiner's withdrawal was not ineffective because allegedly based on certain omissions from orders accompanying questionnaires submitted to the carriers, which were subsequently corrected by order of Division 2; such a circumstance does not negate action taken on the request for withdrawal. And though that request was made to Director of Bureau of Rates and Practices, the reassignment order of the Chairman shows on its face that the matter reached the commission's attention, thus the question of an intermediary is of no consequence.—Id., p. 184.

Nor was there any irregularity in failure to assign the proceedings to a successor examiner in rotation; though §11 of APA provides for assignment of cases to examiners in rotation "so far as is practicable," the commission has found assignments to hearing examiners in strict rotation to be impracticable and indeed impossible from standpoint of economy and

efficiency of administration. Assignment of examiners out of rotation in accordance with itinerary requirements for reasons of economy was sanctioned in 227 F. 2d 420; and observance of strict rotation is precluded by assignment of cases requiring special skill or knowledge to examiners thus qualified, also by unavailability of examiners next in rotation because of their absence or their existing workloads. Petitions for reconsideration of orders relating to the change of examiner assignments, denied.—Id., p. 184.

Although orders issued respectively 63 and 15 days before further hearing on "grandfather" application each assigned the matter to a different examiner (also appointed pursuant to APA) from the one who presided at initial hearing, and intervener thus had ample notice of the change in assignment, neither it nor its counsel objected thereto until the second hearing was called to order. If intervener considered the objection vital to its interest, it should have brought it to the commission's attention a reasonable time before the date of further hearing; simple fairness to the commission and to other parties to the proceeding, also due regard for the commission's task of administering the act effectively, dictate that a request for the same presiding officer should have been made within a reasonable time after service of the first order, which apprised intervener that a different examiner was assigned to the further hearing. In the circumstances, intervener's objection was not timely raised.—Holomon, 92 M.C.C. 8 (9, 11).

Even if timely made, intervener's objection is not well founded; §5(c) of APA requires only that the same officer who presided at the reception of evidence shall make the recommended decision, and the court has held that this requirement applies to situations where credibility evaluation of witnesses may affect the findings. In instant case, applicant was the only witness to testify at either hearing and no conflict of testimony was involved; examiner who presided at reception of evidence at initial hearing made his findings on the facts before him, and his report and recommended order were duly served and made part of the record; the same is true of the further hearing and the examiner who presided at it; each report and recommended order was prepared by an examiner who was in position to evaluate the credibility of the only witness, and conclusions of the first examiner and bases therefor were available to the second for consideration with his own evaluation of the witness's demeanor. The commission, having the benefit of both reports, has considered the exceptions and replies filed to each; procedure followed in no way prejudiced intervener's rights or infringed provisions of APA.—Id., pp. 11-12.

Upon full and careful consideration of the record in investigation of operations of Carload Shippers Assn., conclusion is inescapable that conduct of the hearing was not all that is required under the law. The examiner's pronounced and overly active participation in interrogation of witnesses was unfortunate, and, while his basic impartiality is undoubted, further treatment of issue of his allegedly prejudicial conduct would only detract from and confuse the fundamental standards now established for forwarding operations of shipper associations. The examiner's conduct has so beclouded the evidence that a finding of unlawfulness of respondents' operations would be inappropriate; investigation discontinued.—Atlanta Shippers Assn., Inc.—Investigation, 322 I.C.C. 273 (289)*.

See also Empire Petroleum Co. case, §13(1), n. 86; Robbins v. US, §204(c), n. 205.

Hearing; Whether Required

Since abandonment proceeding before the Interstate Commerce Commission was not a rulemaking proceeding within §4 of APA and there was no statutory requirement for an agency hearing within contemplation of §5 thereof, because §§1(19) and 20a(6) of the Interstate Commerce Act leave the matter of holding hearings in abandonment proceedings to the commission's discretion, no hearing in conformity with §7 of the statute was required. Moreover, in 339 US 33, the Court commented that the limitation in §5 of APA to hearings required by statute exempts those which administrative agencies may hold by regulation, rule, custom, or special dispensation; proceedings on abandonment involved were ones which the agency was discretionar-

ily entitled to hold "by regulation," and plaintiffs have not challenged constitutionality of the governing statute.—Brotherhood of Locomotive Engineers v. United States, 217 F. Supp. 98 (100-1)*.

While courts should not force administrative agencies to hold unproductive hearings, rejection of unopposed expert testimony on a matter susceptible of reasonably precise measurement, without the agency's developing its objections at a hearing, should be upheld only when (1) the agency's uncommunicated criticisms appear to be both so compelling and so deeply held that the court can be fairly sure the agency would not have been affected by anything the witness could have said, had he known of them, and (2) the court would be bound to affirm, despite the expert's hypothetical rebuttal, out of deference for the agency's judgment on so technical a matter. It is insufficient answer that plaintiff was able to present counterarguments by petition for rehearing or reconsideration; argumentative criticisms of expert testimony cannot be refuted by such petitions nearly so well as by the expert himself; moreover, for commissioners, as for judges, freedom of decision is at least subconsciously restricted once a position has been publicly taken.—Davis & Randall, Inc. v. United States, 219 F. Supp.. 673 (679)*.

Letter of plaintiff's counsel denying permission, except on certain conditions, for a commission accountant to examine work sheets and other data underlying plaintiff's cost exhibits can be taken as requesting a hearing in case the commission's examination did not satisfy it as to propriety of the proposed rates, and was appropriate in view of aborting of the modified procedure due to railroads' withdrawal of their protest. The commission's criticism that the basic data in the cost study might be inaccurate is the kind of attack normally required to be made at a hearing where the witness can defend himself or set parameters on any error. In light of the apparently reasonable nature of the cost evidence, insufficiency of the commission's criticisms thereof to require affirmance no matter what a hearing might have produced, and other considerations, enforcement of its order requiring cancellation of the rates is enjoined, without prejudice to any future action it might take concerning the rates upon complaint.—Id., pp. 682, 683.

Provisions of the statute governing hearings, findings and substantial evidence apply only when a hearing is required by law. As considered transfer of motor carrier operating rights is within the exemption of §5(10) of Interstate Commerce Act, the sole governing statute is §212(b) thereof and rules and regulations promulgated thereunder; neither §212(b) nor the transfer rules requires a hearing on an initial transfer application; thus, the APA does not apply. Therefore, the commission's failure to grant an oral hearing upon plaintiffs' petition for reconsideration of its order approving the transfer did not violate Administrative Procedure Act; order of the commission sustained.—A. L. Root Transportation, Inc. v. United States, 280 F. Supp. 152 (155-6, 157)*; Chemical Leaman Tank Lines, Inc. v. United States, 251 F. Supp. 269 (272, 273)*.

It is well settled that the definition of commercial zone limits is "rulemaking" within meaning of §2(c) of APA, which under §4 thereof can lawfully be accomplished without formal hearing. As statements and arguments submitted by the parties concerning proposed redefinition of the commercial zones present sufficient data for an informed decision on the matter, oral hearing is omitted.—St. Louis, Mo.—East St. Louis, Ill., Commercial Zone, 96 M.C.C. 691 (692-3)*; Washington, D.C., Commercial Zone, 98 M.C.C. 106 (110-111)*.

The commission's failure or refusal, in interpreting plaintiff's authority to transport "contractors' machinery and equipment," to consider evidence of facts tending to contradict the restrictions which its interpretation would place on a service claimed to have been performed by plaintiff and its predecessor since 1941 deprived plaintiff of a full and fair hearing and violated §8(b) of APA. Order in interpretation case is erroneous and should be set aside because the commission gave no consideration to plaintiff's actual operations under temporary authority on and prior to October 25, 1946, the date of issuance of permanent certificate describing the authority granted in almost identical terms. Remanded for action in accordance with the opinion.—W. T. Mayfield Sons Trucking Co. v.

United States, 234 F. Supp. 655 (660-1)*.

Section 7(c) of APA is ample authority for failure to accord defendants an evidentiary oral hearing when, after notice and allowance of ample time, they failed to make their request for hearing and cross-examination adequately specific, and their reply statement did not dispute any of material facts stated by complainant's witnesses under modified procedure.—United States v. Missouri Pac. R. Co., 322 I.C.C. 418 (419-20).

See also Norfolk & W. Ry. Co. v. United States, §1(19), n. 14.

Judicial Review

The test of judicial review of the commission's action, in granting applications of seven railroads to provide additional service to Lake Calumet Harbor Port (near Chicago), is whether it is supported by substantial evidence on the record as a whole. The district court erred in striking down conclusions of the commission that were largely based on previous commission findings which the court had approved, since it is the commission's function to draw reasonable and proper conclusions from its findings; and possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by the record. Therefore, having found substantial support of record for commission findings as to the port's future potential and the necessity for competitive rail service at the start of development, it was not the lower court's function to substitute its conclusions for those which the commission had fairly drawn; its agreement with the controlling subsidiary findings required the court to sustain the commission's conclusions. Reversed and remanded with instructions.—Illinois Central R. Co. v. Norfolk & W. R. Co., 385 U.S. 57 (65-9)*.

The rule of 332 US 194 is that an agency's discretionary order must be upheld, if at all, on the same basis articulated in the order itself; if those grounds are improper, the court is powerless to affirm the administrative action. When the commission did not find that a cease-and-desist order would be ineffective, as an alternative remedy to issuance of certificate to an additional carrier, to cure a deficiency in service due to trunkline motor carriers' refusal under union pressure to interchange traffic in contravention of a "hot cargo" clause, the courts may not accept commission counsel's post hoc rationalization of its action. For the courts to substitute their or counsel's discretion for that of the commission is incompatible with orderly functioning of the process of judicial review; this is not to deprecate, but to vindicate, the administrative process, for the purpose of the rule is to avoid propelling the court into the domain which Congress has set aside exclusively for the administrative agency.—Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (168-9)*.

Moreover, there is not substantial evidence of record on which to base a finding that a cease-and-desist order would have been ineffective; there was every indication at the time that such an order would render the deficiencies of service purely temporary phenomena and would thus be effective in promoting adequate, economical, and efficient service and in fostering sound economic conditions among the carriers affected. The judgment of the district court must be reversed and the commission's order set aside as an improvident exercise of its discretion.—Id., pp. 165, 169.

Review of Supreme Court decisions on the issue of reviewability of administrative orders indicates that the test of ripeness for judicial review of such an order, as carried down from 307 US 125 through 363 US 202, is that administrative orders are not reviewable unless and until they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process (333 US 103).—National Van Lines, Inc. v. United States, 326 F. 2d 362 (367-372)*.

While findings and resulting orders in investigation to determine applicability of rates on household goods under certain tariffs were declaratory, they followed an adversary proceeding in which the critical question was sharply disputed, and order discontinuing it was a final order; thus the order resulted from a hearing in tradition of judicial proceedings and was not a stage in an incomplete process of adjudication. And since the commission report (incorporated in the final order) ruled adversely to respondents and found that cer-

tain past charges made contrary to that ruling violated §217(b) of ICA, and on basis of the commission order the Government has already made overcharge deductions from payments due certain carriers, it was not an abstract declaration, but had an immediate and practical impact on the carriers. On balance, the commission's findings resulted in an order declaratory in nature, subject to and ripe for review by the district court.—Id., pp. 367, 373-4.

While due weight should be accorded the commission's construction of a tariff, it is within the courts' competence to construe a tariff differently from the commission's interpretation, particularly when the construction presents a question solely of law; and the application of rules of construction to undisputed facts is classically a question of law. There is no reason to defer to the commission's determination in such circumstances. The commission's determination as to construction of tariff in issue was not reached on voluminous and conflicting evidence, the adequate appreciation of which requires acquaintance with many intricate facts of transportation; its interpretation of the tariff was erroneous, and the lower court erred in upholding its decision.—National Van Lines, Inc. v. United States, 355 F. 2d 326 (333)*.

Scope of the court's authority on review of an order of the commission is limited; if such order lies within scope of the commission's statutory authority, is based on adequate findings, and is supported by substantial evidence, it should not be set aside, modified or disturbed on review by the court.—Atlantic Coast Line R. Co. v. United States, 202 F. Supp. 456 (458)*.

Scope of judicial review of an administrative order is delineated by §10 of APA, 5 USC §1009; the court must sustain the commission if its findings are supported by substantial evidence, or if there is a rational basis for its conclusions, and its rulings and decisions are in accord with the applicable law. However, when the commission's decision based on the stated findings is erroneous and reflects misinterpretation of the law as amended by §15a(3), its order requiring cancellation of considered rail ratings and rates because they constitute a destructive competitive practice must be set aside and enforcement thereof enjoined.—Missouri Pac. R. Co. v. United States, 203 F. Supp. 629 (631-2, 633, 636)*.

Judicial review of the commission's order granting authority for one carrier to purchase a portion of operating rights and property of another carrier is limited to determination of whether the order is based on adequate findings, supported by substantial evidence on the record as a whole, and is entirely rational and lawful. The court has no authority to substitute its opinion for that of the commission; sustained.—West Bros., Inc. v. United States, 203 F. Supp. 839 (840)*.

The scope of the district court's power to review orders of administrative agencies was materially broadened by enactment of the Administrative Procedure Act. New breadth of the court's reviewing responsibility was brought about by insertion in §10(e) thereof of specific direction to reviewing courts that their decisions be based upon a review of the "whole record." [Citing Universal Camera case, 340 US 474.]—Chicago, R.I. & P. R. Co. v. United States, 205 F. Supp. 378 (380-1)*.

In determining whether there is substantial evidence relating to convenience and necessity to support the commission's findings and decision authorizing construction of an extension of a rail line, the court must carefully examine all of the evidence presented to the commission. However, it is not the role of the court to consider the record before the commission by a standard different to that of the commission, but rather to measure with the commission's standard the evidence upon basis of the rule that the determination be reasonable and be supported by substantial evidence. Decision of the commission sustained.—Id., pp. 382, 383-4.

Scope of the court's review of the commission's order is limited to determination, upon the whole record, of whether the commission's findings are supported by substantial evidence, or whether its findings and conclusions were induced by misapplication of the law. Record fails to support the commission's conclusions, and practical effect of its order is to stifle, rather than encourage, fair competi-

tion between rail and motor carriers in derogation of provisions of §15a(3); order annulled and set aside.—St. Louis-S.F. Ry. Co. v. United States, 207 F. Supp. 293 (294-5, 299)*.

Under §10(e) of APA, a reviewing court must determine whether or not there was substantial evidence on the record considered as a whole to support findings of an administrative agency. However, substantial-evidence requirement was not intended to negative the function of an administrative tribunal, like the commission, which is presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which the courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the commission's choice between two fairly conflicting views, even though the court would justifiably have made a different choice.—General Motors Corp. v. United States, 207 F. Supp. 641 (643)*.

While a court may set aside an administrative agency's order where there is no warrant in the law for its action, or where its findings and conclusions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, the record as a whole supported the commission's decision as to applicability and reasonableness of assailed rates and, in so finding, the commission did not act arbitrarily, capriciously or abuse its discretion.—Id., pp. 644, 646, 648.

In reviewing the commission's decision denying reparation to plaintiff, it is for the court to consider and decide only whether the decision and order are free from error of law and are based on findings supported by substantial evidence; and in determining even that narrow issue, the court may not substitute its own judgment or discretion for that of the commission on questions of credibility, weight of evidence, and the inferences to be drawn from facts deemed proven. Thus, while the court may pass upon the reasonableness of a finding, it may not pass upon its rightness.—William N. Feinstein & Co. v. United States, 209 F. Supp. 613 (619)*.

Mere fact that a commission decision may be inconsistent with a prior commission determination is not a valid ground for reversal. An administrative body such as the commission is not required to deal with a particular case as it has dealt with a prior case that seems similar, since there may be diverse factors in the second determination which the commission feels, in exercise of its special experience, justify a different result. The court can only look at the record before it; if the commission's decision is not arbitrary but based on adequate findings, which are supported by substantial evidence, it must be left undisturbed. The court may not substitute its judgment as to whether a finding which is based on inferences drawn by the commission from the evidence before it was right, or whether a different inference would be better supported; the court can only inquire whether drawing of such inferences was reasonable.—Id., pp. 620, 622.

The scope of judicial review of an order of the commission is governed by APA, particularly §1009(e); only questions affecting constitutional power, statutory authority, and the basic prerequisite of proof can be raised. If these legal tests are satisfied, the commission's order becomes incontestable.—A. L. Mechling Barge Lines, Inc. v. United States, 209 F. Supp. 744 (747)*.

The sole function of a reviewing court under §10(e) of Administrative Procedure Act is to determine whether the commission gave consideration to all of the factors which it was required to consider in making its decision, and whether on the record as a whole there was "substantial evidence" to support its findings and order. [Citing 166 F. Supp. 851.]—Fried v. United States, 212 F. Supp. 886 (889-90)*.

If the essential findings of the commission are supported by evidence, the court should decline to substitute inferences of its own for those drawn by the commission; and the court cannot, except under certain limited conditions, usurp the administrative functions of the commission by setting aside its lawful orders upon the court's conception of whether the administrative power has been wisely exercised.—North American Van Lines, Inc. v. United States, 217 F. Supp. 837 (840, 841)*.

Scope of the court's review, in action to set aside and enjoin the Interstate Commerce Commission's orders finding disparity in rail

rates on meats and packinghouse products unduly prejudicial and unduly preferential, is limited by provisions of §10(e) of the statute.—Atchison, T. & S.F. Ry. Co. v. United States, 218 F. Supp. 359 (362)*.

Although where Congress has expressly conferred ultimate discretion on the executive the determination is not subject to judicial review, and this principle is specifically recognized in §10 of APA, no such absolute or exclusive discretion is conferred on the commission by §208(b) of ICA, and no reason appears why any rules or regulations promulgated under §208(b) and any orders issued under such rules should not be subject to judicial review, unless they are "abstract declarations" not determining rights or obligations and from which no legal consequences will flow (363 US 202). Validity of the commission's deviation rules insofar as they authorize approval of regular alternate routes as deviations is clearly a matter for judicial review; and orders issued thereunder which give plaintiff's competitor a right, though terminable, which it did not have before and which plaintiff asserts adversely affects its rights are not mere abstract declarations and are no less subject to judicial review than ones determining rates or rights to certification.—Greyhound Corp. v. United States, 221 F. Supp. 440 (443)*.

The scope of judicial review of a commission order includes consideration of whether the commission's conclusions are supported by substantial evidence on the record as a whole, are free from errors of law, and are not so arbitrary or capricious as to constitute an abuse of discretion. If the court is affirmatively satisfied that the order does not depart from those standards, it must be sustained, even though the court might have adopted a different view on the same facts and law.—Youngblood Truck Lines, Inc. v. United States, 221 F.upp. 809 (812)*.

The commission's determination of scope of transportation permitted by a certificate issued by it is within its statutory authority and will not be overturned by the courts unless the order is "clearly erroneous" as that term is used in §10(e) of APA. The commission's rulings on plaintiff's contentions were neither arbitrary, capricious, nor otherwise clearly erroneous, and its findings on each point raised were supported by substantial evidence; to consider the weight of that evidence or the soundness of the commission's reasoning is outside the province of the court; the order sustained.—Mitchell Bros. Truck Lines v. United States, 225 F. Supp. 755 (758, 760)*.

A court does not have jurisdiction to review an agency's denial of a declaratory order which denial is discretionary with the agency.—W. J. Dillner Transfer Co. v. McAndrew, 226 F. Supp. 860 (864)*.

In judicial review of commission orders the court's task requires review of the whole record, and is not limited merely to examination of evidence supporting the commission's findings. While, prior to 1951, it was held that a district court need only read the side of the case for which the commission ruled, and that if it found any evidence there the commission's action would be sustained, dissatisfaction with this restrictive scope of review led to enactment of APA, which expressly directs reviewing courts to consider the "whole" record in determining whether administrative findings have the required evidentiary support. [Citing 340 US 474.]—Atchison, T. & S.F. Ry. Co. v. United States, 231 F. Supp. 422 (429)*. (See same case, §17(5), n. 10, concerning reopening by commission while court action pending.)

In action to set aside the commission's order denying plaintiff's petition for reopening of its "grandfather" proceeding (closed in 1943) and waiver of rules 1.101(e) and 1.102 of the Rules of Practice, the review function of the court is limited to determining whether there is warrant in law and fact for the commission's action. If there is, the court must affirm; it cannot substitute its judgment as to what it feels should have been done for that of the commission. The commission had broad discretion in the first instance to determine plaintiff's "grandfather" rights; granting of petition for rehearing made more than 30 days from date of a commission decision or order is not a matter of right, such petition being addressed to the commission's discretion; also it is well within the commission's discretion to refuse to waive rules 1.101(e) and 1.102. The record indicates no abuse of such

discretion and, there being warrant in law and fact for its action, the commission's order is sustained.—Cardinale Trucking Co. v. United States, 232 F. Supp. 339 (344-5, 347-8)*.

Under §10(e) of APA, where agency action is committed to agency discretion there may be no judicial review, and though railroads filed new reduced rates during pendency of court action to set aside order approving reduced rates on same commodity between the same and additional points, the commission's refusal to suspend the rates most recently filed was a matter exclusively within its sound discretion and is not susceptible of review by the district court.—Seatrain Lines, Inc. v. United States, 233 F. Supp. 40 (45, 47).

While the court is cognizant of §10(e) of APA, defining the scope of judicial review of commission action, and the matter of interpretation of plaintiff's operating authority is before the court for the second time, the court is nevertheless required to hold unlawful and set aside agency action found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law, or without observance of procedure required by law. The commission's failure or refusal to consider evidence of plaintiff's actual operations under temporary authority on and prior to date of issuance of the certificate in question deprived plaintiff of a full and fair hearing; and while the court is without power to perform the functions of the commission, it is its duty to declare the order in the interpretation case erroneous and set it aside for that reason. Remanded for action in accordance with the opinion.—W. T. Mayfield Sons Trucking Co. v. United States, 234 F. Supp. 655 (660-1)*.

The scope of judicial review of the commission's order is fixed by §10(e) of APA. The court must hold unlawful and set aside any action, finding, or conclusion found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, or unsupported by substantial evidence. Otherwise, the court may not reweigh the evidence or question the soundness of the commission's reasoning. And the court must review the whole record, including the examiner's proposed report, for though the proposed report is not binding on the commission, it is entitled to consideration by the court on the issue of substantiality of the evidence.—Stanislaus County v. United States, 236 F. Supp. 146 (148, 151)*.

Orders of the commission should not be set aside, modified, or disturbed by a court on review if they lie within scope of the commission's statutory authority and are based on adequate findings supported by substantial evidence, even though the court might reach a different conclusion on the facts presented. The commission's finding that plaintiff's "driveaway" business is a common carrier operation subject to the act is supported by substantial evidence and is in accord with court decisions on essentially similar facts. Sustained.—Spencer v. United States, 236 F. Supp. 230 (232)*.

Any right of plaintiff labor unions and motor carrier association to sue to set aside a commission order entered against defendant carriers in a rate proceeding must rest on §205(h) of ICA, which in turn refers to §17(9) which provides for judicial relief from the commission's decisions. But suits must be brought in accordance with existing law governing cases seeking to enforce, enjoin, suspend, or set aside the commission's orders, and those sections are further circumscribed by §10(a) of APA, which requires that for judicial review of an administrative action a person must have suffered a legal wrong or be adversely affected or aggrieved by such action within meaning of the relevant statute. Plaintiff unions are not parties in interest nor aggrieved by the order, since their claim that the prescribed helper service rule interferes with their collective bargaining rights is too remote and tenuous to give them standing to sue; and none of carrier members of plaintiff association, itself neither a carrier nor a shipper, are parties to instant suit. Thus plaintiffs are barred by both ICA and APA from any judicial relief; complaint dismissed.—Teamsters Joint Council 40 (J.C.)v. United States, 238 F. Supp. 301 (306, 308)*.

In action to enjoin and set aside the commission's orders prescribing new divisions of joint rail rates on transcontinental traffic, it is not the court's duty to evaluate each bit of evidence and determine whether the commission has drawn the proper conclusion there-

from. The commissioners are experts and their stated opinions as to factual matters, when based on evidence, are sufficient to support their findings. Whether evidence is sufficient for the commission to arrive at the costs of service, and the data and information and the method used, is within its discretion, absent an abuse thereof; but once the necessary factors are determined, there must be findings disclosing that the commission has considered the financial effect of new divisions as to each carrier involved, in order for the court to determine whether the commission has met the statutory requirements. Because of insufficiency of the commission's findings and conclusions, as stated, case remanded to it for further proceedings consistent with the court's opinion.—Atchison, T. & S. F. Ry. Co. v. United States, 238 F. Supp. 528 (534, 535-6, 540)*.

With the commission's expertise in mind, it is the court's duty to review the record and the conclusions reached, in accordance with provisions of §10 of APA that a commission order may be invalidated if it is either "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law * * * (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory rights * * * (5) unsupported by substantial evidence." "Arbitrary" and "capricious" are to be understood in their legal sense, and mean "without rational basis"; so if a rational basis for the order is found, so far as arbitrariness or capriciousness is concerned the court will have exhausted its function.—Eastern Central Motor Carriers Ass'n v. United States, 239 F. Supp. 591 (594)*.

To merit judicial approbation, the commission's order also must be within the statutory limits and authority expressed by Congress; and the national transportation policy is the yardstick by which the correctness of the commission's actions will be measured. In reviewing the commission's approval of motor-carrier rates, the court must satisfy itself that the commission has followed the policies of §216(b), which requires all common carriers to establish just and reasonable rates, of §216(d), which requires all charges to be just and reasonable and declares unlawful every unjust and unreasonable charge, and of §216(g), which places the burden of proof on a carrier proposing a changed rate to show that it is just and reasonable. Just as the court would overstep its duty by undertaking to evaluate the evidence according to its own notions of the public interest, so would it shirk its duty were it summarily to approve the commission's evaluation of the record without determining that such evaluation had been made in accordance with the mandates of Congress.—Id., p. 595.

As to the sufficiency of evidence to support the order, while it is not the court's proper function to substitute its judgment or to weigh evidence in place of the commission, it must review the record without a rubber stamp approach. The court is bound to inquire into every aspect of the commission proceeding wherein it may appear that the commission has applied an erroneous standard of law, or has made arbitrary findings, or has reached ultimate conclusions without adequate subordinate facts, or has failed in any other way to observe the procedures of proper administrative determination.—Id., pp. 595-6; the mere fact that the rule stated in 318 ICC 567 and followed in the case under review, as to cost evidence required to show compensativeness of rates covering service provided by a carrier using owner-operators, departs from the rule of an earlier case does not require the court to take corrective action. Nor is the fact that other rulings have followed that case decisive; however, such rulings may be weighed in accordance with their thoroughness of consideration, validity of reasoning, and consistency with earlier or later decisions.—Id., p. 599.

In holding that the commission, in approving reduced rates proposed by a motor carrier using owner-operators, improperly applied the criteria of compensativeness stated in 318 ICC 567, and that those criteria unjustly discriminate against self-sustaining carriers who are required to submit much more detailed cost data to show compensativeness of their rates, the court is not unmindful of the function that the commission is to perform or the discretion that it has. Nor does the court question the selection of methods used to prove that rates are compensative; it merely holds that, in absence of sufficient reasons,

when the cost method is used to prove compensativeness of reduced rates, full production of evidence is required for both the self-sustaining carrier and the carrier employing owner-operators. The order set aside and the case remanded for further consideration.—Id., pp. 600-1.

Upon review, the court is directed by the applicable statutes to compel agency action unlawfully withheld and to set aside as unlawful agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Plaintiff, protestant in application proceeding, seeks to set aside the commission's orders refusing to waive rule 101(e) of its Rules of Practice and denying plaintiff's petition for reopening of the proceeding for purpose of changing a portion of the certificate alleged to have been granted upon misrepresentation and by mistake. In its application and petition plaintiff set forth facts which, if found to be true, would require the commission to reopen the proceeding to allow plaintiff to adduce evidence in support of its position and to be heard in opposition to that portion of the commission's order granting authority beyond that recommended by the examiner. Administrative boards and commissions have the duty to so conduct their proceedings as to secure a just result, and it is the court's duty to see that the commission, whose orders it is directed to review, performs this obligation.—James J. Williams, Inc. v. United States, 241 F. Supp. 535 (537-8)*.

Jurisdiction to review agency orders is vested in a court with equity powers, and while the court must act within bounds of the statute and without intruding on the administrative process, it may adjust its relief to the exigencies of the case in accordance with equitable principles governing judicial action. In summarily rejecting, without a hearing, plaintiff's application for waiver of the commission's rule 101(e), the commission did violence to an established principle of law; such action was the type of arbitrary action which the court is required to set aside. At the court's instance, plaintiff demonstrated that it was in a position to prove its allegations with respect to circumstances giving rise to the mistake which it claims occurred. Accordingly, the commission's order denying plaintiff's petition is set aside and cause remanded, with directions to grant the hearing and make the determinations set forth in the court's findings.—Id., pp. 538-9.

In action to set aside the commission's order approving purchase of certain operating rights by intervening defendant, the commission's failure to follow, distinguish, or discuss two prior purchase proceedings involving same vendee did not make its conclusions arbitrary and capricious, or constitute an abuse of discretion. As held in 151 F. Supp. 577, the commission's findings may not be attacked because they are inconsistent with its findings in other cases.—Alabama Highway Exp., Inc. v. United States, 241 F. Supp. 290 (292-3)*; and the commission's express finding that a new service would not emerge from proposed acquisition of authority, which is supported by substantial evidence, is dispositive of plaintiff's contention that approval of the purchase, which would result in completely new service, without proof of convenience and necessity was arbitrary and capricious.—Id., pp. 293-4.

Even though the reviewing court might reach a different conclusion on the facts presented, the commission's order should not be set aside if it is not arbitrary or capricious, or unlawful, and if the findings are adequate and supported by substantial evidence. Based on the entire record, the commission's interpretation of the law cannot be found erroneous; nor can it be said that its findings that activities of the defendant before it are confined to one terminal area and do not include assumption of any origin-to-destination responsibility for shipments, were not supported by substantial evidence. Order of the commission dismissing the complaint, because plaintiffs failed to sustain their burden of proof, sustained.—National Motor Freight Traffic Ass'n v. United States, 242 F. Supp. 601 (604-5, 606)*.

While the court has its statutory limitations upon the scope and range of review in cases involving application for motor carrier operating authority, still the commission does not possess any carte blanche authority to disregard positive, undenied, credible testimony and binding judicial opinions and applicable

legal precedents in such cases. A protesting carrier does not have any property right in his operating authority which would preclude the commission from granting competing authority to another carrier; still the requirements of consistency in the public interest and due process must be observed, otherwise the commission would fail of its purpose and duty to the public.—Dixie Highway Exp., Inc. v. United States, 242 F. Supp. 1016 (1019)*.

Although the scope of review of an administrative order or ruling is limited, and agency findings of fact are conclusive unless unsupported by substantial evidence, "substantial evidence" (specifically listed in the statute as a sine qua non of an agency decision) is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; it is more than a mere scintilla, must afford substantial fact basis from which an issue can be inferred, and therefore must do more than merely create a suspicion of the existence of fact or facts to be established. Viewing the record in its entirety, including evidence opposed to the commission's conclusions, order of the commission denying plaintiff's purchase application is not supported by substantial evidence.—Interstate Motor Freight System v. United States, 243 F. Supp. 868 (871, 872)*.

The statute precludes judicial review of agency action which is committed by law to agency discretion. Therefore, since the commission is expressly empowered, in its discretion and without hearings or other proceedings, to grant temporary motor carrier authority where an immediate and urgent need for such service, at points having no service capable of meeting that need, is shown, the grant of the temporary contract-carrier authority in question is not subject to judicial review within Administrative Procedure Act.—Union Cartage Co. v. United States, 244 F. Supp. 1005 (1007)*.

Although the scope of judicial review is limited, the court has jurisdiction to review the commission's orders which vacated grant of temporary authority by the Finance Board pending determination of motor carriers' application for permanent control authority. Plaintiff's contention that the orders under consideration were arbitrary, capricious, and unlawful is not supported by the record; complaint dismissed.—Three "I" Truck Line, Inc. v. I.C.C., 246 F. Supp. 410 (412)*.

So long as the commission's findings are supported by substantial evidence, and it has not abused its discretion, its order denying plaintiff authority to purchase operating rights of another motor carrier must be sustained. And where the examiner and the commission reach different conclusions, the court is required to examine the record as a whole, including testimony taken before the examiner and his report, to determine whether there is substantial evidence to support the commission's conclusions. However, since under §8(a) of APA the agency has full power to reach any conclusions it would have reached in the absence of an examiner's initial decision, the final obligation to determine the facts rests solely with the administrative agency; thus, it is the commission's findings and not those of the examiner which the court is to review.—C & H Transp. Co., Inc. v. United States, 249 F. Supp. 97 (98-9)*.

Judicial review of administrative agency action is limited to consideration of all relevant questions of law, constitutional and statutory provisions, and the meaning or applicability of the terms of any such action. While a court can set aside an agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise unlawful, considered report and order of the commission carries a presumption of validity and should stand unless reviewing court can find that it misapplied the law. The commission's legal conclusions are not erroneous and are found to be permissible on the evidence before it; its decision approving proposed reduced multiple-car rates on iron ore is lawful in all respects; complaint dismissed.—Baltimore & O. R. Co. v. United States, 249 F. Supp. 712 (718-20)*.

Scope of the court's review of the commission's orders is limited to determination upon the whole record whether the commission's findings are supported by substantial evidence or whether its findings and conclusions are induced by misapplication of the law; if the findings are supported by substantial evidence and are in accordance with the law, they must be upheld. However, since the commission's regulations governing transfer of water car-

rier certificates have the force of law, and the Federal agency promulgating a rule is as bound by its terms as is the general public, the commission's orders approving transfer of considered certificate must be set aside when record shows that it allowed a concealment and violation of its rules in the application for approval. The commission cannot ignore its own rules under the facts before it.—Mississippi Valley Barge Line Co. v. United States, 252 F. Supp. 162 (163, 166)*.

The court properly performs only a very limited role in reviewing a decision of an administrative agency; once a rational basis for conclusions in such a decision is found, the judicial function is ended. Courts are not empowered to weigh the wisdom of a particular decision of an administrative body.—City of Galveston v. United States, 257 F. Supp. 243 (245)*.

Function of the reviewing court is limited to ascertaining whether there is warrant in the law and the facts for the commission's action. Absent some specific prejudicial departure from requirements of the law or abuse of the commission's discretion, the court is without authority to intervene. However, judicial deference to expertise is not boundless; and expertise is not sufficient in itself to sustain a commission decision; the commission's order must be supported by substantial evidence and must be made within statutory limits placed on its powers by Congress. As to the sufficiency of evidence to support the order, while it is not a proper function of the court to substitute its judgment or to weigh evidence in place of the commission, the court must review the record without a rubber stamp approach.—Campbell Sixty-Six Exp., Inc. v. United States, 258 F. Supp. 529 (532-3)*.

Applying the principles stated in 239 F. Supp. 591 regarding grounds on which a commission order may be invalidated to the situation in instant suit to set aside an order granting intervening defendant an alternate-route certificate, the facts as found by the examiner and adopted by the commission simply do not supply any rational basis for the finding that intervenor is "actually" in competition with plaintiffs between the affected points. Thus, the "ultimate conclusion" reached by the commission on the alternate-route test of actual competition is not based on any "adequate subordinate findings" and is therefore, in the legal sense, "arbitrary and capricious" [230 F. Supp. 646]; order of the commission is set aside and declared void.—Id., pp. 533, 534-5.

In reviewing an order of the Interstate Commerce Commission, it is the court's function only to ensure that the commission's judgments have a rational basis; that is, whether its conclusions are based on substantial evidence and whether it has applied standards of law arbitrarily or erroneously to reach its conclusions. There is substantial evidence to support the commission's findings; even though the court might have reached a different conclusion, were it authorized to be the expert fact finder, reviewing court may not substitute its judgment for that of the commission. The commission acted within its statutory powers, its findings are supported by substantial evidence, and its decision is in accord with applicable law. Complaint dismissed.—Petroleum Carrier Corp. v. United States, 258 F. Supp. 611 (615, 617)*; Id., 258 F. Supp. 617 (619-20)*.

Function of the reviewing court is limited to determining whether the commission's order (which denied plaintiff's application for authority to transport passengers and their baggage, and express and newspapers in same vehicle) is within its statutory authority and is predicated on adequate findings supported by substantial evidence; and, while Joint Board's recommended grant is considered, the court's determination is made on the record as a whole. Record shows in detail the commission's consideration of the application, its review of the evidence, and the reasons for its denial of authority sought. Conclusions of the commission find support in the record as a whole; there is no suggestion that it abused its discretion or that it did not weigh amply the supporting claims; complaint dismissed.—Continental Southern Lines, Inc. v. United States, 265 F. Supp. 218 (221-2)*.

In action to review the commission's report and orders in investigation proceeding, record sustains its finding that, at the time of hearing, operations of respondent association had been reformed and were those of a bona fide shippers' association within statute exempt-

ing such associations from regulation and that, though it had operated unlawfully in the past, it was not then an illegally operating freight forwarder. However, the commission did not rule on question of whether an exempt shippers' association may engage in practice of "co-loading" its trailers with those of other shipper associations in order to secure benefits of rail volume TOFC rates. The issue of coloading having been raised at start of the proceedings and being a material issue, the commission was required to rule thereon and its failure to do so violated §8(b) of the statute. Affirmed in part, and remanded for further proceedings as to the coloading issue.—Freight Forwarders Institute v. United States, 263 F. Supp. 460 (464-5, 466-9)*.

The statute precludes judicial review of agency action which is committed by law to agency discretion, unless that action is arbitrary, capricious, or an abuse of discretion. Thus, since action of the commission in granting the temporary authority in issue is a discretionary action, which the commission is empowered to exercise by an act of Congress, and there is no showing that it acted arbitrarily, capriciously, or abused its discretion, the grant of the temporary authority in question is not subject to judicial review within the Administrative Procedure Act.—Merchants Delivery Co. v. United States, 265 F. Supp. 669 (672-3)*.

The judicial function, in action to set aside Interstate Commerce Commission's orders granting motor carrier authority to intervening defendants, is exhausted when there is found to be a rational basis for the conclusions of the administrative body. The commission's findings and orders are presumptively valid; and, if based on adequate findings and supported by substantial evidence of record, its orders cannot be upset. Therefore, since evidence heard by the commission in each of the application cases supports its findings and, since its conclusions are not arbitrary, but are adequate, supported by the record and in accordance with the law, the commission's orders must be sustained.—United Van Lines, Inc. v. United States, 266 F. Supp. 586 (588, 590)*.

In judicial review of orders of the commission, the test is whether the commission's action is supported by substantial evidence on the record viewed as a whole; and substantial evidence is "enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." The commission's decision and order denying plaintiff's substitution-of-gateways application in its entirety were based on adequate findings supported by substantial evidence; complaint dismissed.—Bowman Transp., Inc. v. United States, 267 F. Supp. 57 (61)*.

Scope of the court's review of Interstate Commerce Commission's order is limited to a determination of whether the order is arbitrary or not in accordance with law, and whether the commission's findings are supported by substantial evidence; and, within the meaning of the statute, an order is arbitrary if it lacks a rational basis and it is not in accordance with the law if based on an erroneous interpretation or misapplication of the relevant statutes.—Louisville & N.R. Co. v. United States, 268 F. Supp. 71 (75)*.

The scope of judicial review of the commission's order is governed by §10(e) of APA. In addition, the court must be guided by well established principles applicable to review of an administrative agency's order; and, since an order of the commission is presumed valid, the party attacking it has the burden of showing invalidity. When administrative order under review is supported by substantial evidence, it may not be modified or set aside by the court if it is based on adequate findings and arrived at by proper application of relevant legal standards; and where the only question is the weight of the evidence before the commission, the court may not disturb its findings or conclusions. Record shows that the commission carefully evaluated all evidence presented and reached its conclusions based on substantial evidence; therefore, since plaintiff did not show an abuse of administrative discretion or a prejudicial departure from requirements of the law, its complaint must be dismissed.—Hughes v. United States, 278 F. Supp. 11 (14, 22)*.

The scope of judicial review in rulemaking proceedings is not whether agency findings and conclusions are supported by substantial evidence, but whether they are arbitrary, ca-

pricious, an abuse of discretion, or otherwise not in accordance with law. Interstate Commerce Commission's actions in redefining limits of a commercial zone, conceded to be a rule-making function, were not arbitrary, capricious, or an abuse of discretion; and furthermore, a review of the entire record fully supports the commission's findings and conclusions; sustained.—Tidewater Express Lines, Inc. v. United States, 281 F. Supp. 995 (996)*.

See also Baltimore & O. R. Co. v. United States, §1(6), n. 41; City of Williamsport v. United States, 49 USC §13a, n. 2; Dixie Ohio Exp., Inc. v. United States, 28 USC §2325, n. 40; I.C.C. v. Atlantic Coast Line, §17(9), n. 2; New York Central R. Co. v. United States, 28 USC §2325, n. 45; Northwestern Pac. R. Co. v. United States, §1(20), n. 16; R-C Motor Lines, Inc. v. United States, 28 USC §2325, n. 48.

Notice

Although the authority referred to in commission's first notice of rulemaking proceeding concerning detention of motor vehicles, as published in Federal Register, might have included §204(a)(1), reference to §216(e), providing for determination of lawful charges or lawful rules, regulations, or practices in an investigation on the commission's own initiative, was sufficiently precise to apprise interested persons of the agency's legal authority to issue proposed rule and to comply with §4(a) of APA concerning rulemaking proceedings.—Detention of Motor Vehicles—Middle Atl. & New England, 318 I.C.C. 593 (594)*.

Though notice of proposed rule making stated that adoption of cost formulas would obviate or shorten cross-examination of witnesses as to methods used in preparing cost studies, it added that cross-examination would be limited to mathematical accuracy of the computations; thus, total effect of the notice is to impose an undue restriction on scope of cross-examination. In accordance with purpose of the proceeding, the prima facie validity of a formula in future proceedings would relate strictly to the approved method, and adoption of specified formulas would foreclose a party from collaterally attacking the formulas, whether or not so expressly provided by rule. However, a witness' selection of a particular formula, and whether he properly exercised his discretion in using, adjusting, or applying it, would be subject to cross-examination; whether underlying figures relied on by the witness were in error would be an obvious subject for inquiry.—Rules to Govern Assembling & Presenting Cost Evidence, 321 I.C.C. 238 (241).

Protestants' contention that they were unprepared at the hearing to try the issue of whether silver bullion is an article of unusual value within applicants' restricted general-commodity authority because that question is not an issue in instant application proceeding, and that examiner's rulings allowing evidence relating to it were violative of the notice provisions of §5(a) of the APA, has no merit. In an application proceeding the scope of the operating authorities of the parties is always an issue, and protestants should not have been surprised. That they were not prejudiced is further evidenced by the fact that at the time of the filing of instant applications, another proceeding involving the same issue, and in which protestants were parties, was being terminated; in addition, motion for dismissals are commonly used in application proceedings, and properly, as a procedural device for determining the scope of commodity descriptions.—Navajo Freight Lines, Inc., Extension, 95 M.C.C. 551 (555-6).

See also Kowalsky's Exp. Service case, §17(6), n. 15.

Procedure

The commission is charged with choosing the proper remedy for a violation of §5(4), and challenged order of divestiture was within scope of its power; judicial review is accordingly limited to ascertaining whether the commission made an allowable judgment in its choice of remedy. Prerequisite to such review is evidence that a judgment was in fact made, that the parties were heard on the issue, and that the proper standards were applied; no such procedure was followed; mitigating considerations indicate that a doubt can be raised as to necessity for divestiture, and that a remand to the commission is not purely academic for sake of procedural regularity. When the commission has exercised its judgment and issued its considered opinion, the

remedy chosen will be ripe for review; judgment of the district court reversed in part and the case remanded for further proceedings—Gilbertville Trucking Co. v. United States, 371 U.S. 115 (130-1)*.

The commission must exercise its discretion under §207(a) within the bounds of public convenience and necessity, and for the courts to determine whether it has done so, it must disclose the basis of its order by making findings that support its decision and are in turn supported by substantial evidence. In granting a certificate to appellee, rather than resorting to §204 procedures, to cure a deficiency in service due to trunkline motor carriers' refusal to interchange traffic, which in turn was due to union pressure exerted under "hot cargo" clauses, the commission made no findings specifically directed to the choice between two vastly different remedies, and gave no indication of the basis on which it exercised its expert discretion. The APA does not permit, and the Court cannot accept, such adjudicatory practice. The commission's unresponsiveness to argument that the refusals could be terminated through complaint procedures, deeming that availability of the other remedy did not alter the situation, was error.—Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (167-8)*.

It is well settled that Interstate Commerce Commission rulemaking power in redefining the limits of a commercial zone does not require the holding of an adjudicatory hearing. Plaintiffs were given notice of proposed rulemaking and took advantage of their opportunity to participate in the proceeding; however, they have at no time indicated what additional evidence they would, or could, offer if an oral hearing had been or were to be held. Under such circumstances, the commission fully complied with the statute and its denial of oral presentation was not arbitrary or capricious, or an abuse of its discretion.—Tidewater Express Lines, Inc. v. United States, 281 F. Supp. 995 (997)*.

Prohibition in §5(c) of APA against a person engaged in performance of investigative or prosecuting functions in a case from participating in decision or review in that or a factually related case applied to prohibit [Securities and Exchange] Commission employee who had acted as director of the agency division which instituted the investigation from participation, after he became a member of the commission, in decision therein, despite provision that the prohibition would not apply to the commission or any member or members thereof.—Amos Treat & Co. v. Securities and Exchange Commission, 306 F. 2d 260 (262, 266).

Although all courts in a supervisory role are concerned with delay, and regulatory agencies must exercise the greatest ingenuity in devising procedures which will permit the regulatory process to function with reasonable dispatch, only in the extremely rare case would a court be justified in holding that the passage of time and nothing more presents an occasion for peremptory intervention of a court outside the direct chain of appellate review in the conduct of an agency's adjudicative proceedings. Absent proof of the normal time necessary to dispose of a similar proceeding, or of facts tending to show a dilatory attitude on part of the [Federal Trade] commission or its staff, a judge may not hold that as a matter of law the commission is not proceeding with dispatch when a complaint pends for some 2-1/2 years before a hearing examiner and 11 months thereafter before the whole commission, and the record reveals that extensions of time have been granted the parties.—Federal Trade Commission v. J. Weingarten, Inc., 336 F. 2d 687 (691-2).

There is nothing in the Interstate Commerce Act, the Administrative Procedure Act, the commission's General Rules of Practice, or Article V of the Constitution which entitles parties to a complaint before the commission to oral argument in addition to written argument.—Boston & M. R. Co. v. United States, 208 F. Supp. 661 (669)*.

The provisions of §1009(e) of APA require affirmance of the findings of an administrative agency if, taking the record as a whole, they are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[340 US 474.] The APA has not altered the doctrine of administrative finality: the courts will not examine the findings of fact further than to determine whether there was substantial evidence to sustain them; if the evidence was substantial, the

commission alone is authorized to decide upon its weight or the significance of the facts.—Id., p. 670.

Since the [Federal Trade] commission's action in vacating examiner's initial decision and remanding investigation matter for further commission proceedings was at most a procedural irregularity, the court has no jurisdiction to grant declaratory judgment and permanent injunction sought; doctrine of exhaustion of administrative remedy applies. After exhaustion of prescribed administrative remedy, plaintiff would have adequate remedy at law for judicial determination of its asserted claim; preliminary, procedural, or intermediate agency action is subject to review upon judicial review of a cease and desist order which the commission might enter in the investigation.—Sears, Roebuck & Co. v. F.T.C., 210 F. Supp. 67 (70).

In denying plaintiff's application for gateway elimination, the commission did not adopt a conclusion "not grounded on basic findings supported by probative evidence," in violation of §8(b) of APA. Examiner's ultimate conclusion (adopted by the commission) was, in recognition of the ultimate question of law presented under §207(a) of ICA, that plaintiff failed to show proposed operation to be required by public convenience and necessity. This conclusion is supported by statistics detailing characteristics of present circuitous and proposed direct services, which had logical bearing on the subsidiary (though fundamental) question whether the proposed service was so close to the old that original determination of convenience and necessity would cover both; and on that evidence was based the finding that the proposed service would be so different as to constitute a new service and consequently one as to which no determination of convenience and necessity had been made.—Yale Transport Corp. v. United States, 210 F. Supp. 862 (864)*.

Presumption, in absence of clear evidence to the contrary, that the commission has properly performed its official duties is too well settled to require reiteration.—Igert v. United States, 211 F. Supp. 42 (44)*.

Omission of examiner's report in proceeding on total abandonment of a railroad did not constitute reversible error under §8(a) of APA; technical requirements of that section would apply only if there were a statutory requirement of an agency hearing, but provisions of Interstate Commerce Act governing abandonment proceedings expressly leave the matter of holding hearings to the commission's discretion. Even if requirements of APA did apply, §8(a) provides that in cases of application for initial license the hearing examiner's report may be omitted if the agency finds that due and timely execution of its functions imperatively so require; the commission made such a finding, which was not challenged; therefore, if considered abandonment application was one for an initial license, the commission was within its power in dispensing with the examiner's report.–Brotherhood of Locomotive Engineers v. United States, 217 F. Supp. 98 (100, 101)*.

Though the APA nowhere defines "initial license," §2(e) provides that "license" includes "the whole or part of any agency permit, certificate, * * * or other form of permission"; and legislative history of APA indicates that "application for an initial license" may be interchangeable with "initial application for license." Since the railroad held no other license to extend or abandon any part of its line, its application was clearly one for an initial certificate to abandon its railroad, or an initial application for abandonment certificate. Thus, the proceeding was an application for initial license, and, whether APA applied or not, omission of examiner's report was a proper exercise of the commission's discretion and plaintiffs are not entitled to reversal of its decision.—Id., pp. 101-2.

Though the commission's rules governing modified procedure read in terms of an adversary proceeding, investigation of plaintiff's proposed motor rates, which had been an adversary proceeding when modified procedure was ordered, ceased to be one when railroads withdrew their protest; and as the commission did not then direct its Bureau of Inquiry and Compliance or its Cost Section to participate, there was no "other party" to serve a statement of its evidence or seek cross-examination of plaintiff's witnesses. Plaintiff's cost evidence stood uncontradicted and uncriticized when the case was submitted; considering qualifications of plaintiff's

expert witness who prepared that evidence and fact that he employed a cost-finding method published by the commission itself, it would seem inconsistent with policy underlying APA for the agency to reject such testimony on basis of arguments which the expert never heard and which he might well have been able to answer.—Davis & Randall, Inc. v. United States, 219 F. Supp. 673 (678-9)*.

The commission's procedure for receiving evidence and ascertaining the facts, whether by hearing, affidavits, or otherwise, is a matter for its sound administrative discretion so long as some reasonable procedure is adopted.—Greyhound Corp. v. United States, 221 F. Supp. 440 (445)*.

The commission's practice of refusing to reconsider matters to which no objection has been made before the initial hearing officer is a rule of procedure which is within its power to adopt and is reasonable on its face. Plaintiff filed no exception to joint board's report and recommended order denying its application for gateway elimination, claiming failure to consider a partial elimination, nor did it suggest to division 1 that it desired such consideration, and not until it petitioned the full commission for reconsideration did it even propose that it be granted a partial elimination. Thus, such a proposal was never properly or timely presented to the commission, and failure to consider it was therefore not unreasonable.—Youngblood Truck Lines, Inc. v. United States, 221 F. Supp. 809 (819)*.

Had the commission properly concluded that plaintiffs' proposed service would not meet supporting shippers' distinct needs, the proper procedure would have been to deny their contract carrier application; but in holding the application to be one in substance, though not in form, for common carrier authority, and in finding that plaintiffs had not established a public need for their service, what the commission actually denied was a certificate for common carrier operation. This unusual procedure resulted in denial of the full and fair hearing on the merits of the application required by §205 of ICA.—Eddleman v. United States, 229 F. Supp. 231 (236-7)*.

As plaintiff's application sought issuance of a contract carrier permit, they could reasonably expect to be required to present evidence to establish propriety of that step, and their evidence was designed to do so; they could not reasonably be required to present evidence of public need for the services proposed when such evidence was irrelevant to issues presented by their application. The commission's purported preference for substance rather than form does not commend itself when in an administrative proceeding an individual is effectively denied opportunity to know the standards by which he is to be judged; its failure to afford plaintiffs a full and fair hearing on the "step asked to be taken" was clear error (citing 261 US 184). Order set aside and case remanded.—Id., p. 238.

The constitutional principle of separation of executive, legislative, and judicial functions, as it applies to administrative agencies, is expressed in §5 of APA. When, to perfect the defense in court of an agency's judicial determination an ex parte reconsideration thereof is made, it is an executive act done in guise of the judicial and is arbitrary and unfair. It is also arbitrary, and a denial of due process of law, when a judicial branch of a regulatory agency, once made aware of a litigant position taken in seeking higher judicial review of its determination, without notice to the appellant and opportunity to be heard, changes or adjusts its judicial position to facilitate a victory by its executive branch for its original determination. However, though the commission, without notice to the court in which action to enjoin its order was pending, reopened the proceeding before it and "amplified" its original findings, no prejudice to plaintiffs has resulted from the manner of such "reconsideration," and under all the circumstances the court would not be justified in holding its order on reconsideration void and of no effect.—Atchison, T. & S.F. Ry. Co. v. United States, 231 F. Supp. 422 (428, 429)*.

Though plaintiffs contend that there should have been a hearing examiner's report on proposed rate which the commission rejected, the process of decision involved the reaching of conclusions based on documentary evidence. The facts in evidence were not disputed; the argument was over the conclusions to be drawn from them, and there was not question of credibility of witnesses. In such circumstances failure to have the hearing exam-

iner make a report was not error requiring a reversal or vacation of the commission's order.—Middlewest Motor Freight Bureau v. United States, 234 F. Supp. 151 (155)*.

Though plaintiffs also contend that, since their cost evidence followed a formula recommended by the commission, they should have been given a further hearing, after the commission found that that method embodied understatements, to show that it also embodied offsetting overstatements, they admittedly had ample opportunity before issuance of the challenged order to attack the commission's cost formula, and their briefs to the commission and portions of the record indicate that they did so; thus, their objection seems to be not so much that the commission should have granted their petition for reconsideration as that it should have considered their arguments. A full-scale rule-making proceeding would seem a more appropriate place for such considerations.—Id., p. 155.

Administrative boards or commissions owe as much duty to so conduct their hearings and proceedings as to secure a just result as is the case respecting proceedings in court. The doctrine of equity whereby in cases involving mistake or accident an order or judgment may be set aside at any time and the cause reopened to permit a complete hearing and the doing of justice is a very ancient one. The duty of administrative bodies to afford justice by reopening an order which is the consequence of mistake or inadvertence is universally recognized, and the commission may not disregard the established doctrine generally applicable to all hearings and proceedings of administrative agencies. Plaintiff's petition for reopening of application proceeding to change a portion of certificate allegedly granted by mistake, and its application for waiver of the commission's Rule of Practice 101(e) limiting time for filing such petitions, set forth facts which if found true would require the commission to reopen the proceeding to allow plaintiff to adduce evidence in support of its position. In summarily refusing, without a hearing, to waive rule 101(e) the commission did violence to an established principle of law. Order denying the petition set aside and the cause remanded with directions.—James J. Williams, Inc. v. United States, 241 F. Supp. 535 (537-9)*.

When grant of temporary authority under §210a(b) of Interstate Commerce Act by the Finance Board, but revoked by a Division of the commission, and therefore was not a final grant, §§9 and 10 of APA are inapplicable in action to set aside the division's order.—Three "I" Truck Line, Inc. v. I.C.C., 246 F. Supp. 410 (412)*.

Action of the Interstate Commerce Commission establishing informal procedure for settlement of uncontested reparation claims against motor carriers and freight forwarders, following 1965 amendment of 49 USC §§304a and 1006a, was a significant step (in implementation of the new statutory judicial remedy) which was within purview of the rule-making requirements of §4 of the APA. By that action, taken and announced to the public without any prior notice and without opportunity to any party to be heard with respect thereto, the commission was definitely committed to an adjudication of the propriety of carrier's return to shipper of transportation charges theretofore collected. Obviously, such adjudication might affect other carriers and shippers; and it is no answer to say that, being provided only for those who choose to use it, it creates no substantive rights. A right to make use of an administrative adjudication does not become trivial simply because it is optional. Whether the commission should have acted at all and, if so, what the form and scope of the procedure should be, were questions suitable for exploration in formal rule-making; considered action held invalid.—National Motor Freight Traffic Ass'n v. United States, 268 F. Supp. 90 (93, 95-6, 97)*.

Administrative agencies must guard against the tendency of rules of evidence and procedure to become talismanic formulas for disposition of cases involving the public interest.—Terminal Charge on Order Bills of lading Shipments, 315 I.C.C. 327 (329)*.

The commission has no burden under §7(c) of APA to show that order discontinuing suspension and continuing investigation of proposed towing rates is lawful; §7(c) is limited by the expression "Except as statutes otherwise provide," and §307(g) of Interstate Commerce Act authorizes the commission to

investigate new rates or regulations, with or without suspension.—Towing Rates between Points on the Ohio River, 315 I.C.C. 583 (586).

Although the statutory period provided by §204a of ICA for institution of an action at law after disallowance of overcharge claims by the carriers has expired, some of considered shipments may not yet be barred by the 3-year limitation period, and under §5(d) of APA the commission has discretion to consider the issue presented as to such shipments, to terminate the controversy.—Bemis Bro. Bag Co. v. Felten Truck Line, Inc., 316 I.C.C. 417 (418).

Admission in a different proceeding of evidence of operations conducted under tempo rary authority prior to hearing did not involve administrative delay necessarily entailed in applicant's proposal to reopen instant proceeding to receive evidence of its temporary operations. Even if accepted, the proffered evidence would not vitiate examiner's conclusion, adopted by the commission, that applicant had failed to show public need for permanent authority.—Convoy Co. Extension, 91 M.C.C. 461 (464)*.

Determination of limits of the scope of incidental charter rights conferred by §208(c) of ICA, which the commission must administer, is an agency statement of general applicability and future effect designed to implement and interpret the Motor Carrier Act within meaning of §§2(c) and 4 of APA; and application to defendant's challenged charter operations of criteria developed in 29 MCC 25, 48 MCC 521, and pertinent collateral decisions did not amount to denial of due process. Defendant had reasonable and proper notice of complaint brought against it, and had opportunity to put in direct evidence, to cross-examine, and to present rebuttal evidence.—Brunswick Transp. Co., Inc.—Revocation of Certificate, 91 M.C.C. 899 (904).

Investigation of respondent's failure to comply with provisions of Part II of ICA and certain orders and regulations of the commission thereunder is not void for noncompliance with procedural requirements of §9(b) of APA. The right to notice and opportunity to achieve compliance granted by §9(b) is expressly made inapplicable to cases of willfulness; order of investigation specified that respondent's certificates might be suspended or revoked only for willful violations, and necessity of a showing of willfulness as a prerequisite to such revocation or suspension clearly exempts the proceeding from provisions of §9(b).—Safeway Trails, Inc.—Investigation and Revocation, 91 M.C.C. 936 (949)*.

Although at hearing the examiner apparently indicated that all questions of supporting shipper witnesses on direct examination should be asked by one practitioner on behalf of all applicants and that the other practitioners should channel their particular questions through that representative, no formal objection to that procedure was made at the hearing. While at one point counsel for one applicant complained that the procedure was "inconvenient and unhandy," such a generalized complaint cannot be considered a serious objection or argument that that applicant was thereby deprived of a fair hearing. Applicant was represented by counsel who had ample opportunity to present the arguments now raised on exceptions, and, having acquiesced in the hearing procedure it now finds distasteful, it thereby waived the objection it now makes.—Maas Transport, Inc., Extension, 92 M.C.C. 534 (537, 541-2)*.

The provisions of §8(b) of APA do not require findings on all issues raised by the parties, but only on those which are material to a decision.—Service Trucking Co., Inc.—Declaratory Order, 94 M.C.C. 222 (226)*.

See also Curties, Inc., case, 49 USC §17(7), n. 10, Malone Freight Lines, Inc. v.United States, 28 USC §2325, n. 7; Naph-Sol Refining Co. v. United States, 49 USC §15(7), n. 2; Norfolk & W. Ry. Co. v. United States, §5(2), n. 112; Southern Tank Lines case, §204(b), n. 8 liquid chemicals; Trailways of New England, Inc. v. United States, §17(5), n. 20; Walker v. United States, §16(6), n. 1.

Record

In taking official notice of data contained in applicants' more recent annual and quarterly reports on file with commission but not of record, to permit a more informed judgment on merits of control application, in conso-

nance with §7(d) of APA effectiveness of order will be deferred for a sufficient period to allow any party to petition for further hearing for purpose of showing any reasons why such data should not be considered.—Adley Exp. Co.—Control— McFaddin Exp., Inc., 87 M.C.C. 665 (671)*.

Records

See Zuzich Truck Line, Inc. v. United States, §204(d), n. 10.

Reports of Commission

Although it is not required to make detailed findings of fact as required of a trial court, the commission must make basic or quasi-jurisdictional findings essential to the validity of its order. Since the reviewing court is bound thereby, it is important to determine precisely the basis of the commission's decision; grounds upon which the commission's order must be judged are those upon which the record discloses that its action was based.—Missouri Pac. R. Co. v. United States, 203 F. Supp. 629 (632)*.

The commission is required to make not only findings that support its decision, but also findings that are intelligible and complete.—Boston & M. R. v. United States, 208 F. Supp. 661 (671)*.

Contention that the commission failed to set out sufficient findings of fact to support its refusal to impose protective labor conditions on total abandonment of a railroad, in violation of §8 of APA, is refuted by the court's finding that the technical requirements thereof were inapplicable to the abandonment proceeding. Even if §8 applied, the commission's report meets all its requirements, since it discussed factors which the commission believed would justify imposition of protective conditions and found them absent, and further found that there was no evidence of record to warrant such imposition. Though plaintiffs contend that the commission failed to set out facts on which those statements were based, in finding that there was no evidence to warrant imposition of such conditions the commission necessarily found that there were no justifying facts; plaintiffs have not shown how the commission could set out facts which it found did not exist. Motion to set aside the commission's order on that basis denied.—Brotherhood of Locomotive Engineers v. United States, 217 F. Supp. 90 (103)*.

Where examiner's report and recommended orders in consolidated application proceedings fully complied with requirements of §8(b) of APA, it was permissible for the commission to affirm and adopt the examiner's report as it did. While the commission doubtless could have paraphrased the fact findings and conclusions of the examiner, where it found them correct in all respects, and so stated in its order, there was nothing to be gained by doing so. The commission having expressly adopted those matters from the examiner's report, the court was apprised of the essential basis of the commission's decision.—North American Van Lines, Inc. v. United States, 217 F. Supp 837 (842)*.

That the commission gave full attention to plaintiff's exceptions to the examiner's report and found them without merit is clear from statement in its order that the exceptions and reply raise no new or material matters of fact or law not adequately considered and properly disposed of by the examiner in his report, and that the evidence considered in light of the exceptions and reply does not warrant a result different from that reached by the examiner. The specific requirement of §8(b) of APA is satisfied if the total decision, including that portion adopted from the examiner's report, sufficiently informed plaintiff of the disposition of all its exceptions. Adoption of the findings and conclusions of the commission's order clearly informed plaintiff of its rulings and position in regard to the exceptions; further particularity would serve no purpose and is not required by the act. The record and findings made, after consideration of the exceptions, adequately establish the basis of the commission's action; the commission's decision affirmed.—Id., pp. 842-3.

Defendants contend that under §14(1) of the Interstate Commerce Act, the commission need not comply with §8(b) of APA, but no reason appears for exempting the IC Act from the requirements of §8(b) of APA; various decisions refer to that provision as applicable to commission reports. Although, in its report

finding assailed rates unduly prejudicial and preferential, the commission did not specifically find substantial similarity of transportation conditions, it complied with §8(b) when it ruled on the "material issue of fact" regarding the similarity thereof.—Atchison, T. & S.F. Ry. Co, v. United States, 218 F. Supp. 359 (369)*.

Though plaintiffs contend that the commission's report approving proposed control transaction is fatally deficient in lacking adequate subsidiary findings, provision of §8(b) of APA that decisions of administrative tribunals shall include a statement of findings and conclusions, as well as reasons therefor, on all material matters of law, fact, or discretion requires subsidiary findings only on material issues, not on those that are collateral. It is enough if an administrative agency such as the commission sets forth a reasonable review of the evidence before it, the weight given thereto, its own resolution of conflicts therein, and the findings necessary to support its ultimate conclusions. Findings expressed by the commission in its report sufficiently explained its view of the evidence and the basis on which it came to its ultimate conclusion that the criteria essential to approval were present and established by the proofs made before it on its extended hearing. The findings it made were adequate to support its order.—Broth. of Maint. of Way Employees v. United States, 221 F. Supp. 19 (27)*.

Requirement of §8(b) of APA that all decisions include a statement of findings and conclusions, with reasons therefor, on all material issues of fact, law, or discretion presented by the record is intended to have teeth (371 US 167). Thus, an agency's discretionary order must be upheld, if at all, on the basis given by the agency; and the strict requirement of findings and reasons should not be relaxed merely because the choice of remedies is among a variety of divisional scales. The Commission's prescription of the challenged schedule for divisions of joint official-w.t.l. interterritorial rates as between eastern lines and plaintiff transcontinental lines, on ground simply that the eastern lines need additional revenue but the scale they seek is not the proper one, does not meet that requirement. Order set aside and proceeding remanded.—Atchison, T. & S.F. Ry. Co. v. United States, 225 F. Supp. 584 (606-7)*.

Though the commission did not consider sufficiently meritorious for separate comment plantiff's contention that applicant contract carrier's president and controlling stockholder would use his employee relationship to the sole supporting shipper to favor applicant over other carriers, with resulting loss of business by plaintiffs and creation of destructive competitive practices, APA does not require the commission to make separate findings on such arguments, especially when the record shows that the hearing examiner, whose report the commission adopted, considered the facts on which that argument was based. Nor was the commission required by §8(b) of APA to state any reasons for its determination, in denying plaintiffs' motion for reconsideration, that the relationship did not raise an issue of general transportation importance. That decision was not governed by §8(b), which applies to agency review of decisions of subordinate officials, not to a petition for reconsideration of the decision of a division of the commission.—Deioma Trucking Co. v. United States, 233 F. Supp. 782 (784)*.

Division of the commission, acting as an appellate division in considering plaintiff's petitions for reconsideration of findings of the Operating Rights Review Board, was not bound to a choice of the examiner's contrary conclusions if conclusions of the board had substantial evidentiary support on the record. Nor was the division required to paraphrase or restate the board's quite adequate report which it adopted as its own, or specify weight given to any fact or item of evidence or disclose mental operations by which its conclusion was reached. Plaintiffs were sufficiently informed as to basis of the division's action, and function of the reviewing court is not hampered by any obscurity. Statutory requirements as to statements of findings, conclusion and reasons for the division's decision were met; sustained.—Trailways of New England, Inc., v. United States, 235 F. Supp. 509 (512)*.

If plaintiff's contention that the commission's order failed to reflect the reasons and basis for the findings and conclusions, as required by §8(b) of APA, is a claim that Divi-

sion 1 (otherwise satisfied with the examiner's report) has to go through the laborious process of issuing its own decision-report, it quickly fails. The commission, as do other adjudicatory tribunals, court or administrative, has the right, if not the duty, to exercise imaginative resourcefulness and judicial inventiveness in developing procedures which enable it to stem the tide of ever increasing backlogs. The commission's DANDO device is certainly permissible; when pursued it means, of course, that the commission's action stands or falls with the examiner's report. From this viewpoint, there is nothing to the criticism leveled; there was no proper exception taken as to form or adequacy of the findings (as distinguished from underlying evidence), and the examiner's exceptionally detailed and revealing report fully met the APA test. Complaint dismissed.—Younger Bros., Inc. v. United States, 238 F. Supp. 859 (861-2)*.

Although findings of the Interstate Commerce Commission under review are sketchy and its opinion (finding assailed export rates unduly prejudicial and preferential) is so imprecise in revealing just what findings are made that the order borders dangerously on running afoul of the requirement that agencies disclose the basis of their orders, the findings under review are adequate under §8(b) of APA when, based on findings of similarity of transportation conditions, the commission's conclusion that complaining port's disadvantage amounted to undue prejudice was clearly stated.—City of Galveston v. United States, 257 F. Supp. 243 (246-7, 248)*.

The commission's report, in proceeding on proposed increase of l.t.l. classification rating on certain stuffed toys, fully serves as the statement required by §8(c) of the APA when it manifests, throughout, that the entire record was considered by the commission in reaching its ultimate conclusion; this is shown by its careful sharpening of the issues as well as by its analysis of all the evidence. On review of the evidence, the court cannot say that the commission's conclusion is without rational basis; sustained.—Overnite Transportation Co. v. United States, 266 F. Supp. 88 (90, 91)*.

Courts ought not to have to speculate as to the basis for an administrative agency's conclusion. Indeed, to prevent such speculation §8(b) of APA provides that all agency decisions shall include not only the appropriate rule, order, sanction, relief or denial thereof, but also findings and conclusions, as well as the reasons or bases therefor, on all material issues of fact, law, or discretion presented on the record. The court cannot say with assurance whether the Civil Aeronautics Board found lack of need for a third carrier in the market for the reasons it gave, added together, or whether it would have reached its conclusion for any one of those reasons standing alone. From the extended discussion of the reasons in its opinions, and the fact that in its original opinion it said that aid to Eastern Air Lines was a "significant" factor in its decision, but downgraded significance of that factor in its report on reconsideration, it may be assumed that the Board gave some weight to each of its reasons, but how much, except respecting aid to Eastern, the court cannot tell. Therefore the decision of the Board cannot stand; remanded.—Northeast Airlines, Inc. v. C.A.B., 331 F. 2d 579 (586, 587).

Contention that the commission's decision and order denying application is fatally defective in failing to set forth findings and conclusions ignores fact that the order expressly adopts those in the examiner's report, which contains a lucid exposition of reasons for denial and is replete with findings of fact. There is no requirement in §8(b) of APA that the commission may not employ incorporation by reference but must in every instance issue a report containing detailed findings and conclusions. Moreover, fact that neither in its exceptions nor in its petitions for further hearing does applicant directly take issue with the findings and discussion in the examiner's report amounts to at least a tacit admission of the propriety and correctness of his conclusions.—Convoy Co. Extension, 91 M.C.C. 461 (463)*.

Even considering grant of temporary authority to applicant and subsequent denial of its application as an "inconsistency," applicant's contention still lacks merit because the applications for temporary and for permanent authority were decided in proceedings of essentially different nature, the former being

granted without hearing in informal proceeding upon shipper representations of urgency and immediacy, whereas latter was denied on consideration of record made upon formal hearing and of examiner's report based thereon; thus the commission did not contradict itself in adopting the examiner's conclusions. As the actual method of presenting the issues was peculiarly within applicant's knowledge as a participant in all the proceedings, discussion in the decision and order of the lack of evidentiary value of the temporary authority was neither necessary or warranted.—Id., p. 463-4.

The protestants' contention that examiner's recommended report did not include an adequate statement of facts or an adequate discussion of the applicable law as provided by §8(b) of the Administrative Procedure Act was disallowed because, while the report is concise, it did contain a statement of all the material facts, a discussion of the applicable law and all the essential findings. There is no requirement that every evidentiary point be recited in the report or that each finding be annotated with appropriate law.—Ryder Truck Lines, Inc., Extension, 96 M.C.C. 771 (777-8).

See also Armored Carrier Corp. v. United States, §204(d), n. 1; Baltimore & O. R. Co. v. United States, §14(1), n. 1; Curtis, Inc., case, 49 USC §17(7), n. 10; General Motors Corp. v. United States, §14(1), n. 1; New York Central R. Co. v. United States, §14(1), n. 1.

Title 7—AGRICULTURE

Chapter 9.—PACKERS AND STOCKYARDS

Sections 225, 226. Powers of Interstate Commerce Commission unaffected. —[Unchanged. See vol. 4, p. 2973.]

Historical note, see vol. 18, p. 14709.

Chapter 35.—AGRICULTURAL ADJUSTMENT ACT OF 1938

Section 1291. Adjustments in freight rates. —[Unchanged. See vol. 10, p. 8288.]

Chapter 38.—AGRICULTURAL MARKETING ACT

Section 1622(j). Improvement of transportation facilities and rates.—[Unchanged. See vol. 14, p 11692.]

Notes of Decision

Volume 17—p. 13677.

Title 10-ARMY

Section 758. Transportation of disabled soldiers.—[Unchanged. See vol. 4, p. 2977.]

FEDERAL POSSESSION AND CONTROL ACT

Section 1361. Control of transportation systems in time of war.—[Unchanged. See vol. 4, p. 2978; provision for extension, see Historical Notes, vol. 16, p. 12966.]

Amendment, see footnote, vol. 16, p. 12966; historical notes, vol. 16, p. 12966.

BANKRUPTCY

Chapter 8.—Title 11 U.S.C.

Section 205. [§77 as enacted] Reorganization of railroads engaged in interstate commerce.—By Sec. 11 of Pub. Law 87-681, 76 Stat. 572-3, Sept. 25, 1962, subsection (a) is amended to read as follows:

(a) Any railroad corporation may file a petition stating that it is insolvent or unable to meet its debts as they mature and that it desires to effect a plan of reorganization. The petition shall be filed with the court in whose territorial jurisdiction the corporation, during the preceding six months or the greater portion thereof, has had its principal executive or operating office, and a copy of the petition shall at the same time be filed with the Interstate Commerce Commission (hereinafter called the "Commission"). When any railroad, although engaged in interstate commerce, lies wholly within one State, the proceedings shall be brought in the United States district court for the district in which its principal operating office has been located during the preceding six months or the greater portion thereof. The petition shall be accompanied by payment to the clerk of a filing fee of $150. Upon the filing of such a petition, the judge shall enter an order either approving it as properly filed under this section, if satisfied that it complies with this section and has been filed in good faith, or dismissing it, if he is not so satisfied. If the petition is so approved, the court in which the order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a court of the United States would have had if it had appointed a receiver in equity of the property of the debtor for any purpose. Process of the court shall extend to and be valid when served in any judicial district. The Supreme Court of the United States shall promulgate rules relating to the service of process outside of the district in which the proceeding is pending, and

any other rules which it may deem advisable in order to aid district courts and courts of appeal in exercising the jurisdiction herein conferred upon them. The railroad corporation shall be referred to in the proceedings as a "debtor". Any railroad corporation the majority of the capital stock of which having power to vote for the election of directors is owned either directly or indirectly through an intervening medium, by any railroad corporation filing a petition as a debtor may file, with the court in which the other debtor has filed such a petition, and in the same proceeding, a petition, a copy of which shall also be filed at the same time with the Commission, stating that it is insolvent or unable to meet its debts as they mature, and that it desires to effect a reorganization in connection with, or as a part of the plan of reorganization of the other debtor; and upon the filing of the petition, the judge shall enter an order either approving it as properly filed under this section, if satisfied that it complies with this section and has been filed in good faith, or dismissing it if not so satisfied, and thereupon the court, if it approves the petition, shall have the same jurisdiction with respect to such debtor, its property and its creditors and stockholders, as the court has with respect to the other debtor. Creditors of any railroad corporation, having claims aggregating not less than 5 per centum of all the indebtedness of the corporation as shown in the latest annual report which it has filed with the Commission at the time when the petition is filed, may, if the corporation has not filed a petition under this section, file with the court in which the corporation might file a petition under this section, a petition stating that the corporation is insolvent or unable to meet its debts as they mature and that the creditors have claims aggregating not less than 5 per centum of all such indebtedness of the corporation and propose that it shall effect a reorganization; copies of the petition shall be filed at the same time with the Commission and served upon the corporation. The corporation shall, within ten days after such service, answer the petition. If the answer admits the jurisdiction of the court and the material allegations of the petition, the judge shall enter an order approving the petition as properly filed if satisfied that it complies with this section and has been filed in good faith, or dismissing it, if not so satisfied. If the answer denies either the jurisdiction of the court or any material allegation of the petition, the judge shall summarily determine the issues presented by the pleadings without the intervention of a jury, and if he finds that the material allegations are sustained by the proofs and that the petition complies with this section and has been filed in good faith, the judge shall enter an order approving the petition; otherwise, he shall dismiss the petition. If such petition is so approved, the proceedings thereon shall continue with like effect as if the railroad corporation had itself filed a petition under this section. If a petition is dismissed, neither the petition nor the answer of a debtor constitute an act of bankruptcy or an admission of insolvency or of inability to meet maturing obligations or be admissible in evid-

ence, without the debtor's consent, in any proceedings then or thereafter pending or commenced under this act or in any State or United States court. If, in any case in which the issues have not already been tried under the provisions of this subdivision, any of the creditors, prior to the hearing provided for in paragraph (1) of subsection (c) of this section, appear and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, and, unless the material allegations are sustained by the proofs, shall dismiss the petition.

Amendments, see footnotes, vol. 10, p. 8310; historical notes, vol. 7, p. 6015, vol. 10, p. 8311, vol. 11, p. 9696, vol. 12, p. 10536, vol. 14, p. 11692, vol. 15, p. 12313, vol. 16, p. 12967, vol. 17, p. 13678; vol. 18, p. 14710.

Historical Note

The Commission recommends, in view of the prohibitions in 28 USC §1001, that §77(p) of the Bankruptcy Act (11 USC §205(p)) be amended so as to eliminate the mandatory oath provision therein, and that such requirement be made discretionary with the Commission.—Annual Report, 1964, p. 72.

Notes of Decisions

Volume 7—p. 6016; Volume 10—p. 8312; Volume 11—p. 9697; Volume 12—p. 10537; Volume 13—p. 11180; Volume 14—p. 11693; Volume 15—p. 12313; Volume 16—p. 12968; Volume 17—p. 13678; Volume 18—p. 14712; Volume 19—15994.

2. Construction and interpretation.—[Vols. 10-17, 19].—When the purpose of §77 and the exact nature of the proceedings under it are considered, no intention can be imputed to Congress that a railroad corporation should escape through a petition for reorganization penalties incurred for violating laws of the United States, which it will be obliged to pay if the reorganization fails and the proceedings are dismissed.—United States v. Dorigan, 236 F. Supp. 106 (109, Note 8).

6. Jurisdiction.—[Vols. 10-18].—Prior approval of the Reorganization Court is a jurisdictional prerequisite to maintenance of condemnation proceeding by the United States to condemn realty of debtor railroad. Since railroad's petition for reorganization had been filed, trustees appointed and qualified, and all property of the railroad vested in them, that court had "exclusive jurisdiction of the debtor and its property, wherever located," under §77(a) of the Bankruptcy Act. Even the right of eminent domain must be exercised subject to the rule that, having possession, the court may not only issue all writs necessary to protect its possession from physical interference, but is entitled to determine all questions respecting it; such orderly procedure does not restrict the power of eminent domain, only the course the government must follow in exercising it.—U.S. v. Certain Land in City of Marlboro, Mass., 234 F. Supp. 426 (427).

Though the statute provides that, during pendency of railroad reorganization proceeding "and for the purposes thereof," the court shall have exclusive jurisdiction of debtor and its property wherever located, in absence of sufficient statutory purpose the bankruptcy court's jurisdiction is not exclusive. See 348 F. 2d 151. State's interest or right, and not the court's general interest in a successful reorganization, must prevail if they are in conflict; thus, while land which state proposes to take by condemnation for use in a transportation corridor is owned by railroad currently in reorganization, the State's special interest or right is paramount to any interest of debtor in the property. With respect to the State's prescriptive rights, the court could not effect any alterations or take any actions ordinarily contemplated in a reorganization proceeding and, in such circumstances, exclusive jurisdiction would not serve the "purposes" of the reorganization. Bankruptcy court's consent is not a jurisdictional prerequisite to maintenance of the State's condemnation action.—Commonwealth of Massachusetts v. Bartlett, 384 F. 2d 819 (820-2)*.

10. Proceedings, in general.—[Vols. 10-17, 19].—Since resolution of primacy of claim, as between underlying mortgages of debtor and its unsecured accounts with other railroads and a fuel supplier, is required to evaluate the possibility of debtor's reorganization, consideration of question of priorities is neither premature nor moot; nothing in the statute forbids ascertainment of the order of liens in advance of formulation of a plan of reorganization.—Southern Ry. Co. v. Flournoy, 301 F. 2d 847 (849, 850).

On appeal from Bankruptcy Court's order authorizing trustees of debtor to file with Interstate Commerce Commission a two-step plan for inclusion of debtor's properties in proposed Pennsylvania-New York Central merger without a vote of security holders, with terms to be accorded security holders subsequently specified and voted on, the court's decision on objections to the plan would be premature. As it is by no means certain that plan approved by the commission and the court, if any plan is approved, will contain features which appellants object to, it would be improper for the Court of Appeals to pass on their objections at this time. Furthermore, since trustees only needed authority to spend money to initiate proceedings before the commission and, meanwhile, keep operating the railroad, there was no reason to involve either the Appeals or Bankruptcy court in an advisory opinion on legal issues that may never arise; considered order should not have included any determination as to validity of the plan. Order modified to read as set forth and, as modified, affirmed.—In re New York, N.H. & H. R. Co., 378 F. 2d 635 (639-41).

Neither petitioner nor employees it represents have been prejudiced in any way by stipulation whereby petitioner agreed to accept a reorganization plan approved by the commission, provided it contained employee-protective conditions embraced in stipulated draft plan, or by the commission's refusal to approve provisions of the stipulated plan without modification; petitioner has been free to raise upon its petition for modification any issue which it could have raised upon exceptions to examiner's proposed report if filing of exceptions had not been waived by the stipulation; although the normal procedure has been shortened by mutual consent of the parties, including petitioner, petitioner's rights have not been abridged in any degree.—Florida East Coast Ry. Co. Reorganization, 312 I.C.C. 744 (745, 747)*.

14. Intervention.—[Vols. 10-12, 14, 15, 18].—Appellant, a Boston & P. R. stockholders development group, has no standing to intervene in reorganization proceedings of New York, N.H. & H. R. as a matter of right; the group does not qualify as a creditor of the New Haven or as an interested party either in New Haven's reorganization or in petition of its trustees for authority to support proposed reorganization plan of Boston & P. R. Denial of intervention was within the lower court's sound discretion; appellant's rights, if any, may be fully protected in Boston & P. R. reorganization proceeding: appeal dismissed.—Boston & P. R. Stockholders development Group v. Smith, 333 F. 2d 651 (652).

15. Staying of suits.—[Vols. 10, 14, 17].—The common law rule is that a receiver pendente lite cannot be sued for torts committed prior to his appointment, although a statutory receiver can be sued for such torts. This is because receivers pendente lite are not successors to the corporation but merely officers of the court without legal powers, their functions being confined to care and preservation of the corporation's properties, whereas statutory receivers succeed to title to the properties and represent or supersede the corporation in the exercise of its powers. And though the proviso of §77(j) expressly excludes from the provisions for stay or enjoiner of suits against the debtor suits for damages arising out of torts caused by operation of trains, whether committed before or after appointment or reorganization trustees, it does not exclude suits for penalties.—United States v. Dorigan, 236 F. Supp. 106 (108).

But while, under principles applicable to statutory receivers, reorganization trustees are liable for acts committed before as well as after their appointment, liability is not synonymous with suability; more important is the nature of the liability, date of its creation, and its classification. With certain exceptions, liabilities created by and inherited from the debtor are stayed, while those created by the

trustees in operation of the railroad are enforceable. Bankruptcy court's orders appointing the debtor-in-possession and the trustees in its place specifically stayed and enjoined all persons from commencing or continuing any suits against either of them except suits for damages arising from operation of trains, whether the acts occurred before or after their appointment. Had the Government's suit to recover penalty for violation of the Safety Appliance Act been commenced before appointment of the debtor or the trustees it would have been stayed, and the Government cannot improve its position by later bringing the action against the trustees.—Id., pp. 108-9.

The purpose of staying suits was to require all suits against the debtor to be determined by the bankruptcy court so that the court might not be frustrated or delayed in expeditiously reorganizing the debtor's properties. However, claims arising after appointment of the debtor or trustees would not be affected by the reorganization proceedings and may therefore be enforced without interfering with the reorganization. Congress has specifically authorized suits against trustees and debtors-in-possession with respect to any of their acts or transactions, without leave of the bankruptcy court. But suit against the trustees for violation of the Safety Appliance Act occurring before debtor filed its petition for reorganization is not predicated on any act of the trustees and therefore requires consent of the bankruptcy court.—Id., p. 109.

Provisions of par. (j), vesting exclusive jurisdiction of suits against a debtor railroad in the reorganization court, do not deprive District Court in Massachusetts of jurisdiction over condemnation suit by the United States to take land in that State owned by railroad undergoing reorganization in District Court in Connecticut absent latter court's consent. Bankruptcy statute is designed to protect debtor from harassment pending reorganization, and reorganization court has both concern and control over ordinary litigation of debtor affecting continued operation of the railroad and orderly liquidation or adjustment of its debts; however, issue in the Government's condemnation suit is determination of amount of just compensation and the claimants thereto. While the reach of the reorganization court's exclusive jurisdiction is sweeping, it should be confined to its objectives and needs; thus, since that court's control is limited to determining application of the proceeds, eminent domain statute under which condemnation suit was filed must prevail.—United States v. New York, N.H. & H. R. Co., 348 F. 2d 151 (152).

20. Priority.—[Vols. 10-17, 19].—In railroad reorganizations, public concern with continued operation of the railroad has been a factor supporting priority accorded general creditors over mortgagees; this is accented by denial of such equity to corporations without public responsibility. Another reason is conservation of the property for maintenance of integrity and mortgage security: bondholders presumably look for security to a live railroad. Both those concepts must at times regard costs of operation as the price of security; mortgagees must then yield priority.—Southern Ry. Co. v. Flournoy, 301 F. 2d 847 (851-3).

Equity warranting deference of mortgages to unsecured claims must embrace following elements: (1) account must cover an expense immediate to continuance of railroad operation, must be a business-operating account; (2) account must have arisen within a reasonable time prior to institution of trusteeship, generally established as 6 months; (3) claim must represent a debt contracted with intention that current earnings would respond thereto; (4) account must first have been given preference in any current debt fund over non-operating debts and mortgage payments; and (5) there must have been such pressing necessity for payment thereof that it was reasonably probable that nonpayment would result in suspension of railroad's operations.—Id., pp. 850-1.

Thus, claims against railroad seeking reorganization for interline accounts, those arising under trackage-rights agreement, under agreements for maintenance of interlocking plant, and under agreement for use of freight facilities house, diesel shop facilities and switching services, and claims for car destruction are entitled to priority over mortgage liens. However, for reasons discussed, neither railroads' claim for installation of au-

tomatic interlocking plant, nor oil company's claim for amount due for locomotive diesel oil sold to debtor is entitled to such priority.—Id., pp. 854-6.

Railroad was not entitled to priority of its claim for freight charges incurred by motor-carrier debtor in Chapter XI proceeding (in accordance with their substituted freight service arrangement) on basis that proceeds from debtor's accounts receivable, to extent they are attributable to the "piggy-back" hauls, constitute trust funds for the railroad's benefit; that debtor may have had a duty to account to the railroad for funds collected as result of such hauls did not necessarily create a trust relationship between them.—In re Chicago Express, Inc., 222 F. Supp. 566 (572)*. [Not arising hereunder]

22. Six-months rule.—[Vols. 10, 13].—The "six-months rule" is not applicable in a Chapter XI proceeding; thus, railroad's claim, representing freight charges incurred by motor-carrier debtor (under their substituted freight service agreement) during the 2-1/2 months prior to filing of arrangements petition, was not entitled to priority status under that rule. Paramount consideration in origin of the rule was public interest in continued operation of "a great public work," see 128 US 416; however, since it is an invasion of established contract rights of lien-holders, it should be strictly contained within narrow confines and limited to purposes which brought it into being. Whatever the relevant economic arguments or equitable considerations, as to applicability of the rule to claims against a railroad debtor and inapplicability thereof to claims against motor-carrier debtor, statutory enumeration of priorities in Chapter XI arrangements neither recognizes the "six-months rule" nor authorizes importation of general equitable doctrines.—In re Chicago Express, Inc., 222 F. Supp. 566 (568-72)*. [Not arising hereunder]

In railroad reorganization proceeding, claims of several unsecured creditors to a priority in debtor's assets, based on so-called "six-months rule," are not entitled to be paid on a priority basis when they must be satisfied from the corpus of the mortgaged property of the railroad. debtor has no current surplus earnings and no unmortgaged property from which the claims could be paid, and the evidence establishes that there has been no "diversion" of a "current expense fund" which would justify invasion of the mortgaged-property corpus to satisfy priority of unsecured operations creditors. It is unlikely that debtor's financial position will improve; however, should sufficient non-corpus assets become available in the future, claimants may renew their request for a priority. Accordingly, the petitions are denied without prejudice to renewal upon a change of circumstances as outlined.—In re New York, N.H. & H. R. Co., 278 F. Supp. 592 (595, 602-7)*.

Generally, the period within which preferred general accounts may be accumulated is limited to the 6 months preceding initiation of receivership proceedings. Such limitation is the result of a balancing of interests: operating creditors must be indemnified for maintenance of mortgagee's security in a lost railroad, yet such general creditors should not be permitted, under guise of maintaining the security, to undermine the mortgage "through secret liens." Unsecured claims accorded priority over underlying mortgages of debtor are limited to those incurred during 6-month period prior to petition for reorganization.—Southern Ry. Co. v. Flournoy, 301 F. 2d 847 (853).

30. Plan of reorganization.—[Vols. 10-19].—Power conferred on the commission by the Bankruptcy Act to approve, reject, or modify a plan proposed by the parties is necessarily a plenary one which, compatibly with the scheme of the statute, may not be circumscribed by private agreement.—Florida East Coast Ry. Co. Reorganization, 312 I.C.C. 744 (746-7)*.

Examiner's recommended plan providing for capitalization of the reorganized company consisting wholly of common stock to be acquired by Erie-Lackawanna R., and for payment of all unliquidated claims in cash, approved.—New Jersey & N.Y. R. Co. Reorganization, 317 I.C.C. 441*.

35. Classification of claims and interests, creditors.—[Vols. 10-15, 16, 18].—Claims arising after appointment of the debtor-in-possession or the trustees in its place would not be affected by the reorganization proceedings and consequently may be en-

forced without interfering with the reorganization; expenses and debts created by them have preference against the assets as administrative expenses. Also, a judgment for violation of the Safety Appliance Act obtained before appointment of trustees is a provable and preferred claim despite provisions of §77(j); but since there is no authorization for such a suit after appointment of trustees, the Government's suit against the trustees to recover penalty for a violation occuring before filing of reorganization petition requires consent of the bankruptcy court.—United States v. Dorigan, 236 F. Supp. 106 (109).

45. General creditors.—[Vols. 10-14, 16, 18].—Unliquidated claims, which under plan approved will be assumed and paid by the reorganized company, are adequately provided for when railroad which under that plan will acquire control of the new company has agreed on the record and has filed undertaking with the control of the new company has agreed on the record and has filed undertaking with the court to furnish the reorganized company all additional cash needed to carry out provisions of the plan.—New Jersey & N.Y. R. Co. Reorganization, 317 I.C.C. 441 (444-5)*.

47.—Former employees.—[Vols. 10-12, 17, 18].—Written employment contract of railroad employee who retired prior to the railroad's reorganization, which specifically set out his pension rights, found not fatal to his claim for pension payments. That petitioner, disturbed by prospect of losing 37 years of accumulated pension rights with another railroad when he changed jobs at age 56, thought it prudent to have the terms of his pension rights embodied in a formal employment contract (which contract was disaffirmed by trustees of the railroad) does not require that he be treated as any other general unsecured creditor whose contract has been disaffirmed; he should be treated as any other pensioner who retired prior to reorganization. Reversed and remanded for district court's determination of petitioner's proper pension; however, that court is not required to give any consideration either to terms of the contract or to actions of railroad's board of directors prior to the reorganization in determining amount of his pension.—Tate v. New York, N.H. & H. R. Co., 332 F. 2d 449 (450-2).

Petitioner's employment contract as railroad's chief executive, providing that he would receive $25,000 annually for 12 years following expiration of his employment "by way of severance pay and as deferred compensation for the services performed and to be performed by him hereunder," cannot be construed as being equivalent to or a substitute for regular railroad company pension payments; compensation thereunder was precisely what it was labelled—deferred compensation. Contract payments due bore no relation to railroad's pension plans, were subject to no conditions as to age or length of service, were limited to the 12-year period and did not terminate on employee's death, and were not referred to as a pension; therefore, petitioner's claim is a nonpreferential ordinary contract claim. Petitioner performed the services before railroad entered reorganization, and his claim to payment did not accrue until thereafter, but the payments cannot qualify as part of debtor's operating expenses. Petitioner has merely an executory contract with the railroad and must wait his turn as a general creditor.—Alpert v. New York, N.H. & H. R. Co., 348 F. 2d 304 (306-7).

48. Protection of employees.—[Vols. 14-19].—Labor organization's petition for adoption in full of employee-protective conditions originally proposed as part of stipulated draft plan of reorganization, in lieu of less onerous conditions imposed in plan approved by the commission, denied; such modification was made primarily on ground of public interest, and adequate reason therefor was stated in 307 ICC 5; petitioner has presented no convincing reason why the rejected provision should be reinstated as a condition of approval of acquisition of control of the reorganized carrier in plan approved.—Florida East Coast Ry. Co. Reorganization, 312 I.C.C. 744 (745)*.

Properly construed, the employee-protective provision of the draft plan was not an agreement between a railroad and representatives of its employees within contemplation of §5(2)(f), since it dealt only with relations between debtor and its employees and did not purport to be an agreement with the reorganized company which is to be the prod-

uct of, and is not a party to, the plan; there is no employment relationship, and no contractual privity as to such relationship, between the parties to the stipulation, and they do not include all who will have an interest in the reorganized company; while they can bind themselves, they may not legally bind the reorganized company.—Id., p. 747.

Neither the commission's duty under the Bankruptcy Act to formulate a reorganization plan compatible with public interest, nor its authority under §5(2)(f) of Interstate Commerce Act, constitutes a divisible and qualified power which may be nullified by such an "agreement." The two statutes are entirely different in nature, scope, and purpose, and power conferred on the commission by the Bankruptcy Act to approve, reject, or modify a plan proposed by the parties is necessarily a plenary one which may not be circumscribed by private agreement.—Id., p. 746.

Moreover, the stipulation by its terms was not a binding agreement between any of the parties with respect to any of the provisions of the draft plan, but was specifically an agreement to accept a plan approved by the commission if it contained the employee-protective and other provisions incorporated in the draft plan, and conditions imposed in order approving the modified plan will not prevent the making of agreements between employee representatives and management of the reorganized company when established.—Id., p. 747.

57. Mortgages; divisional mortgages.—[Vols. 11-14, 16].—In railroad reorganization, a mortgage is a paramount and exclusive lien upon property therein conveyed as against a later unsecured or otherwise junior claim save for an exceptional and supreme equity. Equity warranting deference of mortgages to a general creditor must embrace the following elements: (1) the account must cover an expense immediate to continuance of railroad operation; it must be a business-operating account; (2) account must have arisen within a reasonable time anterior to institution of trusteeship, generally established as 6 months; (3) claim must represent a debt contracted with intention that current earnings would respond thereto; (4) account must first have been given preference in any current debt fund over non-operating debts and mortgage payments; and (5) there must have been such pressing necessity for payment thereof that it was reasonably probable that nonpayment would result in suspension of railroad's operations.—Southern Ry. Co. v. Flournoy, 301 F. 2d 847 (850-1).

60. Capitalization.—[Vols. 10-18].—There is no merit to contention of debtor's trustee that the examiner, in fixing capitalization of the reorganized company at $3,500,000 composed entirely of common stock, based his valuation of the railroad on fact that it permitted distributions proposed in the filed plans, thus improperly fixing value on basis of consent of some of the parties; capitalization recommended reflects a fair valuation, based on examiner's independent consideration of all elements of value shown of record, including debtor's capitalizable assets and especially its earning power; approved.—New Jersey & N.Y. R. Co. Reorganization, 317 I.C.C. 441 (443)*.

61. Valuation; earnings.—[Vols. 11-18].—There was no error in failure of examiner's valuation of debtor's railroad to reflect its relatively large income tax loss carryover, prospective increases in traffic from new or expanded industries on its lines, reductions in per diem rentals and car-line days paid for, and other matters relating to amount of income which debtor might be expected to earn in a normal year, as to which matters no evidence was presented. To obtain a 6-percent return on the capitalization approved, earnings of the reorganized company must equal $210,000, and it has not been shown that greater future earnings might reasonably be expected.—New Jersey and N.Y. R. Co. Reorganization, 317 I.C.C. 441 (444)*.

Nor is there any merit to objection that the examiner failed to evaluate increased value resulting from economies of unified operation with Erie-Lackawanna R., and increased value of traffic contributed by debtor to the Erie, since those considerations pertain to prior plans which provided for sale of debtor's property to the Erie, whereas recommended plan contemplates an internal reorganization of debtor, with acquisition of control by Erie, in which not all elements of value that might be involved in a sale of the property are nec-

essarily present.—Id., p. 444.

62. Liens.—[Vols. 11-15, 16].—Although oil company's unsecured claim against debtor railroad for amount due for locomotive diesel fuel oil is not entitled to priority over debtor's mortgages, this does not affect its lien under State statute, since the preference which State law gives the general creditor against corpus of the railroad's assets is unconditional.—Southern Ry. Co. v. Flournoy, 301 F. 2d 847 (856).

66. Consolidation; acquisition; operation; construction; sale.—[Vols. 10-19].—Debtor's reorganization proceedings have reached final stages, a reorganization plan has been found feasible, and a specific plan—and provision for making inclusion of debtor a condition of merger of Pennsylvania R. and New York Central R.—has been approved and is about to be certified to the bankruptcy court; therefore, it would be error on the court's part to entertain and approve of action by certain of debtor's bondholders (who seek its immediate take over by the Penn-Central or its liquidation and termination of the reorganization) designed to scuttle the entire proceeding when such course of action, which Interstate Commerce Commission stated would be of no benefit to creditors, is not endorsed by representatives of other bondholders or creditors. Also, petitioners may not maintain what in effect is a collateral attack on the commission's report and order; as steps have been taken toward direct review thereof, they will have ample opportunity to present their claims of lack of due process and taking property without just compensation before the reviewing court. Cross-petitions denied.—In re New York, N.H. R. Co., 281 F. Supp. 65 (67-9)*.

Merger.—[Vols. 16, 17, 19].—See also In re New York, N.H. & H. R. Co., n. 10, above.

67. Abandonment of lines.—[Vols. 10-15, 17-19].—See also Commonwealth of Massachusetts v. Bartlett, 49 USC §1(18), n. 30.

85. Bonds and bondholders.—[Vols. 10-18].—Although plan approved provides for payment of principal and interest on bondholders' claims in cash, it does not specify method of payment; however, it provides that such claims shall constitute a prior lien on property of the reorganized company until paid, and that details of payment shall be determined by the reorganization manager under the court's supervision; thus, the mortgage trustees and the reorganization manager can make necessary arrangements to protect the former in case of bonds not promptly presented for payment.—New Jersey & N.Y. R. Co. Reorganization, 317 I.C.C. 441 (442)*.

90. Stock and stockholders.—[Vols. 10-17, 19].—Record in 278 F. 2d 402, in which order eliminating interests of stockholders in the reorganization of Hudson & M. R. was affirmed, shows that notice informing stockholders of the hearing on the proposed reorganization plan was mailed to all stockholders of record; as a consequence, all stockholders are bound by the decision in that case.—Zanca v. Stichman, 317 F. 2d 355 (356).

110. Appointment of trustees; ratification; duties.—[Vols. 10-12, 14-16, 19].—

Trustees under §77 have all powers of a trustee appointed under §44 of the act as well as all powers of a receiver in an equity proceeding, including title to and possession of the debtor's properties, with full authority to exercise its rights and franchises to run the railroad and to represent all creditors and claimants with respect thereto. In effect they are a combination of trustees in bankruptcy and receivers in equity. Applying principles of cases concerning statutory receivers, reorganization trustees are liable for acts committed before as well as after their appointment; but a judgment against the debtor in a suit against it alone, instituted after appointment of trustees and in which they were not joined as parties, would not be binding on them, hence would not be a burden on them or a lien on the estate, and would be of no value to plaintiff. The trustees are indispensable parties in any suit to enforce such liability.—United States v. Dorigan, 236 F. Supp. 106 (108).

The trustees operate the railroad for purpose of preserving the assets for benefit of the public and the creditors, and expenses and debts created by them have preference against the assets as administrative expenses. But the bankruptcy court has exclusive jurisdiction of the debtor and its properties wherever located, and while Congress has specifi-

cally authorized suits against the trustees without leave of court with respect to any of their acts and transactions, the Government's suit against the trustees to recover penalty for violation of the Safety Appliance Act prior to debtor's filing of its petition for reorganization is not predicated on any act of the trustees and requires consent of the court.—Id., p. 109.

Trustees in railroad reorganization proceedings under §77 have all the powers of a trustee under §44 of the Bankruptcy Act, and thus are "vested by operation of law with the title of the bankrupt as of the date of the filing of the application * * *," and protection of the interests of bondholders and all other creditors and stockholders of the debtor is the responsibility of the trustees; and any rule permitting creditors or stockholders of a railroad affected by proposed merger of other lines to interpose themselves in the merger proceeding would be impracticable from an administration standpoint. Moreover, and even more decisive, there can be no occasion for an administrative agency to determine whether trustees should speak for a bankrupt estate; power to instruct them or to turn over the job to someone else is vested exclusively in the bankruptcy court. Plaintiff bondholders have no standing to seek injunction against consummation of approved merger of other railroads.—Oscar Gruss & Son v. United States, 261 F. Supp. 386 (392-3, 394)*.

Trustees' application for loan guaranty under Part V of Interstate Commerce Act, see New York, N.H. & H. R. Co. Trustees' Loan Guaranty, 49 USC §501, n. 2.

112. Compensation of trustees.—[Vols. 10-14, 17].—Debtor's trustee did not receive interim compensation for services over and above his duties as debtor's chief executive. in connection with the reorganization plan and creation of a situation which made possible the takeover of debtor by a public authority. Those services were of type involving public relations, knowledge of factors which influence governmental authorities and legislative bodies, and skill in securing the proper results from those bodies, and are not the type of services customarily found in reorganizations. He is entitled to additional allowance of $200,000 for those services.—In re Hudson & Manhattan R. Co., 224 F. Supp. 815 (825-6)*. [Not arising hereunder.]

Compensation may be allowed an indenture trustee only for services beneficial to administration of debtor's estate.—Id., p. 829.

Submission of reorganization plan to the court before final determination of allowances for debtor's trustee and his counsel and for other parties in interest in the proceeding does not have effect of placing a ceiling on such allowances; §77 provides that a plan shall provide for payment of all costs of administration and all other allowances made or to be made by the judge, and under plan approved those items will be paid in cash. Nothing in the act requires determination of such allowances prior to promulgation of a plan, and in most proceedings plans have been approved and consummated before final determination of all administrative expenses.—New Jersey & N.Y. R. Co. Reorganization, 317 I.C.C. 441 (445)*.

115. Counsel; compensation.—[Vols. 10-18].—Comparison of amount of compensation requested by special counsel for debtor's trustees with maximum limits fixed by the commission as compensation for general counsel of the trustees has little value in determining reasonableness of the former; when maximum limits for general counsel were fixed, the commission had no specific information as to time which would be required for performance of their service to the trustees; also, in fixing maximum limits for special counsel, due regard must be given to fact that they, unlike the general counsel, must devote a large proportion of their income from professional services to payment of general overhead expenses.—New York, N.H. & H.R. Co. Reorganization, 312 I.C.C. 697 (699).

Upon the showing made, the $25,550 requested may not be fixed as a maximum limit for the period specified; no breakdown is given of time devoted to the respective matters involved, some of which were of fairly routine nature, while others entailed a higher degree of expertise. However, as several months have elapsed since end of that period, and a major portion of the work performed was beneficial to the estate, amount requested may properly be fixed as maximum limit of interim compensation to be paid at this time, without relation to the period specified in the

petition; if that amount later appears excessive for services rendered in that period, adjustment can be made.—Id., p. 700.

Available information does not permit fixing of maximum limits for additional allowances in future; in requesting future allowances petitioners should describe in detail the nature of the work performed (with allocations of time to distinct categories), resulting benefits to debtor's estate, and responsibilities placed on them by the trustees for final decision, as distinguished from that reposed in their general counsel respecting identical matters.—Id., p. 700.

But §77(c)(2) does not contemplate fixing of maximum limits for allowances to trustees' counsel for costs and expenses such as travel, telephone, and duplication of documents; subject to orders of the judge, the trustees may reimburse counsel for such expenses without recourse to the commission; however, order will provide that compensation paid within the maximum limits fixed shall cover any office or overhead expenses which should be provided for in connection with the services rendered.—Id., p. 700.

See also §§506, 577, 579, 624, n. 115.

116. Compensation of mortgage trustees; special counsel.—[Vols. 11-13, 17, 18].—The court has power to fix attorneys' fees for legal services rendered by special counsel subsequent to filing of reorganization petition, in litigation commenced long before such filing, without a maximum or ceiling on such compensation having first been fixed by Interstate Commerce Commission under §77(c)(2) of Bankruptcy Act. Criterion of whether legal services do or do not come within those provisions derives from nature of issues involved in the legal work performed, and whether they are part of the reorganization proceedings as such; the test is whether the service rendered is part of the regular, normal legal business of the carrier, which any railroad not in reorganization might carry on, rather than legal work connected with and peculiar to its reorganization proceedings and plans. Case in which involved services were performed started and was maintained as part of debtor's regular legal business, and subsequent intervention of its bankruptcy had no effect on nature thereof.—In re New York, N.H. & H. R. Co., 221 F. Supp. 288 (289, 290).

Mortgage trustee's theory that the test of applicability of §77(c)(2) should be whether the attorney is an independent contractor or whether he is part of "house counsel" and therefore in effect an employee or agent, regardless of any fee or salary, size of amount involved, or importance of the issues, finds no support in history of that section or its application by the commission and the courts. A construction which would require that the commission fix a ceiling on compensation of all special counsel employed during a railroad reorganization would be unnecessarily burdensome, generate costly delays, make it virtually impossible to retain competent counsel for specialized legal problems, and generally be highly prejudicial to the reorganization proceedings.—Id., pp. 289-90.

135. Reorganization managers; proxies; protective committees.—[Vols. 10-18].—Provision in plan approved for appointment of a reorganization manager nominated by Erie-Lackawanna is proper since Erie, which will acquire sole stock control of the reorganized company, is the principal party interested in that company and in debtor's reorganization.—New Jersey & N.Y. R. Co. Reorganization, 317 I.C.C. 441 (445)*.

136. Voting trusts and trustees.—[Vols. 11-15].—Since under plan approved capitalization of the reorganized company will consist entirely of common stock all of which will be owned by Erie-Lackawanna, voting trust proposed by debtor's trustee would serve no useful purpose and was properly excluded.—New Jersey & N.Y. R. Co. Reorganization, 317 I.C.C. 441 (445)*.

Section 208. (a), (b). Petition subsequent to certification of reorganization plan; Duty of commission to report changes, etc., to court; Supplemental report and order, etc.—[Unchanged. See vol. 14, p. 11712, vol. 16, p. 12979.]

Historical notes, see vol. 14, p. 11714.

Notes of Decisions

Volume 16—p. 12979; Volume 17—p. 13694.

Chapter 10—CORPORATE REORGANIZATIONS

Subchapters II, VII, XI

Sections 506, 577, 579, 624.—Plan; hearing; confirmation, consummation. —[See vol. 10, p. 8380. Section 229(a), July 7, 1952, Public Law 456, 66 Stat. 431, prescribes terms for consummation of plan.]

Historical note, vol. 11, p. 9745.

Notes of Decisions

Volume 12—p. 10566; Volume 13—p. 11204; Volume 14—p. 11715; Volume 15—p. 12331; Volume 16—p. 12983; Volume 17-p. 13695; Volume 18—p. 14720.

2. Construction and interpreation.—[Vols. 15, 18].—Unlike ordinary bankruptcy, whose objective is fair distribution of assets among creditors, a reorganization proceeding is aimed at rehabilitation and possible ultimate payment in full of all claims; and general provisions of the Bankruptcy Act apply under Chapter X only "insofar as they are not inconsistent or in conflict" therewith. Thus, as principle that insolvent debtor's surety is entitled to have creditor apply debt owing to debtor to satisfaction of his claim is applicable in ordinary bankruptcy, surety of motor carrier undergoing reorganization can be denied the right to have creditors apply debts owed debtor for unpaid freight charges to satisfaction of surety's claim (subject to later appropriate recognition in a reorganization plan) for reimbursement of payments for cargo loss and damage, pursuant to insurance policies issued by it, only if enforcement of such right would interfere with rehabilitation objective of the reorganization. District court order denying surety's right to setoff vacated and cause remanded for determination of whether any setoff would be compatible with the reorganization or what limits would be appropriate.—In re Yale Express System, Inc., 362 F. 2d 111 (116-7)*.

5. Jurisdiction.—[Vols. 13-15, 17, 18].—Petitioning creditors of debtor interstate carrier were entitled to reclaim trucks and trailers purchased from them by debtor when conditional sales contracts and chattel mortgages, executed by debtor in connection with those purchases, were not invalid for lack of prior commission approval of issuance thereof. While, in the broadest sense, such contracts and mortgages are evidences of indebtedness, they do not constitute "stocks, bonds, notes, or other evidence of indebtedness" within §§20a and 214 of the Interstate Commerce Act; moreover, since the mortgages and sales contracts in question do not exceed one million dollars, the commission's approval specifically is not required by §214 of that act.—In re Independent Truckers, Inc., 212 F. Supp. 402 (405-6)*.

Defendant's motion to dismiss action by stockholders and bondholders against former officers, directors, and accountants to recover for alleged improper statements or information in connection with sale of stock of regulated motor carrier, currently in reorganization under Chapter X of the Bankruptcy Act, is without merit and must be denied. While movants urge that the complaints present unusual and intricate problems of compliance or noncompliance with carrier accounting requirements imposed by the Interstate Commerce Commission, they do not seriously argue that ICC is empowered to grant the relief requested therein. Moreover, the ICC authorized issuance of the securities in question, millions of dollars worth were sold through the stock exchanges and, even as-

suming that ICC has the power to declare them void over two years later, it cannot be conceived that it would do so or, if it did, plaintiffs' remedies in the courts would be cut off thereby.—Fischer v. Kletz, 249 F. Supp. 539 (540-2).

And defendants' motion to stay the court actions under the doctrine of primary jurisdiction, pending reference to the ICC for resolution of certain factual matters, is denied. The complaints are based primarily on the Securities and Exchange Act and, from time immemorial, issues raised thereby have been passed upon by the courts; and the possible difficulty of resolution of any intricate or difficult accounting problems that may be raised, of course, is no bar to their determination by the court. The case does not involve transportation matters clearly within jurisdiction and expertise of the ICC, but is a case which essentially a claim for damages based on sales of securities as result of alleged fake and fraudulent statements. In such circumstances, the ICC could not make meaningful contributions to solutions of the problems posed; indeed, the relevant factors indicate that it would be an abuse of judicial discretion ro refer the issues to any administrative agency for resolution.—Id., pp. 542-4.

12. Sale of property.—[Vols. 15, 16, 17].—Motor carriers' assignment of their certificates of convenience and necessity to a loan association, for security purposes, was never recorded under Nebraska law, nor was notice of such assignment given to the Interstate Commerce Commission; equitable lien created by that assignment was not valid as against trustees in reorganization and in bankruptcy of the carrier corporations. Proceeds from sale of both certificates pursuant to orders of the court, which sales were approved by the commission, were allocated first to administrative expenses of reorganization and bankruptcy and priority wage claims, to be determined, then to county for personal property taxes, to chattel mortgagee, and then to the United States for its tax lien.—In re Independent Truckers, Inc., 226 F. Supp. 440 (442, 443, 447, 449)*.

115. Counsel; compensation.—[Vol. 17].—Firm which represented debtor for about 3 months following filing of involuntary petition in bankruptcy is entitled to allowance when it obtained an order authorizing debtor to continue operating and successfully resisted creditors' efforts to vacate it; though its vigorous efforts in contesting the involuntary petition were unsuccessful, the services were rendered on an emergency basis and were necessary to determination of debtor's status and what provisions of the Bankruptcy Act governed its reorganization.—In re Hudson & Manhattan R. Co., 224 F. Supp. 815 (842)*; since indenture trustee and its counsel were not volunteers in the reorganization, it was necessary that they keep informed of the proceedings and participate therein, and counsel is entitled to compensation for such services.—Id., p. 829; although counsel for bondholders' committee was unsuccessful in certain efforts in their behalf, the issue required resolution and allowance should be made for his services.—Id., p. 838.

Rate of compensation which trustee's special counsel would customarily charge to its firm's clients is not an applicable test for determining allowances in Chapter X reorganization; nor should compensation be paid to counsel for a bondholders' committee on basis of rates charged private clients; important criterion is the extent to which the estate benefited from those services.—Id., pp. 828, 834. And division of joint fee allowed to counsel who filed original petition and represented petitioning creditors is a matter for them to handle, not for the court to determine.—Id., p. 833. While the statute permits participation by a number of representatives of same class of security holders, allowances may not be made for duplicating services; the estate is to be charged only one fee for a particular service.—Id., pp. 831, 833, 835. Security holders' counsel are entitled to compensation only to extent that they contributed something of value to the plan or to the administration of debtor's estate; otherwise they should look to their clients for compensation.—Id., pp. 830-1, 838-40, 841-2.

ANTITRUST ACTS

Chapter 1.—Title 15

SHERMAN ACT

Section 1. Trusts, etc., in restraint of trade illegal; exception of resale agreements; penalty.—[Unchanged except that by act of July 7, 1955, "fine not exceeding $5,000" was changed to "fine not exceeding fifty thousand dollars." See vol. 4, p. 3032, vol. 11, p. 9756.]

Historical note, see vol. 4, p. 3032.

Notes of Decisions

Volume 4—p. 3033; Volume 7—p. 6024; Volume 10—p. 8395; Volume 11—p. 9756; Volume 12—p. 10568; Volume 13—p. 11206; Volume 14—p. 11715; Volume 15—p. 12332; Volume 16—p. 12983; Volume 17—p. 13696; Volume 18—p. 14772; Volume 19—p. 15999.

11. Purpose; interpretation generally.—[Vols. 4, 12, 13, 18, 19].—Joint efforts by railroads, railroad associations, and public relations firm to influence legislative and administrative action do not violate the Sherman Act, even when they are jointly made for the purpose of destroying or restricting competition. [Citing 365 US 127.]—Association of Western Rys. v. Riss & Co., 299 F. 2d 133 (135)*.

District Court erred in failing to accept verdict of the jury in civil anti-trust suit finding against five defendants and showing total amount of verdict as "none"; verdict plainly meant that five defendants had conspired and also that the conspiracy had not damaged plaintiff; it was not ambiguous. Gist of such civil anti-trust action is not merely the unlawful conspiracy but is damage to individual plaintiff proximately resulting from defendant's acts which constitute violation of the law. Judgments for all defendants should be entered.—Id., pp. 135-6.

Purpose of the Sherman Act is to preserve for industry free access to competitive markets and to prevent monopolies in restraint of trade.—Crawford Transport Co. v. Chrysler Corp., 338 F. 2d 934 (939)*.

Interruption of commerce arising out of a bona fide labor dispute does not come within the Sherman Act. Defendant railroads' strike insurance plan did not, or could not, place any restriction on commercial competition for any goods or services; thus the sine qua non of condemnation of the statute, "restraint on commercial competition," is totally lacking; complaint dismissed.—Kennedy v. Long Island R. Co., 211 F. Supp. 478 (489-91)*.

Congress did not intend to supplant penal provisions of the Sherman Act, or to relieve from liability any violators thereof, by enactment of §14 of the Clayton Act; to the contrary, it was the purpose of Congress to maintain all penal provisions of the Sherman Act in undiminished force; the Clayton Act was intended to supplement purpose and effect of the Sherman Act.—United States v. North American Van Lines, Inc., 202 F. Supp. 639 (642-4).

Principle of per se illegality is to be applied only to conduct which of necessity produces consequences violative of the statute under consideration, or which produces proscribed consequences in such an overwhelming proportion of cases that minute inquiry in every instance would be wasteful of judicial and administrative resources. Railroads' participation in considered strike insurance plan did not constitute a per se violation of the Antitrust Acts.—Kennedy v. Long Island R. Co., 319 F. 2d 366 (372-3)*.

18. Conspiracy to prevent transportation by others.—[Vols. 10, 11, 16-19].—If cheap rates are monopolistic or in restraint of trade, and

are the result of a combination or conspiracy among carriers, the Government has adequate civil and criminal remedies under the Antitrust Act.—Arrow Transp. Co. v. Southern Ry. Co., 308 F. 2d 181 (185)*.

When indictment, without qualification, charged each of four corporations, five of their officers, and a trade association, with engaging in a combination and conspiracy in unreasonable restraint of trade and commerce in transportation of household goods in violation of §§1 and 3 of the Sherman Act, individual defendants were subject to prosecution under that statute rather than under §14 of the Clayton Act. The Clayton Act supplements, but does not supplant penal provisions of, the Sherman Act; and where more than one statute is violated, the Government may elect to prosecute under either. A defendant cannot complain merely because charge against him is brought under statute carrying more serious penalties when two statutes punish the same general acts. Individual defendants' motion to dismiss as to them, denied.—United States v. North American Van Lines, Inc., 202 F. Supp. 639 (641-6).

Protestant water carrier has not sustained its allegation of conspiracy to eliminate it as a competitor for transcontinental canned-goods traffic; while general tenor of many statements in documents relied on indicates that rail respondents hoped by considered reduced rate to attract some of the traffic then moving by intercoastal water lines, those documents also show that there was considerable disagreement among respondents and between them and important shippers concerning measure of rate which would effect that purpose, and that shippers generally regarded the reduced rate as a step in restoring their market relationships prior to general increases; testimony of witnesses who wrote some of letters principally relied on refutes existence of any unlawful intent to destroy protestant, and one document indicates that Pacific coast respondents proposed the new rate in definite belief that it would not impair competitive position of the water carriers.—Canned Goods from Pacific Coast to Eastern Points, 315 I.C.C. 769 (793-4).

20. Limitation of application of act to interstate commerce.—[Vols. 4, 7, 19.]—Effect of considered restrictive convenant in lease of part of shopping center for a gasoline service center, which prohibits use of any other part of the shopping center for a gasoline station, and its enforcement on interstate commerce is incidental and inconsequential; hence, jurisdictional requirements of the Sherman Act are not met.—Savon Gas Stations No. 6, Inc. v. Shell Oil Co., 203 F. Supp. 529 (534).

28.—Stock control, directly or through holding company.—[Vol. 4].—See § 18, this title, n. 13.

.29.—Restraint of commerce, other than transportation.—[Vols. 4, 10, 12, 18, 19].—Defendant automobile manufacturer's plan for distribution of new automobiles to its dealers, whereby manufacturer selected carriers used to transport the cars, is not the type of tie-in sale that is judicially condemned as a violation of the Sherman Act. Defendant owned no transportation companies, had no financial interest in those it selected, did not attempt to invade or dominate the carriers' business, and made no permanent commitment to any carrier. While defendant benefited financially to the extent of its substantial savings in the cost of transportation, it received no direct profits from the selected carriers. Absent any purpose to create or maintain a monopoly, the statute does not restrict the right of a trader or manufacturer engaged in private business to exercise freely his independent discretion as to parties with whom he will deal. See 250 US 300.—Crawford Transport Co. v. Chrysler Corp., 338 F. 2d 934 (938-9)*.

40. Enforcement of section; authority of Interstate Commerce Commission.—[Vols. 4, 13, 15, 16, 19].—When a charge of violations of antitrust laws involves issues within jurisdiction of an administrative agency such as Interstate Commerce Commission, a court will not adjudicate such charges until the issues have been passed on by the agency.—American Com'l Barge Line Co. v. Eastern Gas & Fuel Ass'n, 204 F. Supp. 451 (453).

The commission has no jurisdiction over shipper claims based on antitrust violations.—Copps v. Alabama G.S.R. Co., 319 I.C.C. 192 (196); nor does it have power to find violations, as such, of the antitrust laws

in respect of monopoly, restraint of trade, or price fixing.—Tennessee Products & Chem. Corp. v. Louisville & N.R., 319 I.C.C. 497 (507).

Section 2,3. [Unchanged except that in both sections the phrase "fine not exceeding $5,000" by act of July 7, 1955, was changed to "fine not exceeding fifty thousands dollars." See vol. 4, pp. 3046-3047.]

Notes of Decisions

§2: Volume 4—p. 3046; Volume 12—p. 10569; Volume 13—p. 11207; Volume 14—p. 11716; Volume 15—p. 12333; Volume 18—p. 14725; Volume 19—p. 16005.

§3: Volume 7—p. 6025.

2. Particular monopolies.—[Vols. 4, 12-15, 18, 19].—Agreement between defendant automobile manufacturer and its dealers (under which manufacturer had sole power to select carriers used to transport new cars to dealers) and manufacturer's adoption of a new plan of distribution, which reduced number of motor carriers to be used from about 80 to 16, did not constitute any contract, combination or conspiracy in restraint of trade; nor did the distribution plan in issue constitute an attempt on manufacturer's part, acting alone or in combination with defendant carrier or any other selected carrier, to monopolize the business of the transportation of new automobiles. Defendant's decision to reduce number of motor carriers to whom it would tender traffic was made for the sole purpose of obtaining economical and efficient distribution of its products; and record contains no evidence of usurpation by the manufacturer of the Interstate Commerce Commission's authority over rates charged and areas served by interstate carriers.—Crawford Transport Co. v. Chrysler Corp., 338 F. 2d 934 (940)*.

Since tariff naming unit train rates on coal concerns an annual volume exceeding present consumption at consignee's electric generating station, consignee has contracted with one producer on a 10-year basis. But though complainant alleges monopolization of the market at that plant, in violation of antitrust policies, as result of favored treatment by defendant, no direct harm to any specific coal shipper is shown, nor any unlawful discrimination or preference by defendant. That the unit train rates provide such stability of transportation as to influence a shipper and a receiver in reaching a 10-year agreement for supplying steam coal cannot be considered creation of a monopoly by defendant. Moreover, in the case of public utilities the assurance of a steady and ample supply of fuel is necessary in the public interest (citing 365 US 320).—Natural Gas Pipeline Co. of America v. N.Y.C. R. Co., 323 I.C.C. 75 (82).

Section 4. Jurisdiction of courts; duty of district attorneys; procedure.—[Unchanged. See vol. 4, p. 3048.]

Historical note, seel vol, 4, p. 3048.

Notes of Decisions

Volume 4—p. 3048; Volume 7—p. 6026; Volume 11—p. 9756; Volume 12—p. 10570; Volume 13—p. 11208; Volume 17—p. 13697; Volume 18—14726.

10. Sufficiency of bill or petition.—[Vols. 4, 13, 17].—Indictment charging each of four corporations, five of their officers, and a trade association with engaging in a combination and conspiracy in violation of §§1 and 3 of the Sherman Act, and not drawn so as to limit charges against individual defendants to acts committed solely as corporate officers, is accepted as written for purposes of individual defendants' motion for dismissal as to them. Individuals suggest that the United States be

required to furnish a bill of particulars stating each act and capacity in which each is claimed so to have acted, however, bills of particulars and statements of parties should not be considered as part of an indictment, or as a substitute therefor or amendment thereto, and can neither weaken the indictment nor change the crime charged.—United States v. North American Van Lines, Inc., 202 F. Supp. 639 (641-2).

Section 5-7. Bringing in additional parties; Forfeiture of property in transit; "Person" defined.—[Unchanged, See vol. 4, pp. 3055, 3056.]

Historical notes, see vol. 4, pp. 3032, 3055, 3056.

Notes of Decisions

§6: Volume 4—p. 3055.

CLAYTON ACT

Section 12. Words defined.—[Unchanged. See vol. 4, p. 3057.]

Historical note, see vol. 4, p. 3057.

Notes of Decisions

Volume 4—p. 3058; Volume 19—p. 16006.

2. Purpose.—[Vols. 4, 19].—The Clayton Act was intended to supplement the purpose and effect of other antitrust legislation, principally the Sherman Act; Congress did not intended by §14 of the Clayton Act to supplant the penal provisions of the Sherman Act or to relieve from liability any violators thereof. To the contrary, legislative history of §14 makes it plain that it was the purpose of Congress to maintain all penal provisions of the Sherman Act in undiminished force.—United States v. North American Van Lines, Inc., 202 F. Supp. 639 (642-4).

Sections 13-17.—[Unchanged. Editorial comment, see vol. 4, p. 3059.]

Section 18. Acquisition by one corporation of stock of another.—[Unchanged. See vol. 15, p. 12334.]

Notes of Decisions

Volume 4—p. 3061; Volume 7—p. 6028; Volume 10—p. 8397; Volume 12—p. 10570; Volume 15—p. 12335; Volume 17—p. 13698; Volume 18—p. 14726.

13. Stock acquisition prohibited.—[Vols. 4, 7, 10].—When plaintiff sold short 400 shares of stock of Central of Georgia during a period ending some 16 months prior to the time defendant began acquiring stock of that carrier, there was no causal connection between defendant's action and any losses plaintiff sustained in covering his short sales, and it need not be determined whether defendant by its stock purchases violated any of the antitrust

laws; even if it were so held, plaintiff has not established that he was injured in his business or property by reason of anything forbidden in the antitrust laws, with a resultant damage proximately caused thereby.—Goldsmith v. St. Louis—S.F. Ry. Co., 201 F. Supp. 867 (870).

Section 19. Interlocking directorates and officers. [Editorial comment, vol. 4, p. 3065; vol. 15, p. 12335.]

See Historical note to §21, infra.

Section 20. Purchases by common carriers in the case of interlocking directors, etc.—[Unchanged. See vol. 4, p. 3067.]

Historical note, see vol. 4, p. 3068, vol. 18, p. 14727.

Notes of Decisions

Volume 4—p. 3068; Volume 7—p. 6033; Volume 10—p. 8398; Volume 12—p. 10571; Volume 16—p. 12984; Volume 17—p. 13698; Volume 19—p. 16007.

1. In general.—[Vols. 4, 7, 10, 12, 17, 19].—A criminal statute is to be strictly construed, and fact that a particular activity may be within same general classification and policy of those covered does not bring it within ambit of the criminal prohibition. In criminal proceeding against railroad and its officers for violation of §10 of the Clayton Act, by participating in sale of railroad coaches, without competitive bidding, to another corporation in which they had "substantial interest," strict construction of words "substantial interest in," as used in the statute, presupposes either an existing investment in the purchasing corporation, or its creation by the individual defendants for their use, or a joint venture or continued course of dealings, licit or illicit, with the corporation for profit sharing.—United States v. Boston & M.R. Co., 380 U.S. 157 (158-60, 162)*.

Section 10 of the Clayton Act is not strictly a conflict-of-interest statute; it was described in 361 US 173 as "an antitrust law," and indeed has its roots in a message by President Wilson to Congress on the subject of "trusts." While bribery (which the indictment, in light of the bill of particulars, in effect charges) might well be within the family of offenses covered by a conflict of interest law, it is more remote from an antitrust frame of reference; §10 is a narrow prohibition applicable to activity within the antitrust philosophy, and cannot be broadened to include present case. Since an amended bill of particulars may be filed, and allowed by the District Court, case is vacated and remanded, leaving open all questions except construction of the statute.—Id., pp. 160-2.

In absence of any interlocking directors, alleged understanding and concert of action among individual and corporate defendants, and others, for purpose of producing profits for defendants from dealings in property acquired from Boston & M. R. without competitive bidding, was not within "any substantial interest" as used in the statute. The statute is limited to one who has a then present legal interest in the buying corporation; it does not include one whose only interest is in the outcome of what may have been an illegal and illicit plan to siphon off for his personal benefit property of the railroad through the medium of the corporation.—United States v. Boston & M. R., 225 F. Supp. 577 (578)*.

Regulations of the Commission

29 FR 15493, Nov. 19, 1964, Part 8: Competitive Bids, §8.1 Specifications, form of proposal and contract; publication of request for bids; variation from the generally accepted procedure. New paragraph (c) added, effective on date of order.

30 FR 8847, July 14, 1965, Part 8: Competitive Bids, §8.5 Examination, last sentence of section revised, effective on date of order.

Section 21. [*§11 as enacted.*] Enforcement provisions; procedure.—[Unchanged. See vol. 18, p. 14727.]

Historical notes, see vol. 18, p. 14732.

Historical Note

The commission renews its recommendation for amendment of various provisions of the Clayton Antitrust Act and the Federal Trade Commission Act, and the exemptions therein, so as to make them applicable to contract carriers as well as common carriers subject to the Interstate Commerce Act; and to increase the limitation on the exemption from competitive bidding in §10 of the Clayton Act to a more realistic figure in light of present day costs of doing business.—Annual Report, 1959, p. 167.

Notes of Decisions

Volume 4—p. 3072; Volume 7—p. 6034; Volume 10—p. 8399; Volume 18—p. 14732; Volume 19—p. 16008.

3. Jurisdiction of Federal Trade and Interstate Commerce Commissions, as to carriers.—[Vols. 4, 7, 19].—In amending the Clayton Act in 1950, Congress did not repeal the provisions of §11 vesting authority in the commission to enforce compliance with certain provisions of that act where applicable to common carriers subject to Interstate Commerce Act. But though, while §11 of the Clayton Act remains on the books, it would presumably authorize the commission to require divestiture of control effected without prior commission approval, in violation of §7 of that act, as an alternative remedy to ordering divestiture under §5(7) of ICA, §11 cannot be read so as to require enforcement of provisions of §7 when an application for commission authorization is before the commission under §5(2) of ICA. And recent Supreme Court decisions confirm the view that an exemption such as is afforded by §5(2) of ICA. And recent Supreme Court decisions confirm the view that an exemption such as is afforded by §5(11) of ICA cuts across the antitrust laws and avoids necessity of their enforcement by the agency exercising regulatory jurisdiction.—Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 I.C.C. 122 (133, 134)*.

Sections 24, 25. Liability of directors and agents; restraining violations.—[Unchanged. See vol. 4. p. 3074.]

Historical notes, see vol. 4, p. 3057.

Notes of Decisions

§24: Volume 4—p. 3074.

Section 26. Injunctive relief for private parties; exception.—[Unchanged. See vol. 4, p. 3076; vol. 11, p. 9757.]

Historical notes, see vol. 4, pp. 3057, 3076.

Notes of Decisions

Volume 4—p. 3076; Volume 7—p. 6037; Volume 10—p. 8400; Volume 13—p. 11209; Volume 16—p. 12985; Volume 17—p. 13699.

5. Proviso as to injunctive relief against carriers.—[Vols. 4, 7, 10, 16, 17].—Under §16 of the Clayton Act jurisdiction of the commission does not delimit jurisdiction of the federal courts to restrain violation of the Sherman Act; it affects only the capacity of a private party to maintain a suit to restrain violations; its purpose is to preclude any interference by injunction with any business of interstate carriers of sufficient public significance and importance to be within the jurisdiction of the commission, except when the suit is brought by the Government.—Arrow Transp. Co. v. Southern Ry. Co., 308 F. 2d 181 (185)*.

A private litigant cannot properly bring an action under §16 of Clayton Act for divestiture of assets allegedly acquired in violation of the antitrust laws.—American Com'l Barge Line Co. v. Eastern Gas & Fuel Ass'n, 204 F. Supp. 451 (453).

Section 27. Effect of partial invalidity.—[Unchanged. See vol. 4, p. 3082, vol. 11, p. 9758.]

Historical note, see vol. 4, p. 3082.

PANAMA CANAL ACT

Section 31. [Unchanged. See vol. 4, p. 3083, vol. 11, p. 9758.]

FEDERAL TRADE COMMISSION ACT

Sections 45, 46. Unfair methods of competition unlawful, etc.

Historical note, see vol. 18. p. 14733:

Section 51. [Unchanged. See vol. 4, p. 3084]

Chapter 6.—STANDARD TIME ACT

Section 261. Zones for standard time.—[Unchanged. See vol. 4, p. 3085.]

Historical notes, see vol. 4, p. 3085; vol. 11, p. 9758; vol. 12, p. 10571; vol. 13, p. 11210; vol. 14, p. 11717; vol. 15, p. 12340; vol. 19, p. 16008.

Notes of Decisions

Volume 4—p. 3086; Volume 7—p. 6040; Volume 10—p. 8402; Volume 11—p. 9758; Volume 12—p. 10572; Volume 14—p. 11718; Volume 15—p. 12340; Volume 17—p. 13699; Volume 19—p. 16009.

Historical Notes

The commission recommends that the scope of the Standard Time Act be broadened by amending it to provide that the time of the zone shall be the exclusive measure of time for all purposes, with certain possible exceptions, and by adding more definite standards and provisions for administration and enforcement. In any event, it is further recommended that there be a thorough survey for purpose of determining whether the commission is the most appropriate agency to fix limits of the zones or to administer provisions of any such statute.—Annual Report, 1962, pp. 151, 198; renewed, Annual Report, 1963, p. 18.

The commission recommends establishment of a uniform system of time standards and measurement for the United States; that observance of such standards be required for all purposes; that the question of whether the commission is the most appro-

priate agency to administer any future law relating to standard time be carefully considered; and that, in the event the present Standard Time Act (15 USC §§261-264) is not amended so as to provide for more efficient and effective time regulation, the commission be relieved of responsibility for its administration.—Annual Report, 1964, p. 73.

6. Boundary lines between zones.—[Vols. 4, 19].—In drafting time zone boundaries, natural and well-defined boundaries have been used so far as possible. Existing boundary between central and mountain zones in South Dakota, which has been observed for over 40 years, for most of its length follows the Missouri River, an ideal natural boundary.—Standard Time Zone Investigation, 319 I.C.C. 529 (533)*.

7. Modifications in zone boundaries.—[Vols. 4, 19].—Extension of Federal time zones is not warranted solely because business of an area properly in one zone has close relations with enterprises located in another; fixing of time standards cannot be based on the narrow concept of the commercial life of a single community or of a relatively limited area, when a much greater overall territory would be affected.—Standard Time Zone Investigation, 319 I.C.C. 529 (532)*.

9.—Between central and mountain zones.—[Vols. 4, 7].—Interests of western South Dakota are predominantly agricultural, apparently best suited to mountain time schedule as shown by experience, and proposed inclusion of entire State in central time zone is supported by a single municipality and by only 2 of 22 counties that would be affected. Widespread local opposition to proposed change more nearly represents majority sentiment of the area as a whole, and adherence of its people to mountain time for over 40 years raises strong presumption that such time results in greater convenience for commerce of the locality than would requested change to central time. Petitions for modification of present boundary, denied.—Standard Time Zone Investigation, 319 I.C.C. 529 (532-3)*.

Section 262. Duty to observe standard time zones.—[Unchanged. See vol. 4, p. 3088, vol. 11, p. 9758.]

Notes of Decisions

Volume 4—p. 3088; Volume 10—p. 8404; Volume 14—p. 11718; Volume 15—p. 12341; Volume 19—p. 16013.

Sections 263-265. [Unchanged. See vol. 4, p. 3088, vol. 14, p. 11719; vol. 4, p. 3090.]

Notes of Decisions

§264: Volume 4—p. 3089.

CRIMES AND CRIMINAL PROCEDURE

EMBEZZLEMENT AND THEFT

Chapter 31.—Title 18

Section 660. Carrier's funds derived from commerce; State prosecutions.—[Unchanged. See vol. 14, p. 11721.]

Cross reference, vol. 14, p. 11721, vol. 15, p. 12342, vol. 18, p. 14733.

EXPLOSIVES AND OTHER DANGEROUS ARTICLES

Chapter 39.—Title 18

Section 831. Definitions.—[Unchanged. See vol. 19, p. 16014.]

Section 832. Transportation of explosives, radioactive materials, etiologic agents, and other dangerous articles.—[Unchanged. See vol. 19, p. 16015]

Notes of Decisions

Former §382: Volume 4—p. 3096.

Section 833. Marking packages containing explosives and other dangerous articles.—[Unchanged. See vol. 19, p. 16016.]

Section 834. Regulations by Interstate Commerce Commission.—[Unchanged. See vol. 19, p. 16016.]

Historical notes, see vol. 14, p. 11724; vol. 15, p. 12343; vol. 16, p. 12986; vol. 17, p. 13700; vol. 18, p. 14734.

Notes of Decisions

(Former §383): Volume 4—p. 3099; Volume 7—p. 6072; Volume 10—p. 8419; Volume 11—p. 9763; Volume 13—p. 11212; (Former §835); Volume 14—p. 11724; Volume 15—p. 12843; Volume 16—p. 12987; Volume 17—p. 13701; Volume 18—p. 14734; Volume 19—p. 16017.

Cross Reference

Section 103(g) of the National Traffic and Motor Vehicle Safety Act of 1966, Pub. Law 89-563, 80 Stat. 720, provides that the commission, in prescribing safety regulations covering motor vehicles subject to the Transportation of Explosives Act, shall not adopt or continue in effect any safety regulation which differs from a motor vehicle safety standard issued by the Secretary of Commerce under Title I thereof, except that the commission is not prohibited from prescribing for such a vehicle a safety regulation which imposes a higher standard of performance subsequent to its manufacture than that required by the applicable Federal standard at the time of tis manufacture.

3. Force and effect of Commission's regulations.—[Vols. 4, 7, 13, 17, 18].—In criminal prosecution involving alleged violation of the commission's regulations for the transportation of explosives, considered regulations lack the clarity required of a criminal statute, i.e., "must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer defending one charged with its violation." Vagueness and ambiguity of the regulations preclude a finding that defendant railroad "knowingly" violated them as required by the statute; judgment of acquittal allowed.—United States v. Seaboard Air Line R. Co., 225 F. Supp. 38 (41).

12. Violations; penalties.—[Vols. 17,

19.]—In criminal prosecution of railroad for violation of the commission's regulations for the transportation of explosives, specifically the paragraph designating the proper position in a train of cars placarded "Explosives," it must be shown that defendant knew the regulations required placarded cars to be placed at least six cars behind the engine and yet voluntarily and purposely violated such requirement, or that it wilfully neglected to ascertain the requirements. And fact that defendant was familiar with the regulations as written does not mean that it was guilty of "wilfull neglect" in failing to ascertain their meaning, as interpreted by the Government, when the regulations lack the clarity required of criminal statutes and are susceptible of different constructions. In the circumstances, it cannot be found that defendant "knowingly" violated the regulations; motion for judgment of acquittal allowed.—United States v. Seaboard Air Line R. Co., 225 F. Supp. 38 (41-2).

15. Motor-vehicle transportation.—[Vols. 10, 11, 14-17, 19].—Though quasi-expert testimony was presented that nitro carbo nitrate and ammonium nitrate carbonate mixtures are the same thing, the commission's regulations permit bulk transportation of the latter (subject to certain loading requirements), but not of the former, and it cannot be inferred that the regulations would permit bulk transportation of a commodity by one name but not another, if in fact it had the same chemical structure under both. Accordingly, official notice is taken of definition of the latter by U.S. Interagency Committee on hazards of transporting ammonium nitrate, and of NCN in note to §73.182(a)(1) of the regulations, which show that they are entirely different commodities. Therefore, under the regulations, motor carriers may not transport NCN in bulk, but may transport bulk shipments of ammonium nitrate, in closed vehicles with wooden floors and sides, or in all-metal open vehicles.—Monkem Co., Inc., Extension, 94 M.C.C. 749 (756-8).

Applicant's description of shipments of ammonium nitrate as merely "fertilizer" when the explosives regulations require specific identification of the commodities therein enumerated is an inexcusable violation of the act.—Id., p. 755.

See also Qualifications of Employees and Safety of Operations, 98 M.C.C. 741, §204(a)(1), n. 10.

Regulations of the Commission

27 FR 3425, Apr. 11, 1962, Parts 71-78: Explosives and Other Dangerous Articles, miscellaneous amendments to regulations, effective June 27, 1962.

27 FR 6735, July 17, 1962, Parts 71-78: Explosives and Other Dangerous Articles, miscellaneous amendments, effective Oct. 3, 1962.

27 FR 11849, Dec. 1, 1962, Parts 71-78: explosives and Other Dangerous Articles, miscellaneous amendments, effective Feb. 17, 1963.

28 FR 4495, May 4, 1963, Parts 71-78: Explosives and Other Dangerous Articles, miscellaneous amendments to the regulations, effective July 24, 1963.

28 FR 13265, Dec. 6, 1963, Part 77: Shipments Made by Way of Common, Contract, or Private Carriers by Public Highways, §77.824 Retesting of cargo tanks, amended by deleting present paragraph (d) and adopting new paragraph (d).

28 FR 14504, Dec. 31, 1963, Parts 71-78: Explosives and Other Dangerous Articles, miscellaneous amendments to the regulations, effective March 18, 1964.

29 FR 3401, Mar. 14, 1964, Part 77: Shipments Made by Way of Common, Contract, or Private Carriers by Public Highway, §77.824 Retesting of cargo tanks. (d) Compressed gas cargo tanks, spec. MC-330, amended to read as set out, effective on date of order.

29 FR 5375, April 22, 1964, Parts 71-78: Explosives and Other Dangerous Articles, miscellaneous amendments, effective July 4, 1964.

29 FR 10431, July 28, 1964, Parts 71-78: Explosives and Other Dangerous Articles, miscellaneous amendments, effective Oct. 12, 1964.

29 FR 12588, Sept. 4, 1964, Part 77: Shipments [explosives] Made by Way of Common, Contract, or Private Carriers by Public Highway, §77.824 Retesting of cargo tanks, paragraph (d)(1) amended, effective on date of order.

29 FR 12776, Sept. 10, 1964, Part 77: Explosives, §77.824 Retesting cargo tanks, corrected amendment of paragraph (d)(1).

29 FR 13428, Sept. 29, 1964, Part 77: Explosives, §77.824 Restesting cargo tanks, paragraphs (d)(1) and (d)(4)(i) amended to read as set forth, effective on date of order.

29 FR 13927, Oct. 9, 1964, Parts 71-78: Explosives and Other Dangerous Articles, miscellaneous amendments, effective Dec. 19, 1964.

29 FR 14118, Oct. 14, 1964, Part 73: Explosives, corrections of order appearing at 29 FR 13927.

29 FR 13997, Oct. 10, 1964, Parts 71-78: Explosives and Other Dangerous Articles, miscellaneous amendments, effective

Dec. 19, 1964.

29 FR 14406, Oct. 20, 1964, Part 79: Specifications for Tank Cars, corrections of order published at 29 FR 13997.

29 FR 14495, Oct. 22, 1964, Part 79: Specifications for Tank Cars, paragraph (a) of §79.500-7 (29 FR 13997) corrected.

29 FR 18652, Dec. 29, 1964, Parts 71-90: Explosives and Other Dangerous Articles, regulations revised and republished in entirety, because of the numerous amendments, for convenience.

30 FR 579, Jan. 16, 1965, Part 78: Shipping Container Specifications, §78.337 Specification MC 331 (steel cargo tanks for compressed gas) through §78.337-18, added; applicable to all such tanks constructed after Sept. 1, 1965.

30 FR 5742, Apr. 23, 1965, Parts 71-79: Explosives and Other Dangerous Articles, miscellaneous amendments, effective July 7, 1965.

30 FR 7419, June 5, 1965, Parts 71-79: Explosives and Other Dangerous Articles, miscellaneous amendments, effective Aug. 22, 1965.

30 FR 8588, July 7, 1965, Parts 71-79: Explosives and Other Dangerous Articles, miscellaneous amendments, effective on date of order.

30 FR 8588, July 7, 1965, Parts 71-79: Explosives and Other Dangerous Articles, §73.22 Specification containers prescribed, paragraph (a)(1) amended, effective 5 days after date of order.

30 FR 13936, Nov. 4, 1965, Parts 73 and 77: Miscellaneous Amendments to regulations applying to transportation of Explosives and Other Dangerous Articles by private motor carriers.

31 FR 537, Jan. 15, 1966, Part 77: Transportation and explosives by private motor carriers, effective date of order of Oct. 21, 1965 (30 FR 13936) postponed until further order.

31 FR 2950, Feb. 19, 1966, Part 77: Shipments Made by Way of Common, Contract, or Private Carriers by Public Highways, §77.823 Required exterior marking on motor vehicles and combinations, amended entire §77.823 (29 FR 18799, Dec. 29, 1964), effective Sept. 1, 1966.

31 FR 6492, Apr. 29, 1966, Parts 71-79: Explosives and other Dangerous Articles, miscellaneous amendments, pertaining to radioactive materials; and also setting forth, for clarification, relationship between A.E.C., B of E. (AAR), and the Commission concerning transportation thereof. Special Permits issued prior to Apr. 1, 1966 under §73.22(a)(1) for transportation of radioactive materials, terminated. Effective July 12, 1966.

31 FR 9067, July 1, 1966, Parts 71-79: Explosives and other Dangerous Articles, miscellaneous amendments, pertaining to regulations governing the transportation of explosives and other dangerous articles, amended as set forth, effective July 1, 1966.

31 FR 9676, July 16, 1966, Parts 71-79: Explosives and other Dangerous Articles, miscellaneous amendments, corrects (31 FR 9067) as set forth, effective on date of order.

31 FR 6591, May 3, 1966, Parts 71-79: Explosives and other Dangerous Articles, miscellaneous amendments, corrects (31 FR 6422) as set forth, effective on date of order.

31 FR 6422 April 28, 1966. Parts 71-79: Explosives and other Dangerous Articles, miscellaneous amendments, amended as set forth, effective July 12, 1966.

31 FR 10531, Aug. 5, 1966, Part 77: Shipments Made by Way of Common, Contract, or Private Carriers by Public Highways; postponement of effective date of order (31 FR 2950).

31 FR 11549, Sep. 1, 1966, Part 77: Shipments Made by Way of Common, Contract, or Private Carriers by Public Highways; §77.823 Required Exterior Marking on Motor Vehicles and Combinations, revised, effective Jan. 1, 1967.

31 FR 11756, Sep. 8, 1966, Parts 71-79: Explosives and Other Dangerous Articles, Postponement of effective date of order (31 FR 9067) only insofar as the amendments to §§73.22(a) and 73.315(b) stayed pending disposition of the matter, effective date of order No. 71, dated 6-6-1966, remains as 9-5-66.

31 FR 16495, Dec. 24, 1966, Parts 71-79: Explosives and Other Dangerous Articles, effective date of order of Dec. 15, 1966 (31 FR 16318) regarding transportation of dangerous commodities by motor carriers, postponed until March 1, 1967.

32 FR 6, Jan. 4, 1967, Part 73: Shippers, miscellaneous amendments, §73.22 Specification containers prescribed, paragraph (a) amended and §73.315 Compressed gases in cargo tanks and portable tank containers, amended by addition of new paragraph (b)(1), effective 30 days after date of service.

32 FR 413, Jan. 14, 1967, Part 73: Shippers, §73.22(a) amended to correct typographical errors, and 73.315 amended by addition thereto of paragraph (b)(1), effective Jan. 28, 1967.

32 FR 1180, Feb. 2, 1967, Part 73: Shippers, ffective date of order of Dec. 21, 1966 (32 FR 413) postponed from Jan. 28, 1967 until March 1, 1967.

32 FR 2818, Feb. 11, 1967. Part 77: Shipments Made By Way of Common, Contract, or By Private Carriers By Public Highway, Subpart F—Regulations Applying to Transportation of Explosives and Other Dangerous Articles by Private Motor Carriers (30 FR 13936), as revised, cancelled and new Subpart F substituted in lieu thereof, effective May 1, 1967.

32 FR 3452, March 2, 1967, Parts 71-90: Explosives and Other Dangerous Articles, miscellaneous amendments, effective May 14, 1967.

32 FR 4360, Mch. 22, 1967, Part 77: Shipments Made By Way of Common, Contract, or Private Carriers By Public Highway, Subpart F — Regulations applying to transportation of Explosives and Other Dangerous Articles by private motor carriers, petition for modification of effective date in order of Jan. 12, 1967 (32 FR 2818) as to §77.875 and 77.876, denied.

32 FR 5273, Mch. 29, 1967, Parts 71-90: Explosives and Other Dangerous Articles, miscellaneous amendments, effective June 14, 1967.

NOTE: For recodification, see 49 CFR, Editorial Note, 32 FR 5606, April 5, 1967.

32 FR 5624, April 6, 1967, Part 173 [formerly Part 73]: Shippers, Authority vested in Director or Acting Director, Bureau of Operations and Compliance, redelegated to Chief or Acting Chief, Sec. of Explosives and Other Dangerous Articles; and §173.22(a)(1) and §173.33(c) amended, effective on date of order.

CONSULT THE TABLE OF CASES WHENEVER A CITATION IS FOLLOWED BY AN ASTERISK

32 FR 5624, April 6, 1967, Part 173 [formerly Part 73]: Shippers, §173.33(b)(2) amended, effective May 14, 1967.

Section 835. Administration.—[Unchanged. See vol. 19, p. 16019.]

INTERNAL REVENUE CODE OF 1954

26 USC §3231

RAILROAD RETIREMENT TAX ACT

Section 3231. Definitions.—[Unchanged. See vol. 17, p. 13702.]

Notes of Decisions

[1934 Act: Volume 7—p. 6198]; Volume 10—p. 8502; Volume 11—p. 9778; Volume 12—p. 10592; Volume 13—p. 11233; Volume 14—p. 11754; Volume 15—p. 12374.

JUDICIARY AND JUDICIAL PROCEDURE

Title 28 U.S.C.

Historical notes; see vol. 14, p. 11726; vol. 15, p. 12344.

THE SUPREME COURT

Chapter 81.—Title 28

Section 1253. Direct appeals from decisions of three-judge courts.—[Unchanged. See vol. 14, p. 11727.]

Notes of Decisions

Volume 15—p. 12345; Volume 19—p. 16020.

1. Direct appeal to Supreme Court.—[Vols. 4, 7, 10, 19].—On direct appeal from decision of three-judge court upholding the commission's grant of certificate to supply deficiencies in service resulting from refusal of trunk-line motor carriers to interchange with applicant's carrier stockholders because of "hot cargo" clauses in their union contracts, the Supreme Court took jurisdiction because of important questions raised as to relationship between remedies available under Interstate Commerce Act and under Labor Management Relations Act.—Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 (158-161)*.

Over a year before the district court sustained the commission's action the Labor Management Relations Act was amended by addition of §8(e), the plain language of which raised serious questions as to legality of direct union-employer agreements to boycott another employer; the district court erred in declining to consider effect of the new law in absence of authoritative judicial interpretation. Under that amendment the pressures which

generated the trunkline carriers' unwillingness to serve might be effectively removed; these intervening facts so changed the complexion of the case that the reviewing equity court should, in exercise of its sound discretion, have remanded it to the commission for further consideration in light of the changed conditions. Case remanded to the district court with direction to remand to the commission for further proceedings consistent with the Court's opinion.—Id., pp. 171-2, 174.

The Supreme Court has jurisdiction of a case, on direct appeal from a district court, if it was one required to be heard and determined by a three-judge district court. Since question, squarely raised by the issue as finally joined, of whether State regulatory scheme is unconstitutional because it burdens the exercise by the United States of its power to maintain a civilian service and carry out other constitutional functions is a substantial one, a three-judge court was required for its adjudication. There being a direct conflict between State law and provisions of the Constitution, there is a clear case for convening a three-judge court; once convened, the case may be disposed of below or in the Supreme Court on any ground, whether or not it would have justified the calling of a three-judge court.—United States v. Georgia Public Service Commission, 371 U.S. 285 (287)*.

Section 1254. Courts of appeals; certiorari; appeal; certified questions.—[Unchanged. See Vol. 14, p. 11727.]

Notes of Decisions

Volume 15—p. 12345; Volume 16—p. 12989; Volume 17—p. 13704; Volume 18—p. 14735; Volume 1—p. 16021.

COURTS OF APPEALS

Chapter 83.—Title 28

Section 1291. Final decisions of district courts.—[Unchanged. See vol. 18, p. 14736.]

Section 1292. Interlocutory decisions.—[Unchanged. See vol. 18, p. 14736.]

Notes of Decisions

Volume 14—p. 11728; Volume 15—p. 12345; Volume 16—p. 12889; Volume 17—p. 13704; Volume 18—p. 14737; Volume 19—p. 16021.

1. Appeals to Court of Appeals.—[Vols. 7, 10, 13-19].—Function of the court, on appeal of shipper's action to set aside and annul order of the Interstate Commerce Commission, is limited to determination of whether the commission's order was supported by substantial evidence and correctly applied the law; decision of the commission that rail rates charged on plaintiff's shipments were applicable, sustained.—General Motors Corp. v. United States, 299 F. 2d 233 (234-6)*.

While the district court gave no reasons for entering order dismissing "complaint" seeking review of a declaratory order of the commission as to applicability during certain periods of rates published on household goods in

certain tariffs, the order of dismissal is treated as a final appealable order. Where a plaintiff prosecutes an appeal from an order of dismissal of the complaint, he thereby elects to stand on the complaint and waives any right to request leave to amend.—National Van Lines, Inc. v. United States, 326 F. 2d 362 (366)*.

Since suit for an injunction against operation of motor carrier "driveaway" service without interstate authority was brought by the Interstate Commerce Commission rather than the United States, the appeal from the district court's dismissal of the complaint was properly taken to the Court of Appeals and not to the Supreme Court under 49 USC §45.—I.C.C. v. AAA Con Drivers Exchange, Inc., 340 F. 2d 820 (821, note)*.

Inasmuch as order denying motion to stay all proceedings in suit seeking an injunction and damages is not a final decision under §1291, it is appealable, if at all, only as an interlocutory order refusing an injunction under §1292; and an order staying or refusing to stay District Court proceedings is appealable as an interlocutory injunction only if the action in which it was made is essentially an action at law and the stay is sought to permit prior determination of some related equitable matter. The suit for injunctive relief is essentially equitable in nature, even though an award of damages is also sought; equitable injunction includes the power to provide complete relief in light of the statutory purpose; considered order denying motion to stay is not appealable.—Ephraim Freightways, Inc. v. Red Ball Motor Freight, Inc., 376 F. 2d 40 (41)*.

DISTRICT COURTS; JURISDICTION

Chapter 85.—Title 28

Section 1331. Federal question; amount in controversy; costs.—[Unchanged. See vol. 18, p. 14737.]

Notes of Decisions

Volume 16—p. 12990; Volume 17—p. 13704; Volume 18—p. 14738; Volume 19—p. 16022.

1. Federal questions, generally.—[Vols. 16, 17, 19].—Federal District court had jurisdiction in action by lessor and lessee railroads and their officers and employees for declaratory judgment that suit brought against them in State court by appellee city was for purpose of suspending and annulling Interstate Commerce Commission's order which approved their lease application. The case is Federal, for purpose of jurisdiction, since, the least contract having been authorized by the commission pursuant to 49 U.S.C. §5(2)—and without such authorization it would have no validity—it involves the commission's statutory power to authorize and give validity to provision thereof which, in accordance with commission decision and order, relieved the railroads from obligation to maintain offices and shops at any particular place, including appellee city, now claimed by the city to exceed the power that Congress granted to the commission. Following the decision in 328 F. 2d 720, lower court's conclusion that there was no federal jurisdiction, and its dismissal of the complaint, reversed and remanded.—St. Louis S. W. Ry. Co. v. City of Tyler, Texas, 375 F. 2d 938 (940-2).

The jurisdiction of federal courts lies within the power of Congress to regulate: if Congress has given the district court power to entertain jurisdiction, it may do so, but not otherwise. Courts created by statute can have no jurisdiction but such as the statute confers; unless a statutory basis for jurisdiction exists, persons have no right to proceed, or be proceeded against, in the first instance in a federal rather than a state court. Where there is no diversity of citizenship of the parties, the major category of cases which the federal courts have authority to hear is that involving "federal questions" arising under the Constitution, laws, and treaties of the United States;

and merely making the United States an additional party to an otherwise private suit neither creates diversity of citizenship nor imports a federal question.—McFaddin Exp., Inc. v. Adley Corp., 240 F. Supp. 791 (794, 797)*.

For federal-question jurisdiction to exist, a controverted question of federal law must form a substantial part of the plaintiff's case; but in seeking remedies for alleged breaches of stock-purchase and management contracts plaintiffs' complaint is based, in all its essential features, on contracts negotiated at arms' length in the open market, which owed nothing to federal legislation, and every question raised depends for decision on conventional common-law concepts applicable in suits to enforce purely private rights. While in construing the contracts it might be expedient or even necessary to refer to or consult the statutes upon which the parties' applications to merge and to temporarily operate plaintiff carrier's business were based, that does not make the case one of federal cognizance; neither the cause of action nor the defense is founded on a law of the United States in any such sense as to bring the suit within jurisdiction of the federal courts.—Id., pp. 794-5.

Any effect of the management contract attached to the application for temporary control authority was merely to corroborate applicants' representations as to completeness of the control being conferred. The legal requirements for ICC approval are grounded in the purposes underlying the whole statutory scheme for regulation of interstate motor freight transportation, as affecting not only carrier-shipper relations but also the general public interest in adequate nondiscriminatory transportation at reasonable rates. The commission's concern with any possible effect of the contracts, other than as basis for temporary permission for defendant's control of plaintiff carrier, was completely divorced from any concern the parties to the contracts might have inter sese. The commission's function, under the order granting temporary control authority, was only to enforce compliance with its rules and regulations, not to enforce either the management contract or the stock-purchase contract; and no violation of any ICC regulation is alleged. As no federal question is presented, complaint is dismissed without prejudice.—Id., pp. 795, 796.

The test of federal jurisdiction, whether asserted under the federal question or the commerce and antitrust section of the jurisdiction statutes, is that it must appear from the complaint that the construction of a federal statute will have an adverse effect on the right of recovery if construed in one, rather than another, way.—Florida East Coast Ry. Co. v. Jacksonville Terminal Co., 328 F. 2d 720 (722)*.

Federal court has jurisdiction in action for breach of contract for joint ownership and management of defendant railroad terminal company when a specific contract for joint ownership of the terminal had been approved by the Interstate Commerce Commission, the contract contained express provisions dealing with management personnel, and the complaint specifically alleges a breach of that contract touching upon management personnel. The contract, which was authorized by federal statute and made legal only because of such statute, may be construed by the federal court upon plaintiff's application.—Id., p. 722.

4. Suits arising under the Constitution or laws of the United States.—[Vols. 18-19].—Survival of a judicial remedy under the saving clause of §216(j) of Interstate Commerce Act does not depend on whether the commission has primary jurisdiction to decide the basic question on which relief depends. The doctrine of primary jurisdiction is designed to apply where a claim is originally cognizable in the courts and its enforcement requires resolution of issues placed within the special competence of an administrative body. Survival of judicial remedy depends on effect of its exercise on the statutory scheme of regulation; according to §216(j), if the remedy is inconsistent with that scheme, it does not survive.—Hewitt-Robins Inc. v. Eastern Freight-Ways, Inc., 371 U.S. 84 (88-9)*.

In action to recover damages for death of valuable quarter horse from heat exhaustion, which occurred during shipment in enclosed van type trailer across southern California in very hot weather, complainant owner was not bound by the $150 declared value thereof shown in the bill of lading when he had not requested that the horse be shipped to him by

motor carrier, nor was he aware that such action was being taken. Although owner had temporarily placed his horse in exclusive control of operator of breeding ranch, and latter's employee had signed the bill of lading, mere possession carries no indication of any right to engage in any transactions of any serious consequence to the owner; placing the horse in control of the ranch did not vest latter with "apparent authority" to enter into a contract binding upon the owner for purpose of effecting its return. The rule is long standing that possession of a chattel, standing alone, does not authorize an agent to effect the principal's interest. Lower court's judgment for owner, in amount of $25,000, affirmed.—Lux Art Van Service, Inc. v. Pollard, 344 F. 2d 883 (887-9).

District court properly dismissed, for want of federal jurisdiction, complaint of motor carrier and its stockholders for injuries allegedly inflicted by defendant carrier during temporary control that was authorized by Interstate Commerce Commission under §210a(b) of the act, pending determination of their purchase application which the commission disapproved. Claim that defendant (vendee in purchase proceeding) exceeded its temporary authority by going beyond terms of the control agreement in its management of plaintiff carrier (vendor), thus violating §5(4) of IC Act and giving rise to a private claim on plaintiffs' part arising under a federal law, must fail. In enacting the Motor Carrier Act, Chap. 8 of the IC Act, Congress omitted any provisions comparable to §§8 and 9 of Chap. 1 thereof which make carriers subject to Chap. 1 liable for damages for any violation and give injured parties the remedy of complaining to the commission or of bringing suit in federal court; that omission was not inadvertent.—McFadding Express, Inc. v. Adled Corporation, 363 F. 2d 546 (547-8)*.

It can be argued that, as motor carrier's subjection to §5(4) since 1940 derives not from the Motor Carrier Act but from §5(13) defining motor carriers as within "carrier" as used in §5, violation of §5(4) by a motor carrier is a violation by "a carrier subject to the provisions of this chapter" within terms of §§8 and 9; however, desire of draftsmen of the 1940 legislation, which set out the National Transportation Policy and adopted the Water Carrier Act, to have a single comprehensive provision relating to consolidation of all three forms of transportation, rather than frame separate sections for each, would not suggest a legislative purpose to provide a private remedy for unlawful control by a motor carrier that had previously been withheld. In addition, no private right of action for motor carrier's violation of §5(4) having existed prior to the 1965 amendment of §204a and §222(b), the court should not assume a desire to change that in absence of some indication of Congressional intent; neither language of the 1965 law nor the legislative history affords any such indication.—Id., pp. 548-9.

The court reads §§8 and 9 to concern only violations of 49 U.S.C., Chap. 1, by carriers generally subject to its provisions, that is, those, primarily railroads, to which §1(1) says provisions of the chapter apply. Therefore, absent a provision in the Motor Carrier Act, no private right of action against a motor carrier for a §5(4) violation exists. Furthermore, having withheld a private remedy for violation of the Interstate Commerce Act, it would be highly unlikely that Congress intended that acts by an acquiring carrier against carrier to be acquired, allegedly in excess of its management contract rights, should give rise to a claim under 28 U.S.C. §1331 or §1337; and, while there is doubtless a federal policy that a carrier authorized to exercise temporary control of another will use such permission in accordance with its agreement, merely infusing the agreement with such policy is not enough to cause a suit for breach of contract to constitute a federal claim. Affirmed.—Id., p. 550.

In order for an agency of the government to be sued in its own name, the congressional act creating such agency must so provide. Since Congress has not authorized suit against defendant (an agency of Department of Agriculture), any action against it would be equivalent of a direct suit against the Government which cannot be maintained in absence of congressional waiver of sovereign immunity. Suit to recover damages from defendant allegedly resulting from certain action by it is accordingly dismissed.—Winneshiek Mutual Insurance Ass'n v. Farmers Home Admin., 233 F. Supp. 691 (692).

For a controversy to arise "under laws of Congress regulating commerce" so as to enable the court to exercise jurisdiction over the matter, there must, at the very least, first be such "laws." Nothing in complaint alleging mismanagement of plaintiff's business by defendant during temporary control under authority from the commission advises defendants what is the law that creates the cause of action, nor does it anywise appear what law regulating commerce might require judicial construction; examples of the wide scope of congressional legislation under the Commerce Clause are not pertinent, for the court's jurisdiction is not coextensive with the powers of Congress. Complaint dismissed for lack of jurisdiction.—McFaddin Exp., Inc. v. Adley Corp., 240 F. Supp. 791 (795)*.

See also United States v. City of Jackson, Miss., 28 USC §2322, n. 1.

10. Costs.—[Vol. 18].—See (also) United States v. Indiana Harbor Belt, 45 USC §6, n. 14.

Section 1332. Diversity of citizenship; amount in controversy; costs.—[Note: by §2 of Public Law 88-439, the following amendment to 28 USC §1332(c) applies only to causes of action arising after the date of enactment.] (c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: Provided further, that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business. (Aug. 14, 1964, Public Law 88-439, 78 Stat 445.) [See also vol. 18, p. 14738.]

Notes of Decisions

Volume 4—p. 3121; Volume 11—p. 9767; Volume 12—p. 10576; Volume 13—p. 11214; Volume 14—p. 11729; Volume 15—p. 12346; Volume 16—p. 12991; Volume 17—p. 13705; Volume 18—p. 14379; Volume 19—p. 16023.

3. Citizenship of parties and amount in controversy.—[Vols. 4, 11-19].—Diversity of citizenship is not established by statement in complaint that plaintiff is a corporation organized under laws of Tennessee and defendant is a foreign corporation, a citizen of Missouri; express allegation should have been made that defendant is incorporated or organized and existing under laws of Missouri, and the principal place of business of each party should have been alleged.—First Flight Co. v. National Carloading Corp., 209 F. Supp. 730 (732, note); however, it is immaterial whether there is diversity of citizenship where both principal and third-party complaints are based at least partly on a federal question; such federal claims, where not plainly wanting in substance, confer jurisdiction on the court to entertain the nonfederal aspects of the case under the concept of pendent jurisdiction, and once jurisdiction of the principal suit is established no independent basis of jurisdiction is required to sustain the third-party suit.—Id., p. 735.

Failure of petition for removal of case to federal court to allege citizenship arising from State of defendant's incorporation and location of its principal place of business was a fatal defect that could not be cured by amendment after time within which removal could have been effected had elapsed.—Young v. Railway Exp. Agency, Inc., 209 F. Supp. 953.

Railroad's liability to its employees who were adversely affected by rail merger, approved by the Interstate Commerce Commission subject to conditions for protection of employees, being a several and not a joint liability, employee claims cannot be aggregated for jurisdictional purposes; court action may be sustained only with respect to those employees whose claims individually involve requisite jurisdictional amount. Though test for determining amount in controversy is value to plaintiff of the right he is seeking to protect, jurisdictional amount is determined by the claim and not by actual amount awarded. However, it must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.—Louisville & N. R. Co. v. Cantrell, 215 F. Supp. 229 (231)*.

When it is necessary, in order to ascertain the amount in controversy, to consider conflicting testimony, or to decide disputed questions of law, such necessity alone gives the court jurisdiction; the court must hear the case, and reach its conclusion judicially; in other words, must take jurisdiction. Thus, since both issues of law and fact are presented relative to validity and effectiveness of election by certain employees to accept lump sum settlement, requisite jurisdictional amount is involved as to claims of those employees. And contention that railroad's total liability should be reduced by the employees' outside earnings fails to recognize that the amount in controversy is ascertained without reference to events occurring subsequent to institution of suit which might reduce that amount below the statutory limit.—Id., pp. 232-3.

In diversity of citizenship cases, the court will look to the law of the State in which it is sitting to determine whether a foreign corporation is doing business in the State so as to be subject to jurisdiction of the federal court; and under Wisconsin law solicitation of business, especially where continuous, constitutes "doing business" for purpose of amenability to court jurisdiction.Defendant railroad, a Kansas corporation which owns no tracks and carries neither freight nor passengers in Wisconsin, is therefore amenable to jurisdiction of the federal district court in that State when it maintains an office in Milwaukee for solicitation of freight and passenger business, and plaintiffs purchased their tickets, for use on its railroad, in Wisconsin.—Hornstein v. Atchison, T. & S.F. Ry. Co., 229 F. Supp. 1009 (1010-11).

When plaintiffs brought separate actions in State court against a nonresident railroad and against the estate of a resident, but did not join claims or defendants in the State suits, they were not entitled to remand following railroad's removal of actions against it to federal court. Writs issued against the railroad show no defect of federal jurisdiction, and there is complete diversity of citizenship and amounts in controversy exceed $10,000. While the cases arise out of the same railroad crossing collision, and plaintiffs could have prevented removal by the railroad had they joined defendants in the original suits, they chose to bring separate actions; the court is not required to revise plaintiffs' choice at this time, to recast their original pleading and so deprive the railroad of its right to remove.—Roby v. Maine Central Railroad, 243 F. Supp. 153 (154-6).

Legislative history of the statute is conclusive that the locus of corporate operations is a more important factor than the locus of over-all policy direction or control in determination of the "principal place of business" of a corporation. Thus, when defendant railroad carries on a predominance of its corporate operations in Oklahoma (most of its track mileage, offices, depots, and assets being located in, and most of its personnel being employed in, that State) no federal diversity jurisdiction is present in suit brought by an Oklahoma resident in State court and removed by defendant to Federal court. Case remanded to State court.—Foster v. Midland Valley R. Co., 245 F. Supp. 60 (61-2).

See also Barney v. Staten Island Rapid Transit Ry. Co., SA, 45 USC §1, n. 10.

Section 1334. Bankruptcy matters and proceedings.—[Unchanged. See vol. 16, p. 12991.]

Section 1336. Interstate Commerce Commission's orders.—

Act of Aug. 30, 1964, Public Law 88-513, 78 Stat. 695, designates the present text as subsection (a) and adds new subsections (b) and (c) as follows:

(b) When a district court or the Court of Claims refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.

(c) Any action brought under subsection (b) of this section shall be filed within 90 days from the date that the order of the Interstate Commerce Commission becomes final. [See vol. 14, p. 11730.]

Notes of Decisions

Volume 15—p. 12346; Volume 16—p. 12991; Volume 17—p. 13706; Volume 18—p. 14739; Volume 19—p. 16023.

2. Construction and interpretation.—[Vols. 15-19.]—Since §9 of Interstate Commerce Act does not impair shipper's right to obtain judicial review of adverse commission orders merely because the order was sought as a basis for reparations, district court had jurisdiction in shipper's action to set aside and annul an adverse order of the commission.—General Motors Corp. v. United States, 299 F. 2d 233 (234)*.

Giving deference to the commission's expertise in the exercise of its primary jurisdiction, following decision in 352 US 59 as to one of the basic problems of the controversy in issue, the district court's action sustaining the commission's conclusion that railroads' classification rating on incendiary bombs applied on Government shipments of napalm gel and Pyrogel bombs, minus bursters and fuses, is affirmed. In view of the commission's analysis, and its conclusion therefrom, record affords no basis for a different result in the Courts.—United States v. I.C.C., 315 F. 2d 44 (46-7)*.

Validity of the commission's decision in proceeding involving the same tariff, like traffic, and a similar situation, wherein appellee was a party, that "transit privilege" as used in tariff item in issue did not include inspection or reconsignment, cannot be questioned in subsequent action for recovery of alleged overcharges; to rule otherwise would be to permit a collateral attack on that decision.—United States v. Great Northern Ry. Co., 337 F. 2d 243 (248)*; and while the possibility of unreasonable results flowing from that interpretation might well have provided a basis to attack the commission's construction of the tariff initially, such attack cannot now be made in a collateral action.—Id., p. 249.

Suit seeking severance pay or alternative mandatory arbitration, brought by railroad employees who were retired at age 65 without severance pay pursuant to 1962 union contract with defendant railroads, is based on theory that the contract contravened conditions of 1961 Interstate Commerce Commission decision providing severance pay for employees who lose their jobs as a result of the abandonment authorized therein; however, plaintiffs complained of the same wrongs in earlier lawsuit between the same parties wherein the contract was attacked as a violation of the Railway Labor Act. This court held in the earlier suit, 323 F. 2d 219, affirming 211 F. Supp. 379, that involuntary retirement provisions in the 1962 contract were valid and binding on plaintiffs; therefore, since reliance on different statutes does not render their claims different "causes of action" for purposes of res judicata, plaintiffs cannot now obtain reconsideration of that holding even on

a ground not heretofore urged. Lower court's judgment reversed and cause remanded for summary judgment in defendants' favor on the ground of res judicata.—Clemens v. Central R. Co. of New Jersey, 399 F. 2d 825 (826-8)*.

Neither the commission's order giving notice that it had concluded not to enter upon an investigation of proposed train discontinuance, nor its order denying petition for reconsideration of such decision, qualifies as an "order" subject to judicial review within meaning of 28 USC §1336; neither action was final, both were completely gratuitous and in effect of no more technical significance than informal statements of commission policy.—Sludden v. United States, 211 F. Supp. 150 (154)*.

The commission's order determining that certain rates charged on Government shipments were unreasonable, as reflected in deductions made by General Accounting Office on post audit, is one "for the payment of money," hence action to enjoin or set aside that order in whole or in part may be heard and determined by a single judge without necessity of a three-judge court.—Baltimore & O. R. Co. v. United States, 217 F. Supp. 918 (919)*.

While the statute provides for appeals from "any order" of the commission, the reasoning behind a decision on a matter within the commission's sole discretion is not something which the court can review. When, after investigation into railroad's proposed discontinuance of passenger trains, the commission decided not to interfere with the service cutbacks and entered an order discontinuing the investigation, the decision to take no action is not reviewable by the courts; and the order terminating the investigation is not an appealable order within meaning of the statute. However, even if the court had jurisdiction to review the commission's findings that value of the service was outweighed by the burden on the railroad, the result would be the same. Such a decision of the commission will not be set aside if it supported by substantial evidence and, even though the commission's conclusion might not have been the only possible one, ample evidence in the record supports it. Complaint dismissed.—State of Minnesota v. United States, 238 F. Supp. 107 (110, 112-13)*.

That the commission approved defendant's temporary control of plaintiffs' carrier business under §210a(b) of Interstate Commerce Act has no significant bearing on jurisdiction of the district court to act on complaint seeking damages for defendant's alleged mismanagement of the business under such temporary authority. No mandatory order of the commission is involved, the authority granted being permissive only. Plaintiffs' contention that they are seeking to "enforce an order of the ICC" and that jurisdiction therefor lies under 28 U.S.C. §1336 is rejected.—McFaddin Exp., Inc. v. Adley Corp., 240 F. Supp. 791 (796)*.

See also I.C.C. v. Atlantic Coast Line, 49 USC §17(9), n. 2.

Section 1337. Commerce and anti-trust regulations.—[Unchanged. See vol. 15, p. 12347.]

Notes of Decisions

Volume 4—p. 3121; Volume 7—p. 6080; Volume 10—p. 8425; Volume 11—p. 9767; Volume 12—p. 10576; Volume 13—p. 11214; Volume 14—p. 11729; Volume 15—p. 12347; Volume 16—p. 12991; Volume 17—p. 13706; Volume 18—p. 14740; Volume 19—p. 16026.

1. Suits arising under law regulating commerce.—[Vols. 4, 7, 10, 12, 13, 15-19].—Complaint in shipper's action (brought in State court) for damage to goods tendered in good condition for interstate movement by defendant, but delivered in damaged condition, states a claim or right "arising under" federal law. There can be little doubt now that the Carmack amendment, 49 USC §20(11), pre-empts the field and su-

persedes all state common law rights as to liability of carriers for damage to shipments moving on interstate bills of lading; under that amendment and the bills-of-lading statutes, carrier liability for damage to interstate shipments is a matter controlled by federal statutes and decisions; and mere fact that plaintiff does not allege that his cause of action is based on federal law cannot be decisive in determining jurisdiction. Accordingly, the District Court has jurisdiction over the matter; plaintiff's motion to remand to the State court is denied.—Sylgab Steel & Wire Corp. v. Strickland Transp. Co., 270 F. Supp. 264 (267-9, 271).

That both contracts between interstate motor carriers, one providing for vendee's purchase of vendor's stock and the other providing for former's temporary control of latter pending Interstate Commerce Commission's determination of the purchase application, could not lawfully be carried out without the commission's approval does not, without more, demonstrate that Congress meant all aspects of their performance or nonperformance to be governed by federal law rather than state laws applicable to similar contracts relating to businesses not under federal control. This is not to say that a particular issue concerning such a contract would not require determination under federal principles, but instant complaint does not suggest presence of any such issue. Lower court's decision that federal-question jurisdiction had not been established, and its refusal to entertain complainant's claims under state law on a theory of "pendent jurisdiction," affirmed.—McFaddin Exp., Inc. v. Adley Corp., 346 F. 2d 424 (425, 427)*.

Suit to restrain application of rates under investigation in proceeding before the commission, which have become effective by virtue of expiration of the statutory suspension period, in essence asks the court to declare that the statutory period is inadequate; however, Congress has fixed 7 months as the maximum period of suspension, and in extending that period, in face of the clear mandate of §15(7) that, if the proceeding has not been concluded and an order made by end of that period, the proposed change shall go into effect, the courts would in effect be amending the statute, which is a matter beyond their power. District court's denial of appellants' motion for preliminary injunction, affirmed.—Arrow Transp. Co. v. Southern Ry. Co., 308 F. 2d 181 (186)*.

Demurrage charges are no part of the rate charges for transportation of shipments; although in prior proceeding which arose out of same bill-of-lading transaction judgment for plaintiff was entered upon agreement between the parties on an amount in full settlement of all claims asserted for additional transportation charges, no claims for demurrage were there asserted, and the prior judgment is not res judicata as to suit to recover demurrage charges on same shipments.—Great Northern Ry. Co. v. United States, 312 F. 2d 906 (910).

The test of jurisdiction under 28 USC §1337, as laid down in 299 US 109, is that the right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. Whether dispute between railroad and employees should be settled as provided in protective agreement approved by the commission under Interstate Commerce Act, or by procedures prescribed in Railway Labor Act, presents a substantial problem of statutory construction that fully satisfies that test.—Brotherhood of Locomotive Engineers v. Chicago & N.W. Ry. Co., 314 F. 2d 424 (428)*.

The principle is firmly established that, in cases requiring exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts, after they have been appraised by specialized competence, serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.—Carnation Co. v. Pacific Westbound Conference, 336 F. 2d 650 (655).

Since issue in controversy involves interpretation and effect of §5(11) of the Interstate Commerce Act on the commission's order approving merger, jurisdiction of the matter before the court is conferred by 28 USC §1337. Such being the case, diversity of citizenship and jurisdictional amount are not essential.—Chicago & N.W. Ry. Co. v. Brotherhood of Locomotive Engineers, 202 F. Supp. 277 (282)*.

If an administrative agency such as Interstate Commerce Commission has jurisdiction to deal with issues of fact raised in an action before the court, the doctrine of primary jurisdiction applies regardless of whether the agency's jurisdiction has already been invoked.—American Com'l Barge Line Co. v. Eastern Gas & Fuel Ass'n, 204 F. Supp. 451 (453).

Changes in operation of sleeping-car service proposed to be made by the Pennsylvania and Pullman Co. constitute changes in existing pooling agreement within scope of §5(1) of Interstate Commerce Act. Plaintiffs, Pullman conductors who would lose their jobs as result of such changes, bring suit on behalf of other Pullman conductors similarly situated, who constitute a class so numerous that it would be impracticable to bring them all before the court; plaintiffs fairly and adequately represent that class, and action is properly brought as a true class suit.—Brogan v. Pennsylvania R. Co., 211 F. Supp. 881 (885, 886).

Federal district court has original jurisdiction of carrier's action to recover undercharges allegedly due because plaintiff failed to charge and collect full tariff charges applicable on considered shipments. There being no genuine issue of any material fact, only a question of law remains to be decided, namely, construction of the published tariff to determine proper charges to be made by carrier and to be paid by shipper.—Miller v. Ideal Cement Co., 214 F. Supp. 717 (718, 720).

While the courts have not always agreed on the question of what is a suit arising under a federal statute, paramount among established guides is the postulate that a right or immunity created by federal statute must be involved. Federal nature of the right is decisive, and jurisdiction cannot be determined by the source of the authority to establish the right; the federal right must be a paramount, not collateral, issue in the suit. Thus, even though one of the parties is engaged in interstate commerce and subject to regulation under a federal statute, the court has no jurisdiction of a matter concerned solely with a contract between the adverse parties. Plaintiff's rights, whatever they are or may be, arise out of its joint-trackage agreement with defendant, not out of provisions of the Interstate Commerce Act; complaint dismissed for want of federal jurisdiction.—Chicago & N. W. Ry. Co. v. Toledo, P. & W. R. Co., 217 F. Supp. 64 (67-8, 70)*.

Motion for dismissal, for lack of subject-matter jurisdiction, of suit to collect money claimed due and owed plaintiff railroad because of alleged underpayments for use of freight cars it furnished defendant, denied. While the Interstate Commerce Act does not expressly require one railroad to pay another just and reasonable charges for use of latter's cars, that requirement and the right of furnishing carrier to sue for such charges is implicit in provisions of §1(4), (5), and (11) of that act. A carrier may be held liable, both civilly and criminally, for violating the duties imposed by those sections; and it would be both illogical and inequitable were carrier precluded from suing for the just and reasonable charges required by §1(5) after having provided car service pursuant to §1(11). The obligation to furnish cars is a duty arising under a federal law; the right which implicitly attends that duty must also "arise" from statute creating the duty; thus, plaintiff's action arises under an Act of Congress regulating commerce.—Clinchfield R. Co. v. Boston & Maine Corp., 258 F. Supp. 467 (468-9).

See also Pennsylvania R. Co. v. Sharfsin, §13a, n. 1.

Section 1339. Postal matters.—[Unchanged. See vol. 15, p. 12348.]

Notes of Decision

2. Construction and interpretation.—[Vol. 17].—Action seeking injunctive relief against proposed increase in size and weight of parcel post packages dismissed as premature because (1) the court has no jurisdiction until the Interstate Commerce Commission either approves or disapproves the proposed action of the Postmaster General, and (2) plaintiff Railway Exp. Agency cannot sustain damage until there is an increase in size and weight of parcel post packages.—Railway Exp. Agency, Inc. v. Day, 209 F. Supp. 766 (768).

Section 1398. Interstate Commerce Commission's orders.—

Act of Aug. 30, 1964, Public Law 88-513, 78 Stat. 695, designates the present test as subsection (a) and adds a new subsection (b) as follows:

(b) A civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, an order of the Interstate Commerce Commission made pursuant to the referral of a question or issue by a district court or by the Court of Claims, shall be brought only in the court which referred the question or issue.[See vol. 14, p. 11730.]

Notes of Decisions

Volume 4—p. 3126; Volume 7—p. 6081; Volume 10—p. 8427; Volume 12—p. 10577; Volume 14—p. 11731; Volume 15—p. 12348; Volume 16—p. 12993; Volume 18—p. 14740.

2. Suits to enforce, suspend, or set aside orders of commission.—[Vols. 4, 12, 18.]—Action, termed loosely one "to enforce" a commission order, asking Missouri single judge court to order the Interstate Commerce Commission to issue motor carrier permit to plaintiff, and to restrain defendants from pursuing suit filed in Alabama three-judge court (wherein defendant carrier is seeking to have the commission's grant of contract carrier authority to plaintiff set aside) pending determination hereof, presents no cause of action within the court's jurisdiction. In effect, plaintiff is really seeking to accomplish a transfer of matters before the Alabama court to the Missouri single-judge court; in other words, plaintiff seeks to compel carrier to challenge validity of the commission decision (if it is to have any right of challenge) in an improper forum.—H. Messick, Inc. v. Baggett Transp. Co., 268 F. Supp. 459 (460, 461).

The commission's decision that plaintiff should be awarded the permit sought is under timely review before the Alabama court that earlier had remanded the case for further action, and enforcement thereof is temporarily enjoined by that court; thus, issuance of order requested by plaintiff would have effect of depriving defendant carrier of its three-judge court review of the propriety of that decision and order, and also would place the commission in the unconscionable position of being forced to violate the order of one of the two federal courts. It would be improper now to direct the commission to issue the permit to plaintiff in direct violation of the Alabama court's order. As the case now stands, plaintiff has no legal right to seek "to enforce" the unissued order in the Missouri court; complaint dismissed with prejudice.—Id., pp. 460, 461.

The commission's decision denying reparation, being correctly dealt with procedurally, is properly reviewable by a one-judge District Court.—William N. Feinstein & Co. v. United States, 209 F. Supp. 613 (619)*.

Plaintiff being an Illinois corporation with headquarters in Chicago, its suit to set aside the commission's order in question was improperly brought in Minnesota; the statute provides that such action be brought in the judicial district where plaintiff resides; and the parties choose not to waive improper venue. Thus, the court must either dismiss the case, as sought by intervener with concomitant dissolution of temporary restraining order obtained by plaintiff on basis of alleged

irreparable damage, or transfer it to the proper forum as urged by plaintiff. Since plaintiff acted in good faith in laying the venue in Minnesota, and its action reflects no effort to circumvent process statutes or any other imrpoper or questionable purposes, such as would call for the more drastic dismissal, it would be an injustice to it to dismiss the suit and thus terminate the temporary injunction. Case is a proper one, "in the interest of justice," for transfer to the proper forum; transferred to Northern District of Illinois, with temporary injunction maintained in force until its determination by that court.—Clark Transport Co. v. I.C.C., 228 F. Supp. 236 (237-8).

See also Borough of Moosic v. United States, 28 USC §2325, n. 11; I.C.C. v. Atlantic Coast Line, 49 USC §17(9), n. 2.

4. District of residence of party upon whose petition order was made.—[Vols. 4, 14, 15, 16].—Suit asking the Missouri court to order the commission to issue motor carrier permit to plaintiff, and to restrain defendants from pursuing action in Alabama court (wherein defendant carrier seeks to have commission order granting the permit set aside) pending determination hereof, presents no cause of action within the court's jurisdiction. Defendant carrier, unsuccessful party before the commission, has a statutory right to seek to have the order set aside by filing a proper suit in its home district; it cannot be compelled directly or indirectly to have such action tried in Missouri, as that would not only deprive it of its rightful forum but would also disrupt the orderly process of judicial review intended by pertinent statutes. If plaintiff is allowed to do what it is attempting, any successful party before the commission could prevent its opponent from obtaining judicial review in the district of its residence simply by filing its own suit "to enforce" the decision, and by asking that opponent's be stayed. Such a proceeding, if tolerated, would clearly disrupt the statutory scheme of review established by Congress. Complaint dismissed.—H. Messick, Inc. v. Baggett Transp. Co., 268 F. Supp. 459 (460, 461).

Section 1391(c), which provides that the judicial district in which a corporation is incorporated or is doing business shall be regarded as its "residence" for venue purposes, is a general venue statute which is not applicable to, and does not enlarge the meaning of, the provisions of §1398, which is a special statute brought to review orders of the commission and makes venue dependent on plaintiff's "residence"; and the Supreme Court has consistently held that the "residence" of a corporation is only in the State and district in which it was incorporated. Plaintiff which was incorporated under the laws of Montana and has its principal office and place of business at Chicago may not bring action to set aside an order of the commission in the Western District of Pennsylvania by reason of its processing plant at Sharpsburg, Pa., but under §1398 may do so in Montana or in the proper district in Illinois.—Zonolite Co. v. United States, 209 F. Supp. 597 (598-9)*.

While, in complaint seeking to set aside an order of the Interstate Commerce Commission, venue provisions should be clearly laid, objections to defects in venue as prescribed by the statute need not be asserted. Federal district court in which complaint was filed clearly has jurisdiction of subject matter therein; and, if objection to venue is not made, suit can be maintained in a district where proper venue does not exist. Three-judge statutory court prayed for by plaintiff will be created.—Rhodes v. United States, 218 F. Supp. 382 (382-3).

Section 1404. Change of venue.—[Unchanged. See vol. 16, p. 12993.]

Notes of Decisions

Volume 16—p. 12993; Volume 17—p. 13707; Volume 18—p. 14740; Volume 19—p. 16028.

1. Transfer of actions.—[Vols. 16, 17, 18, 19].—The venue statutes are a safeguard against inconvenient litigation at a distance from the "home" or place of business of the defendant, and under §1391(c) a corporation generally may challenge the venue (not the

jurisdiction) of any suit brought against it in a federal district in which it is not "doing business." While the venue privilege is not open to a third-party defendant, such a defendant may ask that the court exercise its discretion under Rule 14 of Federal Rules of Civil Procedure against permitting maintenance of the third-party suit. Finally, there is always available a motion for change of venue under the forum non conveniens statute, which is defendant's last resort, since inconvenience and distance of litigation have no bearing on the question of personal jurisdiction.—First Flight Co. v. National Carloading Corp., 209 F. Supp. 730 (739-40).

Interests of justice require that defendant's motion to transfer action to recover damages on considered shipments because of forum non conveniens be granted. Plaintiff chose to do business in Colorado, its shipments moved from that State to the East, but none moved through Texas; and, even though plaintiff may have moved all its records to Texas, it would be more unfair to require defendant to bring its records to southern Texas, where it had never done business, than to require complainant to take its records back to State where it chose to do business. Action transferred to District court for State of Colorado.—McBride Produce Co. v. Denver & R.G. W. R. Co., 227 F. Supp. 399 (400).

Third-party defendant's motion to transfer motor vehicle collision case from district where instituted to the district where the collision occurred, where other suits arising out of the same collision have been instituted, and where it might be reached earlier for trial, denied. While it may perhaps be advantageous to try the case in the district to which transfer is sought, alleged inconvenience to parties, witnesses and the administration of justice do not outweigh plaintiff's right to choose his forum; plaintiff resides in district where suit was brought. there is no indication that bringing suit there was for purpose of harassing or imposing undue hardship on defendant, and third-party defendant (not sued by plaintiff) can make no charge of unfair advantage against plaintiff. Sufficient equities to justify exercise of the court's discretion to transfer the action, not demonstrated.—Sell v. Greyhound Corp., 228 F. Supp. 134 (136-7).

On defendant's motion to transfer personal injury action by passenger on its train from one federal district to another for convenience of parties and witnesses and in the interest of justice, plaintiff's choice of forum should prevail unless the balance as to convenience is strongly in favor of defendant. The ultimate inquiry is where the trial will best serve convenience of the parties and the ends of justice; much is left to discretion of the court to whch plaintiff first resorts. District court where suit was brought and the one to which transfer is sought are both current; defendant's supporting affidavits do not indicate harassment; motion for change of venue, denied.—Johnson v. Chicago, R.I. and P. R. Co., 228 F. Supp. 160 (161).

Action to set aside the commission's order authorizing issuance of a motor carrier permit is a proper case, "in the interest of justice," for transfer. Plaintiff, an Illinois corporation with headquarters in Chicago, acted in good faith in beinging suit in Minnesota: however, the statute provides that such action be brought in the district where plaintiff resides and, since the parties do not choose to waive improper venue, the court must either dismiss the suit or transfer it to the proper forum. As commencing the action in Minnesota is not reflective of effort to circumvent process statutes or of any other improper or questionable purpose, such as would require dismissal, and because venue properly should be in the Northern District of Illinois, the case is transferred to that jurisdiction.—Clark Transport Co. v. I.C.C., 228 F. Supp. 236 (237-8).

While plaintiff's choice of forum is not an absolute and uncontrolled privilege, it should not be disturbed unless the balance of convenience is clearly in favor of defendants. In proceedings on motion to transfer the movant must make a clear-cut showing that, considering all the interests, convenience of the parties and the interests of justice will be better served in the other district; thus, where the interests are evenly balanced transfer should be denied. And, in considering such motions, the courts accord some, but not decisive, weight to calendar conditions. Issues raised by motion to tranfer being closely contested,

and defendants having failed to sustain their burden of proof, motion is denied.—Securities and Exchange Com'n v. Golconda Mining Co., 246 F. Supp. 54 (56.60).

REMOVAL OF CASES FROM STATE COURTS

Chapter 89.—Title 28

Section 1445. Nonremovable actions.—[Unchanged. See vol. 14741.]

Notes of Decisions

Volume 12—p. 10582; Volume 13—p. 11220; Volume 14—p. 11731; Volume 15—p. 12349; Volume 16—p. 12994; Volume 17—p. 13708; Volume 19—p. 16030.

1. In general.—[Vols. 14-17, 19].—Plaintiff-shipper's motion to remand to State court (where it was brought) its action against motor carrier for loss and damage to shipments transported by defendant, on ground of lack of jurisdiction because no cause of action under federal law is alleged, is denied. The Carmack amendment, 49 USC §20(11), which also applies to motor carriers, pre-empts the filed and supersedes all state common law rights with regard to carrier liability for damage to interstate shipments; and, though only one carrier is involved, plaintiff's damage suit has its origin in, and is controlled by, the Carmack amendment. Therefore, complaint states a claim or right "arising under" federal law and, since amount claimed is over $3,000. the District Court has jurisdiction.—Sylgab Steel & Wire Corp. v. Strickland Transp. Co., 270 F. Supp. 264 (266, 268-9, 271).

Action to recover cost of repairing plaintiff's trailer allegedly delivered in damaged condition following defendant's piggyback transportation thereof, in addition to being within purview of §1337, was controlled by §20(11) of the Interstate Commerce Act which grants concurrent jurisdiction to both Federal and State courts. Although Congress has granted the right to transfer certain cases from State to Federal courts, removal of plaintiff's suit in assumpsit filed in State court was unwarranted when amount in controversy did not exceed $3,000, exclusive of interest and costs; remanded to State court.—Eazor Exp. v. Pennsylvania R. Co., 214 F. Supp. 695 (696-7).

Plaintiff's motion to remand to state court his personal injury suit against railroad and its section foreman, which had been removed to Federal court after dismissal as against the resident (individual) defendant, on ground that the local defendant's removal from the case was over his objection, overruled. State court's order on resident defendant's motion for a peremptory instruction at conclusion of plaintiff's case is an "order * * * *from which it may first be ascertained that the case is * * * or has become removable" for the first time upon the happening of such event. Something must be read into the statute which Congress did not write into it before it can be said that a case can become removable from a state court during the trial only in event a plaintiff voluntarily does something to extricate and completely remove the resident defendant from the suit.—Lyon v. Illinois Central R. Co., 228 F. Supp. 810 (811).

EVIDENCE: DOCUMENTARY

Federal Business Records Act

Chapter 115.—Title 28

Section 1732. Record made in regular course of business; photographic copies.—[Unchanged.]

Notes of Decisions

Volume 16—p. 12995; Volume 17—p. 13708; Volume 18—p. 14742; Volume 19—p. 16031.

2. In general.—[Vols. 16-19].—In order for a document to come within the business records rule, it must be made in the systematic conduct of a business and reflect regular business transactions; it should not be one calculated for use essentially in litigating a claim. Fact that defendant makes similar summaries in other accidents does not make considered summary of car inspection reports, prepared for use in disposing of plaintiff's claim for personal-injury damages, a business record made in the regular course of business.—Trout v. Pennsylvania Co., 300 F. 2d 826 (830).

Purpose of the statute was to permit introduction into evidence of reports in substitution for actual testimony in court of person making such reports, and the broad policy thereof was to bring the rules of admission into evidence of business writings, records, and memoranda more nearly into line with standards relied on by business men in making business decisions outside of court. Official report relating to injuries sustained by Government employee on defendant's pier, which was required by Federal Employees' Compensation Act and was made day after the accident, should have been admitted in action by plaintiff, as assignee of its employee under that statute, alleging that employee's injuries were caused by negligence of defendant, owner of the pier; report was not made for purposes of litigation, and maker thereof testified in court and was available for cross-examination thereon.—United States v. New York Foreign Trade Zone Operators, Inc., 304 F. 2d 792 (796-8).

Written reports of highway accident by driver of tractor-trailer to the owners of the equipment and to defendant-lessee, the carrier, shortly after collision with plaintiff's automobile were not privileged as the "work product" of defendant's lawyer; they were made in the ordinary course of business under Interstate Commerce Commission safety regulations and do not represent the lawyer's work product. Plaintiff showed good cause for production of those documents; lower court's denial of his motion for production was an abuse of discretion.—Goosman v. A. Duie Pyle, Inc., 320 F. 2d 45 (50-3).

In action for death of railroad employee as result of accident, intra-company written report of the accident made by foreman of the work detail (who was not an eyewitness) on regular printed form used by the railroad for required reporting of accidents by its employees was not admissible under exception to hearsay rule provided by the Federal Business Records Act. Such report is not a record made for systematic conduct of railroad's business as a business; while an accident report may affect that business in the sense that it affords information on which management may act, it is not typical of entries made systematically or as a matter of routine to record events or occurrences, reflect transactions with others, or to provide internal controls. Fact that a company makes a business of recording employees' versions of their accidents does not put those statements in the class of records made "in the regular course of business" within meaning of the statute (318 US 109).—Dilley v. Chesapeake & O.

Ry. Co., 327 F. 2d 249 (251).

File copies of freight waybills kept by the carriers in regular course of business, covering movement of the cars from origin to transit point, the outbound movement to destination, and the corrected billing for the undercharges sued for, were obviously admissible without limitation of use under the Business Records Act, having been properly authenticated and objections to authenticity having been categorically waived. Those documents were enough to establish the weight of the shipments involved, and shipper's effort to negative a concession on correctness of weight did not affect either their admissibility or the judicial weight to be accorded them. As there is no question that those papers were kept in the respective carriers' regular course of business and used by them as basis for further commercial action in relation to the movement of the shipments and the billing and payment of freight therefor, there is no merit to shipper's objection that none of the carrier witnesses identifying the papers knew who weighed the shipments.—Louisville & N. R. Co. v. Knox Homes Corp., 343 F. 2d 887 (895-6)*.

It is the purpose of the Business Records Act to dispense with the necessity of proving each and every entry by the persons actually making them. The probative reliability of the waybill copies as proof of the matters reflected therein is established by the system under which they were made; it is the business record in the form regularly kept by the particular business and reliance thereon that gives trustworthiness and hence legal admissibility to such records. The waybill records are not only admissible but are binding on shipper for the considered shipments, since shipper paid the charges originally billed for the movement to the transit point, and in so doing placed its own imprimatur of accuracy on the very same weights. There is neither proof nor suggestion that in making payment based on those weights shipper was misled or acted inadvertently or erroneously. Under the peculiar circumstances of the case, the considered records merely proved what shipper by its conduct had already demonstrated beyond question—that the weights were those shown. The district court's instructed verdict on that score should have gone for the carrier, not the shipper; so much of the judgment as held the proof on weights inadequate is therefore reversed.—Id., p. 896.

The main purpose of the Federal Business Records Act and rule 1.79 of the commission's Rules of Practice, which is almost identical in language, is to lighten the burden of producing or accounting for witnesses by permitting records to be verified by anyone who knows that they are made in the regular course of business; and fact that the witness neither prepared the records nor supervised their preparation does not affect their admissibility.—Von Der Ahe Van Lines, Inc.—Lease and Purchase—Bee-Line, 93 M.C.C. 498 (504)*.

REVIEW.—MISCELLANEOUS PROVISIONS

Chapter 133.—Title 28

Section 2101. Supreme Court; time for appeal or certiorari; docketing; stay. —[Unchanged. See vol. 15, p. 12349.]

1. In general.—Record is clear that appeal was properly taken from the District Court's second order (entered after commission report on reconsideration following remand of application proceeding) which vacated the commission's action and, also, permanently enjoined it from issuing a certificate to the applicant; therefore, without passing on appropriateness of the All-Writs procedure used by appellees in the second suit for re-

view, their argument that the appeal was untimely because filed more than 60 days after lower court's initial judgment is palpably untenable.—United States V. Dixie Highway Exp., Inc., 389 U.S. 409 (411, note)*.

Sections 2106, 2109. Determination; quorum of Supreme Court justices.—[Unchanged. See vol. 14, p. 11732, vol. 16, p. 12995.]

Notes of Decisions

§2106: Volume 16—p. 12995; Volume 17—p. 13709; Volume 19—p. 16032.

5. Remand.—[Vols. 16, 17, 19].—Since Congress entrusted the issue of reasonableness of rates charged solely to the commission, and the commission properly weighed all pertinent factors in finding that charges applicable on involved shipments were unreasonable, the issue of reasonableness was not open to the district court in injunction proceeding, and that court erred in reversing the commission's decision; remanded with direction to dismiss carrier's petition for want of equity.—Pennsylvania R. Co. v. United States, 315 F. 2d 460 (465)*.

DECLARATORY JUDGMENTS

Chapter 151.—Title 28

Section 2201. Creation of remedy.—[Unchanged. See vol. 18, p. 14742.]

Notes of Decisions

Volume 15—p. 12351; Volume 16—p. 12996; Volume 17—p. 13709; Volume 18—p. 14743; Volume 19—p. 16032.

2. Construction and interpretation.—[Vols. 15-19].—Action against the city by transfer company (employed by railroads to transfer passengers and baggage between rail terminals in Chicago) asking the court to declare that provisions of Chicago Ordinance requiring it to obtain city licenses are invalid as unconstitutional burdens on, and attempts to regulate, interstate commerce, was not premature. The controversy is alive and ready for action; it has lasted over a decade and, though it obtained licenses after filing suit challenging the ordinance, carrier has continued operation only by paying the license fees into court; city, even while suit was pending, amended its ordinance so as to further regulate the carrier and has continually demanded its full compliance therewith. Also, while disclaiming power to stop transfer company's operation, the city retains power under the ordinance to find it and arrest its drivers for operating without a license and to revoke for discretionary reasons all licenses it may obtain; thus, the company continues to operate only at the city's sufferance. Trial court's dismissal of the action as premature, affirmed by the Court of Appeals, reversed.—Railroad Transfer Service, Inc. v. Chicago, 386 U.S. 351 (355-8)*.

Since an actual controversy existed between railroads and unions, as to whether the procedures governing personnel changes prescribed in Railway Labor Act, or those set out in "stipulation" of the parties authorized by the Interstate Commerce Commission as a part of its order approving merger of railroad

yards, should be followed, a declaratory judgment declaring the rights of the parties should be entered.—Chicago & N.W. Ry. Co. v. Brotherhood of Locomotive Engineers, 202 F. Supp. 277 (283)*.

The Declaratory Judgment Act requires "an actual controversy" before the court's jurisdiction may be invoked, "actual" being used for emphasis rather than definition, and judicial discretion should be exercised in deciding whether or not a declaratory judgment should be rendered. Railroads' actions for declaratory judgment against collective bargaining representatives of railroad employees were dismissed when differences of opinion between the parties were too nebulous and contingent for adjudication, and there was considerable uncertainty whether any harm would ever result to plaintiffs. Speculative anticipation of a future course of action or mere forecasts and predictions of irreparable injury would not warrant grant of relief requested.—Southern Ry. Co. v. Brotherhood of Locomotive Fire. & Eng., 223 F. Supp. 296 (304-8)*.

Plaintiff railroad's properly filed tariff determined rights of the parties, for purposes of its motion for summary judgment to recover demurrage claimed for detention of its lighters, when defendant consignee, while refusing to concede its applicability and pleading this as a question of law, relied on that tariff to bar plaintiff's claim in its affirmative defenses, and its entire legal argument centered on interpretation of regulations therein. While rate applicable on consignee's cargo included unloading of lighters by carrier, under the tariff, that duty to unload would not arise until consignee signified its readiness to receive; and it is immaterial that defendant's inability to receive, which relieved plaintiff of duty to unload before demurrage charges could accrue, was due to a strike over which it had no control. Summary judgment in favor of plaintiff.—Pennsylvania R. Co. v. Moore-McCormack Lines, Inc., 246 F. Supp. 143 (144-7)*.

In declaratory judgment action arising out of highway accident, question of agency of driver of leased tractor and trailer involved must be resolved not only on basis of written agreement between lessor and lessee motor carriers, but also from facts surrounding their continuing relationship and the facts and circumstances surrounding the accident. When driver was carrying out lessee's instructions to return the equipment to lessor, his employer, at time of the accident, he had not abandoned lessee's service or that of his employer; on the contrary, he was continuing to act for their mutual benefit and was subject to their joint control. That the mutually beneficial lease contained no provisions respecting exclusive possession, control and use or assumption of responsibility, would not excuse lessee from liability it might otherwise have; and lessee's liability would not serve to release lessor if, when collision occurred, it had joint right of control over the driver. In death action pending against both carriers, liability rests upon both.—Vance Trucking Co. v. Canal Insurance Co., 249 F. Supp. 33 (35-6, 39).

The Interstate Commerce Commission is an indispensable party to action for declaratory judgment as to common meaning and connotation of terminology in plaintiff's interstate motor carrier certificate, since interpretation of the certificate should be made in the first instance by the commission upon whom Congress has placed the responsibility. Plaintiff's quarrel is not basically with defendant who is employed by the commission as a regional district supervisor; the real controversy, if any, is between the commission and plaintiff.—W. J. Dillner Transfer Co. v. McAndrew, 226 F. Supp. 860 (862)*.

The Declaratory Judgments Act vests in the court discretion whether or not to "declare the rights and other legal relations of any interested party seeking such declaration." For such an action to be justiciable, the issues must be definite and concrete, touching on legal relations of parties having adverse legal interests, and must constitute a real and substantial controversy admitting of specific relief. Plaintiff's complaint does not measure up to standards of justiciability set by the statute; alleged actions, threats, and lack of knowledge of defendant-employee do not give rise to a case or controversy, and cannot be judicially reviewed; disagreements between plaintiff and defendant are not such that the court can see what legal issues it is

deciding; plaintiff does not request an adjudication that it has a right to do, or to have, anything in particular.—Id., pp. 863-4.

Moreover, the declaratory judgment procedure will not be used to pre-empt and prejudge issues that are committed to the Interstate Commerce Commission. It would not be tolerable that a declaratory judgment interpret a motor carrier certificate in order to forestall proceedings by the commission, which is authorized to try such issues in the first instance; responsibility for effective functioning of administrative process cannot be thus transferred from the commission to the courts. Complaint dismissed.—Id., p. 864.

The commission's decision in proceeding to which appellee was a party and which involved the same tariff, like traffic, and a similar situation, that "transit privileges" as used in that tariff did not include inspection or reconsignment, was consistent with its traditional view, accepted by the courts, and was entitled to be given the greatest deference and weight by the district court in subsequent action to recover alleged overcharges. The district court was in error in its interpretation of that term as including reconsignment and its consequent granting of summary judgment to appellee; reversed, with direction to enter judgment for appellant.—United States v. Great Northern Ry. Co., 337 F. 2d 243 (248, 249)*.

There is no doubt as to availability of summary judgment procedure in suit seeking a declaration as to whether certain acts of the parties would constitute a violation of the [National Labor Relations] statute; however, before a court can issue a declaratory judgment the underlying claim for declaratory relief must present an actual controversy between parties having adverse legal interests of sufficient certainty and immediacy; complaint dismissed.—International Longshoremen's Ass'n. v. Seatrain Lines, Inc., 212 F. Supp. 653 (655).

Summary judgment procedure is appropriate where sole question for adjudication is one of law, namely, the legal effect and enforceability of agreement between plaintiff railroad and defendant shippers that their tariff dispute be governed by outcome of a suit by plaintiff in another district court, involving the identical question. Plaintiff's suit is analogous to situation where parties seek collaterally to attack a judgment rendered in another forum; clearly, if the original forum had jurisdiction over both the parties and the subject matter, collateral attack would fail ab initio without reference to what the new forum's views might be on the merits of the controversy.—Western Maryland Ry. Co. v. Continental Grain Co., 219 F. Supp. 126 (127, 128, 130).

Moreover, both sides agreed that the question should be disposed of by adjudication of a single case; no-one should be permitted to gamble on the result of a judgment and then repudiate the result when the judgment is adverse (citing 1 F. 2d 465). Agreements of type under review should be encouraged if otherwise valid and not contrary to any specific statutory provision, and refusal to enforce agreements which would promote expeditious disposition of multiple claims would be incompatible with policy of the Federal Rules of Civil Procedure. Plaintiff has failed to sustain its burden of showing why the agreement should not be enforced; defendants' motion for summary judgment, granted.—Id., p. 131.

In action seeking summary judgment, or dismissal, with respect to cease and desist order previously issued by the [Federal Trade] commission, the court should not deny the commission the reasonable discretion which necessarily must rest in it in proceedings to enforce such order so long as judicial rights of plaintiff are safeguarded and so long as it is not deprived of an available forum in the event any of its rights are transgressed. Plaintiff cannot be harmed until an enforcement order is entered; and if it is denied the right of due process, those questions may be raised before the Court of Appeals. Plaintiff's motion for summary judgment denied.—Nash-Finch Co. v. F.T.C., 233 F. Supp. 910 (916-7).

That bill of lading included, although not expressly written into it, requirement of rule 27 of uniform classification that owner unload shipment moving at c.l. rate did not create a contract of indemnity entitling carrier to recover from consignee (third-party defendant) any sums awarded its employee in his suit to

recover for injuries sustained while unloading car and allegedly due to carrier's negligence. Nothing in language of that rule could be reasonably interpreted to impose on consignee an indemnity liability for an accidental injury to its employee where the employee is covered by workmen's compensation and that act insulates the employer from common law liability therefor. Consignee found entitled to summary judgment and third-party complaint dismissed.—Halstead v. Norfolk & W. Ry. Co., 236 F. Supp. 182 (184, 187-9).

Since it is the consensus of federal decisions that a carrier may not waive, or be estopped from asserting, the bill-of-lading requirement for shipper's filing of a written claim for damage to a shipment, and plaintiff's supplemental invoice showing estimated cost of repairs to machine damaged in transit was not a claim sufficient to apprise defendant that plaintiff was presenting a claim for damages and expected recompense, and no other writing or written claim was presented, defendant's motion for summary judgment is granted.—Lucas Mach. Div., New Britain Mach. Co. v. New York Cent. R. Co., 236 F. Supp. 281 (282-3).

See also Auto Drive-Away Company of Hialeah, Inc. case, §222(b), n. 30; Garrett Freightlines, Inc., v. United States, Government Traffic, 49 USC §65, n. 10; Georgia S. & F. Ry. Co. v. Atlantic Coast Line R. Co., 49 USC §1(20), n. 17.

Section 2202. Further relief.[Unchanged. See vol. 15, p. 12351.]

INJUNCTIONS: THREE-JUDGE COURTS

Chapter 155.—Title 28

Section 2284. Three-judge district court; composition; procedure.—[Unchanged. See vol. 14, p. 11733; vol 19, p. 16034.]

Notes of Decisions

Volume 15—p. 12351; Volume 16—p. 12997; Volume 17—p. 13711.

9. Validity under Federal Constitution, of State order.—[Vol. 15].—Inasmuch as plaintiffs seek an injunction, on Federal constitutional grounds, to restrain enforcement, operation, and execution of State segregation statutes by restraining action of State officers in enforcement thereof, the proceedings are properly heard by a court of three judges under 28 USC §2281. Thus, the court may dispose of all issues raised in the cases.—United States v. Lassiter, 203 F. Supp. 20 (24).

As the complaint alleges that State statutes involved are unconstitutional in that they constitute direct regulation of interstate commerce by the State contrary to the federal constituion, and that orders and actions of State officials complained of, under color of authority of those statutes, is an unlawful and unconstitutional interference with, and obstruction of, licensed and authorized interstate commerce, a district court composed of three judges, under 28 USC §2284, has jurisdiction. That it is determined, after final submission and upon consideration of briefs and argument, that the statute does not apply, and that constitutional question should not therefore be ruled, does not oust the three-judge court of jurisdiction.—Great Northern Ry. Co. v. Thompson, 222 F. Supp. 573 (579-80, 587).

Evidence conclusively establishes that actions taken, or threatened, by defendant offi-

cials of North Dakota directly affect both the business operations of plaintiff and its rights under its interstate common-carrier authority, and infringe personal, constitutional rights of plaintiff's drivers; in addition, they have the effect of nullifying plaintiff's interstate operating rights, and of illegally preventing the interstate commerce in issue unless and until plaintiff secures a certificate of necessity and convenience from the Public Service Commission of the State; such actions have and will in the future cause irreparable damage to plaintiff. Remedies available to plaintiff in the State courts, which were suggested by defendants' counsel, are inadequate and would be totally ineffective; plaintiff is entitled to permanent injunctive relief against all defendants as sought.—Id., pp. 584-6, 587.

10. State orders, generally.—[Vols. 16, 17].—When plaintiff railroad, after Pennsylvania commission had denied its application to discontinue a pair of trains between Harrisburg, Pa., and Hagerstown, Md., filed discontinuance notice with Interstate Commerce Commission under §13a(1) of Interstate Commerce Act, jurisdiction over the matter vested exclusively in ICC, and the railroad had authority, upon ICC's conclusion not to investigate, to discontinue the trains in accordance with the notice. Pennsylvania commission's subsequent order directing the railroad to restore and continue service in compliance with its prior order was therefore completely abortive; that invalid order could not on any theory be res judicata, and ICC was under no obligation to give it full faith and credit. Comity between State and Federal authority is not at issue, and the court has found §13a(1) to be constitutional. Defendants are therefore permanently enjoined, individually and as members of the Pennsylvania commission, from pursuing any of the remedies provided by Pennsylvania law to compel plaintiff to reinstate the discontinued trains.—Pennsylvania R. Co. v. Sharfsin, 240 F. Supp. 233 (236-7)*.

Suit seeking to enjoin enforcement of State commission order holding that plaintiff was engaging in both intrastate and interstate for-hire transportation of crude oil, and ordering it to cease and desist therefrom until it obtained proper operating authority, is not a proper case for convening a three-judge district court. Under §2281 a three-judge court is necessary when an injunction is sought on ground of federal unconstitutionality of a State statute; an agency determination, being primarily a finding of fact, is not the kind of an order contemplated by that statute. Since plaintiff's attack is directed against what the State commission has done—not against what the statutes authorize it to do—there is no substantial claim of unconstitutionality requiring a three-judge court. The case must be left for disposition by the single judge to whom it was originally assigned.—McWood Corp. v. State Corp. Commission of N. M., 237 F. Supp. 963 (964-5).

INTERSTATE COMMERCE COMMISSION ORDER; ENFORCEMENT AND REVIEW

Chapter 157.—Title 28

Section 2321. Procedure generally.—[Unchanged. See vol. 14, p. 11734, vol. 15, p. 12352, vol. 19, p. 16034].

Historical Note

The commission recommends that procedures for review of commission orders be changed to provide that (a) review be upon appeals to the U.S. Court of Appeals in all cases where a special three-judge court is presently used, (b) review be permitted in any judicial circuit wherein a party or any of the parties filing request therefor have their residence or principal office, (c) final

review by the U.S. Supreme Court be only by petition for a writ of certiorari, (d) review proceedings be brought against the commission as defendant, rather than the United States, with the Department of Justice to have the right to intervene in any proceeding, and (e) that certain other changes be made with respect to time within which a petition for review must be filed, form of such petition, service of notice of appeal, and (where several appeals are taken from the same commission order) determination of venue and consolidation and handling of appeals.—Annual Report, 1963, p. 16, Annual Report, 1964, p. 73-4.

Section 2322. United States as party.—[Unchanged. See vol. 14, p. 11734; vol. 15, p. 12352.]

Notes of Decisions

Volume 17—p. 13711.

See Historical Note to §2321, above.

1. In general.—[Vol. 17].—In view of provisions of this section, §§16(12) and 222(b) of the Interstate Commerce Act, and the Elkins Act, relating to enforcement of Interstate Commerce Commission orders, there is no serious question as to the Government's standing to bring suit against interstate carriers for injunctive relief against racial segregation in rail and bus terminals. By implication, those statutes provide a basis for action against city and city officials who, through maintaining signs on sidewalks adjacent to the terminals which indicate that those facilities are separated on basis of race, unlawfully effect segregation therein. Statutory power to enforce substantive provisions of law must carry with it the power to make such enforcement effective; enforcement can be made effective only if relief is granted against noncarrier defendants who are causing the carriers to violate the law. Injunction should be issued against all defendants.—United States v. City of Jackson, Miss., 318 F. 2d 1 (8-9, 16-17)*.

The United States is an indispensable party to a suit for review of adverse orders of the commission in plaintiffs' application proceedings, and naming of "Interstate Commerce Commission, an agency of the United States Government" does not make the United States a party; argument that the commission and "its parent proprietorship" are one and the same is untenable; despite the court's reluctance to dismiss a complaint filed by a group of laymen on their own behalf, it must rule in accordance with the law as declared by Congress and as stated by the Supreme Court; complaint dismissed, without prejudice.—Cox v. I.C.C., 207 F. Supp. 957 (959)*.

The United States is not an indispensable party to action for declaratory judgment as to common meaning and connotation of terminology in plaintiff's interstate motor carrier certificate. Substantial authority exists for the proposition that the United States may not be sued under the Declaratory Judgments Act without its consent; and, although 28 USC §§2321 and 2322 require that actions to enforce, suspend, annual, or set aside any order of the Interstate Commerce Commission shall be brought against the United States, those statutes do not govern in declaratory judgment action in which plaintiff does not seek to have the court do any of those things.—W. J. Dillner Transfer Co. v. McAndrew, 226 F. Supp. 860 (863)*.

Since the Attorney General, representing the United States, opposes proposed railroad merger, the United States is realigned as a party plaintiff in action to set aside and enjoin the commission's orders approving merger of Atlantic Coast Line into SeaBoard Air Line.—Florida East Coast Ry. Co. v. United States, 242 F. Supp. 14 (17)*.

The United States is not only an indispensable party to, but its absence as a party is a fatal jurisdictional defect in, stockholder's derivative action to set aside railroad corporation's sale of owned stock, on ground that purchasing company (Alleghany Corp.) had failed to comply with registration requirements of the Investment Company Act, when, although an attack on Interstate Commerce Commission orders specifically regu-

lating Alleghany as a common carrier was involved, the action was not brought against the United States as required by the statute. Requirements for review or enforcement of ICC orders are not mere matters of procedure; they were imposed by Congress as a matter of policy in order to protect the public interest in the specialized area entrusted to the commission's jurisdiction; and a commission order cannot be attacked unless those requirements are met.—Schwartz v. Bowman, 244 F. Supp. 51 (66-9)*.

As required by law, the United States was named a defendant in suit to set aside Interstate Commerce Commission's order, as was the commission; however, the United States, admitting that "the order of the Interstate Commerce Commission is invalid," was treated as an additional plaintiff for purposes of brief and oral argument.—Louisville & N. R. Co. v. United States, 268 F. Supp. 71 (73)*.

Section 2323. Duties of Attorney General; intervenors.—[Unchanged. See vol. 14, p. 11735, vol. 15, p. 12352.]

Notes of Decisions

Volume 4—p. 3133; Volume 7—p. 6083; Volume 12—p. 10577; Volume 14—p. 11735; Volume 15—p. 12352; Volume 17—p. 13711; Volume 19—p. 16034.

See Historical Note to §2321, above.

2. Parties who may intervene.—[Vols. 14, 15, 17, 19].—On review by the full court, a single judge of three-judge court properly permitted motor carrier association to intervene as a party plaintiff in suit brought by one of its members to set aside an order of the commission; provisions of §2323 clearly permit intervention by associations interested in such a controversy. Defendant's objection to the association's intervention on ground that it was not a party to the proceeding before the commission, overruled.—United Transports, Inc. v. United States, 214 F. Supp. 34 (38)*; and exhibit consisting of affidavit by the association's traffic manager, which is offered for sole purpose of establishing the association's interest in the proceeding and not to supplement the record before the commission in order to secure a trial de novo, is admissible for that limited purpose only.—Id., p. 38.

3. Parties before commission may attack the order in courts.—[Vols. 4, 7, 12, 15, 17].—See H. Messick, Inc. v. Baggett Transp. Co., 28 USC §1398, n. 4; National Motor Freight Traffic Ass'n., Inc., v. United States, 28 USC §2325, n. 14.

Section 2324. Stay of Commission's order.—[Unchanged. See vol. 14, p. 11735.]

Notes of Decisions

Volume 16—p. 12998; Volume 19—p. 16034.

See Historical Note to §2321, above.

10. Stay of operation of commission's order.—[Vols. 16, 19].—In arguing that reopening of docket No. 29885 renders unreasonable the application of the basis of divisions therein prescribed to rates involved in the case under review, plaintiffs in effect ask the court to annul or stay the commission's order on assumption that the commission will decide

the reopened proceedings in their favor, that the decision will be made retroactive, and that if challenged in the courts it would be upheld; those assumptions cannot reasonably be made. In addition, to suspend operation of the order until the reopened proceedings are concluded would be tantamount to reversal by the court of the commission's refusal to consolidate the instant proceeding with the reopened docket No. 29885, which was clearly within the commission's discretionary power.—Boston & M.R. v. United States, 208 F. Supp. 661 (677)*.

Section 2325. Injunction; three-judge court required.—[Unchanged. See vol. 14, p. 11735.]

Notes of Decisions

Volume 4—p. 3139; Volume 7—p. 6085; Volume 10—p. 8429; Volume 11—p. 9767; Volume 12—p. 10578; Volume 13—p. 11215; Volume 15—p. 12353; Volume 16—p. 12998; Volume 17—p. 13712; Volume 18—p. 14745; Volume 19—p. 16035.

See Historical Note to §2321, above.

Jurisdiction of Courts to Retain Enforcement of Commission's Orders

7. Jurisdiction of district court.—[Vols. 4, 7, 10, 12, 14, 16, 18, 19].—

Derivative stockholder's action under the Urgent Deficiencies Act, following dismissal of similar action (under the Investment Company Act) in 244 F. Supp. 51, affd. 360 F. 2d 211, cert. denied 385 US 921, for lack of subject matter jurisdiction, failed to state a cause of action cognizable by the court as constituted. Complaint seeks recision of Chesapeake & O. R.'s sale of its New York Central R. stock to Alleghany Corp. (a registered investment company which had been made subject to the Interstate Commerce Act when it was authorized to acquire control of C&O) because at the time of considered transaction Alleghany, having secretly sold its C&O stock, was again an investment company and had not registered under the Investment Company Act. The only claim which the district court, constituted under the Urgent Deficiencies Act, can determine is that an ICC order is invalid; therefore, plaintiff's express disclaimer of any attack on an ICC order would seem to remove its claim of jurisdiction under that statute.—Schwartz v. Alleghany Corporation, 282 F. Supp. 161 (162-3)*.

Argument that Alleghany's sale of its C&O stock, which plaintiff alleges was a condition precedent to sale of the NYC stock in issue, automatically terminated its subjection to ICC regulation was rejected in the cited decision wherein the court found that the commission's order subjecting Alleghany to its jurisdiction was not terminated until the year following the one in which considered transactions took place. Accordingly, since plaintiff apparently seeks a holding that in spite of the commission ruling, defendant was subject to registration requirements of the Investment Company Act once it disposed of its C&O stock, but does not attack the basis of the rulings that it was still subject to ICC control, he has not stated a claim within the court's jurisdiction since, as convened the court is concerned only with the validity of the commission's rulings; complaint dismissed.—Id., pp. 163-4.

Inasmuch as the court has jurisdiction to review the commission's determination in proceeding on railroad's proposed discontinuance of passenger trains, the District Judge acted properly in entering considered temporary restraining order before the commission's order became final. The court agrees with the Judge, after considering the evidence and plaintiffs' arguments, that effective judicial review would be impaired, and irreparable harm to plaintiffs and the public would result, if the trains were allowed to be discontinued while petitions for reconsideration

were pending before the commission; thus, the railroad was properly restrained from discontinuing those trains until a final commission order is issued, or until further order of the court. Therefore, railroad's motion to dissolve the temporary restraining order, on ground that the court lacks authority to review such passenger train discontinuances, is denied.—City of Williamsport v. United States, 273 F. Supp. 899 (901-4)*.

As stated in 251 F. Supp. 421, thrust of 1958 amendment to the Interstate Commerce Act, which became §13a, was relief of hard pressed railroads from heavy losses from passenger train operations by giving the roads the option of having the commission, rather than State bodies, pass on discontinuance of interstate passenger train operations; however, there is no convincing evidence that Congress intended the unusual and unfair result of granting judicial review of the commission's determination solely to the roads, and not to opposing parties. A road can obtain review and reversal of an order wrongfully granted; and, if an order is wrongfully refused, ordinary principles of review, as well as fairness, call for judicial review at the instance of opposing parties. Congress having set statutory standards for the commission, its decision not to order continuance, as well as a decision to order it, should be reviewable. Three-judge district court has jurisdiction in State's action to enjoin and set aside, or to remand, commission reports and orders permitting discontinuance of considered passenger trains.—State of Vermont v. Boston and Maine Corp., 269 F. Supp. 80 (81, 83-4)*.

Section 1336 confers on the district courts jurisdiction of civil actions with respect to "any order of the Interstate Commerce Commission"; and Congress, in §17(6) of the Interstate Commerce Act, authorized the commission to adopt rules regulating applications for rehearing. Under the commission's Rules of Practice, the division's denial of plaintiff's petition for reconsideration of the order under attack purported to clothe that order with administrative finality, and all parties concede that the administrative process has come to an end; thus there is not the utter lack of jurisdiction which the court should notice sua sponte. Nor does §17(9) operate to forbid judicial review of minor orders denied administrative review, though final; the court has jurisdiction of the parties and the subject matter.—Malone Freight Lines, Inc. v. United States, 204 F. Supp. 745 (753-4)*. [But see dissent.]

Administrative determinations must have a basis in law and must be within the authority granted. It is a judicial function, not an administrative one, to determine the limits of the statutory power of an administrative agency.—J. B. Montgomery, Inc. v. United States, 206 F. Supp. 455 (458)*.

Though the legal validity of a contract subject to the commission's approval under §5 is a judicial question for the courts, not the commission, the function of the reviewing court, in a suit challenging the commission's order approving the transaction on modified terms, is no more extensive than that of the commission in that regard.—Walker v. United States, 208 F. Supp. 388 (396)*.

Although injunctive order of federal district court prevented carriers from charging reduced rate lawfully on file with, and approved by, the commission during the time it was in effect, such order did not affect validity of the lawful rate during that period. A stay order does not adjudicate rights, but merely preserves the status quo; and, while courts do not have power to establish rates, the restraining order having been issued, it could not be ignored. That defendants were prevented from collecting the reduced rate while the stay order was in effect, however, does not mean that they may retain overcharges they were required to collect during that period. To permit such retention would result indirectly in establishing a rate by court order for the period; courts are not entitled to engage in any semblance of ratemaking whatsoever, either direct or indirect.—Humble Oil & Refining Co. v. Great Northern Ry. Co., 212 F. Supp. 747 (752-6).

Though complaint seeking to set aside the commission's order approving certain reduced all-rail rates presented a prima facie case for adjudication by a three-judge court [which was duly constituted in accordance with prayer therein] and a show-cause and temporary restraining order was issued, that matter has now become moot; and relief now

sought by way of order to show cause why the earlier show-cause order and the temporary restraint therein should not apply to subsequently filed rates on the same commodity between two of the same points is not within jurisdiction of the district court because the commission's refusal to suspend the most recently filed rates is a matter exclusively within its sound discretion and is not susceptible of review by the court.—Seatrain Lines, Inc. v. United States, 233 F. Supp. 40 (45, 46, 47).

In action to set aside and remand the commission's denial of plaintiff's application for motor carrier certificate, plaintiff asks, in the alternative, that the court instruct the commission to grant the requested authority; however, such alternative prayer for relief exceeds the court's scope of authority. Reviewing courts have no authority to order an administrative body, such as the commission, to perform a discretionary act; nor does the court have authority to perform the act itself.—Watkins Motor Lines, Inc. v. United States, 243 F. Supp. 436 (438, note)*.

Request of the United States, acting through the Attorney General, that proposed railroad merger be permanently enjoined is denied when, while a three-judge district court has power to enjoin the commission's orders approving the merger, it is doubtful if such court has power permanently to enjoin the merger. Functions of the reviewing court are limited; requested permanent injunction would require the court to go beyond the present record and to find that upon no set of facts which applicants might present could proposed merger be found consistent with the public interest. Resolving such considerations would require extensive facilities, expert judgment and considerable knowledge of the transportation industry; wisdom and experience of the commission, not of the courts, must determine whether proposed transaction is consistent with the public interest.—Florida East Coast Ry. Co. v. United States, 242 F. Supp. 14 (23-4)*.

See also H. Messick, Inc. v. Baggett Transp. Co., 28 USC §1398, n. 2; Naph-Sol Refining Co. v. United States, 49 USC §15(7), n. 1; United States v. Saskatchewan Minerals, §17(6), n. 10.

8. Exclusive jurisdiction of district court of three judges.—[Vols. 4, 7, 10].—Disposition of an action to enjoin railroads from making proposed rate changes effective, the statutory suspension period having expired, pending the commission's decision in the suspension proceeding would seem to require some consideration of claim that proposed rates are unreasonable; such a procedure would permit a single judge to pass before final commission action upon the question of reasonableness of a rate, which the statute expressly entrusts to a court of three judges reviewing the commission's completed task.—Arrow Transp. Co. v. Southern Ry. Co., 372 U.S. 658 (669-71)*.

Where Congress has provided administrative and judicial procedures which are designed to permit agency expertise to be brought to bear upon a particular problem, the prescribed procedures are exclusive; this is true even though Congress may not have expressly provided for exclusiveness of such procedures. When the railroad did not contest validity of the commission's emergency car service order, by seeking administrative review pursuant to §17(6) and §17(9) of Interstate Commerce Act, until after commencement of action against it in single-judge district court for civil penalties for alleged violations of the order, the district judge had no authority to consider railroad's challenge to the order's merits. Provisions of governing statutes were intended to confine presentation of such challenges to a specially convened three-judge court after the carrier has filed, and the commission has ruled on, a petition for "rehearing, reargument or reconsideration"; reversed and remanded with instructions.—United States v. Southern Ry. Co., 380 F. 2d 49 (53-5, 57)*.

Where Congress has provided administrative and judicial procedures which are designed to permit agency expertise to be brought to bear upon particular problems, such as those applicable to all suits to enforce, enjoin, suspend or set aside orders of the commission, the prescribed procedures are exclusive; this is true even though Congress may not have expressly provided for exclusiveness of such procedures. Therefore, railroad challenging validity of the commission's car distribution Service Order (issued

during period of acute car shortage) is required to first seek administrative relief from an appellate division of the commission and, if dissatisfied with the administrative review, to seek judicial review by a three-judge district court. In action against railroad to recover penalties for alleged violations of the car service order, district judge had no power to inquire into validity of the order, although the attack was collateral in nature, when the railroad had not exhausted its administrative remedies by seeking review by a three-judge court. Judgment set aside and cause remanded.—United States v. Southern Ry. Co., 364 F. 2d 86 (91-3, 96).

9. Three-judge court.—[Vols. 4, 7, 10, 14-19].—Sections 2284, 2321-2325 of 28 USC provide that an order of Interstate Commerce Commission may be set aside or annulled only by a three-judge court convened pursuant to §2284, and a single district judge has both the power and the duty to determine whether a three-judge court should be convened; this should not be done if the complaint is jurisdictionally defective.—Cox v. I.C.C., 207 F. Supp. 957 (959)*.

When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is limited to determining whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within requirements of the three-judge statute. Manner in which a three-judge court must function once it has been convened is governed by §2284; that section assumes jurisdiction in the district court over the controversy, and its provisions come into play only when that jurisdiction exists and after a three-judge court has been convened. It remains for the judge who is asked to convene a three-judge court to determine whether jurisdiction exists in the district court, and if he properly concludes that there is no jurisdiction, his power to dismiss the complaint, as well as to deny the motion to convene a three-judge tribunal, is in no way circumscribed by §2284.—Seatrain Lines, Inc. v. United States, 233 F. Supp. 40 (46).

Complaint seeking to set aside the commission's order approving certain reduced all-rail rates disclosed a prima facie cause of action requiring a three-judge court for adjudication, and the single judge to whom the case was assigned ordered defendants to show cause why that procedure should not be followed, incidentally staying operation of the commission's order, and provided for convening of the three-judge court. Subsequently, plaintiffs by affidavit represented that the railroads (intervening defendants) had filed new reduced rates on one of the same commodities between two of the same points, which the commission had declined to suspend, and upon their application the single judge directed defendants to show cause why the original show-cause order, including the temporary restraint, should not apply to and restrain the taking effect of the new rates. That new issue, which should have been presented by a supplemental or new separate complaint, evoked the temporary restraining order embodied in the order to show cause, which is clearly within authorization of §2284(3).—Id., pp. 42-4, 46-7.

Upon return of the order to show cause it appeared for the first time that the matters presented by the original complaint had become moot, and that the court, whether consisting of a single judge or of three judges, is without jurisdiction to grant the relief now sought. The matter at present before the court is an order to show cause why relief not prayed for in the complaint should not be granted to plaintiffs in the pending action, which has been referred to a three-judge court under the statute. Language of §2284(5) authorizing a single judge to "perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure" is authorization for disposition of the order to show cause by a single judge, despite the fact that a three-judge court has been constituted. Order to show cause and restraint therein contained as to the new rates is therefore dissolved for want of jurisdiction, but whether the pending action should be dismissed for mootness is left to the three-judge court.—Id., p. 47.

11. Suits to restrain, set aside, annul, suspend, or enforce commission orders.—[Vols. 4, 7, 10, 12-17, 19].—Motions of defendant and intervening defendants for stay of proceedings in action seeking to enjoin and set

aside the commission's orders in railroad merger proceedings, pending outcome in a similar suit that was instituted earlier in adjoining State, granted. Venue language of 28 USC §1398 does not preclude granting the stay sought in view of the Supreme Court's statement, in 282 US 760, that it is for the discretion of the District Court in which such a suit is brought to determine whether it should be permitted to continue or proceedings therein should be stayed, pending outcome of an earlier suit, in order that there not be a multiplicity of suits without substantial reason. In addition, both the Supreme Court and the Court of Appeals have approved the rule that "the court which first has possession of the subject must decide it." Therefore, proceeding is stayed until after date of final hearing in earlier suit pending in court in adjoining State, or until the court's further order, with leave to any party or amicus curiae to seek modification of such stay should future circumstances so justify.—Borough of Moosic v. United States, 272 F. Supp. 513 (517-8)*.

Since challenged bus operations through Air Force Base are lawfully conducted under a valid certificate therefor, and are not dependent upon the commission's administrative ruling concerning service at military establishments which can be entered within one aerial mile of an authorized route, validity of that administrative ruling is not justiciable in action to set aside and enjoin the commission's order authorizing the operations.—Carolina Scenic Stages v. United States, 202 F. Supp. 919 (922)*.

Although the court sustains the commission's conclusion, in conversion proceeding initiated by it under §212(c), that plaintiff should be converted from a contract to a common carrier, there is considerable merit to argument that plaintiff's failure to question that conclusion in its petition for reconsideration by the entire commission now precludes it from raising that issue in court.—P. Saldutti & Son, Inc. v. United States, 210 F. Supp. 307 (313)*.

In action to set aside the commission's report and order, plaintiffs' argument that decision of another district court in an essentially similar proceeding was "incorrect, unjustified and should not be accepted by this Court" is rendered untenable by the Supreme Court's affirmance of that decision.—Chief Freight Lines Co. v. United States, 230 F. Supp. 79 (81)*.

Where plaintiff's attack, in proceeding for review of the commission's order, is directed against conclusions reached by the commission on the evidence, the order may be set aside only if it is not supported by substantial evidence, or is arbitrary or capricious. Since plaintiff failed to make the evidence before the commission a part of the record before the court, the commission's findings must be accepted as conclusive; and, as the commission's findings support its order, the complaint is dismissed.—Lynden Transfer, Inc. v. United States, 237 F. Supp. 124*.

In action to enjoin and set aside report and order of the commission in rail-highway grade-crossing investigation, entire record of the proceedings before the commission was admitted in evidence, over defendants' objection to its materiality.—American Trucking Associations, Inc. v. United States, 242 F. Supp. 597 (601)*.

See also New York Central R. Co. v. United States, §14(1), n. 1; Shelby Biscuit Co. v. United States, §203(c), n. 3.

12. Collateral attack.—[Vols. 4, 7, 10, 11, 13, 16-18, 19].—The court has no jurisdiction to annul or set aside Interstate Commerce Commission orders, which specifically make Alleghany Corp. subject to its regulation as a common carrier, in stockholder's derivative action to set aside railroad corporation's sale of owned stock because the purchasing company (Alleghany) had failed to comply with registration requirements of the Investment Company Act. Congress established an exclusive method for review or enforcement of ICC orders in the Urgent Deficiencies Act, in order to insure that the public interest as well as interests of all parties concerned would be protected, and compliance therewith has been strictly enforced. None of the statutory requirements have been met in the case at bar; the court has no power to consider and determine the question which is basic to relief under Investment Company Act—the validity of the ICC orders, since validity of those orders can be tested only in appropriate action under the Urgent Deficiencies Act.—Schwartz v.

Bowman, 244 F. Supp. 51 (66-9)*.

See also United States v. Great Northern Ry., 28 USC §1336, n. 2.

13. Orders of commission.—[Vols. 4, 7, 10, 12-14, 16-19].—The court does not sit de novo in cases dealing with orders of the commission; Congress has delegated exclusively to the commission a wide latitude of discretion in determining public convenience and necessity, and the scope of review by the court is limited by the doctrine of administrative finality. Only questions affecting constitutional power, statutory authority, and the basic requisites of proof can be raised; if these legal tests are satisfied, the commission's order becomes incontestable.—Edwards Motor Transit Co. v. United States, 201 F. Supp. 918 (920-1)*.

Since the commission's order permitting Southern Pac. Co. to discontinue certain intrastate passenger trains is justified and supported by the findings in the commission's report, the order must stand; complaint dismissed.—People of State of California v. United States, 207 F. Supp. 635 (636)*.

The commission's order is the product of expert judgment which carries a presumption of validity, and he who would upset the order under the act must make a convincing showing that it is invalid because unjust or unreasonable in its consequences. However, though presumed valid, the order may be annulled if shown to rest on a misconstruction of the act or on inadequate or unsupported findings of fact; the commission's expertise is not sufficient by itself; findings supported by substantial evidence are required.—Boston & M. R. Co. v. United States, 208 F. Supp. 661 (670)*.

Although appeal calls in question an opinion of the commission giving its general interpretation of the statute, rather than a definitive order applicable to any particular party, the close similarity of the matter involved to that considered in 351 US 40 requires that jurisdiction be assumed and the matter further investigated.—Lester C. Newton Trucking Co. v. United States, 209 F Supp. 600 (602)*.

In its interpretive order the commission set out three criteria to be applied in future in determining the exempt or nonexempt status of agricultural products in general. Each of the specific frozen foods mentioned in the proceedings before the commission comes within the first criterion, and insofar as that criterion determines the status of those commodities it is such an "order" as to form the basis of the present action. However, insofar as that criterion refers to the status of commodities not before the commission or considered by it, it is not such an "order" as to form the basis of injunctive proceedings or proceedings in nature of appeal, but rather an indication of probable future course of conduct should occasion arise. Few of the commodities involved are embraced in either of the other two criteria, and no substantial testimony concerned either; therefore, questions arising from the criteria and their application to commodities not considered by the commission should be directly presented upon a hearing on a cease-and-desist order if such occasion arises.—Id., pp. 605-6.

Reviewability of an order of the commission does not depend on the form which it takes, whether affirmative or negative, but on whether it determines rights or obligations from which legal consequences may flow; regard must be had to the immediate and practical impact it will have on affected carriers and shippers. Where the immediate and practical effect of an order is to subject a carrier to risk of civil or criminal sanctions if he continues to operate in disregard of the order or of the determinations expressed therein, the order is reviewable even though purely negative in form and even though the shipper seeking review was not a party to the agency proceedings which resulted in the order being issued. [351 US 40.]—Ballentine Produce, Inc. v. United States, 209 F. Supp. 679 (681)*.

But where the order complained of is a mere abstract declaration, where it does not command the carrier to do or refrain from doing anything, where it neither grants nor withholds any authority, privilege, or license, where it does not extend or abridge any power or facility, where it does not subject the carrier to any liability or change its existing or future status or condition, and where it determines no right or obligation, it is not reviewable; such an order does not tender any judiciable controversy.—Id., p. 681.

The commission's order denying petitions

for declaratory order concerning "grandfather" rights to transport certain frozen vegetables is not reviewable, since it imposed no duty or obligation, conferred no right which did not exist before, and subjects plaintiff to no penalty to which it was not subject before; it involved no affirmative interpretation of the law and no classification of commodities as exempt or nonexempt either before or after the Transportation Act of 1958, but merely denied the petitions on ground that the relief sought was unnecessary in view of prior agency interpretations. Plaintiff has not been adversely affected by the challenged order, and although it may have been damaged by virtue of decision in 81 MCC 649, that proceeding has been expressly excluded from the instant litigation.—Id., pp. 681, 682.

Neither the commission's order giving notice that it had concluded not to enter upon an investigation of proposed train discontinuance, nor its order denying petition for reconsideration of such decision, qualifies as an "order" subject to judicial review within meaning of 28 USC §2325; neither action was final, both were completely gratuitous and in effect of no more technical significance than informal statements of commission policy.—Sludden v. United States, 211 F. Supp. 150 (154)*.

The commission's report and order finding that carrier-made rates were not just and reasonable, and requiring them to be canceled, is a determination that the railroads could not impose certain charges and thus is an order that determines a "right or obligation" so that "legal consequences" will flow from it. Such an order is reviewable.—Pennsylvania R. Co. v. United States, 216 F. Supp. 199 (200-1)*.

In order issued under §211.1(c)(8) of its deviation rules, authorizing plaintiff's competitor to use a shorter alternate route between two cities, the commission received no evidence and made no findings with respect to any of the criteria spelled out in that rule, but merely found generally that requirements of the deviation rules were met; there is thus no basis for ascertaining whether the order is supported by facts establishing that the reasonable standards prescribed by the regulations have been met, and whether the order has a rational basis in fact. While the court may not substitute its evaluation of the evidence for that of the commission, common sense and fair play require that the ground upon which an administrative agency acts be clearly disclosed and adequately sustained. Order set aside and the case remanded for further proceedings.—Greyhound Corp. v. United States, 221 F. Supp. 440 (444-5)*.

The findings and orders of the commission are presumptively valid; and function of the court, in action to set aside orders granting motor carrier authority to intervening defendants, is exhausted when there is found to be a rational basis for the commission's conclusions. Therefore, since the commission's findings and conclusions are supported by substantial evidence of record, are not arbitrary, but are adequate and in accordance with the law, the court must affirm its decisions and enforce the orders; commission orders based on adequate findings and supported by substantial evidence cannot be upset.—United Van Lines, Inc. v. United States, 266 F. Supp. 586 (588-9)*.

See also DeCamp Bus Lines case, 49 USC §17(9), n. 2; National Van Lines, Inc., v. United States, §17(9), n. 2.

14. Parties entitled to restrain enforcement of commission's orders.—[Vols. 4, 7, 10, 12-19].—Associations of motor carriers, authorized under §5a of Interstate Commerce Act, perform significant functions in administration of that act, including representation of member carriers in proceedings before the commission; since individual member carriers of appellant associations will be aggrieved by the commission's order approving forwarder volume rates, and since appellants are proper representatives of their members, they have standing to challenge the validity of the commission's order in the district court.—National Motor Freight Traffic Assn. v. United States, 372 U.S. 246 (247)*.

Plaintiff has no right to complain that, under modified control transaction approved by the commission, it is acquiring carrier's controlling stockholder who, as to either the note to be given plaintiff by the carrier or the cash payment, ultimately bears the risk and will end up owning the noncarrier involved. Since the court regards the report in the finance docket (authorizing issuance of the note) as a

supplemental and integral part of the control proceeding under review, whatever attack plaintiff makes as to the report in the latter is available to him as to the former, even though no separate appeal has formally been taken. Reading all the commission reports together, practically all points urged by plaintiff wash out, and it is unnecessary specifically to consider the threshold dispute as to whether he has standing to challenge the commission's orders; it may be assumed, without deciding, that he does.—Walker v. United States, 208 F. Supp. 388 (393, 394)*.

Although validity of certificate under attack was upheld by a different district court in 205 F. Supp. 831, instant plaintiff was not a party to that case and is not bound by the result.—Sloan's Moving & Storage Co. v. United States, 208 F. Supp. 567 (571)*.

Regulated carriers for hire of fresh meat and other packinghouse products, some of whom participated as active parties throughout the commission's proceedings, including the phase in which order under review was entered, are parties in interest with standing to maintain action challenging validity of that order; they have lost and are continuing to lose substantial amounts of traffic in considered commodities to private carriers. Since the commission's erroneous construction of the statute authorizes unlawful transportation by private carriers, plaintiffs have standing to sue to the end that the commission may be guided in the future by the court's construction of the act.—Atchison, T. & S.F. Ry. Co. v. United States, 209 F. Supp. 35 (45)*.

The broad issue of the commission's statutory authority over substituted rail-for-motor freight service, as raised by intervening forwarders, is not properly part of proceeding to set aside the commission's findings and order holding plaintiffs' substituted service to be unlawful and requiring cancellation of rates proposed thereon. Interveners are in no way affected by the commission's order and have no interest in setting it aside.—Strickland Transp. Co. v. United States, 219 F. Supp. 618 (620)*.

Since plaintiff, in action seeking to temporarily enjoin reparation orders issued by the commission against Baltimore & O. R. Co., need not pay any of the reparations in issue, it cannot be damaged by the commission's orders. Plaintiff cannot be held in contempt or be forced to make such reparation until a shipper to whom reparations are due brings a suit under §16(2) of the Interstate Commerce Act and prevails therein. Granting of a temporary injunction is justified only where there is a showing of irreparable injury during pendency of the action; denied.—Central Vermont Ry., Inc. v. United States, 231 F. Supp. 967 (968)*.

Plaintiff labor unions and motor carrier association have shown no ground entitling them to seek judicial relief from the commission's order requiring certain carriers to publish prescribed tariff rule governing furnishing of helper service for loading and unloading of t.l. freight. The association is neither a carrier nor a shipper, none of its member carriers are parties to instant suit, and it does not contend that the order is illegal or beyond the commission's powers. Plaintiff unions charge only that the order impairs their labor contract, but the court finds that it does not impair the validity of their collective bargaining agreements with motor carrier employers, and the claimed interference with their bargaining rights is too remote and tenuous to give them standing to set aside the commission'a order. None of plaintiffs has any legal right or interest that would be injuriously affected by the order within doctrine of 192 F. Supp. 12 (affirmed per curiam in 365 US 649), and they therefore have no standing to sue; complaint dismissed.—Teamsters Joint Council 40 (J.C.) v. United States, 238 F. Supp. 301 (302, 306, 307-8)*.

The courts are unanimous in holding that, for a person to be in position to maintain a complaint to set aside an order of the commission, he must show that he has a legal right or interest that would be injuriously affected by the order. Complaint seeking to set aside the commission's order denying plaintiff leave to intervene in motor-carrier control proceeding, on ground that, having sold his stock in acquired carrier, he had no sufficient interest in the §5(2) proceeding that would entitle him to intervene, is devoid of any allegation which if proven would convince the court of a legal right or interest that would be adversely affected by the order. Complaint dismissed and

application for appointment of a three-judge court denied.—Kulp v. United States, 238 F. Supp. 390*.

Plaintiffs, a motor carrier association and two common carrier conferences, clearly have standing to challenge validity of the commission's order dismissing their complaint seeking a finding by the commission that one defendant therein was operating as a freight forwarder in interstate commerce without appropriate authority and that two other defendants were aiding and abetting in such activities.—National Motor Freight Traffic Ass'n v. United States, 242 F. Supp. 601 (602-3)*.

Plaintiffs, holders of bonds of New York, N.H. & H. R. (currently in reorganization), which the commission required to be included in approving merger of the New York Central and the Pennsylvania R., have no standing to raise question of whether the condition with respect to inclusion of the New Haven gives that railroad adequate protection by an action to enjoin consummation of the merger. The merger as proposed did not involve any transaction relating to the New Haven; and, while it threatened injury to that railroad, it posed no individualized threat to plaintiffs as distinguished from all other claimants against debtor's estate. Moreover, protection of plaintiffs' interests and those of all other New Haven creditors and stockholders was, and is, the responsibility of the Trustees in the bankruptcy proceeding. Complaint dismissed.—Oscar Gruss & Son v. United States, 261 F. Supp. 386 (391, 392, 395)*.

Plaintiff is not precluded from maintaining suit to set aside orders of the commission simply because he was not a participant in the commission proceedings if, in the court action, the orders are attacked as exceeding the powers of the commission; however, it is not clear on what basis the orders are attacked in instant action, or even that they are in fact being attacked.—Schwartz v. Alleghany Corporation, 282 F. Supp. 161 (163)*.

See also United Transports case, §2323, this title, n. 2.

15. Parties defendant.—[Vols. 4, 7].—United States a necessary party, see §2322, this title, n. 1.

Equitable Relief

21. Other remedies available upon application to the commission.—[Vols. 4, 7, 10, 12, 14-17, 19].—Even assuming that the commission's order denying petitions for a declaratory order concerning "grandfather" rights to transport certain frozen foods were reviewable under decision in 351 US 40, the court could give plaintiff no effective relief at this time. Though all products transported by plaintiff are now nonexempt, it is the commission's function, not the court's, to determine in the first instance whether all were exempt prior to the Transportation Act of 1958 and thus within the "grandfather" provisions of §7(c) thereof. Plaintiff is free to take its certificate to the commission for construction and clarification and thereafter to seek judicial review of an adverse administrative ruling; the controversy will then be before the court in concrete form and upon an adequate record, with the court having the benefit of the commission's informed judgment as to proper classification of the products involved and whether they are covered by plaintiff's certificate. Complaint dismissed without prejudice.—Ballentine Produce, Inc. v. United States, 209 F. Supp. 679 (683)*.

22.—Necessity of application for rehearing before commission.—[Vols. 4, 7, 10, 12, 15].—See also Teamsters Joint Council 40 case, 49 USC §17(9), n. 2.

—Temporary restraining order.—[Vols. 4, 7, 17, 18].—Order issued temporarily restraining operation and effective date of the commission's order authorizing merger of Atlantic Coast Line into Seaboard Air Line until convening of a three-judge court to hear plaintiffs' motion for interlocutory injunction. Otherwise, it appears, based on the pleadings, the exhibits attached thereto, and evidence presented at hearing, that the irreparable damage specifically alleged by plaintiffs will result.—Florida East Coast Ry. Co. v. United States, 228 F. Supp. 340 (343-4)*.

However, motion of Coast Line and Seaboard that plaintiffs be required to post bond during pendency of the temporary restraining order is denied. Lack of reported cases indicates that, upon the requisite showing of ir-

reparable damage, it has been the custom throughout the Federal judiciary to issue temporary restraining orders in statutory three-judge cases without requiring bond. The statutory scheme embodied in the Interstate Commerce Act, the Administrative Procedure Act, and the three-judge court provisions of 28 USC §§2281-2284 and 2321-2325 contemplates that in course of orderly procedure there may be review of the commission's orders after administrative procedures are final. At present stage of the proceedings neither the proposition (1) that the merger is lawful, nor (2) that if merger in presently approved or modified form is finally allowed the expected savings of $20 million per year will be realized, is established with such certainty and finality as to require indemnification for the delay caused by the final step in the statutory scheme, judicial review.—Id., p. 343.

Had Congress intended that bond be required in statutory three-judge cases, it could have included in 28 USC §§2324 and 2284 a provision for execution of a bond for damages similar to that in §16 of the Clayton Act; absence of such a provision is persuasive that posting of an indemnity bond by plaintiffs should not be required. Furthermore, plaintiffs have clearly shown that no bond requirement of nature proposed, or remotely approaching it, could be met, and the result would be to permit the merger to proceed while its legality is litigated; should plaintiffs ultimately prevail, the resulting chaos could never be restored to order, nor the injury to plaintiffs be repaired. Such a result cannot be reconciled with a statutory scheme that envisions that interested parties be entitled to seek orderly and effective judicial review of administrative orders.–Id., p. 343.

While, in view of voluminous record on which the order of the commission in issue was based and the short time before effective date thereof, it is impossible for the court to find that plaintiffs have a reasonable probability of success when the case is submitted to a three-judge court on its merits, record before the court on motions seeking to temporarily restrain operation of the order makes a determination of possibilities feasible. In the circumstances, the court deems it within contemplation of the law and of the authorities cited to grant relief when record shows that plaintiffs have a reasonable possibility of success on the merits. A balancing of the equities and a consideration of the public interest require that a temporary restraining order, maintaining, pendente lite, the status quo existing at time of filing of the complaint, be granted.–Cincinnati, N.O. & T.P. Ry. Co. v. United States, 220 F. Supp. 46 (47-8)*.

In determining whether a temporary restraining order should be issued against the commission's order prescribing increased divisions to L. & N. R. out of certain joint rates with Southern Ry., comparison of injuries to the parties is a sounder approach than trying to weigh the likelihood of success, since the actual controversy is between those railroads and it would be useless to speculate on the merits before the matter is heard by a three-judge court. If cost to plaintiffs of establishing and operating a different accounting system be deemed irreparable injury, it is counterbalanced by the detriment to L&N from delaying of monthly payments otherwise due it, on which interest, if allowed, would be considerable. Plaintiffs have shown no probability of ultimately prevailing, nor any likelihood of irreparable injury outweighing detriment to the party who would be denied relief by a restraining order; entry of such an order is therefore not justified under either criterion.–Carolina & N.W. Ry. Co. v. United States, 230 F. Supp. 581 (582)*.

However, denial is subject to conditions that (1) if plaintiffs are successful in permanently enjoining the commission's order, L&N shall resettle its accounts with Southern on basis of present divisions on all shipments after date specified, with interest at 6 percent on the monthly differences between the two divisional bases, computed from customary settlement dates, and (2) that the question of whether and to what extent L&N may be required to bear plaintiffs' accounting changeover expense in event they are successful is reserved for further consideration by the court.—Id., pp. 582-3.

See also City of Williamsport v. United States, n. 7, above; Seatrain Lines, Inc., v. United States, n. 9, above.

27.—Preliminary or pendente lite injunction.—[Vols. 4, 7, 14, 19].—Plaintiffs' appli-

cation to enjoin the commission pendente lite from issuing a certificate of convenience and necessity in accordance with the challenged orders was denied, since no prospect of irreparable injury to plaintiffs could be shown, beyond possible loss of some trade if carrier involved should proceed to operate under the certificate before suit to set aside the commission's orders could be decided on the merits.—Aero-Mayflower Transit Co. v. United States, 208 F. Supp. 303 (304)*.

Plaintiff seeking to enjoin Securities & Exchange Commission from prosecuting a "stop order" proceeding, in which notice of hearing has been issued, has not exhausted its administrative remedies when its allegations concerning methods and tactics employed by the commission's investigators in accumulating evidence are subject to motions to suppress, objections, etc., in proceedings before a hearing examiner, and the entire proceedings may thereafter be subject to judicial review. Preliminary injunction denied.–Wolf Corp. v. Securities & Exchange Commission, 209 F. Supp. 481 (482). [Not arising hereunder.]

A preliminary injunction will not be granted merely on a balancing of the equities, as plaintiffs propose, but rather upon a showing of probable cause for ultimate relief on the merits. The court cannot, and will not, act in action seeking an injunction temporarily restraining defendants from acquiring "control" of plaintiff railroad through further purchases of latter's capital stock, in order to maintain the status quo in the matter until the commission can determine merits of plaintiffs' complaint filed with it alleging violations by defendants of §5(2) and (4) of the IC Act. The court may not, under a "status quo" label, usurp the functions of a specialized agency uniquely qualified to deal with such matters.–Chicago S.S. & S.B. R. v. Monon R., 235 F. Supp. 984 (985, 987-8).

Grant of preliminary injunction is the exercise of a very far-reaching power, never to be indulged in except in a case clearly warranting it; and since plaintiffs failed to show they would suffer irreparable harm if the Interstate Commerce Commission is not restrained from issuing certificate to intervenor, pending decision on merits of their complaint, preliminary injunction is denied. There is a formal difference between an order of the commission and a certificate issued pursuant thereto. While there is no statutory provision for review of a certificate, there is no limitation on jurisdiction of the court to review the commission's order and to take whatever action may be appropriate with respect to the resulting certificate itself. To extent that the court's judgment affects the commission's order, the certificate is commensurately affected and the court's power over the certificate is implicit in its power of review of the order that it issue.—Asbury Transp. Co. v. United States, 236 F. Supp. 322 (324, 325)*.

Record failed to show such irreparable injury as would entitle plaintiff to requested preliminary injunction requiring Interstate Commerce Commission to issue an "authorization" enabling plaintiff to continue forwarding used automobiles independently of and not in connection with the forwarding of used household goods, and restraining the commission from any enforcement action against it, pending determination of its application for a freight forwarder permit. Main premise of plaintiff's case (that the commission's holding in 323 ICC 382 that forwarding of used automobiles separately from used household goods is not within exemption of §402(b), and such forwarder's entire service requires a permit, constituted a reversal or change of its prior interpretation of that exemption) is wrong; it is incorrect to find from line of cases cited the sudden change in the commission's position alleged.-Routed Thru-Pac, Inc. v. United States, 242 F. Supp. 781 (782-4).

While plaintiff may have lost some Department of Defense business when that agency changed its policy following the commission decision, it does not allege that the commission was in any way responsible for that; no real evidence of threatened loss of commercial contracts was adduced; moreover, whatever speculative loss of business plaintiff faces is only for a limited time, since its pending application proceeding is expected to be completed in about 6 months. And, plaintiff can eliminate the threat of future enforcement action against it by temporarily stopping the prohibited type of shipments, while continu-

ing the rest of its business.–Id., p. 784.

Plaintiff's request for preliminary injunction, pending final determination of its action to review the commission's order permitting railroad to abandon branch of its line in issue, denied when, the record failing to reveal a probable basis for setting aside order of the commission, probability that plaintiff would prevail on the merits is not shown. Moreover, plaintiff failed to show that it would suffer irreparable harm if preliminary injunction is not granted. Although abandonment of the line would necessitate plaintiff's trucking its sand an additional distance to the railroad, probably increasing its transportation costs, record does not show that irreparable injury would result therefrom; financial loss or diminished profits are not necessarily synonymous with irreparable injury.–Whitehead Bros. Co. v. United States, 247 F. Supp. 614 (615-6)*.

Record in action by union, seeking suspension of preliminary injunction restraining work stoppage at lake port where Canadian unions were picketing the loading of coal into Canadian vessels by plaintiff's employees, fails to show that the union will be injured if the preliminary injunction remains in force; there is no claim that it is affiliated with the picketing unions, or that its members are engaged in the same trade, craft, or occupation as members of those unions. Conversely, if the injunction is suspended, inability of the terminal company and its owning railroads to handle the coal tonnage may involve substantial loss of revenue, and could result in irreparable loss to carriers. Plaintiff's loss might be avoided if Canadian consignee selected other lake carriers for transshipment of the coal; however, as a common carrier, plaintiff would have no right to dictate to consignee what vessels it must have its coal shipped in; preliminary injunction not suspended.—Lakefront D. & R.T. Co. v. International Longshoremen's Ass'n, 333 F. 2d 549 (552-3).

30.—Perpetual injunction.–[Vols. 4, 16].–See United States v. Dixie Highway Exp., Inc., §207(a), n. 9.

Scope of Judicial Review of Commission's Orders

40. In general.–[Vols. 4, 7, 12-15, 17, 19].—The court's powers of review are limited; if the commission has not misapplied the law, if its ultimate conclusions are supported by substantial evidence, and if it has not acted arbitrarily or capriciously, its action must be sustained.—Cope v. United States, 222 F. Supp. 596 (601)*; A. L. Mechling Barge Lines, Inc., v. United States, 218 F. Supp. 837 (839)*; Alabama, T. & N. R. Co. v. United States, 207 F. Supp. 638 (638-9)*; Atwood's Transport Lines, Inc., v. United States, 211 F. Supp. 168 (173)*; Boston & M. R. v. United States, 202 F. Supp. 830 (834, 838)*; Chicago, S.S. & S.B. R. v. United States, 221 F. Supp. 106 (109)*; Commercial Motor Freight, Inc., v. United States, 276 F. Supp. 264 (268-70)*; Cooper Transfer Co., Inc., v. United States, 281 F. Supp. 917 (917-18)*; DeCamp Bus Lines v. United States, 224 F. Supp. 196 (201-2)*; Frozen Food Exp. v. United States, 219 F. Supp. 131 (136)*; Great Northern Ry. Co. v. United States, 209 F. Supp. 230 (232)*; Id., 209 F. Supp. 234 (236)*; Id., 209 F. Supp. 238 (240)*; J. B. Acton, Inc., v. United States, 221 F. Supp. 174 (177)*; J. B. Montgomery, Inc., v. United States, 206 F. Supp. 455 (458-9)*; Motor Truck Supply Co. v. United States, 238 F. Supp. 645 (647-8)*; Safeway Trails, Inc., v. United States, 234 F. Supp. 362 (365)*; Denton Produce, Inc., v. United States, 270 F. Supp. 402 (405-7, 408)*; North American Van Lines, Inc., v. United States, 217 F. Supp. 837 (840-1)*; Pre-Fab Transit Co. v. United States, 262 F. Supp. 1009 (1010-11, 1016)*; Resort Bus Lines, Inc., v. I.C.C., 264 F. Supp. 742 (746-7)*; Sea-Land Service, Inc., v. United States, 222 F. Supp. 558 (566)*; Sloan's Moving & Storage Co. v. United States, 208 F. Supp. 567 (569, 571)*; State Corporation Comm. of State of Kansas v. United States, 216 F. Supp. 376 (379)*; United States v. I.C.C., 221 F. Supp. 584 (587)*; United Transports, Inc., v. United States, 214 F. Supp. 34 (39)*; United Van Lines, Inc., v. United States, 249 F. Supp. 984 (985)*

The jurisdiction conferred on three-judge statutory district courts to review orders of the commission is very definitely circumscribed: if an order of the commission lies within scope of a statute it is authorized to administer and enforce, and if the order is based on adequate findings which are in turn supported by substantial evidence, the order may not be set aside by a court on review even though the court might disagree with the

commission's conclusions or might consider them contrary to the weight of the evidence.—Edwards Motor Transit Co. v. States, 201 F. Supp. 918 (920)*.

If an order of the commission lies within scope of a statute which the commission is authorized to administer and enforce, and if it is based on adequate findings which in turn are supported by substantial evidence, it may not be set aside by a court on review, even though the court might disagree with the commission's conclusions or consider them contrary to weight of the evidence. In finding that considered transportation with leased vehicles was for-hire carriage by plaintiff lessor, rather than private carriage by shipper-lessees, the commission acted within its statutory authority and rational bases for its conclusion and order exist; consequently, its decision must be affirmed.—John J. Casale, Inc. v. United States, 208 F. Supp. 55 (60)*.

It is beyond the court's province to consider the weight of the evidence before the commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made in other cases; the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.–Aero-Mayflower Transit Co. v. United States, 208 F. Supp. 303 (305, 306)*.

The function of the court is to review the administrative action, not to determine whether the court on the evidence would have reached the same result as did the commission; and the judicial function is exhausted when there is found to be a rational basis for the conclusion approved by the administrative body. Since the findings of fact made by the commission are supported by substantial evidence and supply a rational basis for the order, and in arriving at its decision the commission substantially observed the standards prescribed by the act, plaintiffs' complaints are dismissed—Boston & M. R. v. United States, 208 F. Supp. 661 (671, 679)*.

Congress has conferred jurisdiction to determine whether rates are just and reasonable upon the commission; it is for the courts to decide whether the commission's findings are supported by substantial evidence and whether there is a rational basis for its conclusions. Determination of the commission that proposed reduced rate, although somewhat in excess of out-of-pocket costs, was not just and reasonable because of resulting loss in net carrier revenue, sustained—Atlantic Coast Line R. Co. v. United States, 209 F. Supp. 157 (159, 160)*.

Scope of judicial review of an order of the commission embraces only questions affecting constitutional power, statutory authority, and the basic prerequisite of proof; if those legal tests are satisfied, the commission's order becomes incontestable.–A. L. Mechling Barge Lines, Inc. v. United States, 209 F. Supp. 744 (747)*.

Jurisdiction of a three-judge statutory District Court to review orders of the commission is limited to determination of whether the orders are within its statutory authority, are based on adequate findings, which in turn are supported by substantial evidence. But though Congress has entrusted to the commission delineation of the area which a carrier may serve, the commission's discretion must be exercised in conformity with the policies of Congress, and the courts should evaluate the evidence to determine if the commission's ruling accords with public interest.—Winter Garden Co. v. United States, 211 F. Supp. 280 (285)*.

The reviewing court's function, in action to set aside the commission's interpretation of plaintiff's certificate, does not involve a de novo construction of the certificate or a reevaluation of the undisputed facts concerning services performed under color thereof. The court is not concerned with weight of the evidence; scope of review is confined to the interpretation placed by the commission on a certificate of its own creation, and the court is bound by that interpretation unless persuaded that it was capricious and arbitrary, constituted an abuse of discretion, or did violence to some established principle of law; and it is beyond the court's province to consider the soundness of the reasoning by which the commission's conclusions were reached.—Bowman Transp., Inc. v. United States, 211 F. Supp. 354 (357)*.

Where plaintiff, in action to set aside the commission's order denying it certain exten-

sion authority, challenges the commission's interpretation of existing carrier's authority, the court's function does not involve a de novo construction of the certificate; scope of review is confined to the interpretation placed by the commission on a certificate of its own creation, and the court is bound by that interpretation unless persuaded that it was capricious or arbitrary, constituted an abuse of discretion, or did violence to some established principle of law; and it is beyond the court's province to consider the soundness of reasoning by which the commission's conclusion was reached.–McKenzie Tank Lines, Inc. v. United States, 211 F. Supp. 876 (878)*.

In absence of an overreaching of the commission's constitutional power, its order approving railroad merger should not be set aside by the reviewing court unless convincing proof is offered to show that it is unjust and unreasonable or not supported by substantial evidence. Reviewing court must be aware of extensive facilities, specialized knowledge, and expertise which the commission brings to the constitutional exercise of its statutory power, and must defer to the commission's judgment and experience in weighing complicated facts, balancing conflicting interests, and predicting future consequences of a complex transaction.–Fried v. United States, 212 F. Supp. 886 (889)*.

Orders of the Interstate Commerce Commission, when issued within its statutory authority and based on adequate findings supported by substantial evidence, are not to be disturbed even though the court might reach a different result on the record. The commission is presumed to have properly performed its official d..ties, and that presumption supports its acts in absence of clear evidence to the contrary. But, while the administrative ratemaker has broad discretion so long as no statutory requirement is overlooked, it is not the function of a reviewing court merely to apply a rubber stamp of approval regardless of whether or not criteria for affirmance are established by the record: to merit judicial approbation the commission must have made certain basic, essential findings, and it is the court's responsibility, giving full recognition to the commission's expertise and according to its order all presumptions it is entitled to by law, to determine whether its findings are supported by substantial evidence, are clear and precise, and are not arbitrary, capricious, or an abuse of discretion.–Cincinnati, N.O. & T.P. Ry. Co. v. United States, 229 F. Supp. 572 (574-5)*.

It is not the proper function of a reviewing court to substitute its judgment for the commission's on matters of fact, or even on such mixed questions of fact and law as may have been committed by law to agency discretion; nor are the commission's findings of fact to be disturbed if based on substantial evidence. However, the court is bound to inquire into every aspect of the proceedings below wherein it may appear that the commission has otherwise applied an erroneous standard of law, or has made arbitrary findings, or has reached ultimate conclusions without adequate subordinate findings, or has failed in any other way to observe those procedures of investigation and elaboration which have become the hallmarks of proper administrative determination.–Nashua Motor Exp., Inc. v. United States, 230 F. Supp. 646 (650)*.

The court's task is limited to ascertaining whether there is warrant in the law and the facts for what the commission has done. Review of the record compels conclusion that plaintiff has failed to demonstrate that the commission's findings were unwarranted or contrary to the evidence. There was a rational and legal basis for the commission's decision; sustained.–Clark Transport Co. v. I.C.C., 233 F. Supp. 839 (842)*.

Where there is warrant in the law and the facts for what the commission has done, a reviewing court is without authority to intervene. The commission acted within the scope of its authority, acted neither capriciously nor arbitrarily, and its ultimate findings of fact are supported by substantial evidence; sustained.–Clay Hyder Trucking Lines, Inc. v. United States, 234 F. Supp. 673 (676)*.

The commission is presumed to have properly performed its official duties; and this presumption, which stems from the deference due the commission because of its familiarity with conditions in the industry it regulates, supports its actions in absence of clear evidence to the contrary. However, judicial deference to expertise is not boundless, and exper-

tise is not sufficient in itself to sustain a decision: the commission's order must be supported by substantial evidence and must be made within the statutory limits placed on its powers by Congress.–Eastern Central Motor Carriers Ass'n v. United States, 239 F. Supp. 591 (594)*.

In action to set aside the commission's order denying plaintiff's application for authority to extend its rail line into newly developed Florida territory, and granting application of Atlantic Coast Line for similar authority, the function of the reviewing court is to determine whether there is substantial evidence on the record as a whole to support the commission's findings, and whether the commission applied proper legal standards in conducting the proceeding before it and in reaching its conclusions. Record of commission proceeding, received in evidence, sustains its finding that public convenience and necessity required granting Coast Line's application and denying plaintiff's; and that finding being supported by substantial evidence, the commission's decision must be upheld; complaint dismissed.–Florida East Coast Ry. Co. v. United States, 242 F. Supp. 490 (491-2, 493)*.

While the judicial function is exhausted when there is found to be a rational basis for an administrative body's conclusion, this does not mean that it is the function of the court to search the records for evidence which in and of itself justifies the administrative decision; "substantial evidence" must be determined with full consideration of contradictory evidence, or evidence from which conflicting inferences could be drawn. Moreover, in action to set aside the commission's order denying plaintiff's application to purchase operating rights of another motor carrier, the court is acting in its historical equity jurisdiction in considering an injunctive remedy and should, therefore, be able to view the situation in its entirety, including related matter of a third carrier's subsequent application to purchase the same rights. However, without considering such related matter, the record affords ample basis for holding that the commission's finding as to creation of substantially duplicate authority is unsupported by substantial evidence.–Interstate Motor Freight System v. United States, 243 F. Supp. 868 (871, 872)*.

Record is convincing that the commission committed no error of law in holding that railroad employees of unincorporated terminal association, created by "arrangement" of several railroads, were entitled to employee-protective benefits if, in fact, they were adversely affected by the railroad merger approved; nor was the commission's action arbitrary, capricious, or an abuse of discretion. The findings being supported by substantial evidence, the court has no authority to disturb conclusions of the experienced Government agency charged with manifold duties in the field of transportation, no small part of which is in the area of mergers and affiliations; complaint dismissed.–Louisville & N. R. Co. v. United States, 244 F. Supp. 337 (338, 342)*.

In action to set aside commission orders granting motor carrier certificate to one rail-subsidiary applicant and finding that the other did not need such authority because it could already provide proposed service, the reviewing court's function is to ascertain whether the commission correctly applied the law and, if so, whether its findings support the conclusions reached, and whether the findings are supported by substantial evidence. The commission's conclusions (1) that "special circumstances" justified granting first applicant unrestricted authority to serve shipper's new plant when it had been serving the old plant, its existing authority contained no rail-auxiliary restrictions, and it sought only a slight extension thereof, and (2) that as second applicant could serve the new plant under its rail parent's authority, plant site being within the railroad's terminal area, it did not need a certificate, were both correct; findings and conclusions of the commission are substantially supported by the evidence of record;sustained.–American Trucking Associations v. United States, 260 F. Supp. 386 (387-8, 388-90)*.

In reviewing an administrative proceeding, the court is confined to the record made before the agency; it is not a trial de novo. On examination of the record as a whole, there is substantial evidence therein to support the commission's findings in consolidated complaint and application proceedings; and its findings and conclusions are neither arbitrary

nor capricious. Action to vacate order of the commission, dismissing plaintiff's complaint and granting motor carrier authority to intervenor, dismissed.–Armored Carrier Corp. v. United States, 260 F. Supp. 612 (615-6)*.

While the reviewing court is bound by the commission's construction of plaintiff's "grandfather" certificate unless it is clearly erroneous, arbitrary, or capricious, and, also, is bound to acknowledge and give weight to the commission's expertise, it is incumbent upon the commission to present sufficient factual findings and reasoning from which the court may determine whether it has properly executed its substantial responsibility. In action to set aside commission orders in consolidated proceeding involving (1) interpretation of plaintiff's certificate and its applications for (2) modifications of commodity and route descriptions in the certificate and (3) for a certificate containing proposed modifications, only in event of denial in the modification proceeding, the commission failed to provide the court with sufficient findings or reasonings as to any of the matters in issue; therefore, orders under review must be remanded for further consideration and findings.–Dixie Ohio Express, Inc. v. United States, 263 F. Supp. 993 (999, 1001-04)*.

In action seeking review of an order of the commission, it is the court's duty to review the record and determine the substantiality of the evidence of the record as a whole. Therefore, since examination of the entire record does not disclose a rational basis for the commission's conclusion that a cease and desist order should issue against plaintiff corporation, the order under review cannot stand; reversed and set aside.–Farmers Feed & Supply Co. v. United States, 267 F. Supp. 72 (76)*.

While administrative agency determinations are normally entitled to considerable deference upon review, and orders of the commission that are in accordance with the law and not arbitrary are not to be disturbed even though the court might reach a different result upon the record, it is not the function of a reviewing court merely to apply a rubber stamp of approval regardless of whether or not criteria for affirmance are established by the record.–Louisville & N. R. Co. v. United States, 268 F. Supp. 71 (75)*.

Though plaintiff seeks to have the court set aside the commission's order denying its motor contract carrier application, and to require approval thereof, the court may not direct the commission to issue to plaintiff the permit sought in the application. A reviewing court has no power to order an administrative agency to perform discretionary acts in a particular manner, or itself to exercise administrative functions. However, since the commission did not properly employ statutory procedures, did not correctly evaluate requisite criteria for issuance of a permit, and made findings not supported by substantial evidence, the order is set aside and the case is remanded to the commission for further consideration consistent with the court's opinion.–Midwest Truck Lines, Ltd. v. United States, 269 F. Supp. 554 (556, 567)*.

See also Calcium Carbonate Co. v. United States, 49 USC §6(7), n. 260, Chicago, R. I. & P. R. Co. v. United States, 205 F. Supp. 378, APA, 5 USC, procedure; Soo Line R. Co. v. United States, 49 USC §5(2), n. 52; State of Illinois v. United States, 49 USC §1(22), n. 12; State of Montana v. United States, 49 USC §13a, n. 2; Walled Lake Door Co. v. United States, §16(12), n. 10; Whitfield Transp., Inc., v. United States, §212(a), n. 1; Zantop Air Transport, Inc., v. United States, 49 USC §303(b), n. 40.

41. Construction of orders.–[Vols. 4, 7, 10, 17].–See Walker v. United States, 49 USC §5(2), n. 100 securities.

42. Constitutionality of orders.–[Vols. 4, 7, 12, 14, 17, 19].–Where an order of an administrative agency operates to deprive an owner of property without due process of law, evidence relating to the confiscatory effect may be introduced in the reviewing court; however, prerequisite to granting the right to introduce such evidence, it must be shown that the aggrieved party was possessed of property in the constitutional sense and had been deprived of it by such order without a fair opportunity to be heard. While an interstate motor carrier has no vested right to use public highways for gain, it does have a right to reasonable compensation for services it is required to render under operating authority issued to it; and unreasonable denial of that

right by arbitrary administrative action does raise the constitutional question of deprivation of property without due process of law.–Cardinale Trucking Co. v. United States, 232 F. Supp. 339 (343-4)*.

However, reasonable control of extent and nature of a carrier's operations, exercised by the commission pursuant to legislative enactment in furtherance of the paramount public interest, does not constitute an unlawful invasion of any constitutional right. Therefore, since record in action to set aside the commission's order (which denied plaintiff's petition for reopening of its "grandfather" proceeding) indicates no arbitrary action, or abuse of discretion, on the part of the commission, there is no constitutional issue which invites a trial de novo, or justifies an oral hearing, on the question of confiscation.—Id., pp. 343, 344.

43. Necessity of notice and hearing before commission.—[Vols. 4, 7, 16, 19].—Since the commission's consideration of the question of reasonableness of proposed rates, through its Suspension Board, involves only a brief and informal hearing, automatic acceptance of a finding of unreasonableness which preceded a suspension order of the commission would delegate a greater effect to such administrative process than the process warrants. As the basis for a decree of a single district judge, such procedure would be inconsistent with §15(1) of the Interstate Commerce Act, which provides that effective rates may be struck down as unlawful after a "full hearing" by the commission.–Arrow Transp. Co. v. Southern Ry. Co., 372 U.S. 658 (671-2)*.

44. Review of questions of law–[Vols. 4, 7, 10-12, 15-19].—Where the applicable statutory language has been construed by the commission in light of its legislative history, such construction commands greater respect than that usually accorded administrative determinations of questions of law—Tar Asphalt Trucking Co. v. United States, 208 F. Supp. 611 (615)*.

While construction of a statute by administrative body charged with its enforcement is entitled to special weight, that principle does not apply where the commission's interpretation is not based in any wise upon its accumulated knowledge and experience but only upon a reading of the dictionary and the Congressional Record, tools which a court is equally able to use. Moreover, the commission's explanation of its turning to aids not specially related to its own expertise deprives its interpretation of any force. And, since the commission for the first time adopted a view antagonistic to the construction it had previously followed, the new interpretation is entitled to no weight as an administrative determination. Permanent injunction granted, and the matter remanded to the commission.—Atchison, T. & S.F. Ry. Co. v. United States, 209 F. Supp. 35 (41-2, 45)*.

The reviewing court must decide whether the commission correctly applied the law, not whether it followed its own precedents; fact that a new decision of an administrative tribunal departs from the rule of an earlier one does not require corrective action by the court.—Yale Transport Corp. v. United States, 210 F. Supp. 862 (864)*.

Though as a rule legislative intent must be ascertained from text of the statute if the words are clear and unambiguous, where the literal words bring about an absurd or futile result, or one plainly at variance with purpose of the legislation as a whole, legislative purpose is followed rather than the literal words; and there is no rule of law forbidding resort to explanatory legislative history, no matter how clear the words may appear on superficial examination. In construing an ambiguous statute, all relevant light shed on the purpose of Congress may be utilized: this includes reports of committees and committee members in charge of a bill, as well as interpretation by the executive department or agency charged with its administration and enforcement; an expression of opinion by the same congressional committee which considered the statute may be considered, particularly where it is made within a reasonable time after its enactment and relates specifically to the construction in question—Daniels v. United States, 210 F. Supp. 942 (949-50)*.

Though in the field of transportation the commission possesses expert knowledge, and its judgment is entitled to great deference because of its familiarity with conditions in the motor carrier industry, there are limits to its statutory powers as fixed by Congress and

the duty of the courts on judicial review is to determine those limits.–Winter Garden Co. v. United States, 211 F. Supp. 280 (285)*.

Notwithstanding limitations on the scope of judicial review of the commission's orders, the courts are still charged with a serious responsibility of seeing that they are reached by application of recognized legal standards [citing 312 US 126]. The court's duty is to determine only whether the challenged findings and rulings of the commission either show affirmatively that its order was not the result of proper application of all the pertinent legal standards, or make it impossible to say that those standards were properly applied.—Frozen Food Exp. v. United States, 219 F. Supp. 126 (136-7)*.

The commission has exercised its primary responsibility for interpreting plaintiff's certificate and determining what items fall within the contested commodity description therein, has delineated the scope of plaintiff's operating authority, has found that plaintiff had been and was willfully transporting commodities not authorized by its certificate, and has issued its order to cease and desist. There was rational factual and legal basis for the commission's order and it is not clearly erroneous, capricious, arbitrary, or the result of any abuse of the commission's discretion; and there is substantial basis for the order; sustained.—J.B. Acton, Inc. v. United States, 221 F. Supp. 174 (178-9)*.

The commission's interpretation of 298 US 349 as laying down the rule that it need not consider any evidence of specific rates in a case involving divisions of joint interterritorial rates as between the respective carrier groups, notwithstanding that the purpose and function of such a proceeding is to establish just and equitable divisions of particular joint rates, is palpably erroneous. No divisions case has even suggested that such is the rule; the consistent requirement sanctioned by the divisions cases in which the Supreme Court has written opinions is that evidence showing specific rates and specific divisions of specific carriers must be in evidence in the controversy and be considered by the commission.—Atchison, T. & S.F. Ry. Co. v. United States, 225 F. Supp. 584 (597, 598)*.

In summarily denying plaintiffs application because "no inadequacy was shown in protestants' services," the court understands the commission to have enunciated a rule of law to effect that a showing of present inadequacy of protestants' services is indispensable to issuance of a certificate of public convenience and necessity; but while there is some authority for this view, the better rule is embodied in the more numerous cases to the contrary. This apparent announcement of an erroneous standard of law requires that the order be vacated and the cause remanded for further proceedings.—Nashua Motor Exp., Inc. v. United States, 230 F. Supp. 646 (652-3)*.

The commission erred in its interpretation and application of §3(4) to the facts of the case under review. While it correctly found that plaintiff Seatrain Lines is a connecting carrier within §3(4), its report does not indicate what consideration was given to the claimed discrimination resulting from western railroads' continued maintenance of an origin port rate on Seatrain's route on a relatively higher level, tested by costs and relation to first-class rates, than level of either the reduced all-rail rate in which they participated on same traffic or the division they accepted out of that rate. Apparently, the commission considered the disparities shown by Seatrain of no significance, in view of its ultimate finding of no discrimination, based on dissimilarity of transportation conditions. However, those disparities are of such magnitude as to make a prima facie case of discrimination, and the burden thereupon passed to the western railroads to show that the difference in conditions justified the rate disparities shown to exist; this they failed to do. The commission's order on the §3(4) issue is therefore set aside and the matter remanded for further proceedings.—Seatrain Lines, Inc. v. United States, 233 F. Supp. 199 (203-4, 210)*.

The courts should respect commission findings in cases involving rates and tariffs, as such findings involve exercise of administrative expertise; however, the courts have held an issue of tariff construction to be a question of law where the construction does not involve technical words within the commission's expertise, or at least a mixed question of law and fact. Thus, in appeal from commission finding that assailed rates applied on

plaintiff's shipments of steel switchboxes, question of whether shipments were entitled to lower rates on boxes made of 14-gauge steel is not within exclusive domain of the commission's expertise, since meaning of "14-guage" as used in that tariff item is equally capable of construction by the court or the commission. However, as technical questions involving the significance of including shipments in one classification or another are faced by the commission often, and rarely by the courts, the commission should have an opportunity to reexamine the case in the light of evidence and arguments in the court record (not previously considered by it) and any relevant evidence plaintiff may yet adduce.—Roach Appleton Mfg. Co. v. United States, 265 F. Supp. 568 (576-7)*.

See also National Van Lines, Inc. v. United States, 355 F. 2d 326, APA, 5 USC, *Judicial Review*.

45.—Orders within scope of delegated authority.-[Vols. 4, 7, 10, 12-19].-Judicial review of orders of the commission is not to determine how the public interest will best be served. That is a function of the commission and is made such by terms of the statute.—Atlantic Coast Line R. Co. v. United States, 202 F. Supp. 456 (458)*.

The commission had power to implement §216(d) by issuance of a general order prescribing regulations to prevent race discrimination between passengers in vehicles and facilities used in interstate commerce, when there was adequate basis for its conclusion that case-by-case action on individual complaints did not afford an adequate remedy.—State of Georgia v. United States, 201 F. Supp. 813 (815)*.

When the commission has disregarded no statutory command, has made findings based on substantial evidence, and its action is warranted by its findings, the reviewing court must accept the commission's conclusions; the court's role in reviewing the commission's order is necessarily very limited.—Carolina Scenic Stages v. United States, 202 F. Supp. 919 (925)*.

Since §212(c) of the Interstate Commerce Act specifically provides that certificate issued thereunder shall authorize transportation of same commodities between same points as authorized in the carrier's permit, and does not authorize the commission to specify territory or determine bona fides of prior motor carrier operations, the commission had no statutory authority to impose restrictions as to points of pickup and delivery on certificate issued under that statute to plaintiff, in lieu of its permit, when the permit contained no such restrictions. Order of the commission set aside, and the matter remanded for further action in accordance with views expressed.—J. B. Montgomery, Inc. v. United States, 206 F. Supp. 455 (458, 460-1)*.

The commission was not barred from granting the certificate under attack by failure of applicant, its parent company, and its carrier affiliates to seek approval under §5(2) of the corporate control involved; the commission's jurisdiction to grant a certificate under §207 is not limited by §5, and there was factual and legal basis for the commission's order and the certificate issued pursuant thereto. Sustained.—Sloan's Moving & Storage Co. v. United States, 208 F. Supp. 567 (572-3)*.

The court may not set aside an order of the commission which is within scope of its statutory authority and based on adequate findings supported by substantial evidence; the commission's interpretation of §212(c) is in accord with the legislative history thereof, and its order, in conversion proceedings initiated on its own motion, finding plaintiff to be a common rather than a contract carrier and granting certificate in lieu of plaintiff's permits, being supported by substantial evidence, is affirmed.—Tar Asphalt Trucking Co. v. United States, 208 F. Supp. 611 (614, 615)*.

There is no merit to argument that the commission's attempt to convert plaintiff's status from contract to common carrier, against plaintiff's will, amounts to a taking of private property for public use without just compensation and without due process of law in violation of the Federal Constitution; the act does not authorize, or the commission's order effect, a conversion of plaintiff from a private carrier to a public utility; the statute merely embodies a new definition of "contract carrier" and empowers the commission to determine whether one holding a contract-carrier permit comes within that definition; ample evidence sustains conclusion that

plaintiff does not.—Id., p. 615.

An administrative interpretation of a statute by the agency charged with its application and enforcement, though not controlling or binding on the courts, is entitled to great weight; in concluding that separate transfers of operating rights of two transferors to a single transferee, neither alone being subject to §5, did not constitute a single transaction which might be subject to §5, and in permitting the transfers under §212(b), the commission did not exceed its statutory authority; the separate orders sustained.—Ship-By-Truck Co. v. United States, 208 F. Supp. 847 (851-2)*.

The commission exceeded its statutory authority in requiring segregation of plaintiffs' private-carrier operations from for-hire operations for which "grandfather" authority was granted under §7(c) of Transportation Act of 1958; that section contains nothing that authorizes such restriction, which would drastically change the basic character of plaintiffs' bona fide operations as conducted on the statutory date and thus deny them the substantial parity of future and past operations contemplated by the "grandfather" clause; proceeding remanded for further consideration in accordance with the views expressed.—Winter Garden Co. v. United States, 211 F. Supp. 280 (291)*.

The commission's application of the "15,000-pound rule," in holding that heavy hauler's authority entitled it to transport Army cargo trucks weighing over 15,000 pounds each, although no special equipment was required or used, served to enlarge the carrier's operating authority in a manner not prescribed by law; such finding was clearly erroneous and beyond its statutory authority. The commission's order set aside and declared a nullity.—United Transports, Inc. v. United States, 214 F. Supp. 34 (42-3, 44)*.

The commission has no power to set aside an ordinance of a municipality on the ground that it does not mean what it declares itself to mean; in holding that ordinance of Orange, Tex., annexing an extensive but narrow strip of land and declaring that the annexed strip is for all purposes part of the city, did not extend the boundaries of Orange for purpose of the commercial zone regulations, the commission extended its quasi-judicial power beyond any conferred upon it by Congress. Order set aside and the case remanded for further proceedings consistent with the court's views.—Yellow Transit Freight Lines, Inc. v. United States, 221 F. Supp. 466 (468)*.

Reviewing court may not modify or set aside the commission's order if it lies within the scope of the commission's statutory authority and is based on adequate findings, which in turn are supported by substantial evidence on the record as a whole. The commission is charged with determining whether a proposed §5 transaction is consistent with public interest; it is the wisdom and experience of the commission, not that of the court, which must determine whether control transaction in question is consistent with the public interest; order authorizing acquisition of control sustained.—Black Ball Freight Service v. United States, 223 F. Supp. 191 (194, 197, 199)*.

The function of the reviewing court is limited; in absence of some specific prejudicial departure from requirements of law or abuse of the commission's discretion the court may not intervene. The commission acted well within its statutory powers and on substantial evidence when it found that public convenience and necessity required issuance of considered motor carrier certificates, and that protestant's (plaintiff's) operating rights did not authorize it to provide proposed service. Even if scope of plaintiff's certificates had not been so interpreted, the commission's conclusion that its joint-line service would not meet shippers' requirement for single-line service in refrigerated equipment is supported by the record as a whole. Sustained.—Worster Motor Lines, Inc. v. United States, 226 F. Supp. 603 (605-7, 608)*.

The commission was correct in dismissing §5(2) application for control and merger of an intrastate carrier and related §207 application for continuance of interstate operations purportedly conducted by it under single-State exemption proviso, upon finding that acquired carrier's proviso status was void from the beginning because of illegal common control with a multistate carrier, and that the transaction was therefore not within scope of §5. It was proper to consider prior illegal control in

a §5(2) proceeding, and the statute should not be construed to require the commission to decide applications not properly before it. Plaintiffs are not entitled to a mandatory injunction directing the commission to take jurisdiction of the subject matter of the two applications in question.—Hart v. I.C.C., 226 F. Supp. 635 (641, 643, 644, 645)*.

The commission's conclusion that minimum-rate limitation on proposed rates violates §3(1) is inadequately supported by its finding of similarity of competitive transportation conditions as between the prejudiced and preferred points, which is itself unsupported by substantial evidence, and constitutes an abuse of discretion in that it was made despite other findings by the commission that the transportation conditions are in fact not similar; and finding that level of the proposed rates would be inadequately compensatory if the prejudice so found were removed, being based largely on the erroneous §3 finding, is likewise invalid. Accordingly, the commission's conclusion that the proposed rates must be increased to avoid unfair and destructive competition in violation of the national transportation policy exceeds the statutory authority granted it and is also invalid; the order is therefore null and void and must be set aside.—Cincinnati, N.O. & T.P. Ry. Co. v. United States, 229 F. Supp. 572 (579-80)*.

In suit to set aside the commission's grant of motor carrier authority, the function of the reviewing court is limited to determining whether the commission's order is within the range of its statutory authority and is based on adequate findings supported by substantial evidence. The court may not choose between competing views of the commission's examiner and its employee review board; while the examiner's report is considered in determining substantiality, the court's determination is made on the record as a whole. The commission's finding of a need for the proposed unique service is well within the realm of its authority; its judgment on that score is entitled to the same respect it commands for other matters within its purview, and the court is afforded no basis for disturbing it.—Trailways of New England, Inc. v. United States, 235 F. Supp. 509 (513, 514)*.

While a construction by the body charged with enforcement of a statute, which construction long has been in effect (and impliedly sanctioned by reenactment without change in the particulars construed) must be treated as read into the law, and the commission's ruling that joint motor-rail or motor-rail-motor rates are subject to 49 US §4 is based on its decision in 219 ICC 245 (1936) that has been followed in numerous cases, administrative interpretations do not become the ruling law on the issue, regardless of time they have been in effect, if the initial interpretation was erroneous or beyond the agency's authority in the first place. The commission, as a creation of Congress, has only the power bestowed on it by its constituent legislation; and ultimate responsibility and power to determine limits of that administrative power lies in the courts.—New York Central R. Co. v. United States, 267 F. Supp. 619 (624-5)*.

In reviewing the commission's authority, it is the court's duty to measure the administrative action solely against statutory grounds invoked by the agency; and administrative construction is merely an aid to judicial review and is not binding on the court. No statutory authority is set forth for the ruling in issue; indeed analysis of the relevant statutes, and of judicial consideration thereof, supports a conclusion contrary to that of the commission; accordingly, the ruling that motor-rail or motor-rail-motor rates are subject to provisions of §4, and the commission's findings that considered TOFC rates violated §4(1), are annulled and set aside.—Id., pp. 625-6, 631-2.

See also Auclair Transp. case, 49 USC §207(a), n. 6 *prior or subsequent movement by rail.*

46.—Arbitrary orders.—[Vols. 4, 7, 10-19].—In limiting "grandfather" authority to two origins in Tennessee, the commission acted arbitrarily and without supporting evidence when characteristics of the traffic and proof of multiple pickup service at 8 widely scattered points entitled plaintiff to statewide origin authority; remanded for further consideration in light of the views expressed.—Winter Garden Co. v. United States, 211 F. Supp. 280 (286)*.

There being no substantial evidence in the

record to support the commission's finding that plaintiffs have been and are engaging in unauthorized transportation of sugar in interstate commerce as a common or a contract carrier in violation of the Interstate Commerce Act, in so finding and entering its cease-and-desist order the commission arbitrarily exceeded its legal authority; order permanently enjoined.—Shannon v. United States, 219 F. Supp. 781 (782-3)*.

That the commission, after adopting the examiners' statement of facts, reached different conclusions does not make its decision arbitrary, capricious, or unlawful. The commission, upon substantial evidence, made three basic changes in the examiners' findings which necessitated reversal of their conclusion; order sustained.—Eazor Exp., Inc. v. United States, 218 F. Supp. 393 (395)*.

In finding that a condition on approval of proposed issue of stock to carrier's employees under an option plan, that the stock be sold at not less than its par value, was necessary to support the required finding that the proposed issue would be compatible with public interest, the commission properly exercised a statutory discretion; under the facts and circumstances of the case, imposition of that condition rests on a rational basis and is not arbitrary or capricious. The commission's order sustained.—Chicago, S.S. & S.B. R. v. United States, 221 F. Supp. 106 (109)*.

The commission's ruling that good-faith operations require that authority issued be read, and that if plaintiff did not read his certificate he is lacking in bona fide operation, or that if he did his considered operations were willfully unlawful, is an erroneous statement of law and an inadequate substitute for actual findings as to whether plaintiff and its predecessors did or did not read the certificate and whether the circumstances were such as to preclude a bona fide operation. The commission leaps to its hypothetical alternative disposition of the issue without making the requisite subordinate findings as to what actually happened and why the concrete circumstances of the case support the legal conclusion that bona fide operation was lacking; it is at best unclear what the commission purports to find, or, at worst, its ultimate finding is wholly arbitrary. Order denying plaintiff's petition for modification of its "grandfather" certificate must therefore be vacated and the cause remanded for further proceedings.—Nashua Motor Exp., Inc. v. United States, 230 F. Supp. 646 (650-2)*.

Ambiguity in a certificate that is merely superficial, resulting only from routine administrative consolidation of two separate grants of authority, neither of which is ambiguous when considered separately, justifies inquiry only to the point of source of original authority, and does not allow examination of what is then indicated to be a secondary source—the original proceeding. The commission's making of the latter inquiry, in such circumstances, was but a thinly veiled violation of the protection allowed existent and operating authority by §212(a) of the act. The commission's order is faulty in law and clearly erroneous; set aside and enjoined.—Parkhill Truck Co. v. United States, 240 F. Supp. 842 *845)*.

48. Soundness of commission's reasoning.—[Vols. 4, 11-19].—Record of proceedings before the commission adequately supports its finding that the policy of requiring racial segregation in facilities used for interstate commerce has been practiced on such regular basis that case-by-case action on individual complaints under §216(e) does not afford an adequate remedy; existence of statutes in many states requiring race segregation in such facilities would be an adequate basis for that conclusion.—State of Georgia v. United States, 201 F. Supp. 813 (815)*.

The courts are not concerned with correctness of the commission's reasoning or with consistency or inconsistency of decisions which it has rendered.—Atlantic Coast Line R. Co. v. United States, 202 F. Supp. 456 (458)*.

While it is the commission, not the court, that brings expertise to bear on the problem, judicial deference to the commission's administrative findings is not boundless. Determination of whether the commission's construction of the certificates and the statute involved is unreasonable must rest, at bottom, on the rationality of application of its findings of fact to its ultimate rulings of law.—Roadway Exp., Inc. v. United States, 213 F. Supp. 868 (874)*.

The commission's fact inference, where shipper supplies C & S containers and carrier provides neither loading nor unloading services but merely transports shipper's [loaded] containers in ordinary vehicles, that the aggregate of facilities provided constitutes a property-carrying unit which is the practical equivalent of a tank or hopper type vehicle, was a legitimate inference within its particular competence as a trier of the facts.—Id., p. 874.

In determining plaintiff's "grandfather" rights under Transportation Act of 1958 to transport bananas and frozen fruits, berries, and vegetables, the commission improperly refused to consider evidence of its operations prior to 1957 and of its holding out and solicitations throughout the "grandfather" period. Both those matters were proper standards the commission was required to consider in determining scope of plaintiff's bona fide operations, and failure to consider either one of them was enough alone to invalidate its order. Order set aside and proceeding remanded to the commission for further proceedings consistent with the court's opinion.—Frozen Food Exp. v. United States, 219 F. Supp. 131 (137, 140)*.

The commission's order striking down plaintiffs' all-commodity boxcar rates on mixed or straight shipments of manufactured articles, finding them to be unreasonable and a destructive competitive practice, is unlawful because based on an erroneous interpretation of §1(6) of Interstate Commerce Act. Issues of the case should never have been framed under §1(6) nor the meaning of the national transportation policy, as referred to in §15a(3), been distorted to supplement it; the order set aside.—New York, N.H. & H. R. Co. v. United States, 221 F. Supp. 370 (372, 376)*.

The approach and interpretation adopted by the commission in construing plaintiff's authority for a route between New York City and Orange, N.J., via Newark as contemplating an east-west operation, and declaring an inordinate amount of indirectness or circuity thereunder unlawful, stands on a firm and rational basis. The commission's rejection of plaintiff's assertion of authority to operate over Garden State Parkway in East Orange and Bloomfield either under that grant or by tacking it with its authority between New York City and Bloomfield is not without justification, and the finding that plaintiff's challenged operations were unlawful is warranted. Such interpretation does not modify or revoke any of plaintiff's operating rights, but merely defines those possessed by it under the grant, and is not clearly erroneous; sustained.—DeCamp Bus Lines v. United States, 224 F. Supp. 196 (208, 209)*.

In action to set aside the commission's order in consolidated proceeding involving, among others, a reopened "grandfather" proceeding, the court's task ends if the commission properly applied the statutory standards. The commission considered very thoroughly all the evidence, both documentary and oral, with respect to plaintiff's service prior to, on, and since the statutory date, and determined that its permit reflected all the "grandfather" authority to which it was entitled; and proper statutory standards were applied in making that determination. Fact that the commission adopted the examiner's findings, with slight modifications, and rejected his recommendations does not compel a different conclusion. The Commission not only is at liberty to reach its own conclusions on the evidence but is required to do so; sustained.—Zuzich Truck Line, Inc. v. United States, 224 F. Supp. 457 (465-6)*.

Courts are not concerned with the soundness of the commission's reasoning or with the wisdom of its decisions; and fact that it may have reached a different conclusion than that recommended by its examiner is of no importance, since the commission has a legal duty to arrive at its own conclusion. The judicial function is exhausted when there is found to be a rational basis for the conclusions reached by the administrative body; the commission's interpretation of plaintiff's certificate is entirely consistent with logic and common sense and is not arbitrary or clearly erroneous; sustained.—Mitchell Bros. Truck Lines v. United States, 225 F. Supp. 755 (758, 760)*.

The commission's disapproval of purchase of vendor's active operating rights does not constitute a "punishment" when the examiner found a deliberate attempt to build up its

dormant rights for purpose of passing them off as bona fide and further found, on adequate evidence, no clear public need for proposed service. Also, denial of the application because of vendee's unlawful control of vendor is not inconsistent with granting vendee authority to acquire other motor carriers in contemporaneous proceedings; if the commission feels that denial of only considered application will be sufficient punishment to keep vendee from flirting close to the line of illegality, the court sees no reason why its judgment should be disturbed.—Lombard Bros., Inc. v. United States, 226 F. Supp. 905 (908)*.

A reviewing court will not disturb an order of the commission if the order is within the commission's statutory authority and is based on adequate findings which are supported by substantial evidence. While the commission has wide discretion in deciding whether additional motor service should be authorized, for the court to decide whether it properly exercised that discretion (in partially denying plaintiff's application) it must disclose the basis for its order. The commission made no specific findings as to factors which motivated the partial denial, other than its conclusion that the proposed service would be competitive and that there was no clear showing of inadequacy of existing service; this was insufficient. That part of the order partially denying the application must be set aside and the cause remanded to the commission for action in accordance with the court's opinion.—Vincent Montone Transp., Inc. v. United States, 231 F. Supp. 484 (487-9)*.

The commission's basic findings must be supported by the evidence, and its ultimate finding must flow rationally from the basic findings; if a basic finding is supported by the evidence and affords legally adequate basis therefor, the commission's order must be affirmed. However, the ultimate finding that assailed rates were not unlawfully prejudicial or preferential is not, as a matter of law, supportable by either of the basic findings that (1) conditions with respect to allegedly preferred areas in San Francisco rate group, when compared with allegedly prejudiced points in Stanislaus County, do not require rates to and from the county on same basis as the lower group rates and (2) complainants failed to show that the rate disparity resulted in damage to the area claimed prejudiced; also, the evidence does not support those basic findings.—Stanislaus County v. United States, 236 F. Supp. 146 (148-51)*.

While the preferred areas were originally included in the San Francisco group because of intermediacy, transportation conditions have changed and, as there is no showing of any present difference in that respect between preferred and prejudiced points, intermediacy does not justify present rate disparity; nor does the fact that competitive motor carrier rates follow the rail grouping, when those rates are not themselves shown to be lawful; nor does the proximity of preferred areas to San Francisco, with its greater population and industrial density, when that condition is not shown to result in lower costs to the railroads serving those areas. As to the commission's second basic finding, the evidence discloses numerous instances of competition between prejudiced points and those in preferred areas, as well as instances of actual injury to the county, sufficient to warrant a presumption of damage from the rate disparity.—Id., pp. 149-50.

While it is possible that the commission could have looked to other conditions in arriving at its finding that conditions with respect to the preferred areas were not present with respect to points in Stanislaus County, the grounds on which an administrative order must be judged are those which the record discloses that the order was based upon, and the conditions described are the ones discussed by the commission in its order. This does not preclude the possibility that the record as it stood before the commission might have shown other conditions which would justify its finding, or that justifying evidence might be adduced on reconsideration. Accordingly, the order is set aside and the case remanded with directions to take action consistent with the views expressed.—Id., pp. 150, 152.

Considering that in five recent court decisions on facts essentially similar to those presented on the present record, in each of which it was held that a "driveaway" operation was subject to the Interstate Commerce

Act, and considering also the commission's rulings in 64 MCC 475 and 77 MCC 365, both of which involved operations not materially distinguishable from those of plaintiff, the commission's conclusion that plaintiff's "driveaway" business ia a common carrier operation subject to application of the act is supported by substantial evidence; sustained.—Spencer v. United States, 236 F. Supp. 230 (232)*.

In action to set aside the commission's order approving proposed purchase transaction, it is neither the duty nor the right of the reviewing court to inquire into the soundness of the commission's reasoning, the wisdom of its decisions, or the consistency of its conclusion with those reached in similar cases.—Alabama Highway Exp., Inc. v. United States, 241 F. Supp. 290 (293)*.

If, judged by applicable standards of law, the commission was right in concluding, on reconsideration, that public convenience and necessity required continuation of intervening defendant's operations without an "in truckload lots" restriction in its certificate, it is unimportant that a different result was reached at an earlier time. The question is whether the commission's conclusion under review reflects a permissible judgment in conformity with statutory standards. Furthermore, as noted, the record considered by the commission in the present proceedings was not identical with record in the earlier proceedings. The commission's orders sustained, and complaint dismissed.—R-C Motor Lines, Inc. v. United States, 241 F. Supp. 124 (126-7)*.

Even if the commission did depart from its precedents by granting motor carrier authority to intervening defendants, that would not be a basis for annulling the orders under review. The court is concerned only with whether or not the evidence presented will support conclusions actually reached by the commission in granting considered certificates, not with the consistency or inconsistency of commission decisions. The fact that there is substantial evidence for other conclusions is not decisive, since transcript of testimony heard by the commission in each of the cases reveals substantial evidence in support of its findings and conclusions therein; orders of the commission sustained.—United Van Lines, Inc. v. United States, 266 F. Supp. 586 (589-90)*.

In action to review the commission's order denying, in part, "grandfather" authority sought by plaintiff, the court is not concerned with the commission's reasoning or with the consistency or inconsistency of its decisions. The commission's judgment is to be exercised in the light of each individual case; and it is only where an error is patent that the court may say it exceeded its statutory authority. Considered order is not erroneous, but is reasonable and supported by substantial evidence; complaint dismissed.—Denton Produce, Inc. v. United States, 270 F. Supp. 402 (405, 407)*.

49. Expediency or wisdom of order, substitution of judgment.—[Vols. 4, 7, 10-19].—The reviewing court may not substitute its own judgment concerning need for considered motor carrier service or speculate what the commission may have done had its experience and administrative practices and rulings taken a different course in the past. The commission's findings in the application proceeding, supported by evidence, of public need for proposed service are accepted, as they must be.—Carolina Scenic Stages v. United States, 202 F. Supp. 919 (925)*.

In reviewing an order of the commission, judicial function of the court is exhausted if a rational basis for the commission's conclusions is found. The court may not substitute its view for the judgment of the commission if that judgment has support in the record and the applicable law.—Atlantic Coast Line R. Co. v. United States, 205 F. Supp. 360 (363)*.

Judicial function of a reviewing court is exhausted where there is found to be a rational basis for the conclusions of an administrative agency; once this rational basis is established, the court cannot substitute its own view concerning what should be done; the commission's order affirmed.—General Motors Corp. v. United States, 207 F. Supp. 641 (643, 648)*.

As much as the court might feel inclined to do at times, it cannot substitute its judgment for that of the commission or challenge the wisdom of its actions.—Great Northern Ry. Co. v. United States, 209 F. Supp. 230 (232)*;

Id., 209 F. Supp. 234 (236)*; Id., 209 F. Supp. 238 (240)*.

A court cannot substitute its judgment for that of the commission, but can only ascertain whether there is warrant in the law and facts for the order under review; review of entire record shows that the commission's order converting plaintiff's contract-carrier authority to common-carrier is supported by substantial evidence, and is in accord with applicable law; affirmed.—P. Saldutti & Son, Inc. v. United States, 210 F. Supp. 307 (315)*.

In action to enjoin in part or void entirely the commission's order authorizing railroad merger, the court will not substitute its judgment for that of the commission as to importance of factors which plaintiffs claim should be given greater weight, including book value and stockholder rights, in the determination of a just and reasonable ratio for exchange of stock of the merging railroads for stock of the merged company.—Fried v. United States, 212 F. Supp. 886 (889, 892)*.

The commission is the expert in the field of transportation and its judgment is entitled to great deference because of its familiarity with conditions of the industry it regulates. It is not the court's function to substitute its independent judgment for that of the commission, for the commission's discretion is to draw its conclusions from all the circumstances which occur in specific instances; the court's function is exhausted when rational basis is found for the commission's conclusions.—Roadway Exp., Inc. v. United States, 213 F. Supp. 868 (873).

Function of the reviewing court is limited to ascertaining whether there is warrant in the law and the facts for what the commission has done; it cannot substitute its own view concerning what should be done, whether with reference to competitive situations or others, for the commission's judgment on matters committed to its determination, if that has support in the record and the applicable law.—Refrigerated Transport Co. v. United States, 214 F. Supp. 536 (538-9)*.

Judgment of the reviewing court may not be substituted for that of the commission when the commission's finding, that railroads had failed to show that differences in competition justified the rate disparity in question, was warranted by the record; such finding cannot be easily overturned. It is the type of finding on which the commission's expertise is brought to bear; sustained.—Atchison, T. & S.F. Ry. Co. v. United States, 218 F. Supp. 359 (376, 377)*.

The court's scope of review is limited; it may not review the evidence de novo but must sustain the commission's findings and conclusions where they are found to be supported by substantial evidence. Unless specific and prejudicial departure from requirements of the law or abuse of discretion is shown, the reviewing court is without authority to intervene and substitute its judgment on the issue of fact committed to the commission's determination; no such showing is made. There is substantial basis on the record for the commission's order; sustained.—Studna v. United States, 225 F. Supp. 973 (981-2, 984)*.

In action to set aside the commission's order granting motor carrier operating authority, it is not the court's function to examine the evidence before the commission and substitute its judgment for that of the commission. The expertise of the commission is entitled to great deference and gives rise to a presumption of validity, if its findings are supported by substantial evidence.—Worster Motor Lines, Inc. v. United States, 226 F. Supp. 603 (605-6, 608)*.

A court may not substitute its judgment for that of the commission, but may only ascertain whether there is warrant in the law and facts for the order under review; if, upon review of the whole record, there is a rational basis for the commission's action and no abuse of discretion or prejudicial departure from the requirements of law, the commission's determination will not be disturbed.—Seatrain Lines, Inc. v. United States, 233 F. Supp. 199 (203)*.

So long as the commission has not violated the law or abused its discretion, a reviewing court is without authority to intervene and substitute its determination of the paramount public interest for that of the commission. Since the commission has neither violated the law nor abused its discretion in finding that grant of contract carrier permit is not in contravention of the national transportation poli-

cy even though applicant's majority stockholder is an employee of the sole supporting shipper, the court may not overrule its expert decision. Moreover, even if it could do so, the court would not reverse the commission's determination, since it agrees with that conclusion.—Deioma Trucking Co. v. United States, 233 F. Supp. 782 (784)*.

Since the commission is one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of expertness which courts do not possess and therefore must respect, the commission's action, if supported by substantial evidence and adequate findings, must be affirmed.—Safeway Trails, Inc. v. United States, 234 F. Supp. 362 (365)*; even as to matters not requiring expertise, a court may not displace the commission's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.—Id., p. 365.

A statutory three-judge court cannot substitute its judgment for that of the agency, if a rational basis exists to support the commission's order. The commission's conclusions that protestant in application proceeding (complainant) could not provide contract-carrier service requested by shipper, that it did not have authority to haul pig iron to the area claimed, and that pig iron is not a bulk commodity, being amply and substantially supported by the facts and law, complaint is dismissed.—Erskine & Sons, Inc. v. United States, 235 F. Supp. 907 (908-9)*.

The courts are not to substitute their discretion for that of the commission. When the commission's action is based on proceedings had by it pursuant to its authority and its order is based on due consideration of substantial evidence, that is all that is required of it, and the court may not substitute its judgment for that of the commission.—Teamsters Joint Council 40 (J.C.) v. United States, 238 F. Supp. 301 (303, 307)*.

The court's duty in reviewing the commission's order authorizing an acquisition of control is to determine whether the commission's conclusions find support in the record as a whole, even though the court would justifiably have made a different choice had the matter been before it de novo. If the commission has made adequate findings which are supported by substantial evidence, the court may not set aside the order even though it may disagree with such findings. The wisdom and experience of the commission, not of the courts, must determine whether the proposed consolidation is consistent with public interest, and if the commission did not exceed the statutory limits within which Congress has confined its discretion, it is not the court's function to upset its order.—Alamo Exp., Inc. v. United States, 239 F. Supp. 694 (697)*.

The court may not substitute its own judgment for that of the commission when acting within scope of its authority and supported by substantial evidence.—Andrews Van Lines, Inc. v. United States, 240 F. Supp. 763 (769)*.

The function of the reviewing court is a very limited one. So long as the commission has not abused its discretion and its findings are supported by substantial evidence, its order disapproving proposed sale of motor carrier operating rights must be sustained even though the court would have reached a different conclusion had the matter been before it *de novo*. Complaint dismissed, and temporary restraining order vacated.—C & H Transp. Co., Inc. v. United States, 249 F. Supp. 97 (98, 101)*.

The reviewing court cannot weigh the wisdom of the commission's decision and order finding export rates on cotton from specified origins unduly prejudicial to one port and unduly preferential of others. Principle that the court may not substitute its own view concerning what should be done, whether as to competitive considerations or others, for a judgment of the commission on matters committed to its determination that is supported in the record and the law, has long been applied to discriminatory rail rate situations. It is for the commission to determine whether a discrimination or preference is undue, unreasonable and unjust, since Congress has constituted it as the expert body which is informed by experience to make such a determination; thus, beyond determining whether the commission followed legal principles and procedures, the court has no

greater role than ascertaining whether a rational basis exists for the order under review.—City of Galveston v. United States, 257 F. Supp. 243 (245-6)*.

50. Affirmative or negative orders.—[Vols. 4, 7, 10-13, 15, 16, 17].—Order requiring cancellation of increased switching charges (that had been permitted to go into effect) is a determination that the railroads could not impose certain charges, thus an order that determines a "right or obligation" so that "legal consequences" will flow from it, and is reviewable by the courts.—Pennsylvania R. Co. v. United States, 216 F. Supp. 199 (200-1)*.

53. Legality of order moot.—[Vols. 4, 7, 10, 17-19].—Since the commission orders under attack are those requiring the railroads to cease and desist from charging the rates found to cause unlawful discrimination, and those orders are found by the court to be adequately supported and in accordance with law, therefore valid, questions raised by motion to dismiss the complaint in part, on ground that the commission's finding specifically directed to assailed rates from Tennessee River ports is not attacked, are moot. Complaint dismissed.—Chicago, R.I. & P. R. Co. v. United States, 233 F. Supp. 381 (385, 388)*.

See also Seatrain Lines, Inc. v. U.S., n. 9, above.

54. Review of commission's findings of fact.—[Vols. 4, 7, 10-19].—In order for an administrative tribunal's basic or essential findings of fact to be given conclusive weight, they must not only be supported by substantial evidence, but such findings must be set out with clarity and completeness.—General Motors Corp. v. United States, 207 F. Supp. 641 (644)*.

In determining plaintiff's "grandfather" application under the Transportation Act of 1958 the commission rejected evidence of shipments in 1955 and 1956 as too remote to have probative value, but its order fails to contain findings which support that conclusion, and the record is not clear whether, or to what extent, consideration was given to shipments subsequent to 1958. This uncertainty in the findings makes it difficult to ascertain what standards were used in the determination and whether the findings were supported by the evidence; findings of that kind are insufficient. Whether the commission has applied the proper standards in arriving at its conclusions and order cannot appear until the order reflects consideration of the applicable evidence; remanded for rehearing in conformity with the opinion.–Hale Distributing Co. v. United States, 221 F. Supp. 266 (269, 270-1)*.

Extent of the "grandfather" rights to which an applicant is entitled is primarily a question of fact which Congress has entrusted to the commission to determine; the task of the court ends if the commission has properly applied the statutory standards. The commission considered very thoroughly all the evidence with respect to complainant carrier's service prior to, on, and since the statutory date and determined that its permit reflected all "grandfather" rights to which it was entitled; proper statutory standards were applied in making that determination; therefore, the commission's order denying modification of the permit must stand.–Zurich Truck Line, Inc. v. United States, 224 F. Supp. 457 (466)*.

Determination of the justness and reasonableness of rates is peculiarly for the commission's judgment and discretion; its judgment is to be exercised in light of the facts of each case, and the courts have no concern with consistency or inconsistency of its decisions. Furthermore, the presumption that it has properly performed its official duties supports its acts in asbence of clear evidence to the contrary. There is ample warrant in the statute and the evidence for finding considered general rate increases unreasonable insofar as they resulted in higher rates to border points than to points beyond in another territory; the report clearly expresses and explains the conclusions reached, and those conclusions are not inadequate, immaterial, or arbitrary. There is no meritorious legal basis for attacking the order requiring cancellation of the rates found unlawful, without prejudice to application of the lower more-distant-point rates as maxima at the intermediate border points. The order sustained.—Accelerated Transport-Pony Exp., Inc. v. United States, 227 F. Supp. 815 (820-1)*.

Where Congress has entrusted to the commission the power to determine the issues of fact involved in a proceeding, the scope of

judicial review is limited to ascertaining whether there is warrant in the law and the facts for what the commission has done; unless there has been a departure from the law or an abuse of the commission's discretion, the court has no authority to intervene.—Melman v. United States, 231 F. Supp. 503 (506)*.

The commission's conclusion that plaintiff Seatrain Lines failed to prove a violation of §3(4) in western railroads' participation in reduced all-rail rate on aluminum articles from Sandow, Tex., to Cressona, Pa., while continuing to maintain a rate on higher level to Texas City, where the traffic is interchanged with Seatrain, based on findings that the all-rail and rail-water-rail routes comprehend entirely different services, that the relevant transportation circumstances and conditions at the respective points of interchange are so radically different that a finding of discrimination against Seatrain would be arbitrary and capricious, and that Seatrain had not sufficiently identified the discriminating carriers, is not adequately supported by the evidence. Disparities established by Seatrain respecting rates, costs, and divisions of revenue are of sufficient magnitude to make out a prima facie case of discrimination, which is not overcome by the differences noted in transportation conditions. Order on the §3(4) issue is therefore set aside and the matter remanded for further proceedings.—Seatrain Lines, Inc. v. United States, 233 F. Supp. 199 (204, 213)*.

The commission's conclusion that a complete service was shown to be required by supporting shipper was a sufficient finding of "distinct need" for applicant's proposed contract-carrier service. Examiner's report, which the commission adopted, describes facts which caused shipper to seek the service applied for; those facts clearly show a distinct need on shipper's part, and his failure to list them under the heading "Findings" or "Conclusions" does not detract from their weight or acceptance. The commission's order sustained.—Deioma Trucking Co. v. United States, 233 F. Supp. 782 (783)*.

The commission's decision that plaintiff had been operating in violation of §§5(4) and 206(a)(1) of the Interstate Commerce Act for about 4 years, that territory involved would be adequately served in the future without consummation of proposed purchase, and (on those premises) that it would not be consistent with public interest to approve the purchase, is a factual judgment permitted by §5(2)(c) of the Act. The subsidiary facts being precisely and completely recounted, and the commission's ultimate inference from them being securely founded, the court's power of review ends. Sustained.—Tank Lines, Inc. v. United States, 236 F. Supp. 354 (356)*.

The commission's denial of plaintiffs' proposed purchase transaction was based eclusively upon its findings that to allow the application would establish a new and different service in considered area, that no need for the extra facility was shown, and that its creation would not be "consistent with the public interest"; the quoted phrase expresses the criterion by which the commission is required by statute to appraise such a transaction. Altogether factual, the holding is clearly stated and, being neither manifestly without foundation in the evidence, nor unsound in law, it may not be up-ended by the court, sustained.—Great Coastal Exp., Inc. v. United States, 243 F. Supp. 943 (944-5)*.

In action to set aside the commission's decision and order granting railroad's application to discontinue interlocking plant, the commission's findings relative to density of movement through the interlocking were factual determinations; thus, they are subject neither to revision nor substitution by the courts.—Legge v. United States, 244 F. Supp. 878 (881)*.

55.—Weight of evidence.-[Vols. 4, 7, 10, 12, 13, 15-19].-It is the task of the commission and not of the courts to pass upon the weight and credibility of the evidence in commission proceedings.—Alabama Highway Exp., Inc. v. United States, 241 F. Supp. 290 (293)*; Atchison, T. & S. F. Ry. Co. v. United States, 218 F. Supp. 359 (377)*; Denton Produce, Inc., v. United States, 270 F. Supp. 402 (405)*; Cincinnati, N. O. & T. P. Ry. Co. v. United States, 229 F. Supp. 572 (574)*; U. S. A. C. Transport, Inc., v. United States, 235 F. Supp. 689 (692)*; Worster Motor Lines, Inc., v. United States, 226 F. Supp. 603 (605)*.

Bindings and conclusions of the commission may not be disturbed where only a question of the weight of the evidence is involved. [See 315 US 475.] And that restriction applies to "grandfather" application proceedings.—Frozen Food Exp. v. United States, 219 F. Supp. 131 (136)*.

Weighing of the evidence before it is for the commission exclusively, and the reviewing court may not substitute inferences of its own for those drawn by the commission from testimony or weigh anew any conflicts therein. The commission's report adequately reviewed the weight it gave to evidece of opposing parties on effect of proposed affiliation of Chesapeake & Ohio and Baltimore & Ohio, not only on New York Central, but on all other railroads whose traffic might be affected; its findings carefully reviewed the testimony of Central's witnesses, gave its reasons why it found their estimates unreliable, and reviewed the evidence supportive of its conclusion that the claimed diversion would not be undue. This was sufficient.—Broth, of Maint. of Way Employees v. United States, 221 F. Supp. 19 (24, 25-6)*.

See also State Corporation Com'n of State of Kansas v. U.S. 49 USC §13(4), n. 71.

56.—Substantial evidence to sustain order.—[vols. 4, 7, 10-19].—It is not the court's function to weigh the evidence before the commission or to substitute its judgment for that of the commission on the question of public need for the service involved; the court's sole responsibility is to determine whether there was before the commission evidence to support its finding that the present and future public convenience and necessity required applicant's proposed service; testimony of 67 public witnesses and of representative of railroad which had abandoned virtually all service in the area amply supported commission's conclusion; sustained.—Edwards Motor Transit Co. v. United States, 201 F. Supp. 918 (922)*.

Findings made by the commission must be supported by substantial evidence before they will be upheld by the courts. The commission's finding that adequate existing service is available and will reasonably meet supporting shipper's asserted needs, is supported by substantial evidence which affords a logical basis for conclusion that plaintiff has not met his burden of proof. Denial of extension application, sustained.—Robbins v. United States, 204 F. Supp. 78 (82, 83)*.

All orders of the commission are entitled to be judged by the report, read as a whole, and by the record as a whole out of which the report arose; so judged, challenged orders granting certificate for a new carrier service and authorizing control of the new carrier by three other motor carriers are supported by findings which are neither arbitrary nor capricious, but are adequately sustained by the record, and there is rational basis for the administrative conclusions. The commission's orders sustained.—Aero-Mayflower Transit Co. v. United States, 208 F. Supp. 303 (305-6)*.

The commission had abundant evidentiary support for its approval in principle of the acquisition of control proposed in proceeding under review; it expressed doubt only as to overcapitalization of acquiring carrier without the conditions and provisions imposed by its supplemental reports and orders; so far as these represent matters which plaintiff may challenge, the commission's reports are sufficient to indicate the basis for its action; the orders under review are approved.—Walker v. United States, 208 F. Supp. 388 (395, 396)*.

The Interstate Commerce Act in general, and §207 in particular, gives the commission broad authority to pass on present and future public convenience and necessity; examination of the record is convincing that the essential findings made by the examiner and adopted by the commission are supported by substantial evidence and that such findings support the commission's order granting the certificate under attack; the commission's order sustained.—Sloan's Moving & Storage Co. v. United States, 208 F. Supp. 567 (569, 571)*.

The commission's finding, in denying plaintiff railroad's application for modification of its motor-carrier certificates to permit an unrestricted service competitive with independent motor carriers in the area involved, that it had failed to sustain its burden of showing that such service was required by public convenience and necessity, is supported by substantial evidence; plaintiff's arguments are contentions which the commission was within

its authority in rejecting, and its action was not arbitrary or capricious; sustained—Great Northern Ry. Co. v. United States, 209 F. Supp. 230 (233, 234)*.

In scrutinizing the evidence upon which a challenged order is premised, the court will not consider the expediency or wisdom of the order, or whether on like testimony it would have made a similar ruling, but only whether in the record as a whole there is substantive evidence to support the order.—A.L. Mechling Barge Lines, Inc. v. United States, 209 F. Supp. 744 (749)*.

Examiner's conclusion (adopted by the commission) that plaintiff had failed to show proposed gateway elimination and resulting more direct operation to be required by public convenience and necessity is supported by statistics detailing characteristics of present circuitous and proposed direct services, which had logical bearing on the subsidiary (though fundamental) question whether the proposed service was so close to the old that original determination of convenience and necessity would cover both; and on that evidence was based the finding that the proposed service would be so different as to constitute a new service as to which no determination of convenience and necessity had been made. Even if the court disagreed with the ultimate conclusion, it cannot be said that denial of plaintiff's application was not grounded on basic findings supported by probative evidence, sustained.—Yale Transport Corp. v. United States, 210 F. Supp. 862 (864-5)*.

While it is the commission, not the court, that brings expertise to bear on the problem, judicial deference to the commission's administrative findings is not boundless. Expertise is not sufficient by itself; the agency must make findings that support its decision, and those findings must be supported by substantial evidence. Sustained.—Roadway Exp., Inc. v. United States, 213 F. Supp. 868 (873-4)*.

Evidence adduced in application proceeding abundantly supports the commission's findings as to feasibility and public need for proposed service, fitness of applicant, and adverse effect on protestants in granting authority sought; record also shows that need for the service was based on considerations other than rates. However, entire application was premised on need for mixed truckload service, but authority to transport mixed shipments was granted; as there is no rational basis of record for grant of authority beyond that sought, case must be remanded for imposition of a proper restriction.—Refrigerated Transport Co. v. United States, 214 F. Supp. 536 (539-40)*.

It is clear from examination of the record as a whole that there was sufficient warrant in the evidence for examiner's findings, which were adopted by the commission, granting authority sought by intervening defendant and denying plaintiff's application for similar authority. Whether the court would find likewise upon the same evidence is a question not open for review; it is sufficient that the commission's action is supported by substantial evidence in the record; the commission's decision affirmed.—North American Van Lines, Inc. v. United States, 217 F. Supp. 837 (841)*.

The commission was warranted in ruling that defendant railroads had failed to show that differences in competition justified the rate disparity in question. Evidence of relative degree of competition was meager; there was no evidence regarding competitive motor rates; nor did railroads show any other details necessary to determine whether rate disparities between alleged prejudiced and alleged preferred points were warranted Sustained—Atchison, T. & S.F. Ry. Co. v. United States, 218 F. Supp. 359 (376)*.

Substantial evidence was presented at hearing from which the commission could justifiably conclude that plaintiffs' routes via New Jersey between Philadelphia and certain other Pennsylvania points were highly circuitous and time-consuming compared with direct operation over Pennsylvania highways, and that no intermediate stops were made in New Jersey to pick up or deliver freight. Evidence as a whole overwhelmingly supports the commission's findings that plaintiffs, which hold no intrastate authority between considered points, have abused their interstate certificates in utilizing such tacked-on routes as a deliberate expedient to escape the rightful jurisdiction of the Pennsylvania commission. The commission's cease-and-desist orders sustained.—Hudson Transp. Co. v. United

States, 219 F. Supp. 43 (46-8, 49-50)*.

There being substantial evidence in the record before the commission to support its action in authorizing abandonment of considered line of railroad, the commission's decision is affirmed. Complaint dismissed and restraining order dissolved.—State of Arizona v. United States, 220 F. Supp. 337 (342)*.

The commission's findings that Baltimore & Ohio was in precarious financial condition and could not by its own efforts obtain necessary financing, and that Chesapeake & Ohio was able and willing to aid it; that the affiliation sought would provide opportunity for cooperative effort and substantial economies and thus enable B & O to become a stronger and more efficient railroad; and that the affiliation would not cause any undue diversion of traffic from other eastern railroads, are all supported by substantial evidence, and such findings add weight to its ultimate conclusion that the affiliation was consistent with public interest. The commission's order sustained and temporary restraining order dissolved.—Bros. of Maint. of Way Employees v. United States, 221 F. Supp. 19 (25, 26-7, 30-1)*.

Although plaintiff contends that the condition imposed by the commission on approval of its proposed stock issue to employees under an option plan, that the stock be sold at not less than par value, was not supported by substantial evidence because, hearing having been denied, there was nothing from which any factual information could be derived to support the condition, the commission had before it plaintiff's financial statements submitted with its application, also its petition for modification which contained reference to price quotations of its stock on Midwest Stock Exchange, and thus could properly take official notice of the price quotations of the stock which appeared regularly in publications of wide daily circulation. Plaintiff has failed to show that the commission acted without substantial evidence; the c mmission's order sustained.—Chicago, S.S. & S.B. R. v. United States, 221 F. Supp. 106 (108-9)*.

Plaintiffs have failed to show that the commission's findings are insufficient as a matter of law to support its discretionary judgment that public convenience and necessity require issuance of certificates granted Railway Exp. Agency for motor operations in lieu of discontinued train service. Nor have they shown that the findings are unsupported by substantial evidence: record contains voluminous evidence of public need for REA's service, and shows that it is handling a substantial volume of express traffic from and to the points involved under temporary authority; moreover, plaintiffs do not challenge the finding that to date they have shown no willingness to perform express service of any kind. The commission's order sustained.—Auclair Transp., Inc., v. United States. 221 F. Supp. 328 (332, 333, 334)*.

The voluminous record before the hearing examiner, whose conclusions the commission adopted, contains a great deal of testimony and exhibits tending to sustain the fairness of the rates approved by the commission, and it is evident that the examiner's decision and the subsequent ruling of the commission were reached after careful study of all the relevant and extensive data presented at the hearings. There is no basis for holding that the commission's order was not supported by substantial evidence, or for concluding that the rates approved are unreasonable or excessive; sustained.—United States v. I.C.C., 221 F. Supp. 584 (587-8)*.

Record justified the commission's action in permitting acquired carrier, upon consummation of control transaction, to retain and exercise its authority to transport explosives between Idaho and Washington; from all the evidence before the commission, a reasonable mind might have found adequate basis to support its conclusions that the carrier's transportation of explosives between points in those States had been substantial and continuous, that it held itself out to handle all such traffic, commensurate with its facilities and abilities, and that the acquisition, if approved, would be consistent with public interest; sustained.—Black Ball Freight Service v. United States, 223 F. Supp. 191 (194-7)*.

The commission's finding that needs of shippers supporting plaintiff's application can all be met by protesting carriers and that those shippers have not adequately utilized the services of carriers now authorized and will-

ing to meet their needs, and its conclusion that plaintiff has failed to establish a need for motor transportation in addition to that available at time of the order, are borne out by substantial evidence. Plaintiff's showing that some supporting shippers might be more conveniently served by a locally based carrier does not overcome the ample evidence of record that existing service is adequate. Order denying plaintiff's application sustained.—Colorado-Arizona-California Exp., Inc. v. United States, 224 F. Supp. 894 (897, 900)*.

The commission's prior denial of authority to five applicants for charter operations from Long Island in no way detracts from the deference the court must afford its ultimate conclusion that the authority sought should be granted; the first determination was never reviewed by the court and might well have been in error, as the commission itself subsequently concluded. More basically, "substantial evidence" may well support two conflicting points of view; to say that only one position in any given case could be supported by "substantial evidence" would deprive the commission of the discretion afforded it by law, and would in effect be reviewing its determination to see if the "correct" result had been reached. This the court cannot and will not do; the commission's conclusions are supported by substantial evidence and must be upheld.–Campus Travel, Inc. v. United States, 224 F. Supp. 146 (148)*.

The commission's ultimate finding or conclusion must be predicated on basic findings supported by substantial evidence, and if such basis is found there is no need to examine the evidence further. The court is not concerned with the weight given to the evidence by the commission, the soundness of the reasoning by which its conclusion was reached, or whether the findings are consistent with those made in similar cases. The evidence of record is ample to show that all destinations in controversy could be served with reasonably adequate speed and volume by existing carriers; thus the commission did not err in holding that as to those destinations plaintiff failed to meet the demands of proof of convenience and necessity; the order sustained.—Curtis. Inc. v. United States, 225 F. Supp. 894 (898, 900, 901)*.

The reviewing court must sustain the commission when, viewing the record as a whole, its findings are supported by substantial evidence.—Worster Motor Lines, Inc. v. United States, 226 F. Supp. 603 (605-6, 608)*.

Scope of review of the commission's decision that control of a purported single-State proviso carrier in common interest with a multistate carrier, which would disqualify it from engaging in interstate operations under the proviso, was unlawfully effected prior to filing of its BMC-75 statement, is limited by the substantial evidence test. Substantial evidence must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. Evidence of the role played by individual controlling the multistate carrier, both in financing acquisition of the intrastate carrier's stock by its present owner and in its subsequent operation and management, amply supports the commission's conclusion that he was the guiding and moving force behind it; the commission's conclusion sustained.—Hart v. I.C.C., 226 F. Supp. 635 (641-3)*.

The commission's findings and order are presumptively valid. Careful examination of the record before the commission, including plaintiffs' cost evidence, reveals no error in its finding that a cost differential which would justify higher compensation to the outbound carrier on ex-barge than on ex-rail grain from same river ports to same destinations was not substantiated. The commission's findings that such difference in treatment for the movement beyond the ports unjustly discriminated against shippers of grain moving to the ports by for-hire barge transportation, to extent that charges on such traffic exceeded the lowest division to the outbound carrier on like shipments of ex-rail grain, are not arbitrary, but are adequate, supported by the record, and in accordance with law, and there is rational basis for the commission's conclusions; sustained.—Chicago, R.I. & P.R. Co. v. United States, 233 F. Supp. 381 (385, 388)*.

The commission's authorization of Greyhound's proposed service to and from Camden, N.J., area is within scope of its statutory authority and fully supported by substantial

evidence. Camden County is a burgeoning suburban area, and many witnesses testified to inconvenience and delay occasioned by having to change to a Greyhound bus in Philadelphia on trips beyond that city; express picked up in or destined for Camden was likewise delayed in shipment. After weighing this public interest against the relatively small amount of business that plaintiff may lose as result of Greyhound's new service, the commission found that the additional Greyhound service was required by present and future public convenience and necessity. The court is in no position to gainsay that statement, which is supported by substantial evidence and adequate findings. The commission's order sustained.—Safeway Trails, Inc. v. United States, 234 F. Supp. 362 (365)*.

There was ample evidence to justify the commission's holding that the diversion of traffic is not apt to be great because of the difference between type of service afforded by the plaintiffs and defendant carrier. Plaintiffs do not intend to provide door-to-door service and their rolling stock consists of large buses, and many witnesses have expressed a desire for door-to-door service. That proposed special and charter-party operations would afford plaintiffs some amount of competition and occasion some diminution in their operating revenues does not justify an upset of the commission's action.—Trailways of New England, Inc. v. United States, 235 F. Supp. 509 (513-514)*.

There being substantial evidence in the record to sustain the commission's finding, that plaintiff's authority to transport general commodities "except liquid petroleum products, in bulk, in tank trucks" does not authorize transportation of petrochemicals, it is not within the court's province to upset that finding; complaint dismissed.–Consolidated Freightways Corp. of Del. v. United States, 237 F. Supp. 391 (392)*.

In action by labor unions and carrier association to set aside the commission's order requiring carrier defendants in proceeding before it to cease providing helper service without charge for loading and unloading of t.l. freight and to publish the remedial tariff rule prescribed, plaintiffs do not aver any lack of substantial evidence before the commission or contend that the order is in any way illegal, but charge only that it impairs their labor contract. However, the proceeding before the commission was a tariff or rate case, and there was substantial evidence to support the commission's findings that defendants' practice of furnishing helper service free of charge to favored shippers amounted to undue preference in violation of §216 of Interstate Commerce Act and also violated §217 in that such service was furnished without tariff charge or authority. Complaint dismissed.—Teamsters Joint Council 40 (J.C.) v. United States, 238 F. Supp. 301 (302, 306, 307)*.

In the proceeding before the commission, plaintiff had the burden of satisfying the commission that sectionalized homes are within its authority to transport "trailers designed to be drawn by passenger automobiles." Although the facts pertaining to their mobility were presented only casually to the examiner, substantial evidence supports the finding that such homes are not sold to customers as mobile units designed to be drawn upon the highways as trailers, but are merchandised as stationary, factory-built homes; this finding supports the conclusion that they do not retain mobility after initial delivery and therefore are not trailers within the described authority. The commission's order sustained.—National Trailer Convoy, Inc. v. United States, 240 F. Supp. 286 (289)*.

The commission's finding that needs of shippers supporting plaintiff's application can all be met by protesting carriers and that those shippers have not adequately utilized the services of carriers authorized and willing to meet their needs, and its conclusion that plaintiff failed to establish a need for motor transportation in addition to that available at that time, are amply supported by substantial evidence of record. Order denying plaintiff's application sustained.—Watkins Motor Lines, Inc. v. United States, 243 F. Supp. 436 (441-2, 443)*.

The commission's finding relative to density of movement at interlocking plant, which railroad sought to discontinue, was not so erroneous as to amount to an abuse of discretion. Tonnage handled by the railroad had reduced by 25 percent between the first and

second of two 5-year periods, and the finding that the number of movements is related to the tonnage was unreasonable; also, there was evidence of record that the number of moves made daily through the interlocking had reduced between the two 5-year periods. Evidence supports the commission's findings, particularly the one "that adequate protection and safety would continue under applicant's proposal"; the court cannot substitute its opinion for that of the commission as it draws its conclusions from the evidence. Order approving discontinuance of interlocking, sustained.—Legge v. United States, 244 F. Supp. 878 (881-2)*.

See also Boston & M.R. v. United States, 49 USC §1(4), n. 126; Chicago, M., St. P. & P.R.Co. v. United States, 242 F. Supp. 698; Cope v. United States, §207(a), n. 6 tacking; State Corporation Comm. of State of Kansas v. United States, 49 USC §13(4), n. 58.

57.—Lack of evidence to sustain order.—[Vols. 4, 7, 12, 17, 19].—Since the commission's order requiring cancellation of plaintiffs' proposed reduced export-import rates is not supported by essential basic facts particularly stated, it cannot be sustained; order set aside.–Boston & M. R. v. United States, 202 F. Supp. 830 (834, 836, 838)*.

Although the commission's interpretation of plaintiff's certificate, in complaint proceeding, as restricting its transportation of general commodities to truckload lots is not shown to be arbitrary, capricious, or contrary to some established principle of law, there is no substantial evidence to support its subsidiary conclusions that plaintiff's past transportation of l.t.l. shipments was obviously illegal and not performed in good faith; those conclusions were gravely prejudicial to plaintiff's application for removal of the "in truckload lots" restriction on its present authority; application proceeding remanded for further hearing.–Bowman Transp., Inc., v. United States, 211 F. Supp. 354 (356, 359)*.

While the commission may base a finding of need for proposed service on future public convenience and necessity, finding for the future must have some evidentiary basis of the anticipated need. Grant of statewide authority to transport interstate shipments of cement from shipper's St. Louis plant to points in Missouri was not supported by substantial evidence; portion of the commission's order granting such authority, set aside.—L. A. Tucker Truck Lines, Inc. v. United States, 215 F. Supp. 261 (264-6)*.

The commission's order directing plaintiff, who holds no intrastate authority between involved Pennsylvania points, to discontinue transporting traffic between them over its authorized interstate routes through New Jersey, is not supported by substantial evidence; no direct evidence was offered of bad faith on plaintiff's part or subterfuge to evade State regulation. Since the commission bottomed its finding of bad faith solely on the circuity of such routing, this unwarrnated conclusion must be rejected; cease-and-desist order reversed.—Jones Motor Co. v. United States, 218 F. Supp. 133 (137, 138)*.

In determining plaintiff's "grandfather" application under the Transportation Act of 1958, the commission acted arbitrarily in refusing to consider shipments in 1955 and 1956 on ground that they were too remote from the critical date to have probative value; those shipments support and aid in evaluating plaintiff's contention that origin and destination points in its principal operations change from year to year in the normal course of business, owing to the special characteristics of the traffic involved. And while it is not clear whether shipments in 1959 and 1960 were arbitrarily excluded from consideration, if they were because applicant failed to file exceptions to an overall acceptable decision of the examiner, refusal to consider such evidence upon the commission's review of the examiner's decision was error. The commission should have considered the proffered evidence for what bearing it might have on the character of plaintiff's operations; remanded for rehearing in conformity with the opion.—Halde Distributing Co. v. United States, 221 F. Supp. 266 (270)*.

The commission's finding that plaintiffs' rates under consideration, which are admittedly compensatory, constitute a destructive competitive practice is not supported by any finding based on evidence that they would destroy the inherent advantages of other modes of transportation. The commission's order condemning the rates, set aside.–New

York, N. H. & H. R. Co. v. United States, 221 F. Supp. 370 (376)*.

Record is devoid of substantial evidence to support the commission's finding that assailed 500-A scale is unlawful for dividing joint official-w.t.l. rates as between eastern lines and plaintiff transcontinental western lines. Such a determination must be made on evidence adequate to sustain it, and the commission must show a rational connection between the finding made and the evidence on which it is based; but there is no substantial showing that the commission considered evidence of any specific rates and divisions, as required by the typical evidence rule. Though it asserts that information about plaintiffs' traffic is available in an earlier docket concerning east-west divisions with a few midwestern lines, it is not shown that such data (which is not before the court) is substantial and representative of plaintiffs' current divisions, or if so, that the commission considered it; and in view of the commission's erroneous conclusion that it need not consider specific rates, the court is not warranted in assuming that it did so.—Atchison, T. & S.F. Ry. Co. v. United States, 225 F. Supp. 584 (599-600)*.

Nor is the commission's prescription of the same divisional scale currently in effect between the eastern and midwestern lines as basis for divisions with plaintiffs supported by substantial evidence. The commission not only improperly excluded as irrelevant evidence offered to show that the prescribed formula had greatly benefited the short-haul midwestern lines, which was evidence of type necessary for application of the commission's own comparison test, but it failed to apply evidence already of record which tended to support plaintiffs' claim of adverse effect of application of that formula to their traffic, because of their long hauls. And in basing its prescription mainly on revenue needs of the eastern lines, the commission does not appear to have considered substantial evidence of revenue needs of all the parties, either as groups or as individual railroads. Order set aside and cause remanded for further proceedings consonant with the court's opinion.—Id., pp. 603, 606.

The commission's purported finding on the essential element of similarity of transportation and competitive conditions is not supported by substantial evidence in the record and is therefore inadequate to support a finding of undue prejudice; and finding that the proposed rates would be inadequately compensatory if such prejudice were removed, based on findings as to car utilization and costing procedures that are not supported by substantial evidence, is likewise invalid. Accordingly, the commission's conclusion that the proposed rates must be increased to avoid unfair and destructive competition is also unsupported by substantial evidence; the commission's order is therefore null and void and must be enjoined and set aside.—Cincinnati, N.O. & T.P. Ry. Co. v. United States, 229 F. Supp. 572 (579-80)*.

On review of the commission's report and order in motor carrier application proceeding, the court is interested in determining whether the commission's decision is supported by substantial evidence in the record; and whether the decision is responsive to uncontroverted, credible evidence of record, or is legally arbitrary and capricious because of failure to respond to and act on any such evidence. Findings and conclusions of the commission must be based on the record and upon fair inferences and must support and justify subsidiary findings and conclusions based thereon.—Dixie Highway Exp., Inc. v. United States, 242 F. Supp. 1016 (1020, 1021)*.

In action to set aside the commission's order denying plaintiff's application to purchase operating rights of a second motor carrier, the record as a whole furnishes ample basis for holding that the commission's decision is not supported by substantial evidence; even without consideration of the facts surrounding subsequent application of a third carrier (intervener in court suit) to purchase the same rights. However, the court is acting in its equity jurisdiction in considering an injunctive remedy, though limited statutorily in extent of the relief it may grant, and it should be able to view the situation in its entirety, including the related matter of third carrier's application. Order of the commission set aside as to two reasons for denial, and case remanded for further hearing on the question of competition and diversion of traffic.–Interstate Motor Freight System v. United States, 243 F. Supp.

868 (870, 872-3)*.

See also Greyhound Corp. v. U.S., n. 13 above; Whitfield Transp., Inc., v. United States, §207(a), n. 24.

58.—Admission of evidence.–[Vols. 4, 7, 19].—In proceeding on "grandfather" application under Transportation Act of 1958, the commission abused its discretion in rejecting evidence of shipments transported in 1956 as too remote; seasonal, changing, and unpredictable nature of traffic involved made consideration of those shipments crucial; their elimination from the evidence denied plaintiffs their statutory right to prove that origin and destination points in their bona fide operations change from year to year, owing to nature of the traffic, and deprived them of their statutory right to continue serving many points they would be entitled to serve under proper application of standards derived from consideration of characteristics of the business. Remanded for further consideration in light of views expressed.–Winter Garden Co. v. United States, 211 F. Supp. 280 (288, 290)*.

While defendant's claim that the commission's refusal to consider evidence of plaintiff's holding out and solicitations during the "grandfather" period should not be considered because, by failing to except to examiner's ruling that certain such evidence was inadmissible, plaintiff waived its right to complain of rejection thereof, and while the question of admissibility of the rejected evidence is not properly before the court, such action and remarks in connection therewith may be considered as an indication that the commission erroneously regarded solicitation and holding out as an improper standard for determining the issue of bona fide operations.—Frozen Food Exp. v. United States, 219 F. Supp. 131 (137, 140)*.

Judicial review of the commission's orders must be confined to the record made by the commission. Evidence outside that record is inadmissible for any purpose and may not be considered by the court.–Denton Produce, Inc. v. United States, 270 F. Supp. 402 (405)*.

59.—Evidence not before the commission.—[Vols. 4, 10, 12, 14, 16].—Objection to plaintiff's exhibit consisting of a tariff filed with the commission by motor carrier conference (intervening defendant), showing carriers parties to the conference and that operating authority of each is limited to transportation of commodities "which because of size or weight require special equipment," sustained; it does not appear that contents of that exhibit were called to attention of, or considered by, either the examiner, Division 1, or the entire commission; nor has it any materiality or bearing on issue of whether a heavy hauler's authority includes transportation of Army cargo trucks which admittedly require no special equipment.—United Transports, Inc. v. United States, 214 F. Supp. 34 (38)*.

In suit to review the commission's orders interpreting scope of plaintiff's operating authority, the court may review the commission's action only on the record which was before the commission; therefore, motion to strike affidavits appended to plaintiff's original complaint will be granted.—U.S.A.C. Transport, Inc. v. United States, 235 F. Supp. 689 (695)*.

Although plaintiff seeks rehearing to present evidence of development and operation of the mobile home industry since the hearing before the examiner in the commission proceeding, the court's review is confined to the record made before the commission. If plaintiff believes that the commission was wrong in its interpretation of plaintiff's certificate because important evidence was not brought to its attention, the appropriate remedy is to make a new application to the commission, which has the power and duty to grant relief if the evidence warrants the change. Petition for rehearing denied.—National Trailer Convoy, Inc. v. United States, 240 F. Supp. 286 (289)*.

The rule is well settled that proceedings for review of commission orders are not de novo, and ordinarily it is improper to allow the commission's findings to be attacked or supported in court by evidence which the commission had no opportunity of considering. Departure from those established principles is not warranted by fact that a rulemaking proceeding involving the same questions intervened between entry of the challenged order and institution of suit to set it aside, or by the subsequent entry of a modified order consistent with the new regulations adopted, after filing of plaintiff's original complaint. Nor

does the limited purpose for which the new evidence was offered–to assist the court in determining the true scope of the exemption statute involved-justify its admission.—Wycoff Co., Inc. v. United States, 240 F. Supp. 304 (308)*.

60.—General order based on evidence which is typical.–[Vols. 4, 7, 10, 16].–See also Atchison, T. & S. F. Ry. v. United States, and Boston & M. R. v. United States, 49 USC §15(6), n. 22 *sufficiency of evidence*.

61. Burden of proof.–[Vols. 4, 7, 10, 14, 16, 19].–In action to annul and set aside the commission's order rejecting plaintiff's tariff, because it published rates on commodities for which carrier held no operating authority, plaintiff's burden of proof is heavy; it must show that the commission's order was invalid as unjust and unreasonable. The court, in 193 F. Supp. 823, held that plaintiff's authority did not embrace some commodities listed in the tariff; the tariff seeks to establish rates on commodities plaintiff is not authorized to transport, language used by plaintiff in the tariff apparently was an attempt to circumvent the commission's orders and also the ruling of the court.—W. J. Dillner Transfer Co. v. United States, 214 F. Supp. 941 (943-4).

An order of the commission is presumed to be valid, and the party attacking it has the burden of showing invalidity.—Frozen Food Exp. v. United States, 219 F. Supp. 131 (136)*.

There is no burden on the commission to prove that the challenged condition imposed on authorization of plaintiff's stock issue was in public interest; once the commission has made its decision, based on substantial evidence, the one attacking the decision has the burden of showing that it is unjust and unreasonable in its consequences. Plaintiff thus has the burden of proving that its proposed stock issue conforms to the public interest and that the commission's order, with the attached condition, was arbitrary, capricious, and erroneous because it was not based on any substantial evidence; plaintiff has failed to carry that burden.—Chicago, S.S. & S.B. R. v. United States, 221 F. Supp. 106 (109)*.

Whoever attacks an order of the commission has the burden of clearly and convincingly establishing that errors of fact or law have been committed and result in an order which is unreasonable or unjust. Plaintiffs having failed to carry that burden, complaint is dismissed.—R-C Motor Lines, Inc. v. United States, 241 F. Supp. 124 (127)*.

62. Review of mixed questions of law and fact.—[Vols. 4, 7, 10, 12, 17].—In action to set aside the commission's report and order granting motor carrier certificate to Railway Exp. Agency for transportation of general commodities, moving in express service, between Kansas City, Mo., and Coffeyville, Kans., (to replace express service formerly performed in passenger train service) plaintiffs failed to establish that the commission's findings are insufficient, as a matter of law, to support the exercise of the discretionary judgment vested in it by Congress; and examination of the record is convincing that those findings are supported by substantial evidence. Sustained.—Chief Freight Lines Co. v. United States, 230 F. Supp. 79 (81)*.

Determination of undue preference and prejudice involves a finding by the commission on a mixed question of fact and law in each case, and its conclusion may be upheld by the court on review only if there is a rational basis in law for the conclusion thus reached. The commission's basic findings must be supported by the evidence, and its ultimate finding must flow rationally from the basic findings. Since, for the reasons discussed, the commission's ultimate finding that the rate disparity complained of is not unlawfully prejudicial or preferential is not, as a matter of law, supportable by either of its basic findings, which in turn are not adequately supported by the evidence, and the commission might not have reached the same result in absence of the basic findings that have been set aside, the matter must be remanded to the commission for further consideration in light of the views expressed.—Stanislaus County v. United States, 236 F. Supp. 146 (148, 151)*.

63. Contentions not raised before commission.—[Vols. 4, 13-19].—Though plaintiff, in suit to set aside and annul the commission's order granting certificate application, contends that applicant's parent company and its carrier affiliates should have been made parties thereto, and that failure to seek approval under §5(2) of the corporate control involved

barred issuance of the certificate, the unlawful control issue was not adequately or properly raised before the examiner or the commission by appropriate pleadings, briefs, exceptions, or otherwise, and the court declines to consider that issue except to the limited extent of determining the contention that the commission lacked jurisdiction to issue the certificate.—Sloan's Moving & Storage Co. v. United States, 208 F. Supp. 567 (572)*.

Plaintiffs' contention that there is no undue advantage or detriment from rate disparity in issue unless the injury can be cured by any method carrier may choose to erase the disparity was not made before the commission; consequently, it is not properly raised before the court in action to set aside the commission's order which permits the railroads to remove the undue prejudice by raising the preferential rate or lowering the prejudicial rate, or both.—Atchison, T. & S.F. Ry. Co. v. United States, 218 F. Supp. 359 (373)*.

Having failed to raise the issue of whether his considered operations constitute "transportation" within 49 USC §303(a)(19) in the commission proceeding in which those operations were found to be for-hire transportation, plaintiff is precluded from raising such issue for the first time in court action to set aside the commission's order requiring him to cease and desist from such operations.—Studna v. United States, 225 F. Supp. 973 (982)*.

It is a sound principle of administrative law that an administrative agency should not be reversed unless it has had whatever opportunity is appropriate under its procedure to correct its alleged error, and this principle has been applied in ICC cases where parties attempt to raise issues in review proceedings not raised in the petition for reconsideration. Issue that, even if the commission was correct in finding that liquidating carrier in proposed merger has no status as an interstate carrier under single-State exemption proviso, it should have considered plaintiff's (survivor's) convenience-and-necessity application for continuance of the purported proviso operations on the merits may not be properly before the court on review, since it was not raised in plaintiff's petition for reconsideration by the commission.—Hart v. I.C.C., 226 F. Supp. 635 (643)*.

An administrative agency should be given the initial opportunity to correct its alleged error. Plaintiff's contention that there should have been a hearing examiner's report on proposed rate which the commission rejected was not raised before the commission and should not be considered on review by the court.—Middlewest Motor Freight Bureau v. United States, 234 F. Supp. 151 (155)*.

Court review of commission proceedings is not de novo, and ordinarily it is improper to allow commission findings to be attacked or supported in the courts by evidence which the commission had no opportunity to consider; however, since technical questions raised in appeal from decision in commission complaint proceeding alleging overcharges (involving determining significance of including shipments in one rate classification or another) are faced by the commission often, and rarely by the courts, the commission should reexamine the matter. On rehearing by the commission, consideration should be given to arguments and evidence which are part of the record before the court, and which the commission has not previously considered; also, consideration should be given to any relevant evidence plaintiff may yet adduce.—Roach Appleton Mfg. Co. v. United States, 265 F. Supp. 568 (572, 576-7)*.

In action to set aside the commission's order approving transfer of motor carrier operating rights, plaintiffs are precluded from raising for the first time the issue of imposition of commodity and territorial restrictions when they failed to request that such restrictions be imposed in their petition to the commission for reconsideration of its order. Thus, plaintiff's contention that the commission erred in not imposing those restrictions is not properly before the reviewing court and they are deemed to have abandoned it.—A.L. Root Transportation, Inc. v. United States, 280 F. Supp. 152 (155)*.

See also Fried v. United States, §5(2), n. 5; Youngblood Truck Lines case, APA, 5 USC *Procedure*.

64. Judicial notice.—[Vols. 7, 10, 12, 13, 16, 17].—The court takes judicial notice of existence of statutes in many states expressly re-

quiring segregation by race in facilities used in transportation of passengers in interstate commerce.–State of Georgia v. United States, 201 F. Supp. 813 (815)*.

UNITED STATES AS PARTY GENERALLY

Chapter 161.—Title 28

Section 2401. (a) Time for commencing action against United States.–[Unchanged. See vol. 16, p. 13003.]

Notes of Decisions

Volume 16—p. 13003; Volume 17—p. 13721; Volume 18—p. 14753; Volume 19—p. 16053.

10. Claims against the Federal Government.—[Vols. 16, 17, 18, 19].–Although, under §22 quotation naming a lower alternative rate on a "truckload minimum weight" of 50,000 pounds, plaintiff should have computed charges on certain shipments on a truckload rather than a volume minimum basis, its claim for additional freight, in suit filed in the Court of Claims, is barred by the 6-year statute of limitations (28 USC §2501). The rule is long established that claims for freight accrue when the services are rendered, and the right to demand payment accrues immediately on delivery of the property; the statute is not tolled while plaintiff awaits government audit or even actively pursues any available administrative remedies, unless the statute requires that a particular remedy be exhausted.—Baggett Transp. Co. v. United States, 317 F. 2d 864 (868-9). [Not arising hereunder.]

The requirement of mutual dealings essential to plaintiff's theory of an open, running account, against which the statute would not begin to run until audit was made, is not met where plaintiff performed all the services and the Government's only obligation was to pay for the services rendered, subject to its right to assure by audit the accuracy of the charges. The general rule is that where the account is all on one side the cause arises from each item so far as the statute of limitations is concerned. Plaintiff did not discover its errors in billing until 6 years after the services were performed; it could not expect the Government to point out those errors, since the right of audit is reserved for protection of the Government, not the carriers, who can conduct their own audits and sue for additional freight at any time within 6 years.—Id., pp. 868-71.

But plaintiff's claim for refund of charges deducted on weight of dunnage included in shipments is not barred, since that cause of action accrued when the deductions were made; the two causes of action are separate, even when growing out of the same shipment, since evidence to support one claim would not necessarily prove the other.—Id., pp. 869, 871.

Section 2403. Intervention by United States; constitutional question.—[Unchanged. See vol. 16, p. 13004.]

FAIR LABOR STANDARDS

Chapter 8—Title 29

Section 213, 215. Exemption; Prohibited acts, prima facie evidence.—[Unchanged with respect to applicable provisions, except that "not included in other exemptions contained in this section;" in §213(a)(9) was changed to read "not an enterprise described in sections 3(s)(2);"[1] by section 9 of the act of May 5, 1961, 75 Stat. 71. See vol. 10, p. 8449.]

Notes of Decisions

Volume 10—p. 8449; Volume 11—p. 9770; Volume 12—p. 10583; Volume 13—p. 11221; Volume 14—p. 11739; Volume 15—p. 12358; Volume 17—p. 13721; Volume 19—p. 16054.

1. In general.—[Vols. 10-15, 17, 19].—If the Interstate Commerce Commission has the power to regulate maximum hours of service of employees, such employees are exempt from overtime provisions of the Fair Labor Standards Act; and, as held in 310 US 534, the commission's power to establish maximum hours is limited to those employees whose activities affect the safety of operation of vehicles in interstate or foreign commerce.—Opelika Royal Crown Bottling Co. v. Goldberg, 299 F. 2d 37 (42).

Warehouseman, whose primary job was handling soft drink bottles within the warehouse, and whose infrequent help in loading supply trucks operated in interstate commerce was within de minimus rule set down in 330 US 695, was not exempt from overtime provisions of the Fair Labor Standards Act. However, driver-helpers on the trucks were exempt from overtime provisions of that statute as employees whose maximum hours of service are subject to regulation by the Interstate Commerce Commission; they are on the trucks at all times and perform a number of recurring functions which relate to safety of operation of the vehicles.—Id., p.43.

Employment of mechanic in defendant's garage was not exempt from overtime provisions of the statute when his duties consisted of service and repair only of industrial machinery, such as fork lifts and front end loaders, and he was never employed in repair and service of tractors and trailers used by defandant in delivering its products in interstate commerce. The employee was not regularly employed in safety-affecting work; and, his occasional service in line-up wlrk being trivial, casual, and insubstantial, his employment was not within provision of the statute which exempts employees over which the Interstate Commerce Commission has the power to establish qualifications and hours of service.—Wirtz v. Tyler Pipe & Foundry Co., 369 F. 2d 927 (929-30).

On appeal from an adverse summary judgment of the trial court, appellant truck drivers who were employed by corporation engaged in general cartage business as a carrier by motor vehicle, and that derived more than 4 percent of its total revenues from hauling traffic moving directly in interstate commerce, were without remedy under the Fair Labor Standards Act to recover for claimed overtime pay; inasmuch as appellants were full-time employees and assignments of work were made indiscriminately to the company drivers, appellants were "exempt employees" within §13(b)(1) of the statute. Summary judgment in favor of appellee-employer affirmed.—Bumgarner v. Joe Brown Company, Inc., 376 F. 2d 749 (750-1)*.

While §13(b)(1) of the Fair Labor Standards Act provides that overtime provisions of §7 of that act shall not apply to

[1]Section 203(s)(2) of this title, in U.S. Code

employees with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service, it does not provide an exemption from the minimum wage provisions of that act for such employees.—Wirtz v. Pioneer Steel Co., 212 F. Supp. 945 (946).

There is no concurrent jurisdiction between the Fair Labor Standards Act and the Motor Carrier Act; if the Interstate Commerce Commission has the power to regulate hours of service of employees, regardless of whether or not it chooses to do so, then the exemption of §213(b) is applicable. And to come within that exemption, a motor vehicle need not actually cross a state line, but it is necessary that the property transported be interstate shipments; therefore, fact that a driver's operation is wholly intrastate is not decisive when the activities constitute part of a continuous or through movement of freight received from points outside the State for movement to retail points within.—Southland Corporation (Cabell's Dairy Division) v. Shew, 248 F. Supp. 12 (14-15)*.

See also Wirtz v. Highway Transportation, Inc., §204(a)(2), n. 20.

Motor-carrier employees: Defendant truck driver found exempt from overtime requirements of the Fair Labor Standards Act although he was employed solely as a driver of plaintiff's trucks carrying refrigerated products from its milk processing plant to branches of its dairy in other points in the State, in private carriage. Since he regularly transported shipments of out-of-state dairy products with the milk shipments, his duties constituted transportation of goods in interstate commerce within meaning of Fair Labor Standards Act; and, since his duties were solely those of a truck driver on highways of the State, his actions directly affected the safety of operation of his vehicle. Under §204(a)(3) of the Interstate Commerce Act, the commission has authority to establish qualifications and maximum hours of service of drivers employed by private carriers; therefore, since, whether that power is exercised of not, the exemption of §213(b) is applicable, defendant is within that exemption.—Southland Corporation (Cabell's Dairy Division). v. Shew, 248 F. Supp. 12 (13-15)*.

Plaintiffs who were employed by private motor carrier to drive pump trucks used in its oil and gas well-servicing business, to load and unload portable job equipment, operate the pumps, and to do routine maintenance work on the trucks and generally keep them in safe operating condition, were not entitled to recover overtime compensation allegedly due them under the Fir Labor Standards Act. Since each plaintiff, at all pertinent times, performed duties which substantially and directly affected safety of operation of defendant's trucks in interstate commerce, under §13(b)(1) of the Fair Labor Standards Act all of them are barred from recovery of any overtime compensation.—Harshman v. Well Service, Inc., 248 F. Supp. 953 (958-60)*.

In determining whether motor carrier's employee is exempt from overtime provisions of the Fair Labor Standards Act, the true determinant is whether he performs any duties which substantially affect the safety of operations, and is therefore subject to regulations of the Interstate Commerce Commission, rather than whether his duties affecting safety are substantial. District court's findings that duties of carrier's assistant dock foreman had no substantial effect on safety of operation of motor vehicles in interstate commerce, so that he was not exempt from those overtime provisions, are supported by substantial testimony; sustained.—Yellow Transit Freight Lines, Inc. v. Balven, 320 F. 2d 495 (499).

In determining whether local truck drivers are engaged in transportation of goods in interstate commerce, and thus are within the motor-carrier exemption from overtime requirements of the Fair Labor Standards Act, "movement," cessation of movement, and interruption of movement are each factual matters. Lower court had ample basis to conclude that "interstate" movement of meat shipments from Iowa ceased upon delivery thereof to Florida storage and processing plant of drivers'

employer; the meat was stored and processed at the plant before local delivery to customers, thus interrupting continuity of its movement from out-of-state origin to ultimate destination. Local delivery truck drivers were not within the motor carrier exemption from overtime requirements of the statute.—Kline v. Wirtz, 373 F. 2d 281 (282).

PARCEL POST ACTS—TRANSPORTATION OF MAIL BY RAILROAD

Chapters 6 and 95.—Title 39

Chapter 6

Section 247. Reformation of classification, etc.—[Unchanged. See vol. 4, p. 3193.

Historical notes, see vol. 4, p. 3194, vol. 15, p. 12359.

Notes of Decisions

Volume 4—p. 3194; Volume 7—p. 6119; Volume 10—p. 8453; Volume 11—p. 9771; Volume 16—p. 13005; Volume 17—p. 13721; Volume 19—p. 16056.

1. Consents given by Interstate Commerce Commission.—[Vols. 4, 10, 16, 17, 19].—The commission consents to increases proposed by the Postmaster General in zone rates on parcel post and catalogs and proposed new schedules of rates for bulk shipments of catalogs. Proposed increases average 13.1 percent and revenue produced thereby, assuming that the 1962 volume of traffic is retained, will raise coverage of cost of the service to 91.3 percent. While those increases will not produce full cost coverage, they represent the Postmaster General's conclusion, in recognition of fact that rate increases can have a diversionary effect on traffic, as to the highest level of rates which present circumstances will permit. Proposed reformation of rates and conditions of mailability for those two categories of fourth-class mail will promote the service to the public, ensure revenues more adequate to attain the statutory objective of meeting costs of service, and are in conformity with the purposes of 39 USC §247.—Reformation of Rates—Fourth-Class Mail, 323 I.C.C. 1 (5, 34).

In support of his finding that cost of fourth-class mail service was permanently greater than revenue therefrom, the Postmaster General submitted an analysis based on the Department's cost ascertainment system (discussed in detail on pp. 5-24). Examination of the method of estimation and method of estimating sampling errors is convincing that proper formulas were used and that results produced provide a reliable foundation for developing costs and revenue distribution. Upon consideration of the cost data submitted and protestants' criticisms thereof, it is concluded that results shown for 1961 and 1962 may be accepted as substantially accurate for purposes of instant proceeding; and it follows that the Postmaster General correctly determined that present rates and other conditions of mailability for parcel post and catalogs are such as permanently to render the cost of the service greater than the revenues therefrom.—Id., pp. 5, 17, 24.

Costs measured by the marginal (added) cost method urged by protestants have generally been found unsatisfactory for purpose of computing rates; use of such a basis to measure parcel post costs requires assumption that the service is entitled to a preference over other mail services, to

extent that it may accept benefit of all expenditures necessary to them, without contribution. There is no warrant for use of marginal costs to measure sufficency of the return from fourth-class mail; it is required to bear, and the Postmaster General's proposal must be considered in relation to, the fully allocated costs of providing the service.—Id., pp. 10, 12.

A number of increases in Department operating costs have occurred since the present rates became effective in 1960; costs for all classes of mail have gradually increased from 1958 to 1962, resulting in an average increase of about 20 percent per pound for all mail and 18 percent for fourth-class mail; and while increase in cost per pound for catalogs was only about 3 percent, increase per piece was over 46 percent and revenues from catalog shipments have been below costs for a considerable time. Proposed parcel-post rates are designed to improve cost coverage on smaller shipments, where need therefor is greatest; but, to avoid drastic increases, a scale was devised producing less than costs for smaller parcels and somewhat increasing present cost coverage on heavier parcels. Prposed schedules provide a reasonable progression of rates and give appropriate consideration to piece and pound elements of all costs, with full coverage reached, except in local movements, at about the 12-pound weight.—Id., pp. 17-8, 24-5.

Proposed rates on catalogs are on lower level than for parcel post, with average increase of 30.1 percent for single-piece mailings and overall increase of about 12 percent under proposed bulk schedule. With expected distribution of the traffic, at 1962 volume the rates will reflect an average increase of 13 percent and produce added revenue raising cost coverage on catalogs to 74.7 percent. The new schedule for bulk shipments in quantities not less than 300 pieces will promote service to the public by affording shippers of larger catalogs a service like that now enjoyed by those able to use third-class service, on assumption that about 95 percent of catalogs in fourth-class service would move on the bulk rates. That schedule is constructed on separate piece and pound rates, with one series for catalogs weighing 1 to 2 1/2 pounds and a lower-rated series on those over 2 1/2 pounds, to reflect efficiencies of the heavier shipments; but even with the greater increases on small catalogs, the rates do not cover estimated unit costs.—Id., pp. 30-2.

And future promulgation of reasonable regulations standardising details of handling bulk shipments of catalogs, in respect of manner of address, method of payment of postage, statement of mailing, and separation, sacking, and labeling of sacks, with opportunity to revise such regulations from time to time when found necessary and proper by the Postmaster General, without specific consent thereto by the commission in each case, will promote the service to the public.—Id., p. 33.

Also, with increased use of motor carriers and extension of the Nation's highway system, occasion for application of the proviso in effect since 1915, imposing zone 3 rates on both parcel post and catalogs when the shortest practicable mail route involves distances over 300 miles, has become rare and revenue benefits from its use are more than offset by time lost by clerks in determining its applicability to particular shipments; proposed cancellation of that proviso will promote the service to the public.—Id., pp. 33-4.

2. Construction.—[Vols. 7, 10, 16, 17, 19].—It is not the commission's function to determine whether the Postmaster General has exceeded his powers under the postal laws; neither Public Law 82-199 (limiting size and weight of parcels) nor any related postal statute suggests that the commission has been delegated any such power. Considering that the Postmaster General, as a member of the Cabinet, shares in responsibilities of the Executive Branch respecting the fiscal problems of the Federal Government and that, subject to judicial review, he is primarily responsible for administration of the postal laws, the commission refrains from any conclusion as to his statutory authority to reform rates and other conditions of mailability of fourth-class mail.—Reformation of

Rates—Fourth-Class Mail, 315 I.C.C. 751 (754-5)*.

However, the commission has the duty of any tribunal to consider the scope of its own power to proposed changes under the 1912 act; its role of giving or withholding consent under the postal laws is limited to the auditing functions essential to determining whether the proposal falls within the statutory range of compensativeness. Were it clear that Congress had withdrawn from the commission the power to consent to changes in size and weight limits for parcel-post packages, it would be its duty to reject the Postmaster General's proposals on that ground; but, balancing the rule of construction against implied repeals with the language and history of Public Law 199, it cannot be concluded with certainty that Congress withdrew in 1951 the power it granted in 1912 to change the size and weight limits.—Id., p. 754; denied for lack of jurisdiction, Id., 318 I.C.C. 858*.

Enactment of 31 USC §695 and amendment thereof by Act of May 27, 1958, together with indicated congressional review of the entire parcel post operation, do not authorize or require the Commission to reevaluate the entire future of parcel post in light of standards provided in the Parcel Post Policy Act of 1958; the statutory standards governing exercise of the commission's function respecting proposed reformation of postage rates and conditions of mailability for fourth-class mail are set forth in 39 USC §247. Whether parcel post has kept pace with national production or consumption, and whether its costs compare favorably or unfavorably with those of privately owned transporters of parcels, are not matters the commission is required to consider; and it is not to determine whether the Postmaster General might have devised or accepted some other proposal, but only to determine whether it may consent to the proposal as made.—Reformation of Rates—Fourth-Class Mail, 323 I.C.C. 1 (3-4).

Numerous congressional reports reflect the policy that fourth-class mail should pay its own way; and restriction on withdrawal of funds imposed by 31 USC §695 was designed to ensure that the Postmaster General would take action as might be necessary to increase revenues from fourth-class mail sufficiently to cover cost of the service. Suspension of that restriction for a 3-year period by the Act of June 29, 1963, does not, as pointed out by the House Committee on Post Office and Civil Service, alter the fundamental statutory requirements of 39 USC §247. Regardless of whether Congress may conclude, after study of the fourth-class mail service, that some other standards are necessary to its continued functioning, in passing on the proposal before it the commission must be guided by the statutory standards as they now exist.—Id., pp. 11-12.

Since the enactment of Public Law 199, 82d Congress, effective Jan. 1, 1942, restricting the size and weight of parcels that may be transported by the Department, reformations which result in increased charges are the only method to which the Postmaster General may resort in attempting compliance with the duty imposed on him by 39 USC §247. That Congress expects him to make all efforts within his power to comply with those requirements was made clear in connection with its rejection of proposal to repeal §247 and substitution of the 3-year moratorium on §695.—Id., pp. 25, 34.

5. Weight limits.—[Vols. 7, 11].—Language of 39 USC §4552 limiting weight and size of fourth-class mail packages is clear and unambiguous, and the Postmaster General is bound by the statute.—Railway Exp. Agency, Inc. v. Day, 209 F. Supp. 766 (767, 768).

6. Size restrictions.—[Vol. 7].—Language of 39 USC §4552 limiting size and weight of fourth-class mail packages is clear and unambiguous, and the Postmaster General is bound by the statute.—Railway Exp. Agency, Inc. v. Day, 209 F. Supp. 766 (767, 768).

12. Competition with express haulage.—[Vols. 7, 10, 16, 19].—While it is probable that the more recent rate increases on parcel post have caused some diversion to other forms of transportation, use of parcel post service has also been affected by greater availability of private

truck transportation, relative quality of competing services, use of drop shipping, and increased use of "will call" outlets by major mail-order companies, as well as changes in retailing practices, declining rural populations, and rise of suburban shopping centers. Short-haul parcels have on the whole been less resistant to diversion than long-haul, and in recognition thereof proposed increase was held to about half that necessary to make revenue balance costs, assuming no loss of volume. Present proposal is designed to increase cost coverage in areas where need therefor is greatest, and while some diversion may result, effect of the proposal cannot be foreseen and the Postmaster General's judgment is entitled to substantial weight.—Reformation of Rates—Fourth-Class Mail, 323 I.C.C. 1 (25-6).

Ratemaking for the future and forecasting of probable traffic losses from increased rates depend predominantly on exercise of informed judgment. Protestants' analyses of volume losses and net revenue differences following the 1960 increase do not warrant conclusion that the differences are solely the product of that increase. Nor can it be found that the difference in volume between 1959 and 1962 provides a reliable measure of volume reductions which may be caused by the present proposal; it cannot be assumed that a reduction in volume between any 2 years is solely the product of an intervening change, or that the percentage of reduction in volume is so positively related to the percentage of the rate increase as to provide a probative measure of the future impact on volume of a proposed increase.—Id., p. 28.

And while competition from motor parcel carriers and Railway Exp. Agency has increased in recent years, neither such carriers nor buslines and forwarders provide the extensive service to all individuals desirous of sending parcels from and to any part of the country that parcel post does. Desirability and value of parcel post service for small shipments to nearby zones is demonstrated by large shippers' use of drop shipping, i.e., trucking parcels part way and mailing them as parcel post when close to their destination. Based on experience, the Postmaster General could reasonably conclude that, while some loss of volume might be expected, the proposal would result in significant net revenue improvements.—Id., p. 30.

Section 434. Failure to enter into or perform contract; proceedings, temporary contracts; adjustment of compensation; extension of term of contract.—[For text of paragraph, see vol. 17, p. 13723. Repealed by Public Law 86-682, Sept. 2, 1960, 74 Stat. 578-730.

Supplemental Appropriations Act, September 27, 1950, Fourth-Class Mail Service.—[31 U.S.C. §695].—[Unchanged. See Vol. 15, p. 12359; Vol. 19, p. 16057].

Historical Note

The act of June 29, 1963, Public Law 88-51, 77 Stat. 71, provides that this paragraph, as amended, shall not be in effect during the period beginning on July 1, 1963, and ending June 30, 1966.

Section 536.—[For text of this paragraph, see vol. 4, p. 3198. This section was not incorporated in Chap. 95 of Title 39 which was enacted by Public Law 86-682, Sept. 2, 1960, 74 Stat. 578.]

Section 550, 552.—[For text of these paragraphs, see vol. 4 pp. 3209, 3211. These sections were not incorporated in Chap. 95 of Title 39 which was enacted by Public Law 86-682, Sept. 2, 1960, 74 Stat. 578.]

Notes of Decisions

§550: Volume 4—p. 3209; §552: Volume 4—p. 3211.

Section 557. Information from Interstate Commerce Commission as to revenues from express companies; rates for transporting matter other than first class.—[For text of paragraph, see vol. 4, p. 3214. Repealed by Public Law 87-108, July 26, 1961, 75 Stat. 221.]

Notes of Decisions

Volume 15—p. 12362; Volume 17—p. 13725.

Chapter 95—TRANSPORTATION OF MAIL BY RAILROAD

[Historical notes. See Vol. 19 p. 16058].

Section 6201. Definition.—As used in this chapter, unless otherwise specified, "railroad" means a railway common carrier, including an electric urban and interruban railway common carrier.

Section 6202. Service by railroad.—This chapter applies to mail transportation performed by a railroad by rail or combination of rail and vessel, or by motor vehicle as provided by section 6213 of this title.

Notes of Decisions

[Formerly §541a.]: Volume 15—p. 12360.

Section 6203. Authorization of service by railroad. [Unchanged. See Vol. 19 p. 16058].

Notes of Decisions

[Formerly §523]: Volume 4—p. 3197.

[Formerly §541]: Volume 4—p. 3200; Volume 7—p. 6131; Volume 10—p. 8456; Volume 15—p. 12360; Volume 17—p. 13724; Volume 19—p. 16059.

1. Manner and conditions of service.—[Vols. 4, 7, 10, 15, 17, 19].—Although the railroad has the statutory duty to transport mail offered by the United States under conditions prescribed by the Postmaster General, in transporting mail cars on intrastate train it seeks to discontinue it acted, not as a common carrier with corresponding rights and liabilities, but as an agency of the Government subject to the laws and regulations of the Post Office Department. The Government is a carrier of mails and its dealings with the railroad are contractual matters between carriers; and the Postmaster General has authority to prescribe the service required of the railroad in carrying the mail. Since routing of mail and the transportation media used in its distribution are matters solely within authority of the Post Office Department, any jurisdiction of the State commission over involved train would not extend to mail cars included therein.—Pennsylvania R. Co. Discontinuance of Passenger Service, 317 I.C.C. 737 (741)*.

Section 6204. Facilities provided by railroads. [Unchanged. See Vol. 19 p. 16060].

Section 6205. Changes in service.—[Unchanged. See Vol. 19 p. 16060].

Section 6206. Evidence of service [Unchanged. See Vol. 19 p. 16061].

Section 6207. Fines and deductions [Unchanged. See Vol. 19 p. 16061].

Notes of Decisions

Section 6205 [Formerly §564]: Volume 4—p. 3216.

Section 6208. Interstate Commerce Commission to fix rates. [Unchanged. See Vol. 19 p. 16061].

Notes of Decisions

[Formerly §542]: Volume 4—3202; Volume 7—p. 6132; Volume 10—p. 8457; Volume 14—p. 11742; Volume 15—p. 12360; Volume 16—p. 13005; Volume 17—p. 13724; Volume 18—p. 14755; Volume 19—p. 16062.
[Formerly §543]: Volume 4—p. 3205.
[Formerly §549]: Volume 4—p. 3208; Volume 7—p. 6135; Volume 10—8459.
[Formerly §570]: Volume 4—p. 3218; Volume 10—p. 8462; Volume 15—p. 12362.

Section 6209. Procedures. [Unchanged. See Vol. 19 p. 16063].

Notes of Decisions

[Formerly §511]: Volume 4—p. 3210; Volume 14—p. 11742; Volume 17—p. 13725.
[Formerly §553]: Volume 4—p. 3213; Volume 7—p. 6137; Volume 10—p. 8460.

Section 6210. Special rates. [Unchanged. See Vol. 19 p. 16063].
Section 6211. Authority to distinguish between classes of mail. [Unchanged. See Vol. 19 p. 16064].
Section 6212. Discrimination in transporting second class mail. [Unchanged. See Vol. 19 p. 16064].
Section 6213. Transportation by motor vehicle. [Vol. 19 p. 16064].
Section 6214. Statistical Studies. [Unchanged. See Vol. 19 p. 16064].
Section 6215. Special contracts. [Unchanged. See Vol. 19 p. 16065].

Section 6216. Railroad operations, receipts and expenditures.—The Postmaster General shall require all railroad companies transporting the mails to furnish, under seal, such data relating to the operating receipts and expenditures of such roads as may, in his judgment, be deemed necessary to enable him to ascertain the cost of mail transportation and the proper compensation to be paid for the same. He shall, in his annual report to Congress, make such recommendations, founded on the information obtained under this section, as shall, in his opinion, be just and equitable. (Added by Public Law 89-554, §6(b), Sept. 6, 1966, 80 Stat. 631.)

SUBMERGED LANDS

Title 43—Chapter 29, U.S. Code

Subchapter III.—Outer Continental Shelf Lands

Section 1334. Administration of Leasing. [Unchanged. See Vol. 19 p. 16065].

SAFETY APPLIANCE ACTS

Chapter 1—Title 45

Section 1. Driving-wheel brakes and appliances for operating trainbrake system.—[Unchanged. See vol. 4, p. 3225.]

Historical notes, see vol. 4, p. 3225, vol. 18, p. 14757; vol 19, p. 16066.

Notes of Decisions

Volume 4—p. 3226; Volume 7—p. 6155; Volume 10—p. 8466; Volume 11—p. 9771; Volume 13—p. 11223; Volume 14—p. 11743; Volume 15—p. 12364; Volume 16—p. 13007; Volume 17—p. 13726; Volume 18—p. 14757; Volume 19—p. 16066.

3. Exclusiveness of Federal legislation.—[Vols. 4, 7, 10, 11, 13].—Where federal legislation admits of a gap the State may pass appropriate laws, to take care of needed protection, which do not conflict with their federal counterparts. Appellant railroad's "hot metal" movement of ladle cars between steel company's furnaces on either side of river at Pittsburgh, Pa., is the sort of operation specifically excluded by §1 of the Safety Appliance Act; thus, because of its position in relation to the federal statute and its extremely hazardous nature, such movement comes within the sphere of appropriate state regulation.—Monongahela Connecting R. Co. v. Pennsylvania Public Utility Com'n, 373 F. 2d 142 (147-8)*.

4. Purpose of acts.—[Vols. 4, 7, 11, 14].—Purpose of Safety Appliance Acts is to promote safety of railroad employees, of persons using the facilities of the railroad, and of the public; to effect this humanitarian purpose the act must be liberally construed.—Carbon County Ry. Co. v. United States, 309 F. 2d 938 (941)*.

See also Legge v. United States, §25, n. 2.

6. Construction.—[Vols. 4, 7, 10, 14, 16, 18, 19].—The Safety Appliance Act does not purport to confer a right of action upon anyone. However, the statute defines the standard of care required of a railroad and, although complainant is not an employee within the Federal Employers' Liability Act, he is a member of a class of persons for whose benefit the Safety Appliance Act was enacted; that statute is applicable in personal injury action against railroad based on violation thereof.—Barney v. Staten Isand Rapid Transit Ry. Co., 316 F. 2d 38 (40-1).

Since an offset duplicating machine is not "equipment" as specifically set forth in the Safety Appliances Act, provisions of that statute do not apply in railroad employee's action (initiated and tried under the Federal Employers' Liability Act) for personal injury which occurred while he was cleaning duplicating machine which he operated to print passenger tickets for the railroad. The issue of responsibility was limited to the claim under the FELA measured by "due care" rather than by "absolute" responsibility; trial court's

instruction to the jury, submitting question of responsibility under both statutes, was error.—Southern Ry. Co. v. Fox, 339 F. 2d 560 (562-3).

10. Duty imposed on carriers.—[Vols. 4, 7, 10, 11, 13, 14, 16-19].—Literal compliance with the Safety Appliance Acts is required, and ignorance of a defect does not excuse a violation of those statutes; a requirement of the Acts cannot be satisfied by rendering a performance equivalent to that required. Defendant railroad was in violation of the Safety Appliance Acts when it operated a train with one car, connected on the air brake line, with inoperative air brakes, even though brakes on the train were inspected before gebinning of trip during which considered brake failure occurred.—United States v. Atchison, T. & S. F. Ry. Co., 205 F. Supp. 589 (590-1).

Duty imposed on carriers by provisions of the Safety Appliance Acts is an absolute one, requiring proper and efficient performance of appliances on the occasion in question.—Trout v. Pennsylvania R. Co., 300 F. 2d 826 (828).

Violation of the Safety Appliance Acts is a breach of an absolute duty imposed by statute rather than negligence; and that duty cannot be avoided by a showing of freedom from negligence, since liability for breach of a statutory duty is imposed irrespective of whether or not negligence is present. However, there is no reason why a railroad, as a private party rather than as a common carrier, cannot make a contract with an industry (such as the side track agreement which is the basis of railroad's action against indemnitor industry for reimbursement of amount paid pursuant to judgment obtained against it by industry employee for violation of Safety Appliance Acts) to relieve itself by indemnity, not only for its own negligence if the contract is sufficiently specific, but also against absolute liability as imposed by statute.—Colorado Milling & Elevator Co. v. Terminal R. Ass'n, 350 F. 2d 273 (275-6, 278-9).

Violations of the Safety Appliance Acts constitute negligence *per se*; however, while negligence *per se* may be negligence as a matter of law, this does not mean that a violation of a safety statute may not also be negligence as a matter of fact. Railroad's violation of Safety Appliance Acts in supplying cars with inefficient brakes to defendant coal mining company constituted negligence *per se* and also negligence as used in sidetrack contract between them; therefore, railroad was entitled to indemnity or contribution in accordance with sidetrack agreement provisions for payment railroad made in settlement of negeligence litigation against it by company's employee.—Chicago, M. St. P. & P. R. Co. v. Alva Coal Corp., 365 F. 2d 49 (54-6).

Although personal injury action against railroad by employee of consignee was not brought under the Federal Employers' Liability Act (jurisdiction being based on diversity of citizenship), it was premised on the Safety Appliance Act and complainant is a member of a class of persons for whose benefit that statute was enacted. Railroad employees are no longer the only ones within the protection of latter statute; and Congress intended to prescribe therein absolute liability on behalf of those within protection thereof. Injuries complained of resulted when ladder on tank car, which complainant was ascending to obtain sample of car's contents prior to unloading, swung out causing him to fall; after the accident, a break in safety railing attached to the ladder was found. Railroad's liability for violation of Safety Appliance Act is absolute in absence of evidence that complainant was contributorily negligent.—Barney v. Staten Island Rapid Transit Ry. Co., 316 F. 2d 38 (40-1).

Power Or Train Brake Provisions

32. Construction.—[Vols 4, 7, 10, 13, 15, 16, 18].—Fact that appellant railroad is engaged in interstate commerce does not of itself subject it to provisions of Safety Appliance Acts. Accordingly, its "hot metal" movement of ladle cars over bridge between steel company's furnaces on either side of river at Pittsburgh, Pa., is not subject to air-brake provisions of the statute when such ladle cars do not move in interstate

traffic and, naturally, the locomotive cannot be moving in interstate traffic. Statute deals with interstate railroad traffic and the hot metal operation cannot be so classified when it is strictly local, confined to the company's industrial complex, and the cars are not received in rail interchange and have no prior or subsequent line-haul movement. Therefore, not being within purview of 45 USC §1, the hot metal movement is subject to regulation by the State commission.—Monongahela Connecting R. Co. v. Pennsylvania Public Utility Com'n, 373 F. 2d 142 (144-5, 147-8)*.

However, appellant's "Talbot" movement of hopper cars over the bridge to furnaces on south side of the river is a train movement and is subject to the Safety Appliance Acts. The hopper cars are picked up from trunk line railroads at interchange points after they have been shipped into Pennsylvania from other States and (though assembling of the cars is a switching type of collection) once they are brought together and movement to the furnaces begins, a valid train operation emerges. As the Supreme Court explained in 237 US 402, when a train is thus made up and is proceeding on its journey it is within the operation of the air-brake provision of the statute. Reversed and remanded for entry of judgment in accordance with the court's opinion.—Id., pp. 144-5, 148-9.

33. Requirements.—[Vols. 4, 13, 17].—Though there is considerable variance in stopping distances of trains, and it is suggested that the commission prescribe a reasonable stopping distance for all trains and authorize its field staff to place out of service any equipment contributing to failure to meet such a requirement, it is not shown that defective railroad equipment caused or contributed to any grade-crossing accident. Distances within which trains can be stopped depend on numerous factors, and it would be difficult, if not impossible, to fix any accurate stopping distance for trains under all circumstances. Moreover, due to slack action between cars, emergency brake application on a long train would create hazards to men in the caboose, and could cause damage to the locomotive and cars, as well as to the lading through shifting; emergency braking of a passenger train creates similar hazards. In view of existing regulations prescribed under the Power Brake Act of 1958 and the Locomotive Inspection Act, additional regulations in that respect are not needed; owing to impracticability of compliance with any prescribed stopping distance, it is doubtful if they would aid materially in preventing grade-crossing accidents.—Prevention of Rail-Highway Grade-Crossing Accidents, 322 I.C.C. 1 (76-8)*.

Section 2. Automatic couplers.—[Unchanged. See vol. 4, p. 3238.]

Notes of Decisions

Volume 4—p. 3238; Volume 7—p. 6161; Volume 10—p. 8468; Volume 11—p. 9772; Volume 12—p. 10586; Volume 14—p. 11744; Volume 15—p. 12364; Volume 17—p. 13727; Volume 18—p. 14758; Volume 19—p. 16068.

Automatic couplers

1. Purpose.—[Vols. 4, 14, 18].—Specific purpose of statute requirng automatic couplers on cars, evident in its language as well as its legislative history, was to minimize the necessity of having men pass between the cars; however, Congress did not attempt to define a car. While the two units of defendant's car (made out of two conventional hopper cars) are permanently combined, are not intended to be uncoupled, and cannot be uncoupled outside a repair shop, the record is neither clear nor unequivocal that the combined-unit car is a single car within meaning of the statute; the fused couplers serve no other office than they did before modification and, superficially, their appearance is not changed. Record does

not justify summary dismissal of the Government's suggestion that railroad men may not be expected always to recognize that the units are not to be uncoupled; so long as there is likelihood that men will be misled into entry between the cars with resulting risk of lives and limbs, the statute's application cannot be said to be foreign to its purpose; summary judgment for the railroad reversed and remanded.—United States v. Southern Ry. Co., 341 F. 2d 669 (671-2)*.

2. Duty imposed by section.—[Vols. 4, 10, 12, 14, 15, 18, 19].—In action for penalties for violation of this section, whether or not the automatic coupling requirement applies to defendant's combined-unit "articulated" car, made by fusing couplers and hoses at "A" end of each of two conventional hopper cars in a locked position, should be determined in light of apparent Congressional purpose in enacting the statute, i.e., to minimize necessity for men to go between cars to couple or uncouple them. For many purposes, the combination is a single car or is treated as if it were, the two units are not intended to be uncoupled, and they cannot be uncoupled outside a repair shop; however, in absence of chains or other connecting material between the ends near sides of the units, there may well be risk that railroad men might be misled into going between the units to attempt their uncoupling.—United States v. Southern Ry. Co., 341 F. 2d 669 (670-2)*.

While the statute should not be applied when its application has no relation to its purpose, absence of any reasonable relationship must be plain. Complete elimination of need for uncoupling cars is safer by far than providing the safest practical means for coupling and uncoupling, but this is so only if there is adequate warning that particular units are not to be uncoupled. Although the railroad may be able to show that such adequate warning has been given, the record does not support lower court's summary judgment that, considered car being a single car within meaning of the statute, automatic coupling requirement did not apply to "A" ends of the combined units. Reversed and remanded for further factual inquiry.—Id., pp. 670, 672-3.

—Coupling by impact required.—[Vols. 4, 7, 10, 15, 17, 19].—The Safety Appliance Act requires that cars remain coupled until freed by some purposeful act after coupling is effected, and a violation of the act is shown by proof that cars failed to couple automatically by impact. In suit by yardmaster who was injured while assisting train crew to couple the last two of a string of cars, the district judge correctly charged the jury that, if they found that the couplers failed to automatically couple because they were not properly set, such failure would not be a violation of the act, but that there would be a violation if they failed for any other reason, and that, if they found that the couplers were properly set but failed to couple automatically upon impact, they could infer from that fact that the failure was under circumstances constituting a violation of the act. The jury's findings in plaintiff's favor being supported by probative circumstances, judgment of the lower court awarding damages is affirmed.—Cobb v. Union Ry. Co., 318 F. 2d 33 (34-7).

8. Coupling and uncoupling levers.—[Vols. 4, 11].—The commission will consider a recommendation to Congress to clear up its right to prescribe the number, location, dimension, and manner of application of uncoupling levers.—Drawbar Extension on Hydroframe-60 Boxcars, 322 I.C.C. 620 (624).

Section 3. Refusal of insufficiently equipped cars from connecting lines.—[Unchanged. See vol. 4, p. 3244.].

Historical notes, see vol. 4, p. 3225.

Notes of Decisions

Volume 4—p. 3244.

Section 4. Grab irons or handholds for security in coupling and uncoupling cars.—[Unchanged. See vol. 4, p. 3245.]

Historical notes, see vol. 4 p. 3225.

Notes of Decisions

Volume 4—p. 3245; Volume 7—p. 6162; Volume 10—p. 8469; Volume 18—p. 14759; Volume 19—p. 16068.

Section 5. Standard height of drawbars for freight cars; noncomplying cars excluded from traffic.—[Unchanged. See vol. 4, p. 3247.]

Historical notes, see vol. 4 p. 3225.

Notes of Decisions

Volume 4—p. 3247; Volume 17—p. 13728.

Section 6. Failure to equip cars as provided; duty of United States Attorneys and Interstate Commerce Commission; exceptions from operation of provisions.—[Unchanged. See vol. 4, p. 3249; vol. 19, p. 16069].

Historical note, see vol. 4, p. 3249, vol. 18, p. 14760, vol. 19, p. 16069.

Notes of Decisions

Volume 4—p. 3250; Volume 7—p. 6163; Volume 10—p. 8470; Volume 11—p. 9773; Volume 12—p. 10586; Volume 13—p. 11224; Volume 14—p. 11745; Volume 15—p. 12366; Volume 16—p. 13008; Volume 17—p. 13728; Volume 18—p. 14760; Volume 19—p. 16069.

Actions For Penalties

11. Nature of action.—[Vols. 4, 16, 17, 19].—Although intentional violations of Safety Appliance Acts rarely occur, and most cases are disposed of by admission of liability or confession of judgment, unlike other civil actions §6 does not permit an unintentional violator to admit liability and settle or pay the amount due prior to commencement of the action. Costs are properly imposed upon defendants who made a suit necessary by persistence in unjustifiable acts or have unnecessarily increased or enlarged the cost of the contest; and docket fees are a proper item of costs.—United States v. Indiana Harbor Belt R. Co., 209 F. Supp. 245 (246).

12. Jurisdiction of district courts.—[Vols. 4, 10, 14].—In a reorganization proceeding under §77 of the Bankruptcy Act, the bankruptcy court has exclusive jurisdiction of the debtor and its properties wherever located; and though Congress has specifically authorized suits against trustees and debtors-in-possession without leave of court with respect to any of their acts and transactions, the Government's suit to recover penalty for a violation of the Safety Appliance Act which occurred before the railroad filed petition for reorganization is not predicated on any act of the trustees

which would authorize it. The Government's failure to obtain permission of the bankruptcy court to bring the present suit against the trustees was a jurisdictional defect justifying dismissal. Consequently, unless consent to institute suit in the district court for the district wherein the violation occurred is obtained nunc pro tunc from the bankruptcy court within 60 days, the complaint will be dismissed.—United States v. Dorigan, 236 F. Supp. 106 (109).

14. Discretion of courts.—[Vol. 4].—The court is vested with discretion in determining what costs, including docket fees, should be allowed in an action against a railroad for violation of Safety Appliance Acts; but though the Court of Appeals for the Sixth Circuit assessed docket fees because of the practice in that district, the Court of Appeals for the Seventh Circuit has never passed upon that question. Defendant has admitted liability for the violations and is willing to pay the stautory penalty; in the circumstances there is no valid reason, absent a policy to the contrary, for taxing a docket fee in addition to other costs; defendant's motion to disallow taxing of docket fees, granted.—United States v.Indiana Harbor Belt R. Co., 209 F. Supp. 245 (246-7).

16. Complaints.—[Vols. 4, 15, 16, 17, 18, 19].—While Congress cannot have intended that a railroad corporation, by filing petition for reorganization, should escape penalties incurred for violating the laws of the United States, and a judgment for violation of the Safety Applicance Act obtained before appointment of trustees is a provable and preferred claim desipte provisions of §77(j) of the Bankruptcy Act, there is no authorization for such suit after appointment of trustees, for, though Congress has specifically authorized suits against trustees without leave of the bankruptcy court with respect to any of their acts, present suit against railroad's trustees to recover penalty for a violation occurring before reorganization petition was filed is not predicated on any act of the trustees. The Government's failure to obtain permission of the bankruptcy court to bring such suit was a jurisdictional defect justifying dismissal; consequently, the complaint will be dismissed unless consent of that court to institute the present suit is obtained nunc pro tunc within 60 days.—United States v. Dorigan, 236 F. Supp. 106 (109).

18. Sufficiency of evidence.—[Vols. 4, 7, 14].—If a violation of the Safety Appliance Act is established, only the proximate cause of the injury remains as an issue; and if a violation is a contributing proximate cause of the injury, a jury may find for the plaintiff. A violation of the act is shown by proof that cars failed to couple automatically by impact. In suit by yardmaster who was injured while assisting train crew in second attempt to couple the last 2 of 10 cars, by being knocked from top of car where he had mounted after assuming from vibration that an impact had occurred, there were probative circumstances from which the jury could infer that there were three impacts, that the couplers were properly set at time of the second impact, and that the cars failed to automatically couple on that impact but did so on the third, when plaintiff was injured. The district judge having properly charged the jury as to the governing principles of law, judgment of the lower court in plaintiff's favor is affirmed.—Cobb v. Union Ry. Co., 318 F. 2d 33 (34, 36).

21. Admissibility of evidence; generally.—[Vols. 4, 10, 15-18].—Since the original car inspection reports, from which defendant's summary was made, were business records under the rule in 318 US 109, that summary may be admitted in evidencc in railroad employee's action for personal-injury damages at discretion of the trial judge, although it was made for purposes of the litigation, provided it meets certain tests.—Trout v. Pennsylvania R. Co., 300 F. 2d 826 (830).

23. Questions for jury.—[Vols. 4, 10, 11, 13-18].—In action under Safety Appliance Acts and Federal Employers' Liability Act for personal injury allegedly sustained when brake on rail car failed to operate, a jury question is presented under former statute if it can be reasonably concluded from the evidence that the brake failed to operate efficiently while being operated in natural,

normal, and usual manner. Plaintiff need show nothing more, and negligence is an irrelevant consideration; the district court's duty was to separate the two causes of action, and to make this clear to the jury. The court's error in not submitting plaintiff's Safety Appliance Acts claim to the jury was not cured by requiring jury to answer interrogatories concerning inefficient or defective brake in connection with submission of his claim under Federal Employers' Liability Act.—Trout v. Pennsylvania R. Co., 300 F. 2d 826 (828-9).

Section 7. Assumption of risk by employees.—[Unchanged. See vol. 4, p. 3257.]

Historical note, see vol. 4, p. 3225.

Section 8, Provisions of chapter extended.—[Unchanged. See vol. 4, p. 3258.]

Historical note, see vol. 4, p. 3258.

Notes of Decisions

Volume 4—p. 3259; Volume 7—p. 6164; Volume 10—p. 8472; Volume 11—p. 9773; Volume 13—p. 11225; Volume 14—p. 11746; Volume 15—p. 12366.; Volume 16—p. 13009; Volume 17—p. 13730; Volume 18—p. 14761; Volume 19—p. 16069.

Provisions of Chapter Extended

1. Constitutionality.—[Vol. 4].—There is no merit to contention that §132.13(e)(1) of commission's brake regulations, if construed as requiring visual inspection of the brakes on each car of a train, is unconstitutional because of vagueness. There is nothing vague in its requirement of the brake test "to determine that the brakes are applied on each car," and the only method of making that determination is by looking at them individually after they are set by the engineer and before they are released.—Carbon County Ry. Co. v. United States, 309 F. 2d 938 (943)*.

Trains Subject to Acts

6. What constitutes a train.—[Vols. 4, 14, 16, 18].—Though the Power or Train Brake Act of 1958 directs the commission to promulgate rules for installation, inspection, etc., of power brakes on trains, neither the statute nor the regulations defines "train" as used therein; from the decisions, however, it is clear that a movement of cars by a locomotive is a train operation unless it is one of switching, i.e. the assembly, classification, and coupling of cars in a yard for purpose of making up a train. Ordinarily, after a unit is thus made up, neither distance moved, hazards incident to the particular movement. Nor whether it is moved on a mainline track is determinative of whether it is a train; the controlling test is the essential nature of the work performed. Where in each instance normal switching operations had been completed and essential nature of the work was transportation of the cars from one location to another, considered movements were train operations.—Carbon County Ry. Co. v. United States, 309 F. 2d 938 (941-2)*.

In truck driver's action for injuries sustained in railroad crossing accident, the trial court correctly ruled that engine and 37 loaded freight cars, which moved across heavily traveled highway in order to put the last car in the string on the car repair shop track, constituted a "train" within meaning of the Safety Appliance Acts and the commission's rules and regulations thereunder, which together require that a train shall not be operated without having

air brakes functioning on 85 percent of the cars being moved.—DiFrischia v. New York Central Co., 307 F. 2d 473 (475).

7. Trains subject to power or train-brake provisions generally.—[Vols. 4, 7, 10, 15-17, 19].—Operation involving a yard engine traveling 1.6 miles at about 8 miles an hour to pick up empty cars in a cohesive area entirely on defendant railroad's property used for classification and storage of cars, and through which no through trains passed and which is not crossed by any public or private roads or highways or by tracks of any other carrier, constituted a "switching operation" rather than a "train movement"; it was an operation involving sorting, selecting, or classifying of cars and had none of the "characteristics of customary 'train' movement" discussed in 361 US 78. Accordingly, failure to have brakes on each of the cars connected or operable by the engineer did not constitute a violation of the Safety Appliance Acts; judgment in favor of defendant.—United States v. Chesapeake & O. R. Co., 238 F. Supp. 160 (161).

Section of the Safety Appliance Acts requiring power brakes contains no exceptions. Although court decisions have held not to be train movements the switching, classifying, and assembling of cars within railroad yards, or movement of a few cars at a time, involving coupling and uncoupling, movements which, though miniature when compared with main-line hauls, have characteristics of customary train movements and their attendant risks are "train" movements. Movement of engine and 37 loaded freight cars across heavily traveled highway in order to put last car in the string on defendant's car repair shop track was a train movement requiring operable brakes on 85 percent of cars moved; fact that switching operations preceded or followed such movement does not remove it from the statutory requirements.—DiFrischia v. New York Central R. Co., 307 F. 2d 473 (475-6).

See also Monongahela Connecting R. Co. v. Pennsylvania Public Utility Com'n, 45 USC §1, n. 32.

8.—Switching trains.—[Vols. 4, 7, 10, 14-19].—Since §9 of the Safety Appliance Acts, which relates exclusively of power brakes, had long been construed as referring only to train movements, and use of words "used or hauled" in 1958 amendment thereof clearly should be construed as shorthand for "used or hauled in a train movement," defendant railroad had no obligation to to comply with those provisions when it was engaged in switching operations. Therefore, lower court's dismissal of certain counts of the Government's complaint for alleged violations of the power brake requirements of the statute is affirmed.—United States v. Ogden Union Ry. and Depot Co., 370 F. 2d 540 (541-2).

Section 9. [§ *2 as enacted*] Number of cars to be operated with power or train brakes; increase of number.—[Unchanged. See Vol. 18, p. 14762.]

Notes of Decisions

Volume 4—p. 3269; Volume 7—p. 6167; Volume 10—p. 8473; Volume 14—p. 11746; Volume 15—p. 12367; Volume 16—p. 13011; Volume 19—p. 16070.

1. Number of cars to be operated with power or train brakes.—[Vols. 4, 7, 10, 14-16, 18, 19].—Statute pertaining to trains operated with power or train brakes is designed to prevent "slack action"; and that statute is violated whenever even one car, connected on the air brake line, does not have its air brakes operative.—United States v. Atchison, T. & S. F. Ry. Co., 205 F. Supp. 589 (591).

5. Inspection, testing, and maintenance rules.—[Vol. 19].—Since a provision of the

Safety Appliance Acts cannot be satisfied by rendering a performance equivalent to that required, and the Interstate Commerce Commission has no authority to nullify or set aside any provisions of those statutes, compliance with the commission's inspection and testing rules cannot be treated as the equivalent of compliance with the Safety Appliance Acts.—United States v. Atchison, T. & S. F. Ry. Co., 205 F. Supp. 589 (591).

Under §132.13(e)(1) of the commission's brake regulations, determination of whether brakes on "each car" of a train are functioning must be made before the brakes are released and the train moved; adequate air in the brake system at end of the train is no assurance that the brakes on all the cars were applied when the brake pipe pressure was reduced; this can be determined only by visual inspection of the brakes on each car, and failure so to inspect is a violation of the order. Under this interpretation of the rule an absolute, not merely a reasonable, determination is required; while in light of its safety record this requirement may seem arbitrary as to the defendant, it is not for courts to determine whether this safety measure is or is not needed in particular cases; Congress determined the policy that governs application of the law.—Carbon County Ry. Co. v. United States, 309 F. 2d 938 (942-3)*.

Regulations prescribed and enforced by the commission under the Power Brake Act of 1958, requiring not only that airbrakes on all trains be tested and inspected at initial terminal, but also that running tests be made and, if the brakes are found not to be operating properly, that the train be stopped, cause of failure ascertained and corrected, and running tests repeated, adequately meet recommended requirement that all brakes be operative at all times.—Prevention of Rail-Highway Grade-Crossing Accidents, 322 I.C.C. 1 (80)*.

Section 10. Former duties, requirements, and liabilities continued unless specifically amended.—[Unchanged. See vol. 4, p. 3271.]

Historical note, see vol. 4, 3258.

Section 11. Safety appliances required for each car; when hand brakes may be omitted.—[Unchanged. See vol. 4, p. 3272.]

Historical note, see vol. 4, p. 3272.

Notes of Decisions

Volume 4—p. 3272; Volume 7—p. 6168; Volume 10—p. 8475; Volume 12—p. 10587; Volume 13—p. 11225; Volume 14—p. 11747; Volume 15—p. 12368; Volume 16—p. 13011; Volume 17—p. 13730; Volume 18—p. 14763; Volume 19—p. 16072.

11. Purpose.—[Vols. 4, 10, 19].—The Safety Appliance Act is a remedial statute which is to be liberally construed to effect its humanitarian purpose to protect the lives and limbs of those engaged in the hazardous operation of railroading and the safety of the public generally.—United States v. Indiana Harbor Belt R. Co., 224 F. Supp. 219 (222).

2a. Construction and interpretation.—[Vols. 18, 19].—Safety Appliance Act defines standards of care required of a railroad and prescribes absolute liability on behalf of those within its protection; plaintiff, while not a railroad employee, is a member of one class for whose benefit the statute was enacted. Although tank car from which complainant fell, causing his injuries, was resting on siding owned by his employer, and was not being hauled or used on defendant railroad's line at time of the accident, Safety Appliance

Act is applicable; complaint specifically averred that defective condition of tank car's ladder and hand rail was the cause of the accident. Ownership of the siding is not significant, for it was the railroad which spotted the car there and removed it after it was unloaded; there is no evidence that anyone else had control of spotting and removing the car. Judgment in favor of railroad reversed and remanded for new trial.—Barney v. Staten Island Rapid Transit Ry. Co., 316 F. 2d 38 (41-2, 43).

Effect of legislatively establishing violation of a statute as negligence *per se* is to dispense with putting an injured party to the proof that the violation was in fact negligence. Violation of Safety Appliance Acts constitutes negligence as a matter of law, but that does not mean that such violation may not also be negligence as a matter of fact; and negligence clause in sidetrack contract between railroad and coal mining company, which provided that any claim or liability arising from joint or concurring negligence of both parties would be borne equally, included negligence *per se*. Railroad's violation of Safety Appliance Acts in supplying cars with inefficient brakes to the company constituted negligence *per se* and also negligence as used in the sidetrack contract; record supported jury's finding that defective hand brake on car, or cars, was not sole proximate cause of personal injury to company's employee; railroad was entitled to indemnity or contribution for payment it made in settlement of negligence litigation against it by company's employee.—Chicago, M. St. P. & P. R. Co. v. Alva Coal Corp., 365 F. 2d 49 (51, 52, 54-6).

The Safety Appliance Act imposes certain duties on all common carriers in interest of public safety and should be liberally construed to effect its humanitarian purpose. Defendant switching line is a common carrier even though acting at the moment under an agency agreement; the duty of a common carrier to refrain from hauling a defective car is absolute and it cannot, in effecting interchange, claim immunity for doing so under an agency agreement.—United States v. Indiana Harbor Belt R. Co., 224 F. Supp. 219 (222).

Since §11 forbids any common carrier subject to provisions of §§ 11-16 to haul any car not equipped as provided therein, it is immaterial whether defendant, a subject carrier operating an interchange facility owned by another carrier, in moving two defective cars received from the latter, as part of making up of trains in which they were spotted, was acting as agent of the other carrier or as an independent contractor. Defendant is liable under either relationship: the duty to refrain from hauling a defective car is an absolute one which may not be avoided, in effecting interchange, by claim of agency or contract.—United States v. Pacific Electric Ry. Co., 224 F. Supp. 948 (949).

7. Running boards.—[Vols. 7, 12-14, 18, 19].—No necessity is shown in present-day railroading for trainmen, conductors, brakemen, or other operating personnel to move from car to car over their roof running boards; easy stepping distance requirement is therefore unnecessary, and the Safety Appliance Standards should be revised accordingly. Specifics of the revision will be handled in a separate proceeding, wherein any other change that may be appropriately suggested can also be considered.—Drawbar Extensions on Hydroframe-60 Boxcars, 322 I.C.C. 620 (623, 624); all parties concede that running boards on the Hydroframe-60 boxcar compare most favorably for all working positions and practices other than the unnecessary practice of moving over the roof to the next car; and since this conclusion is limited to car-to-car movements over roof running boards, rather than merely going to or riding on the roof of a single car, petitioners' plea that they not be required to go on the tops of cars in any circumstance does not come into play—the two situations being greatly different, safety-wise.—Id., pp. 623-4.

Regulations of the Commission

28 FR 5389, May 30, 1963, Part 131: Safety Appliance Standards (Railroad), a new section, §131.22 Operation of track motor cars, added, effective on date of order.

28 FR 7839, Aug. 1, 1963, Part 131: Safety Appliance Standards (Railroad), effective date of new section, §131.22 Operation of track motor cars, postponed until further order of the commission.

29 FR 12589, Sept. 4, 1964, Part 131: Safety Appliance Standards (Railroad), regulations amended by addition of new section, §131.23 Unidirectional passenger-train cars adaptable to van-type semi-trailer use.

29 FR 15923, Nov. 28, 1964, Part 131: United States Safety Appliance Standards (Railroad), corrected order, effective Oct. 22, 1964, makes §131.1 not applicable on cars with roofs 16 ft. 10 in. or more above top of rail, and promulgates new "Hy-Cube" car classification and standards in §131.24 Box and other house cars with roofs 16 ft. 10 in. or more above top of rail.

30 FR 4062, Mar. 27, 1965, Part 132: Power Brakes and Drawbars (Railroad), §132.12 Initial terminal road train air brake tests, answers or interpretations in response to certain questions as to meaning and application of the regulation.

30 FR 7901, June 18, 1965, Part 131: United States Safety Appliance Standards (Railroad), new §131.25 Track motor-cars (self-propelled 4-wheel cars which can be removed from the rails by men), and §131.26 Pushcars, added, effective Jan. 1, 1967.

32 FR 2701, Feb. 9, 1967, Part 131: United States Safety Appliance Standards (Railroad), amendments not previously published in Federal Register through inadvertence: §131.1 is amended by addition of introductory note immediately before paragraph (a), and §131.27 Box and other house cars without roof hatches, and §131.28 Box and other house cars with roof hatches, are added, effective April 1, 1966.

32 FR 3152, Feb. 22, 1967, Part 131: Safety Appliance Standards (Railroad), §131.27(a)(3)(ii), pertaining to location of hand-brake shaft, amended, effective Feb. 28, 1967.

Section 12. Safety appliances as designated by commission to be standards of equipment; modification of standard height of drawbars.—[Unchanged. See vol. 4, p. 3274.]

Historical note, see vol. 4, p. 3272.

Notes of Decisions

Volume 4—p. 3274; Volume 10—p. 8475; Volume 19—p. 16075.

10. Cars of special construction.—[Vol. 4].—The Hydroframe-60 boxcar is not shown to be in violation of the Safety Appliance Acts or of any valid requirement of the Safety Appliance Standards or any other law or regulation, or to be an unsafe or undesirable car in any respect sufficient to justify any unfavorable action or recommendation by the commission. No present or future danger in its use is apparent that is not an inherent fact of railroading; thus there appears to be no safety hazard peculiar to that car or attributable to it in significantly greater measure than to other cars. However, this conclusion is necessarily based on the present record, and should it develop that that record is based on insufficient experience or is otherwise deficient the commission may still take action within its jurisdiction and responsibilities to meet the needs of the situation; the matter of safety will continue to be under constant scrutiny by Bureau and field personnel.—Drawbar Extensions on Hydroframe-60 Boxcars, 322 I.C.C. 620 (624).

Section 13. Penalty for using car not equipped as provided; hauling car for repairs where equipment becomes defective; liability for death or injury of employee; use of chains instead of drawbars.—[Unchanged. See vol. 4, p. 3277, vol. 18, p. 14764.]

Historical note, see vol. 4, p. 3272.

Notes of Decisions

Volume 4—p. 3278; Volume 7—p. 6169; Volume 10—p. 8476; Volume 13—p. 11226: Volume 14—p. 11747; Volume 16—p. 13012; Volume 17—p. 13731; Volume 19—p. 16075.

2. Construction.—[Vols. 4, 7, 13, 14, 16, 17, 19].—Defendant switching line violated provisions of Safety Appliance Act when it took a defective car received at Gibson yard, Hammond, Ind., and hauled it over tracks regularly used by defendant to Bensenville, Ill., for delivery to the Milwaukee. The fact that it took the defective car as part of a train already classified by New York Central at latter's Elkhart, Ind., yard for delivery to the Milwaukee at Bensenville under an agency agreement providing that for liability purposes such trains should be considered the sole trains of Central does not create an exception which would relieve defendant from penalty for violation of the act. Judgment for plaintiff.—United States v. Indiana Harbor Belt R. Co., 224 F. Supp. 219 (219-20, 222).

Defendant, which operates an interchange facility owned by Southern Pacific, received from latter two defective cars and moved them within the facility other than for purpose of repair, although one car was repaired at the facility and the other could have been. Whether, in moving the cars as part of making up of trains in which they were spotted, defendant acted as Southern Pacific's agent or as independent contractor is immaterial; duty under §11 to refrain from moving defective cars is an absolute one, and in effecting interchange, using Southern Pacific's tracks in execution of its contract, defendant was liable under either relationship. It is no defense that Southern Pacific is being sued for moving the same two cars on same date, since that action is based on Southern Pacific's movement of the cars into the facility and its movement of the unrepaired one out of the facility. Defendant is in violation of the Safety Appliance Acts; judgment for plaintiff.—United States v. Pacific Electric Ry. Co., 224 F. Supp. 248 (249, 250).

6. Proviso as matter of defense.—[Vols. 4, 10, 17, 19].—Provision of statute permitting movement of a defective car to nearest available repair point, without liability for penalty, is only available to excuse violations of the Safety Appliance Acts occurring after discovery of the defect. That proviso did not excuse defendant railroad from liability for penalty during the period of time it hauled boxcar having inoperative brakes, without any knowledge of such defect, before the defect was discovered.—United States v. Atchison, T. & S. F. Ry. Co., 205 F. Supp. 589 (591-2).

Sections 14, 15, 16.—[Unchanged. See vol. 4, p. 3283, 3284.]

Notes of Decisions

§14: Volume 4—p. 3283.

ASH PAN ACT

Sections 17—21. Locomotives to be equipped with safety ash pans; penalty for violation; enforcement.—[Unchanged. See vol. 4, p. 3285, 3286.]

Historical note. see vol. 4, p. 3285.

LOCOMOTIVE INSPECTION ACT

Section 22. Inspection of locomotives and appurtenances; definitions.—[Unchanged. See vol. 4, p. 3287.]

Historical notes, see vol. 4, p. 3287, vol. 11, p. 9774.

Notes of Decisions

Volume 4—p. 3288; Volume 7—p. 6172; Volume 10—p. 8478; Volume 11—p. 9774; Volume 13—p. 11227; Volume 16—p. 13012; Volume 17—p. 13732; Volume 18—p. 14765.

4. Construction.—[Vols. 4, 7, 10, 11, 17].—The Locomotive [Boiler] Inspection Act has been liberally construed in light of its prime purpose, the protection of employees, by requiring use of safe equipment. [317 US 481.] Any employee engaged in interstate commerce who is injured by reason of a violation thereof, has a cause of action under the statute.—Gowins v. Pennsylvania R. Co., 299 F. 2d 431 (433).

5. Relation to other acts.—[Vols. 4, 13, 18].—The Locomotive [Boiler] Inspection Act is substantially, if not in form, an amendment to the Federal Employers' Liability Act and is subject to the same construction.—Gowins v. Pennsylvania R. Co., 299 F. 2d 431 (434).

Section 23. Use of unsafe locomotive and appurtenances unlawful; inspection and tests.—[Unchanged. See vol. 4, p. 3291.] (Feb. 17, 1911, c. 103, §2, 36 Stat. 913; Mar. 4, 1915, c. 169, §1, 38 Stat. 1192; June 7, 1924, c. 355, §2, 43 Stat. 659.)

Historical notes, see vol. 4, p. 3291, vol. 12, p. 10587, vol. 13, p. 11227, vol. 14, p. 11748.

Notes of Dcisions

Volume 4—p. 3291; Volume 7—p. 6173; Volume 10—p. 8478; Volume 12—p. 10588; Volume 13—p. 11227; Volume 14—p. 11748; Volume 15—p. 12369; Volume 16—p. 13013; Volume 17—p. 13733; Volume 18—p. 14765; Volume 19—p. 16077.

1. Construction.—[Vols. 4, 7, 10, 12, 14, 18, 19].—In view of identity of purpose of both the Boiler Inspection and Safety Appliance acts, and the similarity and overlapping of subject matter in dealing with railroad equipment and appliances, cases defining and construing "in use" for purpose of Safety Appliance Act are authoritative for the same purpose under the Boiler Inspection Act. Since defendant's electric, self-propelled mail and baggage car was "in use" at time of accident in question, for purposes of Boiler Inspection Act, that statute is applicable in car inspector's action for personal injuries received when explosion and fire in defective fuse box on the car ignited his clothing and caused him extensive and severe burns.—Holfester v. Long Island R. Co., 360 F. 2d 369 (372-3).

2. Character of duty imposed on carriers.—[Vols. 4, 10, 12, 14, 15, 18-19].—Negligence is not the basis for liability under the act; partial defense of contributory negligence and the bar of assumption of risk are not available to employer. The act requires use of safe equipment for protection of employees; and any employee who is injured by reason of a violation thereof, has a cause of action under the

statute.—Gowins v. Pennsylvania R. Co., 299 F. 2d 431 (433).

Boiler Inspection Act, with its absolute liability, applies to one in plaintiff's position, who, as an inspector for defendant railroad, was engaged in searching out defects on electric, self-propelled mail and baggage car (which was on a track adjacent to the main line for a between-run inspection) so that railroad could comply with the act. Defendant's liability arises from its being unlawful to use locomotives which are defective—not from employee's position or work he may be doing when he is injured, provided the defective equipment is the proximate cause of the injury. Therefore, plaintiff is not barred from seeking damages under the act for injuries received when defective fuse box on the car exploded and resulting fire ignited his clothing, causing severe burns which permanently and seriously disabled him. The record clearly supports judgment of the trail court that defendant railroad had violated the statute and that such violation was proximate cause of plaintiff's injuries; affirmed.—Holfester v. Long Island R. Co., 360 F. 2d 369 (370-2, 373).

While the statute creates an absolute duty on part of defendant railroad, to which contributory negligence is no defense, negligence is not the basis for railroad employee's action for personal injuries suffered in two accidents, the first covered by the Federal Employers' Liability Act and the second by the Boiler Inspection Act. If the court's failure to charge the jury to effect that violation of a commission regulation issued pursuant to the Boiler Inspection Act is per se a violation of the act itself was erroneous, the error was cured by verdict for plaintiff; verdict was large enough to render altogether speculative and utterly untenable plaintiff's argument that the jury awarded nothing for the second accident because of the court's alleged erroneous charge; new trial denied.—Luke v. Pennsylvania R. Co., 207 F. Supp. 550 (551, 552)*.

3. What constitutes violation.—[Vols. 4, 12, 13, 15, 16].—The statute covers not only defects in construction and mechanical operation, but gives protection against presence of dangerous objects or foreign matter. When railroad employee claimed that there was oil on walkways of two diesel locomotives attached to freight train, which he had to use in getting on and off the engines in his required duties, and that when he attempted to get on one of the locomotives he "slipped and tripped," trail court erred in withdrawing from the jury's consideration the employee's claim for damages under the Locomotive [Boiler] Inspection Act. Reversed and remanded for a new trial.—Gowins v. Pennsylvania R. Co., 299 F. 2d 431 (433-4).

Defendant railroad did not violate the Locomotive Inspection Act by permitting a steam locomotive (previously given to a fair association for historical display) to be coupled in front of its locomotive which was hauling an excursion train of railroad fans, and moved a distance of from 100 to 300 feet, so that the railroad enthusiasts could take pictures of the double-heading. Instead of defendant making use of engine in question because its horsepower was needed, or for any other purpose, the excursion passengers were making use of defendant's train to make home-movie records of its rolling in a double heading. Also, since the locomotive was not "used" by any railroad company on occasion in issue, defendant's permitting a non-profit fair association and a non-profit association of railroad enthusiasts to use its tracks for the run thereof, in manner described and without a current inspection, did not violate §91.159 of the commission's rules and instructions for inspection of steam locomotives; therefore did not violate the statute.—United States v. Quincy R. Co., 338 F. 2d 430 (432-3).

4. Locomotives subject to act.—[Vols. 4, 15, 17].—When defendant's electric, self-propelled mail and baggage car had been only temporarily taken off its main line and placed on adjacent train-assembly track for a between-run inspection (but had not been removed to a repair or storage track or removed from service) at time of accident in question, it was still "in use" for purposes of Boiler Inspection Act; thus, car inspector's action against the railroad for in-

juries received when explosion and fire in defective fuse box on the car ignited his clothing, causing him extensive and severe burns, comes within provision of that statute. Lower court's determination that, within meaning of the act, the locomotive was "in use," though motionless, when accident occurred is clearly supported by the record; affirmed.—Holfester v. Long Island R. Co., 360 F. 2d 369 (371-2).

Section 24. Director and assistant directors of locomotive inspection; appointment and salaries.—[Unchanged except as shown in footnote, vol. 17, p. 13733. See vol. 14, p. 11749.]

Amendments, see footnotes, vol. 4, p. 3295, vol. 10 pp. 8482, 8483, vol. 14, p. 11749; vol. 17, p. 13735. Historical note, see vol. 4, p. 3295, vol. 18, p. 14766.

Historical Note

Reorganization Plan No. 3 of 1965, effective July 27, 1965, transferred all functions vested in the director of locomotive inspection, assistant directors of locomotive inspection, and district inspectors of locomotives to the Interstate Commerce Commission; abolished the offices of director, assistant director, and district inspector; and authorized the Commission to make such provisions as it deems appropriate for performance of the functions transferred, for the transfer of records, property, and funds affected by the reorganization plan, and to employ necessary personnel to carry out the transferred functions under the classified civil service and pursuant to the Classification Act of 1949. 30 FR 9351, July 28, 1965.

Sections 25, 26, 27.—[Unchanged. See vol. 14, p. 11749, 11750, vol. 10, p. 8484.]

Section 28. Rules and instructions as to inspection.—[Unchanged. See vol. 10, p. 8486.]

Histroical notes, see vol. 4, p. 3287.

Notes of Decisions

Volume 4—p. 3299; Volume 7—p. 6175; Volume 10—p. 8486; Volume 12—p. 10588; Volume 13—p. 11228; Volume 14—p. 11750; Volume 17—p. 13734; Volume 18—p. 14766; Volume 19—p. 16078.

2. Rules and instructions as to inspection.—[Vols. 4, 7, 10, 17-19].—The commission's rules and instructions governing inspection and testing of locomotives, adopted and issued in the exercise of the authority conferred by the Locomotive Inspection Act, acquire the force of law and become an integral part of the statute. However, when defendant's permitting use of its tracks for run of an old steam locomotive, in the manner described and without a current inspection, did not violate the rule requiring inspection reports for each locomotive used by a railroad company (since neither defendant nor any other railroad "used" the locomotive on that occasion), the statute was not violated.—United States v. Quincy R. Co., 338 F. 2d 430 (433).

In light of current technical developments and operating conditions, petitioner's proposed test operation of 12 specified diesel electric locomotives equipped with 6-I.N. type distributing brake valves for a period of up to 15 months, for purpose of ascertaining whether they can be safely operated for that time without cleaning of those valves, is clearly in in-

terest of progress, provided adequate protection and safety continues throughout duration of the test, which it will if the test is conducted strictly in accordance with the rules, circumstances, and conditions proposed.—Rules for Inspection of Locomotives Other than Steam, 315 I.C.C. 99 (101-103).

Relief granted from Rule 91.208 of inspection and testing rules (which requires cleaning of brake valves every 6 months), subject to the additional conditions that the test be promptly terminated should that appear advisable in interest of safety, that no more than one test unit be used in the same movement, and that records and results of the test be made available for inspection not only by the commission and its employees, but also by all interested rail carriers, Association of American Railroads, protestant employee organizations, and any interested manufacturers of valves and air-brake equipment.—Id., p. 103.

Regulations of the Commission

28 FR 157, Jan. 5, 1963, Part 91: Locomotive Inspection, §91.232 Classification or marker lights, effective date postponed to Apr. 1, 1963 subject to conditions stated, effective on date of order.

28 FR 13400, Dec. 11, 1963, Part 91: Locomotive Inspection, miscellaneous amendments. Relief from requirements of §§91.223, 91.225, 91.226, 91.227, 91.238(d), 91.239(b), and 91.253 revoked, except with respect to certain locomotives used by Iowa Term. R. Co., effective Jan. 1, 1964.

31 FR 11179, Aug. 24, 1966, Part 91: Locomotive Inspection, miscellaneous amendments, §§91.201, 91.206, 91.208, 91.212, 91.247, 91.264, 91.265, 91.266, 91.267, amended; §§91.330, 91.331, 91.334, deleted, effective 60 days from publication in Federal register of Aug. 24, 1966.

32 FR 4360, March 22, 1967, Part 91: Locomotive Inspection, Subpart C—Other Than Steam Locomotives and Appurtenances, miscellaneous amendments and corrections substituted for regulations published at 31 FR 11179, effective 60 days from date of service.

32 FR 8092, June 6, 1967, Part 191 [formerly Part 91]: Locomotive Inspection, Other than Steam Locomotive Rules; pursuant to §12(b) of Dept. of Transportation Act, the stay or postponement of effective date of ICC orders published at 32 FR 4360 and 31 FR 11179 continues in effect until further order of the Federal Railroad Administrator.

Sections 29-33. Duties of district inspectors; inspection and repairs; notice; appeal Powers and duties of inspectors; examinations of inspectors; Reports.—[Unchanged. See vol. 10, pp. 8487-8490.]

Amendments, see footnotes, vol. 10 pp. 8487-9; historical notes, see vol. 4, p. 3287.

Notes of Decisions

§29: Volume 4—p. 3303; Volume 7—p. 6176.

Historical Note

§29. The commission recommends, in view of the prohibitions in 18 USC §1001, that §6 of the Locomotive Inspection Act (45 USC §29) be amended so as to eliminate the mandatory oath provision therein, and that such requirement be made discretionary with the commission.—Annual Report, 1964, p. 72.

Historical Note

§32 and 33. It is recommended that §8 of the Locomotive Inspection Act be amended so as to prohibit (a) use in any damage suit of any report sent by a carrier under that act, (b) introduction in evidence in any damage suit of a report submitted to the commission by its accident investigators, (c) expert opinion testimony by such investigators in damage suits,

and (d) to restrict factual testimony by such investigators to cases where factual evidence is not reasonably available from other sources.—Annual Report, 1963, p. 15, Annual Report, 1964, p. 71-2.

Section 34. Penalty for violations by carrier; duty of United States attorney to sue therefor; director to give information.—[Unchanged. See vol. 10, p. 8490, vol. 18, p. 14770.]

Amendment, see footnotes, vol. 10, p. 8490; historical note, see vol. 4, p. 3287, vol. 18, p. 14771.

Notes of Decisions

Volume 4—p. 3306; Volume 7—p. 6178; Volume 13—p. 11228; Volume 14—p. 11751; Volume 16—p. 13014; Volume 17—p. 13735.

1. Elements of offenses.—[Vols. 4, 7].—Defendant violated the commission's regulations issued to implement the Locomotive [Boiler] Inspection Act (specifically 49 CFR §91.355) by failing to immediately report by wire, as provided therein, an accident causing serious injury to its fireman which resulted from fireman's accidental contact with electrically energized part of its diesel-electric locomotive unit; and committed a second violation of the same regulation by failing to mail written report of same accident to the Director of Locomotive Inspection. Defendant is liable for statutory penalty for each violation and for costs.—United States v. Northern Pac. Ry. Co., 213 F. Supp. 1 (2-3).

BLOCK SIGNAL RESOLUTION

Section 35. Investigation and report by Commission; evidence.—[Unchanged. See vol. 4, p. 3307.]

Historical notes, see vol. 4, p. 3307.

SUNDRY CIVIL APPROPRIATIONS ACT, MAY 27, 1908, SEC. 1

Sections 36, 37. Investigation, testing appliances or systems to promote safety; mail cars.—[Unchanged. See vol. 4, pp. 3309, 3310.]

Historical notes, see vol. 4, pp. 3307, 3309, 3310.

ACCIDENT REPORTS ACT

Section 38. Monthly reports of railroad accidents; duty of carrier to make.—[Unchanged. See vol. 19, p. 16090]

Notes of Decisions

Volume 4—p. 3311; Volume 12—p. 10589.

Historical Note

The commission recommends, in view of the prohibitions in 18 USC §1001, that §1 of the Accident Reports Act (45 USC §38) be amended so as to eliminate the mandatory oath provision therein, and that such requirement be made discretionary with the commission.—Annual Report, 1964, p. 72.

Section 39. Peanlty for failure to make report.—[Unchanged. See vol. 4, p. 3312.]

Section 40. Investigation by commission of accidents; cooperation with State commissions; reports of investigations.—[Unchanged. See vol. 4, p. 3313.]

Historical notes, see vol. 4, p. 3311, vol. 11, p. 9775, vol. 12, p. 10589; vol. 19, p. 16080.

Notes of Decisions

Volume 16—p. 13014; Volume 17—p. 13736; Volume 18—p. 14771; Volume 19—p. 16080.

10. Causes of accidents, generally.—[Vols. 10-19].—Derailment of passenger train resulting in one death and many injuries was caused by the train entering a curve on a descending grade at rate of speed which exceeded the theortical overturning speed on the curve as well as maximum authorized. Due to their physical condition (lack of sufficient rest together with effects of beverages consumed) engine crew was not alert; culpable human failure, not mechanical failure, was the primary cause of the accident; there was no defective condition of track structure or train's brake system which could have caused or contributed to the cause of the accident, and no appropriate action to stop the train or reduce speed prior to derailment was taken.—Accident near Evaro, Mont., 318 I.C.C. 199 (199, 209).

The primary cause of grade-crossing accidents is failure of the motor-vehicle operator to exercise due caution or to comply with existing laws and regulations and obey warning signs or signals; mechanical difficulties, weather conditions, and speeds of trains or motor vehicles are not shown to be significant factors. Some 73 percent of such accidents involve private automobiles, while only about 19.4 percent involve commercial vehicles; of the latter, while the heavy types are involved in the more serious accidents, regulated carriers generally present no problem the principal offender against safety being the exempt, unregulated, or irresponsible carrier; and though any type vehicle may be involved in a serious accident, the most severe are those involving vehicles hauling flammable, explosive, or other dangerous commodities. But while human failure causes most grade-crossing accidents, inadequate protection or maintenance of crossings, restricted visibility or sight distance, and insufficient warning time given by approaching trains are also contributing factors.—Prevention of Rail-Highway Grade-Crossing Accidents, 322 I.C.C. 1 (13-21, 63-6, 73, 86)*.

While the Bureau of Safety and Service's accident-reporting procedure has no direct bearing on prevention of grade-crossing accidents, it is significant in formulating recommendations for their prevention; statistical studies made from such reports are indispensable to a sound legislative policy and in formulation of adequate safety regulations. Statement of the cause or causes of a grade-crossing accident would be more meaningful if it gave more complete and detailed information, although in many instances, owing to death of members of the train crew and the truck driver involved, the best evidence is not always available and the commission must rely on

secondary evidence in determining the cause of the accident. The commission will therefore consider revision of its accident reporting procedure and include in its reports a more detailed analysis of the causes of accidents—Id., p. 81.

Section 41. Reports not evidence in suits for damges.—[Unchanged. See vol. 4. p. 3313.]

Notes of Decisions

Volume 19—p. 16081.

Historical Note

It is recommended that §4 of the Accident Reports Act be amended so as to prohibit the introduction in evidence in any damage suit of a report submitted to the commission by its accident investigators, expert opinion testimony by such investigators in damage suits, and to restrict factual testimony by such investigators to cases where factual evidence is not reasonably available from other sources.—Annual Report, 1963, p. 15, Annual Report, 1964, p. 71-2.

Section 42. Rules and regulations; form of reports.—[Unchanged. See Vol. 19, p. 16081.]

Section 43. Definitions.—[Unchanged. See Vol. 19, p. 16082.]

MEDALS OF HONOR ACT

Section 44. Medals of honor for persons saving lives on railroads and highways.—[Unchanged. See vol. 18, p. 14772.]

Historical notes, see vol. 4, p. 3315, vol. 11, p. 9775, vol. 12, p. 10589, vol. 13, p. 11229, vol. 14, p. 11751, vol. 15, p. 12371, vol. 16, p. 13015, vol. 17, p. 13736, vol. 18, 14773.

Historical Notes

By Executive Order 11382 of November 28, 1967, Executive Order No. 10765, governing award of life-saving medals under Medals of Honor Act (22 FR 2783), is amended so as to transfer certain functions, and assign certain authority and duties concerned with transportation, to the Department of Transportation. 32 FR 16247, Nov. 29, 1967.

The commission recommends that the Medals of Honor Act be repealed, in view of the more comprehensive recognition of heroism presently afforded by the Carnegie Hero Fund Commission.—Annual Report, 1964, p. 62-3.

Section 45. Rosettes and ribbons.—[Unchanged. See vol. 4, p. 3318.]

Section 46. Payment of expenses.—Appropriations for the Interstate Commerce Commission are hereby made available for carrying out the provisions of this act. (Feb. 23, 1905, c. 744, §3, 33 Stat. 743; June 13, 1957, S. 1463, 71 Stat. 69.)

HOURS OF SERVICE ACT

Chapter 3.—Title 45

Section 61. Carriers and transportation subject to provisions of chapter; "railroad" and "employees" defined.—[Unchanged. See vol. 4, p. 3321.]

Historical notes, see vol. 4, p. 3321, vol. 10, p. 8493, vol. 11, p. 9775, vol. 12, p. 10589.

Notes of Decisions

Volume 4—p. 3322; Volume 7—p. 6185; Volume 10—p. 8493; Volume 13—p. 11229; Volume 14—p. 11752; Volume 15—p. 12372.

Character of Act; Construction

3. Nature of act; whether civil or penal in character.—[Vol. 4].—The Hours of Service Act is civil rather than criminal and should be given broad construction in order that its purpose may be fulfilled.—United States v. Northern Pac. Ry. Co., 224 F. Supp. 303 (304).

4.—Purpose of the act.—[Vols. 4, 7, 13-15].—Purpose of the statute is to promote safety in train operation by preventing excessive physical and mental strain which usually results from remaining too long at an exacting task; it must be construed and applied in view of that purpose.—United States v. Detroit, T. & I. R. Co., 205 F. Supp. 860 (863, 864)*.

Purpose of the Hours of Service Act is to promote the safety of railroad passengers and employees by making mandatory release from duty for a period sufficient to allow adequate rest for those engaged in the movement of trains; a tired worker creates an unnecessary risk to himself, his fellow workers, and passengers of the railroad, as well as a potential danger to property. The act is merely designed to limit a railroad's right to require its employees to work overtime, not to control activities of employees with regard to "moonlighting"; it was enacted to prevent patterns of employment which would cause fatigue among employees who participate in movement of trains.—United States v. Northern Pac. Ry. Co., 224 F. Supp. 303 (304, 305).

The purpose of the Hours of Service Act was to reduce dangers to the public incident to the strain of excessive hours spent on duty by employees of the class covered. All such employees are restricted to a maximum of 16 on-duty hours in a 24-hour period; and in further providing that employees carrying out the exacting work of handling orders affecting train movements shall not be permitted or required to remain on duty more than nine hours in any 24-hour period. Congress obviously felt that an employee working more than nine hours at such duties would suffer a loss of efficiency which might be dangerous to other employees and the public.—United States v. Great Northern Ry. Co., 248 F. Supp. 88 (90-91).

Purpose of the limitation of hours of service is to promote safety in the operation of trains by preventing excessive mental and physical strain which usually results from remaining at an exacting task. The evil to be remedied is excessive labor by employees which makes them dangerous to themselves and the public.—United States v. Alabama, T. & N. R. Co., 252 F. Supp. 526 (528).

7.—Character of duty imposed upon the carrier.—[Vol. 4].—Requirements of the Hours of Service Act are absolute and lack of knowledge, lack of wilfulness, inadvertence, etc., will not excuse violations thereof.—United States v. Detroit, T. & I. R. Co., 205 F. Supp. 860 (863)*.

8.—Remedial character.—[Vols. 4, 10].—The Hours of Service Act is a remedial statute and must be liberally construed to effectuate its purpose.—United States v. Detroit, T. & I. R. Co., 205 F. Supp. 860 (863, 864)*; and the Act was enacted for protection of the public and railroad employees from the dangers inherent in long, uninterrupted periods of time on duty by railroad employees.—Jopek v. New York Central R. Co., 353 F. 2d 778 (781).

9.—Liberal construction.—[Vols. 4, 7, 13].—The statute should be construed in the light of its purpose, which means that it should be liberally construed. In definition of an employee as a person actually engaged in or connected with movement of any train, the work "actually" differentiates those who are from those who are not within its scope. Meaning of the words chosen by Congress is plain, and it is clear that the purpose of the act to eliminate or reduce railroad accidents caused by overwork could be effectuated only by encompassing all employees who are "actively" or "presently" engaged in or connected with the movement of trains; and an employee's services or duties must proximately relate to a train or trains already in motion or about to move. Thus, sweeping and cleaning certain switches on railroad's main line which were to be operated because of an approaching train and which, due to cold weather and snow, were not functioning properly, were duties intimately and directly connected with the movement of trains.—Jopek v. New York Central R. Co., 353 F. 2d 778 (781-3).

Persons Subject to Act

23. Employees subject to Act.—[Vol. 13].—In action under Federal Employers' Liability Act to recover for death of railroad employee, predicated on general negligence and violation of Hours of Service Act, trial court did not err in deciding as a matter of law that employee whose duties were to sweep and clean certain switches was actually engaged in or connected with movement of trains within meaning of the act when he suffered a fatal heart attack. Employee's duties were to sweep and clean only those switches on railroad main line which were to be operated because of an approaching train and which, due to cold weather and snow, were not functioning properly; as those duties were intimately and directly connected with movement of trains, he was an employee within scope of the statute. And, since testimony of witnesses concerning the employee's duties was consistent, undisputed and raised no question of credibility, the court could properly decide the question of his status without invading province of the jury.—Jopek v. New York Central R. Co., 353 F. 2d 778 (780-4).

Section 62. Hours of service limited.—[Unchanged. See vol. 4, p. 3331.]

Historical note, see vol. 4, p. 3321.

Notes of Decisions

Volume 4—p. 3322; Volume 7—p. 6186; Volume 10—p. 8493; Volume 11—p. 9775; Volume 12—p. 10590; Volume 13—p. 11230; Volume 14—p. 11752; Volume 15—p. 12372; Volume 17—p. 13737.

2. What constitutes being or remaining on duty, in general.—[Vol. 4].—An employee is on duty under the Hours of Service Act when under orders and not at liberty to go away; he is none the less on duty even though inactive if the time is not his own. Time performing work required preparation for work, is time on duty. Obvious purpose of the statute is defeated if an employee is required or permitted to occupy

hours intended for rest and relaxation with service of another kind; and particular character of such other service is immaterial.—United States v. Detroit, T. & I. R. Co., 205 F. Supp. 860 (863)*.

3.—Acts constituting service on duty.—[Vol. 4].—Time spent by railroad brakeman in driving his own car from place of call to place of duty was directly related to his employment to such an extent that it may not be considered "hours off duty"; under the particular circumstances, those hours were necessary to the employee's tour of duty.—United States v. Detroit, T. & I. R. Co., 205 F. Supp. 860 (862, 864)*.

However, after he finished his assigned job and had been released from duty, he was not on duty until he again reported for work the following morning; and when 8 hours had elapsed between the time he went off duty and the time he next reported for work, defendant railroad was not guilty of violation of the Hours of Service Act. During that 8 hours, the brakeman was free to do as he pleased; if he did not get enough rest, he alone was responsible. Judgment of the lower court reversed, and cause remanded with instructions to dismiss the complaint.—Id., 315 F. 2d 802 (804)*.

5.—Commingling of duties connected and not connected with train operation.—[Vols. 4, 14].—Policy behind the Hours of Service Act is best served by including all work performed for the railroad by its employees in determining violation. The statute was violated when employee worked over 17 hours in a 24-hour period although the last 8 hours was in non-covered work as assistant yardmaster, in which work he was not engaged in movement of trains. Shifting of duties should not be a method of circumventing the law; an employee will not feel more rested because part of his work involved duties not connected with movement of trains. And fact that the employee could work for another employer is irrelevant; the act is merely designed to limit railroad's right to require employees to work overtime.—United States v. Northern Pac. Ry. Co., 224 F. Supp. 303 (304-5).

In action alleging that two of defendant's employees were required to remain on duty for more than 9 out of 24 hours, in violation of the statute, the 9-hour restriction of on-duty time of employees handling train orders did not require inclusion of both time spent in that (covered) work and subsequent time spent in non-covered work when latter duties replaced former and at no immediate subsequent time were the employees shifted back to employment requiring handling of train orders. Neither employee worked with train orders at a time when he had already been on duty, in any capacity, more than 9 in the past 24 hours; neither was required to work, in any capity, more than 16 hours in the 24-period; and as they did not return to duties dealing with train movements at any time material to the case, there is no evidence of any "pattern of the shifting of duties as "a method of circumventing the law." [Citing 224 F. Supp. 303.] Judgment in favor of defendant.—United States v. Great Northern Ry. Co., 248 F. Supp. 88 (89-90, 91).

Commingling of duties will not avoid application of the Hours of Service Act; thus, when action to recover for railroad employee's death is predicated, in part, on violation of the act, and the railroad concedes that he had been on duty more than 16 hours at the time he suffered a fatal heart attack, duties of the employee at that time must be scrutinized to ascertain coverage or nonapplicability of the statute.—Jopek v. New York Central R. Co., 353 F. 2d 778 (781).

14.—Definiteness of respite as affecting continuity of service.—[Vols. 4, 10].—Short interruptions in service do not break continuity of on duty time; to break that continuity, time off duty must provide opportunity for substantial rest and relaxation. That an employee is absolutely relieved from service is not of controlling importance if the time is so short, or opportunities for rest so meager, that for all practical purposes he cannot recuperate from fatigue. Brief interruptions such as time for meals, waiting for orders, etc., cannot be considered off duty.—United States v. Detroit, T. & I. R. Co., 205 F. Supp. 860 (863)*.

Statutory provision that no telegraph operator may work more than nine hours in

any 24-hour period, if station is in the day-and-night class, nor more than 13 hours in any such period if station is in daytime class, is directed toward preventing an employee from exceeding the maximum time in any 24 hours, regardless of how computed. The phrase "any twenty-four hour period" is not used with reference to computation of class of station, and this should not be read into the statute. Computing the hours of use of defendant's telegraph station (operated with one employee on duty for periods of more than 9 but less than 13 hours) from time the sole operator commenced his daily shift, as logic requires, there is no proof that it was in use for more than 13 hours in a 24-hour period; therefore, there was no violation of the Hours of Service Act.—United States v. Alabama, T. & N. R. Co., 252 F. Supp. 526 (527-8).

Section 63. Penalty; suits therefor; exceptions from operation of act.—[Unchanged. See vol. 4, p. 3346, vol. 18, p. 14773.]

Historical notes, see vol. 4, pp. 3321, 3346, vol. 18, p. 14773.

Notes of Decisions

Volume 4—p. 3347; Volume 13—p. 11230.

Recovery of Penalties; Proceedings

5.—**Questions for the jury.**—[Vol. 4].—In action to recover statutory penalty from railroad for violation of the Hours of Service Act, whether or not one hour break in which railroad fireman was not actually working should be counted as on duty or off futy depends on whether it afforded a substantial and opportune period of rest under all the circumstances; and generally, the question of whether such a release is sufficient to break the continuity of service, in the particular circumstances, is one of fact for of fact for the jury. District court erred in directing a verdict for the railroad when, in light of the evidence and of all the other circumstances in the case, a question of fact was presented for the jury's determination as to whether the one hour afforded a substantial and opportune period of rest; reversed and remanded.—United States v. Mississippi Export R. Co., 321 F. 2d 583 (585-6).

Section 64. Enforcement by Interstate Commerce Commission.—[Unchanged. See vol. 4, p. 3359.]

Historical notes, see vol. 4, pp. 3321, 3359.

Notes of Decisions

Volume 4—p. 3359.

Regulations of the Commission

27 FR 6716, July 14, 1962, Part 61: Hours of Service of Railroad Employees, §61.1 Method and form of monthly report, revised, commencing with report for month of August, 1962.

ADAMSON EIGHT-HOUR ACT

Sections 65, 66. Establishment of eight-hour day; Penalty for violation.—[Unchanged. See vol. 4, p. 3361.]

Historical note, see vol. 4, p. 3361

Notes of Decisions

Volume 4—p. 3362; Volume 7—p. 6187; Volume 13—p. 11231.

Chapter 5.—GOVERNMENT-AIDED RAILROADS

Section 84. Interstate communication.—[Unchanged. See vol. 4, p. 3365.]

Historical note, see vol. 4, p. 3365; vol. 16, p. 12715.

Notes of Decisions

Volume 4—p. 3365.

Chapter 8.—RAILWAY LABOR ACT

Section 151. Definitions.[Unchanged. See vol. 7, p. 6193, vol. 15, p. 12373.]

Historical note, see vol. 7, p. 6194.

Notes of Decisions

Volume 4—p. 3374; Volume 10—p. 8495; Volume 11—p. 9776; Volume 12—p. 10591; Volume 13—p. 11232; Volume 14—p. 11753; Volume 15—p. 12373; Volume 16—p. 13016; Volume 17—p. 13738; Volume 18—p. 14774.; Volume 19—p. 16084.

3. Representatives.—[Vols. 10, 19].—In approving railroad merger, the Interstate Commerce Commission imposed conditions for protection of railroad employees adversely affected thereby, but did not undertake to determine the rights of individual employees or groups of employees; disputes as to entitlement of protective benefits are to be resolved by arbitration in accordance with implementing agreements, and arbitration machinery provided therein, between railroads and the duly authorized representative of their employees, as defined by the Railway Labor Act. The court lacks jurisdiction to adjudicate claims of individual employees or groups thereof.—Louisville & N. R. Co. v. Cantrell, 215 F. Supp. 229 (232-6, 240)*.

5. Construction, generally.—[Vols. 10-19].—Principle of per se illegality is to be applied only to conduct which of necessity produces consequences violative of the statute under consideration, or which produces proscribed consequences in such an overwhelming proportion of cases that minute inquiry in every instance would be wasteful of judicial and administrative resources. Railroads' participation in considered strike insurance plan did not constitute a per se violation of the Railway Labor Act.—Kennedy v. Long Island R. Co., 319 F. 2d 366 (370-2)*.

Purpose of the Railway Labor Act is to set up procedure to avert interruption to commerce, not to prescribe or proscribe the labor activities of parties. Defendant railroads' strike insurance plan, providing for daily indemnity for loss due to work stoppages designed to enforce demands of labor unions, was not a violation of railroads' duty to bargain in good faith under the statute; indeed it might well be viewed as an attempt by railroads to follow procedures of the act in an effort to reach a peaceful settlement and avoid a strike.

Considered strike insurance plan does not violate the statute.—Kennedy v. Long Island R. Co., 211 F. Supp. 478 (486-8)*.

National Mediation Board has no authority to determine whether persons employed by Alabama State Docks Department are railroad employees as defined in certain orders of Interstate Commerce Commission, or to define certain work as that of a railroad employee or subordinate official; that authority is vested exclusively in the commission. But the board has the right to ascertain initially whether persons in the employment of a carrier fall within the orders of the commission; it is not required to defer its proceedings and submit to the commission the question whether certain designated employees are or are not within the classifications covered by the Commission's orders.—United States v. Feaster, 330 F. 2d 671 (675).

And failure to allege that the commission has determined the State Docks Department to be a carrier subject to Part I of Interstate Commerce Act is not fatal to complaint seeking injunction to compel certain officials of the Docks Department to permit the board to examine its records to determine whether persons involved in labor dispute are performing work defined by the Commission as that of an employee. The complaint alleges that the Docks Department is a carrier within meaning of the act; that allegation is subject to proof like any other, and prior determination by the commission that the particular functions performed by appellees constitute them a carrier is unnecessary.—Id., pp. 675-6.

RAILROAD RETIREMENT ACT OF 1937

Sections 228a (a), (e), (j), (k), (m), 228r.—Definitions.—[Unchanged, with respect to jurisdiction of commission.]

Notes of Decisions

Volume 10—p. 8502; Volume 11—p. 9778; Volume 12—p. 10592; Volume 13-p. 11233; Volume 14—p. 11754; Volume 15—p. 12374; Volume 18—p. 14774.

RAILROAD RETIREMENT TAX ACT

26 USC § 3231, Railroad Retirement Tax Act, 1954, Internal Revenue Code. [Vol. 17, p. 13702].

RAILROAD UNEMPLOYMENT INSURANCE ACT

Sections 351, 357, 362.—[Unchanged. See vol. 10, p. 8505, vol. 15, p. 12375.]

NOTES OF DECISIONS

Volume 15—p. 12375.

2. In general.—[Vol. 15].—Railroad employees adversely affected by rail merger authorized in 259 ICC 457 who received coordination or dismissal allowance are not entitled to unemployment compensation under the statute. If such compensation is paid to employees and it is later determined that they are entitled to employee-protection benefits, the railroad is obligated to with-hold an amount equal to the amount of unemployment compensation received by each employee and to return it to the Railroad Retirement Board.—Louisville & N. R. Co. v. Cantrell, 215 F. Supp. 229 (232)*.

SHIPPING

Section 289. Shipping Act of 1916, section 832. [Unchanged. See vol. 4, p. 3399, vol. 14, p. 11756, vol. 15, p. 12376.]

Notes of Decisions

§ 289: Volume 14—p. 11756: § 832: Volume 7—p. 6201: Volume 16—p. 13017.

MERCHANT MARINE ACT

Chapter 24.—Title 46

Sections 867, 876. Investigation, port facilities, etc.; Power of Secretary and Board.—[Unchanged. See vol. 4, pp. 3400, 3402, vol. 10, p. 8509, vol. 15, p. 12376.]

Historical notes, see vol. 4, p. 3401. 10, p. 8508.

Notes of Decisions

Volume 4—pp. 3401, 3403; Volume 7—p. 6201.

Section 883. Transportation of merchandise between points in United States in other than domestic-built or rebuilt and documented vessels.—[Unchanged. See Vol. 18, p. 14775.]

Historical note. See vol. 19 p. 16085.

Notes of Decisions

Volume 4—3405; Volume 7—p. 6202; Volume 10—p. 8510; Volume 11—p. 9780.

Section 884. Charges for transportation subject to Interstate Commerce Act.—[Unchanged. See vol. 4, p. 3407, vol. 15, p. 12376.]

Historical notes, see vol. 4, pp. 3401, 3404.

Notes of Decisions

Volume 4—p. 3407.

PUERTO RICO

Chapter 4.—Title 48

Section 751. Interstate commerce and certain other laws inapplicable to Puerto Rico.—[Unchanged. See vol. 11, p. 9781.]

Title 50—WAR

Chapter 8.—Federal Explosives Act

Section 127. Transportation.—[Repealed. § 123 of the act supersedes the transportation provision, and is quoted in volume 11, at page 9763.]

GENERAL RULES OF PRACTICE

[Unchanged except Rules 4(e), 5(d)(j)(k), 8(a)(c), 9, 10, 11, 12, 13, 17, 19, 21, 34, 35, 42, 44, 45, 49, 50, 53(a), 55, 56, 70(a)(b), 73, 88, 91(d), 92, 93, 94, 101(a)(2), (e), (g), 102, 225, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250.]

NOTES OF DECISIONS

Volume 12—p. 10593; Volume 13—p. 11235; Volume 14—p. 11757; Volume 15—p. 12376; Volume 16—p. 13018; Volume 17—p. 13769; Volume 18—p. 14778; Volume 19—p. 16086.

Rule 2. Liberal construction.—While rule 1.2 provides that the Rules of Practice shall be liberally construed to secure just, speedy, and inexpensive determination of issues, application of liberality would be misplaced where nearly 10 years elapsed between filing of informal and formal complaints, during which time complainants failed to take further action following initial telegrams, or to correct deficiencies in mailed informal complaint after notification thereof by the commission, or otherwise to follow a course leading to a "speedy" or "just" determination.—Plaswood Corp. v. Alton & S.R., 321 I.C.C. 434 (439-40, 441).

See also 99 M.C.C. 797; 109 M.C.C. 830; 111 M.C.C. 347; 319 I.C.C. 393.

Rule 4. (d) *Objectionable matter.*—See 91 M.C.C. 25; 91 M.C.C. 179.

(e) *Ex parte communications prohibited; penalties provided.* Ex parte communications as defined in Appendix C to these rules are prohibited and any person violating the prohibitions set out in such Appendix is subject to the penalties as therein provided.

(28 FR 7095, July 11, 1963. New subparagraph (e) added, effective 30 days after date of publication.)

Rule 5. Definitions.—(d) The term "pleading" means a complaint, answer, reply, application, protest, motion (other than motion orally made at hearing or argument), petition, document supplementing oral hearing as described in §1.86 and all documents filed under modified procedure.

See 89 M.C.C. 471 (478).

* * * * * * *

(j) Text deleted.

(k) Redesignated as (j).

Effective 30 days after date of publication. 28 FR 9353, Aug. 24, 1963.

(k) The term "transcript" shall include either a written or electronically recorded statement of all proceefings at an oral hearing.

Effective 30 days from date of service. 32 FR 5273, March 29, 1967.

Rule 7. Register of practitioners.—See 321 I.C.C. 460.

Rule 8. Practitioners' qualifications and requirements.—The following persons shall be permitted to practice before the Commission:

(a) *Attorneys at Law.* Any person who is a member in good standing of the bar of the highest court of any state, possession, territory, commonwealth or the District of Columbia may represent others before the Commission upon filing with the Commission a written declaration so stating that he is currently qualified. The written declaration shall contain the declarant's full name, address and telephone number. A declaration may be filed with the Secretary of the Commission in the form as shown in Appendix D to this part, in which event the attorney's name will be entered in the Register of Attorneys-at-Law. Attorneys may also file declarations with the Secretary or a Hearing Officer when making an initial appearance in any proceeding and the Attorney's name will be entered in the Register of Attorneys-at-Law. Once an attorney's name is entered in the Register of Attorneys-at-Law no further declaration of qualification will be required except in those instances where an attorney's right to practice has been suspended in which event a written declaration will be required that he is now properly qualified in accordance with this subsection.

* * * * * * *

(c) *Appearances.* Petitioners who met the requirements set forth in paragraphs (a) and (b) of this section shall also file a declaration that they are authorized to represent the particular party in whose behalf they propose to act at the time of making an initial appearance in any proceeding. This requirement will be met by the practitioner entering his name as the representative of an applicant in the appropriate space on an application form; by signing any complaint, petition, protest, reply, or other pleading with a designation following the practitioner's signature that he is the attorney or other representative of a party therein named; by entering an appearance on the form provided at any hearing; or by filing a letter with the Secretary of the Commission stating that he is authorized to represent a party, whose name and address is given in a particular proceeding which shall be identified.

Caption and paragraph (a) amended, and paragraph (c) added, effective Dec. 29, 1967. 32 FR 20778, Dec. 23, 1967.

Rule 9. Non-attorneys' applications for admission to practice.—An application under oath for admission to practice shall be addressed to the Commission, Washington, D.C. 20423, and must state the name, residence address, and business address of the applicant, and the nature of his qualifications. Such application shall also state whether the applicant has ever been suspended or disbarred as an attorney, or whether his right to practice has ever been revoked by any court, commission, or administrative agency, in any jurisdiction. Such application shall be accompanied by a certificate signed by three or more practitioners as sponsors for the applicant, which certificate shall recite that applicant possesses all the requisite qualifications under this section and under Rule 8(b), and the sponsors shall incorporate in their certificate a recommendation and motion that applicant be admitted to practice under this section.

Effective Dec. 29, 1967. 32 FR 20778, Dec. 23, 1967.

Rule 10. Additional certificates by applicant's sponsors; hearing; abandonment of application.

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Caption of rule amended, effective Dec. 29, 1967. 32 FR 20778, Dec. 23, 1967.

Rule 11. Application fee.—An application filed under Rule 9 must be accompanied by a fee of $25. Payment must be made either in cash, or by check, or money order payable to

the Interstate Commerce Commission. The fee will be returned if applicant is not admitted to practice.

Effective June 17, 1968; 33 FR 7821.

Rule 12. Applicant's oath.—No applicant under Rule 9 shall be admitted to practice before the Commission until he shall have subscribed to an oath or affirmation that he will demean himself, as a practitioner before the Commission, uprightly, and according to law; and that he will support the Constitution of the United States and laws of the United States and will conform to the rules and regulations of the Commission.

Effective Dec. 29, 1967. 32 FR 20778, Dec. 23, 1967.

Rule 13. Denial of admission, censure, suspension, or disbarment of practitioners.—The Commission may, in its discretion, deny admission, censure, suspended, or disbar any person not an attorney who, it finds, does not possess the requsite qualifications to represent others, or is lacking in character, integrity or proper professional conduct. All persons whether or not admitted to practice under Rules 8 or 9, must, in their representations before the Commission conform to the code of ethics for Practitioners, which code is set forth as Appendix A to this part. If for good cause shown, the Commission shall be of the opinion that any attorney is not conforming to such standards, or that he has been otherwise quilty of conduct warranting disciplinary action the Commission may issue an order requiring such attorney to show cause why he should not be suspended or denied the right to practice before the Commission. If such attorney shall fail to show good cause why he should not be suspended or denied the right to practice, he may be censured, suspended or disbarred. Any person who has been admitted to practice may be suspended or disbarred only after he is afforded an opportunity to be heard.

Effective Dec. 29, 1967. 32 FR 20778, Dec. 23, 1967.

The commission has jurisdiction to consider charges against respondent practitioners relating, not to a proceeding before it, but to their business of auditing freight bills; and it is relatively unimportant whther they were bound literally by the practitioners' association's code of ethics. Although provision of Rule 1.13 that practitioners must conform to the code did not become effective until November 1955, it replaced similar language in Rule 71(b) of the 1942 Rules of Practice, and in respondents' actions prior to effective date of that portion of Rule 1.13 they were chargeable with knowledge of the code under former Rule 71(b).—In Re Pollack and Axelrod, 315 ICC 391 (397, 398).

Few changes have been made in the code of ethics since its adoption in 1930; its canons are not limited to conduct in actual proceedings, since some of them apply where proceedings are anticipated for foreseeable, whether or not they actual ensue, and others seek to guide practitioners' conduct in circumstances where litigation is not intended or even possible. Even if respondents need not have complied with the letter of the code, they were required at least to uphold the spirit thereof; it would be anomalous to hold that class B practitioners, though having the same privileges as attorney practitioners, have a lesser degree of responsibility. The code of ethics provides adequate guidelines which, if observed, will serve to keep all practititioners before the commission within the bounds of propriety.—Id., pp. 397-8, 400.

While the services of freight bill auditors and freight bureaus, properly conducted, are in public interest, those functions are independent of, and can be carried on apart from, the professional activities of a practitioner; ethical considerations require their separation, and it is incumbent on all practitioners to recognize the distinction between them. This is not to hold that a transportation consultant may not advise clients of rate situations that need adjusting; what is condemned is the employment of a practitioner's title to solicit business, either directly or by letterheads using the term "Registered Practitioners before the Interstate Commerce Commission," or a similar designation; all practitioners are admonished to refrain from using their status as such in furtherance of the advertising and solicitation activities of traffic bureaus.—Id., p. 400.

See also 315 I.C.C. 359, 319, I.C.C. 224 and 91 M.C.C. 827.

Rule 15. Typographical specifications generally.—Rule 1.15 was initiated for the commission's convenience in binding pleadings; and the commission is usually liberal in its application and rejects only such pleadings as cannot be bound properly. Although the requirement as to margins was not observed, considered exceptions are brief and their acceptance was reasonable.—Cooper's Exp., Inc.—Purchase—Ferguson Motor Transp., 90 M.C.C. 613 (616).

Rule 17 Attestation and Verification.—Heading of rule amended to read as above, effective June 12, 1962.

27 FR 5797, June 20, 1962.

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(b) *When no practitioner's signature.*—See 213 F. Supp. 205.

Rule 19. Pleadings part of record.—Recitals of material and relevant facts in a pleading filed prior to oral hearing in any proceeding, unless specifically denied in a counterpleading filed under these rules, shall constitute evidence and be a part of the record without special admission or incorporation therein, but if a request is seasonably made, a competent witness must be made available for cross-examination on the evidence so included in the record. Pleadings may contain specific references to or quotations from the tariffs or schedules containing the several rates, fares, charges, schedules, classifications, regulations or practices alleged to be material. A filing under §1.42, Petitions for suspension of tariffs or schedules, shall not be considered a pleadings for purposes of this rule.

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Effective upon publication in the Federal Register. 28 FR 11016, Oct. 15, 1963

See 89 M.C.C. 471 (478); 89 M.C.C. 750; 95 M.C.C. 483; 206 F. Supp. 835.

Rule 20. Amendments.—See 315 I.C.C. 152

Rule 21. Time—(a) *Computation*—See 338 I.C.C. 717.

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(b) *Modification.* Paragraph amended by deleting the third reference to "10 days" and substituting in lieu thereof the word "time."

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Effective Oct. 1, 1964, 29 FR 11500, Aug. 11, 1964.

See 317 I.C.C. 166; 92 M.C.C. 135.

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(c) *Five days additional.* Paragraph deleted, effective July 16, 1962.

27 FR 5797, June 20, 1962.

See 335 I.C.C. 142 (143)

Rule 23. Replies.—(a) *Time for filing.*—Protestants' petition that the commission take official notice of certain tariffs filed by applicants pursuant to recent grants of authority to transport mixed loads of frozen and unfrozen commodities, alleging that they provide no limit on amount of frozen commodities that may be included in a mixed shipment, merits consideration, and applicants' motion to strike the petition on ground that it constitutes a reply to a reply in violation of Rule 1.23 of Rules of Practice is overruled; issues raised on petition specifically were not treated on exceptions, and the petition therefore complies with the rules.—Wilson Bros. Truck Line Extension, 92 M.C.C. 497 (499).

Although a reply by one protestant to the exceptions of another may be somewhat unusual, motion to strike on the grounds that parties were not "adverse parties" within the provisions of Rule 1.23(a) denied; since the two groups of protestants—passenger carriers and automobile transporters—had little interest in common, one group may advance an argument in its own interest that is "adverse" to the interest of the other.—Adams, 94 M.C.C. 280 (292).

As Bureau of Inquiry and Compliance did not receive copy of exceptions until 4 days after date when replies were due, in absence of objection Rule 1.23(a) is waived and the Bureau's late-filed reply accepted for consideration.—Caton Transfer Co.—Lease—Caton, 93 M.C.C. 416.

(b) *Replies to petitions under rule 101 and exceptions.*—Inasmuch as the Bureau of Inquiry and Compliance was not served with a copy of applicant's exceptions to the examiner's recommended order until after the due date for filing a reply thereto had expired, rule 1.23(b) of the Rules of Practice is waived and the Bureau's late-tendered reply is accepted for filing.—Gibney Distributors, Inc., 95 M.C.C. 733.

See also 89 M.C.C. 663 (664); 91 M.C.C. 21 (25); 97 M.C.C. 38, 109 M.C.C. 895; 111 M.C.C. 435; 115 M.C.C. 866; 205 F. Supp. 831 (833-4).

Rule 25. Informal complaints seeking damages.—(b) *Content.*—See §16(3), n. 30, 34, or 213 F. Supp. 199 (205).
See 321 ICC 434

(d) *Copies.*—Compliance with requirement of Rule 25(d) for furnishing of copies of informal complaints for service on all defendants is mandatory. Complainants failed to comply with commission requests for written confirmation of 5 telegraphic informal complaints, accompanied by copies required by Rule 25(d). Also, a sixth informal complaint submitted in writing, with copies, named certain defendants which, as appeared from the routing, were not parties to the transportation; though correction of that defect was essential to apprise the commission of the proper defendants to be served, it was not done. Defendants were threfore unaware that those 6 informal complaints had been filed with the commission, until shipments specified therein were included in formal complaint filed nearly 10 years later, following declination of other informal complaints. In view of complainants' failure over so long a period to perfect the 6 informal complaints as requested, they are deemed to have *abandoned them.*—Plaswood Corp. v. Alton & S. R. 321 I.C.C. 434 (439-42).

(e) *Special docket proceedings.*—See 213 F. Supp. 199, or 318 I.C.C. 501; 315 I.C.C. 680.

(f) *Six months' rule.*—Rule 25 of the commission's Rules of Practice must be strictly construed in conjunction with §16(3)(b): since payment of reparation under special docket order terminated informal complaint as provided in Rule 25(e), it was unnecessary that any further action be taken, or advice given, by the commission under Rule 25(f). And since complainant's subssequent letters requesting reopening of the informal complaint did not submit any additional fact basis as required by Rule 25(f), the commission's perfunctory reopening thereof was improper.—Atlantic Coast Line R. Co. v. United States, 213 F. Supp. 199 (205)*. [But see Thomson Phosphate Co. v. Atlantic Coast Line R. Co., 282 F. Supp. 698, aff'd 434 F. 2d 180.]

Rule 1.25(f) does not conflict with §16(3)(b) and (c) of the Act, since it merely provides a means whereby the 2- and 3-year limitation periods specified in those paragraphs are tolled pending informal consideration of a complaint.—Atlantic Creosoting Co., Inc. v. Southern Ry. Co., 323 I.C.C. 533 (535); and provision of rule 1.25(f) that the parties will be "notified in writing by the commission" upon declination of an informal complaint was satisfied by letters signed by the Secretary of the commission. Complaint admits that a "writing" on the commission's letterhead and stationery was received; though the signature was subscribed "Secretary," it is unnecessary that commission communications, to be valid, be signed by a commissioner; for that purpose §18(1) provides that the commission "shall appoint a

Secretary," and an obvious duty of the Secretary thus appointed would be the signing of communications.—Id., p. 535, Note.

But complaint's letters written within 6 months of the commission's first letter of declination do not constitute a resubmission of the matter on an additional-fact basis as required by rule 1.25(f), since they contain no new or additional facts but are merely repetitive of the original submission.—Id., p. 535.

See also 315 I.C.C. 680 (681); 323 I.C.C. 509.

Rule 28. Formal complaints; allegations generally.—See 329 I.C.C. 332.

Rule 29. Formal complaints; when damages sought.—213 F. Supp. 205.

Rule 30. Formal complaints; discrimination, preference, and prejudice.—(a) *Generally.*—See 316 I.C.C. 305; 316 I.C.C. 600.

Rule 34. Service of formal and cross complaints.—The Commission will serve formal complaints. It will also serve supplemental, amended, and cross complaints and specific amendments to all complaints when it has granted leave to file such pleadings. Such service will be made personally upon a carrier or freight forwarder or upon an agent thereof designated for purposes of service, or by mail addressed to the carrier or freight forwarder or to the agent thereof at the address filed. If no agent has been designated, service may be made by posting in the office of the Secretary of the Commission, and if the defendant be a carrier subject to part II of the Act, by also posting in the office of the secretary or clerk of the motor-carrier regulatory board of the State wherein the motor carrier maintains headquarters. If the complaint involves only the lawfulness of rates, fares, charges, classifications, or practices, service in the manner indicated in the third sentence of this section may be made upon an attorney in fact of a carrier or freight forwarder who has filed a tariff or schedule in behalf of such carrier or freight forwarder, but such service will not be made upon a carrier subject to part I unless such carrier has failed to designate an agent for service in the city of Washington.

Effective 30 days after date of publication. 28 FR 9353, Aug. 24, 1963.

Rule 35. Answers and cross complaints to formal complaints.—(a) *Generally.*—An answer may simultaneously be responsive to a formal complaint and to any amendment or supplement thereof. It must be drawn so as fully and completely to advise the parties and the Commission of the nature of the defense, including, if a departure from the requirements of section 4(1) of the Act is involved, the number of the particular application or order, if any, which protects such departure; and must admit or deny specifically and in detail each material allegation of the pleading answered. An answer may embrace a detailed statement of any counter-proposal which a defendant may desire to submit. Unless the issue is such that separate answers are required, answer for all defendants may be filed on their behalf by one defendant in one document, in which event the answer must show clearly the names of all defendants joining therein, and their concurrence.

Effective 30 days after date of publication. 28 FR 9353, Aug. 24, 1963.

See 319 I.C.C. 86.

Rule 40. Protests against applications. (a) *Content.*—See 90 M.C.C. 623.

Rule 42. Petitions for suspension of tariffs or schedules.—(b) *When filed.* Protests against, and requests for suspension of, tariffs or schedules filed under the act will not be considered unless made in writing and filed with the Commission at Washington, D.C. Such protests and requests for suspension shall reach the Commission at least 12 days (except as provided in paragraph (c) of this rule) before the effective dates of the tariffs, schedules, or parts thereof to which they refer, unless the protested publications were filed on less than 30-days notice under the authority of this Commission, in which event the protests should be filed not less than 5 days before such effective dates. In an emergency, telegraphic protests will be acceptable if received within the time limits herein specified, provided

they also fully comply with paragraph (a) of this section and copies thereof are immediately telegraphed by protestants to the respondent carriers or their publishing agents. Six copies of such telegrams should immediately be mailed by the protestants to the Commission at Washington.

(c) *Motor carrier revenue proceedings.* When motor common carrier tariff bureaus file schedules of proposed general increases in rates and charges, or of a proposed rate restructuring, which proposals are subject to the special procedures prescribed in Ex Parte No. MC-82, New Procedures in Motor Carrier Rev. Proc., 339 I.C.C. 324, and set forth in 49 CFR 1104, protestants thereto shall reach the Commission at least 20 days before the published effective dates of those schedules. To assure consideration, replies to protests should reach the Commission not later than the seventh workday prior to the effective date of the protested schedules.

(d) *Copies; service.* Designation of paragraph (c) changed to (d).

(e) *Reply to protest.* Designation of paragraph (d) changed to (e).

Effective 30 days after publication in the Federal Register. 36 FR 7134, April. 15, 1971.

Rule 44. Petitions seeking institution of rulemaking proceedings.—Any person may file a petition requesting the Commission to institute a proceeding for the purpose of issuing statements, rules, or regulations of general applicability and significance designed to implement or interpret law, or to formulate general policy for future effect. No reply to such a petition may be filed. Whether a proceeding shall be instituted as requested is within the discretion of the Commission and the ruling on the petition will be final.

Effective 30 days after date of publication. 28 FR 9353, Aug. 24, 1963.

[Note: Current Rule 44. Shortened procedure, deleted by this order]

Rule 45. Modified procedure; how initiated.—(a) *Commission's initiative or by request.* Modified procedure (see §1.5(j)) will be ordered in a proceeding upon the Commission's initiative or upon its approval of a request filed by any party that the modified procedure shall be observed.

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Effective 30 days after date of publication. 28 FR 9353, Aug. 24, 1963.

Rule 46. Modified procedure; effect of order.—(b) *Default where failure to comply.* See 112 M.C.C. 314.

Rule 49. Modified procedure; content of pleadings.—(a) *Generally.* A statement filed under the modified procedure after that procedure has been directed shall state separately the facts and arguments and include the exhibits upon which the party relies. If no answer has been filed pursuant to the waiver provision of §1.46, defendant's statement must admit or deny specifically and in detail each material allegation of the complaint. In addition defendant's statement and complainant's statement in reply shall specify those statements of fact and arguments of the opposite party to which exception is taken, and include a statement of the facts and arguments in support of such exception. Complainant's statement of reply shall be confined to rebuttal of defendant's statement.

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Effective 30 days after date of publication. 28 FR 9353, Aug. 24, 1963.

See 115 M.C.C. 865, 315 I.C.C. 60; 316 I.C.C. 194; 316 I.C.C. 230; 316 I.C.C. 578; 318 I.C.C. 298; 322 I.C.C. 418; 329 I.C.C. 326; 340 I.C.C. 340.

Rule 50. Modified procedure; verification.—Heading of rule amended to read as set forth above, effective June 12, 1962, 27 FR 5797.—Protestant's and respondents' statements of fact were certified by responsible officials as true and correct "except as to matters and things, if any, stated on information and belief"; mere presence of the words

"information and belief" does not constitute noncompliance with the rule where the statement itself and tenor of the attestation indicate that the witness is attesting to the truth of the information presented, and the matter offered is such as may reasonably be expected to become known to him in his official capacity; considered statements are in substantial compliance with Rule 1.50.—Magazines, Old Saybrook, Conn., to New Eng., N.Y. & N.J., 315 I.C.C. 281 (282).

Complainants' statements of fact and argument do not lack proper verification as required by rule 1.50 because the verifications refer to the "complaint" rather than the preceding statement; verifications attached to the statements are in same form as those accompanying the complaints, and intention clearly was to verify the statements preceding the certifications. Mere technicalities should not be permitted to abort the administrative process. Moreover, each complaint is supported by an additional verified statement by an appropriate official of the individual complainant, wherein reference is made to all shipments inditified in the complaints, the witnesses having stated under oath that all freight charges thereon were paid or borne by the complainants.—Steel, Inc. v. Chicago, B. & Q.R. Co., 323 I.C.C. 509 (510).

See also 109 M.C.C. 578; 112 M.C.C. 118; 115 M.C.C. 406; 315 I.C.C. 152; 315 I.C.C. 689; 315 I.C.C. 744; 315 I.C.C. 182; 315 I.C.C. 519, 315 I.C.C. 695; 316 I.C.C. 194; 316 I.C.C. 243; 316 I.C.C. 626; 323 I.C.C. 525; 325 I.C.C. 200; 329 I.C.C. 326; 338 I.C.C. 283; 789.

Rule 51. Modified procedure; when pleadings filed and served.—See 95 M.C.C. 627; 115 M.C.C. 866; 315 I.C.C. 60.

Rule 53. Modified procedure; hearings.—(a) *Request for cross examination or other hearing.* If cross examination of any witness is desired the name of the witness and the subject matter of the desired cross examination shall, together with any other request for oral hearing, including the basis therefor, be stated at the end of defendant's statement or complainant's statement in reply as the case may be. Unless material facts are in dispute, oral hearing will not be held for the sole purpose of cross examination.

* * * * * * *

28 FR 8211, Aug. 9, 1963. Effective on date of order.

Rule 1.53 requires that a request for oral hearing or cross-examination of any witness, along with basis therefor, be stated at end of the statement of facts and argument. Defendants' statements in many instances amounted to no more than a mere objection to receipt of complainants' evidence and a request for oral hearing; thus there was actually no statement placing the material facts in issue. Defendants' failure to file a complete statement of facts and argument places them in position of failing to show that they are not fully protected under modified procedure; but parties to a proceeding have a right to oral hearing and cross-examination only when it is shown that they are not fully protected or that their case cannot be presented under modified procedure.—Steel, Inc. v. Chicago, B. & Q. R. Co., 323 I.C.C. 509 (516).

See also 111 M.C.C. 757; 800; 315 I.C.C. 184; 316 I.C.C. 788; 322 I.C.C. 418.

(b) Hearing issues limited. See 91 MCC 93.

Rule 54. Modified procedure; subsequent procedure.—See 112 M.C.C. 767.

Rule 55. Notice of hearing.—*(a) Assignment; service and posting of notice; electronically recorded transcript.* In those proceedings in which a hearing is to be held, the Commission will, by order or otherwise, assign a time and place for hearing. Such action will include notice when the transcript is to be made by electronic recording. Notice of such hearing will be posted in the Office of the Secretary of the Commission and will be served upon the parties and such other persons as may be entitled to receive notice under the act.

(b) Reqeusts for changes in assignment. Requests for postponements of date of hearing will be granted only for good and sufficient cause. After notice of the use of electronic recording, any request for stenographic transcript by the Commission's official reporter in lieu thereof must be made in writing to the Secretary of the Commission not less than 20 days prior to the date of the hearing. Such request will contain a statement that the requestor will provide the Commission with the original and one copy of such stenographic transcript at his own expense in accordance with the schedule of charges in the official reporting contract. In the event a request is made for a written transcript of an electronic recorded proceeding at a later date, the requestor will furnish at no expense to the Commission, an original and one copy of such written transcript for the Commission's use, in accordance with the schedule of charges in the official reporting contract.

(c) Service of notice of assignment change. The Commission may confine the service of notice of a change of time or place assigned for hearing (other than by publication or posting), or of any adjourned, further, or supplemental hearing to those only who have indicated to the Commission a desire to be notified, at their own expense if telegraphic advice becomes necessary, of any such change.

Effective 30 days from date of service. 32 FR 5273, March 29, 1967.

See 111 M.C.C. 420; 317 I.C.C. 623; 230 F. Supp. 700.

Rule 56. Subpenas— * * * *(e) Witness fees.* A witness who is summoned and responds thereto is entitled to the same fee as is paid for like service in the courts of the United States. Such fee is to be paid by the party at whose instance the testimony is taken at the time the subpena is served, except that when the subpena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered at the time of service.

Effective June 12, 1962, 27 FR 5797, June 20, 1962.

See 216 F. Supp. 561; 230 F. Supp. 700.

Rule 57. Depositions; preliminary.—See 216 F. Supp. 561; 230 F. Supp. 700.

Rule 68. Prehearing conferences.—*(a) Purposes.* * * *

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(7) Such other matters, including disposition of requests for discovery, as may aid in the simplification of the evidence and disposition of the proceeding.

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Effective Oct. 23, 1967; 32 FR 14696, Oct. 24, 1967.

(a) See 316 I.C.C. (362).

Rule 69. Stipulations.—See 79 M.C.C. 731; 85 M.C.C. 443; 94 M.C.C. 96.

Rule 70. Authority of officers.—*(a)* * * *. The officer shall regulate the procedure in the hearing before him and take all measures necessary or proper for the efficient performance of the duties assigned him, including the disposition of requests for discovery.

Effective Oct. 23, 1967; 32 FR 14696, Oct. 24, 1967.

(b) At any oral hearing conducted before the Commission, or before an Administrative Law Judge of the Commission, at which an official record of the proceeding is made, the recording of the hearing by means of live or delayed television, radio, or the use of a tape recorder or other electronic or photographic equipment by any person other than the official reporter will not be permitted without special permission of the Chairman of the Commission.

Effective April 20, 1973 38 FR 7563, March 23, 1973.

Irrespective of its merits, motion to dismiss complaint for failure of complainants to conform to pleading specifications set forth in rules 1.28 and 1.30 cannot be ruled on by

the examiner because it is beyond his power under rule 1.70—Natl. Motor Freight Traffic Assn. v. Delaware Valley, 323 I.C.C. 560 (570)*.

See 111 M.C.C. 757; 315 I.C.C. 292; 319 I.C.C. 605.

71. Appearances, standard of conduct; absence from hearing.—*(a) Who may appear.*—Although under rule 1.71(a) a bona fide officer or full-time employee of a corporation may appear for the corporation only by permission of the officer presiding at hearing, practitioner who was applicant's counsel sent applicant's president to represent it at hearing, but did not attend himself, and in subsequent court proceeding to set aside the commission's orders admitted that he had deliberately taken this course "as a matter of strategy" because shipper witnesses supporting application were unavailable. The practitioner should have been present at hearing so that he could take exception to any ruling of the examiner which he considered prejudicial to his client's interests and thus provide a basis for court review of the ruling in the manner provided by statute; his conduct thus violated the code of ethics for practitioners.—In re Bernard, 323 I.C.C. 649 (652, 654).

See also 91 M.C.C. 827; 111 M.C.C. 421; 315 I.C.C. 551.

(c) Standard of conduct.—Applicant asserts that witnesses appearing without a practitioner or a prepared written statement are not precluded from engaging in practices forbidden by the code of ethics for practitioners. However, Rules 1.71(c) and 1.13 of Rules of Practice clearly apply, and all parties, whether practitioners or not, are bound to conduct themselves in the manner so specified.—Blythe Extension, 91 M.C.C. 827 (830, 832).

See also 91 M.C.C. 827.

Rule 72. Intervention; petitions.—*(a) Content generally.*—See 109 M.C.C. 7; 114 M.C.C. 228, 836; 338 I.C.C. 797.

(b) When filed.—See 338 I.C.C. 797.

(c) Broadening issues; filing.—See 318 I.C.C. 529; 226 F. Supp. 635.

(e) Disposition.—See 97 M.C.C. 105.

Rule 73. Participation without intervention.—In an investigation proceeding, [in a proceeding under paragraphs (18) to (20) inclusive of Section 1, or Sections 5 and 13a of part I, in application proceedings under parts II, III, and IV], and in a proceeding of any one of the characters herein enumerated when heard on a consolidated record with a complaint proceeding, but in no other proceeding, an appearance may be entered at the hearing without filing a petition in intervention or other pleading, if no affirmative relief is sought, if there is full disclosure of the identity of the person or persons in whose behalf the appearance is to be entered, if the interest of such person in the proceeding and the position intended to be taken are stated fairly, and if the contentions will be reasonably pertinent to the issues already presented and any right to broaden them unduly is disclaimed. A person in whose behalf an appearance is entered in this manner becomes a party to the proceeding.

Effective June 12, 1962, 27 FR 5797, June 20, 1962.

See 93 M.C.C. 11; 94 M.C.C. 514; 319 I.C.C. 230; 321 I.C.C. 460; 226 F. Supp. 635.

Rule 74. Witness examination; order of procedure.—Applicant's interpretation of provision of Rule 74 that witnesses be "orally examined under oath" as meaning interrogation in specific question and answer form, and that if witness is allowed to testify orally in narrative form there is in fact no "examination" within meaning of the term, rejected; past usage and a reasonable construction of the Rules of Practice militate against such a narrow interpretation. "Examined" is used in its generic sense to include both the offering of testimony and the cross-examination thereon, and has been consistently so used and interpreted by the commission for three quarters of a century; to interpret it

otherwise would seemingly preclude the right of cross-examination (which is inherent in proceedings on operating applications), since no such right is expressly provided for in this or other applicable rules.—Blythe Extension, 91 M.C.C. 827 (829, 830).

Though Rule 74 of Rules of Practice provides that respondents may be required to open and close in presentation of evidence at a formal hearing in an investigation when consolidated with other proceedings, notwithstanding that they may not have the burden of proof, such procedural obligation to go forward initially with the production of evidence under that rule is not to be construed as creating a burden of proof where none exists.—Terminal Charge on Order Bills of Lading Shipments, 319 I.C.C. 772 (773)*.

See also 316 I.C.C. 525; 319 I.C.C. 123.

Rule 75. Evidence; admissibility generally.—See 89 M.C.C. 753; 99 M.C.C. 797; 111 M.C.C. 347; 112 M.C.C. 68.

Rule 76. Evidence; cumulative restriction.—See 89 M.C.C. 720; 94 M.C.C. 153; 95 M.C.C. 457.

Rule 77. Evidence; prepared statements.—See 91 M.C.C. 827.

Rule 78. Evidence; official records.—See 89 M.C.C. 196.

Rule 79. Evidence; entries in regular course of business.—See 89 M.C.C. 241; 90 M.C.C. 629; 93 M.C.C. 498; 104 M.C.C. 143; 329 I.C.C. 326.

Rule 80. Evidence; documents containing matter not material.—See 114 M.C.C. 541.

Rule 81. Evidence; documents in Commission's files.—*(a) In general.*—See 319 I.C.C. 107.

Rule 82. Evidence; records in other Commission proceedings.—See 89 M.C.C. 196; 92 M.C.C. 566; 95 M.C.C. 576; 99 M.C.C. 797; 111 M.C.C. 347; 114 M.C.C. 462; 319 I.C.C. 123; 323 I.C.C. 709; 325 I.C.C. 168; 205 F. Supp. 833, 834.

Rule 83. Evidence; abstracts of documents.—See 89 M.C.C. 153; 316 I.C.C. 478.

Rule 84. Evidence; exhibits.—*(b) Reference to tariff authority, routes, and distances.*—See 330 I.C.C. 260.

Rule 86. Evidence; filing of subsequent to hearing; copies.—See 92 M.C.C. 566; 97 M.C.C. 38; 104 M.C.C. 141; 109 M.C.C. 787; 111 M.C.C. 320; 112 M.C.C. 127; 117 M.C.C. 686; 316 I.C.C. 272; 318 I.C.C. 429; 323 I.C.C. 525, 672; 209 F. Supp. 233-4.

Rule 87. Evidence; objections to—See 91 M.C.C. 827; 93 M.C.C. 11; 318 I.C.C. 646; 323 I.C.C. 258; 340 I.C.C. 219.

Rule 88. Oral argument before officer.—If oral argument before the officer is desired, he should be so notified at or before the hearing and may arrange to hear the argument at the close of the testimony within such limits of times as he may determine, having regard to other assignments for hearing before him. Such argument will be recorded and made a part of the transcript of testimony, and will be available to the Commission for consideration in deciding the case. The making of such argument shall not preclude oral argument before the Commission and request therefor may be made as provided in Rule 98.

Effective 30 days from date of service. 32 FR 5273, March 29, 1967.

Rule 91. Briefs: content and arrangement.—* * * *(d) Evidence abstract.* A brief filed after a hearing should contain an abstract of the evidence relied upon by the party filing it, preferably assembled by subjects, with reference to the pages of the record, if written, or exhibit where the evidence appears. The abstract should follow the statement of the case and precede the argument. In the event the party elects not to include a separate abstract in his brief, he should give specific reference to the portions of the record, whether transcript or otherwise, relied upon in support of the respective statements of fact made throughout the brief.

* * * * * * *

Effective 30 days from date of service. 32 FR 5273, March 29, 1967.

(d) Evidence abstract.—See 90 M.C.C. 607.

(e) Requested findings.—See 94 M.C.C. 625.

Rule 92. Briefs; when officer's report is served.—In a proceeding which has been the subject of oral hearing, and in which an officer's report is to be prepared and served, which fact will be stated by the officer on the record, only one brief shall be filed by each party. The officer shall fix for all parties the same time within which to file briefs, which time shall not exceed 45 days from the close of the hearing unless otherwise ordered by the Commission. Reply briefs are not permitted unless ordered by the Commission.

Effective June 1, 1965. 30 FR 6485, May 11, 1965.

Rule 93. Briefs; when officer's report is not served.—In a proceeding which has been the subject of oral hearing, and in which no officer's report is to be prepared and served, which fact will be stated by the officer on the record, only one brief shall be filed by each party. The officer shall fix for all parties the same time within which to file briefs, which time shall not exceed 45 days from the close of the hearing unless otherwise ordered by the Commission. Reply briefs are not permitted unless ordered by the Commission.

Effective June 1, 1965. 30 FR 6485, May 11, 1965.

Rule 94. Briefs of interveners.—Briefs of interveners shall be filed and served within the time fixed for the brief of the party in whose behalf the intervention is made.

Effective June 1, 1965. 30 FR 6485, May 11, 1965.

Rule 96. Exceptions to officer's report.—*(a) Generally.*—Where exception raised essentially one ground for exception, that examiner erred in recommending approval of purchase application after finding that vendee is presently unfit, and did not allege errors in his findings of fact, there was no need for separate statements or numbering.—Cooper's Exp., Inc.—Purchase—Ferguson Motor Transp., 90 M.C.C. 613 (616).

Exceptions by protestants to examiner's findings were stricken for failure to comply with rule 96 of the Commission's General Rules of Practice which requires that such exceptions be specific and be stated and numbered separately.—Howard's Exp., Inc.—Purchase—Exchange Trucking Corp., 97 M.C.C. 341 (344).

See also 87 M.C.C. 740; 89 M.C.C. 37, 38, 213, 761; 91 M.C.C. 179; 94 M.C.C. 402, 625, 96 M.C.C. 285, 357; 112 M.C.C. 127, 139, 626; 114 M.C.C. 462; 317 I.C.C. 645; 323 I.C.C. 740.

(b) When filed.—87 M.C.C. 740; 95 M.C.C. 338; 114 M.C.C. 816; 316 I.C.C. 237, 444; 244 F. Supp. 881, note.

Rule 98. Oral argument before Commission.—See 112 M.C.C. 298; 208 F. Supp. 661.

Rule 99. Compliance with Commission's orders.—See 91 M.C.C. 513; 94 M.C.C. 15; 98 M.C.C. 166; 113 M.C.C. 103; 114 M.C.C. 316; 115 M.C.C. 104, 809, 831, 845; 117 M.C.C. 905.

Rule 100. Statements of claimed damages based on Commission findings.—See 318 I.C.C. 35.

Rule 101. Petitions for rehearing, reargument, or reconsideration.—*(a) In general.*—Analysis of paragraphs (1)-(9) of §17, construed in pari materia, is convincing that the commission did not exceed its statutory authority in adopting the amendment of February 1, 1961, which added paragraphs (2) and (3) to Rule 101(a).—Malone Freight Lines, Inc. v. United States, 204 F. Supp. 745 (748-50)*.

Amendment to §1.101 of Rules of Practice, precluding reconsideration of a proceeding wherein hearing officer's report is affirmed by division and the matter is not determined to involve an issue of general transportation importance, by its terms is inapplicable to any proceeding in which exceptions to the officer's report were filed prior to effective date thereof; thus, objection to petitions for reconsideration filed after effective date of such amendment is not well taken when exceptions were filed several months prior thereto.—Eldon Miller, Inc., Extension—Memphis, Tenn., to Three States, 88 M.C.C. 309 (311), note*.

See also 109 M.C.C. 244.

(2) Administrative finality of division and employee board decision. * * *. Decisions of an employee board, whether original or on review, are not administratively final. Such employee board decisions shall be subject to review by an appropriate appellate division of the Commission upon the filing of a timely petition in accordance with these rules of practice.

* * * * * * *

Heading amended and sentence added at end of paragraph, effective Sept. 5, 1967.
32 FR 12757, Sept. 6, 1967.

Applicant's motion to divide the issues of value and price of stock from that of consistency of the merger is granted and the latter issue may be considered administratively final upon affirmance of the examiner's findings in view of the examiner's recommended approval which none of the exceptions vitiates. Additionally, the possible range of prices payable to minority stockholders does not seem to threaten surviving carrier's financial and operating abilities.—Yellow Transit, Inc.—Merger—Wilson, Inc., 104 M.C.C. 737 (755).

See also 91 M.C.C. 312, 313; 109 M.C.C. 16, 173; 112 M.C.C. 567; 316 I.C.C. 732; 220 F. Supp. 337; 221 F. Supp. 106; 244 F. Supp. 642.

(3) Limitations on petitions for review of division decisions.—In prior report, 107 M.C.C. 201, commission reversed decision of the examiner and denied the application. Protestant seeks to have the order granting reconsideration vacated contending that applicants' petition for reconsideration, pursuant to rule 101(a)(3), should be referred to division 1, "as constituted", when the prior decision was rendered or be referred to the entire commission for disposition; but nothing in such rule requires that a petition for reconsideration go to a division. Had the commission intended otherwise, there is no reason that the words "as constituted" could not have been added to the words "same division" in the rule. Commission is an institutional agency and the appeal must be to the institution, not to the predilection of individual members. Petition denied as no issues of general transportation importance are contained requiring reconsideration of the entire commission.—Dallas & Mavis Forwarding Co., Inc., Ext. Canadian Ports of Entry, 108 M.C.C. 295 (296-7)*.

Since petitions for reconsideration allege that railroad subsidiary applicant is participating in movement of traffic in an all-motor service in violation of the rail-auxiliary restriction in its certificate, the proceeding involves the question of need for modification of a condition similar to that contained in a number of other certificates; therefore, pursuant to rule 101(a)(3), the proceeding was designated as one involving an issue of general transportation importance by order of the commission.—Santa Fe Trail Transp. Co. Extension, 108 M.C.C. 16 (17)*.

See also 225 F. Supp. 973; 228 F. Supp. 793.

(4) Petitions seeking a finding that an issue of general transportation importance is involved; 3-page limitation; time for filing; no reply permitted.—As set forth in published notice of Interpretation of Three-Page Limitation (34 FR 9006, June 5, 1969), the 3-page limitation on General Transportation importance petitions shall be construed as meaning three pages of substantive pleading exclusive of a title page or a certificate of service page.

Plaintiff's request for reconsideration of decision of the Operating Rights Review Board having been denied by an appellate division of the commission, it had no right to petition the commission to make a finding that an issue of general transportation importance was involved. There is no statutory basis for the filing of such a petition; such authority as exists is in Rule 101(a)(4) of the Rules of Practice which authorizes filing of such a petition only if the proceeding involves taking of evidence at oral hearing or by modified procedure. In

proceeding under review no oral evidence was taken and modified procedure was not followed.—Transamerican Freight Lines, Inc. v. United States, 258 F. Supp. 910 (913)*.

Also, the rule seemingly recognizes that reconsideration by the commission of an appellate division decision is not authorized by §17, for it expressly states that a petition for a finding that an issue of general transportation importance is involved shall not be considered an application for reconsideration; nevertheless, by stating that the commission may make such a finding "on its own motion," it would make statutory finality of an appellate division decision subject to a condition subsequent—commission review and the consequent possibility of reversal or modification. Under the rule, once the commission determines that an issue of general transportation importance is involved and decides to review the decision, all semblance of finality is lost, and the purpose of the statute is defeated. Therefore, being inconsistent with the statute, the rule can be given no effect.—Id., pp. 918-9.

See also 91 M.C.C. 214.

(b) Rehearing or further hearing.—Greyhound's bare assertions of changed economic conditions which, in its view, precludes consummation of considered purchase and control transactions along the lines proposed by applicants and which supports its request for further hearing (to adduce evidence showing changed economic conditions) falls far short of satisfying rule 1.101 of the Rules of Practice which requires such a request to be supported by a brief statement of the noncumulative evidence sought to be adduced, and an explanation of why such evidence was not previously adduced. Therefore, the request, treated as a motion for further hearing, is denied.—Greyhound Corp.—Control—Tex., N. Mex. & Okla. Coaches, 104 M.C.C. 652 (654, 656)*.

See also 94 M.C.C. 153; 97 M.C.C. 38; 322 I.C.C. 103; 323 I.C.C. 601; 221 F. Supp. 106; 224 F. Supp. 894; 295 F. Supp. 112.

(e) Time for filing. Except for good cause shown, and upon leave granted, petitions under this section must be filed within 30 days after the date of service of a decision or order, except as otherwise provided in the Special Rules of Practice.

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Effective Sept. 5, 1967. 32 FR 12752, Sept. 6, 1967.

See 89 M.C.C. 567; 92 M.C.C. 642; 212 F. Supp. 659; 232 F. Supp. 330; 236 F. Supp. 354; 241 F. Supp. 535; 283 F. Supp. 866.

(f) Successive petitions on same grounds, not entertained. See 102 M.C.C. 178.

(g) Petitions for reconsideration of appellate division decisions on review of board decisions. When an appellate division has denied a petition seeking a reversal, change or modification of a determination whether original or on review by a board of employees, any further petition for reconsideration by the same party or parties upon substantially the same grounds will not be entertained. * * *

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First sentence of Rule 101(g) amended, effective Sept. 5, 1967. 32 FR 12752, Sept. 6, 1967.

Plaintiff's argument that the language in Rule 101(g) of the commission's Rules of Practice should be interpreted as barring an Appellate Division from reconsidering its orders must be rejected; that regulation merely means that the Appellate Division is not compelled to entertain the pettion.—Resort Bus Lines, Inc. v. I.C.C. 264 F. Supp. 742 (754, Note)*.

Rule 102. Petitions not otherwise covered.—When the subject matter of any desired relief is not specifically covered by the rules in this part, a petition seeking such relief, which relief shall be construed as including appropriate discovery procedures, and stating the reasons therefor may be served and filed.

Effective Nov. 1, 1963. 28 FR 10518, Oct. 1, 1963.

When employee union sought clarification of prior commission order (as to scope of employee-protective conditions imposed in the *Richmond Terminal* proceedings which it contended extended to certain railroad junior employees) under Rule 102 of the commission's Rules of Practice, fact that its petition was not filed for over three years after date of the order did not warrant denial of the relief sought for failure to comply with the Rules of Practice, particularly Rule 101, as plaintiff contends. Rule 102 permits petitions seeking relief, other than that specifically covered under other commission rules, without imposing a time limit; thus, 30-day limitation in Rule 101(e) on petitions for rehearing does not apply. However, even considering proceeding and order under attack to be a "rehearing," such petitions are addressed to the agency's discretion and, apart from Rules 101 and 102, there is adequate statutory authority for the commission's action and the result it reached was proper. Complaint dismissed.—Seaboard Coast Line R. Co. v. United States, 283 F. Supp. 866 (868-9)*.

Inasmuch as the District Court for the Eastern District of Virginia issued a temporary restraining order staying the commission's cease and desist order against applicant pending further action of the commission on applicant's petition for extraordinary relief and reconsideration, the tendered petition is hereby accepted for filing pursuant to § 102 of the Rules of Practice.—Jetco, Inc.—Investigation and Revocation of certificate 108 M.C.C. 498*.

See also 109 M.C.C. 141; 112 M.C.C. 8; 117 M.C.C. 77, 319 I.C.C. 725; 232 F. Supp. 339.

SPECIAL RULES OF PRACTICE

Rule 200. Special rules of practice governing procedure in certain suspension and fourth-section matters.—Since no unusual circumstances were set forth in plaintiff's petition for reconsideration of decision of the Board of Suspension not to suspend proposed reduced rates (which plaintiff had protested as unreasonable), the commission on appeal was confined, under its rules, to the record before the Board of Suepension. Therefore, allegation that proposed rates were illegal in that they were filed in violation of defendant rate bureau's §5a agreement, first made in the petition for reconsideration, was not before Division 2, acting as an appellate division, when it considered that petition and thereafter decided not to suspend the rates.—Movers' and Warehousemen's Ass'n v. United States, 227 F. Supp. 249 (250).

See 246 F. Supp. 335.

Rule 225. Special rules of practice governing the procedure of the Motor Carrier Board,[1] the Finance Board,[1] the Operations Boards,[1] the Special Permission Board,[1] the Released Rates Board,[1] Tariff Rules Board,[1] and the Operating Rights Board[1]—(a) The proceedings of the Motor Carrier Board, the Finance Board, the Operations Boards, the Special Permission Board, the Released Rates Board, Tariff Rules, Board and the Operating Rights Board shall be informal. No transcript of such proceedings will be made. Subpoenas will not be issued and, except when applications, petitions, or statements are required to be attested, oaths will not be administered.

(b) A petition for reconsideration of an order of one of the following boards may be filed by any interested person:

[1]The General Rules of Practice apply to the procedure of all employee boards except to the extent specifically provided for in Rules 200 and 225.

(1) The Motor Carrier Board, an Operations Board, the Special Permission Board, the Released Rates Board, or the Tariff Rules Board; or

(2) The Operating Rights Board only with respect to matters arising pursuant to the Commission's Deviation Rules as set out in part 1042 of this chapter.

(c) A petition for reconsideration of the Operating Rights Board, except as provided in paragraph (b) of this section, and the Finance Board may only be filed by a party to the proceeding.

(d) A petition for reconsideration pursuant to paragraphs (b) and (c) of this section and reply thereto will be governed by the Commission's general rules of practice, except as provided in paragraphs (e), (f), and (g) of this section.

(e) The original and six copies of every pleading, document, or paper permitted or required to be filed under this section, shall be furnished for the use of the Commission.

(f) A petition seeking reconsideration of an order of the Motor Carrier Board entered under section 210a (a) or 311 (a) or of the Finance Board entered under section 210a (b) or 311 (b) of the Interstate Commerce Act must be filed within 20 days after the date of service of the order. Within 20 days after the filing of such petition with the Commission any interested person may file and serve a reply thereto.

(g) A petition seeking reconsideration of an affirmative order of the Motor Carrier Board entered pursuant to the rules and regulations governing transfers of property brokers' licenses, Part 1045 of this chapter, passenger brokers' licenses, Part 1133 of this Chapter, motor carrier operating rights, Part 1132 of this chapter, water carrier operating rights, Part 1141 of this chapter, and freight forwarder permits, Part 1151 of this chapter, must be filed within 20 days following publication of a synopsis of such order in the *FEDERAL REGISTER*. In such a petition the matters claimed to have been erroneously decided and the alleged errors must be specified with particularity. If the petition contains a request for oral hearing, the request shall be supported by an explanation as to why the evidence sought to be presented cannot reasonably be submitted in adfidavit form. Within 20 days after the final date for filing of such petitions with the Commission, any interested person may file and serve a reply thereto.

Effective upon publication in the Federal Register: 32 FR 20654, Dec. 21, 1967.

Note: The heading, and paragraphs (a), (b)(1), (f), and (g) were amended by inserting "Motor Carrier Board" in lieu of "Temporary Authorities Board" and "Transfer Board." Effective Jan. 21, 1969 34 FR 441, Jan. 11, 1969.

The heading, paragraph (a), and paragraph (b)(1) were amended by adding thereto "Tariff Rules Board." Effective July 1, 1970. 35 FR 10448, June 26, 1970.

See 109 M.C.C. 733. 312 I.C.C. 799, Note 2.

Rule 240(c)(1). Protests and requests for hearing under section 5(2).—Rule 1.240(c)(1) describes two classes of protestants: those who file a protest and those who appear at a hearing, and it is part of the scheme of certain proceedings before the commission, including §5(2) applications, that protesting carriers can appear without filing a petition for leave to intervene. Plaintiffs' position that Rule 240(c) should not be construed so as to confront an applicant with unexpected protestants, and that a person may appear to protest only an application for temporary authority without filing a protest, cannot be accepted in face of the clear language that failure to file seasonable protest is a waiver of oppotition "unless an oral hearing is held." Rules complained of were adopted by the commission under procedures of the Administrative Procedure Act and were apparently applied to plaintiffs in same manner as to others; plaintiffs have not shown how they were thereby deprived of property without the process due them.—Hart v. I.C.C., 226 F. Supp. 635 (644-5)*.

See also 90 M.C.C. 531, 623.

Rule 240. Special rules governing notice of filing of applications by motor carriers of property or passengers under sections 5(2) and 210a(b) of the Interstate Commerce Act and

certain other procedural matters with respect thereto.—*(a) Scope of special rules.* These special rules govern the filing and handling of (1) applications under section 5(2) of the Interstate Commerce Act respecting control, lease, and unification of operating rights and properties of motor carriers of property or passengers, and (2) applications for approval under section 210a(b) of the act of the temporary operation of motor carrier properties sought to be acquired in an application under section 5(2) of the act. Except as otherwise herein provided, the General Rules of Practice shall apply.

(b) Notice to interested persons. (1) Notice of the filing of applications under section 5(2) will be given by the publication of a summary of the authority sought in FEDERAL REGISTER. Such summaries will be prepared by the Commission, and it shall be the responsibility of applicants proptly to advise the Commission if the summary does not properly describe the authority sought.

(2) If applicants propose that any portion of the operating rights involved in the transaction be canceled or restricted, such proposal will be included in the summary.

(3) The summary will state whether an application has or has not been filed for temporary authority under section 210a(b) of the act.

(4) No notice by applicants to interested persons is required, except that applicants are not relieved from the obligation to file copies of applications with Governors, State Boards, and Regional Directors of the Commission's Bureu of Operations as may be required by the prescribed form of application, and except as hereinafter provided in paragraph (d)(3) of this section.

(5) Except for good cause shown, amendments to applications which broaden the scope of the proposed transaction will not be allowed if tendered after notice of the filing of an application has been published in the FEDERAL REGISTER. Restrictive amendments may be submitted at any time, but if tendered after such publication, they may be allowed only in the discretion of the Commission, or by the hearing officer if the matter is assigned for hearing or prehearing conference.

(c) *Protests and requests for hearing under section 5(2).* (1) Protests to the granting of an application under section 5(2) of the act shall be filed with the Commission within 30 days after the date notice of the filing of the application is published in the FEDERAL REGISTER. A protest filed under these rules shall be served upon applicants' representatives named in the notice of filing published in the FEDERAL REGISTER. Unless otherwise specified in the notice, the original and one copy of the protest shall be filed with the Commission. Protests not in reasonable compliance with the requirements of these rules may be rejected in the discretion of the Commission.

(2) Failure seasonably to file a protest will be construed as a waiver of opposition and participation in the proceeding.

(3) A protest against an application shall set forth specifically the grounds upon which it is made and the protestant's interest in the proceeding, shall request an oral hearing if one is desired, and shall specify with particularity the facts, matters, and things relied upon, but shall not include issues or allegations phrased generally.

(4) Any request for an oral hearing shall be supported by a specific explanation as to why the evidence to be presented cannot reasonably be submitted in the form of affidavits, and shall set forth the approximate number of witnesses who would be presented by the protestant, an estimate of the hearing time required for such presentation, and whether a hearing at Washington, D.C., would be objectionable, and, if so, what place would be more suitable; and protestant shall certify in its protest that, if an oral hearing is held, it will appear and present evidence.

(5) Where a person has a limited interest in an application, which possibly could be eliminated by a restrictive amendment of the proposed transaction, such person may also include in a protest filed in conformity with this paragraph an offer to withdraw the protest in the event of acceptance by applicants of such amendment.

(6) Except as provided in paragraph (5) above, or for good cause shown, the failure of any person filing a protest to an application to appear at a hearing scheduled thereon shall be construed as a waiver of his right to participate further in the proceeding; such person shall no longer be considered as a party to the proceeding, and such person and any representative responsible for his participation in the proceeding may be subject to censure for failure to appear.

(7) Any interested person, not a protestant, desiring to receive notice of the time and place of any hearing, conference, or other proceedings shall notify the Commission by telegram or letter within 30 days from the date of the publication of the notice of the filing of the application in the FEDERAL REGISTER.

(d) *Procedure to be followed under section 210a(b).* (1) Subject to paragraph (4) below, protests to the granting of an application for temporary authority under section 210a(b) may be filed by persons who oppose, or intend seasonably to oppose, the application under section 5(2).

(2) The protest to temporary approval may be by telegram, letter, or other writing, of which only an original need be filed, or may be included in a protest filed under paragraph (c). It should state the interest of the protestant and the grounds for the position taken in opposition to temporary approval, and should show service upon applicants' representatives.

(3) If an application for temporary authority is filed in a contested proceeding after the period for filing protests under paragraph (c) has expired, applicants are required to furnish copies of such application to protestants. Notice will not thereafter be given by publication in the FEDERAL REGISTER.

(4) Applications for temporary authority under section 210a(b) will be disposed of without hearings or other proceedings, and without necessarily awaiting expiration of the period allowed for protests.

(5) Unless circumstances requiring immediate action are shown, applications for temporary authority under section 210a(b) will not be disposed of before 10 days after the date the notice of filing of the application under section 5(2) is published in the FEDERAL REGISTER, or 10 days after the date an amended notice is published, if the application for temporary authority is filed within 30 days after the date of initial publication; or, if the application for temporary authority in is filed after expiration of the 30 days from the date of initial publication of notice of the section-5 application, and protests have been filed, copies of the temporary authority application should be served on protestants, and action will not be taken in less than 20 days from the date of such service, unless circumstances require immediate action.

(e) *Hearing or other procedures under section 5(2).* (1) The Commission will determine whether an assignment for oral hearing should be made, after notice to interested persons of the filing of the application has been published in the FEDERAL REGISTER and the period for filing protests has expired. At or prior to such time, applicants who do not intend to prosecute their application should promptly request dismissal thereof.

(2) Applicants who believe their application is not susceptible of handling without oral hearing may request oral hearing when the application is filed, or later, if additional evidence which cannot reasonably be submitted in the form of affidavits is required.

(3) If applicants request an oral hearing and show that such hearing is necessary, or if the proceeding is contested, applicants shall advise the approximate number of witnesses who will be presented, furnish an estimate of the hearing time required for such presentation, and state whether a hearing at Washinoon, D.C., would be objectionable, and, if so, what place would be more suitable.

(f) *Notice of hearing, conference or other proceedings.* (1) Notice of the time and place of any hearing, conference, or other proceedings will be given to applicants' representatives, applicants, protestants, and other interested parties by mailing to them the order or notice assigning the application for hearing, conference, or other procedure.

(2) A request by any party for a change in the time or place of an assigned hearing must set forth good and sufficient cause for the action requested, must be in writing and filed with the Commission not less than 10 days before the assigned hearing date, except in emergency circumstances, and must be served on all known parties of record at the same time and by the same method of communication as service is made on the Commission. Where such requests are filed less than 10 days before the date of hearing, the petitioning party shall state the reasons for this failure to make such request within the prescribed time.

(3) The applicants' representatives, protestants, and those who request notice of changes in time or place of hearing, conference, or other proceeding will be informed of such changes if notice is given by mail. If telegraphic notice becomes necessary, notice of such changes will be given by telegram only to those who request telegraphic notice at their expense.

(4) Upon receipt of an order or notice of a hearing assignment, applicants who no longer intend to proceed to hearing shall immediately and jointly request dismissal of their application, with appropriate notification to all protestants, failing in which applicants or their representatives, or both, may be subject to censure.

(g) *Intervention.* Rule 73 relating to participation without intervention is inapplicable to applications subject to this section, except with respect to persons seeking to intervene in support. No person who fails to file a protest as provided in these rules will be permitted to intervene in opposition except upon a showing of substantial reasons in a petition submitted in accordance with Rule 72.

Effective Oct. 1, 1964, 29 FR 11499, Aug. 11, 1964.

Rule 241. (By order dated April 6, 1966, Ex Parte No. 55, Rule 241 deleted. Effective May 20, 1966.

Rule 242. Special Rule 242 deleted, effective Sept. 5, 1967; 32 FR 12752, Sept. 6, 1967.

Rule 243. Special Rule 243 deleted, effective Sept. 5, 1967, 32 FR 12752, Sept. 6, 1967.

Rule 244. Special Rule 244 deleted, effective Sept. 5, 1967, 32 FR 12752, Sept. 6, 1967.

Rule 245. Special rules governing procedures for the issuance to single-State common carriers by motor vehicle of Certificates of Registration under section 206(a)(6) of the Interstate Commerce Act, as amended October 15, 1962, authorizing motor common carrier operations in interstate and foreign commerce, and certain other procedural matters with respect thereto.—(a) *Scope of special rules.* These special rules govern (1) the matter of giving notice to interested persons, by publication in the Federal Register, of the filing of applications for State certificates of public convenience and necessity authorizing motor common carrier operations in the transportation of property or passengers in *intrastate commerce,* in connection with which the applicant also desires to engage in transportation in interstate and foreign commerce under the provisions of section 206(a)(6) of the Inerstate Commerce Act, as amended October 15, 1962, and certain related matters.

(2) The filing with the Interstate Commerce Commission of applications for Certificates of Registration based upon intrastate certificates of public convenience and necessity issued by a State Commission which contain a concurrent finding that the public convenience and necessity require operations in interstate and foreign commerce in accordance with the provisions of section 206(a)(6) of the Interstate Commerce Act, as amended October 15, 1962.

(3) The filing with, and the handling by, the Interstate Commerce Commission of petitions for reconsideration of the decisions of State Commissions, made pursuant to the provisions of section 206(a)(6) of the Interstate Commerce Act, as amended October 15, 1962, finding that the public convenience and necessity require motor common carrier operations in the transportation of property or passengers, in interstate and foreign commerce, which do not exceed the scope of the concurrently authorized motor common carrier operations in intrastate commerce contained in certificates of public convenience

and necessity issued by such State Commissions. Except as otherwise herein provided, the General Rules of Practice shall apply.

(b) *Notice to interested persons of the filing of State Applications.* In accordance with such rules and regulations as may be prescribed by the State Commissions, any person seeking an intrastate certificate of public convenience and necessity, who or which also desires to engage in transportation in interstate and foreign commerce pursuant to section 206(a)(6) of the Interstate Commerce Act, as amended October 15, 1962, shall so notify the State Commission with which the intrastate application is filed at the time of filing the intrastate application. Notice to interested persons of the filing of such an application, and of the applicant's desire also to engage in transportation in interstate and foreign commerce, shall be given by the publication in the FEDERAL REGISTER of a summary of the authority sought as prepared by the State Commission and transmitted to the Interstate Commerce Commission at Washington, D.C. (See approved form in appendix hereto.) In order to afford interested persons a reasonable opportunity to be heard, such summaries must be forwarded to the Interstate Commerce Commission sufficiently in advance of any hearings that may be scheduled on the application so noticed. Except as otherwise may be required by the State Commission, no other notice by applicant to interested persons is necessary.

(c) *Conduct of, and participation in, State Commission application proceedings.* Subject to the requirement of section 206(a)(6) of the Interstate Commerce Act, as amended October 15, 1962, that interested persons be afforded a reasonable opportunity to be heard, the rules and regulations of the State Commission with which the intrastate application is filed shall govern the conduct of, and participation in, any State hearings or other State Commission proceedings that may be held with respect to such application, notice of the filing of which has been published in the FEDERAL REGISTER pursuant to paragraph (b) above. Protests and requests for information concerning the time and place of State Commission hearings or other proceedings, any subsequent changes threin, and any other related matters shall be directed to the State Commission with which the application is filed and shall *not* be addressed to or filed with the Interstate Commerce Commission. The record made in the State Commission proceeding shall be made available to the parties to such proceeding upon payment of such costs as may be fixed or prescribed by the State Commission.

(d) *Applications to the Interstate Commerce Commission for Certificates of Registration.*

(1) Within 30 days after service by the State Commission of a certificate of public convenience and necessity authorizing motor common carrier operations in intrastate commerce and containing the recitations required by section 206(a)(6) of the Interstate Commerce Act, as amended October 15, 1962, the holder of such State certificate shall file with the Interstate Commerce Commission at Washington, D.C., an Application For Motor Carrier Certificate of Registration, Form BOR-100, 49 CFR 7.100. Such application shall be prepared in accordance with and contain all information called for in the form of application and the instructions thereto. Copies of such application shall be furnished in such number, and be filed and served in the manner and upon the persons specified in the form of application.

(2) Upon receipt, an application for a Certificate of Registration will be assigned a docket number; and thereafter notice of the date of filing of the application and the docket number assigned thereto will be transmitted by the Interstate Commerce Commission to the applicant and those persons upon whom copies of the application were served by the applicant as specified in the form of application; and thenceforth all further proceedings therein before the Interstate Commerce Commission will be under such docket designation.

(3) Any party in interest, who or which opposed in the State Commission proceeding the authorization of operations in interstate or foreign commerce, shall be deemed to be a party

in the corresponding application proceeding instituted in accordance with paragraph (d)(1) above. No other person will be permitted to participate in such proceeding except upon a showing of substantial reasons in a petition submitted in accordance with §1.72 of the Commission's General Rules of Practice.

(4) Except for good cause shown, and upon leave granted, failure to file an application for a Certificate of Registration within the 30-day time period specified in paragraph (d)(1) above shall be construed as a waiver of any right thereafter to file for and obtain such a certificate.

(e) *Petitions for reconsideration of State Commission decisions made the subject of applications for Certificates of Registration.*

(1) *Parties.* Any party in interest, who or which opposed in the State Commission proceeding the authorization of operations in interstate or foreign commerce, may file with the Interstate Commerce Commission at Washington, D.C., a petition seeking reconsideration of the State Commission decision which is the basis for an application for a Certificate of Registration.

(2) *Filing Requirements.* Except for good cause shown, and upon leave granted, petitions under this rule shall be filed within 30 days after the date of the filing of an application with the Interstate Commerce Commission pursuant to paragraph (d)(1) above for a Certificate of Registration authorizing motor common carrier operations in interstate and foreign commerce under the provisions of section 206(a)(6) of the Interstate Commerce Act, as amended October 15, 1962, and such petition shall be filed under the docket number assigned to the related application proceeding.

(3) *Contents.* Any such petition shall specify with particularity the facts, matters, and arguments relied upon; and unless a copy of such record already has been submitted by another petitioner, such petition shall be accompanied by a certified copy of the complete record made before the State Commission, including a transcript of any testimony taken and any exhibits filed before such State Commission, such copy to be provided by, and at the expense of, the petitioner. The petition shall conform in all respects to requirements of §1.15 and 1.17 of this Commission's General Rules of Practice. The original and 6 copies of the petition, and one certified copy of the record made before the State Commission, shall be furnished for the use of the Interstate Commerce Commission.

(4) *Replies to petitions.* A reply to a petition filed under these rules may be filed and served within 20 days after the final date for filing such petitions. The original and 6 copies of the reply shall be furnished for the use of the Interstate Commerce Commission.

(5) *Service of petitions and replies.* Copies of each petition and reply filed under these rules shall be served on the State Commission involved and on all other parties to the State Commission proceeding in accordance with the requirements of Section 1.22 of the Commission's General Rules of Practice.

(6) *Effect of petitions.* The filing under these rules of a petition for reconsidertation shall not preclude or affect the institution of the motor carrier operations in *intrastate commerce* authorized by the State certificate; and failure seasonably to file a petition for reconsideration under these rules will be construed as a waiver of opposition and further participation in the related application proceeding for a Certificate of Registration.

(f) *Disposition of Applications for Certificates of Registration and related petitions for reconsideration.* Applications for Certificates of Registration and related petitions for reconsideration filed under these rules will be handled together and processed in a single proceeding and will be disposed of by the division of the Interstate Commerce Commission to which these matters may be assigned, acting as an Appellate Division. Except as the Interstate Commerce Commission may, in its discretion, otherwise direct, a decision or order issued by the Appellate Division disposing of such an application and petition will be administratively final and petitions by any of the parties for reconsideration of such Division's actions will not be entertained.

(g) *Disposition of Unopposed Applications for Certificates of Registration.* Where the State Commission proceeding which resulted in the issuance of the State Certificate sought to be made the basis of a Certificate of Registration was unopposed, or where petitions for reconsideration of the finding of the State Commission that the public convenience and necessity require operations in interstate and foreign commerce are not seasonably filed, the application for a Certificate of Registration will be disposed of in the most expeditious manner and, so far as practicable and legally permissible, without formal hearings or other proceedings.

Effective March 18, 1963. 28 FR 3533, Apr. 11, 1963.

Rule 246. Special rules pertaining to proceedings for the discontinuance or change of train or ferry service.—(a) *Scope of special rules.* These special rules govern procedure before the Commission in proceedings commenced by carriers subject to part I of the Interstate Commerce Act, under and pursuant to the provisions of section 13a of said Act, upon a notice under paragraph (1) of said section or by a petition under paragraph (2) thereof, with respect to a proposed discontinuance or change, in whole or in part, of the operation or service of any train or ferry.

(b) *General rules otherwise applicable.* Except as provided otherwise in these special rules, proceedings upon notices and petitions filed under section 13a shall be governed by the Commission's General Rules of Practice.

(c) *Notices and petitions by carriers.* A notice filed under paragraph (1), and a petition under paragraph (2), of said section 13a shall be prepared in accordance with and contain the information called for by rules and regulations then in force with respect to such a notice or petition. See 49 CFR, Part 43.

(d) *Notice to interested parties.* Notice of the institution of any investigation or of the time and place of any hearing, conference, or other proceeding will be given by the Commission to the carrier or carriers involved, the Governor and appropriate regulatory agency of each State in which the train or ferry affected is operated, protestants, and other interested parties of record, by mailing to them the order or notice instituting the investigation or assigning the hearing, conference, or other proceeding. Similar notice will be given to the same parties of changes in the time or place of hearing, conference, or other proceeding when time permits notice by mail; but, if telegraphic notice becomes necessary, notice of such changes will be given by telegram only to those who have requested telegraphic notice at their expense.

(e) *Participation at hearings without intervention.* In an investigation proceeding under section 13a(1), or in proceedings upon a petition filed under section 13a(2), an appearance may be entered at the hearing without filing a petition in intervention or other pleading, if there is full disclosure of the identity of the person or persons in whose behalf the appearance is to be entered, if the interest of such person in the proceeding and the position intended to the taken are stated fairly, and if the contentions will be reasonably pertinent to the issues already presented. A person in whose behalf an appearance is entered in this manner becomes a party to the proceeding.

(f) *Complaints and protests.* When a notice is filed with the Commission pursuant to the provisions of section 13a(1), proposing to discontinue or change, in whole or in part, the operation or service of any train or ferry operating from a point in one State to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, any interested person opposed to such proposal may make his opposition known by filing with the Commission a complaint or protest. The compliant or protest may be by telegram, letter, or other writing, of which only an original need be filed. Service of copies thereof upon the carrier proposing the discontinuance or change is not required. A complaint or protest should identify the proceeding by reference to the name of the carrier and to the particular train or ferry involved, and should state the interest of the complainant or protestant and the grounds for the position taken in opposition to the

proposal. In order to be considered by the Commission, a complaint or protest must be filed with the Commission in Washington, D.C., not later than 15 days before the date when the carrier proposes to make effective the subject discontinuance or change. Replies to a protest or complaint are not contemplated, and failure to reply will not be construed as an admission of any allegations contained therein.

(g) *Petitions for reconsideration of orders instituting an investigation.* Petitions for reconsideration of an order instituting an investigation in relation to a proposed change or discontinuance may be filed by the carrier or carriers affected within 15 days after the date of service of the order. An original and 6 copies shall be furnished for the use of the Commission, and copies thereof shall be served upon the persons to whom copies of the notice of the carrier were required to be mailed by the rules and regulations prescribed by the Commission. See 49 CFR 43.5. Any interested person may file and serve a reply to any petition for reconsideration permitted under this paragraph within 15 days after the filing of such petition with the Commission.

(h) *Reconsideration of decision not to institute an investigation.* A decision not to institute an investigation concerning a proposed discontinuance or change of service may be made the subject of a petition for reconsideration by any interested person, provided the petition reaches the Commission at least two work-days prior to the effective date of the proposed discontinuance or change of service. If an order is desired requiring continuance of the service pending hearing and decision upon investigation, the petition should reach the Commission at least two work-days before the Commission's authority to enter such an order will expire.[1] For the purposes of this section, a work-day shall be considered any day except Saturday, Sunday, or a legal holiday in the District of Columbia. (A legal holiday of less than one day shall be considered a work-day within the meaning of this section.) Petitions submitted under this paragraph shall be filed with the Secretary of the Commission by 4:00 p.m., United States Standard Time (or by 4:00 p.m., Local Daylight Saving Time if that time is observed in the District of Columbia). Written or telegraphic communication in intelligible form requesting reconsideration will be sufficient. The request for reconsideration shall contain the following prefatory statement: "This matter requires expedited handling under the Commission's Special Rules of Practice." If in writing, an original and six copies of the petition shall be furnished for the use of the Commission. Telegraphic notice or its equivalent must be given by the petitioner to the carrier or carriers affected, and certification that such notice has been given must accompany the request for reconsideration. Action may be taken upon the petition without awaiting a reply, but if a reply is received prior to a decision upon the petition it will be given consideration. A petition not timely filed will be rejected by the Secretary.

(i) *Protests.* As the applicable statute requires a full hearing in the State involved before the Commission may grant a petition under the provisions of section 13a(2), for authority to discontinue or change the operation or service of any train or ferry operated wholly within the boundaries of a single State, it is not necessary that persons opposed to such a petition file a protest in order to obtain a hearing on the proposal, but interested persons may file protests by complying with §1.40 of the Commission's General Rules of Practice, or they may register their opposition by letter addressed to the Secretary, Interstate Commerce Commission, Washington 25, D.C., for the purpose of receiving notice of the time and place of hearing when assigned. See paragraph (e) of this section in regard to participation at hearings.

Effective May 15, 1963. 28 FR 3399, Apr. 6, 1963.

Rule 247 Special rules governing notice of filing of applications by motor carriers of property or passengers and brokers under sections 206 (except section 106(a)(6) relating to

[1]Under the provisions of section 13a(1) of the Act, an order of the Commission requiring continuance of the operation or service, pending hearing and decision in an investigation, must be served upon the carrier or carriers affected thereby at least 10 days before a discontinuance or change would otherwise become effective.

Certificates of Registration), 209 and 211, by water carriers under sections 302(e), 303, and 309, and by freight forwarders under section 410 of the Interstate Commerce Act, and certain other procedural matters with respect thereto. (Rule 247)—(a) *Scope and applicability of special rules*—(1) *Scope.* These special rules govern the filing and handling pursuant to the provisions of the Interstate Commerce Act of (i) applications for certificates, permits, and licenses respecting the transportation of property or passengers under sections 206 (except section 206(a)(6) relating to Certificates of Registration), 209, and 211, (ii) applications for certificates, permits, and exemptions respecting the water transportation of property or passengers under sections 302(e), 303, and 309, and (iii) applications for permits to operate as freight forwarders and for certificates of abandonment under section 410. Except as otherwise herein provided, the general rules of practice shall apply.

(2) *Applicability.* These special rules shall apply to all applications enumerated in subparagrpah (1) of this paragraph and filed with the Commission on and after May 20, 1966, and to such of those applications filed prior to that time as the Commission may designate by appropriate publication in the FEDERAL REGISTER.

(b) *Applications*—(1) *Form and content.* An application filed with the Commission under these special rules shall be prepared in accord with and contain the information called for in the form of application prescribed by the Commission or in instructions which may have been issued by the Commission with respect to the filing of such an application.

(2) *Copies and service.* Copies of an application filed under these special rules shall be furnished in such number and shall be filed and served in the manner and upon the persons specified in the form or instructions.

(3) *Requests for handling applications without oral hearing.* An applicant who believes its application is susceptible of handling without oral hearing may request such handling when the application is filed. If such a request is made at that time, the applicant shall submit with its application original verified statements of the facts to which its witnesses would testify at an oral hearing if one were held, together with one copy thereof which need not be verified. Applicant shall furnish copies of its verified statements to interested persons upon request from such interested persons.

(c) *Notice to interested persons.* (1) Notice of the filing of applications to competitors and other interested persons will be given by the publication of a summary of the authority sought in the FEDERAL REGISTER. Such summaries will be prepared by the Commission, and it shall be the responsibility of applicant promptly to advise the Commission if the summary does not properly describe the authority sought. No other notice by applicants to interested persons is required, except that applicants are not relieved from the obligation to file copies of applications with Governors, State Boards, and Regional Directors of the Commission's Bureau of Operations as may be required by the prescribed form of the application.

(2) *Amendments.* Except for good cause shown, amendments to applications which broaden the scope of the proposed operations will not be allowed if tendered after notice of the filing of an application has been published in the FEDERAL REGISTER. Restrictive amendments acceptable to the Commission may be submitted at any time, but if tendered after such publication, they may be allowed only in the discretion of the Commission or by the hearing officer if the matter is assigned for hearing or prehearing conference.

(d) *Protests and request for hearing.* (1) Protests to the granting of an application shall be filed with the Commission within 30 days after the date notice of the filing of the application is published in the FEDERAL REGISTER. A protest filed under these rules shall certify that it has been served upon applicant's representative (or applicant, if no practitioner representing him is named in the notice of filing published in the FEDERAL REGISTER). Unlesss otherwise specified in the published notice, the original and one copy of the protest shall be filed with the Commission. Protests not in reasonable

compliance with the requirements of these rules may be rejected in the discretion of the Commission.

(2) Failure seasonably to file a protest will be construed as a waiver of opposition and participation in the proceeding.

(3) A protest against any application shall set forth specifically the grounds upon which it is made and contain a detailed statement of the protestant's interest in the proceeding (including a copy of the specific portions of its authority which protestant believes to be in conflict with that sought in the application, and describing in detail the method (whether by joinder, interline, or other means) by which protestant would use such authority to provide all or part of the service proposed), shall request an oral hearing if one is desired, and shall specify with particularity the facts, matters, and things relied upon, but shall not include issues or allegations phrased generally. Protests phrased in general terms and not complying with these specifications may be rejected.

(4) Any request for an oral hearing shall be supported by a specific explanation as to why the evidence to be presented cannot reasonably be submitted in the form of affidavits, and shall set forth the number of witnesses which would be presented by the protestant and an estimate of the hearing time required for such presentation. Protests embracing a request for oral hearing shall contain the following certification without further qualification:

The undersigned hereby certifies that, if an oral hearing is held, protestant(s) will appear and present evidence of protestant(s) own operations and particular interest(s) in the outcome of this application unless this application is amended so as to eliminate the interest(s) of protestant(s) as set forth in this protest.

(5) Where a person has a limited interest in an application, which possibly could be eliminated by a restrictive amendment to the application, which amendment must be acceptable to the Commission, it may also include in a protest filed in conformity with this paragraph an offer to withdraw the protest in the event of acceptance by applicant and the Commission of such amendment.

(6) Except where a restrictive amendment has been made as provided in subparagraph (5) of this paragraph, or for good cause shown, the failure of any person filing a protest to an application to appear at a hearing scheduled thereon shall be construed as a waiver of its right to participate further in the proceeding; such person shall no longer be considered as a party to the proceeding, and it and any representative responsible for its participation in the proceeding may be subject to censure for failure to appear. In addition, the mere appearance of protestant without the presentation of evidence of protestant's own operations and particular interest in the application may, in the absence of good cause shown, subject protestant and its representative to similar censure.

(7) An interested person, not a protestant, desiring to receive notice of the time and place of any hearing, conference, or other proceedings shall notify the Commission by telegram or letter (original and one copy) within 30 days from the date of the publication of the notice of the filing of the application in the FEDERAL REGISTER.

(8) A person (carrier) who does not file a protest as required by the regulations in this part, or who otherwise fails to remain a proper party to an application proceeding filed under the regulations in this part (by withdrawal of a previously filed protest, by failure to file verified statements in opposition as required by an appropriate order, by failure to appear at a scheduled oral hearing, or by other means), and who is not granted leave to intervene pursuant to the provisions of paragraph (h) of this section, except for good cause shown, may not personally, or through a representative, appear as a witness for a party protestant, except as provided hereafter. This provision shall not preclude the filing of a proper joint protest on behalf of several opposing carriers, or the presentation of evidence of service by bona fide connecting carriers through a duly qualified protestant as to the nature and extent of their joint services, or other probative evidence, provided the party

protestant's original protest contains a clear statement that its opposition is based, in part at least, upon a transportation service performed by it jointly with connecting carriers.

(e) *Hearing or other procedures to be followed*—(1) *Determination.* The Commission will determine whether an assignment for oral hearing should be made after notice to interested persons of the filing of the application has been published in the FEDERAL REGISTER and the period for filing protests has expired. At or prior to such time, any applicant who does not intend to prosecute its application should promptly request dismissal thereof.

(2) *Uncontested proceedings.* Proceedings in which no protests are filed within 30 days after publication of notice in the FEDERAL REGISTER, and which are not assigned for oral hearing, will be determined on the basis of verified statements submitted by applicant. Where not submitted previously along with the application as provided in paragraph (b) (3) of this section, such statements, by order, will be required to be filed by the applicant with the Commission within the time prescribed in said order, failing which the application may be summarily dismissed for want of prosecution.

(3) *Contested proceedings.* In those contested proceedings which the Commission determines that assignment of an application for oral hearing is unnecessary, thereafter the procedure shall be in accordance with Rules 45(b), 46(b), and 47-54, inclusive, of the general rules of practice, except that only the original and one copy of any statement made pursuant to Rule 51 need be filed with the Commission. All other contested proceedings which are subject to these rules will be assigned for oral hearing, unless other procedures are ordered.

(f) *Withdrawal or dismissal of contested applications.* If protests to its application have been filed, applicant shall, within 30 days after the period for filing protests has expired, notify the Commission in writing (1) that it is ready to proceed and prosecute the application, or (2) that it wishes to withdraw the application. Failure so to notify the Commission will be construed to mean that applicant has no further interest in the application, and the application will thereupon be dismissed by the Commission. Withdrawal of the application after the 30-day period or failure by applicant to appear at a hearing scheduled thereon will, except for good cause shown, subject applicant and its representative to censure.

(g) *Notice of hearing, conference or other proceedings*—(1) *Initial assignment.* Notice of the time and place of any hearing, conference, or other proceedings will be given to applicant's representative, applicant, protestants, and other interested parties by mailing to them the order or notice assigning the application for hearing, conference, or other procedure.

(2) *Assignment of an application for hearing concurrently with notice of its filing.* For the convenience of the Commission in handling applications related to one or more applications which already have been noticed in the FEDERAL REGISTER, when, in the Commission's discretion, the public interest would be served, an application may be concurrently noticed and assigned for hearing provided appropriate publication in the FEDERAL REGISTER can be made at least 1 week prior to the assigned date of hearing. Where such action is taken, and regardless of any prior publication of the application, any interested person may, without filing a protest prior to the assigned hearing, appear at the hearing in opposition to the application so assigned and become a party and be entitled to participate in that proceeding.

(3) *Requests for change.* A request by any party for a change in the time or place of an assigned hearing must set forth good and sufficient cause for the action requested, must be in writing and filed with the Commission not less than 10 days before the assigned hearing date, except in emergency circumstances, and must be served on all known parties of record at the same time and by the same method of communication as service is made on the Commission. Where such requests are filed less than 10 days before the date of hearing,

the petitioning party shall state the reasons for his failure to make such request within the prescribed 10 days.

(4) *Notice of changes.* The applicant's representative (or applicant if it has no representative), protestants, and those who request notice of changes in time or place of hearing, conference, or other proceeding will be informed of such changes if notice is given by mail. If telegraphic notice becomes necessary, notice of such changes will be given by telegram only to those who request telegraphic notice at their expense.

(h) *Intervention.* Rule 73 relating to participation without intervention is inapplicable to applications subject to this section, except with respect to those persons seeking to intervene in support. No person who fails to file a protest as provided in these rules will be permitted to intervene in opposition in a proceeding except upon a showing of substantial reasons in a petition submitted in accordance with Rule 72.

(i) *Drafting of recommended order and report by prevailing party.* Applications in which oral hearings are held and in which the hearing officer can announce his decision, either (1) on the record after the close of the taking of testimony or (2) by appropriate notification to the parties after the filing of briefs, may be made the subject of a report and recommended order, prepared by the party or parties in whose favor the hearing officer decides, within a period specified by the hearing officer. The hearing officer will make such changes as he considers appropriate in the draft prepared for him.

[32 F.R. 20066, Dec. 20, 1967, as amended at 33 F.R. 9259, June 22, 1968]

NOTE: The following General Policy Statement Concerning Motor Carrier Licensing Procedures (Ex Parte No. 55) was published May 3, 1966, at 31 F.R. 6600:

The number of applications filed for authority to conduct operations, in interstate or foreign commerce, as common and contract carriers by motor vehicle, long has been on the increase. The rate of this increase has accelerated markedly in recent years and shows no signs of abating. Motor carrier applications alone, which now make up about 85 percent of the Commission's formal case docket, increased from 5,655 new filings in 1964 to 7,658 new filings in 1965. In the first quarter of 1966, 2,454 motor carrier applications already have been opened. The pending docket of this category of cases alone on April 1, 1966, totaled 6,534.

Motor carrier application proceedings involve issues of substantial interest not only to the regulated transportation industry, but to every shipper and receiver of goods, regardless of the size of his operation; to manufacturers, wholesalers, distributors, and retailers; and to all members of the general public, both as buyers and consumers, and as travelers over the lines of the Nation's common carriers of passengers. To delay a determination that a newly proposed motor transportation is required by the public convenience and necessity or would be consistent with the public interest and the national transportation policy can result in an irretrievable loss of sales and can unjustifiably deprive the public of needed products and transportation services. For the regulated surface transportation industry to continue to thrive, to grow, and to keep pace with the expanding national economy, the mechanic of regulation must be such that administrative decisions are not only fair and impartial, but are rendered with reasonable dispatch and efficiency. The regulatory process in which competing claims are considered and adjudicated must be geared to the type of proceeding involved, and must not entail an expenditure of time and money, either for the parties or the Government, which is disproprtionate to the scope, importance, and economic significance of the particular proceeding.

Operating under its present procedures, the Commission no longer is able to deal with motor carrier application proceedings with the promptness and efficiency to which the parties are entitled, and which the nature of the proceedings themselves and the public interest require. The due and timely execution of the Commission's functions, therefore, imperatively and unavoidably, requires that these procedures be modified to eliminate those steps and procedural requirements which result in undue and unnecessary delay and in unjustified expense.

To achieve the foregoing ends and to insure that application proceedings are adjudicated with the maximum possible speed and efficiency consistent with requirements of due process of law, this Commission has adopted, among other things, a number of general policies and internal procedures governing the handling and processing of motor carrier operating authority applications. A new form for applying for operating rights has been approved and released, and revised special rules of practice have been issued.

In processing the motor carrier caseload, the scheduling of unnecessary oral hearings will be avoided to the extent possible. Where the issues presented are well defined or where the matters involved are not of sufficient moment to justify the expense of an oral hearing, parties will be required to submit their evidence in the form of verified statements under the modified procedure, and the issuance of an initial report by a hearing officer will be dispensed with. Oral hearings for the sole purpose of cross-examination will be scheduled only where material facts are in dispute.

All applications for motor carrier operating rights will be noticed in the FEDERAL REGISTER as at present. After the 30-day period for filing protests has expired, the Commission will determine whether an application should be placed on the hearing docket or the modified procedure docket.

All unopposed applications will be assigned directly to the Commission's Operating Rights Board, as is done at present. Where the necessary supporting information has not been filed with the application, an order will be entered

calling for the filing of the necessary supporting verified statements, after which the case will be disposed of by that Board.

All opposed applications will be placed either on the hearing docket or the modified procedure docket. To the hearing docket will be assigned the more complex cases, and those which, for one reason or another, might be handled more expeditiously and effectively with an oral hearing. Applications placed on the hearing docket will be processed through oral hearing and the issuance of a report and recommended order.

To the modified procedure docket will be assigned those applications in which an oral hearing is not deemed necessary for their proper disposition. Assignments to the modified procedure docket will be followed by the entry of an order requiring the submission of the supporting and opposing evidence under the present general rules of practice. Such order will provide that "except for good cause shown" all preliminary motions or other requests for relief filed prior to a decision will not be handled separately but will be acted upon by those making the decision in the case.

Following the filing of all verified statements under the modified procedure in opposed application proceedings, the cases will be submitted to one of the five existing Review Boards, in rotation, to the extent practicable, for the issuance of final reports. The Boards' decision will be subject to petitions to Appellate Division 1.

A request for cross-examination by any party will be disposed of by the Review Board. If the Board concludes that the request has merit, it will have the authority to refer the case for hearing for the purpose of cross-examination. Requests which are found to be without merit will be denied in the Board's report, with the reasons for the action taken. The Review Board also will have authority to refer for full oral hearing any case in which it believes such treatment is warranted.

(d) *Protests and request for hearing.*—RP 247(d)(3) as amended in May, 1966, precludes a party protestant from introducing, in support of its protest, evidence of operations and services of a non-party carrier, which had not been specified in its protest. This rule specifically requires protestant to indicate in its protest the evidence it will seek to introduce and failure to do so is grounds for a motion to strike. Thus, since protestant failed in its protest to indicate that it would introduce evidence in behalf of another carrier, its attempt to broaden the basis of its protest by bringing in this evidence violates the Rules of Practice now in force. Therefore, applicant's motion is granted and verified statement of non-party carrier stricken.—Legion Warehouse Corp.—Contract Carrier Application, 105 M.C.C. 111 (112).

On reconsideration, precise language of amended rule 247(d)(3) failed in its purpose of preventing party protestants from bringing other existing carriers not of record into a case and did not provide adequate notice to interested persons of the commission's goal to terminate this objectionable pratice; accordingly, protestant's evidence which was rejected in the prior report will be accepted in accordance with the prevailing understanding of the rule as it existed prior to its amendment. The rules of practice governing proceedings of this type are concurrently amended to provide that a formal protest must be filed by each opposing carrier who expects to participate as a party and present evidence in opposition to an application except as provided in the rules governing intervention, joint protest and evidence proffered by protestant's bona fide connecting carriers. Noncompliance will, in future, result in disallowance of the testimony and evidence. In the interim, those applications published in the Federal Register prior to service of this report will be decided on the same basis as applied to the proceedings herein considered.—Legion Warehouse Corp.—Contract Carrier Application, 107 M.C.C. 419.

On reconsideration, precise language of amended rule 247(d)(3) failed in its purpose of preventing party protestants from bringing other existing carriers not of record into a case and did not provide adequate notice to interested persons of the commission's goal to terminate this objectionable practice; accordingly, protestants' evidence which was rejected in the prior report will be accepted in accordance with the prevailing understanding of the rule as it existed prior to its amendment. The rules of practice governing proceedings of this type are concurrently amended to provide that a formal protest must be filed by each opposing carrier who expects to participate as a party and present evidence in opposition to an application except as provided in the rules governing intervention, joint protest and evidence proffered by protestant's bona fide connecting carriers. Noncompliance will, in future, result in disallowance of the testimony and evidence. In the interim, those applications published in the Federal Register prior to service of this report

will be decided on the same basis as applied to the proceedings herein considered.—Id. 107 M.C.C. 419.

Verified statements of 12 motor carriers not parties to the proceedings will be considered since the present application was published in the Federal Register prior to service of the Legion Warehouse report supra.—Osborn, Inc., Extension, Rugs and Textile Products, 107 M.C.C. 854 (858).

Commission reversed a prior denial since the examiner relied on evidence in an exhibit that properly had been excluded from the record because of protestant's noncompliance with Rule 247(d)(3) regarding full disclosure in its protest of the scope of its interest in the proceeding.—Chieppo Petition for Modification of Certificate, 117 M.C.C. 358 (378)*.

See also 106 M.C.C. 1, 22,885, 109 M.C.C. 83, 341 I.C.C. 178, 321 F. Supp. 821.

(e) *Hearing or other procedures to be followed.*—See 115 M.C.C. 866; 332 F. Supp. 1076.

(f) *Withdrawal or dismissal of contested applications.*—See 111 M.C.C. 421.

(i) *Drafting of recommended order and report by prevailing party.*—See 115 M.C.C. 287.

Rule 248 Implementation of Public Law 91-375, Postal Reorganization Act (Motor Carrier Licensing Provisions). *(a) Scope of special rules.* These special rules govern the filing and handling of applications seeking the right to operate pursuant to either a Postal Certificate of Public Convenience and Necessity or a General Postal Certificate of Exemption authorizing operation, in interstate or foreign commerce by motor vehicle in the transportation of mail.

(b) *Applications for postal certificates of public convenience and necessity.* (1) The application form (Op-Or-10) shall be available from the Secretary, Interstate Commerce Commission, and shall be completed in duplicate, and transmitted to the Secretary, Interstate Commerce Commission, Washington, D.C. 20423, and a copy thereof shall be sent to the transportation regulatory commission (or, if none, the Governor) of each State within which operations are sought to be performed.

(2) Attached to the application shall be a true copy of applicant's contract with the Postal Service (or its predecessor Post Office Department), which contract must have been in force on the effective date of section 5215 of the Postal Act.

(3) If applicant is a successor in interest to a qualifying star route carrier, evidence of continuity of star route service and carrier identity must be furnished (this may be done in letter form duly sworn and notarized).

(4) The application form provides space for a description of the territory served by the applicant on or before the effective date of section 5215. Here, applicant should describe the territorial extent of operations performed pursuant to its contract in force on the effective date, such description being in terms of the appropriate political division or subdivision (i.e., State, country, city, village, et cetera) within which service was authorized by contract. Authority may be granted only commensurate with the service covered by applicant's contract; therefore, applicants are cautioned to be specific in delineating the territory sought, in order to avoid delays in processing their applications.

(5) Notice to the public of any such application will be made by publication in the FEDERAL REGISTER. Provision will be made for the filing of protests within 30 days from the date of publication, although it is not contemplated that protests will, in fact, be filed.

(6) Upon determination that an applicant is qualified to receive "grandfather" authority, and upon compliance by applicant with sections 215 and 221(c) of the Interstate Commerce Act, and with the rate-filing procedures established by this Commission, a Postal Certificate of Public Convenience and Necessity will be issued, authorizing the transportation of mail from, to, or between points in the involved territory.

(7) All further proceedings, including petitions for reconsideration, shall be handled in the manner specified in this Commission's general rules of practice.

(c) *Applications for inclusion within general postal certificate of exemption.* The class of carriers to which such certificate of exemption is applicable is defined as all star route, mail messenger, and contract motor vehicle operators, whose for-hire motor carrier operations are confined to a single State, and who, on the effective date of section 5215 of the above-entitled Postal Act, hold a contract for the transportation of mail wholly within a single State. Upon submission to this Commission of a copy of such contract, the name of the carrier's representative to whom inquiries may be made, and the carrier's written request therefor, such carrier shall be included within the terms of the general postal certificate of exemption which reads as follows:

GENERAL POSTAL CERTIFICATE OF EXEMPTION DESIGNATED SINGLE-STATE MOTOR CARRIERS AFFECTED BY THE POSTAL REORGANIZATION ACT (PUBLIC LAW 91-375)

At a general seesion of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 3d day of March 1971.

After due investigation, it appearing that any motor carrier having complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and having complied with all the requirements established by this Commission in its report in Ex Parte No. MC-86, and lawfully engaging in operations solely within a single State in the transportation of mail; That the transportation of mail in interstate or foreign commerce performed by him is in fact of such nature, character, or quantity as not substantially to affect or impair uniform regulation by this Commission of transportation by motor carriers engaged in interstate or foreign commerce in effectuating the national transportation policy declared in the Interstate Commerce Act; that he, therefore, is entitled to inclusion within a general postal certificate of exemption in accordance with the provisions of section 204(a)(4a) of part II of said act; and this Commission so finding:

It is ordered, That the said motor carrier be, and it is hereby, granted this general postal certificate of exemption, which during the period it shall remain effective and unrevoked, shall exempt the said motor carrier from compliance with the provisions of part II of said act in respect of transportation of mail in interstate or foreign commerce, and it is hereby issued to said motor carrier.

It is further ordered, That this general postal certificate of exemption shall be effective from the date hereof and shall remain in effect until revoked in accordance with the provisions of said act.

By the Commission.

[SEAL] ROBERT L. OSWALD,
Secretary,

(Secs. 204, 206, 207, 208, and 210; 49 Stat. 546, as amended, 551, as amended, 552, as amended, 554, as amended; 49 U.S.C. 308, and 310) [36 F.R. 5913, Mar. 31, 1971]

Rule 249 Special rules governing the filing of motor carrier mail transportation service orders or determinations under subsection (f) of section 5203 of title 39, United States Code, 84 Stat. 768, 39 U.S.C. 5208 (Rule 249). (a) *Definitions.* For the purposes of this section the following words and terms, except as otherwise indicated in the context of this section, are to be construed as follows:

(1) "Postal Service" means the U.S. Postal Service, 39 U.S.C. 201.

(2) Whenever a "section" is cited, it refers to a provision of title 39, United States Code, as revised and reenacted.

(3) "Commission" means the Interstate Commerce Commission.

(4) "Motor carrier" or "carrier" means a common carrier by motor vehicle as defined in subsection (5) of the section 5201 of title 39, United States Code, 39 U.S.C. 5201.

(b) *Applicability.* The provisions of this section shall apply to all orders or determinations of the Postal Service under section 5203 (39 U.S.C. 5203) directing a motor carrier to transport mail.

(c) *Filing and content of orders or determinations*—(1) *General.* All orders or determinations shall be filed by the Postal Service with the Commission at its office in Washington, D.C., and shall conform to the provisions of subparagraphs (2) and (3) of this paragraph.

(2) *Content.* Each order or determination of the Postal Service shall include: (i) The full and correct name and business address of the motor carrier, (ii) a description of the mail transportation service required, (iii) a specification of the operating authority held by the carrier which corresponds to the mail transportation service required, and (iv) a showing that the order or determination is consistent with orders of the Commission under sections 5207 and 5208 (39 U.S.C. 5207 and 5208), if any, or that the Postal Service and the carrier have agreed that the compensation for the transportation and service connected therewith is fair and reasonable. Further, each order or determination issued shall set forth in a conspicuous place on the face thereof, in bold face type, a clear statement that the order or determination is concurrently filed with the Interstate Commerce Commission at Washington, D.C., that it is being simultaneously deposited with the Director, Office of the Federal Register, and that any protest seeking termination thereof under subsection (f) of section 5203 (39 U.S.C. 5203) must be filed with the Commission in accordance with this §1100.249 within 15 days of the date of publication in the FEDERAL REGISTER. This statement may also include reference to the penalty provisions of section 5206 (39 U.S.C. 5206), and such other information as the Postal Service deems appropriate.

(3) *Copies; service.* The original and seven copies of each order or determination issued under this section shall be filed with the Commission, and one copy of the order or determination, simultaneously shall be served upon the motor carrier specified therein and upon any person known to be interested, in such a manner so as to be received on the date the original is filed with the Commission, and a copy also shall be simultaneously deposited with the Director, Office of the Federal Register, for publication therein as notice to all other interested persons. A certificate shall be executed by an authorized official of the Postal Service, showing upon whom simultaneous service has been made. The order or determination filed with the Commission and the envelope of transmittal to the Commission should be clearly marked: "Mail Transportation Service Order (or Determination)."

(d) *Protests seeking termination of Postal Service order or determinations, and replies thereto*—(1) *General.* A motor carrier subject to an order of determination of the Postal Service, or any of the carrier's other customers, may protest to the Commission and request termination of the order of determination. Such protests shall be restricted to the matter of showing that performance by the carrier of the required mail transportation service would be detrimental to the carrier or to its other customers, or that the carrier does not operate equipment suitable for the transportation of mail, and shall conform to the provisions of subparagraphs (2), (3), and (4) of this paragraph.

(2) *Content.* The protest for termination of an order or determination filed under this section must identify the issued order or determination (i) by reference to the name and address of the motor carrier shown in the order or determination, (ii) the order number or other identification assigned thereto by the Postal Service, and (iii) specific citation to the volume, page, and date of publication in the FEDERAL REGISTER, i.e., "------ F.R. ------, ----------197—." Facts relied upon in support of the protest must be verified as provided in Rule 50 of the Commission's general rules of practice (§1100.50).

(3) *When filed.* Protests requesting termination of an order or determination filed under this section will not be considered unless made in writing and filed with the Commission at Washington, D.C., within 15 days of the date of publication of the order or determination in the FEDERAL REGISTER.

(4) *Replies.* Replies confined to rebuttal of such protests may be filed within 10 days of the date on which the protest was filed with the Commission.

(5) *Copies; service.* The original and seven copies of each protest or reply shall be filed with the Commission, and one copy simultaneously shall be served on the opposing party(ies). A certificate shall be executed stating that simultaneous service has been made. The protest or reply and the envelope of transmittal to the Commission should be clearly marked: "Protest (Reply)—Mail Transportation Service Order (or Determination)," and be delivered free of all charges. (Copies for service on the Postal Service shall be addressed to the Assistant General Counsel, Transportation, U.S. Postal Service, Washington, D.C. 20260, as agent for the Postmaster General.)

(e) *Petitions for reconsideration.* Petitions for reconsideration (1) of an order terminating an order or determination of the Postal Service, or (2) of a notice declining to order termination of such an order or determination, may be filed by any interested person within 20 days after service of the order or notice of the Commission. As no replies to the petitions for reconsideration under this rule are contemplated in view of the statutory time limitation, petitioners will be expected, except in unusual circumstances, to rely wholly on the information previously filed with the Commission. Such petitions for reconsideration must be clearly marked: "Petition for Reconsideration—Mail Transportation Service Order (or Determination)." Petitioners shall file an original and seven copies of the petition with the Commission and one copy thereof shall be served simultaneosly on the opposing party(ies) and a certificate of service shall be executed to that effect.

(f) *Withdrawal of Postal Service orders or determinations.* If, within 90 days after the filing of an order or determination by the Postal Service, the motor carrier cited in the order or determination voluntarily agrees and undertakes to perform the required mail transportation service, the Postal Service shall promptly notify the Commission of such action and shall withdraw the Postal Service order forthwith.

(Sec. 5203, 84 Stat. 769, 39 U.S.C. 5203; sec. 17, 40 Stat. 270, 49 U.S.C. 17) [36 F.R. 6426, Apr. 3, 1971]

Rule 250. Special rules pertaining to all proceedings before the Commission to insure that environmental amenities and values are given appropriate consideration.—(a) *Scope of special rules.*—These special rules are applicable to all proceedings before the Commission. They are intended to assist the Commission in discharging its duties under the National Environmental Policy Act of 1969 (Public Law 91-190, 83 Stat. 852) which authorizes and directs that, to the fullest extent possible, the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies for the protection of the environment declared in that act.

(b) *Detailed environmental statement.*—It shall be the general policy of the Interstate Commerce Commission to adopt and adhere to the objectives and aims of the National Environmental Policy Act in performing its regulatory duties and powers under the Interstate Commerce Act and related statutes. Among other things, the National Environmental Policy Act requires, to the fullest extent possible, a detailed environmental statement in all reports and recommendations on legislative proposal and other major Federal actions which will significantly affect the quality of the human environment.

In compliance with this requirement, a detailed environment statement will be made when the regulatory action taken by the Commission under the applicable statutes will have such a significant environmental impact. The detailed statement, which statement shall be made as part of the initial decision in the proceeding and shall become final (with or without modification) when a final decision or order is entered by the Commission, shall fully develop the five factors listed below, among other relevant factors including the justification of a proposed action as compared to its alternatives. The following factors are listed merely to illustrate the kinds of values that *must* be considered in the statement, and in no respect is this listing to be construed as covering all factors relevant to the disposition of any particular proceeding:

(1) The environmental impact of the requested action;

(2) any adverse environmental effects which cannot be avoided should be requested action be granted;

(3) alternatives to the requested action;

(4) the relationship, if any, between local short-term uses of man's environment and maintenance and enhancement of long-term productivity; and

(5) any irreversible and irretrievable commitments of resources which would be involved in the requested action should it be granted.

The procedures set forth in this rule are intended to encourage, to the fullest extent possible, public and governmental participation in those formal proceedings which might significantly affect the quality of the human environment, and to the end of insuring that a complete record is developed which will enable the Commission to consider fully the environmental impact of a contemplated action.

(c) *Applicable general and special rules not affected.*—The Commission's general and/or special rules heretofore applicable to a proceeding shall remain in effect and govern the procedure therein. These special rules shall supplement the applicable existing rules.

(d) *Papers to show effect of subject matter of proceeding on the quality of human environment.*—

(1) In all initial papers filed with this Commission by a party, there shall be filed a statement indicating the presence or absence of any effect of the requested Commission action on the quality of the human environment. If any such effect is alleged to be present., the paper shall include, but not be limited to, statements relating to each of the relevant factors set forth in part (b)(1)-(5) above.

(2) In all proceedings determined or alleged to have a significant effect on the quality of the environment, all parties shall file statements submitting information relating to the relevant factors set forth in part (b)(1)-(5) above.

(e) *Notice to appropriate governmental agencies.*—

(1) All papers submitted in compliance with these rules, and affirmatively alleging a substantial environmental impact, beneficial or adverse, shall be served by the person or persons submitting it on those governmental bodies given notice pursuant to paragraph (1) of this section. The person or persons submitting the statement also shall supply 10 copies of the statement to the Council on Environmental Quality.

(2) A notice of all proceedings determined to have a significant effect on the quality of the human environment will be transmitted by the Commission as promptly as possible to the Council on Environmental Quality and to appropriate governmental bodies—Federal, regional, State, and local—(as identified in the guidelines promulgated by the Council on Environmental Quality) with a request for public comments on the environmental considerations listed in part (b)(1)-(5) above.

(3) All interveners, including other government agencies, taking a position on environmental matters shall file with the Commission an explanation of their environmental position, specifying any differences with the original party's detailed statement upon which intervener wishes to make its views known, and including therein a discussion of that position in the context of the factors enumerated in part (b) above. All interveners shall be responsible for filing 10 copies of their submission with the Council on Environmental Quality at the time they file with the Commission and shall also supply a copy of such submission to all participants to the proceeding. Nothing herein shall preclude an intervener from filing a detailed environmental statment. The Commission will consider all representations submitted prior to the final disposition of the proceeding.

(4) The views of the Council on Environmental Quality, if any, should be made in a written statement served upon the Secretary of the Commission and all parties of record.

(f) *Official notice.*—The Commission may take official notice of any facts relating to the environmental situations before it. This shall include, but not be limited to, scientific studies, governmental reports, and maps which have not been presented in evidence by any of the parties of record.

(g) *Determinations.*—The determinations in all proceedings which investigate environmental issues should include an evaluation of the environmental factors enumerated in part (b)(1)-(5) above, and the views expressed in conjunction therewith by all persons making formal comment pursuant to the provisions of this section. Specific findings should be made in each such proceeding as to whether the relief sought is or is not environmentally advantageous.

(h) *Review of initial decision on environmental impact.*—Any decision with respect to the environmental issue will be subject to Commission review in the same manner as other issues in the proceeding.

(i) *Proceedings in progress.*—With respect to those proceedings already in progress, the Commission recognizes that it may not be possible to comply fully with the procedures outlined herein and, in particular, that it may not be possible in every instance to include within the record all of the material relating to the environmental impact of the contemplated action which might otherwise be developed. Nonetheless, it is the policy of the Commission to apply these procedures to the fullest extent possible to proceedings already in progress.

Effective March 28, 1972. 37 FR 6318

FEDERAL AND STATE PRECEDENTS CITED

See Volume 11 p. 9821; Volume 12 p. 10598; Volume 13 p. 11242; Volume 14 p. 11762; Volume 15 p. 12378; Volume 16 p. 13021; Volume 17 p. 13771; Volume 18 p. 14784; Volume 19 p. 16091.

ABANDONMENT

Defined: Zirn v. Hanover Bank, 215 F. 2d 63, in 320 ICC 624

Intrastate commerce, needs considered: Colorado v. US, 271 US 153, in 312 ICC 791, 317 ICC 363, 320 ICC 19, 317 ICC 645.

Test for approval: Purcell v. US, 315 US 381, in 317 ICC 225 (237)

What considered: Colorado v. US, 271 US 153, in 320 ICC 19, 320 ICC 278

Partial discontinuance: Sludden v. US, 211 F. Supp. 150, in 320 ICC 85

Public convenience: Purcell v. US, 315 US 381, in 317 ICC 513, 320 ICC 278

AGRICULTURAL COMMODITIES

Defined: Home Transfer & Stor. Co. v. US, 141 F. Supp. 599, aff'd 352 US 884, in 88 MCC 223; ICC v. Weldom, 90 F. Supp. 873, 188 F. 2d 367, in 88 MCC 473; Fruit Growers v. Brogdex Co., 283 US 1, in 88 MCC 784

ALL-FREIGHT RATES

§1(16) inapplicable: All States Freight v. N.Y., N.H. & H. R., 379 US 343, in 323 ICC 730

ALLOWANCES

Shipper furnishing facilities, services; El Dorado Oil Works v. US, 328 US 12, in 323 ICC 168

APPLICATIONS

"Grandfather," amendment: Herrett Trucking v. US, 14 Fed. Car. Cas. &81,380, in 88 MCC 197, 91 MCC 211

when justified: United States v. Northern Pac. Ry. Co., 288 US 490, in 95 MCC 220

ASSOCIATION OF SHIPPERS

Agents of: ABC Frt. Fwdg. Corp. v. US, 125 F. Supp. 926, aff'd 348 US 967, in 316 ICC 259 (282)

Agricultural cooperatives: ICC v. Jamestown Farmers Union etc., 151 F. 2d 403, in 96 MCC 293

"Compensation" what constitutes: I.C.C. v Shippers Cooperative, Inc., 196 F. Supp. 8, affd. 308 F. 2d 888, in 94 MCC 440.

Corporate status: Hecht v. Malley, 265 US 144, Schenley Distillers v. US, 61 F. Supp. 981, aff'd 326 US 432, ICC v. Shippers Cooperative, 169 F. Supp. 8, Caminetti v. US, 242 US 470, Morrissey v. Commissioner, 296 US 344, in 316 ICC 259 (284, 287); Freight Consolidators Cooperative v. US, 230 F. Supp. 692, in 323 ICC 619 (634)

Forwarders vs.: Pac. Coast Wholesalers' Assn. v. US, 81 F. Supp. 991, aff'd 338 US 689, ABC Frt. Fwdg. Corp. v. US, 125 F. Supp. 926, aff'd 348 US 967. US v. Drum, 368 US 370, ICC v. Stickle, 41 F. Supp. 268, in 316 ICC 259 (276-7, 279); Pac. Coast Wholesalers' Assn. v. US 81 F. Supp 991, aff'd 338 US 689, in 318 ICC 507, 323 ICC 619 (635); US v. Pac. Coast Wholesalers' Assn., 338 US 689, in 323 ICC 658 Freight Consolidators Cooperative v. US, 230 F. Supp. 692, in 323 ICC 619 (635)

323 ICC 619 (635)

ANTITRUST ACTS

Annual-Volume rates for public utilities, not monopoly: Tampa Electric Co. v. Nashville Coal Co., 365 US 320, in 323 ICC 75

Consolidation, merger, etc.: McLean Trucking v. US, 321 US 67, in 87 MCC 637 (650), NYC Securities Corp. v. US, 287 US 12, McLean Trucking v. US, 321 US 67,

ANTITRUST ACTS—Continued

Georgia v. Penn. R., 324 US 439, Schwabacher v. US, 334 US 182, St. Joe Paper Co. v. ACL R, 347 US 197, Minneapolis & St. L. R. v. US, 361 US 173, California v. EPC, 369 US 482, Brown Shoe Co. v. US, 370 US 294, Pan American v. US, 371 US 296, US v. Phila. Nat's Bank, 374 US 321, in 320 ICC 122 (128-9, 131, 134, 166)

BARGE, BARGE LINES

Exempt, discrimination against: ICC v. Mechling, 330 US 567, Blue Line, Inc. v. US, 100 F. Supp. 66, aff'd 342 US 951, Dixie Carriers v. US, 351 US 56, Arrow Transp. v. US, 176 F. Supp. 411, aff'd 361 US 353, in 316 ICC 759

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Instrumentality of commerce: US v. Ferger, 250 US 199, in 323 ICC 168

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Broker not a carrier: National Bus Traffic Assn. v. US, 143 F. Supp. 689, aff'd 352 US 1020, in 88 MCC 455

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Contract-carrier application: ICC v. J-T Transport, 268 US 81, in 89 MCC 209, 91 MCC 36 (40), 91 MCC 489, 92 MCC 189, 92 MCC 266, 92 MCC 293, 95 MCC 312

Intrastate rates: Public Serv. Comm. of Utah v. US, 356 US 421, in 318 ICC 151

Procedural effect: Pacific Portland Cement Co. v. Food Mach. & Chem. Corp., 178 F. 2d 541, in 315 ICC 327

Upon defendants: A. T. & S.F. Ry. v. US, 218 F. Supp. 359, in 323 ICC 601

CAR-HIRE SETTLEMENTS

Chicago, R.I. & P. Ry. Co. v. US, 284 US 80, in 318 ICC 555

CERTIFICATE

Application by railroad's motor subsidiary, policy: American Trucking Assns. v. US, 355 US 141, in 88 MCC 703

Commodity description: Arrow Trucking Co. v. US, 181 F. Supp. 775, in 88 MCC 87, 94 MCC 711

"Grandfather" clauses: Act of 1958, commodities; Willis Shaw Frozen Exp., v. US, 256 F. Supp. 257, in 102 MCC 616

actual performance: US v. Carolina Freight Carriers, 315 US 475, in 91 MCC 211

commodities formerly exempt: Milk Transport v. ICC, 190 F. Supp. 350, aff'd 368 US 5, in 89 MCC 471

holding out: Willis Shaw case, 256 F. Supp. 257, in 102 MCC 616

Greater scope than requested: C., St. P., M. & O. v. US, 322 US 1, in 88 MCC 3, 89 MCC 651

Interpretation: by commission: Service Stor. & Transfer Co. v. Virginia, 359 US 171, in 94 MCC 221

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grammatical construction: Dart Transit v. US, 110 F. Supp. 876, aff'd 345 US 980, Brown v. Brown, 42 Del. 157, 29 A. 2d 149, Service Investment v. Dorst, 232 Wis. 574, 288 N.W. 169, Greenough v. Phoenix Ins. Co., 206 Mass. 247, in 89 MCC 5

intended use test: Mitchell Bros. Truck Lines v. US, 225 F. Supp. 755, in 99 MCC 621

judicial review: Parkhill Truck Co. v. US, 198 F. Supp. 362, Worster Motor Lines, Inc. v. US, 226 F. Supp. 603, in 94 MCC 711

CERTIFICATE—Continued

plain language: US v. Standard Brewery, 251 US 210, in 89 MCC 5 Andrew G. Nelson v. US, 355 US 554, in 91 MCC 635; Sims Motor Transport Lines v. US, 183 F. Supp. 113, Nowinsky v. US, 195 F. Supp. 748, in 92 MCC 516

trade usage: Black v. ICC, 167 F. 2d 825, certiorari denied 335 US 818, in 88 MCC 723, 91 MCC 259; Hancock Mfg. Co. v. US, 155 F 2d 827, in 91 MCC 259; Converse v. US, 109 F. Supp. 807, J.B. Acton, Inc. v. US, 221 F. Supp. 174, in 99 MCC 621

Interstate, issued by State, not eligible for registration: Gulf Coast Motor Frt. Lines v. US, 35 F. Supp. 136, in 88 MCC 357

Modification, revocation: Andrew G. Nelson v. US, 355 US 554, Floyd & Beasley Transfer Co. v. US, 185 F. Supp. 390, Sims Motor Transport Lines v. US, 183 F. Supp. 113, in 91 M.C.C. 635

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Public need determining factor: Chesapeake Motor Lines, Inc. v. US, 176 F. Supp. 98, in 91 MCC 667

Rail or motor carrier: Schaffer Transp. Co. v. US, 355 US 83, in 88 MCC 403, 316 ICC 609

Revocation:

violation State regulations: Castle v. Hayes Freight Lines, Inc., 348 US 61, in 96 MCC 347

willful violation, APA inapplicable: Great Western Food Distr. v. Brannan, 201 F. 2d 476, Walker v. CAB, 251 F. 2d 954, Eastern Produce Co. v. Benson, 278 F. 2d 606, in 91 MCC 936 (949)

What commodities included: Dart v. ICC, 110 F. Supp. 876, aff'd 345 US 980, in 89 MCC 59, 91 MCC 919;Union Cartage v. US, 193 F. Supp. 645, aff'd 368 US 143, in 318 ICC 859, 96 MCC 285; Converse v. US, 109 F. Supp. 807, in 92 MCC 167, 99 MCC 621

CHARTER OR SPECIAL OPERATIONS

Incidental authority, under §208(c): Safeway Trails v. ICC, 176 F. Supp. 201, in 96 MCC 1

"Special" operations defined: Bingler Vacation Tours v. US, 132 F. Supp. 793, aff'd 350 US 921, in 96 MCC 1

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By commodities transported: W.J. Dillner Transfer Co. v. ICC, 193 F. Supp. 823, affd. 368 US 6, in 91 MCC 91 (101).

intended use test: Mitchell Bros. Truck Lines v. US, 225 F. Supp. 755, in 99 MCC 621

COMMERCIAL ZONES

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COMMON CARRIER

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Existing carriers, protection: Gregg Cartage & Stor. Co. v. US, 316 US 74, in 93 MCC 38

Market, justifying reductions: North Carolina Natural Gas Corp. v. US, 200 F. Supp. 745, in 323 ICC 75

National transportation policy: New York Central v. US, 194 F. Supp. 947, in 315 ICC 311 (322); McLean Trucking v. US, 321 US 67, in 317 ICC 261 (292)

Need for different type of service: Schaeffer Transp. Co. v. US, 355 US 83, in 88 MCC 299, 88 MCC 403, 91 MCC 82

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T Transport, 368 US 81, N.Y. Central v. Southern Ry., 226 F. Supp. 463, in 324 ICC 208 (232-3, 235)

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Intent of shipper: Seaboard Air Line v. Lee, 14 F. 2d 439, aff'd 276 US 591, in 323 ICC 740

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Arrow Line, Inc. v. United States, 256 F. Supp. 608, reversing and remanding Arrow Line, Inc., Extension—Limousine Service, 100 MCC 167, latter reversed, 103 MCC 195—§204(d), n. 1; §207(a), n. 5, 24

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Arrow Transp. Co. v. Cincinnati, N.O. & T.P. Ry. Co., 379 US 642, vacating and remanding, per curiam, Cincinnati, N.O. & T.P. Ry. Co. v. United States, 229 F. Supp. 572, which set aside order in Grain in Multiple-Car Shipments—River Crossings to So., 321 ICC 582 [listed for citation only]

Arrow Transp. Co. v. Southern Ry. Co., 372 US 658, affirming 308 F. 2d 181—NTP, n. 5 water; §15(7), n. 2; 28 USC §2325, n. 8, 43; §8, n. 122; §12(1), n. 9; §15(7), n. 1, 8; A-T, 15 USC §1, n. 18; §26, n. 5; 28 USC §1337, n. 1

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Asbury v. Chesapeake & O. Ry. Co., 264 F. Supp. 437, subsequent report, 314 F. Supp. 310 [latter too late too late to include]—§1(20), n. 16

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Ashworth Transfer, Inc.—Control—Hawkes Transp. Co., 87 MCC 653, reversing 85 MCC 801, sustained Black Ball Freight Service v. United States, 223 F. Supp. 191—§5(2), n. 7, 15 duplicate, 45 conditions, violations, 105, 115, 126

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Atlanta Motor Lines—Control—Atlanta-Asheville Motor, 93 MCC 160—§5(2), n. 5, 17, 45 conditions, 110 revocation

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Atlantic Coast Line R. Co. Construction, 324 ICC 286, sustained Florida East Coast Ry. Co. v. United States, 242 F. Supp. 490, latter affirmed, per curiam, 382 US 161—§1(18), n. 47, 130. 134, 140; §1(19), n. 20; §1(20), n. 3

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Atlantic Coast Line R. Co. v. United States, 355 F. 2d 154—§1(6), n. 171

Atlantic Coast Line R. Co. v. United States, 202 F. Fupp. 456, sustaining S.C. Loveland Co., Inc., Extension—Tampa, Fla., 313 ICC 121—NTP, n. 5 inherent; §309(c), n. 25; APA, 5 USC, procedure; 28 USC §2325, n. 45, 48

Atlantic Coast Line R. Co. v. United States, 205 F. Supp. 360, sustaining Routing, Coal from Origins on Louisville & N. R., 313 ICC 752; affirmed per curiam, 371 US 6—§3(4), n. 42. §15(3), n. 20, 35, 50; 28 USC §2325, n. 49.

Atlantic Coast Line R. Co. v. United States, 209 F. Supp. 157, sustaining Phosphate Rock, Points in Florida to Virginia, 313 ICC 495—§15(7), n. 4; §15a(2), n. 1; §17(6), n. 10; 28 USC §2325, n. 40

Atlantic Coast Line R. Co. v. United States, 213 F. Supp. 199, setting aside Thomson Phosphate Co. v. Atlantic Coast Line R. Co., 303 ICC 25 and 311 ICC 315, affirmed as to court's jurisdiction, I.C.C. v. Atlantic Coast Line R. Co., 334 F. 2d 46, latter reversed, 383 US 576. See also Thomson Phosphate Co. v. Atlantic Coast Line R. Co., 282 F. Supp. 698, aff'd 434 F. 2d 180 [last two reports too late to include]—§13(1), n. 11; §16(3) n. 30, 34, 50, 54, 80; RP 17(b), 25(b),(e),(f), 29

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Atlantic Truck Lines, Inc., Contract Carrier Application, 89 MCC 687, modifying 83 MCC 151—§209(a)(1), n. 25

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Atwood's Transport Lines, Inc. v. United States, 211 F Supp. 168, sustaining Alexandria, B. & W. Transit Co. v. Atwood's Transport, 86 MCC 399, affirmed, per curiam, 373 US 377—§208(c), n. 1, 15, 16; 28 USC §2325, n. 40

Auch Inter-Borough Transit Co. Extension—22 States, 88 MCC 455—§203(a)(18), n. 1; §206(b), n. 15 parties, 18; §207(a), n. 7; §208(c), n. 10; §211(b), n. 4

Auclair Transp., Inc. v. United States, 221 F. Supp. 238, sustaining Railway Exp. Agency, Inc., Extension—Nashua, N.H., 91 MCC 311, affirmed per curiam 376 US 514—NTP, n. inherent; §207(a), n. 6 prior rail, 7 existing, 25, 25 existing carriers, rates; 28 USC §2325, n. 56

Auto Drive-Away Company of Hialeah, Inc. v. I.C.C., 360 F. 2d 446—§222(b), n. 30

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Babcock & Lee Petroleum Transporters Extension—Petroleum, 91 MCC 517——§207(a), n. 25 existing carriers, through

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Baggett Bulk Transport, Inc., Contract Carrier Application, 88 MCC 403——§5(2), n. 6, 45 conditions; §207(a), n. 25 existing carriers, railroads; §208(a), n. 30; §209(b), n. 10

Baggett Transp. Co. Extension—Redstone Arsenal, 88 MCC 3, sustained U. S. A. C. Transport, Inc. v. United States, 235 F. Supp. 689, affirmed, per curiam, 380 US 450 ——§204(a)(1), n. 10; §204(b), n. 7 airplaines, dangerous, heavy, missiles; §206(b), n. 15 parties, 16 broadening; §207(a), n. 9, 25 necessity, commodity, one-way; §209(b), n. 10; §212(a), n. 35

Baggett Transp. Co., Inc. v. United States, 231 F. Supp. 905, setting aside and remanding H. Messick, Inc., Extension—Explosives, 92 MCC 293——§209(a)(1), n. 24, 25; §209(b), n. 2; §212(a), n. 1

Baggett Transp. Co. v. United States, 206 F. Supp. 835, sustaining Baggett Transp. Co.—Purchase—Hunt Freight Lines, Inc., 87 MCC 235——§5(2), n. 5, 70, 115; §5(9), n. 10; RP 19

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Bakery Goods, Foodstuffs & Groceries from N.J. & N.Y., 316 ICC 639——§216(b), n. 125 groceries; §216(g), n. 10, 66; §217(a), n. 10

Ballentine Produce, Inc. v. United States, 209 F. Supp. 679, dismissing suit to enjoin enforcement of order of Aug. 3, 1961 in dockets MC-C-2708 and No. 2738——§203(b), n. 50 Act of 1958; §212(a), n. 1; 28 USC §2325, n. 13, 21

Baltimore & O. C. Term. R. Co. v. United States, 389 US 88, see Cancellation of Private Car Allowances, 322 ICC 565

Baltimore & O. R. Co. Discontinuance of Passenger Trains, 317 ICC 673, sustained Rhodes v. United States,——§13a, n. 20, 21, 25

Baltimore & O. R. Co. Discontinuance of Service, 317 ICC 371; prior report 317 ICC 509——§1(18), n. 34,59,91; §1(19), n.1; §13a, n. 15,21,25,25 computation, 30

Baltimore & O. R. Co. v. Atchison, T. & S.F. Ry. Co., 383 US 832, order in Atchison, T. & S.F. Ry. Co. v. United States, 238 F. Supp. 528, treated as divisible from appeals in two other companion cases. Upon consideration of the entire record, judgment is vacated as respects instant appellants, and to that extent the cause is remanded with instructions to dismiss as moot.

Baltimore & O. R. Co. v. Chicago & E.I. R. Co., 318 ICC 771, reversed on the merits 322 ICC 572 [latter too late to include]——§1(5), n. 14, 91, 240

Baltimore & O. R. Co. v. United States, 212 F. Supp. 13, remanding Iron Ore from Eastern Ports to C.F.A. Points, 314 ICC 149; see also New York Central R. Co. v. United States, 207 F. Supp. 483——§1(5), n. 503; §14(1), n. 1

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Baltimore & O. R. Co. v. United States, 249 F. Supp. 712, sustaining Iron Ore from Cleveland, Ohio, to Ohio and Pennsylvania, 323 ICC 746, affirmed, per curiam, 385 US 3——§15a(2), n. 1; APA, 5 USC, judicial

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Bananas and Fresh Produce, Forest Park, Ga., to Ill., Ind., & Mo., 315 ICC 1——§217(a), n. 6

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Bananas from Gulfport to the East, South, and West, 321 ICC 274——§216(b), n. 125 bananas; §216(g), n. 20

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Barber Transp. Co.—Purchase—Conner, 90 MCC 475——§5(2), n. 3, 7 single-line, 48 single-line, 115, 126

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Barney v. Staten Island Rapid Transit Ry. Co., 316 F. 2d 38——SA, 45 USC §1, n. 6, 10; §11, n. 2a

Barsh Truck Lines, Inc., Extension—Bartow, Fla., 88 MCC 579, remanded on other grounds Refrigerated Transport Co. v. United States, 214 F. Supp. 536, modified 92 MCC 254, latter sustained Refrigerated Transport Co. v. United States, 227 F. Supp. 1021——§207(a), n. 25 25 commodity, fitness, public need, rates, special equipment, n. 6 commodities

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Bauman Extension—Coal, 91 MCC 289, affirming 83 MCC 87, other prior report, 79 MCC 547——§209(a)(1), n. 25 denied

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Braswell Freight Lines, Inc., Extension—Atlanta, 95 MCC 457, remanded on other grounds, Dixie Highway Exp., Inc. v. United States, 242 F. Supp. 1016, affirmed on further consideration; 100 MCC 482; injunction against commission entered, Dixie Highway Exp., Inc. v. United States, 268 F. Supp. 239, reversed and remanded, 389 US 409——§205(a), n. 30; §207(a), n. 25 financial; §208(a), n. 30

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Bumgarner v. Joe Brown Company, Inc., 376 F. 2d 749, affirming U. S. Dis. Ct. E.D. Oklahoma——Fair L.S., 29 USC §§213, 215, n. 1

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Butter from Mandan and Bismarck, N. Dak., to Twin Cities, 321 ICC 386, sustained Middlewest Motor Freight Bureau v. United States, 234 F. Supp. 151——§216(g), n. 66

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Canada Packers Ltd. v. Atchison, T. & S.F. Ry. Co., 385 US 182, reversing 342 F. 2d 563, see also Canada Packers v. Atchison, T. & S.F. Ry. Co., 313 ICC 759——§1(1), n. 52; §8, n. 3

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Canadian Natl. Transp.—Control—Husband International, 93 MCC 80——§5(2), n. 5, 110 affiliation, 115

Cancellation of Private Car Allowances, 322 ICC 565, sustained Baltimore & O. C. Term. R. Co. v. United States, C A No. 65-C-609, U.S. Dist. Ct., N.D., Ill. (2/13/67),—F. Supp.——, affirmed, per curiam, 389 US 88——§1(6), n. 2; §15(13), n. 15, 49

Candy and Confectionery from N.J., N.Y., & Pa. to Tex., 321 ICC 154——NTP, n. 5 destructive; §1(5), n. 350 candy; §3(4), n. 41, 42; §6(11), n. 30; §15(7), n. 70; §15a (3), n. 2

Candy & Confectionery, Hoboken & New York to Chicago, 316 ICC 671——§216(b), n. 102, 104; §216(g), n. 66

Candy & Confectionery, Ill. & N.Y. to Ill., Ky., N.Y. & Pa., 318 ICC 540——§1(5), n. 860; §216(g), n. 10, 20, 66

Candy and Confectionery, New York State to Midwest, 318 ICC 409——§216(g), n. 10, 20, 66

Candy and Confectionery, New York, N.Y., to Rockford, Ill., 325 ICC 522——§216(g), n. 10, 66

Candy and Related Articles, Mass. Points to Camden, N.J., 316 ICC 596——§216(b), n. 225

Candy and Related Articles, New York to Detroit, Mich., 314 ICC 759——§216(b), n. 104; §216(g), n. 66

Candy—Montgomery, Ala., to Points in South Carolina, 315 ICC 96——§216(b), n. 225; §216(g), n. 20, 65

Canned Goods, Cincinnati, Ohio, to Ind., Ill., Ky., Mo., & Wis., 315 ICC 169——§216(g), n. 65, 66

Canned Goods from Chicago, Ill., to Twin Cities, 316 ICC 221——§216(b), n. 125 canned goods; §216(g), n. 5, 66

Canned Goods from Eastern Points to Pacific Coast, 315 ICC 757——NTP, n. 5 destructive; §1(5), n. 119, 350 canned; §15(7), n. 70

Canned Goods from Florida to Illinois and Indiana, 318 ICC 445, proposed reduced rates not shown to be compensatory. [Not annotated].

Canned Goods from Pacific Coast to Eastern Points, 315 ICC 769——§NTP, n. 2, 5 destructive; §1(5), n. 76, 119, 120, 350 canned, 433; §1(6), n. 566; §5a, n. 2, 5; §15(7), n. 50, 65, 70; A-T, 15 USC §1, n. 18

Canned goods from San Francisco to Pocatello, Idaho, 316 ICC 296——§216(g), n. 20, 66

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Canzano Common Carrier Application, 95 MCC 568, sustained Trailways of New England, Inc. v. United States, 235 F. Supp. 509 (1964).——§203(a)(19), n. 2; §206(b), n. 22 record in other, 25; §207(a), n. 25 fitness; §208(c), n. 10

Capital Exp., Inc., Extension—Dehumidifiers, 91 MCC 819——§203(a)(15), n. 1; §209(a)(1), n. 18, 25

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Capitol Truck Lines, Inc., Extension—Alternate Route, 88 MCC 212——§202(b), n. 5; §204(c), n. 65; §207(a), n. 28 alternate, alternate to alternate

Car Services, Inc., Common Carrier Application, 92 MCC 595——§203(a)(17), n. 5; §203(c), n. 5

Carbon Black from Tex. and La. to N.J. and Pa., 318 ICC 339——§305(a), n. 28, 102, 125 carbon black

Carbon County Ry. Co. v. United States, 309 F. 2d 938, affirming United States v. Carbon County Ry. Co., 199 F. Supp. 726——SA, 45 USC §1, n. 4; §8, n. 1, 6; §9, n. 5

Carbon Motorway, Inc., Extension—Explosives, 92 MCC 127, application denied when applicant has failed to establish that proposed service will meet a public need that cannot or will not be met by existing carriers. [Not annotated]

Cardinale Trucking Co. v. United States, 232 F. Supp. 339, sustaining orders in Cardinale Trucking Corp. Common Carrier Application, 41 MCC 846——§17(6), n. 10; §206(a)(1), n. 50; §212(a), n. 1; APA, 5 USC, judicial; 28 USC §2325, n. 42; RP 101(e), 102

Carla Ticket Service, Inc., Broker Application, 94 MCC 579, granting authority denied in 91 MCC 721——§211(b), n. 2, 3 fitness, 4

Carload Shippers Assn., Inc., Investigation, 316 ICC 535, see Atlanta Shippers Assn., Inc.—Investigation, 322 ICC 273

Carnation Co. v. Pacific Westbound Conference, 336 F. 2d 650——28 USC §1337, n. 1

Carolina & N.W. Ry. Co. v. United States, 230 F. Supp. 581, denying temporary restraint of order in Louisville & N. R. Co. v. Southern Ry. Co., 319 ICC 639——28 USC §2325, n. 26

Carolina & N.W. Ry. Co. v. United States, 234 F. Supp. 112, sustaining Louisville & N. R. Co. v. Southern Ry. Co., 319 ICC 639, affirmed, per curiam, 380 US 526——§1(4), n. 134

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Carolina Scenic Stages—Purchase—Patterson, 97 MCC 79——§5(2), n. 3, 7, 7 passenger, 48 discontinued, expedited, operating rights, 110 revocation

Carolina Scenic Stages v. United States, 202 F. Supp. 919, sustaining The Greyhound Corp. Extension—Charleston Air Force Base, S.C., 83 MCC 34——§204(a)(6), n. 2; 206(b), n. 22; §207(a), n. 9, 25, 25, past, 30; 28 USC §2325, n. 11, 45, 49

Carolina-Virginia Courier, Inc., Extension—Virginia Counties, 95 MCC 612——§212(a), n. 1; APA, 5 USC, declaratory

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Carriers Insurance Exchange v. Truck Insurance Exchange, 203 F. Supp. 764, affirmed 310 F. 2d 653——§204(e),(f), n. 10 (both cases)

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Cartwright—Purchase—El Reno Transfer & Storage Co., 93 MCC 72, prior report 87 MCC 728——§5(2), n. 2 vehicles; §212(b), n. 10

Casale, see John J.

Case Driveaway, Inc., Extension—Nine States, 89 MCC 633 modifying decision of Nov. 13, 1961——§204(b), n. 7 gen. commodities, machinery, heavy, special equipment; §207(a), n. 25; necessity §212(a), n. 35

Cassens Transport Co.—Purchase—Dealers Transit, Inc., 93 MCC 768——§5(2), n. 15 dividing

Cassens Transport Co.—Purchase—Speedway Transports, Inc., 90 MCC 159——§5(2), n. 2 findings, 7, 8, 48 discontinued; §204(e),(f), n. 10

Cast Iron Boilers, Boyertown, Pa., to Points in Texas, 319 ICC 319——§1(5), n. 350 heating; §15(7), n. 70

Caton Transfer Co., Inc.—Lease—Caton, 93 MCC 416——§5(2), n. 2 State cert., vehicles, 45 violations, 48 intrastate, 50; §5(13), n. 2; RP 23(a)

Cedar Rapids Steel Transp., Inc.—Control and Merger, see Three "I" Truck Line, Inc. v. I.C.C.

Cellulose Film, Not Printed, Marcus Hook, Pa., to Chicago, 316 ICC 322——§216(b), n. 104, 125 miscellaneous; §216(g), n. 66

Cement and Mortar—Ill. & Mo. to Ill., Ind., Iowa, & Ky., 321 ICC 166——§204(c), n. 28, 206; §216(b), n. 102, 104

Cement from Dewey, Okla., to Points in Kansas, 318 ICC 281——§216(b), n. 104, 125 cement; §216(g), n. 65, 66

Cement from Hudson, N.Y., to New England and Pa., 319 ICC 235——§216(b), n. 72, 76, 104, 125 cement; §216(g), n. 5 initial, 20, 66; §218(c), n. 5, 10

Cement from Kosmosdale, Ky., to Ill., Ind., and Ohio, 318 ICC 497——§218(a), n. 25; §218(b), n. 25

Cement from Pennsylvania to New Jersey, 318 ICC 217——NTP, n. 5 destructive; §1(5), n. 95, 350 cement

Cement—Memphis and Fredonia, Kans., to Ark., Mo., & Okla., 318 ICC 273——§216(b), n. 104

Cement within Southern Terr. & from Hagerstown to So., 319 ICC 465—NTP, n. 5 competition, destructive, inherent; §1(5), n. 307, 350 cement, 548; §15(7), n. 42, 50, 70

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Center America Corp.—Investigation of Operations, 88 MCC 740——§203(a)(17), n. 5; §203(c), n. 3, 5; §204(c), n. 50, 251

Central & Southern Motor Frt. Tariff Ass'n v. United States, see Aggregate Rates on Wearing Apparel—Ry. Exp. Agency

Central Freight Lines, Inc.—Control—Alamo Exp., Inc., 90 MCC 96, affirming and clarifying 75 MCC 731 and order of June 4, 1959 (other prior report 70 MCC 610); sustained Walker v. United States, 208 F. Supp. 388——§5(2), n. 2 authority, 45, 45 conditions, 52, 110 securities

Central Freight Lines, Inc.—Control—Inland Motor, 90 MCC 777, modified 93 MCC 411, authority previously denied granted in report of June 29, 1964 (not printed), latter sustained Alamo Exp., Inc. v. United States, 239 F. Supp. 694, affirmed, per curiam, 382 US 19; subsequent report 97 MCC 249——§5(2), n. 45, 45 violations, 110 fitness, temporary; 45 conditions

Central Freight Lines, Inc., Note, 90 MCC 246, sustained Walker v. United States, 208 F. Supp. 388——§5(2), n. 110 securities; §20a(7), n. 2; §214, n. 2

Central Freight Lines, Inc. v. East Texas Motor Freight, 89 MCC 637, reversed on the merits, Yellow Transit Freight Lines, Inc. v. United States, 221 F. Supp. 465; modified, 96 MCC 150——§204(c), n. 50; §203(b), n. 60 commercial, contiguous, distance, municipality, Orange, Tex.; §212(a), n. 35

Central Freight Lines, Inc. v. Strickland Transp., Inc., 102 MCC 291, modifying Strickland Transp. Co., Inc., Extension—Louisiana Routes, 84 MCC 562, sustained Strickland Transp. Co. v. United States, 274 F. Supp. 921, affirmed per curiam 389 US 574——§207(a), n. 6 points

Central Maryland Lines, Inc.—Second Proviso Eligibility, 92 MCC 737, sustained, Central Maryland Lines, Inc. v. United States, 240 F. Supp. 254——§206(a)(1), n. 26

Central Maryland Lines, Inc. v. United States, 240 F. Supp. 254, sustaining Central Maryland Lines, Inc.—Second Proviso Eligibility, 92 MCC 737——§206(a)(1), n. 26; §206(a)(6),(7), n. 2

Central Motor Exp., Inc.—Purchase—Skaggs Transfer, 90 MCC 332, modifying report of Apr. 4, 1962——§5(2), n. 15 split, 48 conditions

Central of Georgia Motor Transport Co. Extension—Cedartown, 94 MCC 6——§206(b), n. 18, 22 number; §207(a), n. 25 express, 28 gateway, 35 substituted

Central of Georgia Ry. Co. Abandonment, 317 ICC 184——§1(18), n. 47, 59, 64, 67, 91; §5(2), n. 56, 70

Central Pac. Ry. Co. Control, see Denver & R. G. W. R. Co. v. I. C. C.

Central R. Co. v. Pennsylvania, 370 US 607——NTP, n. 15 taxation

Central States Motor Freight Bureau, Inc., Petition, 319 ICC 745, subsequent report 321 ICC 726——§202(b), n. 5; §203(a)(10), n. 5; §216(b), n. 425; §217(b), n. 5; §219, n. 15

Central Vermont Ry., Inc. v. United States, 231 F. Supp. 967, denying temporary injunction in Thermoid Co., Southern Division v. Baltimore & O. R. Co., 303 ICC 743——28 USC §2325, n. 14

Centralia Cartage Co. Extension—Elimination of Gateway, 91 MCC 749——§206(b), n. 22 oral; §207(a), n. 28 alternate, elimination

Cereal, Coffee, Tea, Drugs, Related Art., N.J. & Pa. to Tex., 319 ICC 424, reversing 314 ICC 734——NTP, n. 5 destructive; §1(5), n. 350 cereals, drugs, extracts, 663

Chadwick Contract Carrier Application, 92 MCC 271——§209(a)(1), n. 18, 25 specialized

Cham. of Com. of St. Joseph, Mo. v. Red Ball Exp. Co., 91 MCC 513——§216(b), n. 550

Chambers, see W. M.

Chandler v. Aero Mayflower Transit Co., 374 F. 2d 129——§219, n. 32

Cheese from Elnora, Ind., to Chicago, Ill., 315 ICC 639, proposed reduced t.l. rate, on increased minimum, not shown to be compensatory; would be burdensome on other traffic; not approved. [Not annotated]

Chem-Haulers, Inc., Extension—Liquid Chlorine, 88 MCC 1——§204(b), n. 7 special equipment; §206(b), n. 15 notice, 16; §207(a), n. 6, 6 equipment

Chemical Express Extension—Douro, Tex., 89 MCC 453——§207(a), n. 6 plant site, 25 necessity; §209(b), n. 10; §210, n. 5

Chemical Leaman Tank Lines, Inc., Extension—Avisun Plant, 95 MCC 394——§204(b), n. 7 dump-truck, petroleum; §206(b), n. 15 parties; §207(a), n. 25 commercial competition, commodity

Chemical Leaman Tank Lines, Inc., Extension—Salt, 91 MCC 683——§204(b), n. 7 chemicals; §207(a), n. 6 equipment

Chemical Leaman Tank Lines, Inc., Extension—Toluene, 95 MCC 349——§204(b), n. 7 petroleum

Chemical Leaman Tank Lines, Inc. v. United States, 251 F. Supp. 269, sustaining orders in Doc. No. MC-FC-65847, Roy Bros., Inc., Pinehurst, Mass., Transferee, and Bianchi Motor Transp., Inc., Boston, Mass., Transferor——§5(2), n. 2 vehicles; §212(b), n. 10; APA, 5 USC, hearing

Chemicals and Related Articles from St. Louis to Chicago, 318 ICC 369——§216(b), n. 112, 125 drugs

Chemicals between Cedartown, Ga., and Points in N.J., 316 ICC 249——§216(g), n. 66

Chemicals, Drugs, Toilet Prep.—Texas and Midwest—East, 315 ICC 598——§216(g), n. 25

Chemicals, Other Articles, Kearney, N.J., to New York Area, 315 ICC 71——§216(g), n. 5, 20

Chemtrans, Inc., Extension—Chemicals to Bridgeville, Pa., 88 MCC 238——§209(a)(1), n. 25; §209(b), n. 10, 20

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Cherokee Pipe Line Co., 57 Val. Rep. 385, 680, 810 [listed for citation; not annotated]

Chesapeake & O. Ry. Co.—Control—Baltimore & O. R. Co., 317 ICC 261, sustained Broth. of Maint. of Way Employees v. United States, 221 F. Supp. 19, affirmed, per curiam, 375 US 216——NTP, n. 5 adequate, combination; §5(2), n. 3, 7, 7 diversions, 8, 8b, 45, 45 conditions, violations, 52, 70, 105, 110 rates

Chesapeake Motor Lines, Inc., Common Carrier Application, 89 MCC 237——§203(b), n. 50 Act of 1958

Chicago & E.I. R. Co. v. Illinois Central R. Co., 261 F. Supp. 289——§1(15), n. 5; §1(18), n. 129; §1(20), n. 1, 16, 17, 24; §1(22), n. 1, 11

Chicago & E.I. R. Co. v. Midwest Homes, Inc., 371 F. 2d 300——§6(7), n. 263

Chicago & N.W. Ry. Co. Abandonment, 317 ICC 207, reversing in part 307 ICC 814, sustained Creston Grain & Lumber, Inc. v. United States, 214 F. Supp. 840——§1(18), n. 57, 60, 64, 68, 91; §1(19), n. 18, 20; §1(20), n. 3; §15(13), n. 39

Chicago & N.W. Ry. Co. Discontinuance of Passenger Trains, 317 ICC 21——§13a, n. 20, 22, 25, 25 computation, feeder

Chicago & N.W. Ry. Co. Discontinuance of Passenger Trains, 320 ICC 85, sustained State of Minnesota v. United States, 238 F. Supp. 107——§1(18), n. 57; §13a, n. 1, 2, 20, 25, 25 computation, 30

Chicago & N.W. Ry. Co. Discontinuance of Passenger Trains, 320 ICC 648——§13a, n. 2, 20, 21, 22, 25, 25 computation

Chicago & N. W. Ry. Co.—Merger, 330 ICC 13, see Soo Line R. Co. v. United States, 280 F. Supp. 907

Chicago & N.W. Ry. Co. Trackage Rights, 317 ICC 350——§1(18), n. 60, 65, 68, 91, 111; §5(2), n. 56

Chicago & N.W. Ry. Co. v. Brotherhood of Locomotive Engineers, 202 F. Supp. 277, affirmed Brotherhood of Locomotive Engineers v. Chicago & N. W. Ry. Co., 314 F. 2d 424——§5(2), n. 70; §5(11), n. 2, 3; 28 USC §1337, n. 1; §2201, n. 2

Chicago & N.W. Ry. Co. v. Chicago, M., St. P. & P. R. Co., 380 US 448, reversing, per curiam, Chicago, M., St. P. & P. R. Co. v. United States, 214 F. Supp. 244, which reversed on jurisdictional grounds Duluth, S.S. & A. R. Co. v. Chicago, M., St. P. & P. R. Co., 307 ICC 311 [not annotated]; rehearing denied, 381 US 907

Chicago & N.W. Ry. Co. v. Louisville & N. R. Co., 318 ICC 286——§3(4), n. 41

Chicago & N. W. Ry. Co. v. Toledo, P. & W. R. Co., 217 F. Supp. 64, affirmed 324 F. 2d 936——§5(2), n. 56; 28 USC §1337, n. 1

Chicago, B. & Q. R. Co. v. Chicago & E.I. R. Co., 322 ICC 138; modifying 315 ICC 37——NTP, n. 5 destructive; §1(5), n. 78, 90, 95, 350 coal; §6(1), n. 56; §13(1), n. 26; §305(a), n. 125 coal

Chicago, B. & Q. R. Co. v. New York, S. & W. R. Co., 318 ICC 180, prior report 297 ICC 291——APA, 5 USC Examiners

Chicago Express, Inc., In re, 222 F. Supp. 566, affirmed 332 F. 2d 276——Bank. Act, 11 USC §205, n. 20, 22

Chicago Great Western Ry. Co. Discontinuance, 328 ICC 664——§1(18), n. 30; §13a, n. 20, 25 computation, 30

Chicago Great Western Ry. Co. Discontinuance of Service, 317 ICC 99——§13a, n. 20, 21, 25, 25 computation, 30

Chicago G.W. Ry. Co. v. Illinois Central R. Co., 275 F. Supp. 909——§1(20), n. 27; §1(22), n. 11

Chicago, Ill., Commercial Zone, 86 MCC 735, prior report 1 MCC 673——NTP, n. 5 exemption; §203(b), n. 60 expansion, Chicago

Chicago, Ill., Commercial Zone, 88 MCC 329, prior reports 1 MCC 673, 86 MCC 735——§203(b), n. 60, commercial, expansion; §204(c), n. 226

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Chicago Kansas City Freight Line, Inc.—Purchase—Capitol, 97 MCC 68——§5(2), n. 15 regular-irregular, 115; §207(a), n. 25 intrastate

Chicago, M., St. P. & P. R. Co. Discontinuance of Service, 317 ICC 691——§13a, n. 21, 22, 25, 30

Chicago, M., St. P. & P. R. Co. Discontinuance of Trains, 317 ICC 761——§13a, n. 2, 15, 35

Chicago, M., St. P. & P.R. Co. Trackage Rights, 317 ICC 14, prior report decided Jan. 17, 1962; modified, 317 ICC 550——§5(2), n. 56, 70, 110 stock, 112

Chicago, M. St. P. & P. R. Co. v. Alva Coal Corp., 365 F. 2d 49——SA, 45 USC §1, n. 10; §11, n. 2a

Chicago, M., St. P. & P. R. Co. v. United States, 242 F. Supp. 698, sustaining Duluth, S.S. & A. R. Co. v. Chicago, M., St. P. & P. R. Co., 307 ICC 311, following reversal of commission case on jurisdictional grounds, 214 F. Supp. 244, which was reversed, per curiam, Chicago & N.W. Ry. Co. v. Chicago, M., St. P. & P. R. Co., 380 US 448, rehearing denied, 381 US 907——§1(18), n. 130

Chicago, N.S. & M. Ry. Abandonment of Entire Operation, 317 ICC 191, affirmed 317 ICC 363, prior report 312 ICC 99; sustained State of Illinois v. United States, 213 F. Supp. 83, affirmed, per curiam, 373 US 378——§1(18), n. 50, 60, 91, 2, 44, 58, 63, 91; §1(20), n. 1, 3, 10; §1(22), n. 12

Chicago, R. I. & P. R. Co. Discontinuance of Trains, 317 ICC 601——§13a, n. 2, 20, 22

Chicago, R.I. & P. R. Co. v. Furniture Forwarders of St. Louis, 272 F. Supp. 62, affirmed Furniture Forwarders of St. Louis v. Chicago, R.I. & P. R. Co., 393 F. 2d 537——§6(7), n. 10, 217

Chicago, R.I. & P. R. Co. v. Furniture Forwarders of St. Louis, Inc., 267 F. Supp. 175——§6(7), n. 5, 12, 16, 160

Chicago, R. I. & P. R. Co. v. United States, 205 F. Supp. 378, sustaining Chicago & N. W. Ry. Co. Construction, 312 ICC 639——§1(18), n. 1, 45, 130; APA, 5 USC, procedure

Chicago, R.I. & P. R. Co. v. United States, 233 F. Supp. 381, sustaining American Barge Line Co. v. Alabama G.S.R. Co., 316 ICC 759, affirmed, per curiam, 380 US 373——§1(5), n. 77; §2, n. 17, 55, 96; §3(4), n. 41; §15(1), n. 89; 28 USC §2325, n. 53, 56

Chicago S.S. & S.B. R. v. Monon R., 235 F. Supp. 984——§5(2), n. 5; 28 USC §2325, n. 27

Chicago, S.S. & S.B. R. v. United States, 221 F. Supp. 106, sustaining orders of Jan. 24 and March 12, 1962, in Finance Docket No. 21804 Chicago, S.S. & S.B. R. Stock——§17(6), n. 10; §20a(2), n. 2, 24; §20a(6), n. 2; §20a(7), n. 2; 28 USC §2325, n. 40, 46, 56, 61; RP 101(a)(2), (b)

Chicago South Shore & S.B. R. Discontinuance of Service, 320 ICC 440——§13a, n. 15

Chief Freight Lines Co. v. United States, 230 F. Supp. 79, sustaining Railway Exp. Agency, Inc., Extension—Yates Center, Kans., 92 MCC 289——§17(6), n. 10; 28 USC §2325, n. 11, 62

Cigarettes and Tobacco between Greensboro and Louisville, 319 ICC 679——§216(b), n. 25, 45, 125 tobacco; §216(g), n. 65

Cigarettes and Tobacco between North Carolina and Pa., 315 ICC 297——NTP, n. 5 destructive; §216(b), n. 165, 225

Cigarettes from Richmond, Va., to Baltimore, Md., 316 ICC 68——§15a(3), n. 2; §216(b), n. 48

Cincinnati, N.O. & T.P. Ry. Co. v. United States, 220 F. Supp. 46, restraining order in Grain in Multiple-Car Shipments—River Crossings to So., 321 ICC 582——28 USC §2325, n. 26

Cincinnati, N.O. & T.P. Ry. Co. v. United States, 229 F. Supp. 572, setting aside order in Grain in Multiple-Car Shipments—River Crossings to So., 321 ICC 582, vacated and remanded, per curiam, Arrow Transp. Co. v. Cincinnati, N.O. & T.P. Ry. Co., 379 US 642——§1(5), n. 23, 54; §3(1), n. 76; §15(7), n. 2; §15a(3), n. 2; 28 USC §2325, n. 40, 45, 55, 57

Cincinnati, Ohio, Commercial Zone, 88 MCC 789, prior reports 26 MCC 49, 41 MCC 227, 46 MCC 733——§203(b), n. 60 boundaries, construction, expansion

Cincinnati, Ohio, Commercial Zone, 92 MCC 180, pertinent prior reports 26 MCC 49, 41 MCC 227, 46 MCC 733——§203(b), n. 60 expansion, Cincinnati

Cincinnati, Ohio, Commercial Zone, 94 MCC 766——§203(b), n. 60 Cincinnati, Ohio

Cities Service Pipe Line Co., 57 Val. Rep. 438, 634, 829 [listed for citation; not annotated]

City of Alexandria, La. v. Chicago, R.I. & P. R. Co., 311 F. 2d 7, reversing and remanding Chicago, R.I. & P. R. Co. v. City of Alexandria, La., 201 F. Supp. 3, rehearing denied 321 F. 2d 822, certiorari denied 375 US 922——NTP, n. 15 taxes; §1(18), n. 5, 30, 55

City of Galveston v. United States, 257 F. Supp. 243, sustaining Nueces County Nav. Dist. No. 1 v. Atchison, T. & S.F. Ry. Co., 325 ICC 400, affirmed, per curiam, 386 US 269——§3(1), n. 96, 106a; APA, 5 USC, judicial, reports; 28 USC §2325, n. 49

City of Hialeah, Fla. v. Florida East Coast Ry. Co., 317 ICC 34——NTP, n. 15; §3(5), n. 3, 6; §5(2), n. 56

City of Williamsport v. United States, 273 F. Supp. 899, see also 282 F. Supp. 46——§13a, n. 2; 28 USC §2325, n. 7

City of Williamsport v. United States, 282 F. Supp. 46, sustaining F.D. No. 24398, Pennsylvania R. Co. Discontinuance of Trains Between Buffalo, N.Y., and Baltimore, Md., affirmed, per curiam, 392 US 642——§13a, n. 2, 15

City of Wilmington v. Alabama G.S. R. Co., 316 ICC 709, modified 319 ICC 620——§1(5), n. 24, 46, 58, 504, 506; §3(1), n. 106a; §13(1), n. 71; §15(3), n. 50; §4(1), n. 168

Claim Settlement on Household Goods—U.S.A., 318 ICC 359——§216(b), n. 735; §217(b), n. 50

Clark Tank Lines Co. Extension—Fertilizer, 95 MCC 422, remanded on procedural grounds, James J. Williams, Inc. v. United States, 241 F. Supp. 535——§207(a), n. 30; §208(a), n. 35

Clark Transport Co. v. I. C. C., 228 F. Supp. 236——28 USC §1398, n. 2; §1404, n. 1

Clark Transport Co. v. I.C.C., 233 F. Supp. 839, sustaining K. W. McKee, Inc., Extension—Secondary Movements to N. Dak., 92 MCC 805——§17(6), n. 10; §209(a)(1), n. 25, 28 USC §2325, n. 40

Class Rates between Greenville, Miss., and Arkansas, 316 ICC 629——§216(b), n. 45, 92, 200; §216(d), n. 20; §216(g), n. 5 reductions, 65

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Clay from Greybull, Wyo., to Points in the Middle West, 314 ICC 705——§216(b), n. 104, 112; §216(g), n. 66

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Dixie Highway Exp., Inc. v. United States, 242 F. Supp. 1016, remanding Braswell Freight Lines, Inc., Extension—Atlanta, 95 MCC 457, affirmed 100 MCC 482, injunction against commission entered, 268 F. Supp. 239, reversed and remanded on other grounds, United States v. Dixie Highway Exp., Inc., 389 US 409——NTP, n. 5 applications; §206(b), n. 23; APA, 5 USC, judicial; 28 USC §2325, n. 57

Dixie Ohio Exp., Inc., Investigation and Revocation, 94 MCC 625, remanded on other grounds, Dixie Ohio Exp., Inc. v. United States, 263 F. Supp. 993, subsequent report 105 MCC 835 [latter too later to include]——§204(c), n. 206; §206(a)(1), n. 50; §206(b), n. 15 notice, 18; §207(a), n. 25 existing service

Dixie Ohio Express, Inc. v. United States, 263 F. Supp. 993, remanding Dixie Ohio Exp., Inc., Investigation and Revocation, 94 MCC 625——§207(a), n. 24, 25 past; §208(a), n. 30; 28 USC §2325, n. 40

Dixie Transport Co., Petition for Modification, see Motor Convoy, Inc. v. United States, 235 F. Supp. 250

Dodds Truck Line, Inc.—Purchase—Strain, 93 MCC 229——§5(2), n. 48 conditions, 110 restrictions; §203(b), n. 60 intrastate, territorial; §207(a), n. 6 points

Dog or Cat Food from Boston to Middle Atlantic Points, 318 ICC 59——§216(b), n. 25, 125 feeds; §216(g), n. 66; §217(a), n. 35

Dolby Advertising of Lake Charles v. Texas & N.O.R. Co., 315 ICC 33——§1(5), n. 222; §1(6), n. 221; §6(7), n. 201

Donaldson Transfer Co. Extension—Points in United States, 89 MCC 651, modified 91 MCC 896——§203(a)(14), n. 1 special service; §206(b), n. 15 notice; §207(a), n. 6, 9, 25 special service

Dorn's Transp., Inc.—Purchase—Mayberry Motor Freight, 90 MCC 269——§5(2), n. 7 single-line, 48 intrastate, 110 restrictions, 115; §207(a), n. 25 past

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Drawbar Extensions | on Hydroframe—60 Boxcars, 322 ICC 620——SA, 45 USC §2, n. 8; §11, n. 7; §12, n. 10

Dreyer Extension—Slag and Slag Aggregates, 96 MCC 343——§204(b), n. 7 chemicals; §207(a), n. 6 commodities

Drilling Mud or Clay—Greybull and Gascoyne to Texas, 315 ICC 191——§216(b), n. 104; §216(g), n. 66

Drugs and Related Articles from N.J. and N.Y. to Texas., 318 ICC 67——NTP, n. 5 destructive; §216(c), n. 10; §305(a), n. 25, 102, 125 drugs; §307(d), n. 150

Drugs and Related Articles, New Jersey to Chicago, 322 ICC 734, reversed and remanded Eastern Central Motor Carriers Ass'n v. United States, 239 F. Supp. 519

Drugs and Toilet Preparations between Middle Atlantic States, 315 ICC 619, proposed reduced l.t.l. class rates found not shown to be compensatory; not approved. [Not annotated]

Drugs & Toilet Preparations, N.J. to Baltimore & Wash., 316 ICC 252——§216(b), n. 25; §216(g), n. 20

Dry Goods and Telephone Housings within Central Ter., 318 ICC 175——§216(b), n. 25, 125 cloth; §216(g), n. 5 reductions, 65

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E. & L. Transport Co.—Purchase—Dealers Transport Co., 87 MCC 785——§5(2), n. 8, 15 initial; §5(3), n. 10; §212(a), n. 25

E. B. Law and Son, Inc., Extension—El Paso, Tex., 94 MCC 532, sustained E. B. Law and Son, Inc. v. United States, 247 F. Supp. 847—§204(b), n. 7 petroleum, 8; §207(a), n. 25 existing service; §212(a), n. 1

E. B. Law and Son, Inc. v. United States, 247 F. Supp. 846, sustaining E. B. Law and Son, Inc., Extension—El Paso, Tex., 94 MCC 532——§204(d), n. 1; §212(a), n. 1

E. Brooke Matlack, Inc., Extension—Flour in Bulk, 89 MCC 76——§207(a), n. 25 necessity

E. Brooke Matlack, Inc., Extension—Niagara Falls, N.Y., see Southern Tank Lines, Inc., Extension—St. Bernard, Ohio

ET & WNC Transp. Co. Ext.—Reg. Routes to & from New York, 103 MCC 751, see Mason & Dixon Lines, Inc., v. United States, 271 F. Supp. 54

E. W. Bohren Transport, Inc., Extension—New Contracts, 89 MCC 266——§203(a)(15), n. 1; §210, n. 3

Eagle Bus Lines Common Carrier Application, 92 MCC 793——§5(2), n. 2 vehicles; §208(c), n. 10

Eagle Motor Lines, Inc., Investigation and Revocation, 94 MCC 704, sustained Eagle Motor Lines, Inc. v. United States, 236 F. Supp. 502——§204(b), n. 7, 7 iron-steel, returned; §212(a), n. 1, 35

Eagle Motor Lines, Inc. v. United States, 236 F. Supp. 502, sustaining Eagle Motor Lines, Inc., Investigation and Revocation, 94 MCC 704——§212(a), n. 1; APA, 5 USC, examiners

Eastern Central Motor Carriers Ass'n v. United States, 239 F. Supp. 591, reversing and remanding Drugs and Related Articles, New Jersey to Chicago, 322 ICC 734——§216(b), n. 104; §216(g), n. 66; APA, 5 USC judicial; 28 USC §2325, n. 40

Eastern Exp., Inc., Extension—Vincennes, Ind., 92 MCC 696——§207(a), n. 28 alternate; §212(a), n. 35

Eastern Wine Corp. v. New York Central R. Co., 355 F. 2d 30——§20(11), n. 37

East-West Motor Transport Common Carrier Application, 88 MCC 352——§203(a)(11), n. 5; §207(a), n. 25, 25 interchange

Eaton Metal Products Co. v. Union Pac. R. Co., 321 ICC 340, reversing report of Apr. 2, 1963——§1(5), n. 236; §15(3), n. 29

Eazor Exp., Inc., Extension—Alternate Routes, 89 MCC 345, sustained Eazor Exp., Inc. v. United States, 218 F. Supp. 393——§207(a), n. 25 existing carriers, 28 alternate

Eazor Exp., Inc., Stock, 90 MCC 235——§214, n. 24, 25

Eazor Exp., Inc., Stock, 90 MCC 388, affirmed 90 MCC 391——§214, n. 9, 24

Eazor Exp., Inc. v. United States, 218 F. Supp. 393, sustaining Eazor Exp., Inc., Extension—Alternate Routes, 89 MCC 345——§206(b), n. 18; §207(a), n. 5; APA, 5 USC Examiners; 28 USC §2325, n. 46

Eazor Exp. v. Pennsylvania R. Co., 214 F. Supp. 695——§20(11), n. 116; 28 USC §1445, n. 1

Eddleman v. United States, 229 F. Supp. 231, setting aside and remanding Eddleman Bros. Contract Carrier Application, 94 MCC 81, subsequent report 98 MCC 681 [latter too late to include]——§206(b), n. 22; §209(a)(1), n. 5, 24; §209(a)(1), n. 5, 24; §209(b), n. 2, 18, 20, 25; APA, 5 USC procedure

Edwards Extension—Jackson, Tenn., 88 MCC 566, modifying 88 MCC 318, which reversed report of May 10, 1961——§206(b), n. 15 notice, omissions; §207(a), n. 25 existing carriers, §208(a), n. 30 fitness, rates;

Edwards Motor Transit Co. v. United States, 201 F. Supp. 918, sustaining Capitol Bus Co. Extension—Elmira-Wilkes-Barre, 83 MCC 559——§206(b), n. 23; §207(a), n. 5, 25 desire for connecting, existing carriers, prior; 28 USC §2325, n. 13, 40, 56

Edwards Trucking, Inc., Extension—Hemingway, S.C., 92 MCC 383, affirming report of June 14, 1961——§206(b), n. 22 cross-examination

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Eldon Miller, Inc., Extension—Memphis, Tenn., to Three States, 88 MCC 309, modifying 84 MCC 195 and reversing W. M. Chambers Truck Line, Inc., Extension—Wood Preservatives, 84 MCC 184——§206(b), n. 15 parties; §207(a), n. 6 tacking, 25 necessity; RP 101(a)

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Elgin Coal Co. v. Louisville & N. R. Co., 277 F. Supp. 247, affirmed 411 F. 2d 1043——§1(11), 5, 84; §23, n. 2, 5

Emerald Pipe Line Corp., 57 Val. Rep. 557, 709 [listed for citation; not annotated]

Empire Petroleum Co. v. Chicago, B. & Q.R. Co., 315 ICC 291——§6(7), n. 49; §13(1), n. 37, 86; EA, §42, n. 1; RP 70

Emsley Truck Rentals, Inc.—Purchase—Foodway Exp., Inc., 90 MCC 414——§5(2), n. 48 conditions, discontinued, 115; §210, n. 3

Ephraim Freightways, Inc. v. Red Ball Motor Freight, Inc., 376 F. 2d 40, certiorari denied 389 US 829——28 USC §§ 1291, 1292, n. 1

Emphraim v. Safeway Trails, Inc., 341 F. 2d 815——§216(a), n. 10

Erickson and Wolf Alaska "Grandfather" Application, 325 ICC 276——§309(a) n. 1, 50

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Erie-Lackawanna R. Co. Extension—Scranton, Pa., 91 MCC 21——NTP, n. 10 restrictions; §204(c), n. 206; §206(b), n. 22; §207(a), n. 35, 35 substituted; RP 4(d)

Erskine & Sons, Inc. v. United States, 235 F. Supp. 907, sustaining McFeeley Extension—Coke, 92 MCC 769——§209(a)(1), n. 25; 28 USC §2325, n. 49

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Estate of E. L. Northcutt v. United States, 263 F. Supp. 255, see Estate of E.L. Northcutt, Deceased—Petition Proceeding, 94 MCC 585

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Everett—Investigation of Operation, 88 MCC 784—§203(b), n. 50; §204(c), n. 251

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Exley Express, Inc. v. United States, 385 US 371, affirming order of U.S. D.C., D. Oregon, Civil No. 65-427, dated June 27, 1966, which sustained grant of authority in Albany Food Products, Inc., "Grandfather" Application, 98 MCC 618 [not annotated]

Exley Express, Inc. v. United States, 254 F. Supp. 363, remanding Jacobs Extension—Frozen Foods, 96 MCC 87—§209(a)(1), n. 24

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F. & W. Exp., Inc., Extension—Friars Point, Powell, and Dundee, 88 MCC 262, modifying report of Feb. 8, 1961——§207(a), n. 6 points, 25, 25 existing carriers

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Farmers Potato Distr. Co., Inc. v. Atchison, T. & S. F. Ry., 315 ICC 105; modified 318 ICC 415——§1(5), n.228,235,319; §4(1), n.168,266,269; §6(7), n. 231;§8, n.94,186; §13(1), n.140

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Fess Transport Common Carrier Application, 91 MCC 924, modifying 86 MCC 625——§204(c), n. 205; §207(a), n. 25 fitness, interchange, past; §217(a), n. 20

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Florida East Coast Ry. Co. v. United States, 228 F. Supp. 340, temporarily restraining order in Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 ICC 122——28 USC §2325, n. 26

Florida East Coast Ry. Co. v. United States, 242 F. Supp. 14, setting aside and enjoining, without prejudice, orders in Seaboard Air Line R. Co.—Merger—Atlantic Coast Line, 320 ICC 122, remanded for full consideration on the merits, Seaboard Air Line R. Co. v. United States, 282 US 154, on remand, commission order sustained, 259 F. Supp. 993——28 USC §2322, n. 1; §2325, n. 7

Florida East Coast Ry. Co. v. United States, 242 F. Supp. 490, sustaining Atlantic Coast Line R. Co. Construction, 324 ICC 286, affirmed, per curiam, 382 US 161——28 USC §2325, n. 40

Florida Refrigerated Service, Inc., Extension—Cheese, 94 MCC 361——§204(e), (f), n. 10; §206(b), n. 22 filing; §207(a), n. 25 lease

Florida Refrigerated Service, Inc., Extension—Frozen Foods, 94 MCC 364——§204(c), n. 53; §206(b), n. 23; §207(a), n. 6, 25, 25 fitness

Floyd & Beasley Transfer Co., Inc. v. United States, 385 US 647, affirming 256 F. Supp. 23 which sustained Floyd & Beasley Transfer Co., Inc., Extension—Childersburg, 99 MCC 258

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Foodstuffs, Magazines or Periodicals—N.Y., Pa., to West, 314 ICC 767——§1(5), n. 119, 663, 865

Foodstuffs, New York Points to Milwaukee & Twin Cities, 315 ICC 725 ——§216(b), n. 125 foodstuffs; §216(g), n. 66

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Forms or Unfinished Shapes, Fabricated——Classification, 316 ICC 679——§1(5), n. 34, 225; §6(7), n. 49, 51

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Fox-Smythe Transp. Co. Extension—Peddle Service, 88 MCC 57——§17(12), n. 1; §206(b), n. 16 narrowing; §207(a), n. 6, 6 plant, 25 fitness, through, volume; §209(a)(1), n. 18

Fraering Brokerage Co., Inc., Investigation of Operations, 95 MCC 771, discontinuing investigation (81 MCC 337) following decision in Shannon v. United States, 219 F. Supp. 781, affirmed 377 US 311 [Not annotated]

Frank P. Dow Co., Inc., Extension—Longview, 322 ICC 103——§402(a)(7), n. 1; §410(b), n. 18, 22, 25; §410(c), n. 2, 7, 25; §410(e), n. 25; §410(f), n. 10; RP 101(b)

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Freight, All Kinds, between Baltimore and Philadelphia, 316 ICC 139, proposed flat charge per trailer, loaded or empty, not shown to be just and reasonable. [Not annotated.]

Freight, All Kinds, between Harrisburg and Pa. Points, 316 ICC 41——§216(b), n. 180; §216(d), n. 25; §216(g), n. 65; §225, n. 49

Freight, All Kinds, Chicago and Ind., Mich., Ohio, 322 ICC 423——§216(b), n. 180; §216(c), n. 3, 10; §216(d), n. 25; §216(g), n. 10, 66

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Freight, All Kinds, Chicago to Cedar Rapids, Des Moines, 321 ICC 380——§216(b), n. 225; §216(g), n. 65

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Freight, All Kinds, from Eastern Points to Milwaukee, Wis., 316 ICC 49——§1(5), n. 495

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Freight, All Kinds, N.Y. & N.J. Stations to Indianapolis, 316 ICC 623——§1(5), n. 495; §2, n. 55; §6(1), n. 136

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Freight Consolidators Cooperative, Inc. v. United States, 230 F. Supp. 692, sustaining American Freight Forwarding Corp. v. Konlon and Walder, 318 ICC 507——§402(c), n. 2, 15; §403(f), n. 15, 30; RP 56, 57

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Freight Forwarders Institute v. United States, 263 F. Supp. 460, affirming in part and remanding in part Piggy-Back Shippers Assn. of Florida—Investigation, 323 ICC 672——§403(f), n. 5; APA, 5 USC, judicial

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Fresh Meats, Ill., Ind., Ky., Ohio & Mo. to Points in Fla., 318 ICC 5——NTP, n. 5 destructive; §1(5), n. 27; §3(1), n. 16, 36, 66, 80; §15(7), n. 28, 60, 81

Fresh or Fresh Salted Meats from Colorado to Chicago, 322 ICC 174——§216(b), n. 60, 102, 104, 112, 313

Fresh Vegetables from Tex., Calif., Ariz., and N. Mex., 319 ICC 141——§1(5), n. 13, 78; §13(1), n. 136; §13(2), n. 2; §15(1), n. 28, 72

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Frit (Glazing Compounds), Chicago, Ill., to Hamilton, Ohio, 316 ICC 453, reduced rate not shown to be compensatory; not approved. [Not annotated]

Frost Motor Exp., Inc., Contract Carrier Application, 89 MCC 155——§203(a)(17), n. 5; §203(c), n. 3; §209(a)(1), n. 15

Frozen Food Exp. Common Carrier Application, 89 MCC 555, see Frozen Food Exp. v. United States, 219 F. Supp. 131

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Frozen Food Exp. v. United States, 219 F. Supp. 131, reversing and remanding Frozen Food Exp. Common Carrier Application, 89 MCC 555, latter decision modified 98 MCC 510 [not annotated] which is sustained, Frozen Food Express v. United States, 280 F. Supp. 661——§203(b), n. 50 Act of 1958; §206(a)(1), n. 50; 28 USC §2325, n. 40, 44, 48, 55, 58, 61

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Gibney Distributors, Inc., Common Carrier Application, 95 MCC 733——§207(a), n. 25 existing service, fitness; RP 1.23(b)

Gilbertville Trucking Co. v. United States, 371 US 115, affirming in part 196 F. Supp. 351, which sustained L. Nelson & Sons Transp. Co.—Control and Merger, 80 MCC 257; remanded on divestiture issue——§5(2), n. 2, 45 violations, 52, 110 fitness; APA, 5 USC procedure

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Great Atlantic & Pacific Tea Co. v. Atchison, T. & S.F. Ry. Co., 224 F. Supp. 903, affirmed 333 F. 2d 705, certiorari denied, 379 US 967——§8, n. 85; §20(11), n. 20, 30, 40

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Gregory Heavy Haulers, Inc., Extension—Road Constr. Machinery, 92 MCC 476, authority granted to transport construction machinery and equipment from Illinois points to Tennessee, Virginia, and North Carolina, restricted against transportation of parts to Memphis and transportation of heavy or bulk articles requiring special equipment. [Not annotated]

Gregory Heavy Haulers, Inc., Extension—Three States, 88 MCC 45——§204(b), n. 7 parts; §207(a), n. 6 commodities, 7 existing, 25 necessity

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H. Messick, Inc., Extension—Explosives, 89 MCC 209, modified 91 MCC 585, further modified, 92 MCC 293, latter also dismissing H. Messick, Inc., Extension—Carthage, Mo., 83 MCC 1, authority therein denied being embraced in that finally granted; 92 MCC 293 set aside and remanded, Baggett Transp. Co., Inc. v. United States, 231 F. Supp. 905, subsequent report 102 MCC 492 [latter too late to include]——§203(a)(15), n. 1; §209(a)(1), n. 18, 25 specialized; §209(b), n. 20, 10; §203(a)(19), n. 2
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Highway Express Lines, Inc. v. Jones Motor Co., Inc., 377 US 217, see Jones Motor Co. v. United States, 218 F. Supp. 133

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Houff Transfer, Inc., Extension—Staunton, 92 MCC 702——§204(b), n. 7 hardware; §208(a), n. 30

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Howard Sober, Inc., Extension—Secondary Truckaway Minnesota, 88 MCC 755——§206(b), n. 22 record; §207(a), n. 6 tacking, 25 existing carriers, truckaway

Hoyt Contract Carrier Application, 92 MCC 189——§209(a)(1), n. 15, 25; §209(b), n. 2

Hudson & Manhattan R. Co., in re, 224 F. Supp. 815, [see also 178 F. Supp. 103] modified as to amount of compensation allowed two law firms, 339 F. 2d 114——Bank. Act, 11 USC §205, n. 112; §624, n. 115

Hudson & Manhattan R. Co. Trustee Abandonment, 312 ICC 701, modifying 312 ICC 487——§1(3)(a), n. 1; §1(19), n. 1; §5(2), n. 5, 100, 115; §20a(1), n. 3; §20a(2), n. 75, 109, 114

Hudson Transit Lines, Inc., Extension—Nassau, 92 MCC 586, reversing decision of Oct. 3, 1961; sustained Campus Travel, Inc. v. United States, 224 F. Supp. 146——§207(a), n. 25 past; §208(c), n. 10

Hudson Transit Lines, Inc.—Purchase—Inter-City Transp., 97 MCC 524; prior report 97 MCC 105——§5(2), n. 8, 15 dividing, 48 routes, 100 intervention; §5(3), n. 10; RP 72(e)

Hudson Transp. Co.—Purchase—Hillside Freight Lines, Inc., 87 MCC 759——§5(2), n. 7 reinstitution, 48 discontinued, 115

Hudson Transp. Co. v. United States, 219 F. Supp. 43, sustaining Pennsylvania Public Utility Comm. v. Hudson Transp. Co., 88 MCC 745, affirmed per curiam Arrow Carrier Corp. v. United States, 375 US 452——NTP, n. 1:, §202(b), n. 20; §204(c), n. 52; 28 USC §2325, n. 56

Huffman—Investigation of Operations, 88 MCC 437——§203(a)(17), n. 5; §203(c), n. 3; §207(a), n. 10

Hugh Breeding, Inc., Extension—Petroleum Treating Compounds, 95 MCC 720——§204(b), n. 7 petroleum products; §206(b), n. 18; §207(a), n. 25 existing carriers, petroleum

Hughes "Grandfather" Application, 89 MCC 471, modifying Hughes Extension—Frozen Foods, 71 MCC 457, modified 100 MCC 386, latter report sustained, Hughes v. United States, 278 F. Supp. 11——§203(b), n. 50, 50 Act of 1958, fish; §204(a)(6), n. 2; §206(b), n. 22 exhibits, weight; §207(a), n. 25, 25 desire for particular, existing carriers, fitness; §212(a), n. 35; RP 19

Hughes v. United States, 278 F. Supp. 11, sustaining Hughes "Grandfather" Application, 100 MCC 386, which modified 89 MCC 471 and Hughes Extension—Frozen Foods, 71 MCC 457——§203(b), n. 1, 50 Act of 1958; APA, 5 USC, judicial

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Humble Oil & Refining Co. v. Great Northern Ry. Co., 212 F. Supp. 747——§6(1), n. 3; §6(7), n. 5; §16(2), n. 2, 12; 28 USC §2325, n. 7

Humble Pipe Line Co., 57 Val. Rep. 333, 645, 815 [listed for citation; not annotated]

Humphreys v. United States, 228 F. Supp. 910, sustaining Southern Pac. Co. Abandonment, 320 ICC 278——§1(18), n. 60, 62, 68

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Huston Contract Carrier Application, 92 MCC 374——§203(a)(14), n. 1; §203(a)(15), n. 1; §207(a), n. 25 necessity

Hutchinson Iron & Metal, Inc., v. Baltimore & O. R. Co., 316 ICC 667——§4(1), n. 53; §8, n. 193

Hygrade Food Products Corp. v. Atlantic Coast Line R. Co., 318 ICC 501, order set aside on other grounds, Hygrade Food Products Corp. v. New York Central R. Co., 266 F. Supp. 946——§16(3), n. 22; RP 25(e)

Hygrade Food Products Corp. v. New York Central R. Co., 266 F. Supp. 946, setting aside and enjoining order in Hygrade Food Products Corp. v. Atlantic Coast Line R. Co., 318 ICC 501——§6(7), n. 10, 12, 17, 109, 116; §15(4), n. 30; §16(2), n. 3, 8

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I. C. C. v. AAA Con Drivers Exchange, Inc., 340 F. 2d 820, reversing 234 F. Supp. 66, certiorari denied AAA Con Drivers Exchange, Inc. v I.C.C., 381 US 911——§203(a)(14), n. 1 holding out; §203(a)(19), n. 2; §203(c), n. 3; §222(b), n. 11; 28 USC §§1291, 1292, n. 1

I. C. C. v. All American Association, 281 F. Supp. 18——§203(b), n. 45; §222(b), n. 11

I.C.C. v. Atlantic Coast Line R. Co., 383 US 576, reversing 334 F. 2d 46, which affirmed Atlantic Coast Line R. Co. v. United States, 213 F. Supp. 199 setting aside orders in Thomson Phosphate Co. v. Atlantic Coast Line R. Co., 303 ICC 25 and 311 ICC 315. See also Thomson Phosphate Co. v. Atlantic Coast Line R. Co., 282 F. Supp. 698, affirmed 434 F. 2d 180 [latter two reports too late to include]——§9, n. 37; §16(2), n. 2, 4; §17(9), n. 2

I.C.C. v. Cardinale Trucking Corp., 308 F. 2d 435——§222(b), n. 25

I. C. C. v. Chatsworth Cooperative Marketing Ass'n, 347 F. 2d 821, affirming order in No. 63 C 776, Dis. Ct. N. D. Ill., E.D. dated Dec. 3, 1964, certiorari denied, Chatsworth Cooperative Marketing Ass'n v. I.C.C. 382 US 938, rehearing denied, 382 US 1000——§222(b), n. 1

I.C.C. v. Dudgeon, 213 F. Supp. 710, certiorari denied, Dudgeon v. Interstate Commerce Commission, 372 US 960——§202(a), n. 2; §203(a)(14), n. 1, 1 holding out; §222(b), n. 2, 11, 25

I. C. C. v. International Shippers Ass'n of New Jersey, Inc., 249 F. Supp. 66, affirmed, per curiam, 363 F. 2d 878——§203(a)(17), n. 5; §203(c), n. 3; §222(b), n. 11; §402(c), n. 2

I. C. C. v. Interstate Auto Shippers, Inc., 214 F. Supp. 473, affirmed, per curiam, 323 F. 2d 367——§202(a), n. 2; §203(a)(14), n. 1, 1 holding out; §203(b), n. 20; §222(b), n. 2, 11, 25

I.C.C. v. Iowa Cooperative Assn., 236 F. Supp. 873——§203(b), n. 45, 50; §222(b), n. 11

I. C.C. v. Memphis Union Station Co., 360 F. 2d 44; affirming 230 F. Supp. 456, certiorari denied, Louisville & N. R. Co. v. Interstate Com. Comm'n., 385 US 830——§1(18), n. 5; §1(20), n. 17, 24; §5(2), n. 56

I. C. C. v. Mitchell Bros. Truck Lines, 250 F. Supp. 636——§204(b), n. 7 machinery; §222(b), n. 14

I.C.C. v. Moore, 236 F. Supp. 168——§203(a)(17), n. 5; §203(c), n. 3; §222(b), n. 11, 25; EA §42, n. 1

I.C.C. v. Nelson Cooperative Marketing Assn., 209 F. Supp. 697——§203(a)(14), n. 1; §203(b), n. 45; §222(b), n. 11

I. C. C. v. New York, N.H. & H. R. Co., 372 US 744, vacating and remanding New York, N. H. & H. R. Co. v. United States, 199 F. Supp. 635——NTP, n. 5 destructive, inherent, national; §1(5), n. 485; §15a(3), n. 2

I. C. C. v. Northwest Agricultural Cooperative Ass'n, see Northwest Agricultural Coop. Ass'n v. I.C.C., 325 F. 2d 252, certiorari denied, 382 US 1011

I. C. C. v. Piedmont Sales Co., 330 F. 2d 351——§203(a)(17), n. 5

I. C. C. v. Schultz Transit, Inc., 207 F. Supp. 749, but see Schultz Transit, Inc. v. United States, 208 F. Supp. 537——§203(a)(17), n. 5; §203(c), n. 3

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Igert v. United States, 211 F. Supp. 42, sustaining Newsprint Paper from Tenn. and Ala. to Baton Rouge, La., 315 ICC 117——§1(5), n. 482; §4(1), n. 165, 173; §12(1), n. 9; APA, 5 USC procedure-

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Illinois-California Exp., Inc., Extension—Navajo Trail Route No. 1, 92 MCC 125——§207(a), n. 25 fitness

Illinois-California Exp., Inc.—Purchase—Salt Lake-Kanab, 97 MCC 38——§5(2), n. 7 single-line, 48 discontinued, intrastate, 110 restrictions, 111, 115; RP 23(a), 86, 101(b)

Illinois Central R. Co. Construction and Trackage, 317 ICC 502, see Illinois Central R. Co. v. Norfolk & W. R. Co.

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Independent Truckers, Inc., In re, 212 F. Supp. 402, see also 226 F. Supp. 440——§20a(7), n. 2; §214, n. 8; Bank. Act, 11 USC §§506-624, n. 5

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Institute of Scrap Iron & Steel, Inc. v. Akron, C. & Y. R., 316 ICC 55, sustained Frank Adams & Co. v. United States, Dist. Ct., S. D. of Ohio, W. D., Civil Action No. 5093, affirmed, per curiam, 275 US 215——§1(5), n. 28, 192, 301, 574; §3(1), n. 76, 112

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Interstate Distributing Co. Contract Carrier Application, 91 MCC 36, affirmed 92 MCC 266——§203(a)(15), n. 1; §203(c), n. 2; §209(a)(1), n. 12, 14, 25 denied; §209(b), n. 18

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Iron or Steel Articles from the East to the Southwest, 321 ICC 419, prior report 310 ICC 587——NTP, n. 5 destructive; §1(5), n. 350 iron-steel; §3(4), n. 41; §4(1), n. 190, 215, 260; §15(7), n. 25

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J. B. Acton, Inc. v. United States, 221 F. Supp. 174, sustaining J. B. Acton, Inc.—Investigation and Revocation of Cert., 89 MCC 59, affirmed per curiam 376 US 779——§212(a), n. 1; 28 USC §2325, n. 40, 44

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J. B. Montgomery, Inc. v. United States, 206 F. Supp. 455, setting aside order in, and remanding, J.B. Montgomery, Inc., Conversion Application, 83 MCC 457, affirmed United States v. Montgomery, Inc., 376 US 389, rehearing denied, 377 US 925——NTP, n. 5 adequate; §206(a)(1), n. 50; §208(a), n. 2; §212(c), n. 2, 20; 28 USC §2325, n. 7, 40, 45

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J-T Transport Co., Inc., Extension—Buffalo, N.Y., 91 MCC 911, affirming 82 MCC 635 and J-T Transport Co., Inc., Extension—San Diego, Calif., 81 MCC 761, and reversing report of June 24, 1960, in J-T Transport Co., Inc., Extension—Burbank and Palmdale, Calif.——§209(a)(1), n. 25, 25 denied

J-T Transport Co., Inc., Extension—Columbus, Ohio, 91 MCC 507, affirming 79 MCC 695——NTP, n. 5 applications; §209(a)(1), n. 25; §209(b), n. 18

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Johnson Freight Lines Co., Inc.—Merger, 87 MCC 747, affirming report of May 16, 1961——§5(2), n. 8b, 110 fitness; §220(d), n. 30, 50

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Johnstown Motor Freight, Inc., Extension—Lowman, 94 MCC 167——207(a), n. 10, 25 fitness, past

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Jones Motor Co. v. United States, 218 F. Supp. 133, reversing order in Pennsylvania Public Utility Commission v. Jones Motor Co., 89 MCC 605, affirmed on rehearing, 223 F. Supp. 835, affirmed, per curiam, Highway Express Lines, Inc. v. Jones Motor Co., Inc., 377 US 217, rehearing denied, 377 US 984——§204(c), n. 126; §212(a), n. 10; 28 USC §2325, n. 57

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K-Lines, Inc.—Purchase—Consolidated Freightways, 93 MCC 720——§5(2), n. 17, 115

K. W. McKee, Inc., Extension—Ex Rail Movements for Studebaker, 89 MCC 777——§203(a)(15), n. 1; §209(a)(1), n. 25; §209(b), n. 18, 20

K. W. McKee, Inc., Extension—Secondary Movements to N. Dak., 92 MCC 805, sustained Clark Transport Co. v. I.C.C., 233 F. Supp. 839——§209(a)(1), n. 25

K. W. McKee Inc. Stock, 93 MCC 1, affirmed 93 MCC 643——§214, n. 13, 28 (both cases)

Kahn, in re, 323 ICC 706——§17(12), n. 1

Kampo Transit, Inc., Extension—Chicago Heights, Ill., 91 MCC 879, applicant found fit to engage in proposed transportation of cer-acids from Chicago Heights, Ill., to points in seven States, public conenveince and necessity therefor having previously been shown; granted, subject to certain conditions. [Not annotated]

Kaneb Pipe Line Co., 57 Val. Rep. 451, 573, 767 [listed for citation; not annotated]

Kansas, see State Corporation Com'n

Kansas City, Mo.-Kansas City, Kans., Commercial Zone, 103 MCC 19, modifying 100 MCC 75, other prior reports, 31 MCC 5, 51 MCC 833, 54 MCC 288, 79 MCC 513, and 81 MCC 24, later report 105MCC 750 [not annotated]——§203(b), n. 60 Kansas City

Kansas City Southern Industries, Inc., Control, 317 ICC 1——§5(2), n. 2 control by noncarrier

Kansas City Southern Ry. Co. v. United States, 288 F. Supp. 742, see Texas & Pac. Ry. Co.—Control—Kansas, O. & G. Ry. Co.

Kansas Intrastate Freight Rates and Charges, 315 ICC 223, affirmed State Corporation Com'n of State of Kansas v. United States, 216 F. Supp. 376, affirmed per curiam 375 US 15——§13(4), n. 50, 58

Kansas State Corp. Comm. v. Atchison, T. & S. F. Ry. Co., see Southeastern Assn. of R. & Util. Commrs. v. A., T. & S.F. Ry.

Kapke Investigation of Operations and Practices, 91 MCC 377——§203(a)(17), n. 5; §203(c), n. 3, §204(c), n. 250, 251; §209(a)(1), n. 15

Kaplan Trucking Co.—Control—Thomas Boyd, Inc., 90 MCC 419, affirmed Kaplan Trucking Co.—Investigation of Control, 93 MCC 167——§5(2), n. 45 other, violations, 50, 52, 60, 110 violation, 126; §204(e), (f), n. 10

Kaplan Trucking Co.—Investigation of Control, 93 MCC 167, affirming 90 MCC 419——NTP, n. 5 public interest; §5(2), n. 45 violations

Kato Theatre Service, Inc., Extension—Magazines, Periodicals, 94 MCC 395——§206(b), n. 15 notice

Kaw Pipe Line Co., 57 Val. Rep. 529, 759 [listed for citation; not annotated]

Kehoe v. Southern Ry. Co., 258 F. Supp. 245——§5(2), n. 70

Keller Common Carrier Application, 94 MCC 238, affirming 83 MCC 339, sustained National Bus Traffic Association, Inc. v. United States, 1965, affirmed, per curiam, 382 US 369——§203(b), n. 32

Kelley Common Carrier Application, 92 MCC 333, applicant found financially fit to conduct proposed transportation of helium gas in tube trailers from southwestern origins to points in continental United States, found to be required in report of Nov. 28, 1962. [Not annotated]

Kenai Pipe Line Co., 324 ICC 243 [Initial valuation; listed for citation; not annotated]

Kendall Co. Common Carrier Application, 88 MCC 364——§203(c), n. 3; §206(a)(1), n. 50; §206(b), n. 18

Kendrick Cartage Co. Extension—Robinson, Ill., 91 MCC 743——§209(a)(1), n. 18, 25

Kennedy Motor Lines, Inc., Extension and Clarification—Nassau County, N.Y., 95 MCC 499——§206(b), n. 22 record in other; §207(a), n. 10, 25 fitness; §208(a), n. 30.

Kennedy v. Long Island R. Co., 319 F. 2d 366; affirming 211 F. Supp. 478, certiorari denied, 375 US 830——§5(1), n. 1, 3, 11; A-T, 15 USC §1, n. 11; Ry. L., 45 USC §151, n. 5

Kenosha Auto Transport Corp.—Investigation, 89 MCC 550, sustained Kenosha Auto Transport Corp. v. United States, 236 F. Supp. 568——§212(a), n. 1, 35

Kenosha Auto Transport Corp. v. United States, 236 F. Supp. 568, sustaining Kenosha Auto Transport Corp.—Investigation, 89 MCC 550——§212(a), n. 1

Kent Feeds, Inc. v. Pennsylvania R. Co., 319 ICC 427, reversing report of Jan. 31, 1963——§1(5), n. 260, 319; §8, n. 94, 140

Keystone Charter Service, Inc.—Purchase—Bushey, 90 MCC 167, purchase of charter operating rights by a new corporation, authorized; parent holding company's acquisition of control of a third interstate carrier found not to require its subjection to regulation under §5(3). [Not annotated]

Keystone Motor Exp., Inc.—Investigation of Operations, 89 MCC 567, sustained Keystone Motor Exp., Inc. v. United States, 228 F. Supp. 793——§17(6), n. 15; §204(c), n. 29; §206(a)(1), n. 50; §207(a), n. 25 existing carriers, fitness, past; §208(a), n. 30; §212(a), n. 30, 35

Keystone Motor Exp., Inc. v. United States, 228 F. Supp. 793, sustaining Keystone Motor Exp., Inc.—Investigation of Operations, 89 MCC 567——§17(6), n. 10, 15; §206(a)(1), n. 50; §207(a), n. 25 necessity; §212(a), n. 1; RP 101(a)

Kindsvater Extension—Western States, 92 MCC 131——§202(b), n. 20; §203(a)(15), n. 1; §206(b), n. 16 §207(a), n. 25 necessity

King Van Lines, Inc., Extension—Seven States, 98 MCC 19, sustained United Van Lines, Inc. v. United States, 266 F. Supp. 586——§207(a), n. 25 household, 26

Kirk Common Carrier Application, 89 MCC 587——§205(a), n. 15; §207(a), n. 25 existing service; §212(a), n. 10

Kiser Common Carrier Application, 89 MCC 750——§206(b), n. 22, 22 oral; §207(a), n. 25 fitness, truckaway; RP 19, 75

Klein, see S. Klein
Kline v. Wirtz, 373 F. 2d 281——Fair LS, 29 USC §§213, 215, n. 1 motor
Knox Motor Service, Inc.—Purchase—K & A Truck Lines, Inc., 93 MCC 26——§5(2), n. 7, 15 duplicate, split, 48 conditions, discontinued, 100, 110 revocation, 115; §212(a), n. 25
Knudsen Alaska "Grandfather" Application, 94 MCC 339——§206(a)(1), n. 56; §206(a)(4),(5), n. 50; §206(b), n. 15 notice
Koss v. A. A. Lexington Moving & Storage Co., 315 ICC 355——§204a, n. 20; §216(b), n. 735; §216(e), n. 3, 81; §217(b), n. 40, 48
Kotwica Extension—Copper and Brass, 91 MCC 235, affirming 83 MCC 822——§209(a)(1), n. 25
Kowalsky's Exp. Service—Control and Merger, 93 MCC 272——§5(2), n. 105; §17(6), n. 15; §212(b), n. 10
Kramer Extension—Fort Pierce, Fla., 91 MCC 16——§207(a), n. 25, 25 existing carriers, existing service, financial
Kramer Extension—Several States, 94 MCC 690, modifying report of Jan. 25, 1963, sustained Clay Hyder Trucking Lines, Inc. v. United States, 234 F. Supp. 673——§207(a), n. 25, commodity, existing carriers
Kreider Truck Service, Inc., Extension—Feed Ingredients, 92 MCC 662——§206(b), n. 15, 18; §207(a), n. 26
Kroblin Refrigerated Xpress, Inc., Extension—Denison, Iowa, 92 MCC 669——§207(a), n. 25 through
Kroblin Refrigerated Xpress, Inc., Extension—North Dakota, 89 MCC 657, reversing report of Nov. 8, 1961——§204(b), n. 7 returned; §206(b), n. 18; §207(a), n. 25 existing carriers, financial, railroad
Kroblin Refrigerated Xpress, Inc., Extension—Soap Products, 89 MCC 255, modifying report of May 11, 1961——§207(a), n. 25, 25 desire for particular, existing service, fitness, past
Kroblin Refrigerated Xpress, Inc.—Purchase—Davis, 93 MCC 356——§5(2), n. 15 commercial, extinguished, 48 expedited, 105, 115
Kugler, see George W.
Kulp v. United States, 238 F. Supp. 390, sustaining denial of intervention in Docket No. MC-F-8290——28 USC §2325, n. 14

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L. A. Tucker Truck Lines, Inc. v. United States, 215 F. Supp. 261, setting aside, in part, Daniel Hamm Drayage Co. Extension—Cement from St. Louis, Mo., 89 MCC 563——§203(a)(10), n. 5 between, common- and; §207(a), n. 25; 28 USC §2325, n. 57
L. E. Whitlock Truck Service, Inc. v. Regal Drilling Co., 333 F. 2d 488——§20(11), n. 3, 4; §219, n. 33
L. Nelson & Sons Transp. Co.—Investigation of Control, 93 MCC 22, prior reports L. Nelson & Sons Transp. Co.—Control and Merger, 75 MCC 45 and 80 MCC 257——§5(2), n. 45 violations, 110 revocation
L.T.L. Pickup & Delivery Charges—from or to New York, 319 ICC 230——§216(b), n. 10, 101, 400; §216(d), n. 15, 25
La Casse—Control—Interstate Exp., Inc., 97 MCC 230, subsequent report, on further consideration, 101 MCC 567 [latter too late to include]——§5(2), n. 2 vehicles, 45 violations; §212(a), n. 35
Labertew Trucking, Inc., Extension—Poultry Offal, 96 MCC 370——§203(b), n. 50 livestock
Lake Charles Harbor & Term. District v. Atchison, T. & S.F. Ry. Co., 315 ICC 485——§1(5), n. 604; §3(1), n. 76, 106a
Lakefront D. & R. T. Co. v. International Longshoremen's Ass'n, 333 F. 2d 549——§1(4), n. 43; 28 USC §2325, n. 27
Lakehead Pipe Line Co., Inc., 57 Val. Rep. 349, 533, 749 [listed for citation; not annotated]
Lakeland Hide & Leather Co. v. Atlantic Coast Line R., 316 ICC 303——§1(5), n. 222, 319; §6(7), n. 225; §8, n. 180; §13(1), n. 46 broadening; §16(3), n. 32; RP 30(a)
Laney Tank Lines, Inc., Extension—Pipeline Terminals, 99 MCC 370, see Petroleum Carrier Corp. v. United States, 258 F. Supp. 611
Lang and Givens—Purchase—T.I.M.E., Inc., 90 MCC 195——§5(2), n. 15 alternate, 110 fitness, restrictions
Langer Transport Corp. Extension—Havre de Grace, Md., 91 MCC 933——§204(b), n. 7 products, solvents; §206(b), n. 22 admissibility
Lanich Bus Lines—Charter Service, 92 MCC 156——§207(a), n. 25 distance; §208(c), n. 10
Larry's Sandwiches, Inc. v. Pacific Electric Ry. Co., 318 F. 2d 690——§20(11), n. 30
Lattavo Bros., Inc., Extension—Neville Island Gateway Elimination, 91 MCC 643, affirming 89 MCC 600——§203(b), n. 60 territorial; §207(a), n. 28 elimination; §208(a), n. 30, 31; §212(a), n. 35
Lattavo Bros., Inc.—Petition for Interpretation, 98 MCC 767——§203(a)(10), n. 5; §203(a)(19), n. 2
Laurel Pipe Line Co., 324 ICC 633, valuation of property owned and used for carrier purposes [listed for citation; not annotated]
Law and Son, Inc., see E. B.
Law Motor Freight, Inc. v. C. A. R., 364 F. 2d 139——§203(b), n. 40
Lead, Aluminum, Brass, Bronze, Copper Metals—Kofman's, 315 ICC 344——§216(g), n. 10, 15
Lead or Zinc Concentrates—British Columbia to Idaho, 318 ICC 85——NTP, n. 5 inherent; §216(b), n. 125 lead; §216(g), n. 66
Leamington Transport Common Carrier Application, 91 MCC 647, prior report 81 MCC 695——§206(b), n. 22 cross-examination; §207(a), n. 25 existing service, fitness, foreign
Lease and Interchange of Vehicles by Motor Carriers, 89 MCC 683, modifying 86 MCC 525——§204(e),(f), n. 10
Lease and Interchange of Vehicles by Motor Carriers, 91 MCC 877, reversing 79 MCC 65 in light of decision in Atchison, T. & S.F. Ry. Co. v. United States, 209 F. Supp. 35 [Not annotated]
Lease Plan International Corp.—Control—National, 93 MCC 173; subsequent report 93 MCC 203——§5(2), n. 2 speculation, 6, 8 commissions, 45, 100; §5(3), n. 10; §210, n. 3
Legality of Pallet Exchange Agreement—Kraft, 322 ICC 439——§203(a)(19), n. 2; §204(c), n. 29, 75; §216(b), n. 409; §217(a), n. 40
Legge v. United States, 244 F. Supp. 878, sustaining Monongahela Connecting R. Co. Modifications of Systems, 325 ICC 160——§17(5), n. 15; §17(6), n. 10; §25, n. 2; 28 USC §2325, n. 54, 56
Lehigh Valley R. Co. Abandonment, 317 ICC 242——§1(18), n. 59; §1(19), n. 14
Leonard Bros. Transfer, Inc., Petition for Clarification, 96 MCC 246, modifying Leonard Bros. Transfer & Storage, Inc., Extension——Aircraft Equipment, 64 MCC 803——§206(b), n. 15 notice; §207(a), n. 6 commodities, explosives, 25 commodity; §208(a), n. 35; §212(a), n. 30

Leroy L. Wade & Son, Inc., Extension—Three States, 92 MCC 451——§204(b), n. 7 heavy; §212(a), n. 30

Lester C. Newton Trucking Co. Com. Car. Application, 98 MCC 702, see Lester C. Newton Trucking Co. v. United States, 264 F. Supp. 869

Lester C. Newton Trucking Co. Extension—Canned Water, 91 MCC 919——§204(b), n. 7 agricultural, canned; §207(a), n. 25 necessity

Lester C. Newton Trucking Co. Extension—Frozen Fruits, Veg., 89 MCC 269, reversing in part Lester C. Newton Trucking Co. Common Carrier Application, 84 MCC 759——§207(a), n. 25 existing service, through

Lester C. Newton Trucking Co. v. United States, 209 F. Supp. 600, sustaining Frozen Cooked Vegetables—Status, 81 MCC 649, affirmed, per curiam, 272 US 702——§203(b), n. 50 Act of 1958; 28 USC §2325, n. 13

Lester C. Newton Trucking Co. v. United States, 264 F. Supp. 869, sustaining Lester C. Newton Trucking Co. Com. Car. Application, 98 MCC 702, affirmed per curiam, 389 US 30——§203(b), n. 2, 50, 50 Act of 1958; §204(b), n. 7 agricultural commodities, frozen foods, general; §207(a), n. 25 necessity, existing service, through

LeTarte Contract Carrier Application, 91 MCC 158——§203(a)(15), n. 1; §207(a), n. 25, 25 existing carriers

Levin v. Mississippi River Fuel Corp., 386 US 162, reversing and remanding Mississippi River Fuel Corp. v. Slayton, 359 F. 2d 106, which reversed Slayton v. Missouri Pac. R. Co., 233 F. Supp. 747; also see Missouri Pac. R. Co. v. Slayton, 407 F. 2d 1078, reversing 279 F. Supp. 525, certiorari denied, 395 US 937, rehearing denied, 397 US 1081——§5(2), n. 8a; §5(11), n. 2

Ligon Specialized Hauler, Inc., Extension—Alloys, 91 MCC 254——§204(b), n. 7 in bulk; §206(b), n. 15 notice, 16 broadening

Ligon Specialized Hauler, Inc., Extension—Illinois Origins, 91 MCC 356——§206(b), n. 22 number; §207(a), n. 6 commodities, 25 commodity, volume, 28 elimination

Limestone Corp., Dallas, Tex., Transferee, 90 MCC 553, authority granted 93 MCC 58——§212(b), n. 10; §214, n. 9, 76

Limestone from Bessemer, Ala., to Mississippi Points, 316 ICC 383——§1(5), n. 350 lime, 547 limestone; §2, n. 95, 99; §3(1), n. 37, 67; §15(7), n. 50, 65, 68

Liquefied Petroleum Gas in Jumbo Tank Cars—S.W.F.B., 319 ICC 31——§1(5), n. 213, 225, 286, 350 gases, 547; §1(6), n. 49; §2, n. 26; §3(1), n. 107; §15(7), n. 50, 70, 74

Liquefied Petroleum Gas, Oklahoma City to Memphis Area, 316 ICC 189——NTP, n. 5 destructive; §1(5), n. 90, 124, 303

Liquid Commodities between Va. and N.J., N.Y. & Pa., 316 ICC 609——§207(a), n. 25 rail, rates, 26; §216(b), n. 102, 445; §216(g), n. 66

Liquid Transporters, Inc., Extension—Limestone, 94 MCC 615——§206(b), n. 16 narrowing; §207(a), n. 25 one-way

Liquid Transporters, Inc.—Purchase—Black, 93 MCC 423——§5(2), n. 48 violation, 50, 110 intrastate, 126; §202(b), n. 20; §203(b), n. 60 construction; §204(e),(f), n. 10; §207(a), n. 25, 25 past; §208(a), n. 30

Little Audrey's Transp. Co., Inc.—Purchase—Refrigerated, 90 MCC 743——§5(2), n. 48, 48 conditions, exempt, 110 cert. under §207

Livestock—Western District Rates, 321 ICC 332, modifying orders entered in 176 ICC 1 and 190 ICC 611——§1(5), n. 420, 549

Livestock—Western District Rates, 321 ICC 391, pertinent prior report 176 ICC 1, requested increase in prescribed minimum weight for feeder and stocker cattle in 36-foot 7-inch cars, to 22,000 pounds from points in southwestern territory, New Mexico, and Arizona, found not justified. [Not annotated]

Loading of Freight by Shippers at Eastern Origins, 316 ICC 179, modified 321 ICC 300——§13(1), n. 155; §1(6), n. 627; §2, n. 53

Locarni Marble Corp. v. Missouri Pac. R. Co., 315 ICC 369, reversing in part 314 ICC 65——§13(1), n. 136

Lombard Bros., Inc.—Purchase—Millis, 90 MCC 604, sustained Lombard Bros., Inc. v. United States, 226 F. Supp. 905——§5(2), n. 45 violations, 48 discontinued, 110 control within §5, 115

Lombard Bros., Inc. v. United States, 226 F. Supp. 905, sustaining Lombard Bros., Inc.—Purchase—Millis, 90 MCC 604——§5(2), n. 48 violation, 115; §17(6), n. 15; 28 USC §2325, n. 48

Long Transp. Co.—Control—Marine Transit, Inc., 90 MCC 261——§5(2), n. 6, 7, 9, 17, 45, 45 conditions, 110 fitness, restrictions, 115; §208(a), n. 31

Los Angeles-Seattle Motor Exp., Inc., Extension—Containers, 89 MCC 621, modifying report of June 29, 1961——§204(b), n. 7 gen. commodities, liquid chemicals; §207(a), n. 7 existing, 25 necessity

Lott, see H. A.

Louisiana & A. Ry. Co. Discontinuance of Service, 317 ICC 155——§13a, n. 20, 21, 25, 25 computation

Louisiana & A. Ry. Co. v. Export Drum Co., 228 F. Supp. 89, reversed and remanded on other grounds, 359 F. 2d 311——§6(7), n. 160, 217, 222; §10(1), n. 2; §13(1), n. 167

Louisiana & A. Ry. Co. v. Export Drum Co., 359 F. 2d 311, reversing and remanding 228 F. Supp. 89——§6(7), n. 217, 262; §8, n. 109, 194; §9, n. 37, 44

Louisville & N. R. Co. v. Cantrell, 215 F. Supp. 229, affirmed Batts v. Louisville & N.R. Co., 316 F. 2d 22——§5(2), n. 70; 28 USC §1332, n. 3; Ry. L., 45 USC §151; n. 3; R. Unemp., 45 USC §351, n. 2

Louisville & N. R. Co. v. Interstate Com. Comm'n, 385 US 830, denying certiorari in I.C.C. v. Memphis Union Terminal Co., 360 F. 2d 44

Louisville & N. R. Co. v. Knox Homes Corp., 343 F. 2d 887, reversing in part and remanding in part, with directions, the decision of the District Court for the Southern District of Georgia——§6(7), n. 260; 28 USC §1732, n. 2

Louisville & N.R. Co. v. Southern Ry. Co., 319 ICC 639, temporary restraining order denied, Carolina & N.W. Ry. Co. v. United States, 230 F. Supp. 581, sustained, Id., 234 F. Supp. 112, latter affirmed, per curiam, 380 US 526——§1(4), n. 123, 128, 129, 134, 148; §1(5), n. 78; §15(6), n. 22 sufficiency, 24, 26

Louisville & N. R. Co. v. United States, 244 F. Supp. 337, sustaining Louisville & N. R. Co. Merger, 312 ICC 676, affirmed, per curiam, 383 US 102——§5(2), n. 5, 70; 28 USC §2325, n. 40

Louisville & N. R. Co. v. United States, 268 F. Supp. 71, setting aside and remanding Ingot Molds from Pennsylvania to Steelton, Ky., 326 ICC 77, reversed and remanded on the merits, with instructions to affirm commission case, American Commercial Lines, Inc. v. Louisville & N. R. Co., 392 US 571 [latter report too late to include]——NTP, n. 5, 5 cost, inherent; §15a(3), n. 2; APA, 5 USC, judicial; 28 USC §2322, n. 1; §2325, n. 40

Louisville Chamber of Commerce v. Ahnapee & W. Ry. Co., 318 ICC 749——§1(5), n. 13, 27, 229; §3(1), n. 67; §13(1), n. 126

Lovell—Investigation of Operations, 92 MCC 728——§203(a)(17), n. 5; §203(c), n. 3

Lowrance Extension—Idaho, 86 MCC 787——§207(a), n. 25, 25 railroad, through

Lowrance "Grandfather" Application, 91 MCC 440, affirming 86 MCC 381——§203(b), n. 50 Act of 1958; §206(b), n. 18; §207(a), n. 6 private

Lubricating Oil from Panama City, Fla., to Atlanta, Ga., 316 ICC 696——§216(g), n. 65, 66

Lucas Mach. Div., New Britain Mach. Co. v. New York Cent. R. Co., 236 F. Supp. 281——§20(11), n. 115; 28 USC §2201, n. 2

Luerssen v. Seaboard Air Line R., 203 F. Supp. 707——§1(7), n. 6

Luke v. Pennsylvania R. Co., 207 F. Supp. 550, affirmed 316 F. 2d 734, certiorari denied 375 US 923——SA, 45 USC §23, n. 2

Lumber from Cimarron, N. Mex., to Chicago, 315 ICC 534——§204(c), n. 26; §216(g), n. 65, 66

Lumber from Denver, Colo., to Kansas City, Mo., 318 ICC 214——§216(g), n. 66

Lumber from Montana to Illinois and Wisconsin, 315 ICC 642——§216(g), n. 66

Lux Art Van Service, Inc. v. Pollard, 344 F. 2d 883, certiorari denied, 382 US 837——28 USC §1331, n. 4

Lynchburg Traffic Bureau v. Chesapeake & O. Ry. Co., 319 ICC 74, sustained Lynchburg Traffic Bureau v. United States, 225 F. Supp. 874, latter affirmed, per curiam, 377 US 270——§1(5), n. 13, 481; §2, n. 95; §3(1), n. 37, 76, 106; §13(1), n. 126

Lynchburg Traffic Bureau v. Smith's Transfer Corp. of Staunton, Va., 339 F. 2d 478, sustaining order of Dist. Ct., W.D. Virginia——§5a, n. 2; §8, n. 2, 251; §204(c), n. 53; §204a, n. 20

Lynchburg Traffic Bureau v. United States, 225 F. Supp. 874, sustaining Lynchburg Traffic Bureau v. Chesapeake & O. Ry. Co., 319 ICC 74, affirmed, per curiam, 377 US 270, rehearing denied, 377 US 1010——§1(5), n. 20, 224; §1(6), n. 121; §3(1), n. 78

Lynden Transfer, Inc., Alaska "Grandfather" Application, 94 MCC 738, modifying report of July 10, 1963, also prior reports in Docket Nos. MC-118452 (Sub-No. 2), MC-118493 (Sub-No. 5), and MC-118520 (Sub-No. 5)——§206(a)(4),(5), n. 2, 50

Lynden Transfer, Inc.—"Grandfather" Application, 92 MCC 797——§203(a)(10), n. 10; §206(a)(2),(3), n. 2; §206(a)(4),(5), n. 50; §208(a), n. 30

Lynden Transfer, Inc. v. United States, 237 F. Supp. 124, sustaining Consolidated Freightways Corp. of Delaware Alaska "Grandfather" Application, 95 MCC 757——28 USC §2325, n. 11

Lyon v. Illinois Central R. Co., 228 F. Supp. 810——28 USC §1445, n. 1

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M & G Convoy, Inc.—Purchase—Great Lakes Forwarding Corp., 90 MCC 397, modified 90 MCC 693——§5(2), n. 2 authority, 15 dividing, duplicate, 110 restrictions, securities

M & H Produce Co., Inc., Common Carrier Application, 91 MCC 183, modifying 86 MCC 647——§203(b), n. 50 Act of 1958

M. D. Cressy Co., Inc., "Grandfather" Application, 91 MCC 211——§17(6), n. 10; §203(b), n. 50 Act of 1958; §206(b), n. 15, parties, 16 broadening; §221, n. 1; RP 101, 243

M. D. Cressy Co., Inc., "Grandfather" Application, 98 MCC 160, modifying 91 MCC 211——§203(b), n. 50 Act of 1958

M.G.M. Transport Corp. Extension—New England, 89 MCC 699——NTP, n. 5 applications, destructive, public interest; §206(b), n. 18; §207(a), n. 11; §216(d), n. 40

M. I. O'Boyle & Sons, Inc., Extension—Fluorspar, 88 MCC 559——§206(b), n. 22 admissibility; §207(a), n. 6 plant, 25 fitness

M. I. O'Boyle & Son, Inc. v. United States, 303 F. 2d 446——Gov't. traffic, §66, n. 1

M. R. & R. Trucking Co., Crestview, Fla., see Cooper Transfer Co., Inc. v. United States

Mass Transport, Inc., Extension—North Dakota Missile Sites, 92 MCC 581, modified 95 MCC 375——§203(a)(10), n. 5 between State; §207(a), n. 6 prior rail, 25 existing carriers

Mass Transport, Inc., Extension—Salt from Williston, N. Dak., 92 MCC 534, prior report Star Transfer Co. Extension—Salt, 84 MCC 69——§206(b), n. 15 parties, 25; §207(a), n. 25, 25 railroad, volume; §208(a), n. 30; APA, 5 USC procedure

Machinery and Brass, Bronze, Copper Articles, East to Tex., and La., 316 ICC 557, modifying 314 ICC 363——§15(7), n. 25

Machinery and Equipment, Central, South, Midwest, 316 ICC 236——§204(c), n. 206; §216(g), n. 6, 10, 20; RP 96(b)

Machinery & Related Art.—Hampstead, Md., to New Eng., 316 ICC 71——§216(b), n. 225; §216(g), n. 5 reductions, 65

Magazines, Old Saybrook, Conn., to Middle Atlantic Ter., 315 ICC 273——§216(b), n. 200, 225; §216(g), n. 20, 66

Magazines, Old Saybrook, Conn., to New Eng., N.Y. & N.J., 315 ICC 281——§216(b), n. 200, 225, 400; §216(g), n. 5, 6, 10; RP 50

Magazines or Periodicals, Miami, Fla., to Derby—Shelton, 319 ICC 340——NTP, n. 5 destructive; §1(5), n. 350 books; §1(6), n. 49; §15(7), n. 65

Magnet Cove Barium Corp. v. Chicago, B. & Q.R. Co., 315 ICC 555——§1(5), n. 156, 261; §3(1), n. 44, 76

Magnolia Pipe Line Co., 57 Val. Rep. 339, 637, 755 [listed for citation; not annotated]

Major Extension—Collinsville, Ill., 92 MCC 316, modified in 94 MCC 652——§203(a)(15), n. 1

Major Extension—Collinsville, Ill., 94 MCC 652, modifying 92 MCC 316——§203(a)(14), n. 1 number; §207(a), n. 6 plant sites, 25 special services; §210, n. 3

Malone Freight Lines, Inc. v. United States, 204 F. Supp. 745, sustaining Floor Coverings or Related Articles from East to South, 313 ICC 530; see also Iron or Steel Scrap from Conn., Mass., and R.I. to Pa., 318 ICC 567——§17(2), n. 1; §17(6), n. 10; §17(8), n. 2; §17(9), n. 2; §216(g), n. 5, 10, 14, 65, 66; 28 USC §2325, n. 7; RP 49, 101(a)

Malt Beverages—Ill., Ind., Ky., & Ohio to Chattanooga, 319 ICC 787——§216(b), n. 125 malt; §216(g), n. 65, 66

Malt Liquors, East St. Louis and St. Louis to Kenosha, 315 ICC 762——§1(5), n. 663; §15(7), n. 65

Malt Liquors from Peoria, Ill., to Newark, N.J., 316 ICC 378——§1(5), n. 85, 300, 663

Manfredi Motor Transit Co. Extension—Houston, Tex., 92 MCC 471, reversing 79 MCC 50 and 82 MCC 620——§203(a)(15), n. 1; §209(a)(1), n. 25 specialized, 34

Marathon Pipe Line Co., 57 Val Rep. 375, 565, 727 [listed for citation; not annotated]

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Motor Transp. of Property Incidental to Air, 95 MCC 71, sustained Air Dispatch, Inc. v. United States, 237 F. Supp. 450, latter affirmed, per curiam, 381 US 412, also sustained National Bus Traffic Association v. United States, 249 F. Supp. 869——NTP, n. 5 exemption; §203(b), n. 40; §204(a)(6), n. 2; §402(a)(5), n. 1

Motor Transportation of Property Within Single State, 94 MCC 541, sustained, per curiam, Pennsylvania R. Co. v. United States, 242 F. Supp. 890, affirmed, per curiam, American Trucking Associations, Inc. v. United States, 382 US 372, rehearing denied, 384 US 914——§203(a)(10), n. 5 between, common; §203(a)(19), n. 2

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Patterson Extension—Bristol, Pa., 91 MCC 249, reversing report of April 19, 1960——§209(a)(1), n. 25

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Paul Marckesano & Sons Co., Inc., Extension—Brick, 86 MCC 727——§203(a)(10), n. 5 between; §203(b), n. 60 construction; §204(b), n. 7 rejected, returned; §207(a), n. 6 prior rail, 25 fitness, refused, 30; §212(a), n. 35; §217(a), n. 66

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Penn-Dixie Cement Corp. v. Chesapeake & O. Ry. Co., 319 ICC 289, reversing report of Feb. 21, 1963——§1(5), n. 319; §8, n. 122

Pennsylvania-Ohio Exp., Inc., Extension—Refractory Products, 96 MCC 449——§204(b), n. 7 brick, products; §207(a), n. 25 commodity, past

Pennsylvania Public Utility Comm. v. Hudson Transp. Co., 88 MCC 745, modifying 83 MCC 729, sustained Hudson Transp. Co. v. United States, 219 F. Supp. 43——NTP, n. 15; §202(b), n. 20; §204(c), n. 52, 251

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Pennsylvania R. Co. Discontinuance of Passenger Service, 317 ICC 111——§13a, n. 1, 2, 20, 22, 25 feeder

Pennsylvania R. Co. Discontinuance of Passenger Service, 317 ICC 737, affirmed 320 ICC 319——§13a, n. 2, 15, 20; Ry. Mail, 39 USC §6203, n. 1

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Pennsylvania R. Co. v. Moore-McCormack Lines, Inc., 246 F. Supp. 143, affirmed 370 F. 2d 430——§1(6), n. 257, 258, 373; §6(7), n. 5; 28 USC §2201, n. 2

Pennsylvania R. Co. v. Sharfsin, 215 F. Supp. 493——§13a, n. 1

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Pennsylvania R. Co. v. United States, 216 F. Supp. 199, setting aside order in Increased Switching Charges, 315 ICC 199——§1(5), n. 522, 540; §13(1), n. 29; 28 USC §2325, n. 13, 50

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Pennsylvania R. Co. v. United States, 315 F. 2d 460, reversing 199 F. Supp. 586, which reversed and remanded in part United States v. Pennsylvania R. Co., 305 ICC 259; certiorari denied, 375 U.S. 814——NTP, n. 5 differences; §1(5), n. 20; §6(7), n. 5, 217; Gov't traffic, §66, n. 1; 28 USC §2106, n. 5

Pennsylvania R. Co. v. United States, 382 US 368, affirming, per curiam, 260 F. Supp. 536, which sustained Port of New York Authority v. Aberdeen & R. R. Co., 321 ICC 738

Pennsylvania Truck Lines, Inc., Extension—Cement, 91 MCC 167, modifying H. C. Gabler, Inc., Extension—Cement from Md., and Pa. Counties, 86 MCC 447, sustained Pennsylvania Truck Lines, Inc. v. United States, 219 F. Supp. 871——NTP, n. 10; §206(b), n. 22 exhibits; §207(a), n. 25 necessity, 35

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Pensick & Gordon, Inc. v. California Motor Exp., 323 F. 2d 769, prior report 302 F. 2d 391, certiorari denied 375 US 984——§216(b), n. 550

People of State of California v. United States, 207 F. Supp. 635, sustaining decision in FD No. 20503, Southern Pac. Co. Partial Discontinuance of Passenger Trains——28 USC §2325, n. 13

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Petroleum Carrier Corp. v. United States, 258 F. Supp. 617, sustaining Motor Fuel Carriers, Inc., Extension—Pipeline Terminals, Doc. No. MC-104960 (Sub-No. 31), decided Oct. 28, 1965——§207(a), n. 25 existing service, following; APA, 5 USC, judicial

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Petroleum Transp., Inc., Extension—Warcer and Tyner, Tennessee, 94 MCC 777——§206(b), n. 22 self-serving; §207(a), n. 25 existing carriers, petroleum

Philadelphia, Pa., Commercial Zone, 94 MCC 172, prior reports 17 MCC 533, 74 MCC 633——NTP, n. 5 exemption; §203(b), n. 60 carriers, expansion, Philadelphia

Phillips Petroleum Co., Products Pipe Line Department, 57 Val. Rep. 321, 526, 800 [listed for citation; not annotated]

Phillips Petroleum Co. v. Panhandle & S.F. Ry. Co., 315 ICC 378——§1(5), n. 28; §8, n. 95, 180

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Piggy-Back Shippers Assn. of Florida—Investigation, 323 ICC 672, remanded in part Freight Forwarders Institute v. United States, 263 F. Supp. 460, subsequent report 332 ICC 349——§402(c), n. 2, 15; §403(f), n. 30

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Platte Pipe Line Co., 57 Val. Rep. 355, 551, 719 [listed for citation; not annotated]

Plavec v. Burch, 310 F. 2d 337, reversing Burch v. Milne Truck Lines, Inc., 199 F. Supp. 575——§5(2), n. 110 contracts

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Pollack and Axelrod, In Re, 315 ICC 391——§17(12), n. 1; RP 13

Polman Extension—Montana, 92 MCC 114, modifying decision of Sept. 19, 1962——§209(a)(1), n. 18; §210, n. 3

Pooling of Railroad Earnings and Service, Pullman Co., 322 ICC 100, pertinent prior reports 268 ICC 473, 276 ICC 5; sustained, Order of Railway Conductors and Brakemen v. United States, 263 F. Supp. 650, affirmed per curiam, 388 US 455——§5(1), n. 4a, 18

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Port of New York Authority v. Aberdeen & R. R. Co., 318 ICC 469; reversed 321 ICC 738; latter report sustained Pennsylvania R. Co. v. United States, 260 F. Supp. 536; affirmed, per curiam, 382 US 368——§1(5), n. 27, 28, 58, 123, 452, 460, 646, 664; §3(1), n. 100, 106; §6(1), n. 57

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Proportional Rates on Grain, Kansas City to Chicago, 315 ICC 249——§1(5), n. 402; §15(7), n. 70

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Railway Exp. Agency, Inc., Extension—Nashua, N. H., 91 MCC 311, modifying Railway Exp. Agency, Inc., Extension—Newport, Vt., 84 MCC 435, sustained Auclair Transp., Inc. v. United States, 221 F. Supp. 328, affirmed per curiam 376 US 514——NTP, n. 5 adequate, 10 express, restrictions; §1(3)(a), n. 3; §17(6), n. 10; §202(c), n. 5 Exp. Agency; §204(b), n. 6, 7 express; §206(b), n. 16 broadening, 23; §207(a), n. 7 existing, 25 express, rates, §208(a), n. 31; §212(a), n. 30; RP 101(a)(2)

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Railway Exp. Agency, Inc. v. United States, 205 F. Supp. 831, sustaining Railway Exp. Agency, Inc. Extension, No. MC-66562 (Sub-No. 1671) decided July 5, 1961, and United Parcel Service, Inc., Extension, 89 MCC 709; see also Sloah's Moving & Storage Co. v. United States, 208 F. Supp. 567——§204(b), n. 6; §206(b), n. 18, 22 record in, 25; §208(a), n. 2; RP 23, 82

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Ralph A. Veon, Inc., Contract Carrier Application, 88 MCC 279, affirmed 92 MCC 248——NTP, n. 5 policy, private; §203(a)(15), n. 1; §209(a)(1), n. 29

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Service Transport Co. Extension—Mineral Wool, 94 MCC 255——§206(b), n. 18; §207(a), n. 25 fitness

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Shamrock Pipe Line Corp., 57 Val. Rep. 416, 622, 803 [listed for citation; not annotated]

Shamrock Van Lines, Inc.—Purchase—Reely, 93 MCC 455——§5(2), n. 5, 7 single-line, 15 circuitous, 110 brokers, stock

Shannon—Investigation of Operations, 95 MCC 771, discontinuing investigation (81 MCC 337) following decision Shannon v. United States, 219 F. Supp. 781, affirmed 377 US 311 [Not annotated]

Shannon v. United States, 219 F. Supp. 781, reversing Shannon—Investigation of Operations, 81 MCC 337, affirmed Red Ball Motor Freight v. Shannon, 377 US 311——§203(c), n. 5; 28 USC §2325, n. 46

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Sheppard v. Southern Ry. Co., 258 F. Supp. 217, affirmed Edwards v. Southern Ry. Co., 376 F. 2d 665——§5(2), n. 70

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63432, decided Dec. 7, 1960, affirmed, per curiam, 373 US 376——§5(2), n. 2 control by noncarrier, 6; §212(b), n. 10; 28 USC §2325, n. 45

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Shippers Cooperative, Inc. v. I.C.C., 308 F. 2d 888, affirming I.C.C. v. Shippers Cooperative, Inc., 196 F. Supp. 8——§203(a)(15), n. 1; §203(a)(17), n. 5; §402(a)(5), n. 1; §402(c), n. 2

Shirts, Made of Cotton, Salisbury, Md., to Paterson, N.J., 315 ICC 798, proposed reduced per-truckload charges not shown to be compensatory or necessary to meet private-carrier competition. [Not annotated]

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Slay Transp. Co., Inc., Extension—Liquid Yeast, 95 MCC 659——§204(b), n. 7 liquid chemicals; §207(a), n. 25 commodity description

Slay Transp. Co., Inc., Extension—24 States, 96 MCC 47——§204(b), n. 7 chemicals, liquid chemicals; §207(a), n. 6 plant-site, 25 commodity, existing carriers

Slayton v. Missouri Pac. R. Co., 233 F. Supp. 747, see Mississippi River Fuel Corp. v. Slayton; see also Missouri Pac. R. Co. v. Slayton, 407 F. 2d 1078, reversing 279 F. Supp. 525, certiorari denied, 395 US 937, rehearing denied, 397 US 1081

Sloan's Moving & Storage Co. v. United States, 208 F. Supp. 567, sustaining United Parcel Service, Inc., Extension—Midwestern States, 89 MCC 709, affirmed, per curiam, 374 US 95——§5(2), n. 2; §206(b), n. 18, 22, 23; §207(a), n. 5, 9, 25, 25 existing service; §208(a), n. 2; §210, n. 3; 28 USC §2325, n. 14, 40, 45, 56, 63

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Somerset Bus Co., Inc., Extension—South Plainfield, N.J., 89 MCC 107, reversing report of June 2, 1961, sustained Suburban Transit Corp. v. United States, 215 F. Supp. 717——§205(a), n. 15; §205(b), n. 15 parties; §207(a), n. 6 points, 7 existing, railroad, 25 through

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Soo Line R. Co. Extension—Chicago, 94 MCC 302——NTP, n. 10 key point restriction; §207(a), n. 35 substituted freight service

Soo Line R. Co. v. United States, 280 F. Supp. 907, remanding for further proceedings Chicago & N. W. Ry. Co.—Merger, 330 ICC 13——§5(2), n. 52, 70, 111

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Southern Pac. Co. Abandonment, 312 ICC 685, sustained State of Arizona v. United States, 220 F. Supp. 337——§1(18), n. 59, 60, 64, 91; §1(19), n. 18; §1(20), n. 3

Southern Pac. Co. Abandonment, 317 ICC 489, reversed on the merits, 320 ICC 38——§1(18), n. 60, 64, 68, 91; §1(19), n. 18, 20

Southern Pac. Co. Abandonment, 320 ICC 278; reversing 317 ICC 645; sustained Humphreys v. United States, 228 F. Supp. 910——§1(18), n. 2, 50, 60, 66, 68, 91; §1(19), n. 9, 20; §1(20), n. 3

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Southern Ry. Co.—Control—Central of Georgia Ry. Co., 317 ICC 557; subsequent report 317 ICC 729, sustained Railway Labor Executives' Assn. v. United States, 226 F. Supp. 521; subsequent repoort 320 ICC 377——NTP, n. 5 employees; §5(2), n. 3, 7, 8, 45, 45 conditions, 70, 110 securities, 115

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Southern Ry. Co. v. Brotherhood of Locomotive Fire. & Eng., 223 F. Supp. 296, affirmed, per curiam, 324 F. 2d 503——28 USC §2201, n. 2

Southern Ry. Co. v. Flournoy, 301 F. 2d 847——§3(4), n. 3; §22(1), n. 60; Bank. Act, 11 USC §205, n. 10, 20, 22, 57, 62

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Southern Ry. Co. v. Louisville & N. R. Co., 315 ICC 175, affirming 310 ICC 747, sustained Southern Ry. Co. v. United States, 217 F. Supp. 159——§1(5), n. 211, 318; §3(4), n. 43

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Southern Tank Lines, Inc., Extension—Denatured Rum, 88 MCC 594——§204(b), n. 7 liquid chemicals; §206(b), n. 18

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Southern Tank Lines, Inc., Extension—St. Bernard, Ohio, 88 MCC 127, reversing 82 MCC 65 and E. Brooke Matlack, Inc., Extension—Niagara Falls, N.Y., 82 MCC 321——§204(b), n. 7 liquid chemicals, 8, 8 liquid; §206(b), n. 22 weight; §207(a), n. 6 plant, 25 existing carriers; §210, n. 3; §212(a), n. 30

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State Corporation Commission v. Bartlett & Co., Grain, 338 F. 2d 495, certiorari denied, 380 US 964——§202(b), n. 5; §203(a)(10), n. 5, 5 intent; §203(b), n. 2

State Corporation Com'n of State of Kansas v. United States, 216 F. Supp. 376, affirming Kansas Intrastate Freight Rates and Charges, 315 ICC 223; affirmed per curiam, 375 US 15——§13(4), n. 3, 58, 62, 71; 28 USC §2325, n. 40

State of Arizona v. United States, 220 F. Supp. 337, sustaining Southern Pac. Co. Abandonment, 312 ICC 685——§17(6), n. 10; §17(9), n. 2; 28 USC §2325, n. 56; RP 101(a)(2)

State of California v. United States, 255 F. Supp. 607, sustaining Feather River Ry. Co. Abandonment, Acquisition, 320 ICC 417——§1(18), n. 4; §1(20), n. 3
State of Georgia v. United States, 201 F. Supp. 813, sustaining Discrimination—Interstate M. Carriers of Passengers, 86 MCC 743, affirmed per curiam, 371 US 9——§202(a), n. 2; §202(b), n. 5; §204(c), n. 75, 251; §216(d), n. 1; 28 USC §2325, n. 45, 48, 64
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State of Minnesota v. United States, 238 F. Supp. 107, sustaining Chicago & N.W. Ry. Co. Discontinuance of Passenger Trains, 320 ICC 85——§1(18), n. 5; §13a, n. 2, 15, 35; §17(6), n. 15; 28 USC §1336, n. 2
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State of New York v. United States, 256 F. Supp. 634, sustaining Grain from Pittsburgh, Pa., to Eastern Base Points, 325 ICC 669, which reversed in part 322 ICC 218, affirmed per curiam, 386 US 349——§15(7), n. 70; §15a(2), n. 2
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Sugars and Sirups, N.Y. to Berwick and Williamsport, Pa., 315 ICC 366, proposed bulk rates, to replace respondent's mileage rates, not shown to be compensatory, or necessary to meet rates of competitive motor carrier. [Not annotated]

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